Transposing the European Preventive Restructuring Directive: The Case of Countries-Candidates for EU Membership

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I. INTRODUCTION

A. Candidate Countries and *Acquis* Transposition Obligations

1. On 23 June 2022, the European Council officially granted candidate status for EU membership to the Republic of Moldova and Ukraine.[2] On 25 June 2024, it was decided to officially open accession negotiations with both countries.[3] In sum, both the Republic of Moldova and Ukraine must adopt the EU *acquis* in its entirety and ensure its full implementation and enforcement.[4] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency)(hereinafter referred to as 'PRD')[5] represents a tiny part of the EU *acquis* yet its importance for both Moldova and Ukraine should not be overestimated. Both nations have been navigating economic transitions and were significantly impacted by the COVID-19 pandemic. Ukraine, especially, has encountered severe challenges following Russia's unprovoked aggression beginning in February 2022. Moldova's economy has also felt the effects of the ongoing war in the neighbouring region.

2. Additionally, Ukraine was explicitly required to transpose the PRD into its national law as part of the conditions for the EU's micro-financial aid in 2023, which mandated its full transposition by the end of Q3 2023.[6] The requirements of the Ukraine Facility[7] reiterated the need to eventually transpose the Directive by emphasising that 'creating an effective legal and institutional framework for preventive restructuring will also allow solvent debtors that experience financial difficulties to preserve their economic viability and the value for creditors in the supply chain, thus playing a favourable role for the overall economic growth and recovery'.[8]

3. For the Republic of Moldova, the European Commission indirectly highlighted the need to transpose the PRD in its 2024 enlargement report, referencing the implementation of the Second Chance Program for small and

2 European Council, 23 and 24 June 2022, EUCO 24/22, para. 11; Commission, 8 November 2023, SWD/2023/698 final, 3; Commission, 8 November 2023, SWD/2023/699 final, p. 28.

3 European Council, 25 June 2024, CONF-MD 2/24; European Council, 25 June 2024, CONF-UA 2/24.

4 European Council, 25 June 2024, CONF-MD 2/24, para. 10; European Council, 25 June 2024, CONF-UA 2/24, para. 10.

5 [2019] OJ L172/18.

6 Memorandum of Understanding between the European Union as Lender and Ukraine as Borrower of 16 January 2023 – Instrument for providing support to Ukraine for 2023 (micro-financial assistance+) of up to EUR 18 billion, Annex I, section B: https://economy-finance.ec.europa.eu/system/files/2023-01/Memorandum%20of%20Understanding_EU-UA.pdf (accessed 27 January 2025) (required transposition of the Directive by Q3 2023).

7 A special EU support mechanism for Ukraine for 2024–2027 to support its recovery, reconstruction, and modernisation. See Regulation (EU) 2024/792 of the European Parliament and of the Council of 29 February 2024 establishing the Ukraine Facility, [2024] OJ L2024/792.

8 Plan for the Implementation of the Ukraine Facility – the Ukraine Plan 2024–2027: https://www.ukrainefacility.me.gov.ua/wp-content/uploads/2024/03/ukraine-facility-plan.pdf (accessed 27 January 2025), p. 72 (required transposition of the Directive by Q4 2024).

medium-sized enterprises (hereinafter referred to as 'SMEs')[9] along with the need to strengthen the regulatory framework for bankruptcy by introducing an electronic register of bankruptcy cases and addressing the absence of specialised bankruptcy courts.[10]

B. Economic Situation and War

4. Russia's unprovoked invasion of Ukraine has triggered the largest military conflict in Europe since World War II. Unsurprisingly, the ongoing war has placed immense strain on Ukraine's economy, presenting extraordinary challenges for businesses already weakened by the COVID-19 pandemic. In 2022, Ukraine's GDP dropped by nearly 30%, with only a modest recovery of 5.7% in 2023.[11] By the end of 2023, the direct damage caused by Russia's invasion reached nearly USD 152 billion, while the total economic loss surpassed USD 499 billion.[12] Interestingly, the expected surge in bankruptcy cases did not materialise. In 2022, Ukrainian commercial courts opened 9,725 bankruptcy cases, down from 16,791 in 2021.[13] This can be attributed to disruptions in the judiciary during wartime and the inability of many affected businesses to meet the legal criteria for initiating proceedings.[14] In 2023, however, bankruptcy filings began to return to pre-war levels, with the Supreme Court of Ukraine reporting 14,046 new cases.[15]

5. For the Republic of Moldova, data shows that the COVID-19 pandemic 'dealt a strong blow to the Moldovan economy, causing GDP to plummet by 7.2% year-over-year during January–June 2020'.[16] By the end of 2020, this decline

9 *Proiectul hotărârii de Guvern cu privire la aprobarea Programului „A doua șansă" Nr. înregistrare Cancelaria de Stat: 616/ME/2021*: https://particip.gov.md/ro/document/stages/proiectul-hotararii-de-guvern-cu-privire-la-aprobarea-programului-a-doua-sansa/8764 (accessed 27 January 2025).

10 Commission, 30 October 2024, SWD(2024) 698 final, p. 52. Similar findings can be found in OECD, EBRD, *SME Policy Index: Eastern Partner Countries 2024: Building Resilience in Challenging Times*, Paris, OECD Publishing, 2023: https://www.oecd-ilibrary.org/deliver/3197420e-en.pdf?itemId=%2Fcontent%2Fpublication%2F3197420e-en&mimeType=pdf (accessed 27 January 2025), p. 367.

11 European Parliament, February 2024, PE 747.858, p. 1.

12 Ukraine, 'Third Rapid Damage and Needs Assessment (RDNA3), February 2022 – December 2023', The World Bank, the Government of Ukraine, the European Union, the United Nations, 2024, p. 10.

13 Data by the Supreme Court of Ukraine cited from 'Ievropeĭs`ki standartu restrukturyzatsiĭ: mozhlyvosti ta vyklyky dlia Ukraïny', lb.ua, 14 June 2023: https://lb.ua/blog/pravo_justice/560497_ievropeyski_standarti.html (accessed 20 December 2024). 2023 data have not been available at the time of writing.

14 The 'war factor' is mentioned by Judge Oleh Vas`kovsky, Secretary of the Bankruptcy Chamber, Cassation Commercial Court under the Supreme Court of Ukraine. See A. HVOZDETSKYĬ, '*Borhovi vymohy ie aktyvom, iakyĭ mozhe buty zarakhovanyĭ v interesakh Ukraïny do derzhavnoho biudzhetu' – Oleh Vaskovsky, Sekretar sudovoï palaty dlia rozhliadu sprav pro bankrutstvo KHS VS*', *Pravo.ua, 20 bereznia 2023 roku*: https://pravo.ua/borhovi-vymohy-ie-aktyvom-iakyi-mozhe-buty-zarakhovanyi-v-interesakh-ukrainy-do-derzhavnoho-biudzhetu-oleh-vaskovskyi-sekretar-sudovoi-palaty-dlia-rozhliadu-sprav-pro-bankrutstvo-khs-vs/ (accessed 27 January 2025).

15 *Statystychnyĭ biuleten` hospodars`kykh sudiv Ukraïny za 2023 rik*: https://supreme.court.gov.ua/userfiles/media/new_folder_for_uploads/supreme/kgs_2023/Stat_bulet_KGS_2023.pdf(accessed 27 January 2025), s. 6.

16 UNECE, *The impact of COVID-19 on trade and structural transformation in the Republic of Moldova: Evidence from UNECE`s survey of Micro, Small and Medium Enterprises*, 2021, p. 11.

had deepened to 8.3%.[17] Russia's full-scale invasion of Ukraine in February 2022 further worsened the situation, leading to a 5.9% drop in Moldova's GDP, inflation peaking at 35%, and a current account deficit of 13% of the national GDP.[18] The Russo-Ukrainian war left Moldovan businesses facing disrupted exports, increased prices, and various fiscal challenges.[19]

The combined impact of the COVID-19 pandemic, the end of state aid measures, the Russo-Ukrainian war, and international sanctions on Russia has led to a surge in bankruptcy cases in Moldova's courts. By the close of 2021, national courts were managing 4,078 bankruptcy cases.[20] In 2022, 4,132 new cases were filed,[21] and from 1 January to 30 September 2023, 3,861 cases were registered.[22]

6. Given the challenging economic conditions in both candidate countries, and regardless of PRD transposition requirements, Moldova and Ukraine could benefit from leveraging all available tools to prevent the bankruptcy of viable businesses. This approach could involve promoting efficient debt restructuring and offering a second chance to honest businesses. The PRD could serve as a valuable tool in this regard.

7. Since in its October 2024 Enlargement Package the European Commission specifically singled out the Republic of Moldova and Ukraine from the ten candidate countries for EU membership,[23] emphasising the need for these two states to introduce a second chance and transpose the PRD,[24] this contribution will examine the Directive's transposition efforts in both countries, with a particular focus on Ukraine, as its legislature (*Verkhovna Rada*) has already adopted the relevant law,[25] set to take full effect in January 2025. The author will aim to analyse the pros and cons of Ukraine's transposition and to briefly cover

17 OECD, EBRD, *SME Policy Index: Eastern Partner Countries 2024: Building Resilience in Challenging Times*, Paris, OECD Publishing, 2023, p. 354.

18 Norwegian Refugee Council, 'Socio-economic Impact on the Moldovan economy since the War in Ukraine', September 2023, p. 20; OECD, EBRD, *ibid.*, p. 367.

19 'War in Ukraine: Moldova to face severe economic shock', *German Economic Team Newsletter*, No. 70, March – April 2022; S. SELEVESTRU, '"Colacul de salvare" pentru entităţile aflate în dificultate financiară', *Contabilitate si Audit*, 09/2023, p. 1.

20 *Raport privind examinarea dosarelor în instanţele de judecată pe parcursul anului 2021*, *Ministerul Justiţiei al Republicii Moldova Agenţia de administrare a instanţelor judecătoreşti, Chișinău, 2022, p. 6.*

21 *Raport statistic despre activitatea primei instanțe privind examinarea dosarelor de insolvabilitate pentru 12 luni ale anului 2022*: https://aaij.justice.md/reports/raport-statistic-despre-activitatea-primei-instante-privind-examinarea-dosarelor-de-insolvabilitate-pentru-12-luni-ale-anului-2022/ (accessed 27 January 2025).

22 *Raport statistic despre activitatea judecătoriilor din prima instanţă privind examinarea dosarelor insolvabilitate – 9 luni 2023*: https://aaij.justice.md/reports/raport-statistic-despre-activitatea-judecatoriilor-din-prima-instanta-privind-examinarea-dosarelor-insolvabilitate-9luni-2023/ (accessed 27 January 2025).

23 Other eight candidates are: Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia, Serbia, Republic of Georgia, Türkiye. See European Commission, 'Commission adopts 2024 Enlargement Package', 30 October 2024: https://neighbourhood-enlargement.ec.europa.eu/news/commission-adopts-2024-enlargement-package-2024-10-30_en (accessed 27 January 2025).

24 The European Commission also pointed out inefficient rehabilitation and reorganization procedures in Bosnia and Herzegovina. See Commission, 30 October 2024, SWD/2024/691 final, p. 77.

25 *Zakon Ukraïny 'Pro vnesennia zmin do Kodeksu Ukraïny z protsedur bankrutstva ta inshykh zakonodavchykh aktiv Ukraïny shchodo implementatsiï Direktyvy Ievropeĭskoho parlamentu ta Rady Ievropeĭskoho Soiuzu 2019/1023 ta zaprovadzhennia protsedur preventyvnoï restrukturyzatsiï' vid 19 veresnia 2024 roku, Holos Ukraïny, No. 151, 23 zhovtnia 2024 roku.*

an extraordinary technical error during the legislative process.[26] For Moldova, which, at the time of writing, has not taken formal steps toward PRD transposition, the author will briefly review the existing restructuring procedures and the Second Chance Program,[27] which the Government has been trying to introduce since the autumn of 2021.

II. UKRAINE

A. Transposition Law

1. *Fast reforms*

8. Although Ukraine missed the initial deadline for the PRD`s transposition (Q3 2023), the passage of the respective reform was swift, considering the extreme circumstances of war. It began with the adoption of a roadmap for reforms in the bankruptcy sphere in September 2023.[28] In October 2023, a corresponding bill (Bill #10143)[29] was introduced in the *Verkhovna Rada* by the ruling Servant of the People party. The bill's first reading took place in May 2024, and on 19 September 2024, the legislature passed it as the Law on Amendments to the Code of Ukraine on Bankruptcy Procedures and Other Legislative Acts of Ukraine Regarding the Implementation of Directive 2019/1023 of the European Parliament and the Council of the European Union and the Introduction of Preventive Restructuring Procedures (hereinafter referred to as the 'PRD Transposition Law').[30] The President of Ukraine signed it into Law on 22 October 2024. It was officially published on 23 October 2024[31]. The Law became effective on 1 January 2025.[32] From that date, the new preventive restructuring procedure replaced the so-called rehabilitation of a debtor prior to the opening of bankruptcy proceedings (*sanatsiia borzhnyka do porushennia spravy pro bankrutstvo*), also referred to as pre-trial rehabilitation/restructuring (*dosudova sanatsiia*), which used to be an analogue of procedures under the PRD, as

26 See para. 10 *infra*

27 *Proiectul hotărârii de Guvern cu privire la aprobarea Programului „A doua șansă" Nr. înregistrare Cancelaria de Stat: 616/ME/2021.*

28 *Dorozhnia karta shchodo diial`nosti z rozbudovy potentsialu dlia pidtrymky vprovadzhennia Kodeksu Ukraïny z protsedur bankrutstva, zatverdzhena nakazom Ministerstva iustytsii Ukraïny No. 3427/5 vid 26 veresnia 2023 roku:* https://minjust.gov.ua/news/ministry/minyust-zatverdiv-dorojnyu-kartu-u-sferi-bankrutstva (accessed 20 December 2024).

29 *Proekt No. 10143 pro vnesennia zmin do Kodeksu Ukraïny z protsedur bankrutstva ta inshykh zakonodavchykh aktiv Ukraïny shchodo implementatsiï Direktyvy Ievropeĭskoho parlamentu ta Rady Ievropeĭskoho Soiuzu 2019/1023 ta zaprovadzhennia protsedur preventyvnoï restrukturyzatsiï*: https://itd.rada.gov.ua/billInfo/Bills/pubFile/2025002 (accessed 27 January 2025).

For more information on Bill #10143, the alternative bill supplied by the Government of Ukraine and commentaries see O. KONONOV, 'Ukrainian Preventive Restructuring – First Transposition of Directive (EU) 2019/1023 by a Non-Member State', *EIRJ*, 2024-3, p. 1.

30 Ibid.

31 Ibid.

32 Initially, it was supposed to enter into force on 23 July 2025. See also para. 10 *infra.*

envisaged in Article 5 of the Code of Bankruptcy Procedures of 18 October 2018 (hereinafter referred to as the 'BCU').[33]

Ukraine's transposition efforts have been promptly recognised by the Commission in its 2024 enlargement report on Ukraine. However, the report emphasises that 'the insolvency regime in Ukraine should be further improved and aligned with the EU *acquis*. [...] Further legislation for simplified insolvency procedures for micro, small and medium-sized enterprises in line with the EU Directive 2019/1023 should still be developed and adopted'.[34]

2. *General Approach of the PRD Transposition Law*

9. Unlike the strategy adopted by some EU Member States,[35] the PRD Transposition Law diverges in its approach to transpose the PRD into Ukrainian law. Instead of the creation of a distinct law exclusively dedicated to preventive restructuring, separate from the existing bankruptcy regulations, the new Law amends the BCU.[36] Specifically, it revises and amends the existing provisions of the Code[37] and introduces 29 new articles that specifically address preventive restructuring as a well-organised Book Three: *Preventive Restructuring*.[38]

10. From the date of its entry into force (1 January 2025), the new preventive restructuring procedure completely replaced the rehabilitation of a debtor prior to the opening of bankruptcy proceedings previously covered by a rather lengthy and poorly written Article 5 of the BCU. However, the PRD Transposition Law (or legislators, for that matter) has created certain ambiguity in the text of the Law adopted on 19 September 2024.[39] Specifically, Article 5 remained intact, while the new Law has amended the Code of Commercial Procedure (hereinafter referred to as the 'CCP')[40] by eliminating any reference to *dosudova sanatsiia*. In particular, the PRD Transposition Law revised provisions regarding the jurisdiction of commercial courts,[41] which would no longer be authorised

33 BCU, Art. 5 was entitled 'Rehabilitation of a Debtor Prior to the Opening of Bankruptcy Proceedings'. The procedure was very similar to the UK's scheme of arrangement and before filing an application with the court required the debtor to have a rehabilitation plan already approved by creditors. For more info on the procedure, controversies in its practical application, see O. KONONOV, 'Ukrainian Preventive Restructuring – First Transposition of Directive (EU) 2019/1023 by a Non-Member State', *EIRJ*, 2024-3, pp. 3–7; O. KONONOV, 'Post-War Economic Recovery of Ukraine: What Role Could the EU Preventive Restructuring Directive 2019/1023 Play for the Ukrainian Small and Medium-Sized Enterprises?' 97(4) *Am. Bankr. L.J.*, 2023, pp. 800–822.

34 Commission, 30 October 2024, SWD(2024) 699 final, p. 49.

35 For example, Czech Republic, Estonia, Finland, Germany, Hungary, Luxembourg, or Sweden.

36 *Kodeks Ukraïny z protsedur bankrutstva vid 18 zhovtnia 2018 roku, VVRU, 2019, No. 19, St. 74.*

37 Art. 4 among others. Art. 4 provides an outline of various measures aimed at preventing bankruptcy.

38 Arts. 33^{1}–33^{29}.

39 See n. 25 *supra*.

40 *Hospodars`kyĭ protsesual`nyĭ kodeks Ukraïny vid 6 lystopada 1991 roku, VVRU, 1992, No. 6, St. 56.* Procedurally speaking, in relation to insolvency and bankruptcy cases, the CCP serves as a *lex generalis*, while the BCU functions as a *lex specialis*.

