Social and Economic Aspects of Court and Out-of-Court Insolvency Proceedings

scientific editors
Anna Hrycaj
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LAZARSKI

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Introduction

This publication is the result of a debate that took place at an international conference 'The Social and Economic Aspects of Court and Out-of-Court Restructuring' on 23 May 2024. The conference was organised by Lazarski University in Warsaw (Faculty of Law and Administration) in cooperation with Adam Mickiewicz University in Poznań (Faculty of Law and Administration) and the Institute of Justice in Warsaw. It was initiated by academics associated with the Institute of Insolvency, Restructuring, and Insolvency Research at Lazarski University in Warsaw, Poland. The conference provided an opportunity to present the results of research conducted at various European research centres focused on insolvency law. Researchers from Norway, Poland, Ukraine, Lithuania, Germany, the United Kingdom, and Slovenia presented papers.

Law is a social phenomenon whose form and effectiveness are determined by the socio-economic conditions of the society in which it is applied. For this reason, similar legal institutions may be effective and efficient in certain jurisdictions while failing to attract interest in others. From a cognitive perspective, it is crucial to examine why certain legal solutions prove effective in some societies but not in others. The search for an answer to this

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question was one of the main objectives of the above-mentioned conference. Presenting research findings on court and out-of-court restructuring is of great social importance, as the global economy continues to grapple with the challenges caused by the COVID-19 pandemic and the war in Ukraine.

In Poland, a significant increase in the number of pre-litigation restructuring cases occurred following the entry into force of the Act of 19 June 2020 on the simplified procedure for the approval of arrangements in connection with COVID-19 (i.e. Journal of Laws of 2022, item 2141), which introduced simplified restructuring proceedings. Subsequently, some provisions of this law were incorporated into the Restructuring Law. This means that what was originally an *ad hoc* and temporary measure has become a permanent part of the Polish legal system. The phenomenon of pre-litigation restructuring has not yet been fully examined in Poland, both from legal and socio-economic perspectives. From a cognitive standpoint, it is important to analyse the circumstances influencing the choice of this restructuring method and the effects of such a decision on the socio-economic environment.

The emphasis in this book is not only on describing what the law looks like (law-in-books) but, more importantly, on how the law operates in practice (law-in-action). For this reason, the work presents the practical aspects of restructuring and insolvency proceedings in different countries, taking into account the legal culture of each jurisdiction.

The book opens with an article by Prof. Aleksander Witosz and Dr Agnieszka Cybulska-Bienioszek, which introduces the topic of restructuring. The article highlights the economic and social objectives that restructuring law should serve and outlines the characteristics of an efficient insolvency procedure.

Prof. Sjur Swensen Ellingsæter examines how restructuring is practised in Norway, noting that out-of-court restructuring is more prevalent than formal (judicial) restructuring.

Prof. Oleksandr Biryukov presents the remarkable development of Ukrainian insolvency law–a development that has occurred and continues despite the ongoing hostilities conducted by Russia on Ukrainian territory.

Lina Dzindzelėtaitė-Šaltė and Prof. Neringa Gaubienė provide a highly engaging discussion on how AI and new technologies can support restructuring processes by increasing their efficiency.

In almost every bankruptcy or restructuring proceedings, a bank acts as a creditor. As a financial institution, the bank plays a special social and economic role in the market economy. Prof. Salvija Mulevičienė and Prof. Remigijus Jokubauskas explore the role of banks in restructuring proceedings from the perspective of Lithuanian law and practice.

Recently, the insolvency of municipalities and even entire states has been increasingly discussed in the public sphere. This intriguing issue, which is not often analysed in insolvency law doctrine, is addressed by Prof. Rafał Adamus in his chapter entitled 'Municipal Insolvency – Is This the Missing Area of Regulation in Poland?' The author focuses on this issue in the context of American, Hungarian, Swiss, and Polish law.

In any restructuring process, an insolvency practitioner plays a crucial role. This individual administers the insolvency proceedings while ensuring that the rights of both creditors and debtors are upheld. Dr Bartosz Sierakowski discusses the legal status of an insolvency practitioner as a liberal profession of public trust from the perspective of Polish law.

Dr Hubert Zieliński analyses the significance of the restructuring plan under Polish law, with a comparative reference to EU and US solutions, in his article entitled 'Introduction to the Role of the Restructuring Plan in Polish Restructuring Proceedings'.

In most restructuring proceedings, the State Treasury appears as a creditor due to outstanding taxes or social security contributions. Despite its importance, the State Treasury rarely influences the content of the adopted arrangement. Norbert Frosztęga addresses this issue from the perspective of Polish law in his work: The Impact of the Arrangement Adopted in the Restructuring Proceedings on the Payment of Debts to the Social Insurance Institution Covered by the Instalment Plan under Polish Law.

Finally, Dr Paweł Janda examines the principle of publicity, which is fundamental to all court proceedings. His article analyses the impact of the introduction of an ICT system for handling bankruptcy and restructuring proceedings in Poland on the implementation of the principle of publicity.

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Aleksander Witosz*
Agnieszka Cybulska-Bienioszek**

Comments on the Purpose of Restructuring

1. Introduction

The process of implementing the Restructuring Directive[1] is nearing completion. Poland remains the only country yet to implement it, despite having a modern restructuring law since 2016[2] that largely aligns with European standards. Poland is also a country where restructuring proceedings are highly popular, especially the out-of-court procedure (the so-called 'procedure for approval of the arrangement'),[3] which effectively serves as a tool to

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1 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 'the Restructuring Directive' or simply as 'the Directive'; [2019] OJ L172/18.

2 See, e.g., Klaudia Szymańska-Rutkowska and Szymon Gałkowski, 'The New Polish Restructuring Law: A "Second Chance" for Businesses', (2017) (4) Emerging Markets Restructuring Journal.

3 In 2023, 457 judicial restructuring applications were filed and 3,903 out-of-court restructurings were initiated, according to data from the *ResTrue Raport 2023 Restrukturyzacje i upadłości w Polsce* <https://orestrukturyzacji.pl/> accessed 16 July 2024.

prevent insolvency. However, the conclusion of the legislative process does not mean that all questions have been resolved–on the contrary. This is partly because the Directive allows for different solutions, provides for exceptions, and grants significant discretion to Member States. Additionally, restructuring is an issue that can be interpreted in different ways. The authors seek to answer the most fundamental question: what is the purpose of restructuring?

2. The source of the problem

There is a significant difference between saving the entrepreneur (partnership or company) and saving the enterprise (business). In the first case, under a subjective approach, the aim is to preserve the legal entity operating the business – i.e., to rehabilitate the business within its current ownership. In the second case, under a functional approach, the aim is to save the business as a functioning economic entity, irrespective of ownership. This means accepting the possibility of selling the business and allowing it to continue operations under new ownership. In both scenarios, preserving the business appears to be the primary objective, as it facilitates the social and economic aims of restructuring – most notably, maintaining employment (which the Directive repeatedly emphasises, e.g., in recitals 2 and 4). Furthermore, keeping the business operational generally provides greater benefits to all stakeholders compared to piecemeal liquidation.[4] However, in the first scenario (subjective approach and saving the entrepreneur),[5] an additional aim is to protect the financial interests of the economic owners of the business.

Against this backdrop, a fundamental question arises, and the answer provided determines the axiology of restructuring, the direction of legislative action, and the application of the law. The core question is: which of

[4] Rizwan Jameel Mokal, *Corporate Insolvency Law: Theory and Application* (Oxford University Press 2005) 194–195; also Janis Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (University of Toronto Press 2003) 52.

[5] In this context, the purpose of the Directive can be descried as facilitating the continuation of the debtor's business–cf. Emilie Ghio, 'Transposing the Preventive Restructuring Directive 2019 into French Insolvency Law: Rethinking the Role of the Judge and Rebalancing Creditors' Rights' (2020) 30(1) International Insolvency Review 54.

these objectives should restructuring proceedings prioritise? It is difficult to argue that restructuring should primarily protect the property interests of the economic owners of the debtor. The Directive adopts a functional approach, focusing on restoring the business to a viable state or salvaging its economically profitable parts. Therefore, there is no requirement to preserve the value of company shares or stocks by ensuring absolute protection of its assets. The business may function just as effectively – or even more so – under new ownership. If restructuring inevitably leads to restrictions on creditors' rights, it is difficult to justify the notion that creditors should bear the financial burden of safeguarding the property interests of investors in an insolvent or financially distressed business.

The protection of an entrepreneur's economic interests is significantly more relevant in the case of sole traders than in the case of partnerships and companies. However, even in such cases, it is not strictly necessary to retain the business under the same ownership. What is essential is that legal provisions allow for the discharge of debts, ensuring the entrepreneur's fresh start. These mechanisms, however, are separate from preventive restructuring, although there is no barrier to excessive debts being written off during the restructuring proceedings of such an entrepreneur.

While the protection of the economic interests of business owners should not be considered the primary goal of a restructuring process, they cannot be completely disregarded – if only for pragmatic reasons. The effective functioning of legal solutions requires the development of a so-called 'rescue culture', in which a key element is the speed of the debtor's response to financial difficulties.[6] Support for economic owners, through mechanisms that protect businesses under the same ownership, may encourage restructuring, serve as an incentive for its use, and reduce the risk of business owners exerting pressure on managers – motivated by fear of losing control – to avoid taking necessary restructuring measures. However, maintaining a business under the same ownership should not be the overriding objective. While it may be a desirable outcome, particularly as a motivator for early restructuring, it should not take precedence over the broader social

[6] See, e.g., Gerard McCormack, *The European Restructuring Directive* (Edward Elgar 2021) 3.

and economic benefits that restructuring can achieve.[7] These benefits can equally be realised by selling the business and enabling it to continue operations under different ownership.

The EU legislator acknowledges this in the Directive. Recital 2 emphasises that 'Restructuring should enable debtors in financial difficulties to continue business, in whole or in part.' Following this, it has been noted in the literature that 'the outcome of the proceedings may not be the sale of all assets of the debtor (whether piecemeal or of the business as a going concern) but rather a debt restructuring, thus avoiding ultimately the liquidation of the legal person.'[8] Despite this clear stance, it should nonetheless be understood that this is a priority objective rather than the only permissible one. The recital further clarifies that it should, in any case, be possible to sell parts of the business and, 'where so provided under national law, the business as a whole'. These assumptions are reflected in the almost identically worded definition of restructuring set out in Article 2(1)(1) of the Directive. The standard required under European law is therefore the admissibility of selling part of a business. This could involve selling an unprofitable segment to preserve the core business under the same ownership,[9] or alternatively, selling a profitable part, followed by the termination of the debtor's business activity. The Directive also permits Member States to adopt a model whereby the entire business may be sold during a restructuring process. Even such a far-reaching solution falls within the scope of restructuring. It has been rightly observed that this approach is typical of 'regular insolvency proceedings in a liquidation scenario'.[10] In conclusion, the Directive's underlying assumption is to provide a broad range of

7 'The reasons behind the Restructuring Directive appear to be quite simple–growth and jobs', ibid 14.

8 Reinhard Dammann, in Christoph G Paulus and Reinhard Dammann (eds), *European Preventive Restructuring* (Bloomsbury Publishing 2021) 37.

9 Against this background, the sale of part of the business becomes a source of financing for the restructuring of the remaining, profitable part, which is sometimes indicated as a justification for the sale of the debtor's assets under Polish law pursuant to Article 323 of the Restructuring Law.

10 Dammann (n 8) 63.

legal solutions, including liquidation mechanisms where other approaches prove unsuccessful.[11]

3. The purpose of restructuring

If we consider the purpose of restructuring proceedings as defined by the legislator, it is to prevent the need for declaring bankruptcy. This assumption is already present in Article 1(1)(a) and Article 4(1) of the Directive,[12] which refer to preventing, insolvency and preserving the profitability of the business. In Polish law, this is the ultimate objective of all four restructuring proceedings. Article 3 of the Restructuring Law states that 'the purpose of the restructuring proceedings is to avoid the declaration of the debtor's bankruptcy by enabling them to restructure by means of a composition with creditors.' Since bankruptcy applies to the entrepreneur, and the Polish act additionally provides for the debtor's right to restructure, this might suggest that the entity that is insolvent or one that is facing insolvency (a partnership, company, or sole trader) must be preserved. However, it does not appear that the obligation to avoid bankruptcy necessarily implies such an interpretation. Recital 2 of the Directive indicates a broader perspective, stating that preventive restructuring should in particular serve to avoid insolvency and, thereby, limit the unnecessary liquidation of viable businesses. The EU legislator uses the concept of insolvency, which in an economic context can be applied to the enterprise (business) in a substantive sense. Moreover, the Directive provides for the liquidation of businesses rather than granting specific protections for debtors as legal entities. Article 4(1) of the Directive expresses the requirement of 'maintaining business activity', which is not explicitly linked to retaining the business under the same ownership.[13]

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11 Matti Engelberg, 'The Proposed EU Framework for Preventive Restructuring and the English Schemes of Arrangement Regime–Seeking the Best Preventive Model for Each Member State' (2019) 14(2) Capital Markets Law Journal 252.

12 McCormack (n 6) 76; Nicholaes Tollenaar, 'The European Commission's Proposal for a Directive on Preventive Restructuring Proceedings' (2017) (5) Insolvency Intelligence 66.

13 It is pointed out (Dammann (n 8) 61) that the definition of restructuring in Article 2 of the Directive should be interpreted in conjunction with Article 4 of the Directive.

A permissible scenario, therefore, could involve the sale of all company assets, allowing the business to continue under new ownership[14] while simultaneously writing off liabilities for which the proceeds from the sale of the enterprise are insufficient. The sale proceeds would be distributed among existing creditors, ultimately preventing the declaration of bankruptcy.[15] This would not constitute a 'forced sale' but rather one of the legal mechanisms available to the debtor within restructuring proceedings, reducing the risk of an 'imbalance of bargaining power in the buyer's favour'.[16] In such a case, the previous owners would no longer hold any business assets. However, nothing would prevent the economic owners of the company from financing it with new capital contributions, effectively enabling it to restart operations. This model may also apply to sole traders, although securing new financing in such cases could present greater challenges. The mechanism of 'cleansing' debts through a combination of restructuring and business sale can be implemented within the restructuring plan, based on the freedom of plan proposals,[17] including liquidation-based solutions. Depending on the jurisdiction, such a sale may even be possible before the adoption of the restructuring plan, during the ongoing restructuring proceedings – an issue that will be further explored in the next section of this study.

A scenario involving the sale of the business, excluding the buyer's liability for existing debts, is the most straightforward way to preserve it as a functioning economic entity.[18] This approach supports the protection of busi-

[14] For this reason, the sale of business as a going concern should not be equated with a liquidation tool but rather should be regarded as equivalent to restructuring, in contrast to classic piecemeal liquidation–Lorenzo Stanghellini, Riz Mokal, Christoph G Paulus and Ignacio Tirado (eds), *Best Practices in European Restructuring. Contractualised Distress Resolution in the Shadow of the Law* (2018) 5.

[15] Therefore, one cannot agree with the thesis (Dammann (n 8) 63) that the scenario of selling the entire enterprise does not fit the purpose of preventing the declaration of a classic liquidation bankruptcy.

[16] Stanghellini, Mokal, Paulus, Tirado (n 14) 64.

[17] It is emphasised that 'there is no predefined content and the proponents of the plan have absolute flexibility' (Dammann (n 8) 61).

[18] Douglas G Baird, 'Priority Matters: Absolute Priority, Relative Priority, and the Costs of Bankruptcy' (2017) 165(4) University of Pennsylvania Law Review 789. The alternative to

ness value,[19] as the sale takes place before the business's market credibility is entirely eroded.[20] Maximising value should be the foremost principle of any legal procedure aimed at resolving the insolvency issue.[21] The prospective buyer is typically another entrepreneur operating within the same industry. However, this situation carries the risk of selling at a reduced price if the entire industry – along with potential buyers – is in crisis.[22] Another risk associated with attempting to sell the business is the buyer's reluctance due to the knowledge disparity between the new owner and the previous investors.

4. Sale of the enterprise outside the plan as a tool of liquidation or restructuring?

This brings us to a key question: is the sale of a business outside the plan during restructuring proceedings a liquidation tool or a restructuring tool? Restructuring through a plan approved by creditors, including the sale of the entire business within the plan, is not always the optimal solution. Since a plan cannot be concluded without securing the support of the requisite number of creditors, it often involves lengthy and exhausting negotiations within a formal procedure. There is no guarantee that these negotiations will succeed. Time is of particular importance, especially when the debtor is in financial distress and lacks the funds to maintain

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the sale of a company (in the material sense) is, of course, the sale of shares in the company by its existing owners, with Mark J Roe being one of the first to present this method as a restructuring tool, see Mark J Roe, 'Bankruptcy and Debt: A New Model for Corporate Reorganization' (1983) 83(3) Columbia Law Review 527.

19 Using the example of the UK scheme of arrangement, it is emphasised that this is, at the same time, a solution that incurs lower costs than piecemeal liquidation – McCormack (n 6) 79.

20 Stanghellini, Mokal, Paulus, Tirado (n 14) 5.

21 Riz Mokal and Alfonso Nocilla, 'Rehabilitating the U.K. Pre-Pack: A Critical Analysis and Proposals for Reform' (2024) 40(2) Banking & Finance Law Review 6 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4565561> accessed 16 July 2024; David Christoph Ehmke, Jennifer LL Grant, Gert-Jan Boon, Line Langkjaer and Emilie Ghio, 'The European Union preventive restructuring framework: A hole in one?' (2019) 28(2) International Insolvency Review 184.

22 Baird (n 18) 789.

current operations.[23] Moreover, in the case of insolvent businesses, there is a tendency for assets to rapidly lose value as restructuring proceedings continue – a phenomenon referred to as 'the melting ice-cube effect'.[24] Due to the numerous disadvantages associated with plan-based procedures (deal-oriented procedures)[25] – particularly their inefficacy in preserving a business as a going concern – some countries have seen the spontaneous emergence of market-driven solutions that allow for the sale of an entire business during restructuring proceedings, but outside the plan. The case of the United States is particularly significant, where this type of sale has even been viewed as a self-correcting mechanism within the deal-oriented Chapter 11 system.[26]

At present, under US law, the sale of an entire business during proceedings under Chapter 11 'Reorganization' of the Bankruptcy Code (US BC) may occur either within a restructuring plan (plan sale) or under § 363(b) US BC, in the absence of a restructuring plan or before its approval. The debtor can therefore choose between two mechanisms to facilitate the sale of significant business assets within the proceedings. The first route, governed by § 1123 US BC, entails a lengthy process of negotiating a restructuring plan and obtaining court approval. The second route, under § 363(b) US BC, allows the debtor to swiftly sell assets outside the ordinary course of business, following the procedural safeguards specified in the Bankruptcy Code.[27] The debtor may conduct a § 363(b) US BC sale in a pre-packaged format – where the transaction is negotiated in full before the commencement of formal proceedings – or without prior preparation, during ongoing

23 Rakhee V Patel and Vickie L Driver, 'Toto, I've a Feeling We're Not in Kansas Anymore: Bankruptcy Sales Outside the Ordinary Course of Business' (2010) 57(2) Federal Lawyer 57.

24 Bo Xie, 'The Customization Effect of Pre-Arranged Sales Under Anglo-American Insolvency Law and Practice: Accountability Deficits and Possible Remedies' (2019) 19(2) Journal of Corporate Law Studies 20.

25 Mark J Roe, 'Three Ages of Bankruptcy' (2017) (7) Harvard Business Law Review 203–205.

26 Stephen J Lubben, 'The "New and Improved" Chapter 11' (2005) 93(4) Kentucky Law Journal 840.

27 Zachary R Frimet, 'Reward the Stalking Horse or Preserve the Estate: Determining the Appropriate Standard of Review for Awarding Break-Up Fees in § 363 Sales' (2015) 20(2) Fordham Journal of Corporate & Financial Law 466.

Chapter 11 proceedings, for example, when other restructuring options have failed.[28] In theory, § 363(b) US BC provides a formal mechanism allowing the debtor (or a trustee appointed in accordance with Chapter 11 BC rules) to sell assets to a third party with court approval, before obtaining creditors' consent to a restructuring plan. Although this was not the intention of the legislator when creating § 363(b) BC, in practice, debtors manage to carry out a comprehensive sale during the proceedings, thereby concluding the restructuring process.[29] The sale under § 363(b) BC is used not only to obtain funds to finance the restructuring process (in line with the legislator's assumptions), but also to sell the entire business and end the proceedings early – without the need for a restructuring plan.[30] Initially, US courts were sceptical about comprehensive sales under § 363(b) BC, as they bypass the protection of stakeholders' interests ensured when proceedings are conducted through a restructuring plan. In the first cases, courts therefore required the debtor to demonstrate that a sale outside the restructuring plan was necessary, e.g., by proving that there were insufficient funds to continue operational activity throughout the restructuring process.[31] Over time, however, such sales became more widely accepted and increasingly popular.[32] The use of this mechanism grew both in terms of the number and size of cases. It has been noted that the popularity of sales under § 363(b) BC stems from the fact that they allow the court to approve a transaction that achieves the most fundamental goal of restructuring – enabling a quick and effective separation of the business's problems originating in the past from its future prospects.[33]

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28 Dror Parnes, 'Bankruptcy Section 363 Sales: Choices and Consequences' (2012) 2(4) Quarterly Journal of Finance 1603.

29 Robert G Sable, Michael J Roeschenthaler and Daniel F Blanks, 'When the 363 Sale is the Best Route' (2006) 15 Journal of Bankruptcy Law and Practice 122.

30 Alla Raykin, 'Section 363 Sales: Mooting Due Process?' (2012) 29(1) Emory Bankruptcy Developments Journal 92.

31 Daniel M Glosband, 'Pathology of Section 363 Sales: Not as Simple as They Look' (2004) 7(4) Journal of Private Equity 60–61.

32 Marshall Huebner and Rajesh James, 'Duties and Obligations of Officers and Directors in § 363 Sales' (2009–2010) 28(10) American Bankruptcy Institute Journal 36.

