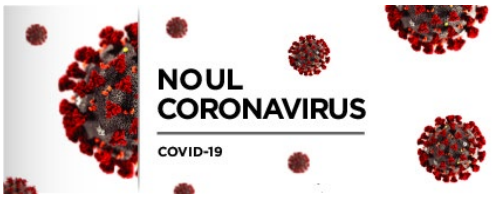
ACCELERATED RESTRUCTURE - SOLIDARY CREDITORS BY NEED OR IN NEED?



In the pre-covid legal age, by the solidarity of the creditors we understood the common rights of the creditors. New times impose a new paradigm of approaches, and isolation of people will be replaced (or completed) with the collaboration of institutions.

On March 27, 2020, the National Bank of Moldova **decided** that banks may defer or change the term and/or amount of payments due by June 30, 2020 on loans to companies, without under-classifying them and forming the additional risk provisions. The decision refers to the legal entities whose financial situation has been temporarily affected due to the state of emergency and the economic consequences generated by COVID-19.

Accordingly, a sound legal premise has been created for banks to accept loan restructuring for the affected businesses, individually or jointly (solidary) with other creditors. In the latter case, when the company affected by the crisis has different creditors, including banks, non-banking credit organizations, suppliers of goods and services that have accepted deferred payment, the state with the tax payments, a kind of solidarity of creditors is required, which volens-nolens will sit at the table (or zoom) for discussions, to agree on the payments restructuring.

It is clear, without much explanation, that more and more businesses are in financial difficulty. It is equally clear that, for the moment, the state does not have defined legal solutions for these situations, it was not a priority. Such a solution is, in our view, **the accelerated restructuring proceeding**.

The procedure is regulated by the draft amendments to the Insolvency Law, approved in Parliament's first reading in December 2018. The proposed model, based on the international concept of "pre-negotiated plan", consists of the following:

1) the company in financial difficulty can prevent entering the insolvency, by negotiating with the affected classes of credit an **extra-judicial restructuring plan**;

2) only the creditors **whose debts will change** (extend, reduce, etc.) are invited to negotiate the restructuring plan;

3) for the period of negotiations (maximum 2 months), at the request of the debtor the court may **suspend the individual enforcements**;

4) in case of successful negotiations, the plan shall be voted and subject to the **court approval**.

The accelerated restructuring, either in the "pre-negotiated" or the "pre-packaged" model, exists and works in many advanced jurisdictions. In France, it is the case of the safeguard procedures (procédure de sauvegarde), the accelerated safeguard (sauvegarde accélérée) or ad-hoc mandate, in Poland – accelerated arrangement or remediation, in Romania - ad-hoc mandate or compromise proceedings. In all cases though at the origin is the idea of the extra-judicial collective negotiations between debtors, on the one hand, and the main creditors (not also the employees, as a rule).

How is this proceeding better off than the existing one:

1. **The unanimous agreement of the creditors is not required**, hence no creditor is able to block the restructuring process. Having different incentives, creditors rarely are able to reach an agreement; in our practice of insolvency proceedings, private creditors and public creditors (Tax Office, social and medical insurance state bodies) often have irreconcilable positions, which can induce the debtor into a coma. As a rule, the private creditors (banks, non-banking lenders, suppliers, lessors, etc.) are more flexible while the state, represented by the officials of the respective state bodies, has a much lower margin of flexibility.
   So, before the crisis will seat the creditors to the solidarity table, the state must equip them accordingly. In this context, the above-named NBM decision is extremely welcome, must be replicated in the non-banking sector as well (we expect NCFM to issue a similar decision in the following days regarding non-banking lenders) and, perhaps even more important, a restructuring mechanism (postponement, cancellation of fines and penalties) of the tax liabilities shall be set up.

2. **Prevents intervention of the courts**, whose activity has been practically frozen for the period of the state of emergency.
   First, the civil proceedings, in particular those regarding debt collection and enforcement of security, have been suspended (by Resolution No. 1/2020 of the Commission for Exceptional Situations, **CES**), so suspension of individual enforcement for the negotiation period is out of question.
   Second, the period of the state of emergency (if it will not be extended) corresponds to the legal period (provided by the draft law) for negotiations, which will take place depending on the continuous change of circumstances, which in turn can be both positive or negative. Obviously, this calculation is valid only if the state authorities will not delay the adoption and implementation of both the above-mentioned amendments to the Insolvency Law and the legal measures that would allow the restructuring of the tax liabilities for companies in financial distress.
   Third, with the adoption of the above-mentioned amendments by the Parliament, CES could allow the approval by the insolvency courts of the pre-negotiated restructuring plans and, as the effect, to resume or continue the debtor's business. Such proceedings can take place remotely, with audio recording (which was done even before the crisis) and in compliance with the short terms inherent to the accelerated restructuring procedure (also known as *expedited reorganization proceedings* - according to the UNCITRAL Legislative Guide on Insolvency Law, which dedicates an entire chapter to it).

3. **Prevents running into bankruptcy and liquidation of the debtor**. Even before the crisis, insolvency usually led to bankruptcy and decimation of the debtor, with major losses for creditors (subsidiary liability working quite poorly, the debtor often being the one with minimal losses, escaping by driving the car that has been just removed from the balance sheet of the company on the verge of bankruptcy). In crisis, where the demand and liquidity decline sharply, bankruptcy and the sale of company assets are even less suitable solutions, creditors becoming naturally more prone towards negotiation and restructuring.
   The current restructuring procedure, provided by the Insolvency Law, does not meet the requirements of the extra-judicial accelerated restructuring, this fact being proved in practice. The procedures last many years, and creditors are usually kept aside of management of the debtor's affairs (or cannot reach an agreement, for the reasons indicated above).

4. **It is (purported to be) fast and effective**. It is a kind of self-isolation of the company, in the sense of debts. A rapid intervention at company level would prevent the effect of financial contagion, transmitted through the value chain to both suppliers (on the input side) and customers (on the output side). The chancelleries of the EU states have already understood to apply support measures for businesses in crisis along the value chain, not just to certain links thereof, along with the traditional medicine, which will implicitly refocus towards treatment of the whole body, not just the organ.
   All the procedural terms (application admission, claim verification and validation, restructuring plan voting and confirmation) are shorter in comparison to the ordinary restructuring procedure, so creditors' financial uncertainty is lower, as the losses (unearned profits) would be following the procedure application.

The accelerated restructuring procedure is not an extraordinary measure valid only for the period of the crisis or of the emergency state. It is equally applicable in time of peace, but it is only in the crisis when the priorities change and prompt while sustainable actions are required.

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