41 There are no separate bankruptcy courts in Ukraine. Commercial courts, which have jurisdiction in commercial cases involving businesses and natural persons registered as sole proprietors, handle bankruptcies and preventive restructuring under Book Three of the BCU (previously – pre-trial rehabilitation cases under Art. 5 of the BCU). Ukraine has trial commercial courts (courts of the first instance) and appellate commercial courts. The Cassation Commercial Court operates within the structure of the Supreme Court of Ukraine, alongside the Cassation Civil Court, Cassation

to hear cases concerning the debtor`s applications for the approval of rehabilitation plans under Article 5 of the BCU.[42]

Furthermore, the CCP was amended to include a new provision stating that pre-trial rehabilitation procedures initiated before the effective date of the PRD Transposition Law 'shall be conducted in accordance with the provisions of this Code as it was in force before the enactment' of the PRD Transposition Law.[43] Also, according to the PRD Transposition Law, any references to *dosudova sanatsiia* were deleted from Article 4 of the BCU, which provides an outline of various measures aimed at preventing bankruptcy.[44]

The amendments made by the PRD Transposition Law raised certain practical questions, effectively leaving two procedures in place: the old pre-trial rehabilitation (*dosudova sanatsiia*) under Article 5 of the BCU and the new preventive restructuring. In the version passed in the first reading in May 2024, Article 5 was supposed to be completely revised with a focus on preventive restructuring, and the very notion of *sanatsiia borzhnyka do porushennia spravy pro bankrutstvo/ dosudova sanatsiia* was intended to disappear entirely from the BCU,[45] The clear objective was to amend the Code by introducing detailed provisions on preventive restructuring, rather than relying on a single, lengthy Article 5 with its 11 paragraphs. The changes in the second reading resulted from a technical error.[46] To address the problem, the *Verkhovna Rada* introduced new amendments to the BCU on 4 December 2024 through a separate law.[47] This law finally repealed Article 5 of the BCU and set a new date for the entry into force of the PRD Transposition Law: 1 January 2025 (instead of July 2025). Needless to say, the legislator's haste in enacting the law left little to no room for stakeholders to adequately prepare for its practical implementation. It is also notable that the controversy does not end here. In September 2024, the PRD Transposition Law introduced a rule stipulating that the BCU could only be amended through

Administrative Court, and Cassation Criminal Court. The Cassation Commercial Court has a special chamber dedicated to handling bankruptcy cases. Certain cases can be referred to the Grand Chamber of the Supreme Court, typically those requiring decisions on the uniform application of laws, when justices of the Supreme Court believe it necessary to deviate from decisions rendered by the Supreme Court in similar cases, or in cases when the Supreme Court acted as a trial court. Decisions of the Supreme Court of Ukraine are final and cannot be appealed. See D. VAUGH and O. NIKOLAIEVA, 'Launching an Effective Anti-Corruption Court: Lessons from Ukraine', *CHR. Michelsen Institute U4 Practice Insight*, 2021:1: https://www.u4.no/publications/launching-an-effective-anti-corruption-court.pdf (accessed 27 January 2025), p. 11.

42 CCP, Art. 20(1), clause 8 (as worded by the PRD Transposition Law).

43 PRD Transposition Law, para. 40, subpara. 1.

44 PRD Transposition Law, para. 4.

45 *Proekt No. 10143 pro vnesennia zmin do Kodeksu Ukraïny z protsedur bankrutstva ta inshykh zakonodavchykh aktiv Ukraïny shchodo implementatsiï Direktyvy Ievropeïskoho parlamentu ta Rady Ievropeïskoho Soiuzu 2019/1023 ta zaprovadzhennia protsedur preventyvnoï restrukturyzatsiï. Porivnial`na tablytsia (Druhe chytannia)*: https://itd.rada.gov.ua/billInfo/Bills/pubFile/2509830 (accessed 20 December 2024).

46 Unfortunately, errors of the kind are common in the *Verkhovna Rada* of the current convocation. See O. IVANOV, 'From Bill to Law: The Process Needs Improvement', *Vox Ukraine*, 6 April 2023: https://voxukraine.org/en/from-bill-to-law-the-process-needs-improvement (accessed 27 January 2025).

47 *Zakon Ukraïny 'Pro vnesennia zmin do deiakykh zakonodavchykh aktiv Ukraïny shchodo priorytetnoho prava deiakykh kategoriy vnytrishno peremishchenykh osib na otrymanni kompensatsiï za znyishchenni ob`iekty nerukhomoho maĭna' vid 4 hrudnia 2024 roku, Holos Ukraïny, No. 185, 10 hrudnia 2024 roku.*

a specific law dedicated to amending the BCU.[48] However, this newly adopted principle was violated by the law of 4 December 2024.[49] While the primary purpose of the latter law was to introduce amendments to several laws related to the rights of internally displaced citizens, BCU amendments were added at the very last moment before its final adoption during the second reading in breach of the Parliamentary Rules of Procedure.[50] This situation is not unique for parliamentary practices dominated by the Servant of the People ruling party; however, it remains to be seen whether the law will be challenged in the future.

11. The PRD Transposition Law carries particular significance by introducing the very concept of preventive restructuring (*preventyvna restrukturyzatsiia*)[51] previously unknown in Ukrainian law and aiming to resolve terminological discrepancies within the existing framework of the BCU.[52] The new Law defines preventive restructuring as a system of organisational and economic, managerial, investment, technical, financial, economic, and legal measures aimed at preventing or avoiding the debtor's insolvency.[53] Preventive restructuring may include changes to the composition, terms, or structure of the debtor's assets and liabilities, as well as any necessary operational changes or a combination of these elements, implemented according to a preventive restructuring plan.[54] This is important given the confusion (in the pre-PRD wording of the BCU) between pre-trial rehabilitation[55] and rehabilitation conducted after the initiation of bankruptcy proceedings,[56] offering an alternative avenue to liquidating the debtor. This clarification is pivotal since the terminological ambiguity often dissuades potential debtors—those who might be eligible for pre-trial restructuring – and might help alleviate the stigma associated with bankruptcy.

12. The old wording of the BCU's Article 5 specifically addressing pre-trial rehabilitation, lacked any definition or description of the circumstances under which the procedure could be initiated.[57] To tackle the problem and in line with the PRD's 'likelihood of insolvency',[58] the PRD Transposition Law clarifies the concept of the 'risk of insolvency' (*zahroza neplatospromozhnosti*). According to the Law, the 'risk of insolvency' pertains to the financial and economic condition of the debtor characterised by circumstances indicating that the debtor will be unable to fulfil their monetary obligations within the next 12 months within the timeframe prescribed for their fulfilment, or to make payments under

48 BCU, Art. 2(8) (as worded by the PRD Transposition Law).
49 See n. 47 *supra*.
50 Art. 116 of the Rules of Procedure explicitly requires that any changes, amendments, or proposals to the text already adopted in the first reading must align with the subject matter of the bill. See *Zakon Ukraïny 'Pro Rehlament Verkhovnoï Rady Ukraïny' vid 10 liutoho 2010 roku* (as amended): https://zakon.rada.gov.ua/laws/show/en/1861-17?lang=uk#Text (accessed 27 January 2025).
51 BCU, Art. 1 (as worded by the PRD Transposition Law).
52 See O. KONONOV, 'Ukrainian Preventive Restructuring – First Transposition of Directive (EU) 2019/1023 by a Non-Member State', *EIRJ*, 2024-3, pp. 4–5.
53 BCU, Art. 1 (as worded by the PRD Transposition Law).
54 Ibid.
55 BCU, Art. 5.
56 BCU, Art. 6(1), Arts. 50–57.
57 More details on the problem, see O. KONONOV, 'Ukrainian Preventive Restructuring – First Transposition of Directive (EU) 2019/1023 by a Non-Member State', *EIRJ*, 2024-3, pp. 10–11.
58 PRD, Recitals 24, 79, 96, Arts. 1(1)(a), 2(2)(b), 3(1), 4(1), 19.

regular business operations.[59] This clarification may indeed prove instrumental in averting potential misunderstandings and better addressing future cases.

13. The PRD Transposition Law specifies the parties involved in preventive restructuring, identifying the debtor, creditors, employees, equity holders, and the property owner (the entity authorised to manage the debtor's property) as the parties to preventive restructuring.[60] The Law delineates the distinction between affected and unaffected parties based on their inclusion in the preventive restructuring plan and the impact of the plan on their claims, rights, or interests.[61] Affected parties include creditors with monetary claims against the debtor, whether the deadlines for these claims have passed before the opening of the preventive restructuring procedure or are scheduled to occur during the procedure, including secured creditors[62]. Additionally, it encompasses creditors with a vested interest in the debtor[63], employees[64], whose claims, rights, or interests undergo alteration due to the preventive restructuring plan[65]. These defined categories lacked equivalents in Art. 5 of the BCU, signifying a departure from the old framework in terms of outlining parties involved and affected by the restructuring process.

14. Aligned with the principles of the PRD, the PRD Transposition Law introduces a range of opt-in/opt-out provisions tailored for micro and small-sized enterprises,[66] acknowledging their vulnerability to insolvency and their limited

59 BCU, Art. 1(1) (as worded by the PRD Transposition Law).

60 BCU, Art. $33^{1}(7)$.

61 Ibid.

62 BCU, Art. 1(1) (as worded by the PRD Transposition Law), Arts. $33^{1}(5)$, $33^{15}(1)$, clause 4.

63 Those can be individuals or entities with specific relationships or interactions with the debtor. According to the description provided by the PRD Transposition Law (new definition of 'parties interested in the debtor' in BCU, Art. 1), such parties include:
(1) Legal entities created with the debtor's participation.
(2) Legal entities that exercise or have exercised control over the debtor during the last three years.
(3) Natural or legal persons controlled by the debtor during the last three years.
(4) Legal entities that, together with the debtor, have been under the control of a third party during this period.
(5) Equity holders (participants, shareholders) of the debtor, as well as the debtor's managers and management bodies.
(6) The accountant or chief accountant of the debtor (CFO), including those who were dismissed up to three years prior to the initiation of bankruptcy proceedings.
(7) Individuals or entities with whom the debtor concluded transactions for the disposal of assets that do not meet the criteria of reasonableness (economic feasibility, business purpose) and good faith.
(8) Parties to fraudulent transactions recognized as invalid under the BCU.
(9) Relatives of the debtor and the other mentioned persons (spouses, children, parents, siblings, grandchildren).
(10) Individuals for whom there are reasonable grounds to consider them interested parties.
Additionally, a creditor is considered an interested party if, within six months prior to the initiation of bankruptcy (insolvency) proceedings or preventive restructuring procedures, they directly or indirectly acquired a claim against the debtor from a creditor who is considered an interested party.

64 BCU, Art. $33^{1}(7)$.

65 Ibid.

66 The Law on the Peculiarities of Regulating the Activities of Legal Entities of Certain Organizational and Legal Forms During the Transition Period and Associations of Legal Entities of 9 January 2025, Art. 2(4), introduces definitions depending on the number of employees and gross income from any annual activities.
– Micro-enterprises shall be those who have an average number of employees during the reporting period (calendar year) not exceeding 10 persons and annual income from any activity not exceeding

financial and informational capabilities for managing restructuring processes. Notably, the new Law omits any explicit provisions for medium-sized enterprises,[67] focusing primarily on the most vulnerable categories (micro- and small). Additionally, by Q1 2026, the *Verkhovna Rada* is expected to develop and adopt legislation that simplifies restructuring procedures for micro, small, and medium enterprises. This legislation will focus on streamlined out-of-court and bankruptcy procedures, ensuring the availability of insolvency tools and practitioners, and preventing potential abuses by smaller businesses.[68]

3. *Early warning tools – Article 3 of the PRD*

15. The concept of early warning is not novel within Ukrainian law. Under the current wording of the BCU, distressed company management is obligated to inform equity holders of a debtor or the property owner (an institution authorised to manage the property)[69] about any indications of impending bankruptcy.[70] Subsequently, equity holders or the property owner are required to undertake essential measures to forestall bankruptcy,[71] with pre-trial rehabilitation/restructuring identified as one potential measure among others.

16. The PRD Transposition Law amends existing provisions to improve their clarity. Notably, alongside the debtor's management, state and municipal authorities will also be held accountable for promptly implementing measures

the amount equivalent to EUR 2 million, determined according to the yearly average exchange rate of the National Bank of Ukraine (NBU).

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

Those definitions apply both to sole proprietors and legal entities.

See *Zakon Ukraïny 'Pro osoblyvosti rehuliuvannia dial`nosti iurydychnykh osib okremykh orhanizatsiĭno-pravovykh form u perekhydnyĭ period ta obiednan` iurydychnykh osib' vid 9 sichnia 2025 roku, Holos Ukraïny, No. 40, 27 liutoho 2025 roku*.

Ukrainian definitions comply with the EU's classification available in Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, C(2003) 1422, [2003] OJ L124/36.

67 Large enterprises are those with an average number of employees during the reporting period (calendar year) exceeding 250 persons and annual income from any activity exceeding the amount equivalent to EUR 50 million determined according to the NBU's yearly average exchange rate. All other enterprises not meeting the criteria for micro, small or large ones shall be deemed medium-sized enterprises. See the Law on the Peculiarities of Regulating the Activities of Legal Entities of Certain Organizational and Legal Forms During the Transition Period and Associations of Legal Entities, Art. 2(4).

68 Para. 8 *supra*; Plan for the Implementation of the Ukraine Facility – the Ukraine Plan 2024–2027, pp. 72, 79.

69 Normally those cover state-owned and municipal enterprises. The State Property Fund of Ukraine or a respective ministry can exercise management of state-owned enterprises. Municipal authorities at the level of local communities can decide who will manage municipal property.

70 BCU, Arts. 4(2), 34(6).

71 BCU, Art. 4(1).

to prevent the debtor's insolvency.[72] Moreover, in alignment with the PRD,[73] the Law appears to adopt a German-inspired approach toward early warning mechanisms.[74] It mandates that auditors[75] and accountants providing services to the debtor,[76] as well as the debtor's CFO, notify the debtor's management within ten days if they detect any signs of insolvency or risk of insolvency based on the results of preparing the debtor's tax reports.[77] Subsequently, within 30 days after the receipt of the notification, the manager is required to inform the owners.[78] The owners or an authorised institution managing the debtor's assets are then obligated to take preventive measures to avert insolvency. These measures may involve extra-judicial settlement of the debt, initiating preventive restructuring proceedings under the BCU, initiation of financial restructuring under the Law on Financial Restructuring[79] or submitting a petition to commence bankruptcy procedures.[80]

Furthermore, a new provision in the PRD Transposition Law stipulates that both creditors and the debtor's employees have the right to request the debtor to initiate preventive restructuring.[81] Upon receiving such a request, the debtor is required to assess it and provide a reasoned response within 30 days.[82]

17. While the PRD Transposition Law introduces innovative warning mechanisms, which mark a progressive step within Ukrainian law, certain limitations and uncertainties are evident. Firstly, the consequences or actions resulting from the failure to fulfil the obligation to notify the debtor remain unclear and unspecified in the Law.[83] It is not helpful at all given that the national company

72 BCU, Art. 4(1) (as worded by the PRD Transposition Law).

73 Art. 3.

74 *Unternehmensstabilisierungs- und -restrukturierungsgesetz [StaRUG], Dec. 22, 2020, BGBl. I S. 3256* as amended by *Gesetz [G], Aug. 10, 2021, BGBl. I S. 3436, § 102.*

75 This obligation is based on International Standards on Auditing. See International Standard on Auditing (ISA) 570 (Revised), Going Concern: https://www.ifac.org/system/files/publications/files/ISA-570-%28Revised%29.pdf (accessed 27 January 2025).

76 The version of the bill adopted in the first reading on 9 May 2024, also included lawyers. This provision was opposed by the Ukrainian National Bar Association, which specifically noted that the bill 'imposes an obligation on the lawyer, during the provision of services to the debtor, that is not typical for legal practice'. See *Propozytsiï ta zauvazhennia Natsional`noï asotsiatsiï advokativ Ukraïny do proektu Zakonu "Pro vnesennia zmin do Kodeksu Ukraïny z protsedur bankrutstva ta inshykh zakonodavchykh aktiv Ukraïny shchodo implementatsiï Direktyvy Ievropeïskoho parlamentu ta Rady Ievropeïskoho Soiuzu 2019/1023 ta zaprovadzhennia protsedur preventyvnoï restrukturyzatsiï (reiestr N. 10143 vid 12.10.2023)*: https://unba.org.ua/assets/uploads/publications/%D0%97%D0%9F%2010143.pdf (accessed 27 January 2025).

77 BCU, Art. 4(2) (as worded by the PRD Transposition Law).

78 BCU, Art. 4(3) (as worded by the PRD Transposition Law).

79 Allows debtors with significant financial liabilities to at least one financial institution, whose businesses are considered financially distressed but still viable, to undergo restructuring. The procedure cannot be used if there is no bank (other financial institution) among the creditors. See *Zakon Ukraïny 'Pro finansovu restrukturizatsiiu' vid 14 chervnia 2016 roku, VVRU, 2016, No. 32, St. 555.*

80 BCU, Art. 4(4) (as worded by the PRD Transposition Law).

81 BCU, Art. 33^{1}(2).

82 Ibid.

83 The issue was highlighted in the assessments of Bill #10143 conducted by the Parliamentary Committee on European Integration and the Main Scientific and Expert Department of the *Verkhovna Rada* of Ukraine. See
Vysnovok na proekt Zakonu pro vnesennia zmin do Kodeksu Ukraïny z protsedur bankrutstva ta inshykh zakonodavchykh aktiv Ukraïny shchodo implementatsiï Direktyvy Ievropeïskoho parlamentu ta Rady Ievropeïskoho Soiuzu 2019/1023 ta zaprovadzhennia protsedur preventyvnoï restrukturyzatsiï

law does not provide any answers either. These aspects necessitate further specification and definition for the effective implementation of the new warning tools. Secondly, the applicability of warnings from auditors and/or accountants raises questions concerning their relevance for smaller businesses. Ukrainian micro and small-sized enterprises often operate without external services due to their small turnovers. In many cases, accounting and financial reporting are managed by the owner-manager. This problem correlates with the 2017 report on the proposed PRD and its impact on SMEs which emphasised the importance of 'a tax advisor for annual tax reports who can be mandated to monitor the business situation'.[84] Unfortunately, in Ukrainian realities, this solution might not be very helpful in practice. Smaller Ukrainian businesses may benefit more from online tools provided by the Ministry of Justice (as mentioned below).