33 Sable, Roeschenthaler, Blanks (n 29) 122.

Therefore, it can be stated that, in the US, the analysed solution functions effectively and enjoys considerable popularity. Meanwhile, in Poland, there is currently a lively doctrinal discussion[34] on whether the sale of the entire enterprise in restructuring proceedings outside the arrangement is (or should be) admissible at all. Critics of such a possibility emphasize, above all, that restructuring is intended to save the debtor. However, in the authors' opinion, the business should be saved in a functional sense, not necessarily in a subjective sense. It is difficult to rationally justify the claim that restructuring must, in every case, save the business in the hands of the existing owner, as the consequence of such an assumption would be to require creditors to bear the burden of protecting the economic interests of the debtor's owners. There is no doubt, however, as to the legitimacy of saving the business as a going concern, given the broader social and economic benefits, such as generating greater value for creditors, preserving jobs, preventing further insolvencies, maintaining access to essential services, and safeguarding the financial interests of the state.

5. **Quick sale**

While recognising the advantages of a quick sale of the business as a going concern during restructuring proceedings, one should still ask the question: on whose decision should it be carried out?[35] It is obvious that – unlike a sale

[34] See, e.g., Cezary Zalewski, 'Sprzedaż w toku postępowania sanacyjnego ze skutkiem sprzedaży egzekucyjnej (art. 323 Pr.Re.)' (2019) 15(1) Doradca Restrukturyzacyjny 15; Stanisław Gurgul, *Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz*, 2020, comment to Article 323 Restructuring Law, Legalis; Feliks Zedler and Patryk Filipiak, 'Dopuszczalność sprzedaży całego przedsiębiorstwa lub jego zorganizowanej części w postępowaniu sanacyjnym na podstawie art. 323 ust. 1 ustawy – Prawo restrukturyzacyjne' (2019) 16(2) Doradca Restrukturyzacyjny 24; Oskar Sitek, 'Dopuszczalność sprzedaży przedsiębiorstwa dłużnika w całości lub zorganizowanej jego części w postępowaniu sanacyjnym' (2023) (11) Monitor Prawniczy 721; Agnieszka Cybulska-Bienioszek and Aleksander Jerzy Witosz, 'Dopuszczalność sprzedaży całego przedsiębiorstwa na podstawie art. 323 Prawa restrukturyzacyjnego' (2024) 35(1) Doradca Restrukturyzacyjny 21.

[35] This is particularly important from a Polish perspective, as opponents of this type of sale in Poland often argue that permitting it may lead the debtor to fear losing their business and, consequently, discourage them from initiating restructuring altogether.

under a plan – since time is crucial, it will not be possible to leave the decision on the sale entirely in the hands of creditors. However, the solutions in this area may vary, as shown by the practice adopted in individual countries. The decision may be made by the insolvency practitioner, as is the case, for example, in the British administration procedure. Under this procedure, there is an approach based on trust in the discretionary decisions of a professional managing the proceedings in a given case.[36] The administrator thus has the right to carry out the transaction solely based on their business judgment.[37] The decision may also rest with the debtor, as is the case in the US. Under US Chapter 11 'Reorganization', the debtor holds a special status referred to as 'debtor in possession' (DIP), and in the vast majority of Chapter 11 cases, a trustee is not appointed.[38] It is the debtor who manages the bankruptcy estate and makes decisions, including those regarding the sale of the business as a whole (via a § 363(b) sale), with the court's approval. One can also envision a model in which the decision is made jointly by the debtor and the insolvency practitioner (IP), which seems justified under Polish conditions.[39] The specific solutions must, therefore, undoubtedly align with the overall concept of the insolvency system in a given country, ensuring that a quick sale is possible while respecting the rights of individual stakeholders in the restructuring proceedings.

A quick sale of the business as a going concern, initiated by the debtor and with limited creditor involvement, draws attention to pre-pack proceedings, as outlined in the new proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law.[40] According to Article 2(p) of the proposal: 'pre-pack proceedings means expedited liquidation proceedings that allow for the sale of the business of the debtor, in whole or in part, as a going-concern to the best bidder, with a view to the

36 Xie (n 24) 11.

37 Adam Gallagher, Nicholas Neuberger and Margaret Rhodes, 'Pre-pack Sales in the U.K.: Smoke Without Fire' (2009) 28(4) American Bankruptcy Institute Journal 38.

38 United States Courts, Bankruptcy Basics, Chapter 11 <www.uscourts.gov/court-programs/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics> accessed 7 July 2024.

39 Cybulska-Bienioszek, Witosz, (n 34) 21.

40 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52022PC0702> accessed 7 July 2024.

liquidation of the assets of the debtor as a result of the established insolvency of the debtor.' The proposed provisions place pre-pack within formal insolvency proceedings aimed at liquidating a debtor – whether a partnership or company, or all his assets (sole entrepreneur).[41] This is noteworthy because pre-pack sales originated in Anglo-Saxon jurisdictions, where they are used in restructuring proceedings, such as Chapter 11 'Reorganization' (US), or in hybrid proceedings, such as the administration procedure (UK).

6. **Conclusion**

Perhaps the above-described mechanism of a quick sale, carried out either in liquidation bankruptcy or in restructuring, without limiting it to a specific procedure, represents the best possible approach. Liquidation bankruptcy and restructuring are merely two different ways of addressing insolvency. A quick sale is simply a tool that should be applied according to the circumstances – when it can serve its purpose – without limiting its use through rigid distinctions between specific legal procedures, especially since the structure of these proceedings differs across jurisdictions. The circumstances of a particular case may vary, and the primary objective should always be to preserve the value of the business, rather than sacrificing it for the sake of maintaining the purity of legal constructs. This approach is characteristic of American law, and it is often noted that the Restructuring Directive is intended as a response to Chapter 11.[42] Let us, therefore, strive to preserve the business as a going concern – whether in the hands of the existing owner (through the restructuring of the company) or by transferring it to new ownership. Let us also ensure that legal frameworks retain sufficient flexibility, so that a quick sale is not dependent on the initial choice of a particular procedural path at the moment the proceedings are opened.

41 In Poland, the sale of the entire enterprise is doctrinally justified only within the framework of one specific type of Polish restructuring proceedings, namely sanation proceedings (remedial proceedings).

42 Paul McGhee, 'A "Chapter 11" Law for Europe's Entrepreneurs' (2016) Euractiv (26 February 2016) <www.euractiv.com/section/euro-finance/opinion/a-chapter-11-law-for-europes-entrepreneurs/> accessed 16 July 2024; Tollenaar (n 12) 66.

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Restructuring Practices in Norway

1. Introduction

Amidst the early phases of the COVID-19 pandemic in 2020, Norway introduced a new formal restructuring framework (*rekonstruksjonsforhandlinger*). In addition to mitigating the effects of the pandemic on the Norwegian economy, the purpose of the new framework was to enable the continuation of viable businesses despite the distress of the legal entity carrying on the business.[1] The new framework replaced a debt composition framework that was widely perceived as dysfunctional. While the new framework is set out in a temporary act that was initially intended to expire on 1 January 2022, the act's expiry date has repeatedly been postponed.[2]

The use of the new restructuring framework has been modest. Data sourced from the Brønnøysund Register Centre shows that 14 limited liability companies entered formal restructuring proceedings in 2023.[3] By comparison, 3,745 legal entities, almost all of which were limited liability

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1 Prop. 75 L (2019–2020) 12.

2 At the time of writing, the act is set to expire on 1 July 2025, see *rekonstruksjonsloven* § 64.

3 <https://w2.brreg.no/kunngjoring/kombisok.jsp?datoFra=01.01.2023&datoTil=31.12.2023&id_region=0&id_niva1=110&id_bransje1=0 > accessed 6 November 2024.

companies, entered insolvent winding-up proceedings (*konkurs*) during the same period.[4]

It is perhaps intuitive to regard the relatively low use of formal restructuring proceedings as a failure on the part of the Norwegian legislator; the low number of proceedings could be seen as evidence of the framework's shortcomings. Such criticism would likely reflect the view that low usage implies that Norwegian restructuring and insolvency law is failing to ensure that a company's distress does not cause the closure of viable businesses.[5] It is therefore reasonable to interpret misgivings over the low usage as reflecting the position that a larger number of viable businesses would have continued to operate if more companies had entered formal restructuring proceedings. If this view is correct, it is likely that, in recent years, there have been instances where viable Norwegian businesses have ceased to operate.

However, the low use of Norwegian restructuring proceedings is also compatible with another explanation: the management and shareholders of distressed companies with viable businesses may be using other means to ensure that their businesses continue to operate. They may do so by agreeing on a debt restructuring with their creditors through informal negotiations ('out-of-court restructuring'), thereby allowing the same company to continue its business. Moreover, asset sales from an insolvent company's estate to a solvent company could ensure the survival of the insolvent company's business despite the demise of the legal entity that previously carried out the operations.

The existence of several plausible explanations for the low use of formal restructuring proceedings raises the question of whether there is reason to believe that distressed companies with viable businesses rely on means other than formal restructuring to ensure their business continuity. This article

4 <www.ssb.no/virksomheter-foretak-og-regnskap/konkurser/statistikk/opna-konkursar/artikler/4-517-konkursar-i-2023> accessed 6 November 2024.

5 References to a 'company' should generally be understood as referring to a private limited liability company. The rules governing such companies are set out in *aksjeloven* [the Private Limited Liability Companies Act]. The rules governing public limited liability companies are set out in *allmennaksjeloven* [the Public Limited Liability Companies Act]. In many respects, the provisions of the two acts are identical, including in relation to all company law issues discussed in this article.

contributes to answering that question by identifying the circumstances under which it is preferable for those in control of a distressed company's decision-making to use alternatives to formal restructuring for securing the business's survival. The key findings are that a company seeking to restructure bond debts issued in the Norwegian market will often prefer an out-of-court restructuring over formal restructuring proceedings, and that an owner-manager of a distressed company may, in some cases, have reason to favour winding-up over formal restructuring proceedings.

2. Background

2.1. Overview of Norwegian corporate insolvency law

The fundamental pillar of Norwegian insolvency law is the *konkurs* proceeding. The commencement of a *konkurs* involves the creation of an insolvency estate that takes control of an insolvent debtor's assets,[6] sells them, and distributes the sale proceeds among the unsecured creditors in accordance with a statutorily defined hierarchy. Security interests over the debtor's assets generally survive the commencement of a *konkurs* and entitle the secured creditors to be paid out of the secured assets ahead of the insolvency estate.[7]

While most *konkurs* proceedings concern limited liability companies, both natural and legal persons may be subject to a *konkurs* proceeding.[8] When a company becomes subject to a *konkurs*, it effectively heralds that the company will cease to exist.[9] Since, for present purposes, we are concerned with insolvency proceedings applicable to limited liability companies, I will use the term 'insolvent winding-up proceedings' when referring to *konkurs* proceedings.

6 *Dekningsloven* [the Creditors' Recovery Act] § 2-2.

7 *Dekningsloven* § 8-14. However, a *konkurs* could render a security interest ineffective due to a failure to perfect the security prior to the proceedings or the security interest being liable to transaction avoidance.

8 Mads Henry Andenæs, *Konkurs* (M.H. Andenæs 2009) 77.

9 *Konkursloven* [the Insolvency Act] § 138.

Konkursloven § 117 instructs the insolvency professional managing the insolvency estate to sell the insolvent company's assets in the manner that is most likely, given the circumstances, to generate the largest amount of proceeds. Among other things, this means that the relevant legislation does not embody a preference for outcomes where a purchaser of the debtor's assets continues the debtor's business. When considering two competing bids for the debtor's assets, the insolvency professional is to choose the bid with the most favourable terms. On the other hand, there is nothing preventing a purchaser from continuing to carry on the business. Nor is there any prohibition on selling to a purchaser who was among the company's shareholders or management prior to the proceedings, although the main rule is that the insolvency professional must advertise the sale to the public before selling assets to such parties.[10]

These features of Norwegian insolvent winding-up proceedings enable the use of such proceedings for the purpose of restructuring a business. This process would involve the following steps: An owner-manager of an insolvent company uses his influence to ensure that the company petitions for the opening of the proceedings.[11] At the same time, the owner-manager establishes a new company and submits a bid for the insolvent company's assets. Assuming the bid is successful, the new company acquires the assets. Any security interests over the transferred assets will continue to subsist following the transfer. However, insofar as the value of the secured asset is insufficient to cover all secured creditors, the security interest will be modified to secure only the amount covered by the secured asset's value.[12]

Another avenue for restructuring a business is to initiate restructuring proceedings (*rekonstruksjonsforhandlinger*). I shall refer to such proceedings as 'formal restructuring proceedings.' The framework for formal restructuring proceedings is, as touched upon in Section 1, currently set out in a temporary act adopted by the Norwegian parliament in May 2020.[13]

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10 *Konkursloven* § 117, second paragraph.

11 See *aksjeloven* [the Private Limited Liability Companies Act] § 6-18.

12 *Konkursloven* § 117a.

13 The Norwegian government is working on a proposal for permanent legislation and has published draft legislation for consultation.

Of most importance for present purposes are the possibilities the current framework offers for restructuring debts. There are two tracks available for restructuring debts: *frivillig rekonstruksjon* (consensual restructuring) and *rekonstruksjon med tvangsakkord* (non-consensual restructuring). As a consensual restructuring requires the consent of all affected creditors, a non-consensual restructuring is the track of most practical use for a debtor.

A non-consensual restructuring may, among other things, consist of a writing down of debts, a postponement of maturities and/or the conversion of debts to shares.[14]

In principle, any claim arising out of circumstances existing prior to the opening of the restructuring proceedings is liable to be altered by a non-consensual restructuring.[15] However, by way of exception, certain claims cannot be affected by a non-consensual restructuring.[16] This means that such claims are not liable to be written down or otherwise altered without the consent of the creditor. These claims include secured claims (insofar as the value of the secured assets covers the secured claim), claims with preferential priority in an insolvent winding-up, and creditors with a right to set off their claims against debts owed to the company.

Following the company's presentation of a restructuring proposal, a single vote is held among the creditors.[17] This means that there is no formation of creditor classes. The adoption of a restructuring requires the consent of at least half of the creditors entitled to vote (as opposed to those actually voting). As a general rule, voting rights accrue to all creditors with claims against the company at the time the proceedings commenced.[18] By way of exception, some of these creditors do not have voting rights. This includes creditors whose claims are not liable to alteration (e.g., secured creditors) and persons closely connected to the company.

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14 *Rekonstruksjonsloven* [the Restructuring Act] § 34(1). It is, as a main rule, not possible to force creditors to become shareholders through a conversion of debts to shares, see *rekonstruksjonsloven* § 34(3).

15 *Rekonstruksjonsloven* § 54, first sentence.

16 *Rekonstruksjonsloven* § 54, second sentence.

17 *Rekonstruksjonsloven* § 42.

18 *Rekonstruksjonsloven* § 41.

As mentioned, a non-consensual restructuring can involve the conversion of debts into shares. Such a conversion requires the issuance of new shares and, therefore, necessitates an amendment to the company's articles of association. As a matter of company law, such amendments require the assent of a qualified majority of shareholders at the company's general meeting.[19] This requirement also applies in restructuring proceedings, but with the modification that approval from half of the shareholders suffices.[20]

2.2. **The companies entering winding-up proceedings**

As discussed, an important policy goal of the Norwegian formal restructuring proceedings is to save viable businesses. As touched upon in Section 1, a low ratio of formal restructuring proceedings to insolvent winding-up proceedings is not necessarily evidence of policy failure in this regard. For one, there is the possibility that the companies entering insolvent winding-up proceedings generally do not have viable businesses. As acknowledged by the Norwegian legislator, the cessation of such businesses does not conflict with the policy goal of saving viable businesses.[21]

This raises the question of what is known about the viability of the businesses of Norwegian companies entering insolvent winding-up proceedings. Norwegian policy documents do not explain the criteria for distinguishing viable businesses from their non-viable counterparts. It is useful, for present purposes, to consider a similar distinction from the financial economics literature, namely that between financial and economic distress. Financial distress denotes a situation where a company has insufficient cash flow to service its debt obligations.[22] By contrast, economic distress denotes a situation where the company's business model is not viable.[23] The difference between a company facing financial distress and one experiencing economic

19 *Aksjeloven* § 5-18.

20 *Rekonstruksjonsloven* § 35.

21 Prop. 75 L (2019–2020) 12.

22 Edward I Altman, Edith Hotchkiss and Wei Wang, *Corporate Financial Distress, Restructuring, and Bankruptcy: Analyze Leveraged Finance, Distressed Debt, and Bankruptcy* (4th edn, Wiley 2019) 8.

23 ibid.

distress thus concerns the ability of the company's business to generate positive operating income: a financially distressed company's business is capable of doing so, whereas an economically distressed company's business is not. This means that there is a debt threshold under which a financially distressed company will generate profits. Conversely, the business of an economically distressed company will be unable to generate a profit even if all its debt obligations are cancelled.

There is no data directly concerning the percentage of companies entering insolvent winding-up proceedings facing financial (as opposed to economic) distress. However, the annual accounts of such companies can provide some insight in this regard. An insolvent company's operating income in the year preceding the opening of insolvency proceedings is likely to offer some indication as to whether the company was suffering from financial or economic distress upon entering the proceedings. A positive operating income would suggest that the company was suffering from financial distress, whereas a negative operating income would suggest economic distress. Some caveats are necessary. Historical operating income does not necessarily indicate whether a company was financially or economically distressed at the time of entering insolvent winding-up proceedings. Moreover, there could be cases where a part of a company's business is profitable and thus viable, even if the combined income from all its business lines is negative. Therefore, the fact that a company recorded a negative operating income in the year preceding insolvent winding-up proceedings does not necessarily imply that the company was economically distressed when the proceedings commenced.

According to data downloaded from Proff Forvalt, 3,703 Norwegian private limited liability companies entered insolvent winding-up proceedings in 2023. For 1,256 of these companies, Proff Forvalt's database contains information about their operating income in 2022. In this sample, 307 of the 1,256 companies had a positive operating income in 2022. For most of these companies, the surplus was modest: only 31 companies had an operating income exceeding NOK 1 million (approx. EUR 84,000). Bearing in mind the aforementioned caveats, the low number of companies with positive operating income suggests that a large majority of the companies in the sample were likely economically distressed.

3. The restructuring decision

3.1. Introduction

The data presented in Section 2.2 provides some indication that many of the companies entering Norwegian insolvent winding-up proceedings are economically distressed and therefore do not have a viable business. It is not a policy failure that such companies do not commence formal restructuring proceedings.

The fact that many companies face distress of an economic nature does not preclude the existence of financially distressed companies that do not enter formal restructuring proceedings. In other words, it cannot be concluded that the companies entering formal restructuring proceedings are the only ones suffering from financial distress. Whether the fact that some financially distressed companies do not initiate formal restructuring proceedings conflicts with the goal of saving viable businesses depends on whether the businesses of such companies cease to operate despite being viable. The answer to this question, in turn, hinges on whether financially distressed companies successfully use other means to ensure the continuation of their businesses. Insofar as they do so, their decision not to initiate formal restructuring proceedings is not contrary to the policy goal of saving viable businesses.

To shed light on whether financially distressed companies resort to alternative means to preserve their businesses, the following section will consider the circumstances under which the board of a financially distressed Norwegian company would regard out-of-court restructuring or insolvent winding-up as preferable options for ensuring the survival of the business. The focus on the board's preferences is warranted because, under Norwegian company law, the board is responsible for deciding whether to initiate formal restructuring proceedings or insolvent winding-up proceedings on the company's behalf.[24]

It is necessary to make certain assumptions regarding the board's preferences. To simplify the analysis, attention will be restricted to cases where the choice between formal restructuring proceedings and alternative means

[24] *Aksjeloven* § 6-18.

is made by a single 'owner-manager', meaning a person who is both the sole board member and the sole shareholder of the company. It will further be assumed that this person acts with the aim of maximising their personal wealth.

Assuming that a company's distress is purely financial, it would be desirable to continue the company's business if it can be placed within a legal entity with a sustainable debt load. There are two primary means of achieving such an outcome. The first option is to reduce the company's debts to a level that its income is sufficient to service. In this case, the business continues within the same company, now relieved of its excessive debt load. The second option is to transfer the business to a different legal entity that is not facing financial distress. Both options share the common outcome of ensuring that the business is carried on within a legal entity unburdened by a debt load that is unproportionally high to the business' income.

The first option is most readily achieved through the original company restructuring its debts. This can be accomplished through out-of-court negotiations with creditors or through formal restructuring proceedings. The second option can be executed by placing the distressed company into insolvent winding-up proceedings, after which a newly formed company controlled by the owner-manager purchases from the insolvency estate the assets necessary to continue the business of the insolvent company.

3.2. **Out-of-court restructurings of bonds**

This subsection examines the advantages and disadvantages of formal restructuring proceedings compared to out-of-court debt restructuring. This analysis could offer a partial explanation for the low number of formal restructuring proceedings: some financially distressed companies may resolve their distress through out-of-court restructuring rather than resorting to formal proceedings.

When referring to 'out-of-court debt restructurings', I have in mind cases where a company and its creditors execute a debt restructuring by relying on contract law and, where applicable, company law if the company is to issue new shares. Under Norwegian law of obligations, any amendment to a debt obligation requires the consent of the creditor holding that

obligation.[25] This means that a company seeking to secure postponements of maturities, reductions in principal, or other amendments to a set of debt obligations must obtain the consent of all creditors concerned.

As discussed in Section 2.1, Norwegian formal restructuring proceedings provide the option of a non-consensual restructuring of unsecured debts. Compared to informal negotiations, formal restructuring offers the advantage of making it possible to adopt restructurings even when not all unsecured creditors have consented. A comparative disadvantage of formal restructuring is the mandatory appointment of a restructuring professional and a creditor committee, along with the resulting restrictions on the company's business operations during the proceedings.[26]

Insofar as a company finds it necessary to restructure secured debts, formal restructuring proceedings offer no particular advantages regarding consent requirements. This is because, as noted in Section 2.1, formal restructuring proceedings cannot affect secured claims without the secured creditor's consent.

