

Preventive restructuring beyond the EU Directive? The Moldovan experience

Irina Selevestru writes on the impact of the Moldovan adoption of the EU Directive

The Republic of Moldova is going through a rather difficult period of time from an economic point of view. As might be expected, businesses have not yet fully recovered from the post-pandemic crisis and are facing other crises caused by military action in Ukraine and rising energy prices.

Under these circumstances, so that entrepreneurs are not paralyzed by the risks to which they are exposed, the authorities should provide them with the necessary support in order to effectively manage unwanted situations that may arise, including solutions to overcome financial difficulties.

In Moldova, both the bankruptcy procedure and the restructuring procedure are carried on by an insolvency practitioner authorized by the Ministry of Justice, thus allowing the same professional to manage both insolvency and restructuring procedures.

The law in Moldova first began with the legal framework provided by the **Bankruptcy Law** (1996-2001), then the **Insolvency Law** (2001-2012) and now Insolvency Law no. 149 of 29 June 2012. In this latest law, the concept of “insolvency” is defined as over-indebtedness and includes the following procedures:

- Bankruptcy;
- Restructuring in insolvency;

- and
- Accelerated restructuring (as a preventive procedure).

The new Insolvency Law applies to all entrepreneurs, including small businesses. In 2020, the accelerated restructuring procedure was modified and now largely corresponds to the terms of Directive (EU) 2019/1023, which is apt as, in 2022, Moldova obtained the status of an EU candidate country.

Options for debtors

Options for debtors in financial difficulty can include:

- Opening out-of-court negotiation with creditors (the negotiation being carried out only with creditors affected); and
- Asking the court for a moratorium on individual forced executions for a period of two months.

The debtor is required to present proof of financial difficulty, in which case, during the negotiation period, the court will suspend enforcement over the debtor’s assets.

Accelerated restructuring

If the debtor and creditors can negotiate a plan, the debtor can ask the court to initiate an accelerated restructuring procedure. The court can dismiss the request for formal reasons (e.g., the failure to attach

accounting documents or relevant extracts from public registers concerning assets). However, it must be noted that a person who has already been, within the last five years, subject to a restructuring procedure, or is insolvent, cannot request the opening of this type of procedure.

After the accelerated restructuring procedure is opened, creditors can submit requests for validation of claims. For these purposes, creditors are divided in four classes:

- Secured;
- Tax or social security authorities;
- Unsecured; and
- Lower-ranked unsecured (such as claims from connected parties).

Nonetheless, only creditors who have requested claims validation within the stipulated deadline are included, as the law does not mention late claims. Claims that appear after the opening of the accelerated restructuring will be claims paid on a priority basis.

When a debtor enters an accelerated restructuring procedure, a plan is voted on by a majority of classes and by the majority of claims within a class. It is possible to vote on the plan even without a majority of claims in the same class, although unaffected creditors do not get a vote. Following creditor approval, the restructuring plan is subject to confirmation by the court.



IRINA SELEVESTRU
President of National Centre of
Instructions “MOLDINSOLV”
Doctor in Law, Insolvency
Practitioner



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The changes introduced by Insolvency Law no. 149 regarding accelerated restructuring largely correspond to the provisions of Directive (EU) 2019/1023



Managing the insolvency

During the restructuring period, debtors retain control over their assets and their current business activity. The appointment of an insolvency practitioner (“IP”) in the field of restructuring can take place, but not necessarily, at the stage of negotiations (i.e., during the two months). The IP can be proposed by the debtor or appointed later by an assembly of creditors from a list of IPs provided by the Ministry of Justice. After the opening of the accelerated restructuring procedure, it is mandatory to name an IP, but the involvement of the IP is limited to supervising the execution of the restructuring plan.

Oversight of IPs

There are sufficient remedies provided to sanction dishonest or negligent IPs. These include:

- disciplinary liability (by a Commission formed by the Ministry of Justice);
- administrative liability (assured by the court); or
- criminal or summary (*contraventional*) liability.

IPs are also subject to continuously professional development provided by the Union of Authorised Insolvency Practitioners.

Conclusion

As stated, the changes introduced by Insolvency Law no. 149 regarding accelerated restructuring largely correspond to the provisions of Directive (EU) 2019/1023. However, to ensure the wider application of these changes, it will be necessary to:

- Develop texts and special guides for early warning processes, made available to the courts and associations of entrepreneurs for information and application purposes;
- Organise trainings for entrepreneurs about early warning systems;
- Include minor amendments to the legislation on the granting of facilities for small and medium-sized enterprises;
- Ensure data on the application of the law is monitored; and
- Elaborate a consumer insolvency law.

Note: the table opposite illustrates the differences and similarities between Insolvency Law no. 149 and Directive 2019/1023 as well as and possible proposals for further development of Moldovan law. ■