4. *Broader Authority of the Ministry of Justice. Online Tools – Articles 3, 8(2), 29 of the PRD*

18. The PRD Transposition Law expands the jurisdiction of the Ministry of Justice,[85] assigning it crucial responsibilities for insolvency prevention. These responsibilities include:

(1) Formulating and implementing state policies aimed at preventing debtors' insolvency, including those undergoing preventive restructuring procedures;

(2) Ensuring the placement of information on its website regarding bankruptcy issues, early warning (detection) tools, and the preventive restructuring procedure;

(3) Creating and sanctioning a template preventive restructuring plan tailored for micro- and small-sized enterprises;

(4) Setting forth the procedure and deadlines for preventive restructuring administrators, as well as for managers of debtors, to submit necessary data required for placement on the authority's website;

(reiestr N. 10143), 6 lystopada 2023 roku: https://itd.rada.gov.ua/billInfo/Bills/pubFile/2060462 (accessed 20 December 2024), *ss. 2 - 3*; *Vysnovok shchodo proektu Zakonu pro vnesennia zmin do Kodeksu Ukraïny z protsedur bankrutstva ta inshykh zakonodavchykh aktiv Ukraïny shchodo implementatsiï Direktyvy Ievropeĭskoho parlamentu ta Rady Ievropeĭskoho Soiuzu 2019/1023 ta zaprovadzhennia protsedur preventyvnoï restrukturyzatsiï (reiestr N. 10143), 8 grudnia 2023 roku*: https://itd.rada.gov.ua/billInfo/Bills/pubFile/2116258 (accessed 27 January 2025), *s. 2*.

84 European Parliament, May 2017, PE 583.151, p. 18.

85 BCU, Art. 3(2) (as worded by the PRD Transposition Law).
The PRD Transposition Law as well as the BCU use the term 'the state body in charge of bankruptcy in the sphere of insolvency prevention', avoiding direct mention of the Ministry of Justice due to the historical transfer of bankruptcy-related responsibilities. These functions, such as training administrators and aiding judges in bankruptcy cases, shifted between the Agency on Prevention of Bankruptcy, the Ministry of Economy, and currently reside with the Bankruptcy Department under the Ministry of Justice of Ukraine. The Ministry's Directorate for Justice and Criminal Justice shapes bankruptcy policy and oversees its implementation. However, there's a possibility of these duties moving to another ministry or executive agency in the future.

(5) Developing and authorising standardised documents pertinent to preventive restructuring procedures, in addition to providing methodological recommendations;

(6) Approving the standard form of the contract with the preventive restructuring administrator;[86]

(7) Exercising other functions as mandated by law.

Given the need to educate stakeholders about preventive restructuring and tools to prevent insolvency, the importance of these provisions can hardly be overestimated. Aligned with the PRD,[87] these provisions signify a crucial step forward. The Ministry of Justice, equipped with its capabilities, stands well-prepared for this task. Notably, it already deals with matters related to insolvency/bankruptcy such as insolvency practitioners and their training, and maintaining the register of enterprises under bankruptcy proceedings. The transposition of the PRD will not therefore be something completely new for the ministry and the officials concerned.

19. Since 2020, Ukraine has demonstrated leadership in Europe by implementing diverse digital solutions for businesses, ranging from online license applications to addressing reporting and tax-related issues,[88] Preventive restructuring now emerges as another promising area for innovation in digital solutions. Although the PRD Transposition Law is 'less advanced' compared to the version adopted in the first reading,[89] it still provides opportunities to access information online. The planned changes look promising, offering much-needed assistance to debtors with limited resources and potentially becoming a significant milestone for Ukrainian authorities in developing new digital tools for those in financial distress. Under the new law, the Ministry of Justice's website will provide information on available early warning tools, details about preventive restructuring measures and procedures, and comprehensive guidance tailored to the needs of micro- and small-sized enterprises for developing preventive restructuring plans.[90]

86 On 25 December 2024, the Ministry of Justice approved the standard form of the preventive restructuring plan for micro and small enterprises, along with the standard form of the contract with the preventive restructuring administrator. See *Nakaz Ministerstva Iustytsiï Ukraïny No. 3735/5 vid 25 hrudnia 2024 roku, zareiestrovano v Ministerstvi Iustytsiï Ukraïny 26 hrudnia 2025 roku za no. 2007/43352, Ofitsiïnyï Visnyk Ukraïny, 2024, No. 110, St. 7093.*

87 Art. 3(1).

88 O. KONONOV, 'Post-War Economic Recovery of Ukraine: What Role Could the EU Preventive Restructuring Directive 2019/1023 Play for the Ukrainian Small and Medium-Sized Enterprises?', 97(4) *Am. Bankr. L.J.*, 2023, pp. 831–832; C. ZAKRZEWSKI, G. DE VYNCK, 'The Ukrainian Leader Who Is Pushing Silicon Valley to Stand Up to Russia', *The Washington Post,* 2 March 2022: https://www.washingtonpost.com/technology/2022/03/02/mykhailo-fedorov-ukraine-tech/ (accessed 27 January 2025); T. SIMONITE and G.M. VOLPICELLI, 'Ukraine's Digital Ministry Is a Formidable War Machine', *Wired,* 17 March 2022: https://www.wired.com/story/ukraine-digital-ministry-war/ (accessed 27 January 2025).

89 Bill #10143 emphasised the establishment of a dedicated web portal focused on preventing insolvency. Costs necessary for the creation of the portal became a subject of discussion in Parliament. Eventually, instead of creating a new portal, the legislature emphasized the need to modernize the existing website of the Ministry of Justice. See https://itd.rada.gov.ua/billInfo/Bills/pubFile/2128344 (accessed 27 January 2025).

90 BCU, Art. 3(3) (as worded by the PRD Transposition Law).

5. *Opening the Procedure: Restructuring Plan – Articles 1, 4, 8, 17 of the PRD*

20. The PRD Transposition Law[91] grants debtors the option to employ procedures resembling the existing pre-trial restructuring in cases where the debtor already possesses a restructuring plan approved by creditors before applying to court. However, instead of mandating the submission of a plan pre-approved by creditors to the commercial court to initiate pre-trial restructuring, the Law enables debtors to present a draft restructuring plan. This draft plan can be negotiated with creditors subsequent to the court's opening the preventive restructuring procedure. It may also undergo modifications before obtaining final approvals from both creditors and the court.[92] Notably, in contrast to the vague provisions of the old Article 5 of the BCU, the PRD Transposition Law specifies highly detailed requirements for the contents of the restructuring plan, aligning with the stipulations set forth in the PRD[93] (see Table 1 below).

Table 1. Contents of the Pre-Trial Restructuring Plan (BCU, Art. 5) vs. Contents of the Preventive Restructuring Plan (PRD Transposition Law – BCU, Art. 33[15])

The pre-trial restructuring plan must contain:	The preventive restructuring plan must contain the following information:
(1) The amounts, procedure, and timelines for settling the claims of creditors participating in the rehabilitation; (2) Measures for implementing the rehabilitation plan[94] and monitoring its execution; (3) The extent of the powers of the rehabilitation administrator (if appointed). **The pre-trial restructuring plan may contain:** (1) categorisation of participating creditors based on the nature of their claims and the presence (or absence) of collateral securing their claims; (2) different terms for satisfying the claims of creditors in different categories; (3) measures for obtaining loans or credits; (4) measures to be taken for restructuring in accordance with the BCU.	(1) The debtor, his financial condition, reasons for insolvency, or threat of insolvency; (2) Monetary obligations of the debtor, the deadlines for which have elapsed before the opening of the preventive restructuring or will occur during the procedure. This includes obligations secured by the debtor's assets, obligations to creditors interested in the debtor, and obligations to employees, specifying the amount of penalties, fines, or other financial sanctions for breaching these obligations; (3) Other non-monetary obligations of the debtor that significantly affect the debtor's assets; (4) The affected parties; (5) Classes into which the affected parties are divided and the amount of claims for each class of creditors;

91 BCU, Art. 33[29].
92 BCU, Art. 33[4](4), clause 4, Arts. 33[15], 33[20]–33[22].
93 Art. 8(1).
94 According to the BCU, Art. 51(2), those measures can be:
(1) enterprise restructuring (the implementation of organisational, business, financial and economic, legal, technical measures aimed at reorganising the enterprise, in particular, by splitting it off, with the transfer of debt obligations to a legal entity not subject to rehabilitation, at changing type of ownership, management, organisational and legal form that will contribute to the financial recovery of the enterprise, increase in production efficiency, increase in the volume of competitive products, and to full or partial satisfaction of creditors' claims);
(2) production conversion;

(6) Unaffected parties, along with explanations for why it is proposed not to involve them in the procedure;

(7) The debtor's assets, including those serving as collateral and their value determined based on an assessment conducted within six months before the date the debtor filed for the opening of the preventive restructuring procedure or according to the debtor's accounting data as of the latest reporting date;

(8) Measures of the preventive restructuring plan[95], the order, and deadlines for their execution, including the order and deadlines for settling the claims of the involved creditors;

(9) Proposed preventive restructuring measures, their duration, respective procedures and timelines for satisfying claims of the affected parties;

(10) The number of employees (staffing levels) and the consequences for the debtor's employees due to the implementation of the preventive restructuring plan, such as layoffs, staff reductions, changes in working conditions, alterations in remuneration, and other measures affecting the rights and duties of employees, as well as mechanisms for informing about the implementation of such measures;

(3) closure of unprofitable productions;
(4) extension of a period for or postponement, or cancellation (write-off) of debts or part thereof;
(5) fulfilment of the debtor's obligations by third parties;
(6) other means to satisfy creditors' claims that does not contradict the BCU;
(7) liquidation of receivables;
(8) restructuring of the debtor's assets in accordance with the requirements of the BCU;
(9) sale of part of the debtor's property;
(10) fulfilment of the debtor's obligations by the debtor's owner and its/his responsibility for non-fulfilment of the undertaken obligations;
(11) alienation of property and settlement of creditors' claims by replacing assets;
(12) dismissal of the debtor's employees who cannot be involved in the process of implementation of the restructuring;
(13) obtaining a loan to settle redundancy payment to the debtor's employees who are dismissed in accordance with the restructuring plan, which is reimbursed in accordance with the requirements of the BCU on an extraordinary basis, through the sale of the debtor's property;
(14) obtaining loans and credits, purchasing goods on credit;
(15) other measures to recover the debtor's solvency.

95 According to the BCU, Art. 33[16](1), those measures can be:
(1) reorganisation or repurposing of the debtor's assets;
(2) restructuring of the debtor's obligations, including deferral, instalment payments, or discharge of debt or part of it, changes to the interest rate on loan or credit agreements, or changes to the method or manner of fulfilling obligations;
(3) raising new financing;
(4) sale of part of the debtor's assets;
(5) sale of the debtor's entire enterprise (pre-pack sale);
(6) replacement of assets;
(7) fulfilment of the debtor's obligations by the equity holders of the debtor;

	(11) Justification for the necessity of obtaining new financing, if envisaged by the preventive restructuring plan; (12) Forecasts regarding the debtor's activities and cash flows during the period of preventive restructuring; (13) Justification that the preventive restructuring plan complies with the criterion of the best interests of the creditors. This means that no involved creditor will be in a worse position, including in terms of the satisfaction of claims, according to the preventive restructuring plan, compared to the scenario of initiating bankruptcy proceedings against the debtor and recognising the debtor as bankrupt or in the event of a court's rejection of the preventive restructuring plan and closure of the preventive restructuring procedure.

The new Law clearly aligns with the requirements stipulated in the PRD and notably broadens the scope of the restructuring plan's contents in comparison to the current provisions outlined in the BCU. This expansion signifies that the development of the plan might pose a more complex task for all parties engaged in preventive restructuring.

21. The PRD Transposition Law offers an alternative for debtors representing micro- or small-sized enterprises to submit a condensed version termed the 'concept of preventive restructuring' (*kontseptsiia preventyvnoï restrukturyzatsii*)[96] which serves as a succinct rendition of the comprehensive restructuring plan. This condensed submission is required to encompass essential information, including:

(1) details about the debtor, his financial situation, and the underlying causes leading to insolvency or the looming threat of insolvency;

(2) a comprehensive breakdown of the debtor's outstanding obligations at the time of initiating preventive restructuring. This includes secured obligations, liabilities to interested creditors, commitments to employees, and estimations of potential penalties and financial sanctions against the debtor;

(3) a listing of involved creditors, inclusive of employees, and equity holders;

(4) explanation regarding uninvolved parties accompanied by justifications clarifying why their involvement is not necessary;

(5) inventory of the debtor's assets[97].

(8) increase of the debtor's authorised capital through additional contributions (involving additional investments);
(9) changes in the organisation of the debtor's labour;
(10) other measures aimed at restoring the debtor's solvency.

96 BCU, Art. 33^4(6).

97 BCU, Arts. 33^4(6), 33^{15}(1).

22. The innovation of an opt-in solution for micro- and small businesses presents a two-fold perspective. On one hand, presenting a concept, rather than a comprehensive plan (in its draft form), prior to initiating preventive restructuring proceedings in court might be more manageable for the debtor. However, as stipulated in the PRD Transposition Law, if the concept is submitted concurrently with the application to initiate preventive restructuring, the plan must be collaboratively developed with the preventive restructuring administrator within court-imposed deadlines.[98] This compulsory involvement of the administrator, as outlined in the new Law, raises concerns, particularly regarding the typically limited resources of micro- and small businesses. Such mandatory engagement might potentially escalate costs for the debtor. Furthermore, the effectiveness of smaller businesses benefiting from template plans available on the Ministry of Justice`s website remains uncertain.

23. The PRD Transposition Law expands the grounds for rejecting a debtor's application and the initiation of preventive restructuring proceedings compared to the existing provisions in Article 5 of the BCU. According to the new Law, the court will reject the opening of preventive restructuring proceedings if:

- the debtor's application does not meet the requirements of the BCU;
- preventive restructuring is not applicable to the debtor;[99]
- the court has issued a ruling regarding the debtor on the acceptance of the creditor's application to initiate bankruptcy proceedings;
- bankruptcy proceedings (insolvency) have commenced against the debtor, or a preventive restructuring plan in the implementation stage has already received approval;
- the debtor is undergoing liquidation or has completed liquidation;
- the state has registered the termination of entrepreneurial activity for a natural person-entrepreneur;
- a preventive restructuring procedure involving the debtor occurred within the same calendar year preceding the submission of the petition for the initiation of preventive restructuring;
- the debtor is subjected to administrative or criminal liability due to unlawful actions related to bankruptcy (insolvency) within the preceding three years.[100]

98 BCU, Art. 33^4(6).

99 The circumstances under which this situation may apply are not clearly defined. According to the BCU, Art. 2(4), no bankruptcy proceedings can be initiated against the so-called *kazenni* enterprises (special category of state-owned enterprises), state non-commercial enterprises and institutions funded from the state budget. The same applies to the state mining enterprises under the Law on the Restoration of Solvency of State Coal Mining Enterprises of 13 April 2017 (as amended), *VVRU, 2017, No. 43, St. 1328*; state-owned enterprises engaged in management of critical infrastructure facilities (electricity supply, coal, gas and/or oil extraction, nuclear energy, energy supply machine building) under the Law on Amending Certain Legislative Acts of Ukraine Regarding Ensuring the Operation of Critical Infrastructure Facilities During Martial Law of 22 May 2024, *VVRU, 2024, No. 31, St. 228*.

100 BCU, Art. 33^5(2).

24. The PRD Transposition Law introduces a provision mandating the court, upon granting the application to initiate preventive restructuring, to issue a corresponding ruling[101] that includes specific mandatory elements:

(1) an indication of initiation of preventive restructuring;

(2) the application of the main protective measures and additional protective measures (if requested by the debtor);[102]

(3) the appointment of a preventive restructuring administrator (if applicable);

(4) specification of the time and place for the final court hearing, scheduled to occur no earlier than two months and no later than six months from the date of the ruling accepting the application.

25. The PRD Transposition Law explicitly stipulates a maximum duration of six months for court proceedings[103] and ensures that all affected parties are afforded a minimum of two months to finalise and approve the preventive restructuring plan.[104] These introduced provisions are noteworthy as the current BCU lacks such specifications. These novelties are poised to provide all involved parties in the procedure with a crucial period to negotiate and reach a compromise.

26. In conclusion regarding the innovations pertaining to the initiation of preventive restructuring, it's crucial to note that as per the new Law,[105] upon the approval of the application to commence the preventive restructuring procedure, the court is obligated to publish an information notice about it on the official web portal of the Ukrainian judiciary.[106] Furthermore, similar notices may be published on the official website of the Ministry of Justice or through other permissible means as outlined by the law.[107]

6. *Stay and Protective Measures – Articles 5–7, 17–18 of the PRD*

27. The old Article 5 of the BCU lacked a provision that prevented creditors from initiating bankruptcy proceedings even after a court-approved pre-trial restructuring.[108] Notably, it did not include a statutory moratorium on creditor actions. This gap, specific to Ukraine's pre-trial restructuring framework,[109] created difficulties for debtors,[110] forcing them to keep their plans hidden until

101 BCU, Art. 33^5(3).
102 See section II.A.6. *infra*.
103 BCU, Art. 33^5(3), clause 4.
104 Ibid.
105 BCU, Art. 33^5(4).
106 https://court.gov.ua/ (limited access since 24 February 2022).
107 BCU, Art. 33^5(4).
108 BCU, Art. 5(7).
109 O. KONONOV, 'Post-War Economic Recovery of Ukraine: What Role Could the EU Preventive Restructuring Directive 2019/1023 Play for the Ukrainian Small and Medium-Sized Enterprises?', 97(4) *Am. Bankr. L.J.*, 2023, pp. 814, 822.
110 Ibid.

the final stages to avoid creditors triggering bankruptcy, which weakened the effectiveness of insolvency prevention measures.[111]

28. To tackle this issue in accordance with the PRD, which mandates that 'Member States shall ensure that debtors can benefit from a stay of individual enforcement actions to support the negotiations of a restructuring plan in a preventive restructuring framework',[112] the PRD Transposition Law introduced the primary and additional protective measures.[113] The primary protective measures apply automatically once the court sanctions the commencement of preventive restructuring. Those measures are:

(1) Prohibiting affected creditors from initiating insolvency procedure against the debtor;

(2) Suspending any financial sanctions/penalties against the debtor;

(3) Requiring that any disposal of the debtor's assets align with the preventive restructuring plan;

(4) Increasing (or decreasing) the debtor's authorised capital, or exiting of a participant from the debtor in a limited liability company or additional liability company, can only be carried out as specified in the preventive restructuring plan.[114]

Additional protective measures require a well-reasoned petition from the debtor and can include:

(i) A ban on foreclosure on the debtor's money or assets from the debtor, except in cases where the enforcement proceedings are at the stage of distributing funds collected from the debtor (including proceeds from the sale of the debtor's property), as well as in the collection of wage arrears, alimony, or compensation for damage caused by injury, other health impairments, or the death of an individual;

(ii) A ban on the enforcement of claims on pledged (mortgaged) assets.[115]

29. The debtor can submit their petition to apply additional protective measures concurrently with the application for initiating the preventive restructuring procedure.[116] These protective measures can endure for up to three months, with the potential for a three-month extension at the court's discretion. Notably, the effect of both primary and additional protective measures automatically ceases after six months from the date of initiating the preventive restructuring procedure, without the possibility of extension by the court.[117]

30. In order to forestall potential abuses by debtors attempting to prolong inevitable insolvency or impede court decisions' enforcement, the PRD Transposition

111 *Kruhlyĭ stil 'Preventyvna restrukturyzatsiia vidpovidno do zakonoproektu No. 10143', Kyiv, Ukraïna, 8 grudnia 2023 roku*: https://www.facebook.com/Pravojusticeukraine/videos/262958836778151 (accessed 27 January 2025).
112 PRD, Art. 6(1).
113 BCU, Art. 33[11](2).
114 BCU, Art. 33[11](3).
115 BCU, Art. 33[12](3).
116 BCU, Art. 33[12](1).
117 BCU, Art. 33[13](3).