There may, however, be instances where it is possible to achieve an out-of-court restructuring despite the opposition of some creditors whose debts the company seeks to restructure. This is because the company and its creditors may have made use of the option for creditors to waive *ex ante* the requirement that each creditor must consent to changes to its rights against the debtor. Contractual practice in the Norwegian bond market demonstrates this approach. The bond terms employed by Nordic Trustee, which acts as bond trustee for most bond issuances in the Norwegian market, permit amendments to bond terms without the consent of all bondholders.[27] Typically, approval from bondholders representing two-thirds of the outstanding bonds (excluding those held by the issuer) suffices for proposed amendments.[28] This applies to all types of changes, including reductions of

25 Viggo Hagstrøm, *Obligasjonsrett* (Herman Bruserud and others (eds), 3rd edn, Universitetsforlaget 2021) 907.

26 See *rekonstruksjonsloven* § 15.

27 See Clause 15.1(a) of the Norwegian Corporate Bond Terms template, available at <https://nordictrustee.com/service/documentation-and-templates/> accessed 30 October 2024 (hereinafter 'the NT Corporate Bonds Template').

28 NT Corporate Bonds Template Clause 15.1(g).

the principal amount and extensions of payment deadlines.[29] As a result, bond restructuring does not require unanimous consent from bondholders.

This feature of the bond terms has two notable implications. First, it allows for the restructuring of secured bond debt without the consent of all bondholders. This is an option that the formal restructuring framework does not provide, as secured claims are excluded from those subject to modification through non-consensual restructuring. Secondly, the voting clause in the bond terms makes the out-of-court restructuring of bond debts easier than would otherwise follow from the general principles of the law of obligations. This reduces the practical utility of formal restructuring proceedings in cases where a company's primary need is to restructure bond debt.

In sum, there is reason to believe that there will be cases where a company seeking to restructure bond debts will deem the costs associated with formal restructuring proceedings to outweigh the benefits and will instead opt for an out-of-court restructuring. Does actual restructuring practice support this hypothesis? While there are no comprehensive data on the number of out-of-court restructurings per year, it is possible to gain insight into the prevalence of such restructurings among companies with listed shares or bonds on markets operated by Oslo Børs (the Oslo Stock Exchange). These companies are subject to disclosure requirements, and disclosures are published on www.newsweb.no, a site operated by Oslo Børs.

Searches conducted on newsweb.no identified at least ten instances of companies with their centre of main interests in Norway–and therefore subject to Norwegian insolvency jurisdiction[30]–having made announcements during the period 2020–2023 regarding out-of-court restructurings involving externally held debts (i.e., excluding debt restructurings limited to shareholder loans). Over the same period, three such companies entered insolvent winding-up proceedings, while three initiated formal restructuring proceedings. These data are consistent with the analysis suggesting that formal restructuring proceedings often do not offer distinct advantages for a company seeking solely to restructure debts related to a single bond issuance.

29 This is expressly made clear by NT Corporate Bonds Template Clause 15.1(a).

30 *Konkursloven* § 146.

3.3. Restructuring through going-concern sales from insolvency estates

This section considers the advantages and disadvantages of formal restructuring proceedings compared to initiating insolvent winding-up proceedings and purchasing assets from the insolvency estate with the intention of continuing the company's business. The comparison focuses on a formal restructuring proceeding being used to reduce or reschedule a company's debt obligations versus a winding-up proceeding involving the transfer of assets to a newly formed company.

Unlike insolvent winding-up proceedings, formal restructuring proceedings enable the continued existence of a distressed company, thereby preserving the company's legal rights and privileges. By contrast, the insolvency estate may only seize and sell assets that are transferable or otherwise capable of being converted into money. Not all rights and privileges meet this criterion. Consequently, restructuring proceedings may preserve value associated with rights or privileges that an insolvency estate cannot seize and sell, whereas an insolvent winding-up proceeding cannot preserve such value. This may include public authorisations or contracts containing favourable terms for the company.

Another potential advantage of formal restructuring proceedings is that debt restructuring does not necessitate cash payments from the owner-manager. If the debt reduction is sufficient to secure the company's future payment capacity, there may be no need for shareholders to inject cash into the company. By contrast, liquidity is essential when purchasing assets from the insolvency estate to continue the business under a newly formed entity. A purchaser must have funds to pay the insolvency estate for the assets acquired. Therefore, there may be situations in which a liquidity-constrained owner-manager would favour formal restructuring proceedings over acquiring assets following an insolvent winding-up.

A disadvantage of a formal restructuring proceeding is that it requires the consent of at least some of the unsecured creditors. As noted in Section 2.1, a consensual restructuring requires unanimity, while a non-consensual restructuring requires approval from at least half of the unsecured creditors entitled to vote on the restructuring. Creditors must therefore agree to forgo their rights against the company. To persuade creditors to do so,

the company must provide information demonstrating that a debt restructuring is in their best interests. Supplying such data imposes costs on the company. Even if the company provides the necessary information, creditors will still incur costs in assessing it. If an individual creditor considers the assessment costs disproportionately high relative to the value of their claim, that creditor may choose neither to assess the information nor to vote. This could make it difficult for the company to obtain sufficient number of votes.

Conversely, purchasing assets from the insolvency estate in principle only requires an agreement with the insolvency professional managing the estate. There is nothing to prevent the insolvency estate from selling assets to a person who was a shareholder or otherwise connected to the company before the winding-up proceedings.[31]

Another potential comparative disadvantage of restructuring proceedings is that certain labour law rights are relaxed when an insolvency estate sells the insolvent company's assets.[32] Normally, a purchaser acquiring assets constituting a business assumes the seller's obligations towards employees engaged in that business.[33] Moreover, the purchaser is not permitted to invoke the acquisition as grounds for dismissal.[34] However, these rules do not apply when an insolvency estate sells a business.[35] In such cases, the purchaser does not automatically assume any contractual relationships with employees they do not wish to continue. By contrast, the commencement of restructuring proceedings does not per se affect employee rights. The formal restructuring proceeding does therefore not offer a means for restructuring a company's work force.

31 See Section 2.1.

32 See, generally, Alexander Sønderland Skjønberg, Eirik Hognestad and Marianne Jenum Hotvedt, *Arbeidsrett* (4th edn, Gyldendal 2024) 579–80.

33 *Arbeidsmiljøloven* § 16-2.

34 *Arbeidsmiljøloven* § 16-4.

35 *Arbeidsmiljøloven* § 16-1(2).

4. Conclusion

The background to this article is the low number of Norwegian companies making use of the Norwegian formal restructuring framework. We have examined whether there is reason to believe that financially distressed companies – i.e., companies whose businesses are viable – rely on alternative means rather than formal restructuring proceedings to ensure the continuation of their businesses. To this end, we considered the circumstances under which a company controlled by an owner-manager would prefer out-of-court restructuring or petitioning for insolvent winding-up proceedings, followed by purchasing assets from the insolvency estate with a view to continuing the business in a new legal entity. The analysis suggests that a company seeking to restructure debts arising from a single bond issue will often prefer an out-of-court restructuring over formal restructuring proceedings if the bond terms conform to the standards commonly used in the Norwegian bond market. Formal restructuring proceedings have both advantages and disadvantages compared to insolvent winding-up proceedings followed by an asset purchase from the insolvency estate to continue the business of a financially distressed company. The preferable option will depend on the specific circumstances of each case. Factors favouring formal restructuring include the business's reliance on legal rights and privileges that an insolvency estate cannot seize and sell, as well as liquidity constraints on the part of a potential purchaser. Factors favouring an insolvent winding-up include the presence of creditors with small claims and a desire to terminate employment relationships that cannot easily be severed under the general rules of Norwegian labour law.

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Development of Bankruptcy Legislation in Ukraine: from a Business-Oriented to a Socially-Centred Model

1. Introduction

Ukrainian bankruptcy legislation has undergone a long and intensive evolution, exploring various approaches to resolving debt issues and addressing the financial difficulties of private individuals to prevent liquidation in bankruptcy proceedings. From the adoption of the first Bankruptcy Law in 1992, considerable hope was placed on out-of-court proceedings.

The Bankruptcy Law progressively evolved into an effective system of measures aimed at addressing social issues within a market economy. The principal legislation in this field has undergone several comprehensive reforms that fundamentally altered the original concept of the bankruptcy system. The text of the Bankruptcy Law has been completely revised several times, with more than 60 provisions introducing numerous amendments and innovations.

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It should be noted that the creation and development of the bankruptcy system in Ukraine progressed against the backdrop of ongoing crises. The collapse of the Soviet Union had catastrophic consequences for the transitional economy. Lacking experience in addressing economic problems using market instruments, the Government sought to apply various mechanisms well-known in insolvency legislation.

In the 1990s, the primary focus of the legislator was on the swift resolution of the problems faced by legal entities, particularly state-owned enterprises. For a considerable period, liquidation was the dominant procedure under the bankruptcy legislation, as it provided a relatively rapid means of satisfying creditors' claims. Under this insolvency regime, the approval of a sanation (restructuring) plan was the only alternative to terminating bankruptcy proceedings.

Subsequently, the legislator gradually embraced market-based instruments. In doing so, various mechanisms were tested, including judicial sanation (reorganisation), pre-trial sanation (rearrangement), restructuring (rehabilitation), financial restructuring, and, more recently, preventive restructuring. As bankruptcy legislation continued to evolve, the social component of the legal mechanisms became more pronounced. With the adoption of the Code on Bankruptcy Procedures, the insolvency of natural persons became a reality. All individuals, including those not engaged in business activities, can now resolve their temporary debt problems by utilising effective bankruptcy procedures.

Today, the formation of a full-fledged bankruptcy system with all the necessary mechanisms for resolving the debt problems of private persons is virtually complete. Ukrainian bankruptcy legislation now encompasses all essential elements to effectively address the debt issues of almost every individual.

This article is dedicated to analysing both the successes and challenges encountered along the lengthy path of creating and developing Ukrainian bankruptcy legislation, transitioning from a business-oriented system to a socially significant model.

2. Non-liquidation proceedings in early legislation

The first law in Ukraine in the field of insolvency – the Law of Ukraine on Bankruptcy[1] – was adopted on 14 May 1992 (hereinafter 'the Bankruptcy Law'). The Law consisted of 22 articles and was six pages long.

At that time, the Bankruptcy Law did not contain formalised procedures for settling the debtor's debts as a result of negotiations; practically, only the liquidation procedure was applied during the period from 1992 until the end of 1999. The title of the Bankruptcy Law accurately reflected this – it implied the liquidation of the debtor following its declaration as bankrupt (*vyznannia borzhnyka bankrutom*).[2] However, the Bankruptcy Law did provide one option to resolve debt problems at the initial phase of bankruptcy proceedings; this was the withdrawal of the application (*vidklykannia zaiavy*) for declaring the debtor bankrupt in an already opened bankruptcy case.[3] The withdrawal of the bankruptcy petition was referred to as 'a sanation procedure'.[4] Technically, a person who expressed a willingness to assume the company's debts entered the proceedings with the status of 'a sanator'.

One of the peculiarities of Ukrainian bankruptcy legislation is its specific terminology. 'Sanation' is one such term that still remains in the bankruptcy legislation. The word 'sanation' (*sanatsiia*) is traditionally used in Ukraine to describe the process of rehabilitation aimed at improving the financial condition of an enterprise. It is well known that this word derives from the Latin *sanatio*, meaning the act or process of healing, curing, etc.[5]

Researchers have noted that the specific terminology in the field of insolvency entered the legal culture of Ukraine along with a copy of the very first

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1 Zakon Ukrainy 'Pro bankrutstvo' vid 14 travnia 1992 roku, Vidomosti Verkhovnoï Rady Ukraïny (VVR), 1992, № 31, ст.440. (in Ukrainian) [the Law of Ukraine on Bankruptcy]. References to that law hereinafter are based on the version available at <https://zakon.rada.gov.ua/laws/show/2343-12/ed19920514#Text> accessed 25 November 2024.

2 The Bankruptcy Law, Article 13.

3 The Bankruptcy Law, Article 6.

4 The Bankruptcy Law, Article 10.

5 See definition of the word 'sanation' in the Merriam-Webster Online Dictionary: <https://www.merriam-webster.com/dictionary/sanation> accessed 25 November 2024.

draft of the bankruptcy law developed in the Soviet Union.[6] The draft Law on Bankruptcy was submitted to the Supreme Soviet of the Soviet Union (the Parliament) on 8 July 1991, and its first reading occurred; however, with the dissolution of the Soviet Union, this legislative process was discontinued.

It should be noted that the term 'sanation' was also adopted in other post-Soviet countries, such as Belarus and Uzbekistan. One of the earliest insolvency laws in the countries of the former Soviet Union was the 1991 Law of the Republic of Belarus on Financial Rehabilitation and Bankruptcy.[7]

The latest attempt in Ukraine to substitute the term 'sanation' with terminology known in the European Union and used in international documents was made in 2018, when the draft of the Code on Bankruptcy Procedures was being prepared for adoption. However, this idea was not realised due to the need to adopt the Bankruptcy Code within a short timeframe. The process required numerous amendments to several other laws and subsidiary regulations.

In accordance with the provisions of the Bankruptcy Law, sanation is associated with the replacement of the debtor in obligations and the transfer of debts to a new person (or persons), who became sanators (investors). This agreement had to be explicitly indicated in the court's ruling on the commencement of the sanation procedure.[8] Based on one of the judgments of the Supreme Arbitration Court of Ukraine,[9] Vyacheslav Jun, a judge and scholar, clarified that, by its legal nature, sanation is an institution of debt transfer adapted to the rules of the procedural regime in bankruptcy cases.[10]

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6 Steve Campbell, 'Brother, Can You Spare a Ruble? The Development of Bankruptcy Legislation in the New Russia' (1994) (10) Bankruptcy Developments Journal 355.

7 Sergey Protasovytskyi, 'Sushchnost, soderzhanye y forma otnoshenyi, sviazannykh s bankrotstvom subъektov khoziaistvovanyia' (1998) Ser 3(2) Bilorus State University Journal 62 (in Russian) [The nature, content and form of relations associated with the bankruptcy of business entities]..

8 Article 12 of the Bankruptcy Law.

9 The name of this branch of the court system in Ukraine was changed to economic courts as a result of the major judicial reform carried out in Ukraine in 2010.

10 Viacheslav Jun, 'Tehniko-yuridichni aspekti zastosuvannya institutu sanaciyi u proceduri bankrutstva' (1995) (3–4) Collection of decisions and arbitration practice of the Supreme Arbitration Court of Ukraine 289–290 (in Ukrainian) [Technical and legal aspects of applying the institution of rehabilitation in bankruptcy proceedings].

After the court approved the plan, the creditors' claims against the debtor were to be satisfied, and the obligations to the state budget fulfilled. If this did not happen, the court would decide to declare the debtor bankrupt and open the liquidation procedure.

3. Development of the bankruptcy legislation in 1992–1999

The formation of Ukraine's legal system after declaring independence occurred when most of the established business relations between the former Soviet Union republics were severed practically overnight, and small producers were unable to continue their business activities.

In the early 1990s, the so-called large-scale privatisation was launched, which was intended to help the economy of the young democracy withstand the shock of transition. Technically, the privatisation process was conducted through the corporatisation of unitary state enterprises, the sole owner of which was the state. Privatisation certificates issued by the state were awarded to every citizen of the country and could be exchanged for shares in state-owned enterprises that were being transformed into new companies with a corporate structure.[11]

In this process, the Bankruptcy Law began to play an important role, directly facilitating the replacement of an ineffective owner, namely the state, with the employees of the respective enterprise.[12]

According to the provisions of the Bankruptcy Law, employees of the debtor were allowed to propose a sanation plan involving transfer of the company's debts to them within the bankruptcy proceedings. Once the court adopted the sanation plan, the employees became co-owners of the given enterprise. In such proceedings, the Bankruptcy Law required that the plan

[11] As a result of the privatisation programme implemented through the corporatisation of state enterprises, approximately 17 million shareholders became co-owners of former state enterprises. This represented a unique example in which almost one-third of the country's population was invited to participate in privatisation by acquiring corporate rights.

[12] The author of this article drew attention to the peculiarity of the term 'rehabilitation' in several publications. See, for instance: Oleksandr Biryukov, 'Sanatsyia yly pryvatyzatsyia?' (2000) 121(15) Legal Practice Gazette 11 (in Ukrainian) [Rehabilitation or privatisation?].

be agreed upon with the state privatisation body.[13] This method appeared less complicated, more predictable, and relatively quicker for changing the ownership of the state enterprises compared to traditional privatisation. It was viewed as an alternative for increasing the effectiveness of the state-owned companies' management.

4. Bankruptcy law reform in 1998

Efforts to make the bankruptcy system more efficient were undertaken against the backdrop of continued crises. One such crisis was the payment crisis in the mid-1990s, when business entities experienced difficulties in settling payments with one another. To some extent, this crisis was mitigated by reverting to Soviet-era practices from the final years of the Soviet regime, when businesses concluded exchange contracts without monetary settlements, relying instead on barter transactions.[14]

Despite these attempts, the Bankruptcy Law was not widely applied, as statistics demonstrate. According to available data, only 38 cases were commenced in 1993, and 194 cases in 1994.[15] Overall, this did not increase the effectiveness of bankruptcy procedures in addressing the problems of legal persons in distress. The situation required radical changes. Further improvement of bankruptcy legislation necessitated the introduction of non-judicial forms of debt settlement

The most extensive reform, which completely transformed Ukraine's bankruptcy legislation, took place in 1998–1999. As a result of a comprehensive revision of the legislation in force at the time, a new law was adopted, introducing a different concept of insolvency. A new version of the

13 Article 12 of the Bankruptcy Law.

14 Pekka Sutela, 'The Underachiever: Ukraine's Economy Since 1991' (Carnegie Endowment Fund for Peace, 9 March 2012) <https://carnegieendowment.org/research/2012/03/the-underachiever-ukraines-economy-since-1991?lang=en> accessed 25 November 2024.

15 Amendments to the Bankruptcy Law made in 1995 improved the situation to some extent–approx. 2,000 applications were filed with the courts to declare debtors bankrupt. See Oleksandr Rohach and Val Samonis, 'Creditor-Led Processes: Enterprise Bankruptcy in Ukraine' (Nov-Dec 1996) Ukrainian Industrialist 24.

Bankruptcy Law, titled the Law of Ukraine on the Restoration of the Solvency of the Debtor or Recognition Thereof as Bankrupt (hereinafter 'the Restoration Law'), was adopted in 1999.[16]

The changes were substantial. For the first time, the term 'insolvency' appeared in the title of the law.[17] This is significant because the term 'insolvency' better reflects the legal nature of insolvency procedures – emphasising the priority of rehabilitating the debtor over liquidation. Furthermore, the Restoration Law contained a greater number of procedural norms, which made it possible to administer court proceedings with minimal references to the provisions of general procedural laws, particularly the Economic Procedural Code of Ukraine.

Two important new articles were introduced in the Restoration Law. These addressed the need to resolve critical debt problems at the pre-trial stage: Article 5 (Measures to prevent the debtor's bankruptcy and out-of-court procedures) and Article 6 (Sanation of the debtor before the initiation of a bankruptcy proceeding). Section 3 of Article 5 of the Restoration Law provided that the owner of the debtor's property (whether a state or private enterprise), the founders or shareholders of the debtor (a legal entity), the debtor's creditors, and other persons, within the framework of measures to prevent the debtor's bankruptcy, could provide financial assistance in an amount sufficient to repay the debtor's obligations to creditors, including tax and other mandatory payments to the state budget. All these measures could be employed within the pre-trial sanation procedure. The provision of financial assistance to the debtor could also be offered in exchange for acquiring property from the debtor.

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16 Zakon Ukrainy 'Pro vidnovlennia platospromozhnosti borzhnyka abo vyznannia yoho bankrutom' vid 30 chervnia 1999 roku № 784-XIV, Vidomosti Verkhovnoi Rady Ukrainy (VVR), 1999, N 42-43, ст. 378. 14 травня 1992 року № 2343-XII (in Ukrainian) [the Law of Ukraine on the Restoration of the Solvency of the Debtor or Recognition it Bankrupt) <https://zakon.rada.gov.ua/laws/show/2343-12#Text> accessed 25 November 2024.

17 The author of this article believes that the meaning of the term 'insolvency' is inaccurate: instead of *nespromozhnist* (insolvency) Ukrainian Law uses *neplatospromozhnist* (inability to pay). The author has expressed his doubts on this issue in one of his articles. See Biryukov O, 'Transkordonni bankrutstva: pytannia terminolohii' (2009) (2) Biuleten Ministerstva yustytsii Ukrainy 89–94 (in Ukrainian) [Cross-border bankruptcies: the subject matter of terminology. Bulletin of the Ministry of Justice of Ukraine].

It is also interesting to note that, along with introducing the concept of pre-trial sanation, the Restoration Law presented another relevant legal category – restructuring. According to the definition provided in Article 1 of this Law, enterprise restructuring is understood as the implementation of organisational, economic, financial, legal, and technical measures aimed at reorganising the enterprise. Other possibilities included the division of the debtor and a change in the form of ownership. As can be seen, the reorganisation of the enterprise through its division, with the transfer of debts to a new legal entity, was added to the typical methods of restoring the debtor's solvency.

Even with the introduction of this quite comprehensive set of measures aimed at resolving a debtor's financial problems without liquidation, these mechanisms were not widely used. Liquidation remained practically the only procedure for settling a debtor's debts. The primary reason for this was the general distrust between debtors and creditors when negotiating the terms of restructuring. This situation provided further impetus to search for measures to improve the efficiency of restructuring proceedings, including both out-of-court and pre-trial procedures.

5. Law on financial restructuring

In the mid-2000s, one of the most notable reforms in the field of resolving debt problems outside the scope of bankruptcy legislation was implemented in Ukraine–the Law of Ukraine on Financial Restructuring, adopted on 14 June 2016.[18] The law was developed to reduce the level of non-performing loans (NPLs), improve the Ukrainian banking system, and restore lending activity.