Table 1: (Non-)Alignment with Directive 2019/1023

| Present | Absent | Possible Proposals |
|--|---|---|
| The insolvency law of the Republic of Moldova applies to all entrepreneurs, including small businesses, without differentiating between procedures. | A consumer insolvency law. Facilities for SMEs compared to large corporations. | Development of consumer insolvency law. Development of facilities for SMEs, especially regarding debt-forgiveness, and easier access to the early warning procedure. |
| Debtors in financial difficulty can resort to: 1. Out-of-court negotiation with creditors; and 2. Suspension of individual forced executions for a period of 2 months during negotiations. | Sufficient information for debtors regarding early warning tools (e.g. website-based), as recommended by the Directive. Nonetheless, the <i>Moldinsola</i> Training Centre exists, which uses its own resources to publish information and relevant articles for debtors. The possibility of an informal restructuring based on contractual agreements, similar to the ad hoc mandate in Romania. As such, the possibility of recourse to extrajudicial agreements is limited. | Developing methods to inform the debtor (texts, guides and helpful instructions), developing an official web page, organizing courses for entrepreneurs to help them understand financial difficulty. The inclusion of an ad hoc mandate, or the possibility of out-of-court negotiation with subsequent confirmation of the agreement by a court. |
| During negotiation of the plan with creditors, the court makes an order suspending the forced execution of the debtor's assets. This order is issued at the request of the debtor, who must present documents proving that financial difficulty. | Clear tests that would prove that the debtor is in financial difficulty at the time of submitting the application. Currently, these tests are left to the discretion of the debtors and the court. | A viability test should be introduced as a condition for access by debtors to the accelerated restructuring procedure. |
| The negotiation is carried out only with affected creditors. | There is insufficient of who is an affected creditor, with assessment being left to the discretion of the court. At the moment, the term from the Directive is the one seen in practice. | Either the inclusion in the law of the term of affected creditor, or the elaboration of a guide for creditors, which would also define the term. |
| If the debtor and creditors negotiate a plan, the creditor can ask the court to initiate the accelerated restructuring procedure. The court may dismiss the request for formal reasons (e.g. proof that creditors who are not affected by the plan are paid in the ordinary course of the debtor's activity, or extracts from public registers about the debtor's assets, although information from accounting records may have been presented). | A procedure to grant a term by the court, for example to remedy the deficiencies. The law states that the court either grants the request of the debtor who negotiated a plan, or dismisses it for formal reasons. | To simplify the method of requesting the initiation of an accelerated restructuring procedure. Debtors who have already negotiated a plan in the previous two months apply for the procedure. Therefore, the role of the court is to start the legal approval process in respect of the plan, without involving too many formalities. The Directive proposes minimal involvement of the judicial authorities. |
| A person who in the last 5 years has been subject to a restructuring procedure, or is insolvent, cannot request the opening of the procedure. | A limited number of procedures that allow companies to restructure their activity only at a relatively late stage in the context of insolvency proceedings. | n/a |
| After the start of the accelerated restructuring procedure, creditors submit claim validation requests. Creditors are included in the table by class: guaranteed, state budget, unsecured, lower-ranked unsecured. We have 4 classes. Regarding the claims that have not yet become due, they will be considered due from the moment the procedure is initiated. The table includes the claims submitted within the deadline, as well as the debts included in the accounting records. | A clear solution for late claims. | A clearer regulation for late claims. |
| During the restructuring period, debtors retain control over their assets and their current business activity. The involvement of the insolvency practitioner is limited to supervising the execution of the restructuring plan. | A regulation that the court could remove a bad faith debtor from business. In that case, the management of the enterprise should be conducted by the insolvency practitioner. | Include clear explanations under which conditions bad faith debtors may be removed from asset management. |
| The appointment of a practitioner in the field of restructuring can take place, but not necessarily, at the stage of negotiations (i.e., within the 2 months). For the supervision of the execution of the plan, the appointment of the IP may also take place but is not mandatory. | n/a | The appointment of a practitioner in the field of restructuring is always necessary, especially in the absence of information on restructuring and the lack of a guide for entrepreneurs. According to the Directive, in order to support the parties in negotiating and drafting a restructuring plan, Member States should make it mandatory to appoint a restructuring practitioner. |
| The suspension of foreclosures for the entire period of early restructuring. Restructuring can take up to 3 years from the moment the plan is confirmed (plus 3-4 months until confirmation). The term can be extended by another 2 years. The suspension also refers to the suspension of the debtor's or creditor's obligation to request the opening of an insolvency procedure that could lead to the debtor's liquidation. Plan voting is based on classes, of which there are 4: secured, state authorities, unsecured and lower-ranked unsecured. The plan is voted by a majority of classes, and with a majority of claims within a class. It is possible to vote on the plan without a majority of claims in the same class under certain conditions that correspond to the recommendations of the Directive. Creditors not affected by the restructuring plan have no voting rights. | A suspension of individual forced execution only against certain creditors or categories of creditors. | n/a |
| The restructuring plan is confirmed by the court. The courts are specialized in insolvency matters. | Sufficient courses for insolvency judges, which could be conducted jointly with those for IPs to ensure uniform practice. | Ensuring the mixed training of judges and IPs and the development of texts, practical guides, commentaries, etc. |
| A provision is made for the possibility of enterprises undergoing restructuring to receive post-filing loans, which become claims of the estate. This provision has never been applied. | n/a | n/a |
| A provision regarding the possibility, within a period of no more than 5 days after publication of the decision confirming the restructuring plan to be appealed, but without suspension of the execution of the plan. There is also the situation in which the court suspends the execution of the decision confirming the restructuring plan. | n/a | n/a |
| Provisions regarding the choice of the insolvency practitioner, who can be proposed by the debtor or appointed by the assembly of creditors from a list of practitioners provided by the Ministry of Justice. Practitioners are subject to continuous professional development by the Union of Authorized Insolvency Practitioners. Sufficient remedies are provided to sanction dishonest or negligent practitioners including disciplinary liability (by a Commission formed by the Ministry of Justice), administrative liability (provided by the court) as well as criminal or summary (<i>contraventional</i>) liability. | Training provided by the National Institute of Justice alongside judges, prosecutors, bailiffs. This would ensure the uniform application of judicial practices. | n/a |
| The possibility of using electronic means only when filing requests in the courts. The E-file register is currently not functional. Recently, a register of insolvency cases was established, where all insolvency cases and the most important documents are entered. | A record of the results of restructuring, insolvency and debt relief proceedings, in order to monitor how insolvency law is applied. | n/a |