Law introduces a guideline specifying that the court can institute protective measures solely under specific conditions:

- The debtor must present a substantiated plan or the concept of preventive restructuring,[118] and there should be reasonable grounds to believe that such a plan will be effectively executed;
- The debtor is obligated to furnish comprehensive and reliable information regarding his financial situation, assets, and liabilities;
- Non-implementation of protective measures would lead to the impracticality of carrying out preventive restructuring or result in the debtor's insolvency.[119]

31. Indeed, the changes could offer new opportunities for debtors seeking to restructure their debts in good faith and relying on a second chance as promoted by the PRD. However, it is not entirely clear how these changes might impact the enforcement of court decisions in general.[120] During discussions regarding Bill #10143, representatives from the State Bailiff Service of Ukraine, as well as private bailiffs, showed a degree of caution, if not outright hostility, towards the concept of suspending enforcement proceedings against the debtor.[121] Ukrainian banks went even further by appealing to the President of Ukraine to veto the PRD Transposition Law since 'beneath the surface of the Euro-integration reform, we have a range of new tools that will allow unscrupulous borrowers, if they wish, to block and complicate the work of financial institutions in recovering funds, delay procedures, and avoid asset seizures and sales to repay debts'.[122]

7. *Preventive restructuring administrator. Debtor-in-possession – Arts. 2, 5, 9, 26–27 of the PRD*

32. As per the repealed Article 5 of the BCU, the appointment of a restructuring administrator (*keruiuchyi sanatsieiui*)[123] was discretionary. Whether with or without an administrator, the debtor or management retained control over all assets and daily operations. Nevertheless, the restructuring plan itself could specify certain constraints and delineate the extent of authority granted to the restructuring administrator.[124] This administrator was selected from the cadre of individuals known as arbitration managers (*arbitrazhni keruiuchi*), who are

118 Para. 21 *supra*.
119 Art. 33[13](5).
120 Problems with the enforcement of court decisions have been constantly mentioned in the Commission`s reports on Ukraine. See Commission, 8 November 2023, SWD/2023/699 final, pp. 28–29; Commission, 30 October 2024, SWD(2024) 699 final, pp. 32–33.
121 *Kruhlyĭ stil 'Preventyvna restrukturyzatsiia vidpovidno do zakonoproektu No. 10143', Kyiv, Ukraïna, 8 grudnia 2023 roku*.
122 *Bankivs`ka spil`nota zaklykaie Prezysenta povernuty Verkhovniĭ Radi na doopratsuvannia zakon No 10143 pro preventyvnu restrukturyzatsiiu*, *nabu.ua*, *4 zhovtnia 2024*: https://nabu.ua/ua/bankivska-spilnota-zaklikaye-prezidenta-povernuti-verhovniy-radi-na-doopratsuyuvannya-zakon.html (accessed 27 January 2025).
123 Those are qualified practitioners in the field of bankruptcy licensed by the Ministry of Justice of Ukraine.
124 BCU, Art. 5(2).

licensed professionals specialising in bankruptcy, insolvency, restructuring, and liquidation processes.[125]

33. In accordance with the existing jurisprudence under Article 5, if no administrator is designated, the restructuring plan would explicitly state that the company's management bears the responsibility for ensuring compliance with the plan.[126] The debtor retains the option to propose a specific candidate for appointment as a restructuring administrator.[127] However, unlike the PRD which does not explicitly provide for the creditor's right to make choices regarding the administrator, Article 5 of the BCU supported the idea that the ultimate decision rested with the creditors, who determined the administrator through a voting process. As had been previously stipulated by the BCU, the administrator selection occurred during the creditors' meeting, where the claims represented collectively exceeded 50% of the total value of claims outlined in the restructuring plan.[128] The appointment was subject to subsequent confirmation by the commercial court. Upon applying to the court for the approval of a restructuring plan, either the debtor or creditor(s) could petition the court to appoint an administrator. This appointed administrator would be responsible for taking measures to safeguard creditors' claims and mitigate the impact of the moratorium on the satisfaction of such claims.[129]

34. The PRD Transposition Law introduced several changes regarding administrators. Firstly, it introduced the concept of a 'preventive restructuring administrator' (*administrator preventyvnoï restrukturyzatsii*).[130] Secondly, in contrast with the repealed Article 5 of the BCU, the new Law outlines scenarios when the administrator's involvement becomes mandatory, namely:

(1) If, at the time of the debtor's petition to the commercial court to initiate preventive restructuring, no preventive restructuring plan has been developed, and a concept of preventive restructuring has been submitted along with the application for the initiation of the preventive restructuring procedure (in this case, the debtor suggests a candidate for appointment).

(2) When the commercial court has imposed protective measures (in this case, the debtor suggests a candidate).[131]

125 The Ministry of Justice keeps the Unified State Register of Arbitration Managers. Arbitration managers are insolvency practitioners like those indicated in Annex B of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), [2015] OJ L141/19.

126 *Postanova Verkhovnoho Sudu Ukraïny vid 15 kvitnia 2021 roku v spravi No. 904/3325/20*: https://verdictum.ligazakon.net/document/96501402 (accessed 27 January 2025), *para 3.8.*

127 *Postanova Verkhovnoho Sudu Ukraïny vid 9 chervnia 2021 roku v spravi No. 924/1083/20*: http://iplex.com.ua/doc.php?regnum=97735108&red=100003a134181032b08b44025ba3f92604ad78&d=5 (accessed 27 January 2025).

128 BCU, Art. 5(7); *Ukhvala Hospodars`koho sudu Kharkivskoï oblasti vid 23 bereznia 2020 roku v spravi No. 922/326/20*: https://zakononline.com.ua/court-decisions/show/88430457 (accessed 27 January 2025).

129 BCU, Art. 5(7).

130 BCU, Art. 1 (as worded by the PRD Transposition Law).

131 See section II.A.5. *supra.*

(3) In instances where cross-class cramdown has been utilised (in this case, creditors propose a candidate for appointment).[132]

(4) If the preventive restructuring plan stipulates monitoring the plan's implementation (in this case, creditors propose a candidate for appointment).[133]

If creditors propose the candidate, they must agree on the candidate and how his/her remuneration will be paid.[134] Regardless of who suggested the candidate, the final appointment is to be made by the court. Even if the administrator's participation is not mandatory under the circumstances, either the debtor or creditors can petition the court to appoint one.[135]

35. Secondly, the PRD Transposition Law provides clarity on the administrator's powers,[136] which were vaguely outlined in Article 5 of the BCU. The new Law underscores the administrator's pivotal role in fostering negotiations between the debtor and creditors and in crafting a restructuring plan. In particular, the restructuring administrator`s powers include providing recommendations to prevent insolvency of the debtor; participating in the development of the restructuring plan; assessing the plan`s compliance with legal requirements.[137] The administrator monitors compliance with protective measures, handles complaints, and provides necessary information to the court and creditors. Additionally, they have the authority to request documents and take action in case of violations. Another aspect of their role involves providing consent for certain transactions and overseeing their execution in accordance with the restructuring plan.[138]

36. Thirdly, the novelties introduced by the PRD Transposition Law distinguish the administrator's compensation based on the debtor's size, differentiating between micro/small enterprises and larger businesses, namely:

(1) three times the minimum wage[139] for each month the preventive restructuring administrator exercises their powers concerning the debtor (if the debtor is a micro-enterprise or a small enterprise);[140]

(2) ten times the minimum wage for each month (if the debtor is a medium-sized enterprise);[141]

132 BCU, Art. 33^{2}(2), clause 3, Art. 33^{23}.

133 BCU, Art. 33^{2}(3), clause 3. At the same time, Art. 33^{2}(11) states that the failure of creditors to submit a candidate for the appointment of an administrator in cases where the appointment of an administrator is mandatory under the BCU upon their submission shall not be a reason for refusing to approve the preventive restructuring plan. In such a case, further proceedings in the preventive restructuring procedure are conducted without the involvement of an administrator.

134 BCU, Art. 33^{2}(7).

135 BCU, Art. 33^{2}(6).

136 BCU, Art. 33^{3}.

137 Ibid.

138 Ibid.

139 The minimum wage is regularly revised according to the laws governing the state budget for each respective year. As of 1 April 2024, it equates to UAH 8,000 (EUR 182.57 according to the rate of exchange as of 1 January 2025).

140 BCU, Art. 33^{2}(8), clause 1.

141 BCU, Art. 33^{2}(8), clause 2.

(3) fifteen times the minimum wage for each month (if the debtor is a large enterprise).[142]

In addition to that, the PRD Transposition Law additionally introduced several provisions empowering the adjustment of the restructuring administrator's compensation. If the administrator's appointment is obligatory, the debtor is responsible for the expenses; otherwise, the party requesting the appointment bears the costs.[143] Creditors must reach an agreement among themselves regarding the payment to the administrator (who pays, proportions, procedures).[144] Upon the debtor's or creditor's request, or at its own discretion, the court is authorised to modify the remuneration amount based on factors such as the anticipated duration of the restructuring process, the administrator's workload, the complexity of the case, the debtor's financial circumstances.[145] These novelties are important given that the concerned amounts might be a burden for small Ukrainian businesses impacted by the war.

37. The Ukrainian law is fundamentally acquainted with the concept of debtor-in-possession (DIP). There were no specific restrictions for DIP outlined in the now repealed Article 5 of the BCU, nor were there any mandates to replace the debtor's management. As per prevailing practices, in instances where no administrator was appointed, typically, the rehabilitation plan included a direct provision holding the company's manager responsible for implementing the plan and overseeing compliance with it.[146] Despite administrators being appointed in the majority of existing pre-trial restructuring cases, the concept of DIP has faced substantial criticism from arbitration managers.[147] They note that not a single court-approved restructuring plan has included provisions for a change in the debtor's management.[148] Given that the mandatory change would be non-compliant with the PRD, these remarks on the part of Ukrainian insolvency practitioners clearly demonstrate the existing stigmatisation of the debtor, the lack of knowledge and the need to further promote the ideas of a second chance and preventive restructuring for viable businesses.

38. Based on the PRD, Article 5 and Article 19, the PRD Transposition Law clarifies that in the preventive restructuring procedure the debtor`s management (directors) must act conscientiously and reasonably, taking into account the interests of both the debtor and creditors, and not to take actions to the

142 Ibid., clause 3.
143 BCU, Art. 33^2(5)(6).
144 BCU, Art. 33^2(7).
145 BCU, Art. 33^2(8), clause 2.
146 *Postanova Verkhovnoho Sudu Ukraïny vid 15 kvitnia 2021 roku v spravi No. 904/3325/20*: https://verdictum.ligazakon.net/document/96501402 (accessed 27 January 2025), para. 3.8.
147 *Kruhlyĭ stil 'Dosudova sanatsiia: pershi uspishni keĭsy ta actual`na sudova praktyka', Kyiv, Ukraïna, 31 sichnia 2023 roku*: https://www.facebook.com/Pravojusticeukraine/videos/852362872691173/?app=fbl (accessed 27 January 2025).
148 Ibid.; V. ESTOR, *'Dosudova sanatsiia: dialoh borzhnyka i kredytoriv na foni viĭny», Pravo.ua, 25 lypnia 2023 roku*: https://pravo.ua/dosudova-sanatsiia-dialoh-borzhnyka-i-kredytoriv-na-foni-viiny/ (accessed 27 January 2025).

detriment of creditors.[149] The debtor must at all times comply with the court-approved restructuring plan, provide information to the administrator, the court and to the creditors.[150] According to the new Law, for the entire duration of preventive restructuring, the debtor is banned to

(1) engage in transactions that worsen the debtor's financial condition or harm the interests of creditors;

(2) give loans, financial assistance, guarantees, warranties, alienate or encumber property, except in cases specified in the court-approved restructuring plan;

(3) pay dividends to equity holders, bonuses to management;

(4) engage in other actions explicitly prohibited by Book Three of the BCU.[151]

39. To conclude, it remains uncertain how the innovations introduced by the PRD Transposition Law will impact the prevailing stigmatisation of the debtor (especially when it goes about the DIP concept) in Ukraine or the current legal practices concerning the appointment of administrators. There are even more uncertainties regarding the utility of these innovations for micro- and small-sized enterprises.

8. *Classes of Creditors – Article 8–10 of the PRD*

40. According to Article 5 of the BCU, categorising creditors into classes was not an essential component of the pre-trial restructuring plan.[152] The old version of the Code permitted the segmentation of creditors participating in pre-trial restructuring based on the nature of their claims and the presence or absence of security for those claims. Furthermore, it was at the discretion of the debtor and/or creditors to include different conditions for satisfying claims for creditors of different categories.[153]

41. Following the requirements of the PRD,[154] the PRD Transposition Law makes it mandatory to divide creditors and other affected parties into classes and include the respective classification in the restructuring plan.[155] According to

149 BCU, Art. 33^{7}(2).
These provisions complement the general provisions on the duty of care found in Art. 89 of the Law on Joint Stock Companies of 27 July 2022 (as amended), Art. 40 of the Law on Limited Liability Companies of 6 February 2018 (as amended), Arts. 23 and 62 of the Law on Business Associations of 19 September 1991 (as amended).
150 BCU, Art. 33^{7}(4).
151 BCU, Art. 33^{7}(3).
152 BCU, Art. 5(2).
153 Ibid. The Supreme Court emphasized the discretionary nature of dividing creditors into classes. See *Postanova Verkhovnoho Sudu Ukraïny vid 15 kvitnia 2021 roku u spravi No. 904/3325/20:* https://verdictum.ligazakon.net/document/96501402 (accessed 27 January 2025), para. 8.3; *Postanova Kasatsiïnoho hospodars`koho sudu Verkhovnoho Sudu Ukraïny vid 10 serpnia 2023 roku u spravi No. 911/166/23:* https://protocol.ua/ua/postanova_kgs_vp_vid_10_08_2023_roku_u_spravi_911_166_23/ (accessed 27 January 2025), para. 59.
154 Art. 8(1)(c)–(d).
155 BCU, Art. 33^{15}(1), clause 5.

the Law, for the purposes of preparing a preventive restructuring plan and its subsequent approval, the affected parties are divided into the following classes:

(1) Secured creditors;

(2) Unsecured creditors;

(3) Creditors with budget claims (claims related to taxes, duties etc.)

(4) Unsecured creditors interested in the debtor[156].

The restructuring plan may include other classes, which must be properly differentiated, taking into account various factors such as: the deadline for fulfilling obligations, the amount or deadline for satisfying claims, the entity of the affected creditor – representatives of micro- and small businesses, suppliers, government authorities, and so on. The criteria for class differentiation must be clearly defined in the preventive restructuring plan.[157] In the event that the preventive restructuring plan provides for an increase in the authorised capital through additional contributions, an exchange of corporate rights for debt obligations, corporate reorganisation, new financing under which the equity holders of the debtor assume new or modify existing obligations, or if the preventive restructuring plan, a class of equity holders of the debtor must be formed.[158]

According to the new Law and in line with the PRD, the preventive restructuring plan cannot provide for different proportions of satisfying the claims of creditors within one class. Otherwise, all creditors within that class who find themselves in a worse position must agree in writing to the deterioration of their situation.[159]

42. It is interesting that the Ukrainian legislature decided not to create a separate class for the debtor's employees. Bill #10143 originally contained a provision requiring the creation of such a class if the proposed restructuring included employees' claims against the debtor.[160] However, this provision was deleted during the second reading and was ultimately not included in the PRD Transposition Law. Instead, the new Law emphasises the need to inform and consult with employees regarding preventive restructuring and the restructuring plan.[161] However, it appears that the relevant provisions of the PRD Transposition Law fail to comply with the Directive. According to the Ukrainian transposition, preventive restructuring measures that lead to changes in work organisation or in contractual relations with employees do not require employee approval. This contradicts both the PRD[162] and the Ukrainian labour legislation, especially in cases when restructuring will somehow affect the existing collective agreements.[163]

156 BCU, Art. 33^{18}(1).
157 BCU, Art. 33^{18}(2).
158 BCU, Art. 33^{18}(3).
159 BCU, Art. 33^{18}(4).
160 Bill #10143, Arts. 5–10(2).
161 BCU, Art. 33^{25}(2).
162 Art. 13(2).
163 *Zakon pro kolektyvni dohovory i uhody vid 1 lypnia 1993 roku, VVRU, 1993, No. 36, St. 361,* Art. 14; *Kodeks zakoniv pro pratsiu Ukraïny vid 10 grudnia 1971 roky, Vidomosti Verkhovnoï Rady Ukraïns`koï RSR, 1971, dodatok do No. 50, St. 375* (as amended), Arts. 13, 22, 173^{3}.