The European Bank for Reconstruction and Development initiated the implementation of the global experience of restructuring corporate loans in Ukraine. As noted by Gordon Johnson, EMA Global President

[18] Zakon Ukrainy 'Pro finansovu restrukturizatsiiu' vid 14 chervnia 2016 roku, Vidomosti Verkhovnoï Rady Ukraïny (VVRU), 2016, No. 32, Item 555 (in Ukrainian) ['the Law on Financial Restructuring']. <https://zakon.rada.gov.ua/laws/show/1414-19#Text> accessed 25 November 2024.

and one of the drafters of the Law, the so-called 'Istanbul approach'[19] was selected as the conceptual basis for the law, as it was considered the most compatible with the economic situation in Ukraine at that time. The Law is based on the voluntary settlement of debt problems between a bank or other financial institution and a debtor in a fully non-judicial manner. The entire procedure is facilitated by the Secretariat of Financial Restructuring, a specialised body established under the Law.

In the first year following the adoption of the Law on Financial Restructuring (the Law entered into force in April 2017), the total amount of financial assets subject to the procedure amounted to UAH 8 billion[20], representing 1.6% of the total volume of NPLs in the corporate loan portfolio. By 2018, this amount had increased to UAH 27.54 billion[21] (5%), and in 2019, it reached UAH 44.85 billion,[22] or 10% of the total size of NPLs. As of early 2021, 41 procedures had been initiated for a total amount of UAH 65.2 billion,[23] of which 40 procedures had already been completed. According to the head of the Secretariat of Financial Restructuring, Yulia Kostecka, 97% of the procedures were successfully completed as a result of agreements reached between debtors and creditors and the approval of restructuring plans.[24]

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19 The Asian Financial Crisis pushed Turkey to develop a framework aimed at establishing a foundation for cooperation between financial institutions and debtors to restructure financial debts. See Kivilcum Metin Özcan and Kenan Şimşek, 'Turkish banking crisis and the debt restructuring process: Istanbul approach' in Şaziye Gazioğlu (ed), *Emerging Markets in Financial Crisis: Capital Flows, Savings, Debt and Banking Reform* (J-Net Publishers 2005) 96 <www.academia.edu/68429000/Turkish_banking_crisis_and_the_debt_restructuring_process_Istanbul_approach> accessed 28 November 2024.

20 Approx. USD 300 million, based on the average annual exchange rate of the dollar in 2017.

21 Approx. USD 1 billion, based on the average annual exchange rate of the dollar in 2018.

22 Approx. USD 1.7 billion, based on the average annual exchange rate of the dollar in 2019.

23 Approx. USD 2.4 billion, based on the average annual exchange rate of the dollar in 2021.

24 Yulia Kostecka, 'Finansova restrukturyzatsiia v umovakh sohodennia. Peredumovy vprovadzhennia Zakonu ta rezultaty yoho zastosuvannia' (Legal Newspaper, 19 January 2021) 1(731) (in Ukrainian) [Financial Restructuring in Today's Conditions. Preconditions for the implementation of the Law and results of its application] <https://yur-gazeta.com/publications/practice/bankivske-ta-finansove-pravo/finansova-restrukturizaciya-v-umovah-sogodennya.html> accessed 28 November 2024. Yulia Kostecka is a Head of the Secretariat of Financial Restructuring.

It is one of the most successful examples of the use of a debt settlement mechanism without the involvement of a court. This was the reason it was later used as a basis for improving the pre-trial sanation procedure provided for in the Restoration Law. Article 6 of the Restoration Law, which regulated the pre-trial sanation procedure, was revised and significantly supplemented with procedural norms. The main innovation was the introduction of the possibility to sell assets, thereby attracting new financing to implement the sanation plan. Gordon Johnson noted that the sale of assets can be one of the methods of quickly raising funds for an enterprise, investors, and strategic partners, thus providing a source of new money or capital for the business.[25]

6. Natural persons insolvency

Another significant step in socialising bankruptcy legislation in Ukraine was the introduction of a new system regulating the insolvency of natural persons who are not engaged in business activity. The comprehensive revision of Ukrainian bankruptcy legislation in 2018 led to the adoption of a codified law – the Code of Bankruptcy Procedures,[26] which incorporated a separate book devoted to the insolvency of individuals including non-entrepreneurs.

The provisions on pre-trial sanation were carried over into the Code of Bankruptcy Procedures (hereinafter 'the Bankruptcy Code') from the previous law (the Restoration Law) practically without any significant changes. It is well understood that the insolvency regime for natural persons who are not engaged in entrepreneurial activity (consumer insolvency) is more closely aligned with social legislation, as the primary goal of this regulation is to help individuals who find themselves in financial difficulties.[27]

25 See Gordon W Johnson, Olexander Droug and Konstantin Penskoy, *Guide to Law on Financial Restructuring of Business in Ukraine* (Master Druk 2018).

26 Kodeks ukrainy z protsedur bankrutstva vid 18 zhovtnia 2018 roku № 2597-VIII (Vidomosti Verkhovnoi Rady (VVR), 2019, № 19, st. 74) [Code of Bankruptcy Procedures] <https://zakon.rada.gov.ua/laws/show/2597-19#Text> accessed 25 November 2024.

27 Insolvency and Creditor/Debtor Regimes Task Force, *Report on the Treatment of the Insolvency of Natural Persons* (World Bank 2014) 8 <https://documents1.worldbank.org/curated/en/668381468331807627/pdf/771700WP0WB0In00Box377289B00PUBLIC0.pdf> accessed 25 November 2024.

The legal concept of discharge is the foundation of these procedures. The main idea is to give an individual a second chance and enable them to return to a normal life.[28]

Only 22 bankruptcy petitions were filed with the courts in 2019, the year the Bankruptcy Code came into force. Since then, the number of debtors filing petitions with the courts has been constantly growing–by a factor of 8.3 in 2020 and 2.7 in 2021 compared to the first year of the law's application.[29]

At present, the number of insolvency cases involving natural persons is increasing, and successful examples of resolving individuals' financial problems have emerged. A representative of the Ministry of Economy of Ukraine reported that pre-trial sanations for major companies, JSC Dnipro Metallurgy Plant and PJSC Kharkiv Tractor Plant, were recently approved by the courts.[30]

7. Preventive restructuring

The pre-trial sanation (*dosudova sanatsiia*) procedure has been used quite rarely in Ukraine. During the period 2020–2023, only up to 20 petitions requesting the approval of sanation plans were filed with the courts.

Last year, a reform of the Bankruptcy Law in Ukraine was finalised. A new bill introducing amendments to the Bankruptcy Code concerning preventive restructuring (*preventyvna restrukturyzatsiia*) was registered in the Verkhovna Rada of Ukraine (the Parliament) at the end of 2023,[31]

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28 ibid 14.

29 See information on bankruptcy according to Open Data Base: <https://opendatabot.ua/analytics/people-bankrupts-2024> accessed 25 November 2024.

30 It was announced at the round table, 'Pre-trial Sanation: Relevant Case Law. First Successful Cases and European Experience', held on 1 February 2023 in Kyiv, with the support of the EU Project Pravo-Justice. A video recording of the round table is available at: <www.pravojustice.eu/en/post/proyekt-yes-pravo-justice-proviv-onlajn-kruglij-stil-do-sudova-sanaciya-aktualna-sudova-praktika-pershi-uspishni-kejsi-ta-yevropejskij-dosvid> accessed 25 November 2024.

31 Oleksiy Kononov, 'Ukrainian Preventive Restructuring: First Transposition of Directive (EU) 2019/1023 by a Non-Member State' (2024) European Insolvency and Restructuring Journal <https://doi.org/10.54195/eirj.18605> accessed 25 November 2024.

passed its first reading on 9 May 2024, and was adopted on 19 September 2024.[32]

Implementation of Directive 2019/1023 of the European Parliament and of the Council of the European Union, and the introduction of preventive restructuring procedures,[33] will allow to allocate financial aid for the recovery of Ukraine. The introduction of preventive restructuring in Ukraine was a requirement of the European Union as part of the government's Ukraine Facility Plan, the implementation of which is linked to the EU's financial support of EUR 50 billion during 2024–2027.[34] According to the Ukraine Facility Plan, the recommendation aims to improve legal mechanisms for resolving debt problems of both businesses and non-entrepreneurs, thereby directing these resources towards business support, job preservation, and compensation for damage caused by the war.[35]

The amendments to the Bankruptcy Code regarding preventive restructuring introduce additional mechanisms that debtors and creditors may use to resolve debts at an early stage of financial difficulties. Among these is the categorisation of creditors into classes, which will enhance the effectiveness of the voting process. In addition, concepts such as early warning,

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32 Zakon Ukrainy 'Pro vnesennia zmin do Kodeksu Ukrainy z protsedur bankrutstva ta deiakykh inshykh zakonodavchykh aktiv Ukrainy shchodo implementatsii Dyrektyvy Yevropeiskoho parlamentu ta Rady Yevropeiskoho Soiuzu 2019/1023 ta zaprovadzhennia protsedur preventyvnoi restrukturyzatsii' vid 19 September 2024 № 3985-IX (in Ukrainian) [Law of Ukraine on Amendments to the Code of Ukraine on Bankruptcy Procedures and Certain Other Legislative Acts of Ukraine on the Implementation of Directive 2019/1023 of the European Parliament and of the Council of the European Union and the Introduction of Preventive Restructuring Procedures] <https://zakon.rada.gov.ua/laws/show/3985-20#Text> accessed 25 November 2024.

33 Directive (EU) 2019/1023 of the European Parliament and of the Council on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) [2019] OJ L172/18.

34 Olha Stakheyeva-Bogovyk, 'Recent Changes to Insolvency Law in Ukraine' (2024) 14 INSOL I-READ Student Newsletter <https://email.insol.org/cr/AQj--A0Qwe1jGO6y8V9GTERxP-7mkcoDx8bSoZfmC_OkRm8d517hIRzg7F8-uYg> accessed 25 November 2024.

35 More details about the Ukraine Facility Plan available at <https://commission.europa.eu/strategy-and-policy/eu-budget/eu-borrower-investor-relations/ukraine-facility_en> accessed 17 February 2025.

cramdown, discharge, and disqualification have been incorporated into Ukrainian bankruptcy legislation.[36]

The amendments will come into force in January 2025, although the provisions on preventive restructuring will come into force in March 2025. There are high hopes that these improvements to the out-of-court debt settlement procedure will help solvent individuals resolve temporary debt problems quickly, inexpensively, and effectively, without initiating formal court proceedings.

8. **Conclusion**

Bankruptcy legislation in Ukraine is rapidly evolving. Ukraine has undergone a long and challenging journey in transforming its bankruptcy law – from attempts to save state-owned enterprises through mass privatisation, to focusing on debt resolution for businesses during various crises, and finally to socially oriented legislation that offers practically every person in distress an efficient solution to their problems.

As a result of recent reforms, the Code on Bankruptcy Procedures has been supplemented with two separate chapters introducing the systems of natural persons' insolvency and preventive restructuring. Through this reform, bankruptcy legislation has acquired a comprehensive framework that offers every possible means to assist both individuals and legal entities in resolving their debt problems through out-of-court, hybrid, and court procedures, thereby granting them a second chance.

International organisations and the European Union have played a significant role in the development and improvement of bankruptcy legislation in Ukraine. With their support, the Ukrainian bankruptcy system today largely aligns with the key principles reflected in the main international instruments in this field.

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[36] Oleksandr Biryukov, 'Piat rokiv Dyrektyvi YeS pro restrukturyzatsiiu i nespromozhnist: uroky dlia Ukrainy' *Yurydychna hazeta.* (24 May 2024) (in Ukrainian) [Five Years of the EU Directive on Restructuring and Insolvency: Lessons for Ukraine] <https://yur-gazeta.com/publications/practice/bankrutstvo-i-restrukturizaciya/pyat-rokiv-direktivi-es-pro-restrukturizaciyu-i-nespromozhnist-uroki-dlya-ukrayini.html> accessed 25 November 2024.

There are promising prospects for the further development of bankruptcy law in Ukraine. The current state of legislative development suggests that future efforts will focus on improving the efficiency of the existing insolvency regime to ensure that any person can overcome temporary financial difficulties or liquidate unviable legal entities effectively. This is critically important in light of the ongoing military aggression by a neighbouring state. Debt problems are increasing as businesses have been forced to relocate from occupied territories and individuals have lost their property while fleeing the war.

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AI-Powered Restructuring Proceedings from a Lithuanian Perspective

1. Introduction

With the emergence of digital technologies such as artificial intelligence, blockchain, and the Internet of Things, the legal landscape is compelled to continuously adapt to new challenges and opportunities. The changes brought about by digitalisation encourage the creation of compensatory mechanisms based on scientific research into the factors determining these processes and the tools for managing them.

Digital technologies are gradually permeating many areas of society, and their potential appears unlimited. States invest heavily in the digitalisation of their justice systems, requiring national courts and other entities involved in the administration of justice to adapt to this paradigm. The use of new technologies can facilitate the resolution of cross-border disputes by making the administration of justice faster, more accessible, and more effective. Modern technology eliminates the distance between courts and litigants through

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online hearings and proceedings. Digitalisation also enhances cross-border judicial cooperation, primarily by dematerialising the circulation of procedural documents between courts, legal professionals, and litigants.

Over the last decade, significant transformations have been observed in civil proceedings. In the digital age, a substantial proportion of assets exist in digital form, and many transactions are conducted electronically. Additionally, numerous procedural acts can now be carried out in an electronic environment. Despite digital advancements worldwide, the COVID-19 pandemic exposed significant gaps in the administration of justice, including in insolvency proceedings, where digitalisation was either absent or insufficient to function effectively when face-to-face interaction was not possible.

Digitalisation has been, and continues to be, a crucial issue globally and, of course, at the EU level. The need for digitalisation is underscored by the European Commission in its proposal for a preventive restructuring directive[1] and in a later proposal for a directive harmonising certain aspects of insolvency law.[2]

Insolvency and restructuring proceedings must be conducted in accordance with standard rules and procedures established by law, which apply to circumstances that vary from one debtor to another and require the analysis of a vast amount of data and documentation. Given the significant technological advancements in both the private and public sectors aimed at assisting in this complex process, the need for further development remains evident. Artificial intelligence (AI), and by extension, generative AI, has gained momentum for its ability to offer a variety of applications. However, its necessity, potential benefits, and associated risks must be carefully considered. These

[1] The European Commission indicated digitalisation as a means to reduce the length of procedures and increase their efficiency (Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance, and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU, COM(2016) 723 final 2016/0359 (COD) <https://ec.europa.eu/information_society/newsroom/image/document/2016-48/proposal_40046.pdf> accessed 17 February 2025).

[2] The European Commission indicates the need for digitalisation, mentioning a higher degree of process automation in the simplified winding-up proceedings for microenterprises (Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law, COM(2022) 702 final, 2022/0408(COD) <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0702> accessed 17 February 2025).

considerations are particularly relevant in the context of corporate restructuring, which involves not only debtors and creditors but also serves the public interest, necessitating the involvement of courts and insolvency practitioners.

2. The Need for AI in restructuring proceedings

2.1. Digital infrastructures in restructuring proceedings in Lithuania

Before analysing the potential features of AI in restructuring proceedings, it is first worth reviewing the digital solutions already implemented in these legal processes. Examining the practice in Lithuania, the main digital solutions applied in restructuring proceedings should be highlighted.

The State Enterprise Centre of Registers collects and publicly provides information on the legal status of companies, indicating whether they are undergoing restructuring or liquidation due to bankruptcy.[3]

The Information Portal for Insolvency Processes[4] (hereinafter referred to as 'the Information Portal'), as part of the Audit, Valuation, and Insolvency Information System (hereinafter referred to as 'AVIIS'), serves as the primary tool for all insolvency and restructuring proceedings. It is used by insolvency practitioners and provides public notices for the sale of property, as well as guidance for businesses considering restructuring proceedings. Within the insolvency section, the Information Portal offers detailed information, including the company name, contact details, the status of insolvency or restructuring proceedings, key dates such as the commencement of the process and liquidation termination, the court handling the case, and the appointed insolvency practitioner along with their contact information. The system also provides statistical data on bankruptcy and restructuring proceedings, including the number of cases initiated, ongoing, and concluded – both in total and on an annual basis.

The Information Portal, along with other components of AVIIS, also serves as a tool for electronic case administration. It is utilised by administrators,

3 <www.registrucentras.lt/jar/index_en.php> accessed 17 February 2025.

4 <https://nemokumas.avnt.lt/public/home/main> accessed 17 February 2025.

courts, and creditors whose claims have been confirmed by the court. The system manages datasets related to restructuring proceedings, including notifications about creditor meetings and committee sessions, decisions, restructuring plans and implementation reports, administration costs, asset information, financial claims, and their levels of satisfaction.

The Information Portal includes a section called Insolvency Guide, which provides a digital tool enabling companies to draw up a restructuring plan that complies with the legal framework. This tool simplifies the process by clearly directing companies on the required information, the questions that must be answered, and the necessary financial projections. As a result, the plan is generated, with the option to supplement it later. Although the tool is primarily tailored to small and medium-sized enterprises (SMEs), it is suitable for companies of all sizes. The Information Portal also features a section for consultations with interested parties. Its structure includes a question-and-answer tool, categorised according to the main topics of restructuring proceedings and based on human-written responses.

The Early Warning System, which implements provisions of the EU Directive on restructuring and insolvency,[5] is designed to assist businesses facing financial difficulties in avoiding insolvency and ensuring their continued viability. The risk of insolvency is determined through statistical methods using data provided by taxpayers, including value-added tax (VAT) returns, VAT invoice data, financial reports, and other information available to the State Tax Inspectorate, as well as data received from third countries. Statistical estimates of insolvency risk are based on annual, quarterly, and monthly data, along with derived data (coefficients), with the dataset covering the last 48 months.[6]

Although not all possible functionalities of the aforementioned systems have been detailed, it can be argued that the digitalisation of restructuring

5 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) [2019] OJ L172/18 (hereinafter 'the Restructuring Directive' or 'the Directive'.

6 Order No VA-55 of 21 April 2004 of the Head of the State Tax Inspectorate on approval of the rules of procedure for the processing and submission of data in the registers of increased value tax invoices, para 6.

cases and their administration, as well as creditor involvement, is already leveraging the benefits of technology to a significant extent. This has resulted in considerable added value, significantly improving communication, transparency, cost efficiency, and the overall speed of restructuring proceedings.

2.2. **Why do we need to think more about?**

Existing digital systems for insolvency and restructuring cases are highly promising and provide an excellent example of the digitalisation of complex legal processes. Current technological tools significantly enhance the transparency, efficiency, and promptness of legal proceedings. Creditors now benefit from quicker and easier access to case documents and decisions, leading to improved communication and decision-making. Digital platforms facilitate faster access to documents and more efficient information retrieval, increasing cost efficiency and reducing administrative expenses. However, these systems have not yet fully exploited the maximum potential of new technologies. The increasing complexity of financial processes, combined with sophisticated business models and economic systems, calls for more advanced digital solutions. These solutions should provide deeper and faster insights, enable the identification of fraud and other malpractices, improve predictive analytics, and offer comprehensive support to all stakeholders involved in restructuring processes.

Insolvency practitioners must manage complex financial and legal procedures while acting in the interests of both creditors and debtors. They are required to analyse vast amounts of data, identify patterns, evaluate debtor transactions, and understand business models and their economic viability. Additionally, they must oversee the restructuring process in a timely manner, maintain communication with creditors and the court, draft procedural and communication documents, prepare reports, and present positions based on professional judgment.

As parties that may lose the right to recover the full amount of their claims due to the debtor's financial difficulties, creditors are granted important rights in the restructuring process. These include the right to decide on the implementation of the restructuring plan, the right to challenge unlawful decisions that infringe their rights, and the right to appeal against actions taken by parties to the proceedings. In order to make well-informed and calculated decisions, creditors must have access to sufficient information, be able to

assess that information effectively, and possess adequate legal knowledge to protect their rights when necessary. These steps are time-consuming. Furthermore, creditors often lack the expertise required to navigate these stages independently. If a creditor is unable to handle these processes on their own, seeking professional assistance results in additional costs – an unwelcome burden in a situation where the creditor is already at a financial disadvantage. This issue becomes even more pressing in cases where restructuring is carried out without the appointment of an insolvency administrator.

To ensure fairness in restructuring cases, courts are also required to analyse complex financial schemes and assess whether the measures proposed in the restructuring plan will result in a lower level of satisfaction for dissenting creditors compared to an insolvency scenario. Courts must determine whether the new financing measures outlined in the restructuring plan are necessary for its implementation and whether they impose undue restrictions on the interests of creditors who have not approved the plan. Additionally, courts must evaluate whether the proposed measures will enable the debtor to overcome financial difficulties, maintain viability, and avoid bankruptcy.

Finally, it is often difficult for a debtor facing financial difficulties to assess the feasibility of restructuring. For large debtors, the complexity of business models presents a challenge, while for small businesses, the lack of expertise and, in times of financial distress, the limited resources to hire a professional to assess restructuring options and prepare a plan are significant obstacles.

Restructuring procedures, therefore, require a holistic approach to address the complex challenges faced by all stakeholders. The current process necessitates sophisticated tools to accurately identify a company's financial and economic situation, conduct a thorough analysis of its assets and liabilities, and effectively manage the administration process. This becomes even more crucial in cases of cross-border restructuring or potential fraud, where the complexity of valuation increases significantly. A sound restructuring plan must reflect the company's current financial situation, provide forward-looking projections, and offer an accurate assessment of the likely satisfaction of creditors' claims in alternative scenarios, such as liquidation. It is, therefore, necessary to evaluate which existing technologies can address these challenges and to what extent they can be utilised.

2.3. What measures can be taken to improve restructuring proceedings?

Restructuring proceedings can be divided into four critical stages: the preventive period, where early warning signs of financial distress are identified; the assessment of restructuring grounds, involving comprehensive financial diagnostics; the formal initiation of the restructuring case, including the preparation of a detailed restructuring plan; and finally, the implementation of the restructuring plan.

At the initial stage, it is crucial to assess potential financial difficulties in a timely manner and to be well-informed. The early warning system mentioned above already serves the primary objectives of the Directive on restructuring and insolvency. However, to ensure consistency and provide assistance on a larger scale, the advantages of technology, particularly generative AI, can be utilised to an even greater extent. Tools that help assess and structure such agreements can be instrumental in reaching settlements with creditors. This is particularly relevant for the debtor to prevent the loss of access to preventive restructuring measures, including judicial restructuring processes, as well as for other parties to clearly define the conditions and consequences of the debtor encountering financial difficulties and contractual obligations.

In the second stage of the analysis, during preparation for restructuring, all stakeholders – the debtor (whether or not pre-restructuring measures have been exhausted), insolvency practitioners, and the court – must be prepared to assess whether there is a sufficient basis for opening restructuring proceedings.[7] Defining these criteria is a complex task, as it requires the evaluation of vast amounts of data and various factors influencing business performance. Technological solutions, particularly AI-driven analytics, can

[7] According to the LILP, two necessary criteria for the company to be eligible for restructuring are that the legal person is in financial difficulties and is viable (Article 21(1)(1) and (2) LILP). Financial difficulties are defined as a situation in which a legal person is insolvent or there is a likelihood of its insolvency (Article 2(5) LILP). Insolvency of the legal person is described as the state of a legal person in which it is unable to meet its obligations in a timely manner, or its liabilities exceed the value of its assets (Article 2(7) LILP). The likelihood of insolvency is described as a situation in which it is realistically probable that a legal entity will become insolvent within the next three months (Article 2(7^1) LILP). The viability of a legal person is the state of a legal person in which it carries out an economic, commercial activity that will enable it to fulfil its obligations in the future (Article 2(6) LILP).

significantly enhance this process by processing complex datasets, identifying subtle financial patterns, and providing objective assessment frameworks that traditional methods might overlook.

The third stage is the most complex and requires the active involvement of all interested parties in the process. Although, as mentioned above, a number of support tools based on the integration of technologies are in place in Lithuania and facilitate the process, further improvements remain of some importance. At this stage, the financial, legal, and economic analysis of the debtor and its transactions, the forecasting of future activities, and the risk assessment become particularly significant. At the same time, the final result is the restructuring plan. If the proceedings are initiated by a company experiencing financial difficulties, a draft of the restructuring plan must be submitted with the application to the court for the opening of insolvency proceedings (Article 17(3)(3) LILP). This draft must later be confirmed by the creditors and shareholders in the groups affected by the restructuring plan. If the restructuring proceedings are initiated by a creditor, the restructuring plan is subsequently prepared by the debtor's manager and approved by the creditors and the court. The preparation of the plan must be based on historical financial data, the company's liabilities, a plan for future business activities, liabilities to creditors, the company's liquidation value, and other relevant factors. Therefore, during this process, historical data and future activities must be evaluated, and forecasts must be calculated, as these will later be assessed by creditors, insolvency practitioners, and the courts. This typically requires specific expertise across a wide range of fields, is time-consuming, and entails significant costs.

The final stage involves the proper implementation and administration of the restructuring plan. The entire restructuring process requires continuous administration over an extended period. The LILP also permits debtor-in-possession situations, presenting two possible approaches. In one scenario, an insolvency practitioner is appointed. In the other, the debtor's management retains full control, meaning that creditors are forced to be able to monitor the debtors' activities. This should not pose significant challenges for major creditors, such as banks, which are typically the primary creditors. However, for smaller unsecured creditors, this could impose a disproportionate burden, potentially relegating them to a passive role in the proceedings.

Once the stages of restructuring have been identified and the potential for the use of technology within them has been recognised, they can be specified. The following applications of artificial intelligence are particularly useful in the restructuring process: automated document analysis, predictive analytics, fraud detection, and consultation based on specific areas of legal acts and case law.

3. Benefits of AI-powered restructuring proceedings

If we take Bork's explanation that legal rules link back to basic principles,[8] the benefits of AI in insolvency can similarly be linked to the implementation of key principles. While the identification of specific principles within the legal framework of insolvency law may vary, the LILP establishes several core insolvency principles that are also relevant in the context of technological advancements, particularly AI.

Principle of efficiency. Article 3(1) LILP states that efficiency is a key principle of insolvency proceedings, requiring a balance between the interests of debtors in financial difficulties and those of creditors to maximise the satisfaction of creditors' claims within a reasonable minimum period. This principle also encompasses cost minimisation and promptness in restructuring proceedings. AI can significantly enhance efficiency by facilitating and accelerating the collection and analysis of information, simplifying administrative processes, reducing insolvency-related costs, and shortening procedural timeframes. The integration of AI tools, therefore, plays a crucial role in upholding the principle of efficiency.

Principle of equality of creditors. Article 3(2) LILP indicates that the principle of equality of creditors means that creditors with similar claims shall be given equal opportunities to participate in the insolvency process in order to satisfy their claims and to protect their other rights and legitimate interests. This principle, which is also referred to as *pari passu*, can be seen both as a substantive principle, ensuring that each creditor receives a proportionate share of their claim, and, at the same time, as having a procedural dimension,

[8] Reinhard Bork, *Principles of Cross-Border Insolvency Law* (Intersentia Ltd 2017).

ensuring that all creditors are granted the same procedural rights.[9] With asset tracking as an important benefit, especially in cross-border insolvency proceedings or cases involving fraudulent transactions, the substantive dimension of this principle can be strengthened, as AI helps to ensure a greater satisfaction of claims and, equally important, an equitable satisfaction of creditors' claims relative to one another. When considering the benefits of AI tools for the procedural dimension of the principle of equality of creditors, we can assert that such tools make a substantial contribution to promoting equal opportunities for all creditors to participate in the proceedings and to protect and defend their rights and legitimate interests effectively.

Principle of transparency. Article 3(3) LILP states that the principle of transparency requires that information about insolvency proceedings be made available in a timely manner to all persons involved in order to ensure the protection of their rights and legitimate interests, except where it is necessary to protect personal data as required by law or information constituting a commercial (industrial) secret. The principle of transparency, which is enshrined in restructuring proceedings, encompasses not only the disclosure of sufficient information to enable the parties involved to adequately represent their rights and legitimate interests but also the comprehensibility of that information. AI tools can therefore play a key role in implementing this principle.

Principle of judicial leading. Article 3(4) LILP states that the principle of judicial leading means that the court may, of its own motion, obligate participants in the insolvency process to conduct procedural actions, collect evidence, and oversee the actions of the parties to the insolvency process to ensure the effective course of in-court insolvency proceedings and the public interest. This principle requires the court to be proactive, which in turn necessitates appropriate and sufficient means to identify and decide on cases requiring *ex officio* court involvement. Thus, AI tools can be crucial to the implementation of this principle as well.

Principle of professionalism. Article 3(5) LILP states that the principle of professionalism requires that persons administering insolvency

[9] Reinhard Bork and Michael Veder, *Harmonisation of Transactions Avoidance Laws* (Intersentia Ltd 2022) 45–46.

proceedings perform their duties in a professional manner, ensuring a high level of professional knowledge and abilities while maintaining an impeccable reputation as representatives of the profession. On the one hand, it can be argued that an insolvency practitioner, by ensuring a high level of expertise, is empowered by technology, thereby enhancing the benefits derived from the implementation of the principle of professionalism. On the other hand, it can also be contended that refusing to use technology, including AI, which can significantly contribute to professionalism in the insolvency process, could constitute a breach of this principle. As a comparison, what would happen if an administrator did not use email? Could such an individual be considered to be acting professionally if they were unable to ensure prompt communication?

Although not limited to these principles,[10] the frequent identification of the above-mentioned principles as the most important demonstrates that AI tools contribute significantly to reinforcing each of them.

4. Ethical and regulatory risks in AI integration

AI demonstrates emerging capabilities every day; therefore, its responsible and thoughtful integration will be essential for achieving sustainable improvements in insolvency and restructuring practices. However, advancements in digitalisation come with significant risks and considerations. Principles of justice, fairness, and procedural transparency are fundamental when implementing AI technologies. Only when AI systems meet these requirements can they be considered suitable for use in the legal sphere.

One prominent concern is algorithmic bias. AI tools, relying on historical data, may replicate and even amplify existing disparities, potentially

[10] Both doctrine (Bork, Veder (n 9)) and soft law instruments (UNCITRAL, *Legislative Guide on Insolvency Law* (United Nations 2005) 28–30 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf> accessed 24 November 2024; World Bank, *Principles for Effective Insolvency and Creditor/Debtor Regimes* (The World Bank Group 2021) 27 <https://documents1.worldbank.org/curated/en/391341619072648570/pdf/Principles-for-Effective-Insolvency-and-Creditor-and-Debtor-Regimes.pdf> accessed 24 November 2024; European Bank for Reconstruction and Development, 2021) point to a number of principles in laying the foundations for an effective insolvency system.

leading to discriminatory outcomes. In insolvency and restructuring contexts, this could disproportionately affect smaller creditors or particular debtor profiles. The risk of bias necessitates rigorous auditing, testing, and ongoing oversight to ensure equitable outcomes. As highlighted in broader discussions on AI ethics, multidisciplinary teams – including legal and technical experts – should be engaged to enhance the reliability of AI systems and mitigate inherent biases.

A related challenge is the opacity of many AI systems, commonly referred to as the 'black box' problem. These systems often operate through algorithms that are not easily interpretable, creating potential barriers to understanding and contesting decisions. Explainability is critical; AI systems should be designed to offer clear, understandable rationales for their decisions. In restructuring cases, where procedural fairness is paramount, a lack of transparency could undermine trust in the system. Explainable AI frameworks, which make algorithmic decision-making comprehensible, must be integrated into insolvency and restructuring technologies. Lessons from jurisdictions such as Colombia, where AI is used in bankruptcy courts to process and verify submissions, suggest that transparency can be improved through user-friendly interfaces and clear procedural guidelines.[11]

Accountability is another pressing concern. Determining responsibility when AI makes errors or produces unjust outcomes remains a complex issue. Should accountability rest with developers, operators, or the entities relying on AI systems? Clear delineations of responsibility are essential, alongside mechanisms for recourse and appeal. Legal frameworks should ensure that individuals affected by AI-driven decisions in insolvency proceedings have the right to challenge and review outcomes. Countries such as the United Kingdom, which has prioritised regulatory clarity and accountability in digitised legal processes, provide valuable insights into how this can be managed effectively.[12]

Data privacy and security are also paramount. Restructuring proceedings involve the handling of vast amounts of sensitive financial and personal

[11] Akshaya Kamalnath, 'The future of corporate insolvency law: A review of technology and AI-powered changes' (2024) 33(1) International Insolvency Review 40–54.

[12] ibid.

information, making them attractive targets for cyberattacks. Ensuring robust security measures, compliance with data protection laws, and clear data handling responsibilities is essential to minimise risks. Privacy considerations should be central to the design and deployment of AI systems in restructuring proceedings. Finland's adoption of the KOSTI portal demonstrates how digitised systems can streamline processes while adhering to stringent data security protocols.[13] The system's success underscores the importance of embedding privacy-by-design principles into any technological platform used for insolvency and restructuring proceedings.

Despite the sophistication of AI systems, systemic errors remain a significant concern. Algorithms may fail when faced with unique or non-standard cases, and the consequences in insolvency proceedings can be severe. Overreliance on AI without adequate human oversight risks exacerbating such issues. A more balanced approach involves adopting hybrid models, where AI manages routine, non-discretionary tasks, while human professionals oversee complex decision-making. Colombia's use of AI for non-discretionary decision-making, such as verifying the completeness of submissions, provides a useful model for balancing automation with human judgment.[14]

The ethical dimension of AI integration in insolvency proceedings requires close attention. Non-substitution of human rationality remains a cornerstone of ethical AI use. Restructuring proceedings often require nuanced legal and financial judgment that considers individual circumstances and broader societal implications. Over-reliance on automation risks reducing the nuance and empathy that legal professionals provide. While AI excels in handling repetitive and data-intensive tasks, ensuring that human professionals retain the ultimate decision-making authority is essential to preserving holistic and context-sensitive justice. Encouragingly, many jurisdictions are exploring AI-assisted processes that maintain human oversight, ensuring that ethical considerations remain central.

Building trust in AI systems within insolvency proceedings relies on ensuring transparency in both process and outcomes. This requires making

13 ibid.

14 ibid.

training data, operational parameters, and the decision-making criteria of AI systems accessible and comprehensible to all relevant stakeholders. For instance, if an AI tool is used to assess restructuring plans, it should disclose the data sources and underlying assumptions that inform its recommendations. This level of transparency enables creditors, debtors, and judicial authorities to assess the system's reliability and fairness.

Stakeholders must also have the ability to audit and understand how AI systems function to ensure alignment with legal standards and ethical principles. For instance, an AI tool used to prioritise creditor claims must clearly explain the criteria it applies – such as claim size, statutory priority, or other weighting factors. Without this clarity, there is a risk that stakeholders may perceive the system as arbitrary or biased, which could undermine confidence in its recommendations.

The regulatory framework governing AI integration into insolvency proceedings presents additional challenges. Rapid technological advancements often outpace regulatory development, creating governance gaps. To address these, it is essential to establish clear guidelines for the use of AI in insolvency processes, including mechanisms for accountability and dispute resolution. Within the European Union, the Artificial Intelligence Act (AI Act) provides a cross-sectoral regulatory framework for AI usage. While it covers AI applications in the justice sector, it lacks provisions specifically tailored to insolvency proceedings.

The AI Act recognises both the opportunities and risks associated with AI. On the one hand, it highlights AI's ability to deliver economic, environmental, and societal benefits, such as enhancing business restructuring prediction models, optimising resource allocation in debt recovery, and streamlining procedural tasks. These capabilities can improve efficiency and fairness in insolvency cases, offering competitive advantages to businesses while promoting broader societal benefits.

On the other hand, the Act identifies significant risks, particularly in judicial contexts. AI systems used for tasks such as assessing creditor claims or evaluating restructuring plans are categorised as 'high-risk' under the Act, reflecting concerns over bias, errors, and lack of transparency. These risks could compromise procedural fairness, making it imperative that AI remains a support tool for human decision-making rather than a replacement.

Maintaining human oversight is essential to ensuring justice, fairness, and procedural integrity in insolvency proceedings.

The high-risk classification does not apply to administrative AI systems that handle tasks such as data anonymisation or document processing, as these do not directly influence substantive outcomes. This distinction reinforces the principle that AI should complement rather than replace human judgement in critical decision-making. For example, AI can streamline creditor notifications or automate routine administrative tasks, while essential decisions remain in the hands of human practitioners.

Ultimately, regulatory frameworks emphasise the importance of transparency, auditability, and accountability in AI systems. In the context of insolvency and restructuring, this means implementing safeguards against AI-related biases or errors, maintaining human oversight, and fostering trust among all stakeholders. By balancing AI's efficiencies with the principles of justice and fairness, insolvency proceedings can benefit from both operational improvements and stakeholder confidence.

5. **Conclusion**

As the restructuring process plays a crucial role in protecting of both the debtor's and the public interest in general, without prejudice to the creditors' interests, it can be promoted by using technology such as AI. It can bring significant benefits at all stages of the restructuring process, including the identification of the need to assess the debtor's potential restructuring, the evaluation of the feasibility of restructuring, the drafting and approval of the restructuring plan, as well as its monitoring, and the assessment of the debtor's financial and economic situation, and the reasonableness and fairness of transactions. Despite the fact that AI technologies pose a number of challenges due to the risks they entail, the uncertainty that still exists regarding their proper integration, and the limitations of their use in judicial proceedings, the significant contribution they make to ensuring important principles in restructuring proceedings, such as transparency, accountability, and efficiency, leads to the conclusion that a strong focus should be placed on the development, implementation, and regulation of these technologies

at all levels, as a tool for the debtor, the creditor, the insolvency administrator, and the courts.

At the same time, it is important to support the view that technology provides not only opportunities but also obligations to use it. Insolvency practitioners and the insolvency community, who provide services in restructuring cases recognised as being in the public interest, as well as the courts and insolvency supervisors, must take advantage of the benefits of technology to make the process and the provision of individual services better, faster, and less costly.

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The Social and Economic Role of Banks in Restructuring Processes in Lithuania

1. Introduction

The Law on Insolvency of Enterprises of the Republic of Lithuania (hereinafter 'Enterprise Insolvency Law' or 'EIL') establishes the rules governing corporate insolvency proceedings. The EIL, adopted in 2019, codified the relevant corporate insolvency rules into a single legal act. It repealed the previous laws on insolvency proceedings, namely the Law on Bankruptcy of Enterprises of the Republic of Lithuania and the Law on Restructuring of Enterprises of the Republic of Lithuania. The main objective behind the adoption of the EIL was to increase the effectiveness of corporate insolvency proceedings and improve the conditions for more efficient restructuring processes. Additionally, the new insolvency law introduces mechanisms allowing for the conversion of bankruptcy (liquidation) proceedings into restructuring proceedings where an enterprise's viability improves and there is a reasonable prospect that the business may be rescued.

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Creditors play a crucial role in bankruptcy and restructuring proceedings under the EIL. Essentially, all creditors whose claims arose prior to the opening of insolvency proceedings have the right to lodge their claims and exercise the rights established under the EIL. The EIL provides for both individual and collective creditors' rights. Collective rights may be exercised through the creditors' meeting and/or committee. For restructuring proceedings, creditors are divided into two classes: the class of secured creditors and all other creditors. Since, in most cases, banks' (credit institutions') claims are secured by collateral, they act as secured creditors, making their role vital in the confirmation of a restructuring plan. Additionally, although the general rule is that only a debtor has the right to apply for the initiation of restructuring proceedings, a creditor whose claim exceeds a certain threshold established by law also has the right to seek the opening of such proceedings. As a result, secured creditors may play a decisive role in determining which insolvency proceedings should be initiated against a debtor.

Banks (credit institutions) acting as creditors in restructuring and insolvency proceedings may play a significant social and economic role. Not only do banks have the right to seek the initiation of restructuring proceedings, but they may also conclude agreements facilitating the restoration of solvency and viability of a company (work-out agreements). Furthermore, if restructuring proceedings are initiated, banks may contribute to the application of preventive restructuring tools, such as the continuation of essential executory contracts and the provision of interim or new financing. Since banks often act as secured creditors and form a separate class for voting on a restructuring plan, their position is particularly important in determining how restructuring proceedings should be conducted.

This article examines the role of banks (credit institutions) in restructuring proceedings under the EIL. It consists of three parts: first, it presents the main elements of restructuring proceedings in Lithuania; second, it analyses the role of creditors in restructuring proceedings; and third, it discusses the position of banks (credit institutions) as secured creditors in restructuring proceedings. Additionally, the article focuses on the relevant provisions of the EIL and case law and examines the implementation

of Directive (EU) 2019/1023 on restructuring and insolvency[1] into Lithuanian insolvency law. The implementation of the Directive into national law has introduced preventive restructuring mechanisms aimed at increasing the effectiveness of restructuring proceedings. Banks, as creditors in restructuring proceedings, may play a crucial role in ensuring the proper functioning of these mechanisms.

2. Overview of restructuring proceedings in Lithuania

Under the EIL, two court insolvency proceedings are available for companies experiencing insolvency (imminent insolvency) issues. When a company becomes insolvent, bankruptcy (liquidation) proceedings must be initiated. The assessment of insolvency involves both liquidity and balance sheet tests. Under the EIL, insolvency is defined as a state in which an enterprise is unable to fulfil its financial obligations on time, or where its obligations exceed the value of its assets (Article 2(7) EIL). When a company becomes insolvent, the manager of the company is obliged to apply for the initiation of bankruptcy proceedings. However, while the company's manager has the right to apply for restructuring proceedings, there is no legal obligation to do so.

The main purpose of such insolvency proceedings is to accumulate and realise the debtor's assets and maximise creditors' returns. All of the debtor's creditors have the right to apply for the initiation of bankruptcy proceedings (Article 9 EIL). However, not all creditors have the right to seek the initiation of restructuring proceedings. Only creditors holding claims that have already fallen due and that exceed a certain amount (10 minimum monthly wages) have the right to apply for restructuring proceedings (Article 4(2) EIL).

The first law regulating restructuring proceedings, the Law on Restructuring of Enterprises of the Republic of Lithuania, was introduced in Lithuania

[1] 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; [2019] OJ L172/18, (hereinafter 'the Restructuring Directive' or 'the Directive').

in 2001. Since the adoption of this law on restructuring proceedings until 2024, a total of 606 restructuring cases have been opened. However, only 76 restructuring cases have been successful, meaning that the restructuring plan was implemented, while 458 restructuring cases have been terminated. Thus, only a small majority of all restructuring cases have properly served their purpose and allowed viable businesses to be rescued. This raises the question of why the number of successful restructuring cases remains low and why restructuring proceedings are not effective. One of the main aims of the insolvency law reform in 2019 in Lithuania was to improve the conditions for and access to restructuring proceedings. Further development of national law was linked to the implementation of the Directive, which provides early restructuring mechanisms.

The statistics of corporate insolvency cases in Lithuania in recent years show that corporate bankruptcy remains the main insolvency procedure. However, an even more pressing issue appears to be the small number of successful restructuring cases where a restructuring plan is implemented:

	2018	2019	2020	2021	2022	2023
Bankruptcy cases	2,091	1,609	790	808	1,193	1,018
Restructuring case	27	33	29	9	21	34
Successful restructuring cases	6	6	7	9	2	5

The statistics of corporate insolvency proceedings in Lithuania show that even with the adoption of the EIL and the implementation of the Directive, the number of restructuring cases remains low in comparison to bankruptcy proceedings. Such low numbers of restructuring proceedings may be attributed to various reasons, such as late filing, unwillingness to reveal financial problems in public, and mistrust in the insolvency system. The low number of successful restructuring cases may be linked to the misapplication or non-application of restructuring tools that would otherwise allow the rescue of a viable company. In such cases, the position of creditors may

play an important role, since the application of business rescue measures may depend significantly on creditors' decisions, such as the protection of essential executory contracts, the provision of additional financing, assistance to the debtor related to the satisfaction of claims, and support for the restructuring plan. The role of banks acting as secured creditors may be particularly significant in determining the chances of successful restructuring and the application of rescue mechanisms.