43. If appointed, the preventive restructuring administrator is obliged to verify the formation of the classes of affected parties and the justification for the amount of monetary claims from the affected creditors, and subsequently inform both the affected parties and the court about the results.[164] Another safeguard for creditors can be found in the provisions authorising any affected creditor, before the final hearing of the court, to apply to the court for a review of the formation of classes and the justification of the amount of monetary claims of the affected creditor if no agreement has been reached between the debtor and the creditor regarding the size of the claims.[165]

44. In summary, the stipulations outlined in the PRD Transposition Law regarding the mandatory classification of creditors and other involved parties will not be a big surprise; Ukrainian jurisprudence is accustomed to this practice. However, the classifications proposed in the Bill are more intricate than the optional prerequisites for pre-trial restructuring. This increased level of detail is likely to pose greater challenges for debtors in adhering to these requirements. Regrettably, the new Law does not provide micro- and small enterprises with the flexibility to refrain from segregating affected parties into separate classes.[166] Smaller Ukrainian businesses often deal with suppliers and tax authorities as creditors, without any secured creditors. Typically, tax and other state authorities with budget claims are hostile to the very idea of debt restructuring.[167] As a result, such debtors may end up with only two creditor classes, where one will consistently oppose restructuring (in which case, the cramdown procedure may assist the debtor but it remains to be tested). Additionally, given that smaller businesses tend to have fewer creditors, and affected parties retain the right to challenge class formation in court, debtors from smaller enterprises may face an added deterrent in utilising preventive restructuring. In the author's opinion, the absence of opt-out provisions for class formation, similar to those provided in the Directive, could present practical complications in the future.

BCU, Art. 33^{25} emphasizes the need for an employee representative in the restructuring procedure; however, their mandate and voting rights on the plan (if any) remain unclear.

164 BCU, Art. 33^{18}(5).

165 BCU, Art. 33^{18}(6).

166 As provided in the PRD, Art. 9(4).

167 For example, the State Emergency Service of Ukraine collects fines for non-compliance with fire safety regulations. In the recent case No. 914/1737/23, the Service appealed the approval of the pre-trial rehabilitation plan under Art. 5 of the BCU, arguing that 'the implementation of the rehabilitation plan would lead to losses for the State Budget of Ukraine due to the shortfall in revenue in the form of interest on funds, 3% annual interest, and inflationary losses caused by the deferral of existing debt'. The Supreme Court refused to overturn the plan, reiterating the validity of the debt deferral, and emphasised that under the approved rehabilitation plan, the State Emergency Service of Ukraine will eventually receive the fine and other due amounts. See *Postanova Verkhovnoho Sudu Ukraïny vid 20 bereznia 2024 roku u spravi No. 914/1737/23*: http://iplex.com.ua/doc.php?regnum=117879950&red=1000038 da8e4ab9b1bbdbf2749337d36d059f0&d=5 (accessed 27 January 2025).

9. *Approval of the Restructuring Plan. Cross-Class Cramdown*

a) *Approval by Creditors – Article 9 of the PRD*

45. Like in the case with the contents of preventive restructuring plan, the PRD Transposition Law provides for a very detailed procedures regarding the approval of the restructuring plan by the creditors' meeting.[168] To approve the preventive restructuring plan, the debtor convenes the meeting of creditors by sending written notices to all affected parties according to the plan. The notice includes:

(1) the preventive restructuring plan;

(2) the conclusion of the preventive restructuring administrator, if appointed, regarding the assessment of the preventive restructuring plan for compliance with the requirements stipulated in the BCU, its feasibility, adherence to the criterion of creditors' best interests, and the amount of claims by creditors where objections exist;

(3) if the preventive restructuring plan involves obtaining new financing, the agreement for the provision of new financing;

(4) if available, court decisions on the outcomes of considering applications for the formation of classes of affected parties and the size of creditors' claims.[169]

46. To approve the preventive restructuring plan, each class of affected creditors must review the preventive restructuring plan and make a decision regarding its approval. The plan is considered approved by the secured creditors' class if it is supported by creditors who have the right to vote and possess 2/3 of the votes of creditors from the total amount of secured claims included in the plan within this class.[170] If the preventive restructuring plan entails a change in the priority of claims of secured creditors, the plan must be approved by each such creditor. The preventive restructuring plan is considered approved by the unsecured creditors' classes if it is supported by creditors who hold more than 50% of the votes of creditors from the total amount of unsecured claims included in the plan in each class.[171]

47. The PRD Transposition Law[172] specifies that certain creditors will not be allowed to vote on the plan:

(1) secured creditors who have an interest in the debtor;[173]

(2) specific class of creditors if the preventive restructuring plan settles all their claims right after the plan gets approved;

(3) tax and other authorities if the preventive restructuring involves deferral, postponement, or discharge of debts related to taxes, and other

168 BCU, Art. 33^{20}.
169 BCU, Art. 33^{20}(1).
170 BCU, Art. 33^{20}(3).
171 BCU, Art. 33^{20}(4).
172 BCU, Art. 33^{20}.
173 See n. 63 *supra*.

mandatory payments). However, these terms must be as good as or better than those offered to ordinary unsecured creditors.

48. The new Law aims to enhance the specificity of voting procedure requirements in alignment with the PRD. Compared to the language in the old wording of the BCU (Art. 5), these amendments have the potential to prevent abuses highlighted in a well-famous recent case (case No. 910/15087/23).[174] In this case, a major Ukrainian electronics retail chain, ELDORADO (the debtor), sought approval for a pre-trial restructuring plan under Article 5 of the BCU. Although the plan initially received approval from 300 unsecured creditors, objections were raised after the debtor applied to the Kyiv Commercial Court for plan sanctioning. Several creditors argued that the voting process lacked transparency and cited numerous procedural violations during the creditors' meeting, including non-compliance with meeting procedures and irregularities in vote casting. As a result, the court refused to sanction the plan. After a series of unsuccessful appeals,[175] the debtor had to resubmit the plan and re-do the voting. Eventually, the resubmitted restructuring plan was approved by the court.[176] Needless to say, the scenario described above involved significant effort and expense on the debtor's part – costs that not everyone could afford. Hopefully, the amendments introduced by the PRD Transposition Law will change this situation.

49. Under the old wording of Article 5 of the BCU, if a restructuring plan proposed deferment or instalment repayment of any budget claims (debts), the consent of the respective state authority was not required. The Code explicitly stated that any tax (mandatory payments) debts that existed three years prior to the approval of the plan must be written off, and any later-matured tax liabilities could be deferred or allowed for instalment repayment under the same conditions as unsecured creditors.[177] It's not uncommon for Ukrainian tax authorities and other creditors with budget claims[178] to contest decisions affirming a restructuring plan. For instance, in Case No. 924/1083/20, the tax authority lodged a cassation appeal with the Supreme Court. Their claim included an argument that the approved pre-trial restructuring plan had disregarded an outstanding tax debt. The Supreme Court dismissed the appeal, highlighting that a tax authority representative had actively participated in the creditors' meeting and had even voted against the plan's approval. Furthermore, the Supreme Court pointed out that the trial court had partially written off the existing tax claims,[179] encompassing fines and penalties. These were excluded

174 *Ukhvala Hospodars`koho Sudu mista Kyieva vid 30 lystopada 2023 roku u spravi No. 910/15087/23*: https://opendatabot.ua/court/115969380-cbd7bfb563b15d97c69141a06863d284 (accessed 27 January 2025).

175 See, for example, *Ukhvala Pivnichnoho Apeliatsiïnoho Hospodars`koho Sudu vid 27 bereznia 2024 roku u spravi No. 910/15087/23*: https://opendatabot.ua/court/118127725-bc348e2bc139d6f03f4daa79e7b8cb44 (accessed 27 January 2025).

176 *Ukhvala Hospodars`koho Sudu mista Kyieva vid 24 kvitnia 2024 roku u spravi No. 910/3368/24*: https://youcontrol.com.ua/en/catalog/court-document/119248488/ (accessed 27 January 2025).

177 BCU, Art. 5(3).

178 See n. 167 *supra*.

179 *Postanova Verkhovnoho Sudu Ukraïny vid 9 chervnia 2021 roku v spravi No. 924/1083/20*: http://iplex.com.ua/doc.php?regnum=97735108&red=100003a134181032b08b44025ba3f92604ad78&d=5 (accessed 27 January 2025).

from the category of monetary obligations defined by the BCU, unlike the debtor's debt to one of its main creditors.[180] Excluding tax and other authorities from participating in the voting process regarding the plan could potentially decrease the instances of baseless appeals filed against trial court rulings that approve restructuring plans.

b) *Approval by the Court – Article 10 of the Directive*

50. Under the old Article 5 of the BCU, when approving pre-trial restructuring plans, Ukrainian courts juxtaposed the rehabilitation plan with a potential liquidation of the debtor.[181] This comparative analysis aimed at verifying the advantages for creditors in implementing the plan over liquidating the debtor's assets.[182] Successfully meeting this test allowed for the imposition of the plan on creditors who did not vote or voted against it. Besides, under the old regulations, the court was also supposed to use the best-interest-of-creditors test like the one provided by the PRD; however, under Article 5, the test was applied *ex officio*. The Code specified that the terms and conditions of a plan, concerning the satisfaction of claims from creditors who either abstained from voting or voted against the debtor's plan, could not be less favourable than those for creditors who supported the plan's approval.[183] In line with the PRD, the PRD Transposition Law introduced an amendment stipulating that the best-interest-of-creditors test will be applied by the court if the plan is challenged.[184]

51. The PRD Transposition Law gives the debtor seven calendar days before the final court session to submit the plan (approved by creditors) for the court's final approval.[185] Along with the plan, the debtor must submit: (1) the

180 Ibid. BCU, Art. 1 defines monetary obligations as the debtor's obligation to pay a creditor a certain amount of money based on a civil transaction (contract) or other legal grounds in accordance with Ukrainian legislation. Monetary obligations also include obligations to pay taxes, fees (mandatory payments), and insurance contributions for compulsory state pension and other social insurance, as well as obligations arising from the inability to fulfil contracts, such as storage contracts, leases, and annuity agreements, that must be expressed in monetary units.
Monetary obligations do not include forfeits (fines, late payment interest) or other financial sanctions determined on the date of the application to the commercial court, obligations arising from causing harm to the life and health of citizens, obligations to pay royalties, or obligations to the equity holders of a debtor – a legal entity that arose from such participation.
The amount of monetary obligations, including the amount of indebtedness for goods transferred, work performed, services rendered, and loans (including interest) to be paid by a debtor, shall be determined on the day of filing an application with the commercial court for opening bankruptcy proceedings unless otherwise stipulated in the law.
When filing an application for opening bankruptcy proceedings, the amount of monetary obligations shall be determined as of the date of submission of such an application to the commercial court.

181 For these purposes the debtor must submit a liquidation analysis along with the restructuring plan.

182 *Postanova Verkhovnoho Sudu Ukraïny vid 15 kvitnia 2021 roku v spravi No. 904/3325/20*: https://verdictum.ligazakon.net/document/96501402 (accessed 27 January 2025), para. 8.7. The same reasoning was applied in *Postanova Verkhovnoho Sudu Ukraïny vid 9 chervnia 2021 roku v spravi No. 924/1083/20*: http://iplex.com.ua/doc.php?regnum=97735108&red=100003a134181032b08b44025ba3f92604ad78&d=5 (accessed 27 January 2025); *Ukhvala Hospodars`koho sudu Kharkivskoï oblasti vid 23 bereznia 2020 roku v spravi No. 922/326/20*: https://zakononline.com.ua/court-decisions/show/88430457 (accessed 27 January 2025).

183 BCU, Art. 5(3).

184 BCU, Art. 33^{24}(1), clause 1. See also para. 52 *infra*.

185 BCU, Art. 33^{21}(1).

preventive restructuring administrator's (if appointed) assessment of the plan for compliance with the BCU, its feasibility, adherence to the creditors' best interests criterion, and the amount of claims by creditors subject to objections; (2) the contract for new financing (if any); and (3) proposals for the candidate to be appointed as the preventive restructuring administrator (unless already appointed).[186]

In case of any objections from affected parties (regarding the plan itself, the amount of claims, and/or the formation of classes), such parties must submit their objections to the court within the same seven-day deadline before the final court session.[187] In such cases, the court must decide on the objections before reviewing the submitted restructuring plan.[188]

52. The court verifies the plan's compliance with the outlined requirements for its contents (see Table 1 above) and the formation of classes among affected parties. If there is non-compliance with these requirements or if the amount of claims of an affected creditor are deemed unjustified the court has the authority to return both the application and the plan for revision, and it postpones the final hearing within the stipulated time limit.[189] Alternatively, if everything complies, during the final hearing, the court is mandated to approve the plan. Approval of the plan will be rejected if:

(1) the creditors' meeting and approval of the preventive restructuring plan occurred in violation of the requirements stipulated in the BCU;[190]

(2) the principle of equal treatment of creditors within the same class has been breached;

(3) the inclusion of new financing is unnecessary for executing the preventive restructuring plan and causes harm to the rights and interests of affected creditors;

(4) the plan does not align with the criterion of creditors' best interests;[191]

(5) there are grounds to believe that the plan lacks a reasonable prospect to prevent insolvency or ensure the debtor's viability;

(6) the debtor has provided inaccurate information in the plan.[192]

c) *Cross-Class Cramdown – Articles 11 and 12 of the PRD*

53. Under the PRD Transposition Law, in instances where the preventive restructuring plan fails to receive unanimous approval from all classes of affected

186 BCU, Art. 33^{21}(2).
187 BCU, Art. 33^{21}(3).
188 Ibid.
189 BCU, Art. 33^{21}(4).
190 See section II.A.9.a. *supra*.
191 Based on the PRD, Art. 14, the PRD Transposition Law allows for valuation of the restructuring plan to verify an alleged failure to satisfy the best interest of creditors test, an alleged breach of the conditions for a cross-class cramdown. The Law is very specific that it can be done only if the plan is challenged by an affected creditor. See BCU, Arts. 33^{22}(2), 33^{24}(3).
192 BCU, Art. 33^{22}(1).

parties, the debtor is empowered to petition the court for a cross-class cramdown.[193] The respective amendments introduced to the BCU echo those outlined in the Directive.[194] The plan is subject to confirmation by the commercial court if the following conditions are met:

a) There are no grounds to reject confirmation of the plan;[195]

b) The plan has been approved:

   – by a majority of the voting classes of affected parties, provided that at least one of those classes is a secured creditors; or, failing that

   – at least one of the voting classes of affected parties with the right to vote other than equity-holders or any other class which would not receive any payment or keep any interest if the normal ranking of liquidation priorities were applied under the BCU;

c) The plan ensures that dissenting voting classes of affected creditors are treated at least as favourably as any other class of the same rank and more favourably than any junior class; and

d) No class of affected parties can, under the restructuring plan, receive or keep more than the full amount of its claims or interests.[196]

54. In summary, the Ukrainian transposition of the PRD demonstrates that Ukraine implemented the 'relative priority rule' instead of the 'absolute priority rule'. Additionally, the new Law did not choose to exclude equity holders from the approval process, as optionally provided by the Directive.[197] Given the novelty of the 'cross-class cramdown' in Ukrainian law, it is difficult to determine at this stage whether it is a good solution. In Ukrainian realities, where state-owned enterprises are patronized in various ways,[198] this requirement can create additional obstacles to the adoption of the restructuring plan, exactly as envisaged by the PRD.[199]

55. The cross-class cramdown provisions outlined in the PRD Transposition Law come with certain obvious caveats. Firstly, the Ukrainian transposition does not fully comply with the PRD. Specifically, the BCU requires prior approval of the plan by a majority of the voting classes of affected parties as a precondition for using the cramdown.[200] This approval must include at least one class of secured creditors, while the Directive offers an alternative of either secured creditors or creditors senior to ordinary unsecured creditors.[201] Secondly, the term 'cross-class cramdown' poses a challenge in Ukrainian legal terminology as it remains unfamiliar. The Ukrainian legislature attempted a Ukrainian translation of 'cross-class cramdown' (*kros-klasove zatverdzhennia*), which raises both linguistic and legal questions. The term '*kros-klasove*' does not exist in the

193 BCU, Art. 33^{23}.
194 PRD, Art. 11.
195 Section II.A.9.b. *supra*.
196 BCU, Art. 33^{23}(2).
197 Arts. 9(3)(a), 12.
198 See n. 99 *supra*.
199 Art. 12.
200 BCU, Art. 33^{23}(2), clause 2(a).
201 Art. 11(1)(a)(i).

Ukrainian language; it essentially represents a calque from the English word. It is worth noting that none of the translations of the PRD into the official Slavic languages of the EU (Bulgarian, Croatian, Czech, Slovak, Slovenian, Polish) adopts an approach similar to that of Ukraine. Instead, official EU translations use functional equivalents/explanations without attempting a word-for-word translation or transliteration,[202] as seen in the Ukrainian version.[203] This disparity could have been easily avoided if the legislature had opted to use the approach proposed in the alternative bill submitted by the Cabinet of Ministers in November 2023.[204] The authors of that bill successfully implemented the concept of cross-class cramdown without explicitly naming it.[205]

10. *Consequences of the Plan's Approval: Monitoring – Articles 15–16, 18 of the PRD*

56. The PRD Transposition Law introduces several innovations concerning the outcomes following the plan's approval and procedures for court oversight regarding the implementation of the restructuring plan. In contrast to the old language in the BCU, which indicated that the pre-trial restructuring plan sanctioned by the court was binding solely for creditors whose claims were included in the plan,[206] the new Law states that the approved plan would become binding not only for all creditors, including those whose claims were part of the plan, but also for all affected parties, regardless of their vote against the plan.[207]

57. Under the PRD Transposition Law, either the debtor or the appointed restructuring administrator will be responsible for submitting reports on the implementation of the plan to the commercial court on a monthly basis.[208] If it becomes evident that the restructuring plan is unfeasible or if its execution fails to avert the debtor's insolvency, the court is empowered to terminate the preventive restructuring at the request of the debtor, the restructuring administrator (if any) or an involved creditor.[209] While the PRD Transposition Law does not propose radical changes compared to the existing language in the BCU, Article 5, it offers enhanced clarity and structure. These amendments are designed to provide affected parties, particularly creditors, with a comprehensive set of tools to monitor the plan's implementation. Additionally, they enable swift petitioning of the court in case of any issues that may arise.