Restructuring is possible for enterprises that are not yet insolvent but may face insolvency in the foreseeable future while remaining viable. Viability of the business is the main criterion that the court has to assess when deciding whether an enterprise may be rescued and whether restructuring proceedings should be opened. Viability is defined as the state of an enterprise in which it pursues business activities that allow it to perform its obligations in the future (Article 2(6) EIL). Under the relevant case law, the viability of a company is assessed using various applicable criteria. Namely, the court has to assess: (1) the reasons for insolvency, (2) the economic activities of an enterprise and their prospects, (3) foreseeable income, (4) the peculiarities of labour relations, and (5) the performance of essential obligations.[2] A restructuring case is opened when all cumulative conditions are met: (i) an enterprise encounters financial difficulties, (ii) it is viable, and (iii) it is not subject to liquidation proceedings (Article 21(1) EIL). In contrast, a bankruptcy case is opened when an enterprise is insolvent and no restructuring case is opened (Article 21(2) EIL).

The determination of business viability is a crucial aspect of the possibility of restructuring and business rescue. The mechanisms of restructuring include various actions necessary for carrying out business activities. The mechanisms of restructuring actions aimed at reviving the company and increasing its competitiveness may involve changing the type of economic activity of companies, improving work organisation, modernising production, selling the company's assets or part of them, acquiring the assets of other companies through mergers or divisions, changing the size and performance deadlines of the company's obligations to creditors, and implementing other

[2] Judgment of the Court of Appeal of Lithuania of 16 March 2023 in civil case e2-295-407/2023.

technical, economic, and organisational measures.[3] Thus, it is accepted in the relevant case law that restructuring mechanisms may involve various business-related changes that should improve the company's business conditions and competitiveness in the market.

With the adoption of the EIL, restructuring has been established as the primary tool for addressing the insolvency problems of a company. The need to preserve a company operating in the market and still able to function essentially independently when its financial difficulties are not of an obviously permanent nature is socially more significant than liquidation, because in the case of the company's rescue, both the company and its employees and other creditors may receive greater benefits. The company will continue to function as a business entity in the future, jobs will be preserved, the state will receive income in the form of taxes, and creditors, especially those of the last order, will have greater opportunities to obtain satisfaction of their claims during the restructuring process than in the case of liquidation, when the company's assets are sold for liquidation value and the last-order creditors' ability to recover debts is often very minimal.[4]

Both bankruptcy and restructuring proceedings are court proceedings, except for one out-of-court bankruptcy procedure where the creditors' meeting acts as a court. The EIL also establishes a mandatory pre-trial dispute settlement procedure before a claim for the opening of insolvency proceedings may be filed with the court (Articles 8 and 9 EIL). The main goal of this procedure is to encourage the debtor and creditors to conclude an agreement that would allow the debtor's solvency to be restored with the assistance of the creditors. All applicants, including the debtor and creditors, must comply with the requirements related to the pre-trial dispute settlement procedure. Thus, irrespective of which insolvency proceedings may be opened, an applicant must first use this pre-trial dispute settlement procedure and only thereafter is entitled to request the court to open insolvency proceedings.

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3 Judgment of the Court of Appeal of Lithuania of 30 May 2024 in civil case e2-387-934/2024.

4 Judgment of the Court of Appeal of Lithuania of 28 July 2022 in civil case e2-822-910/2022.

Restructuring proceedings are always court proceedings. If the court opens restructuring proceedings, the manager of the company remains in power (debtor in possession), although an insolvency practitioner may be appointed. The manager of the company must prepare the restructuring plan within four months after the opening of restructuring proceedings in court, although this period may be extended for additional two months. The overall period within which the restructuring plan must be prepared and submitted to the court is six months (Article 110 EIL). Before the restructuring plan is submitted to the court, it must be approved by the company shareholders (Article 106 EIL) and creditors (Article 107 EIL). The restructuring plan must then be confirmed by the court (Article 111(1) EIL). The EIL also establishes the cramdown procedure (Article 111^1 EIL). The implementation period of the restructuring plan is four years, but it may be extended for one additional year (Article 105 EIL).

Restructuring proceedings are regarded as the primary tool for addressing insolvency problems while maintaining the viability of a company. Restructuring proceedings are always court proceedings and may only be opened if the company is viable. Additionally, a debtor (company) or creditors must use the work-out procedure, which aims to encourage the debtor and creditors to conclude agreements that would allow the debtor's viability to be restored.

3. The role of creditors in the restructuring proceedings

Creditors are participants in restructuring proceedings. In restructuring proceedings, creditors' active participation may play a crucial role in ensuring the effective rescue of the business.

Creditors' involvement in the rescue of a debtor begins even before formal restructuring proceedings commence in court. Certain creditors have the right to request the opening of restructuring proceedings. If a creditor's claim has already fallen due and the amount of the claim exceeds ten minimum monthly wages, the creditor has the right to demand the opening of restructuring proceedings. Thus, if creditors believe that the debtor's business activities may be rescued, they may request the initiation of pre-trial

insolvency proceedings (work-out) and subsequently submit a claim to open restructuring proceedings in court. Although creditors rarely exercise this right in practice and the need for business rescue should primarily originate from the debtor company, the fact that creditors also have the right to seek the opening of restructuring proceedings demonstrates that bankruptcy is not the only available instrument for addressing the insolvency problems of a counterparty.

If an enterprise seeks to initiate formal restructuring proceedings in court, the manager of the enterprise must inform all creditors within a period of 15 to 30 days, allowing creditors to provide any assistance that could help restore the solvency and viability of the enterprise. Assistance to the company should be provided under an agreement on assistance, which is defined as any agreement between an enterprise and creditors that directly creates, modifies, or terminates civil rights and/or obligations arising from creditors' assistance in overcoming the enterprise's financial difficulties (Article 10(1) EIL). In most cases, such an agreement would involve modifying the performance of creditors' financial obligations to the debtor, such as postponement or reduction of payments, new financial assistance, or other measures. Article 2(18) EIL establishes that assistance to overcome financial difficulties of a legal entity includes assistance provided by creditors to help the entity overcome financial difficulties, including the postponement of a deadline for fulfilling an obligation, the waiver of an obligation or part of it, or the replacement of an obligation with another obligation.

The aim of such assistance to the debtor is to provide financial support that enables the debtor to continue business activities. In most cases, such assistance involves modifying claims against the debtor. Additionally, agreements on assistance must be clear, concrete, and provide real support to the debtor to facilitate the restoration of solvency.[5]

In pre-trial insolvency proceedings, creditors are not obligated to conclude an agreement on assistance with the debtor but may be motivated to do so if there are reasonable prospects that the debtor may be able

[5] Judgment of the Court of Appeal of Lithuania of 15 September 2020 in civil case e2-1478-407/2020.

to pursue economically beneficial business activities and later repay the debts to creditors. In essence, such an agreement on assistance resembles workouts, which are commonly regarded as contractual rather than insolvency law solutions to debt problems.

Under the EIL, creditors as participants in insolvency (restructuring) proceedings have certain rights and duties. The EIL establishes creditors' individual rights (Article 43) and collective rights (Article 44) in insolvency proceedings. The duties of creditors are not specifically outlined in the EIL; however, general duties in civil proceedings, such as the prohibition of abuse of rights, are also applicable to creditors. The exercise of collective creditors' rights is particularly significant in restructuring proceedings. In these proceedings, each creditor has individual rights, which may be exercised independently without coordination with other creditors, and collective rights, which are exercised collectively in creditors' meetings or committees. The creditors' meeting has the authority to decide how insolvency proceedings should be handled.

Creditors vote on the restructuring plan. The implementation period of the restructuring plan may not exceed four years (Article 105(1) EIL), but it may be extended by one additional year (Article 105(4) EIL). The restructuring plan must be approved by shareholders and creditors. Creditors are divided into two classes: (i) creditors whose claims are secured by a lien and (ii) other creditors. All creditors in the same class have equal rights in similar circumstances (Article 108 EIL). Only affected creditors vote on the restructuring plan. The restructuring plan is deemed approved if, in each class, the majority of creditors representing more than half of all affected creditors in that class vote in favour of the plan. Thus, not all creditors of the legal entity under restructuring, as approved by the court, have the right to vote, but only the creditors affected by the restructuring plan, as specified in the plan. However, when calculating the voting results, the sum of the claims of all creditors approved by the court in the relevant creditor class is taken into account. To ensure an efficient and effective restructuring process and to protect the interests of both the legal entity being restructured and all of its creditors (both those affected by the restructuring plan and those not affected), it is particularly important to properly define which creditors are recognised as affected by the

restructuring plan according to the provisions of the EIL and to clarify which entities are entitled to vote on the approval or rejection of the draft restructuring plan.[6]

Thus, creditors have the right to demand the opening of restructuring proceedings and to make critical decisions regarding the rescue of a company. Most importantly, creditors are divided into two classes, both of which must vote on the approval of the restructuring plan.

4. Position and role of banks in restructuring proceedings

The EIL does not establish any special rules regulating the participation of banks (credit institutions) in restructuring proceedings. Banks, like other creditors, have the same rights and duties. However, the peculiarities of banks as creditors derive from their status and claims against a debtor. Banks may be among the major creditors in restructuring proceedings, meaning they hold the largest claims and can significantly influence decision-making in creditors' meetings (committees). Since banks often hold the majority of claims, they also hold the majority of votes in creditors' meetings (committees), allowing them to significantly impact decisions.

Additionally, banks frequently act as secured creditors, meaning they hold certain property rights over assets constituting the insolvency estate (collateral). The company's assets pledged to the bank may be particularly important for the possibilities of rescuing the company. Decisions regarding how such pledged assets should be treated play a crucial role in determining whether the debtor can continue business activities.

Moreover, banks are often likely providers of additional financing for a debtor, which is essential for maintaining business activities. Such additional financing may be critical for the continuation of business operations after restructuring proceedings are initiated or for the proper implementation of rescue mechanisms established in the restructuring plan.[7]

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6 Judgment of the Court of Appeal of Lithuania of 11 July 2024 in civil case e2-533-798/2024.

7 Judgment of the Court of Appeal of Lithuania of 21 April 2020 in case 2-724-585/2020.

In some cases, banks and debtors may conclude agreements that include specific rules on the termination of financial agreements (such as lease agreements) and the satisfaction of creditors' claims. However, even though such agreements are lawful under civil law, their implementation between the parties changes in the event of an insolvency (bankruptcy) case. If an insolvency (bankruptcy) case is opened against a debtor, the fulfilment of obligations and the submission of claims are regulated by the EIL.[8] Thus, all creditors' claims in restructuring proceedings are satisfied under the EIL.

In the liquidation of a legal entity, claims of the holders of pledged property are satisfied first from the pledged property. The claims of the following creditors are satisfied in the first instance: claims of creditors who provided new and/or interim financing that is not secured by a pledge and/or mortgage, arising from the failure of the legal entity to repay the loans within the terms stipulated in the contracts (Article 94(1) EIL). The same ranking of creditors is applied in restructuring proceedings (Article 113(1) EIL).

One of the key elements of effective restructuring, introduced in the EIL following the implementation of the Restructuring Directive, is the protection of essential executory contracts. Article 102^1(1) EIL establishes that until the court order approving the restructuring plan takes effect, creditors of a legal entity cannot: (1) terminate essential contracts or change their terms to the detriment of the legal entity; (2) terminate contracts that are not classified as essential contracts or change their terms to the detriment of the legal entity solely because the court has made a decision to accept a statement on the filing of a restructuring case or because a restructuring case has been filed against the legal entity. Under Article 102^1(2) EIL, this protection applies to contracts concluded before the opening of the restructuring case and whose term of performance has not expired. Loan (credit) contracts concluded between a debtor company and a bank may be one of the main sources of financing for a company's activities. The preservation of such contracts in restructuring proceedings is particularly important to maintaining the company's viability.

[8] Judgment of the Court of Appeal of Lithuania of 26 September 2023 in case e2-914-933/2023.

Another crucial factor for the effectiveness of restructuring proceedings is additional financing, which may be required for a company to cover financial costs and taxes related to the continuation of business activities after the opening of restructuring proceedings and later to meet the expenses associated with the implementation of the restructuring plan. It is likely that credit institutions (banks) will provide such additional financing in restructuring proceedings. In line with the Restructuring Directive, the EIL establishes two types of additional financing: interim and new financing.

The EIL defines both concepts of additional financing in restructuring proceedings. Interim financing is defined as additional funding provided to an enterprise by new or existing creditors, which is reasonable and immediately necessary to enable the enterprise to continue its activities, maintain viability, or prevent a reduction in its value before the restructuring plan is confirmed (Article 2(20) EIL). New financing is defined as additional funding confirmed in the restructuring plan and provided by current or new creditors, allowing the company to address its financial difficulties (Article 2(15) EIL). Both definitions of additional financing closely align with the concepts delineated in the Restructuring Directive. If interim financing is to be provided, the restructuring plan must include information about interim financing, such as the amount and conditions of potential loans (credits), the means of their performance, and other sources of financing before the approval of the restructuring plan (Article 17(3)(4) EIL).

The EIL provides certain protections for transactions involving interim or new financing. It stipulates that transactions under which new and/or interim financing was provided to an enterprise cannot be declared void unless they were concluded in violation of the law or through fraud (Article 64(3) EIL). Additionally, a creditor who has provided new or interim financing cannot be subject to civil, administrative, or criminal liability on the basis that such financing causes negative consequences for the interests of all creditors (Article 102^2(2) EIL).

Transactions that are reasonable and necessary for the approval or implementation of the restructuring plan approved by the court cannot be declared invalid solely on the grounds that they cause negative consequences for all creditors, except where they were concluded in violation of the law or through fraud (Article 102^2(3) EIL). The transactions referred to in part 3 of

this article relate to the costs of preparing the restructuring plan, consultation during the preparation of the plan, payment of wages to employees of the legal entity, and other settlements necessary for the normal economic and commercial activities of the legal entity (Article 102^2(4) EIL).

The role of banks as creditors in restructuring proceedings is particularly relevant to ensuring the effectiveness of restructuring. Under the EIL, banks not only have the potential to provide additional financing for a company but may also play a significant role in the confirmation of the restructuring plan.

5. Conclusion

Restructuring is one of the insolvency proceedings established under the EIL. It is a collective insolvency mechanism that includes all creditors affected by the restructuring plan. Nevertheless, restructuring remains infrequently used in Lithuania. Banks may play a key role in facilitating the rescue of viable businesses. Since banks often act as secured creditors and may hold the majority of votes in creditors' meetings (committees), their position on the prospects of a company's business operations is particularly significant. The new preventive restructuring mechanisms introduced by the Directive may encourage banks to maintain loan (credit) contracts concluded with a company that enters restructuring proceedings and to provide interim or new financing.

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Municipal Insolvency – Is This the Missing Area of Regulation in Poland?

1. Introduction

The debt of municipalities in Poland is a real problem, which clearly justifies the need to seek appropriate legal remedies in the event of insolvency. With regard to municipal property, enforcement proceedings may be conducted to satisfy monetary claims. An indebted municipality may therefore be interested in so-called 'protection against creditors', an institution relevant to insolvency law. Municipalities play a key role in providing services to the population, such as education, water supply, waste disposal, healthcare, and infrastructure maintenance, and their insolvency may disrupt the provision of these services. The spillover effect of municipal insolvency could pose a serious threat to the finances of the entire state.

The 21st century has brought many spectacular cases of 'formal' insolvency (i.e., established on the basis of authoritative regulations) of large cities or other territorial administrative units. For example, in the US, insolvency affected Vallejo in 2009, Jefferson County in 2011, Stockton and San Bernardino (city) and San Bernardino County in 2012, and Detroit in 2013. The financial catastrophes of many cities were characterised by

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extremely high levels of debt. These phenomena emerged in wealthy countries and affected populous agglomerations. In some cases, the effects of insolvency were particularly severe.[1]

In some legal systems, the subjects of insolvency law regulations are municipalities (cities) or other territorial administrative units. Examples include Chapter 9 of the U.S. Bankruptcy Code, and – in particular – the legislation in force in Hungary, Romania, Switzerland, Colombia, and South Africa.[2]

In the Polish legal system, local government units are neither granted bankruptcy capacity nor restructuring capacity. At the same time, they maintain financial independence. Many municipalities in Poland are indebted. An extreme example of unpayable debt was the case of the liquidated municipality of Ostrowice.

2. The special legal nature of municipalities as debtors and reasons for municipality insolvency

A municipality (a local government unit) is a component of the constitutional system of the state. By its nature, it is not subject to principles such as the rules of the free market, as its primary role is to satisfy specific collective needs of the community. Meeting some of these needs may be inherently

[1] Clayton P Gillette and David A Skeel Jr, 'Governance Reform and the Judicial Role in Municipal Bankruptcy' (2016) 125(5) Yale Law Journal 1152; Valbona Metaj, 'Municipal Bankruptcy: 21st Century Challenges' (2015) 4(7) Macrotheme Review 89; Eugenio Vaccari, 'Municipal Bankruptcy Law: A Solution Which Should Not Become a Problem' (2017) 5(1) Nottingham Insolvency & Business Law e-Journal 1.

[2] Sorin-Nicolae Borlea and Monica-Violeta Achim, 'From the Insolvency of the Enterprises towards the Insolvency of the Municipality: New Legislative Challenges in Romanian Space' (2014) 4(7) International Journal of Academic Research in Business and Social Sciences 398; Richard W Trotter, 'Running On Empty: Municipal Insolvency and Rejection of Collective Bargaining Agreements in Chapter 9 Bankruptcy' (2011) 36(1) Southern Illinois University Law Journal 45; Kyle Montrose, 'Aim for the Best, Prepare for the Worst: Indiana's Lack of Municipal Bankruptcy' (2017) 50(2) Indiana Law Review 707; Steven G Craig, 'How a City Can Survive a Boom and Bust Cycle Without Bankruptcy: The Case of Houston' (1996) 89 Proceedings of the Annual Conference on Taxation Held under the Auspices of the National Tax Association-Tax Institute of America 90–95.

deficit-generating. Municipalities do not operate a transient household that ceases with the departure of a generation; rather, they are 'eternal' entities. Power within a municipality is exercised by individuals elected (or nominated) through a specific political mechanism. Municipalities are not only entities of public law but also possess legal personality in the sphere of private law. An argument against granting municipalities bankruptcy capacity includes concerns about the potential consequences of 'uncontrolled' bankruptcy proceedings.

Municipalities represent a special type of debtor because, in addition to typical creditors, such as contractors under civil law contracts, municipal administrative employees, bondholders of municipal bonds, and creditors holding enforceable titles, a distinct group of stakeholders consists of recipients of public services provided by municipalities.

Municipalities may become insolvent for various reasons. Insolvency may result from a single event or be the outcome of a gradual process of increasing municipal debt. In the first scenario, insolvency may arise, for instance, from the municipality losing a civil case (particularly following a class action lawsuit), embezzlement of public funds, or an unsuccessful investment. Insolvency can also be a consequence of destruction caused by an extraordinary natural disaster. In the second scenario, insolvency may stem from factors such as deindustrialisation, depopulation of the municipality, a significant decline in the number of taxpayers contributing to municipal taxes, poor management of municipal finances, rising costs associated with performing self-governing tasks in areas such as education or health care, increasing expenses related to maintaining municipal infrastructure, or growing costs of servicing issued municipal bonds.[3]

[3] Andy Kopplin, 'Preventing Bankruptcy and Transforming City Finances after Hurricane Katrina' (2020) 32(1) New England Journal of Public Policy; Mona N Shah and Ramakrishna Nallathiga, 'Detroit: The Case of Bankruptcy of a City Government' (2015) (5) Journal of Business and Management 66; John A Dove, 'Detroit: A Microcosm of Municipal Finance, Bankruptcy, and Recovery' (2020) 38(1) Essays in Economic & Business History 337; Seth Schindler, 'Detroit after bankruptcy: A case of degrowth machine politics' (2016) 53(4) Urban Studies 818–836.

3. Examples of national legislation

3.1. Legislation in the US: Chapter 9 US Bankruptcy Code

The insolvency procedure of a municipality is not intended to harm creditors but to work to their advantage. Accordingly, Chapter 9 of the US Bankruptcy Code imposes an obligation on the municipality to act in good faith.

According to Chapter 9 of the US Bankruptcy Code, the legal remedy provided is temporary protection from creditors (automatic stay) and a restructuring plan. The restructuring plan must meet numerous requirements, is subject to court approval, and its implementation is supervised. It should be emphasised that these are non-liquidation remedies and are applied *ex post*. The guiding assumption is to allow the municipality to 'catch its breath'. Mass debt collection of multiple receivables can never lead to the immediate satisfaction of creditors and, at the same time, is a source of increasing debt. As part of the restructuring plan, it is possible to reduce liabilities, grant a grace period for repayment, and divide them into instalments. In the financial realities of US cities, a significant group of creditors are bondholders of municipal bonds, and restructuring may also include their receivables. The provisions of the US Bankruptcy Code allow the municipality to terminate contracts that are unfavourable to it, including employment contracts. However, legal scholars have formulated the view that there is a need for broader legal protection for employee benefits. Submission of an application by the municipality under the US Bankruptcy Code requires appropriate authorisation from the state authorities. There is no legal obligation to submit such an application. Moreover, the court's influence on the municipality's activity is limited compared to insolvency cases involving entrepreneurs. The court cannot control the political and executive power of municipalities. The restructuring plan requires approval by the majority of creditors and must also be confirmed by the court.

There are proposals to expand the catalogue of legal remedies to include the possibility of liquidating the entity.[4] Despite some criticism of the existing

[4] Hannah Heck, 'Solving Insolvent Public Pensions: The Limitations of the Current Bankruptcy Option' (2011) 28 Emory Bankruptcy Developments Journal 89.

regulation, which may serve as a driving force for reform, the institution of municipal insolvency is generally assessed positively. One of the most interesting axiological issues related to Detroit's insolvency was the question of cultural assets held by the city. The question arose as to whether it would be justified to use works of art of enormous market value to satisfy the claims of bondholders of municipal bonds. Criticism of the limited legal remedies available under Chapter 9 of the US Bankruptcy Code has gained momentum, particularly in the post-COVID economy.[5]

3.2. **Legislation in Italy**

Currently, the provisions of Italian administrative law concerning the management of municipalities in financial difficulty apply only to selected local and territorial public entities (*enti pubblici locali e territoriali*). These include municipalities, provinces, and metropolitan cities (*comuni*, *province*, and *città metropolitane*). The Italian legislator defines the concepts of 'structural deficit' and 'structural imbalance' as conditions for the application of appropriate procedures.

A municipality is in a structural deficit if its balance sheet does not meet at least five of the ten financial criteria set by the central authorities. In such a situation, the municipality is placed under the supervision of a central administrative body, which imposes a number of restrictions, including limitations on the employment of new staff. If the structural deficit is not reduced, a situation of structural imbalance may arise. The municipality makes a public declaration in this regard and subsequently initiates a multi-annual restructuring procedure. This is a formal procedure conducted by the debtor and has the same consequences as the supervision process, such as control over personnel and expenditure, but also results in the suspension of enforcement proceedings against the municipality. If the municipality raises local taxes to the maximum thresholds set by law and presents a plan within 90 days to reduce the structural imbalance and sell all non-core assets, it may apply for financial support. The municipality may also borrow funds from the market, but only for investment purposes.

[5] Carolyn Abott and Akheil Singla, 'Helping or Hurting? The Efficacy of Municipal Bankruptcy' (2021) 81(3) Public Administration Review 428.

In 2011, the legislator introduced the 'managed imbalance procedure', which is initiated by a judicial body if the municipality's balance sheet shows a structural deficit that could lead to structural imbalance (i.e., the same requirement as for initiating a multi-annual restructuring procedure). The court requires the municipality to adopt all necessary measures to resolve the structural deficit within a short period (in practice, the municipality must develop a multi-annual adjustment plan). Failure to act results in the dissolution of elected bodies and the appointment of a special commissioner responsible for preparing an adjustment plan.

If none of these mechanisms are effective and the municipality faces a structural imbalance, the only remaining option is the imbalance procedure. This procedure may be initiated either by the municipality itself or by a special commissioner. The management of the procedure is entrusted to a designated individual (*organo straordinario di liquidazione*) appointed by the Minister responsible for the Interior. The initiation of the procedure results in the suspension of enforcement proceedings against the municipality and the freezing of interest on all consolidated debts. New debt may only be incurred for the repayment of existing debts from Cassa Depositi e Prestiti S.p.A., a public company wholly owned by the State. All local taxes will be increased to the highest possible rate for a period of up to five years. The individual overseeing the procedure has the authority to renegotiate existing debts with creditors. A repayment plan for outstanding liabilities is then formulated.[6]

3.3. **Legislation in Hungary**

Since 1996, Hungarian legislation has provided for an insolvency procedure for municipalities, in which the court rules (pursuant to the 1991 Act on Local Governments, as amended).[7] Municipal insolvency is understood as the inability to pay employees, creditors and suppliers on time. The

6 Vaccari (n 1).

7 Károly Jókay and Katalin Veres-Bocskay, 'Only in Hungary: Experiences with Municipal Debt Adjustment and Suggested Regulatory Changes' (2009) 54(1) Public Finance Quarterly (Corvinus University of Budapest) 115; Gábor Kovács, 'External Financing of Hungarian Local Governments: Knowledge and Attitude' (2011) 4(16) Zarządzanie Publiczne 81; Erzsébet Pocsai, 'On the Regulation of Municipal Indebtedness' (2023) 10(4) Prosperitas 2.

procedure is judicial in nature. The municipality is required to file an application, and the satisfaction of municipal debt is supervised by an independent bankruptcy officer.

The Hungarian regulation is based on the assumption that Hungarian municipalities can conduct business activities and that the state is not responsible for their obligations. At the same time, public funds are made available only for the provision of public services. The law protects both creditors and the indebted municipality. The municipality may also be declared insolvent by the court at the request of creditors. As a result of initiating the proceedings, the municipality must suspend the financing of all activities and services that do not serve basic functions or exercise public authority on behalf of the state. At the same time, the act provides a detailed list of mandatory municipal tasks that must continue to be performed during the debt restructuring process and must be financed from the emergency budget. The suspension of payments covered by the restructuring occurs by operation of law. The restructuring plan requires approval by the majority of creditors and confirmation by the court.

Between 1996 and 2010, 38 applications were filed. About half of them resulted from excessive spending and financial mismanagement. In no case was the provision of public services interrupted. Nevertheless, it is estimated that many municipalities meeting the criteria for insolvency failed to file an application, despite the fact that it was mandatory. Creditors were also reluctant to initiate proceedings.

3.4. **Legislation in Switzerland**

The origins of municipal insolvency regulation in Switzerland date back to the 19th century, when several municipalities found themselves in serious financial distress and had to rely on support from cantonal authorities. During that time, regulations on municipal insolvency were drafted but were never implemented. Further attempts at regulation were made during the economic crisis of the 1930s. However, it was only in 1947, under pressure from banking and insurance institutions, that a federal law was adopted on the enforcement of debts by municipalities and other corporations of cantonal public law. This procedure is primarily administrative in nature and is governed by the principle of *ultima ratio*. The submission of an application

by a municipality or another authorised public authority is voluntary. The suspension of debt payments may only occur if it does not harm creditors. The restructuring plan requires acceptance by the majority of creditors and approval by the administrative authority. There is a direct relationship between restructuring and budget stabilisation, meaning that appropriate actions should be taken before the application is submitted.[8]

4. Proposal of the regulation regarding the insolvency of municipalities in Poland

The solvency of a municipality can be defined as its ability to settle current and future liabilities on time while maintaining budgetary discipline. The legal system provides various remedies to protect municipalities from insolvency. At the same time, there are legal instruments that allow for remedial actions in response to insolvency.

In Poland, municipalities independently manage their financial affairs. The budget resolution forms the basis for the financial management of a local government unit in a given budget year. The adoption of the budget, its implementation, and internal audits are subject to a strict legal regime. Nevertheless, budget deficits may be financed through revenues from the sale of securities, loans, and credits. Academic literature on the subject highlights the need to maintain financial balance between expenditures and revenues. Debt ceilings are of key importance. The published budget resolution specifies the limit of liabilities arising from loans and securities issued, as well as the limit of other liabilities classified as debt. The regulations impose an obligation on municipalities to prepare a multi-year financial forecast. The financial management of municipalities is supervised by regional audit chambers. However, the question arises as to whether these safeguards are sufficient.

The current regulation of the problem of municipal insolvency, primarily at the level of public finance regulations, does not seem to be a sufficient solution for contemporary challenges. However, a specialist regulation

[8] Katharina Herold, 'Insolvency Frameworks for State and Local Governments' (2020) 2020(2) OECD Journal on Budgeting 108.

concerning the insolvency of municipalities cannot be a simple copy of the solutions adopted for entrepreneurs. Proposing an additional regulation relating to municipalities should be based on:

1. the assumption that it will not result in a violation of the constitutional position of the municipality,
2. the assumption that there will be no interruption in meeting the collective needs of the community,
3. the assumption that rational use of new solutions will be ensured;
4. the basis of the economic efficiency of such a solution,
5. the principle of appropriate respect for the interests of creditors and residents of the municipality,
6. the assumption that the new insolvency regulations will only introduce additional and optional legal instruments.

Local government performs public tasks that are not reserved by the Constitution or laws for bodies of other public authorities (Article 163 of the Constitution). The inclusion of municipalities in the regulation of insolvency law cannot affect their performance of public tasks. This means that, on the one hand, the municipality cannot cease to perform these tasks, and on the other hand, neither courts nor court officials appointed in an insolvency case should influence the manner in which they are performed. In accordance with Article 165 of the Constitution, local government units have legal personality. They are entitled to the right of ownership and other property rights. The independence of local government units is subject to judicial protection. In accordance with Article 169(1) of the Constitution, local government units perform their tasks through legislative and executive bodies. As a result, under the provisions of insolvency law, neither the court nor the court official appointed in an insolvency case may take over the management of the municipality's assets, nor may they assume the statutory competences of the municipality's bodies. It would not be permissible to appoint either an indirect or a direct deputy for the municipality's bodies in an insolvency case. Under Article 167 of the Constitution, local government units are provided with a share of public revenues in proportion to the tasks assigned to them. The revenues of local government units consist of their own revenues, general subsidies, and earmarked grants from the state

budget. The sources of income for local government units are specified by law. The activities of municipalities are therefore subject to special financing; however, this provision neither prohibits nor limits the possibility of restructuring municipal liabilities. These considerations can be summed up with the conclusion that, due to the legal position of the municipality, it is not possible to apply a full-scale insolvency law, including provisions on the creation of a special asset mass, the management of which is taken away from the debtor and, simply put, transferred to insolvency proceedings.

De lege ferenda, proceedings against insolvent municipalities should be restructuring-oriented only (regardless of doubts expressed in American legal literature as to the completeness of such an instrument in relation to municipalities). Such proceedings could not be solely aimed at liquidating municipal assets and depriving the municipality of its legal existence. At the same time, drawing on domestic traditions, such proceedings should be judicial rather than administrative. To emphasise the specificity of the procedure intended for insolvent municipalities, it should not be merely a separate restructuring procedure within the main framework of proceedings designed for entrepreneurs. This procedure should be independent in nature. Substantive, systemic, and procedural norms may be consolidated within a single act, which – to the extent not regulated therein – could refer to the Act of 15 May 2015, Restructuring Law, and, in a layered manner, to the provisions of civil procedure. The purpose of the proceedings in the event of municipal insolvency should, first and foremost, be to ensure the uninterrupted satisfaction of the community's needs. The second objective should be to restructure municipal liabilities and, depending on the circumstances, to satisfy creditors as fully as possible. As for creditors, the *pari passu* principle should apply. Nevertheless, the regulations should take into account privileges resulting from security interests. Additionally, a separate procedure for bondholder creditors should be taken into account. The municipality's obligation to repay subsidies must comply with European Union law. The entities subject to the new regulations would certainly include municipalities (including cities with county rights). However, municipal associations, counties, and other similar entities may also be considered.

The proceedings should be initiated – after meeting the substantive conditions for insolvency, separately established for municipalities – only

at the request of the interested municipality. The application by a creditor, prosecutor, or other third party should be inadmissible. The submission of such an application by the municipality – debtor should require the prior consent of the relevant supervisory body – the voivode (with the opinion of the relevant regional audit chamber). The submission of an application by the municipality should be optional.

The effect of opening the proceedings should be the suspension of the performance of obligations subject to restructuring (and, at the same time, proportional protection against enforcement). The suspension of the performance of obligations (protection against enforcement) should be only temporary. The law on the insolvency of municipalities should aim to relieve the debt collection 'jam' and also limit the increase in municipal debt resulting from the debt collection costs by subjecting this collection process to a joint procedure. The state of insolvency could serve as a basis for changing the municipality's tax policy concerning the level of municipal tax rates. The restructuring act should confirm the municipality's obligation to continuously satisfy the collective needs of the community during the proceedings. Neither the restructuring court nor the supervisor appointed to support the restructuring process should have the right to interfere in the municipality's systemic affairs, nor should they take control over its assets. Therefore, the proposed regulation would allow for the municipality's insolvency situation to be brought under control. The municipality would gain new crisis management tools while maintaining its independence.

The restructuring plan may include, among others, such measures – applied individually or in combination – as:

1. a grace period for the repayment of liabilities,
2. payment of liabilities in instalments,
3. cancellation or reduction of the interest rate,
4. reduction of the principal amount,
5. conversion of receivables into unsecured or secured municipal bonds,
6. conversion of receivables into shares or stocks of municipal companies in which the shareholders' meeting or the general meeting of shareholders has adopted appropriate resolutions on increasing the share capital for this purpose,

7. conversion of receivables into shares or stocks of municipal companies with a programme for their repurchase by the municipality,
8. participation of creditors in the margin profits of municipal companies, based on an appropriately amended company agreement (statute).

The value of the cancelled liabilities would not constitute the municipality's tax income. The advantage of presented proposal lies, therefore, in the wide variety of restructuring tools. The restructuring plan should be voted on by a majority of creditors and should be subject to court approval. Thanks to this regulation, the municipality could also include in the restructuring process those creditors who oppose any concessions and with whom it would otherwise have no chance of concluding an agreement.

The condition for court approval of the restructuring plan should be an appropriate reduction in the budget deficit and the restoration of the municipality's financial stability. The connection between liability restructuring and changes in the budget policy of the indebted municipality should be of key importance in the new regulation.

The concept of allowing the municipality to establish a specialist special-purpose company (operator company) to handle the implementation of the arrangement – whose management board members could only be persons holding a restructuring advisor licence – remains to be considered. Such a company could, among other things, be provided with appropriate assets by the municipality (e.g. real estate, receivables, dividends from municipal companies, blocks of shares in municipal companies, uncollected receivables), intended for sale at a price not lower than that determined by valuation, to obtain funds for the implementation of the arrangement. Such an entity could also provide support in issuing bonds or converting receivables into shares or stocks of municipal companies. At the same time, a detailed control procedure for the activities of such a company would be necessary.

5. Conclusion

Polish insolvency law is undergoing notable evolutionary changes. The unified law of 1934 was intended only for merchants (later: business entities, entrepreneurs). In 2008, it was extended to individuals who did not conduct business activity (so-called consumers). Currently – approximately ten years after its fundamental change in 2015 – it should be considered whether to extend it to the insolvency of certain public law entities (municipalities). The issue of public insolvency of municipalities has so far been regulated in only a few legal systems; however, these regulations were, in most cases, introduced as a response to adverse practical experiences. Currently, in light of the growing phenomenon of toxic debt, a discussion on opening a third way for insolvency law seems necessary.

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Insolvency Practitioner under Polish Law

1. Who is an insolvency practitioner? Introduction

An insolvency practitioner is a professional who provides restructuring and bankruptcy services. This occupation is considered a liberal profession, as well as a profession of public trust.[1] The profession of an insolvency practitioner is practised on the basis of a licence issued by the Minister of Justice.[2] The rules for obtaining an insolvency practitioner's licence and the rules governing administrative supervision over the activities of licensed insolvency practitioners are set forth in the provisions of the Act of 15 June 2007 on the License of an Insolvency Practitioner.

An insolvency practitioner may act both as a fully private entity (providing restructuring advice, issuing opinions, preparing analyses, and drafting restructuring plans) and as an extrajudicial body in bankruptcy and

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1 Anna Hrycaj, *Wykonywanie uprawnień z licencji doradcy restrukturyzacyjnego – jako działalność łączona z inną aktywnością zawodową bądź realizowana wyłącznie* (Instytut Wymiaru Sprawiedliwości 2020) <https://iws.gov.pl/wp-content/uploads/2024/08/IWS_Hrycaj-A._Wykonywanie-uprawnien-z-licencji-doradcy-restrukturyzacyjnego.pdf> accessed 31 December 2024.

2 Act of 15 June 2007 on the License of Insolvency Practitioner (consolidated text: Journal of Laws of 2022, item 1007).

restructuring proceedings.[3] In the latter case, the insolvency practitioner is treated as a private entity acting as a public body in bankruptcy or restructuring proceedings. As an extrajudicial body in insolvency proceedings, the insolvency practitioner is subject to supervision by the judge-commissioner and the insolvency court.

2. Path to obtaining an insolvency practitioner's license

The procedure for obtaining an insolvency practitioner's licence requires the candidate to meet several requirements. The basic requirements include:

- being a citizen of an EU Member State, Switzerland or an EFTA member state,
- knowledge of the Polish language at the level required to perform the job,
- full legal capacity,
- possession of a university degree and a Master's degree (which does not necessarily have to be in law),
- a good reputation,
- at least three years' experience in the administration of a bankruptcy estate, a business or a separate part thereof,
- a clean criminal record (i.e., the candidate must not have been convicted of a felony or a tax offence and must not be suspected or accused of a felony or tax offence that is subject to public prosecution),
- the candidate must not be an insolvent debtor disclosed in the relevant public register.

The final requirement is a positive result on the state exam for insolvency practitioners. The exam is organised by the Minister of Justice at least twice a year. It consists of two written parts, both of which are taken on the same day before an Examination Commission appointed by the Minister of Justice. The first part consists of 100 multiple-choice questions, each with three

[3] Anna Hrycaj, *Syndyk masy upadłości* (Wydawnictwo Wyższej Szkoły Komunikacji i Zarządzania w Poznaniu 2006) 385–386.

possible answers, of which only one is correct. The second part consists of a case study, which is requires the candidate to provide a detailed answer to a practical problem. The exam covers legal, economic, financial, and management issues, with particular emphasis on bankruptcy and restructuring. To pass the exam, a candidate must obtain at least 75 out of 100 marks in the first part and at least 20 out of 30 marks in the second part.

An application for an insolvency practitioner's licence must be submitted no later than two years after passing the professional exam. The application must demonstrate that the applicant meets all the requirements for obtaining a licence. After examining the application, the Minister grants the licence for an indefinite period. The person must then be entered on the official list of licensed insolvency practitioners.

The next step in the career of an insolvency practitioner is obtaining the title of qualified insolvency practitioner. This title is available to insolvency practitioners with significant experience in acting as a trustee in bankruptcy, administrator, or supervisor in bankruptcy and restructuring proceedings. This experience includes, for example, having conducted at least six restructuring proceedings in the last seven years, which have ended with the final approval of an arrangement with creditors. The specific conditions for obtaining the title of qualified insolvency practitioner are set forth in Article 16a of the Act on the Licence of an Insolvency Practitioner.

3. Two spheres of activity of the insolvency practitioner

3.1. Introduction

As mentioned in the introduction of this paper, an insolvency practitioner can operate in the following two areas:

(a) as a wholly private entity performing what the Act on the License of Insolvency Practitioner calls 'restructuring consulting activities' on behalf of clients, and

(b) as an extrajudicial body in bankruptcy or restructuring proceedings, and, in certain strictly defined cases, also as an administrator in enforcement proceedings.

3.2. **Insolvency practitioner activities – private sector**

A person holding an insolvency practitioner's licence may carry out restructuring consulting activities. As explained in Article 2(3) of Act on the License of Insolvency Practitioner, restructuring consulting activities include 'providing advice, opinions and explanations, as well as other services in the field of restructuring and bankruptcy'. This is a broad definition. The professional activity of an insolvency practitioner thus encompasses a wide range of advisory services in the legal, economic, financial, and managerial fields, provided to those affected or potentially affected by insolvency. Restructuring consulting can therefore be provided to debtors, creditors, investors interested in acquiring assets in bankruptcy, company owners facing insolvency, and managers overseeing companies in financial crisis.

Examples of the areas of activity of an insolvency practitioner are as follows:

- restructuring consulting, assisting the debtor in developing restructuring plans and financial projections,
- participation in negotiations with creditors to obtain their support for planned restructuring measures,
- drafting agreements with creditors to facilitate future restructuring proceedings (so-called standstill agreements),
- advising entrepreneurs considering filing for restructuring or bankruptcy, particularly regarding the advantages and disadvantages of available insolvency proceedings. The support of a licensed insolvency practitioner in such cases may help avoid civil or criminal liability.[4] Managers may face such liability if they fail to file a bankruptcy petition in a timely manner or do not initiate restructuring proceedings when required, and

[4] For an extensive discussion of civil and criminal liability for late filing of a restructuring application or bankruptcy petition, see Bartosz Sierakowski and Mateusz Waberski, *Odpowiedzialność kadry zarządzającej w sądowych postępowaniach restrukturyzacyjnych z punktu widzenia naruszenia obowiązku dochowania należytej staranności w zakresie złożenia wniosku restrukturyzacyjnego lub wniosku o ogłoszenie upadłości w czasie właściwym*, (Instytut Wymiaru Sprawiedliwości 2024) <https://iws.gov.pl/wp-content/uploads/2024/12/2024_PrawoP_B_Sierakowski_M_Waberski_Odpowiedzialnosc_kadry_zarzadzajacej_w_sadowych_postepowaniach_restrukturyzacyjnych.pdf. accessed 31 December 2024.

– providing legal, economic, or administrative support to other trustees in bankruptcy, supervisors, and administrators in complex bankruptcy or restructuring proceedings.

Finally, it should be noted that in restructuring and bankruptcy cases, a licensed insolvency practitioner may also serve as an attorney.[5] For example, an insolvency practitioner can draft and sign a bankruptcy petition on behalf of a client and represent the client before the insolvency court.

3.3. Performing functions in legal proceedings – public sector

An insolvency practitioner may also act as an extrajudicial body in bankruptcy proceedings, restructuring proceedings, and, to a limited extent, in enforcement proceedings. These activities may be carried out by an insolvency practitioner personally (as a holder of an insolvency practitioner's licence) or through a commercial company. In the latter case, certain additional requirements must be met, namely that all members of the company's management board must hold an insolvency practitioner's licence.

An insolvency practitioner may perform the following functions in court proceedings:

(a) trustee in bankruptcy proceedings pursuant to the Act of 28 February 2003 – Bankruptcy Law,
(b) supervisor or administrator in restructuring proceedings pursuant to the Act of 15 May 2015 – Restructuring Law,
(c) administrator in enforcement proceedings pursuant to the Act of 17 November 1964 – Code of Civil Procedure.

Re. (a) Trusty in bankruptcy proceedings

A trustee is always appointed by an order of the bankruptcy court. As a rule, the trustee is appointed in the bankruptcy order. The replacement of a trustee is also possible at a later stage of the proceedings, but this too is done by order of the bankruptcy court. The trustee's actions are therefore always based on a court order. However, creditors have a say in who acts as trustee

[5] This authority derives from Article 87 § 1 of the Act of 17 November 1964 – Code of Civil Procedure (consolidated text: Journal of Laws of 2024, item 1568).

through the creditors' council. This council is established by the bankruptcy commissioner-judge and consists of five members and two deputies. The creditors' council has the power to pass a resolution to change the trustee in bankruptcy proceedings. If such a resolution is passed, the court must replace the trustee and appoint a person designated by the creditors' council, unless (i) it would be unlawful; (ii) it would be grossly detrimental to the interests of creditors; (iii) there is reasonable suspicion that the designated person will not properly perform the trustee's duties.