58. The restructuring procedure concludes when the debtor or the administrator submits a report to the commercial court detailing the fulfilment of the preventive restructuring plan.[210] The PRD Transposition Law diverged from the

202 See https://eur-lex.europa.eu/eli/dir/2019/1023/oj (accessed 27 January 2025).
203 At the time of writing, no official translation of the PRD into Ukrainian even exists.
204 *Proekt No 10228 vid 8 lystopada 2023 roku pro vnesennia zmin do deiakykh zakonodavchykh aktiv Ukraïny shchodo vdoskonalennia preventyvnykh protsedur ta zapobihannia bankrutstvu*: https://itd.rada.gov.ua/billInfo/Bills/pubFile/2064509 (accessed 27 January 2025).
205 Ibid., Art. 5(4).
206 BCU, Art. 5(10).
207 BCU, Art. 33^{26}(1).
208 BCU, Art. 33^{26}(3).
209 BCU, Art. 33^{27}(1), clauses 8–11.
210 BCU, Art. 33^{28}(1).

approach of the alternative bill,[211] which provided more avenues for affected parties to contest the conclusion of the preventive restructuring and allowed for the possibility of extending the procedure.[212] Instead, the new Law emphasises the 'successful' completion of the process but lacks explicit provisions regarding objections by affected parties. The latter perhaps contributed to the banks` dissatisfaction and opposing the new Law.[213]

III. REPUBLIC OF MOLDOVA

A. Current State of Play – Accelerated Restructuring Procedure

59. Similar to Ukraine, the concept of preventive restructuring is not entirely new for Moldovan law. Insolvency proceedings in Moldova are regulated by Insolvency Law No. 149/2012 of 29 June 2012 (hereinafter the 'Insolvency Law').[214] Significant amendments were made to this law in 2020, including the revision of provisions enabling financially distressed debtors to negotiate restructuring arrangements with their creditors. Currently, the closest Moldovan equivalent to restructuring under PRD is the accelerated restructuring procedure (*procedura accelerată de restructurare*).[215] According to the Insolvency Law, this procedure is designed to preserve the debtor's business as a going concern, retain employment, and fulfil creditors' claims through a structured restructuring plan.[216] The process involves the debtor negotiating an extra-judicial restructuring plan with creditors, which is then formally sanctioned by the court.

60. Only a debtor experiencing financial distress (*dificultate financiară*)[217] may initiate accelerated restructuring. Financial distress is defined as a condition in which the debtor, despite fulfilling or being able to fulfil their obligations, faces imminent insolvency – an inability to meet future payment obligations.[218] In interpreting the relevant provisions of the Insolvency Law, the Supreme Court of Justice of the Republic of Moldova has clarified that debtors experiencing financial distress are not yet considered insolvent; rather, they are on a 'declining trajectory' that could eventually result in an inability to meet due monetary obligations. This situation qualifies as grounds for initiating the accelerated restructuring of the debtor.[219] If the debtor has already reached the stage of cash insolvency or balance sheet insolvency, accelerated restructuring is no longer an option; instead, standard insolvency liquidation or restructuring must

211 *supra* (n 204).
212 Bill #10228, Art. 5-2.
213 *Supra* (para 31).
214 Lege insolvabilităţii nr. 149 din 29.06.2012, Monitorul Oficial, 14.09.2012, Nr. 193-197 art. 663.
215 Insolvency Law, Arts. 218–226.
216 Insolvency Law, Art. 218.
217 Insolvency Law, Art. 218(1).
218 Insolvency Law, Art. 2.
219 *Hotărârea Plenului Curţii Supreme de Justiţie a Republicii Moldova nr. 2 din 24 martie 2014 cu privier la aplicarea în practica judiciară a Legii insolvabilităţii:* http://jurisprudenta.csj.md/search_hot_expl.php?id=359 (accessed 27 January 2025), s. 1.2.

be pursued.[220] Therefore, triggering the accelerated restructuring procedure requires precisely identifying the onset of financial distress that precedes actual insolvency – when the debtor's situation is worsening but the business remains able to fulfil their obligations.

1. *Initiation of Accelerated Restructuring*

61. The accelerated restructuring procedure must be initiated by the debtor no later than 30 days after discovering financial distress that may lead to insolvency.[221] If the debtor fails to do so, they must file a suit to initiate insolvency proceedings.[222] In other words, the debtor in Moldova must do their best to detect financial distress in a timely manner and be able to distinguish it from actual insolvency.[223] Unlike the Ukrainian *dosudova sanatsiia* under Article 5 of the BCU, which required the debtor to have a restructuring plan already approved by creditors before initiating the procedure in court,[224] a debtor in Moldova can simply file an accelerated restructuring notice with the court.[225] However, to do so, out-of-court negotiations must be ongoing at the time of submitting the notice. In other words, in Moldova, restructuring is a two-step procedure that requires court involvement: (1) submitting a notice to the court regarding the initiation of negotiations with creditors, and (2) filing a lawsuit with the court after successfully negotiating a restructuring plan with creditors. Another distinctive feature of the Moldovan accelerated restructuring procedure is that, to initiate the second stage – a lawsuit to launch accelerated restructuring – the accelerated restructuring procedure plan (*planul procedurii accelerate de restructurare*) must already be approved by the creditors.[226] Once the court accepts the debtor's application and initiates the lawsuit under stage 2, the new voting on the plan must take place. The draft plan, pre-approved by creditors under stage 1, can be revised and amended during this stage before receiving final approval from creditors. This requirement adds complexity to the process and does not enhance the procedure's overall appeal.

62. Along with the notice submission the debtor can petition the court to suspend foreclosures on their assets for up to two months[227] and request the appointment of a provisional administrator (*administrator provizoriu*) to assist in

220 Insolvency Law, Art. 219(3); EBRD, 'Business Reorganisation Assessment: Moldova', 2022: https://ebrd-restructuring.com/storage/uploads/documents/13472%20EBRD%20(Moldova%20Country%20Profile%20ARTWORK).pdf (accessed 27 January 2025), p. 4.

221 Insolvency Law, Art. 14(3), Art. 219(2).

222 Insolvency Law, Art. 219(2).

223 S. SELEVESTRU, '"Colacul de salvare" pentru entităţile aflate în dificultate financiară', *Contabilitate si Audit*, 09/2023, p. 3.

224 Like in Ukraine, there are no specialised bankruptcy courts in the Republic of Moldova. Cases related to insolvency/bankruptcy, accelerated restructuring involving both legal entities and/or individuals including sole proprietors are heard under the general rules of the Code of Civil Procedure by district courts of general civil jurisdiction acting as trial courts. There are also courts of appeal and the Supreme Court of Justice. Decisions of the latter are final and cannot be appealed. In practice, due to the high concentration of businesses in the capital city, most insolvency cases are handled by the Chișinău City Court.

225 Insolvency Law, Art. 219(1).

226 Insolvency Law, Art. 220(1)(c).

227 Insolvency Law, Art. 219(1).

negotiations with creditors.[228] Such an administrator is appointed from among the ranks of insolvency practitioners licensed by the Ministry of Justice, the debtor can suggest a candidate to the court. The court also determines the amount of the administrator's remuneration.[229] At later stages, the provisional administrator verifies and decides on the creditors' claims[230] and chairs the meetings of creditors.[231] In sum, his role is crucial for meeting numerous formal requirements of the Insolvency Law. It is important to note that the administrator's appointment is optional during stage 1 and becomes mandatory during stage 2.[232]

2. *Creditors' Claims and Moratorium*

63. Within three working days of receiving the debtor's notice, the court must verify that the debtor is indeed in a state of financial distress but not yet insolvent. The court should then sanction the moratorium on foreclosures and appoint a provisional administrator according to the debtor's request, if any.[233] During the moratorium period, which cannot exceed two months, negotiations on the restructuring plan between the debtor and creditors must be finalised.[234] In the meantime, if any creditor files a lawsuit to initiate insolvency proceedings against the debtor, the court will return it without consideration.[235] Thus, the moratorium indeed provides some breathing space for negotiations between the debtor and creditors.

In Case No. 2i-493/2023, the court refused to initiate the accelerated restructuring procedure and denied a moratorium. According to the court's findings, simply notifying that the debtor could not pay debts to one creditor was insufficient. Therefore, the debtor failed to demonstrate an inability to pay the existing debts. The court noted that the debtor should have provided financial

228 Insolvency Law, Art. 219(5).

229 The court sets the administrator's monthly remuneration as a fixed amount, based on the actual work performed and documented. This amount cannot be less than the minimum recommended multiplier for determining the base salaries of managers in organisations that do not use the single tariff grid salary system. It is calculated by multiplying the recommended coefficient by the minimum guaranteed salary in the real sector for financially autonomous organisations. See Insolvency Law, Art. 25(6).
According to Annex 4 to Government decision No. 743/2002 (as amended in 2023), the range of the above-mentioned multiplier is MDL 17,600–33,300 (EUR 915–1,732) per month. See Hotărâre Nr. 743 din 11.06.2002 cu privire la salarizarea angajaţilor din unităţile cu autonomie financiară Monitorul Oficial, 20.06.2002, Nr. 79 – 81 art. 841; Hotărâre Nr. 1069 din 27.12.2023 cu privire la modificarea anexei nr. 4 la Hotărârea Guvernului nr. 743/2002 cu privire la salarizarea angajaților din unitățile cu autonomie financiară Monitorul Oficial, 28.12.2023, Nr. 502 – 504 art. 1248.

230 Para. 68 *infra*.

231 Paras. 65–66, 69–70 *infra*.

232 Moldinsolv, 'Preventive restructuring procedure beyond the EU Directive on Restructuring and Insolvency of 20 June 2019 (EUR 2019/1023, "Directive")', 11 June 2024: https://moldinsolv.md/preventive-restructuring-procedure-beyond-the-eu-directive-on-restructuring-and-insolvency-of-20-june-2019-eur-2019/1023-directive (accessed 27 January 2025).

233 Insolvency Law, Art. 219(6).

234 Insolvency Law, Art. 219(7).

235 Insolvency Law, Art. 219(4).

statements clarifying their situation and proving inability to meet existing financial obligations.[236]

3. *Restructuring Plan and Its Approval by Creditors*

64. According to the Insolvency Law, the accelerated restructuring procedure plan must provide detailed info on:

(1) an analytical account of the debtor's assets and liabilities, as well as the causes of their financial distress;

(2) a program for debt discharge;

(3) the anticipated percentage of debt satisfaction resulting from the implementation of proposed recovery/rehabilitation measures, such as: postponement or rescheduling of debt payments, full or partial discharge of certain debts or only of interest or delay penalties through set-off, consolidation, full or partial remission of debt, novation, conversion of debts into equity, conversion of obligations and other securities into equity, and other lawful methods for debt discharge.[237]

In the draft of the accelerated restructuring procedure plan submitted for creditor approval, the debtor shall propose the candidate for insolvency administrator, who will oversee the plan's implementation, as well as the administrator's remuneration for the period of the plan's implementation. However, the creditors may disagree with the debtor and demand the appointment of a different candidate.[238]

It must be noted that the contents of the accelerated restructuring procedure plan are simplified compared to the very detailed requirements for the plan submitted within the framework of restructuring procedure initiated as an alternative to liquidation.[239]

65. Procedures for the approval of the restructuring plan[240] are detailed in the Insolvency Law. It requires creditors to be grouped into the following classes:

(1) secured creditors;

(2) creditors with budget claims;[241]

(3) unsecured creditors excluding lower-ranking creditors;

(4) lower-ranking unsecured creditors.[242]

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236 *Încheierea Judecătoriei Chișinău, sediul central, din 6 iulie 2023 (Dosarul nr. 2i-493/2023, nr. electronic al cererii: 2-23094976-12-2i-03072023-1)*: https://jc.instante.justice.md/ro/pigd_integration/pdf/348e13c6-2f6c-4a34-aa9a-2111551ff781 (accessed 27 January 2025).

237 Art. 222(1).

238 Insolvency Law, Art. 225(2).

239 See Insolvency Law, Art. 190.

240 With minor deviations the procedure is identical for both accelerated restructuring and restructuring after the initiation of a formal insolvency procedure, as an alternative to the debtor's liquidation.

241 According to Art. 43(3), clauses 3 and 4 of the Insolvency Law, those can include taxes and state duties, payments based on state loans and guarantees, state reserve's claims.

242 Those include the following claims: claims calculated after the initiation of restructuring; fines, penalties, and other sanctions for failure to meet contractual obligations; claims arising from

However, the categorisation of creditors into separate classes is optional and is not required if the restructuring plan does not envisage different legal treatment of creditors during its implementation.[243] The law explicitly states that each claim for at least one MDL[244] equals one vote.[245] Each class votes on the proposed restructuring plan separately.

66. The restructuring procedure plan is considered approved by a specific class of creditors if the majority of creditors in that class who hold more than 50% of the total value of claims of that class have voted in favour of it.[246] Moldovan rules on cramdown state that the plan is deemed to be approved even in the absence of the required majority if (a) the creditors of the respective class are not placed in a less advantageous position as a result of the plan's approval compared to the situation they would have been without the plan; (b) the majority of classes of creditors participating in the voting have approved the plan according to the procedure envisaged by the Insolvency Law.[247]

4. *Initiating A Suit to Launch Accelerated Restructuring Procedure and Approval of the Plan by the Court*

67. Once an agreement with creditors on the restructuring plan is reached, the debtor can file a formal application to initiate the accelerated restructuring procedure.[248] This application must be accompanied by the draft accelerated restructuring procedure plan, proof of its approval by creditors, a categorisation of creditors into classes, and a proof that creditors not included in the plan will receive due payments.[249] In the event of unsuccessful negotiations, the debtor must trigger the insolvency procedure.[250] Additionally, any creditor may file a lawsuit against the debtor to initiate insolvency proceedings.[251] The court has only three working days to decide on the application and must render a positive decision if the debtor submitted all the required documents.[252] If no provisional administrator was appointed earlier, the court appoints one to observe the debtor who remains in possession, and may also decide on the creation of the creditors' committee.[253] However, the court has the option to restrict the debtor's rights to manage assets and daily business activities.[254]

free-of-charge services rendered by the debtor; claims arising from loans made by equity holders or persons affiliated with the debtor; and claims for wages or remuneration owed to members of the debtor's management and/or supervisory bodies, as well as liquidators and the CFO. In case of sole proprietors their claims for wages or similar remuneration are also included into this category. See Insolvency Law, Art. 247.

243 Insolvency Law, Art. 190.
244 As of 1 January 2025, one Moldovan leu (MDL) equals EUR 0.05.
245 Insolvency Law, Art. 201(4).
246 Insolvency Law, Art. 202(3).
247 Art. 203.
248 Insolvency Law, Art. 220(1).
249 Ibid.
250 Insolvency Law, Art. 219(8).
251 Ibid.
252 Insolvency Law, Art. 220(2)(3).
253 Insolvency Law, Art. 220(4).
254 Insolvency Law, Arts. 24, 220(4).

This can be done based on a well-founded request from the creditor(s), the provisional administrator, or on the court's own initiative.[255]

68. Within five working days, the appointed provisional administrator must notify the creditors of the date and location of the meeting to approve their claims, as well as the meeting to consider the restructuring plan.[256] The restructuring plan must be approved by creditors simultaneously at the meeting convened to approve creditors' claims against the debtor,[257] unless the court decides otherwise.[258] The provisional administrator verifies all creditors' claims and includes them in the register of claims,[259] after which the court must approve these claims according to the general procedure established by the Insolvency Law for claims by unsecured creditors.[260]

Claims included by the administrator based on the debtor's accounting records, but unconfirmed by creditors, as well as those submitted after the published deadline for submission, are temporarily assigned by the court to the creditors' pool.[261] These claims are factored into the accelerated restructuring plan by reserving them within the debtor's assets.[262] Only creditors with claims included in the register of claims confirmed by the court's decision can vote on the restructuring plan.[263] In any case, creditors can appeal to the court handling the case if they disagree with the administrator's decision regarding their claims against the debtor.[264] This appeal is an important procedural tool in the creditors' hands. In Case No. 2rci-59/24, after an unfavourable decision by the court of appeal, the Estonian creditor brought the matter to the Supreme Court of Justice in an attempt to contest the amount of claims included by the provisional administrator in the register of claims in May 2023. In autumn 2024, the Supreme Court of Justice ruled in the creditor's favour, reversed the decision of the court of appeal, and reiterated the need to properly validate all creditors' claims.[265] Needless to say, this decision will postpone all accelerated restructuring procedures.

69. The role of the provisional administrator becomes extremely important at this stage of the proceedings. According to the Insolvency Law,[266] before the creditors' meeting to vote on the accelerated restructuring procedure plan, the provisional administrator is required to present to the court considering the case a report on the actual feasibility of fully or partially maintaining the debtor's enterprise and implementing the debtor's accelerated restructuring procedure

255 Insolvency Law, Art. 24(2)(b).
256 Insolvency Law, Art. 220(5).
257 Insolvency Law, Art. 200(1).
258 Insolvency Law, Art. 200(2). If that happens the meeting to approve the restructuring plan must be convened within three days after the creditors` meeting deciding on the claims. See Art. 223(2).
259 Insolvency Law, Art. 221(1).
260 Ibid.
261 Insolvency Law, Art. 221(2).
262 Ibid.
263 Insolvency Law, Arts. 201(1), 223(4).
264 Insolvency Law, Art. 221(3).
265 *Decizie a Curții Supreme de Justiție a Republicii Moldova din 30 octombrie 2024 (Dosarul nr. 2rci-59/24 Nr. PIGD 2-23035077-01-2rci-14062024)*: https://jurisprudenta.csj.md/search_col_civil.php?id=76460 (accessed 27 January 2025), s. 42.
266 Art. 220(6).

plan or, as the case may be, the reasons to reject the plan`s approval.[267] Besides, before the voting on the plan, creditors must hear the provisional administrator`s report on the feasibility of the debtor`s restructuring.[268] Before approving the plan, the Insolvency Law requires the court to hear the administrator, the creditors` committee (if any) and the debtor.[269]

Based on the register of claims approved by the court, the provisional administrator prepares a list of creditors with voting rights and presents it to creditors present at the meeting to approve the accelerated restructuring plan for signing in order to determine the quorum.[270] The provisional administrator also prepares and submits the agenda for approval, which may be supplemented by the meeting or at the request of one of the creditors with voting rights. Additionally, the provisional administrator prepares the voting ballots and the voting protocols, and documents the minutes of the creditors' meeting.

Simultaneously with the approval of the accelerated restructuring plan, creditors will also decide on the appointment of a permanent insolvency administrator (*administratorul insolvabilităţii*) to supervise the implementation of the plan.[271] The permanent administrator will replace the provisional one once the court sanctions the plan.

70. The accelerated restructuring plan will be sanctioned by the court if the creditors approved it as indicated above[272] at a special meeting for the plan's consideration and approval. If there are only two classes of creditors, the plan is deemed to be accepted if the class with the largest total amount of claims supported the plan.[273] Besides, to sanction the plan, the court must verify whether each class of creditors whose claims are in a less favourable position that rejected the plan received fair and equitable treatment.[274] Fair and equitable treatment is considered to be achieved if:

(i) No class of creditors that rejects the plan and no claim that rejects the plan receives less than they would in the event of bankruptcy;

(ii) No class and no claim belonging to a class receives more than the total value of their claim;

(iii) If a specific class of creditors, whose claims are at a disadvantage, rejects the plan, no junior class receives more than they would in the event of bankruptcy.[275]

71. The court has five days to decide whether to sanction the accelerated restructuring plan approved by creditors.[276] Sanctioning of the plan will be denied if:

267 See para. 71 *infra*.
268 Insolvency Law, Art. 223(3)(a).
269 Art. 204(2).
270 Insolvency Law, Art. 223(4).
271 Insolvency Law, Arts. 223(3)(c), 225(2).
272 Insolvency Law, Art. 204(4)(a). See para. 66 *supra*.
273 Insolvency Law, Art. 204(4)(b).
274 Insolvency Law, Art. 204(4)(c).
275 Insolvency Law, Art. 204(5).
276 Insolvency Law, Art. 224(1).

(1) The requirements regarding the plan's contents have not been met and that non-compliance cannot be remedied;

(2) The procedure for its approval by creditors has not been followed, and it is impossible to remedy this;

(3) The debtor's liquidity clearly exceeds the total amount of the creditors' claims included in the register of approved claims;

(4) The submitted plan contains false information or clear errors;

(5) The conditions provided in the Insolvency Law[277] have not been met;

(6) The remuneration and other payments related to the activities of the provisional administrator, the insolvency administrator appointed to supervise the plan's implementation, and the experts and specialists involved in the process have not been paid or their payment has not been ensured in accordance with the provisions of the plan.

5. *Consequences of the Accelerated Restructuring Procedure Plan's Approval and Its Implementation*

72. If the court sanctions the accelerated restructuring procedure plan, it simultaneously terminates the accelerated restructuring procedure and shifts to the plan's implementation stage.[278] As of that moment, the debtor's right to manage their assets and daily business activities (if previously restricted) shall be restored in accordance with the terms and conditions outlined in the approved accelerated restructuring plan.[279] According to the latter, it may be the case that the insolvency administrator will continue to monitor the debtor`s activities and the implementation of the plan.[280] The court's approval of the plan also makes the plan binding for the debtor and affected creditors.[281]

73. New financing must be approved by the insolvency administrator and will be considered a priority expense in the proceedings, taking precedence over other debts.[282] If the financing amount exceeds a specified threshold (between 10% and 50% of the debtor's estate, based on the most recent financial assessment report), it requires approval from the creditors' committee.[283] The insolvency administrator may grant a first-ranking or other priority pledge on any existing secured assets as collateral for the new financing. A first-ranking pledge can only be granted to the new lender over the existing secured assets if the secured creditors agree to waive their priority rights.[284]

74. Although the Insolvency Law is sometimes vague regarding calendar terms and deadlines, it is very specific when it comes to the implementation stage of

277 Para. 68 *supra.*
278 Insolvency Law, Art. 224(1).
279 Insolvency Law, Art. 225(1).
280 Insolvency Law, Art. 225(2).
281 Insolvency Law, Art. 225(3).
282 Insolvency Law, Art. 52(2)(c).
283 Insolvency Law, Art. 69(3).
284 Insolvency Law, Art. 52(5).

the accelerated restructuring procedure. The execution of the restructuring procedure plan shall not exceed three years from the date the court sanctioned the plan. In exceptional, well-justified cases, and provided the debtor has adhered to the restructuring plan in the first two years, the restructuring duration may be extended, by resolution of the creditors' meeting, once, for a period of up to two years.[285] In Case No. 2ri-110/24, the insolvency administrator proposed extending the debtor's restructuring period by additional 24 months and adjusting the payment schedule accordingly. The creditors' meeting approved the extension in accordance with the procedures outlined in the Insolvency Law. However, one creditor – the State Fiscal Service – filed an objection against the resolution of the creditors' meeting. The case was brought before the Chişinău Court of Appeal, which ultimately rejected the creditor's arguments. The court found no grounds for annulment of the creditors' resolution under Article 59 of the Insolvency Law[286] and emphasised that mere disagreement with the resolution adopted by the creditors cannot serve as valid grounds for its annulment. The court further highlighted that the restructuring process is inherently collective, meaning decisions are made jointly by the creditors rather than by an individual creditor.[287]

75. If during the execution of the restructuring plan the debtor fails to comply with the accelerated restructuring plan or to secure the receivables for temporarily admitted claims, the Insolvency Law authorizes any creditor to file a lawsuit with the court.[288] If such a lawsuit is initiated, the debtor enters the insolvency proceedings with liquidation of their assets, and the creditor will not have to prove the debtor`s insolvency.[289] This seems to serve as a sort of 'insurance policy' for creditors, yet they may face certain inconveniences, such as the need to return everything received during the restructuring, while their claims are reinstated as if the accelerated restructuring had never existed.[290]

6. *Accelerated Restructuring – Unpopular Procedure*

76. The availability of data on the use of *procedura accelerată de restructurare* in the Republic of Moldova is limited. Neither the courts nor the Ministry of Justice has published reports on its application, making it challenging to determine

285 Insolvency Law, Arts. 190(6), 224(8).

286 Such grounds include procedural violations at the request of the insolvency administrator or the debtor's representative, as well as for reasons of illegality at the request of creditors who: (a) voted against the resolution, with this fact being recorded in the minutes of the meeting; (b) were unjustly denied admission to the meeting or were not notified, in accordance with the provisions of the Insolvency Law, about the date, time, and place of the meeting; (c) had their rights infringed by a resolution on a matter that was not on the meeting's agenda or by the fact that the meeting was held without the quorum required by law, in violation of voting thresholds.

287 *Decizie a Curții de Apel Chișinău din 09 aprilie 2024 (Dosarul nr. 2ri-110/244. nr. electronic al cererii: 2-19138008-02-2ri-14022024)*: https://cac.instante.justice.md/ro/pigd_integration/pdf/2ea5d45d-aede-419f-8ab1-ac4f5c12f4ee (accessed 27 January 2025).

288 Insolvency Law, Art. 226(1).

289 Ibid.

290 Insolvency Law, Arts. 217(2), 226(2). The rule does not apply to payments received in satisfaction of claims arising from the restructuring procedure itself (including new financing), receivables, claims resulting from health injuries and/or death, or employees' salaries.

the frequency of such cases. Furthermore, the absence of a unified register for bankruptcy cases – an issue highlighted by the European Commission in its 2024 report[291] – complicates efforts to identify the number of accelerated restructuring cases handled by national courts. This lack of centralised data restricts transparency and impedes comprehensive analysis of bankruptcy and restructuring practices in Moldova. It is difficult to determine the exact number of accelerated restructuring procedure cases handled by trial courts. However, some conclusions about the rarity of such cases can be drawn from the available open data on higher courts. Between 2019 and 2024, the Chişinău Court of Appeal rendered only 13 decisions related to accelerated restructuring procedures[292]. According to the Supreme Court of Justice's database, the court rendered only 18 decisions on this subject matter between 2014 and 2024.[293] This data does not, by any means, attest to the 'high quality' of trial court decisions that supposedly never require appeals. A closer examination of higher court decisions reveals that misapplication of the Insolvency Law by trial courts is common, while both debtors and creditors frequently exploit every available tool to delay the final resolution of cases.

77. Tracing 'big cases' is somewhat easier given that Moldovan mass media willingly cover the use of the procedure by large economic players, such as Air Moldova (the national flag carrier) and TOPAZ Plant (a manufacturer of precision instruments and equipment). Affected by the COVID-19 pandemic and the outbreak of the full-scale Russo-Ukrainian war, the former initiated an accelerated restructuring procedure before the Chișinău City Court in May 2023 in an attempt to restructure MDL 2 billion (EUR 104.03 million) in debt and attract new financing from investors to avoid insolvency.[294] After a procedural saga, which involved moving the case between different courts (due to allegations from some creditors regarding the court's partiality), lasting for many months,[295] the case is still pending as of 1 November 2024, and Air Moldova's fate has not yet been decided.

The situation with TOPAZ Plant is more straightforward. As an entity controlled by the Russian defence industry – ODK Corporation – the plant became subject to Ukrainian and international sanctions. Exports to Russia became impossible. In the summer of 2023, the Russian *ODK* attempted to sell its shares to a Moldovan investor, while the plant unsuccessfully tried to initiate an accelerated

291 Para. 3 *supra*.

292 https://cac.instante.justice.md/ro/court-decisions?dossier_theme=procedurii%20accelerate%20de%20restructurare&type=Civil&apply_filter=1 (accessed 27 January 2025).

293 *Baza de date a hotărârilor. Colegiului civil, comercial și de contencios administrativ al Curții Supreme de Justiție*: https://jurisprudenta.csj.md/db_col_civil.php (accessed 27 January 2025).

294 *'Ce se întâmplă în procesul de insolvență al companiei Air Moldova', Stiri.md, 21 mai 2024*: https://stiri.md/article/social/ce-se-intampla-in-procesul-de-insolventa-al-companiei-air-moldova/ (accessed 27 January 2025).

295 *Încheierea Curții Supreme de Justiție a Republicii Moldova din 7 august 2024 (Dosarul nr. 2ac-122/24, nr. electronic al cererii: 2-23066452-01-2ac-02042024)*: https://jurisprudenta.csj.md/search_col_civil.php?id=75755 (accessed 27 January 2025); *Încheierea Curții Supreme de Justiție a Republicii Moldova din 15 noiembrie 2023 (Dosarul nr. 2ac-371/23, nr. electronic al cererii: 2-23062397-01-2ac-09102023)*: https://jurisprudenta.csj.md/search_col_civil.php?id=72929 (accessed 27 January 2025).

restructuring procedure at its domicile in Chișinău.[296] In February 2024, creditors filed a lawsuit to officially initiate insolvency proceedings against the plant.[297]

78. Moldovan experts conclude that the accelerated restructuring procedure is rarely used, either by large enterprises or by smaller businesses.[298] According to them, 'very few local entities have appealed to the accelerated restructuring procedure. [...] such a situation is due primarily to the lack of knowledge of this procedure among business owners, both because of the limited information in the public space on crisis recovery methods for businesses, and due to the absence of entrepreneurial education that would enable struggling entities to recognize their mistakes and overcome the fear of social stigma'.[299]

B. Second Chance Program

79. The available research indicates that the simplification of the voluntary liquidation procedure in the Republic of Moldova in 2017[300] along with the worsening of economic situation led to negative trend among the business population. In 2019 alone, the number of enterprises declared insolvent rose by 24.3% compared to 2018.[301] Moreover, in 2019, the number of enterprises deregistered from the State Register of Legal Entities and Individual Entrepreneurs reached 10,166[302]-a record for the country, where 5.36% were enterprises entering insolvency and liquidation, and the rest – inactive or shell enterprises.[303] In 2021, the Ministry of Economy[304] acknowledged that if this trend continued, 40% of all businesses in Moldova could be written off by 2026.[305] Furthermore, after the COVID-19 pandemic, the Ministry also recognised that micro and small

296 See n. 236 *supra*.
297 *'Uzina Topaz, conectată la o corporație militară din Rusia, a intrat în insolvabilitate', RISE Moldova, 12 februarie 2024*: https://www.facebook.com/photo/?fbid=911036737688400&set=a.517020787089999 (accessed 27 January 2025).
298 S Selevestru, '"Colacul de salvare" pentru entitățile aflate în dificultate financiară', *Contabilitate si Audit*, 09/2023, p. 2; A. Novac, E. Aculai and L. Maier, 'A Second Chance for Entrepreneurs in the Republic of Moldova: Challenges and Solutions', *Economy and Sociology*, 2021/1, pp. 47, 49.
299 S. Selevestru, '"Colacul de salvare" pentru entitățile aflate în dificultate financiară', *Contabilitate si Audit*, 09/2023, p. 2.
300 In 2017, Parliament amended the relevant provisions of Law No. 845/1992 on Entrepreneurship and Enterprises, dated 3 January 1992, and Tax Code No. 1163/1997, dated 24 April 1997.
301 A. Novac, E. Aculai and L. Maier, «A Second Chance for Entrepreneurs in the Republic of Moldova: Challenges and Solutions», *Economy and Sociology*, 2021/1, p. 45.
302 Ibid., p. 46.
303 See n. 9 *supra*.
304 From 2023 – Ministry of Economic Development and Digitalization.
305 See n. 9 *supra*.

businesses[306] were hit particularly hard.[307] In a country where SMEs account for 98% off all businesses – and micro-enterprises dominate, making up 84.7% of the total[308] – the situation could not have been more challenging.

1. *Program's Scope and Core Activities*

80. Having recognised that the aid measures offered to smaller businesses during the pandemic had a very limited effect, and considering the systemic problems encountered by SMEs (such as the lack of management and financial skills, limited access to financing, lack of access to early warning mechanisms, lack of access to technical assistance for enterprises in financial distress), in late 2021, the Government of the Republic of Moldova suggested the introduction of a new measure 'to provide early warning tools and access to information to help businesses in financial difficulty detect circumstances that could increase the likelihood of insolvency, and to signal the need for prompt actions to save the business'.[309] This measure, the 'Second Chance Program' (hereinafter referred to as the 'Program'), was designed based on Title IV, Chapter 10 of the Association Agreement between the EU and Moldova,[310] National Development Strategy 'Moldova 2030'[311] and Article 14 of Law No. 179/2016 on Small and Medium Enterprises,[312] which specifically empowers Moldovan authorities to introduce various state aid measures for smaller businesses.

81. The Program did not offer any amendments and or 'special application' of the Insolvency Law but rather constituted a *de minimis* state aid measure

306 Law no. 179 on Small and Medium Enterprises of 21 July 2016, Art. 5, classifies enterprises based on average number of employees, annual turnover, or the total assets they own.
(1) Micro-enterprises – enterprises with no more than 9 employees, an annual turnover of up to MDL 18 million, or total assets of up to MDL 18 million;
(2) Small enterprises – enterprises with no more than 49 employees, an annual turnover of up to MDL 50 million, or total assets of up to MDL 50 million;
(3) Medium enterprises – enterprises with no more than 249 employees, an annual turnover of up to MDL 100 million, or total assets of up to MDL 100 million.
See Lege nr. 179 din 21.07.2016 *cu privire la întreprinderile mici şi mijlocii* Monitorul Oficial, 16.09.2016, Nr. 306 – 313 art. 651.
Moldovan definitions comply with the EU's classification available in Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, C(2003) 1422, [2003] OJ L124/36.

307 See n. 9 *supra*.

308 Ibid.; OECD/EBRD, *SME Policy Index: Eastern Partner Countries 2024: Building Resilience in Challenging Times*, Paris, OECD Publishing, 2023, p. 356.

309 See n. 9 *supra*.

310 [2014] OJ L260/4. In particular, Art. 62 of the Agreement reads: 'The Parties shall develop and strengthen their cooperation on industrial and enterprise policy, thereby improving the business environment for all economic operators, but with particular emphasis on small and medium-sized enterprises (SMEs). Enhanced cooperation should improve the administrative and regulatory framework for both EU businesses and businesses of the Republic of Moldova operating in the EU and in the Republic of Moldova, and should be based on the EU's SME and industrial policies, taking into account internationally recognised principles and practices in this field.'

311 *Strategia națională de dezvoltare „Moldova 2030"*: https://gov.md/ro/moldova2030 (accessed 27 January 2025).

312 See n. 306 *supra*.

as understood by the relevant EU *acquis*[313] and its Moldovan transposition.[314] The Program was intended for 36 calendar months (2022–2024) with the general objective to enhance the business potential of the Republic of Moldova by establishing 'a new infrastructure for technical and financial assistance that will stimulate the performance of SMEs, ensure their long-term sustainable economic growth, and increase both revenues and the number of jobs'.[315] The Program`s budget was supposed to be MDL 60 million (EUR 3.13 million);[316] partially its implementation was supposed to be carried out through the Danube Chance 2.0 project,[317] funded by the EU. The Organization for the Development of Small and Medium Enterprises *(Organizatia pentru Dezvoltarea Intreprinderilor Mici si Mijlocii – ODIMM*)[318] was supposed to administer the Program.[319]

82. The existing Moldovan accelerated restructuring procedure differs from the PRD primarily in the following ways:

a) The absence of accommodations for smaller businesses (micro and small enterprises especially);

b) A lack of electronic resources providing information on available early warning tools, restructuring options, etc., specifically designed for debtors.[320]

Taking this into consideration, the Program's specific objectives were as follows:

(1) Increasing SMEs' awareness of their own situation regarding potential operational issues that jeopardize SME performance, promoting the avoidance of insolvency, or encouraging preventive restructuring;

(2) Providing digital tools for self-assessment and anonymous diagnostics for SMEs;

(3) Ensuring professional mentoring, business advisory services, education, and training for SMEs in areas where there is a lack of knowledge and skills, enhancing their competitiveness and sustainable growth;

(4) Providing justified financial support to SMEs in cases where it mitigates financial issues that could lead to insolvency;

313 Arts. 107 and 108 of the Treaty on the Functioning of the European Union (TFEU), [2012] OJ C326/1; Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, [2013] OJ L352/1.

314 Hotărîre Nr. HCC01/2020 din 06.08.2020 cu privire la aprobarea Regulamentului privind ajutorul de minimis Monitorul Oficial, 30.10.2020, Nr. 279 – 284 art. 1089.

315 Program, Section 3.

316 Program, Section 8(2).

317 https://dtp.interreg-danube.eu/approved-projects/danubechance2-0 (accessed 27 January 2025).

318 From 2023 – Entrepreneurship Development Organization (*Organizația pentru Dezvoltarea Antreprenoriatului – ODA*). ODA like its predecessor (ODIMM) is a public institution under the Ministry of Economic Development and Digitalization with the primary mission to support entrepreneurship in the Republic of Moldova.

319 Program, Section 8(4).

320 See n. 232 *supra.*

(5) Strengthening SME value chains and vertical cooperation within clusters,[321] based on a systemic approach aimed at solving economic activity-related problems, where applicable;

(6) Integrating counselling, consulting, and mentoring assistance with other SME support programs, such as business internationalisation or financial support through the Credit Guarantee Fund, provided the eligibility criteria are met.[322]

2. *Eligibility Criteria and Main Components of the Program*

83. The drafters of the Program intended it to be applicable to all SMEs as defined by Law No. 179/2016,[323] provided they met the eligibility criteria.[324] SMEs systematically violating law, engaged in financial services, the import of excisable goods, gambling, or holding a dominant market position, as well as those where more than 25% of the share capital belonged to an equity holder not classified as an SME, would not qualify for the Program by default.[325] ODIMM was supposed to be responsible for the application of eligibility criteria and the diagnosis of the enterprise's financial situation, as well as an assessment at the activity/operational level. SMEs would be classified into groups based on their financial status, liquidity, and outstanding payments. A delay period of 60 days would serve as the reference threshold.[326]

To qualify for the Program the SME needed to be:

1. Solvent and viable experiencing temporary financial difficulties, with minor payment delays – ranging from one to a few overdue payments under 60 days; or
2. Solvent with one overdue payment exceeding 60 days or imminent financial difficulties anticipated in the next 6-12 months.[327]

SMEs in technical insolvency, with multiple overdue payments exceeding 60 days and total debts surpassing total assets normally would not qualify to participate. The Program emphasised that those enterprises required restructuring or liquidation within the insolvency process.[328] However, they could still participate in the Program if they had a viable business plan and a restructuring plan approved by creditors and sanctioned by the court.[329] In other words, the

321 According to Art. 3 of Law no. 179/2016, cluster is an association of interconnected enterprises located in close geographical proximity, typically belonging to a specific sector or related sectors, as well as research institutions, universities, and other organisations whose activities are focused on innovation. Their cooperation enables the enhancement of the competitive advantages.
322 Program, Section 3.
323 See n. 306 *supra*.
324 Program, Section 6.
325 Ibid.
326 According to Art. 2 of the Insolvency Law, the debtor's insolvency (*incapacitate de plată*) is presumed if the debtor is more than 60 days overdue in payment.
327 Program, Section 6.
328 Ibid.
329 Ibid.

Program would enable such enterprises to access its benefits, provided that no creditor has formally filed an application to initiate insolvency proceedings.

84. The Program contained three components (actions) that would be applied sequentially to eligible SMEs with active participation of the ODIMM, namely:

I. – Diagnosis and eligibility for the Program

ODIMM was supposed to provide all SMEs with anonymous access to self-assessment through digital tools. Enterprises would be able to use Early Warning Tools, which will ensure a rapid diagnosis and provide recommendations for subsequent actions.[330]

II. – Mentorship and business advising

ODIMM would organise the provision of mentorship and business advisory services to eligible SMEs. Those services would be delivered by professional experts specialising in technical, economic, managerial, human resources, and legal fields, ensuring both knowledge and practical application. Through its special unit dedicated to the Program, ODIMM would coordinate its implementation and facilitate the transfer of knowledge between mentors and SMEs.[331]

III. – Providing financial support

All SMEs that have gone through the mentoring stage and have been identified as needing financing for restructuring or to ensure the feasibility of operations must meet the eligibility criteria based on the SME's provisional current financial reports at the time of the application, as follows:

1) earnings before interest, taxes, depreciation, and amortization to be at least 0.1% or 10% of total revenues;

2) total liabilities vs all assets to be at most 0.8% or 80% of total assets value;

3) current assets/current liabilities or (cash + bank deposits + 50% of inventory)/total current liabilities to be at least 80% of total current liabilities. Accounts receivable from clients were considered to have a value of zero;

4) equity to be at least 50% of share capital and reserves or, alternatively, 25% of total liabilities, depending on which value was higher.[332]

The Program emphasised that financial support could be provided in the form of an interest-free loan. For those purposes ODIMM was supposed to set up a SME Recovery and Sustainable Development Fund.[333] An independent Evaluation Committee created by the Ministry of Economy was to be responsible for deciding whether to grant a loan.[334] The funds were to be used exclusively for working capital financing and for basic machinery and equipment

330 Program, Section 4(1).
331 Program, Section 4(2).
332 Program, Section 7.
333 Program, Section 9.
334 Program, Section 10.

necessary to increase sales revenues and cash inflows during the restructuring process. Working capital could cover operational expenses (inventory, utilities, transport, salaries). Financing for machinery and equipment could be granted only if it directly boosted sales or diversified products.[335] The loan amount depended on the SME's size:

(i) Up to MDL 300,000 (approx. EUR 15,604) for micro enterprises;
(ii) Up to MDL 500,000 (approx. EUR 26,007) for small enterprises;
(iii) Up to MDL 1 million (approx. EUR 52,015) for medium enterprises.[336]

3. *Specific Support Measures Available to SMEs under the Program*

85. The Program outlined a structured approach[337] to support eligible SMEs through a three-component process, tailored to their financial status and challenges. Each component emphasised tailored financial, operational, and strategic measures to address specific SME needs while ensuring sustainability and accountability. The amount of financing (loan) could not exceed maximum volumes indicated above.

1. Viable SMEs with payment delays under 60 days:
   – Component I: financial analysis using Altman's Z-score Model,[338] solvency, liquidity, and cash flow metrics; diagnosis of operational issues and resource availability;
   – Component II: evaluation of technology and workforce competitiveness; market demand assessment; business consulting in key areas (e.g., operations, marketing, HR); and strategic mentoring;
   – Component III: financing up to 1/3 of annual revenue for working capital, interest-free loans, or sustainable business plan development.
2. SMEs facing financial difficulties within 6–12 months:
   – Component I: similar financial analysis and diagnosis as for viable SMEs;
   – Component II: expanded support including creditor analysis, competitor/investor review, debt negotiation, and restructuring plan development;
   – Component III: financing up to 1/4 of annual revenue for working capital or restructuring, with a three-year repayment period.
3. Technically insolvent enterprises:
   – Component I: financial analysis to determine insolvency causes;
   – Component II: strategic guidance, debt negotiation, or, if necessary, liquidation planning and court assistance;
   – Component III: conditional financing up to 1/2 of working capital for restructuring, with additional guarantees.

335 Program, Section 4(3).
336 Ibid.
337 Program, Section 11.
338 See, for example, E.I. ALTMAN, 'Predicting financial distress of companies: revisiting the Z-Score and ZETA® models' in A.R. BELL, C. BROOKS and M. PROKOPCZUK (eds.), *Handbook of Research Methods and Applications in Empirical Finance*, Cheltenham, Edward Elgar Publishing, 2013, pp. 428–456.

86. To implement the Program, the Ministry of Economy and, in particular, ODIMM were expected to launch a nationwide campaign to promote the Program and its benefits.[339] Special focus was placed on the need to make self-assessment tools, including specialised software using Altman's Z-score model tests, available to all SMEs in the Republic of Moldova.[340] The Program also specified the need to train ODIMM staff in business counselling and mentoring (train-the-trainers), after which these trainers would train the contracted mentors.[341] Entrepreneurs who had successfully participated in the Program could join a peer-to-peer consultant network to assist 'newcomers' in benefiting from the Program.[342] In addition, the Program encouraged the exchange of best practices with the Early Warning Europe Network[343] and other programs, such as the Danube Chance 2.0 Project.[344]

4. *Intended Outcomes of the Program*

87. When the Ministry of the Economy submitted the draft program for public consultations (December 2021), it indicated in its impact analysis that the introduction of similar initiatives in EU member states[345] had shown that between 50% and 75% of SMEs that, under other circumstances, would become insolvent and bankrupt were saved and brought back onto the path of sustainable and productive growth.[346] The Ministry emphasised that, if nothing is done, these businesses will not be saved. Therefore, the government will have to pay social compensation for the released workforce and will lose a significant source of tax revenue. 'Ignoring the signs of financial difficulty before it gets out of control can be devastating. It could reach a point where severe financial difficulty can no longer be remedied because the obligations of the company or individual have grown too large and can no longer be repaid. If this happens, bankruptcy may be the only option.'[347]

88. The potential impact of the Program could have been evaluated based on metrics like the number of jobs preserved, the retained value of fixed assets, and the additional tax revenue generated. These outcomes would have been contrasted with the consequences of insolvency, including job losses, increased public spending on unemployment benefits, a 40% decline in the value of fixed assets among insolvent SMEs, the loss of potential tax contributions, a rise in non-performing loans as unemployed workers struggled to pay their mortgages, and the ripple effects of insolvency on unsecured creditors and suppliers

339 Program, Section 13(1), clauses 2 and 4.
340 Program, Section 13(1), clause 3.
341 Program, Section 13(1), clauses 6 and 7.
342 Program, Section 13(1), clause 8.
343 https://www.earlywarningeurope.eu/ (accessed 27 January 2025).
344 See n. 317 *supra*. The Project implemented various initiatives for SMEs in the Danube region. In Moldova, prior to the development of the Program, the Project was engaged in the development of early warning mechanism for businesses; the initiative had limited success and was not implemented nationwide; Program, Section 13(1), clause 9.
345 It was not specified what countries exactly were meant.
346 Impact analysis of the prosed Program, section 3, see n. 9 *supra*.
347 Ibid.

unable to recover debts from insolvent SMEs.[348] In its assessment, the Ministry noted that the Program would have contributed to saving SMEs of all types – including those led by young entrepreneurs, startups, enterprises in rural areas, and businesses developed by women and other disadvantaged individuals – by facilitating access to business support services, financial resources, training, consultancy, and mentoring in business management and expansion.[349] The impact would have been evaluated in the following areas:

(1) Retaining young people in the country, including in rural areas;

(2) Saving at least 500 businesses, with at least 30% managed by women and disadvantaged individuals;

(3) Preserving and maintaining at least 4,000 existing jobs, including 30% in rural areas.[350]

5. *A New Chance for the Program*

89. The Government of the Republic of Moldova never approved the Program. Two months after the draft Program was released to the public, a full-scale Russian invasion to Ukraine began. The Russo-Ukrainian war exacerbated the challenges faced by the Moldovan economy and enterprises, which were already heavily impacted by the COVID-19 pandemic.[351] Following the outbreak of the war in February 2022, many businesses lost access to Ukrainian seaports and export opportunities, while others lost Ukrainian customers who were unable to transfer money to Moldova due to currency restrictions imposed by Ukrainian authorities, among other new challenges. Indeed, under the circumstances, the importance of a second chance for businesses, especially smaller ones, has taken on new significance.

90. Given Moldova's complex political situation in late 2024, when citizens narrowly reaffirmed the country's EU integration course,[352] supporting businesses through a 'second chance' initiative is not a top priority for the Government of the Republic of Moldova. However, the Program has not been entirely overlooked. In spring 2024, the Ministry of Economic Development and Digitalization proposed amendments to the Insolvency Law to enhance its enforcement.[353] While the bill did not explicitly address the PRD transposition, the Government's impact assessment highlighted the importance of

348 Ibid.
349 Ibid.
350 Ibid.
351 Para. 5 *supra*.
352 S. RAINSFORD and L. GOZZI, 'Moldova says `Yes` to pro-EU constitutional changes by tiny margin', *BBC.com*, 21 October 2024: https://www.bbc.com/news/articles/c1wnr5qdxe7o (accessed 27 January 2025).
353 *Proiectul de lege pentru modificarea Legii insolvabilității nr. 149/2012 (art. 2, 8, 19, ș.a.) (nr. înregistrare: 304 DP 42.7 2024-10-16)*: https://www.parlament.md/material-details-md.nspx?param=1f8709de-4ee2-4004-a21e-52eea349b40e (accessed 27 January 2025).

aligning with PRD provisions,[354] particularly the 'second chance' program for smaller enterprises.[355] The Alliance of Small and Medium-Sized Enterprises from Moldova (*Alianța Întreprinderilor Mici și Mijlocii din Moldova - AIM*), in its comments on the bill, went even further by suggesting the introduction of extra-judicial restructuring procedures for SMEs, inspired by the models used in Greece, Spain, and Portugal.[356] Unfortunately, those suggestions were not incorporated in the final text of the respective law adopted by Parliament on 26 December 2024.[357] Recent remarks from the OECD, EBRD, and European Commission emphasising the necessity of finally adopting and implementing the Program[358] could serve as additional incentives for the Government to resume work on it. It appears that the Program must be revised to align with changes in the EU *acquis*[359] and relevant national regulations,[360] as well as to address the broader challenges faced by SMEs after 2022. Moreover, implementing the Program could become a first step toward transposing the PRD and introducing broader amendments to the entire Insolvency Law, which Moldovan businesses have been requesting for years.[361] At the time of writing, it remains to be seen how the Moldovan authorities will proceed, as no official decisions regarding the Program or formal steps toward the transposition of the PRD have been made.

IV. CONCLUSION

91. The transposition of the PRD by both the Republic of Moldova and Ukraine represents a unique example of third countries aspiring to EU membership adopting such measures. While Moldova is only beginning to consider the transposition, Ukraine has already moved forward with its implementation. Ukraine's transposition of the PRD marks an unprecedented case of a non-EU

354 The bill specifically included amendments to the procedures for convening creditors' meetings (across various types of insolvency or bankruptcy processes), voting procedures, remuneration of the insolvency administrator, and the foreclosure on the debtor's assets.

355 *Hotărâre cu privire la aprobarea proiectului de lege pentru modificarea Legii insolvabilității nr. 149/2012 (număr unic 318/MDED/2024)*: https://cancelaria.gov.md/sites/default/files/document/attachments/nu-318-mded-2024.pdf (accessed 27 January 2025).

356 '*AIM a expediat propuneri de completare a proiectului de lege pentru modificarea legii insolvabilității*', *sme.md*, *martie 26, 2024:* https://sme.md/aim-a-expediat-propuneri-de-completare-a-proiectului-de-lege-pentru-modificarea-legii-insolvabilitatii/ (accessed 27 January 2025).

357 *Lege pentru modificarea Legii insolvabilității nr. 149/*2012 *Monitorul Oficial, 16.01.2025, Nr. 8 – 10. art. 25.*

358 See n. 10 *supra.*

359 In December 2023, the Commission Regulation (EU) No 1407/2013 of 18 December 2013 (n. 313 *supra*) was replaced by Commission Regulation (EU) 2023/2831 of 13 December 2023 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, [2023] OJ L2023/2831.

360 In September 2024, the Competition Council of the Republic of Moldova adopted a new Regulation on de minimis aid, see *Hotărîre* Nr. HCC06/2024 din 05.09.2024 cu privire la aprobarea Regulamentului privind ajutorul de minimis Monitorul Oficial, 03.10.2024, Nr. 414 – 417 art. 769. It replaced the 2020 Regulation (n. 314 supra).

361 R. Gladei and V. Cernei, 'Insolvency 2024 – Moldova', *Chambers and Partners*, 14 November 2024: https://practiceguides.chambers.com/practice-guides/insolvency-2024/moldova/trends-and-developments (accessed 27 January 2025); A. Sorocean, 'Moldova: Navigating the Insolvency Legal Landscape', *CEE Legal Matters*, 2024/10(12), p. 73.

Member State adopting such a measure. This situation is particularly unique for several reasons. Firstly, the transposition was conducted under extreme wartime conditions and martial law. Secondly, Ukraine was explicitly requested to transpose the Directive as part of the EU's micro-financial aid package – an unconventional requirement. Thirdly, the deadlines for transposition were tight, leaving the national legislator with significantly less time compared to EU Member States. As a result, Ukraine adopted a law with clear caveats, many of which were pointed out by various stakeholders during public discussions of the bill.[362]

92. Given the circumstances of the PRD Transposition Law`s adoption, the efficiency of the transposition process in Ukraine remains uncertain. It's evident that challenges loom large, and stakeholders universally acknowledge the improbability of the new preventive restructuring mechanism being fully operational immediately upon the enactment of the new law[363] in January 2025. Lack of the new Law's support by the Ukrainian banks might cause various complications in the future. Moreover, it remains to be seen how Ukraine will address further reforms for SMEs, as explicitly mentioned by the European Commission[364] – whether through a separate law or a series of new amendments to the BCU. However, the PRD Transposition Law presents a solid foundation to address the deficiencies inherent in the existing pre-trial restructuring system. Notably, it takes a specific initiative to assist micro- and small enterprises. The new preventive restructuring procedure may well serve as an additional tool for the national economy's recovery post-war. Despite the anticipated hurdles and the gradual implementation process, these legislative initiatives can significantly contribute to the economic rehabilitation and revitalisation of the country.

93. Moldova, on the other hand, faces no tight deadlines like Ukraine and has an opportunity to 'test' the second-chance concept by adopting and implementing the Program for SMEs. This approach would enable Moldova to better understand the needs of smaller businesses, train stakeholders in applying the accelerated restructuring procedure, and raise awareness about the procedure and its possibilities. Additionally, Moldova can learn from Ukraine's mistakes, avoiding unnecessary haste in pursuing transposition goals to meet its obligations as an EU candidate country. Ukraine, in turn, can learn from Moldova how to promote second-chance initiatives among businesses in need.

362 *Kruhlyĭ stil 'Preventyvna restrukturyzatsiia vidpovidno do zakonoproektu No. 10143', op. cit.;* IX *Forum iz restrukturyzatsiĭ ta bankrutstva, Kyiv, Ukraïna, 20 bereznia 2024 roku*: https://www.youtube.com/watch?v=WvMHFQ9XFs0 (accessed 27 January 2025).

363 *Kruhlyĭ stil 'Preventyvna restrukturyzatsiia vidpovidno do zakonoproektu No. 10143', op. cit.*

364 Para. 8 *supra*.