The trustee has two main roles in bankruptcy proceedings:

- acts as an extrajudicial body of bankruptcy proceedings, responsible for evaluating claims, preparing a list of claims, drafting plans for the distribution of bankruptcy funds, and submitting reports on activities, and
- acts as the indirect representative of the bankrupt, meaning that in matters relating to the bankruptcy estate, the trustee performs legal acts on behalf of the bankrupt, but in their own name.

The trustee's duties are generally defined in Article 173 of the Bankruptcy Law. According to this provision, the trustee immediately takes possession of the bankrupt's assets, manages them, protects them from destruction, damage, or removal by outsiders, and proceeds with their liquidation. The trustee's role is therefore to take possession of the property efficiently, conduct an inventory and valuation, and then proceed with a speedy sale. The sale should take place within six months of the declaration of bankruptcy. This should be followed by the distribution of proceeds, which is carried out by the trustee through drafting and implementing distribution plans. In this way, the trustee fulfils the primary function of bankruptcy proceedings, which is to satisfy creditors. In carrying out these activities, the trustee should follow the principle of optimisation set out in Article 2(1) of the Bankruptcy Law. According to this provision, bankruptcy proceedings should be conducted in such a way as to satisfy creditors' claims to the greatest extent possible and, where reasonable considerations allow, to preserve the debtor's existing business.

The trustee must submit reports on activities to the judge-commissioner supervising the proceedings. These reports include: a report on changes in the state and composition of the bankrupt's estate, a report on receipts and

expenditures, information on the state of funds in bank accounts and the bankrupt's cash register, and a description of the trustee's activities during a given period. These reports are subject to continuous inspection by the judge-commissioner, which can also be initiated by creditors or the bankrupt. Creditors and the bankrupt may challenge the trustee's expenses by submitting objections. If the judge-commissioner finds that the expenses were unjustified, they may refuse to recognise all or part of the disputed expenses, either by accepting the objections or *ex officio* within two months from the date on which the report was submitted. The judge-commissioner may then order reimbursement of the disallowed expenses to the bankruptcy estate.

A person acting as a trustee (i.e., an insolvency practitioner) is liable for damage caused as a result of improper performance of duties.[6] It is generally accepted that the trustee's liability is purely in tort. Since the trustee derives powers from the court's order of appointment and from the law, there is no contractual relationship between the trustee and the parties to the bankruptcy proceedings or third parties. Given the tortious nature of the trustee's liability, the following cumulative conditions must be met for the court to establish liability for damages:

- the trustee's conduct constitutes a tort,
- the trustee's conduct caused damage to the injured party,
- there is an adequate causal link between the trustee's conduct and the damage, and
- the trustee is at fault for the conduct in question.[7]

Re. (b) Supervisor or administrator in restructuring proceedings

According to Polish Restructuring Law, there are four types of restructuring proceedings, the purpose of which is to settle an arrangement between the debtor and its creditors. These proceedings are:

1. proceedings for approval of the arrangement (*postępowanie o zatwierdzenie układu*),

6 Article 160(3) of the Bankruptcy Law.

7 The prerequisites for the trustee's liability are analysed in detail by Anna Hrycaj (see Hrycaj (n 3) 352–362).

2. accelerated arrangement proceedings (*przyspieszone postępowanie układowe*),
3. ordinary arrangement proceedings (*postępowanie układowe*),
4. remedial proceedings (*postępowanie sanacyjne*).

The four restructuring proceedings mentioned above can benefit both insolvent debtors and debtors only at risk of insolvency. Proceedings for the approval of an arrangement in their initial phase (i.e., the phase of negotiation and conclusion of an arrangement) have the character of an out-of-court restructuring. Arrangement approval proceedings are a form of preventive restructuring referred to in 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 'the Restructuring Directive' or 'the Directive').

Every restructuring procedure involves an insolvency practitioner who acts either as a supervisor or as an administrator. The requirements for an individual or company appointed as a supervisor or administrator are the same as those for a trustee in bankruptcy. However, there is a difference between an arrangement supervisor in arrangement approval proceedings (*nadzorca układu*) and a supervisor or administrator in the other three restructuring proceedings. An arrangement supervisor, unlike an administrator, trustee, or court supervisor, is not appointed by a court order. Instead, the debtor appoints the arrangement supervisor when initiating proceedings for approval of an arrangement. The appointment is made on the basis of an agreement between the debtor and the insolvency practitioner who is to act as the arrangement supervisor. Pursuant to Article 210 of the Restructuring Law, for the purpose of preparing arrangement proposals, conducting voting, and filing the application for arrangement approval, the debtor must enter into an agreement with an insolvency practitioner or a company of insolvency practitioners to act as an arrangement supervisor and supervise the conduct of the proceedings.

The court supervisor (administrator), on the other hand, is always appointed by a decision of the restructuring court. As a rule, the court

supervisor (administrator) is appointed in the decision to open restructuring proceedings. It is possible to change the court supervisor (administrator) at a later stage of the proceedings, but this is also done by a decision of the restructuring court. The source of the court supervisor's (administrator's) authority is therefore always a court decision. However, the creditors have a say in the appointment of the administrator through the creditors' council. The creditors' council is appointed by the judge-commissioner. It consists of five members and two deputies. The creditors' council may adopt a resolution to change the court supervisor (administrator). If such a resolution is adopted, the court must replace the supervisor (administrator) and appoint the person designated by the creditors' council, unless (i) it would be illegal, (ii) it would grossly violate the interests of the creditors, or (iii) there is a reasonable suspicion that the designated person would not properly perform the duties of the court supervisor (administrator).

The **arrangement supervisor's** main task is to supervise the debtor's day-to-day activities in relation to its assets, as well as to prepare the restructuring plan, the arrangement proposals for creditors, the inventory of claims, and the inventory of disputed claims, and to submit a report assessing the debtor's ability to implement the arrangement. The arrangement supervisor is also responsible for conducting the voting on the arrangement in the ICT system for court proceedings.

The **court supervisor** differs from the arrangement supervisor in that, in addition to the differences mentioned above, the purpose of the court supervisor's function is to oversee the debtor's activities beyond the scope of ordinary management. In order to carry out such activities, the debtor requires the approval of the court supervisor. In addition, the court supervisor is responsible for informing creditors of the opening of restructuring proceedings, drawing up the restructuring plan, compiling the list of claims and the list of disputed claims, evaluating settlement proposals submitted to them, and, if necessary, advising on modifications to their content.

The administrator, on the other hand, is most similar to a bankruptcy trustee. As a rule, a trustee is appointed in remedial proceedings (*postępowanie sanacyjne*). Exceptionally, an administrator may also be appointed in accelerated arrangement proceedings (*przyspieszone postępowanie układowe*) or ordinary arrangement proceedings (*postępowanie układowe*) if the debtor

breaches the law or acts dishonestly by failing to provide guarantees for the implementation of arrangements with creditors. Immediately after the opening of the restructuring proceedings, the administrator takes control of the debtor's assets, administers them, prepares an inventory and valuation, and drafts and implements the restructuring plan. The administrator is also responsible for compiling an inventory of claims. The administrator's status is similar to that of a bankruptcy trustee, meaning that the administrator plays a dual role in restructuring proceedings:

- as an extrajudicial body of restructuring proceedings, responsible for drawing up a list of claims, drafting the restructuring plan, and submitting activity reports,
- as an indirect representative of the debtor, meaning that in matters relating to the insolvency estate, the administrator performs acts on behalf of the debtor but in their own name

The court supervisor and administrator, like the bankruptcy trustee, must report to the judge-commissioner on their activities. The supervisor's report must include at least: whether the debtor is paying debts incurred after the opening of restructuring proceedings (if not, the report should include the current status of outstanding debts), the debtor's income and expenditure, and the amount of cash in bank accounts and on hand, as well as a list of the debtor's activities beyond the scope of ordinary administration that the supervisor has agreed to carry out. The administrator's report, on the other hand, must indicate and discuss the stage of preparation or implementation of the restructuring plan and list both satisfied and unsatisfied liabilities. The administrator must also submit an accounting report, including a statement of income and expenditure. The administrator's accounting report is subject to control by the judge-commissioner, as well as by creditors and the debtor, under the same conditions that apply to the bankruptcy trustee's report (see above regarding the control of the bankruptcy trustee's expenses).

Re. (c) Administrator in enforcement proceedings

The Code of Civil Procedure provides for various forms of enforcement. One of them is execution by receivership (*zarząd przymusowy*) over a debtor's business or farm. Enforcement by receivership may be initiated at the

creditor's request. Its purpose is to satisfy creditors from the income derived from the business or farm. The court appoints an administrator, who may be an individual or legal entity designated by the parties, provided they hold an insolvency practitioner's licence. The administrator's task is to manage the enterprise or farm and then to draw up a plan for the distribution of the funds obtained through execution by receivership.

4. What are the rules for determining an insolvency practitioner's remuneration?

The performance of restructuring consulting activities, whether in the private or public sector, is a professional activity. As a rule, remuneration is due for activities performed in the course of professional work. The sources of remuneration for an insolvency practitioner may be:

- a contract between the insolvency practitioner and the client,
- a court decision determining the remuneration of an insolvency practitioner for acting as a supervisor, administrator or bankruptcy trustee.

The contract forms the basis for a claim for payment of remuneration in the following cases:

- providing consulting services that constitute restructuring advisory activities (rendering advice, opinions, explanations, and other restructuring and bankruptcy services),
- providing legal representation services (acting as a trial attorney) in bankruptcy and restructuring court proceedings,
- acting as an arrangement supervisor in proceedings for approval of an arrangement (the remuneration of the arrangement supervisor may be set at any amount; however, the law imposes an upper limit in the case of micro-entrepreneurs),
- acting as a supervisor of the implementation of an arrangement after the completion of restructuring proceedings (the remuneration for this role may also be determined within the content of the arrangement with creditors, as approved by the court).

In turn, **a court decision** serves as the basis for claims for payment of fees in cases where an insolvency practitioner acts as a supervisor, administrator, or trustee based on an order of the bankruptcy court, restructuring court, or enforcement court.

The rules for determining the remuneration of an insolvency practitioner acting as a court supervisor, administrator, or trustee are set out in the provisions of the Restructuring Law and the Bankruptcy Law. The basic rule is that remuneration is determined by court decision, which may be appealed by the participants in the proceedings. A final court decision serves as the basis for payment of remuneration. The remuneration is paid from the debtor's funds, i.e., from the insolvency estate. On an exceptional basis, in cases of consumer bankruptcy, the trustee's remuneration may be covered by the State Treasury. In bankruptcy and restructuring proceedings, the trustee, administrator, or court supervisor may collect advances on future remuneration. If the advances collected exceed the remuneration finally determined by the court, the insolvency practitioner must return the excess to the insolvency estate.

The remuneration of the supervisor, administrator and trustee is determined by the court based on objective and subjective considerations. Objective considerations include circumstances such as: the number of creditors, the number of employees, the amount of debt, the degree of creditor satisfaction, the duration of proceedings. Subjective considerations include factors such as: the insolvency practitioner's role in achieving the objective of the bankruptcy or restructuring proceedings, the complexity of the proceedings, the scope and nature of the activities performed by the insolvency practitioner.

5. Supervision of the activities of the insolvency practitioners

A fundamental issue in Polish insolvency law is the lack of a professional self-government for insolvency practitioners. As mentioned at the beginning of this paper, the field of insolvency practitioners is a liberal profession of public trust. For this reason, the legislator should establish a mandatory self-government for insolvency practitioners, which would, among other

things, have a disciplinary judiciary and develop a code of ethics for insolvency practitioners. The disciplinary system should be structured on two levels:

- first level: a two-instance disciplinary court,
- second level: an appeal against the decisions of the disciplinary courts to the ordinary court or the Supreme Court

At present, supervision of the activities of insolvency practitioners is dispersed. Two types of supervision can be distinguished:

- judicial supervision by the judge-commissioner and the bankruptcy (restructuring) court,
- administrative supervision by the Minister of Justice.

Judicial supervision is exercised on a case-by-case basis, within the framework of specific bankruptcy or restructuring proceedings. This supervision is carried out by the judge-commissioner and the bankruptcy (restructuring) court. The exercise of this supervision is illustrated below using the example of a bankruptcy trustee. In bankruptcy proceedings, the judge-commissioner oversees the trustee's activities in several ways. Firstly, the judge-commissioner examines the trustee's accounting reports to assess the legality of the trustee's actions, with particular attention to the reasonableness of the expenses incurred. Secondly, the judge-commissioner exercises ongoing supervision over the trustee's activities, identifies actions that the trustee may not undertake without prior approval, and addresses any misconduct by the trustee. Thirdly, the judge-commissioner has the authority to discipline the trustee by issuing a warning in the event of improper performance of duties. Fourthly, the judge-commissioner can impose a fine on the trustee. Finally, if the trustee's misconduct persists despite the imposition of a fine, or if the trustee commits gross misconduct, the bankruptcy court may take the most severe measure of dismissing the trustee.

Administrative supervision is exercised by the Minister of Justice over all persons licensed as insolvency practitioners. However, as stated in Article 20b(1) of the Act on the License of Insolvency Practitioners, this supervision may not interfere with the assessment of the legality of activities carried out by the insolvency practitioner directly on behalf of the court, with the permission or consent of the court or the judge-commissioner. This provision

raises a number of interpretative questions, including concerns about its compliance with the Constitution of the Republic of Poland, due to unclear criteria distinguishing between the sphere of activity of an insolvency practitioner that is subject only to judicial supervision and the sphere of activity that may also be subject to supervision by the Minister of Justice.

The supervisory powers of the Minister of Justice over the activities of persons licensed as insolvency practitioners include:

- suspension of rights under an insolvency practitioner's licence,[8]
- revocation of an insolvency practitioner's licence.[9]

The revocation of the rights under an insolvency practitioner' licence is mandatory if the licence holder:

- has lost citizenship of a Member State of the European Union, the Swiss Confederation, or a member state of the European Free Trade Agreement (EFTA),
- has lost full legal capacity,
- has been entered in the register of insolvent debtors,
- has been dismissed twice from the position of trustee, supervisor, or administrator by a final court decision due to improper performance of duties, or once in the case of gross misconduct,
- has made a request for revocation of the licence,
- has been convicted by a final judgment of an intentional crime or tax crime,
- has committed a persistent or flagrant violation of the law in connection with the performance of activities as an insolvency practitioner, and this violation has been established under the supervision of the Minister of Justice.

In addition, the Minister of Justice may (but is not obliged to) revoke the rights under an insolvency practitioner's licence if the licence holder has been convicted by a final judgment of an unintentional crime related to

8 Article 20 of the Act on the License of Insolvency Practitioner.

9 Article 18 of the Act on the License of Insolvency Practitioner.

the exercise of powers under the insolvency practitioner's licence that has affected the quality and manner of their execution.

In turn, **suspension of the rights under an insolvency practitioner's licence** is mandatory if, among other things, the insolvency practitioner is being prosecuted for an intentional crime for which a public indictment has been issued. In addition, the Minister of Justice may (but is not obliged to) suspend the rights under an insolvency practitioner's license if:

- there are proceedings against the insolvency practitioner for an unintentional crime prosecuted by public indictment,
- proceedings have been instituted for revocation of the insolvency practitioner's licence due to the insolvency practitioner committing persistent or gross violations of the law in connection with the performance of their professional activities.

In addition, the Minister of Justice may carry out the following supervisory activities as part of his supervisory powers:

- inspection covering the entire activity of a person licensed as an insolvency practitioner,
- inspection of selected aspects of the activities of a person licensed as an insolvency practitioner,
- request for production of documents prepared by an insolvency practitioner in connection with their role as supervisor, administrator, or trustee, together with explanations,
- requesting access to the files of completed or pending restructuring or bankruptcy proceedings in which a licensed insolvency practitioner has acted as a supervisor, administrator, or trustee,
- requesting the production of business books, including accounting records, of entrepreneurs who are or have been subject to restructuring or bankruptcy proceedings in which a licensed insolvency practitioner has acted as a supervisor, administrator, or trustee, and
- referral of the case to the judge-commissioner for handling within the framework of the supervision exercised by the judge-commissioner pursuant to the provisions of the Bankruptcy Law or the Restructuring Law, if the possible violations of the law or

other deficiencies relate to ongoing bankruptcy or restructuring proceedings.

6. **Conclusion**

The legal status of an insolvency practitioner under Polish law remains unclear due to the variety of functions that a licensed insolvency practitioner may perform. An insolvency practitioner may act both as a fully private entity (in which case they provide restructuring advice to clients) and as an extra-judicial authority in bankruptcy and restructuring proceedings (in which case they act as a supervisor, administrator, or trustee). In the latter case, the insolvency practitioner is treated as a private entity performing a public function in bankruptcy or restructuring proceedings. However, the source of this public function is not always a court decision, as is the case in proceedings for the approval of an arrangement, where the arrangement supervisor is appointed by the debtor rather than by the court.

The main shortcoming in the practice of the insolvency profession in Poland is the lack of professional self-government for insolvency practitioners and the lack of clear conditions for disciplinary liability. This, in turn, raises numerous concerns, including doubts about the compatibility of the provisions of the Act on the License of Insolvency Practitioners with the Constitution of the Republic of Poland and the European Convention on Human Rights. For these reasons, it is necessary to amend the law to establish a mandatory self-government for insolvency practitioners and to create clear regulations on the principles of disciplinary liability for insolvency practitioners as public trust professionals.

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Introduction to the Role of the Restructuring Plan in Polish Restructuring Proceedings

1. Introduction

In this article, I present an overview of the role of the restructuring plan in Polish restructuring proceedings, especially in comparison with documents that share the same or a similar name, originating from Chapter 11 of the United States Bankruptcy Code,[1] European Union law, and management studies. I also describe the circumstances under which this institution was originally introduced into the Polish legal system, replacing previously established regulations, and consequences thereof. I believe that a better understanding of the functions assigned to different documents and institutions forms the basis for proper comparative studies on insolvency law. Existing differences in terminology and applications of various related institutions may lead to inadequacies in the implementation of European law and comparative research. In preparing this paper, I have also used the results of my research into regulations regarding restructuring plans in Polish restructuring proceedings, published in 2020.[2]

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1 United States Code, Title 11 'Bankruptcy', Chapter 11 'Reorganization' <https://uscode.house.gov/browse/prelim@title11/chapter11&edition=prelim> accessed 24 November 2024.

2 See Hubert Zieliński, 'Analiza krytyczna instytucji planu restrukturyzacyjnego wprowadzonej ustawą z 15.10.2015 r. – Prawo restrukturyzacyjne' (2020) (5) Przegląd Sądowy 66–80.

2. Remarks on terminology – what does the term 'restructuring plan' actually mean?

The term 'restructuring plan' is ambiguous and has various meanings in international insolvency law and management studies. In its broadest sense, it is used in the context of European Union law,[3] where a restructuring plan is a collective expression for a set of documents that consists of financial, operational, asset-related, and informative components.[4] In this context, the term 'restructuring plan' refers 'both to the contractual or quasi-contractual provisions that amend the rights and obligations of the parties,[5] and to statements (…) that provide the parties and the court with all requisite information as part of the restructuring process'.[6] It does not matter whether national law provides for various separate documents or just one document.[7] In the European Union Directive on preventive restructuring frameworks, the content of the restructuring plan is regulated under Article 8, and it should contain, among other elements:

1. a list of the debtor's assets and liabilities,
2. affected parties and the classes into which the parties have been grouped (if applicable),
3. restructuring measures and their proposed duration,

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3 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) [2019] OJ L172/18; referred to as 'the Directive on preventive restructuring frameworks and second chance' or 'the Directive'.

4 See Przemysław Malinowski 'Rozdział 5. Plan restrukturyzacji' in Rafał Adamus and others (eds), *Dyrektywa o restrukturyzacji i upadłości. Perspektywa międzynarodowa i polska*, (Legalis 2021).

5 Therefore, restructuring plan is subject to a vote and confirmation by a judicial or administrative.

6 Lorenzo Stanghellini, Riz Mokal, Christoph G Paulus and Ignacio Tirado (eds), *Best Practices in European Restructuring. Contractualised Distress Resolution in the Shadow of the Law* (2018) 49 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3271790> accessed 24 November 2024.

7 ibid.

4. overall consequences regarding employees,
5. an estimation of future financial flow,
6. reasons explaining how the restructuring plan will prevent the debtor's insolvency.

This represents only the minimum standard, and 'Member States should be able to require additional explanations.'[8] In summary, when referring to the restructuring plan in the context of the European Union Directive on preventive restructuring frameworks and second chance, this term includes all documents covering operational and financial restructuring and should contain all necessary information allowing creditors and the court to assess the plan.[9]

On the other hand, in the United States Code, Title 11, Chapter 11 'Reorganization', which regulates corporate restructuring through the adoption of a reorganisation plan while benefitting from mechanisms such as automatic stay and the rejection of unfavourable executory contracts,[10] the term 'reorganisation plan' has a slightly different meaning than its European counterpart. According to 11 U.S. Code § 1123, the reorganisation plan must:

1. designate classes of claims and classes of interest,
2. specify the classes and claims that are not impaired under the plan,
3. specify the treatment of classes of claims or interest and ensure that treatment is uniform within each class,
4. provide means for implementation, such as retention of property by the debtor, sale or transfer of property, merger, consolidation, curing of defaults, satisfaction or modification of any lien.

8 Recital 42 of the Directive on preventive restructuring frameworks and second chance.

9 Stanghellini, Mokal, Paulus, Tirado (n 6) 50, 'The restructuring plan should provide the stakeholders and the court with all the information that is reasonably required to enable them to assess the plan.'

10 See Eduardo Cervantes, 'The Evolution of Chapter 11: How Corporate Restructuring Has Evolved and Its Important Role in the Recovery of a Struggling Economy' (2023) 20(1) DePaul Business & Commercial Law Journal 93 <https://via.library.depaul.edu/bclj/vol20/iss1/4> accessed 24 November 2024.

As we can see, the reorganisation plan focuses on the future of the debtor's property and liabilities from a financial and asset-based perspective,[11] but does not provide necessary financial and organisational context to assess its feasibility. To ensure that creditors have access to the information and data required to make an informed decision, § 1125 of the U.S. Bankruptcy Code introduces the so-called 'post-petition disclosure'. To approve or reject the proposed plan, claim holders must be provided with a written disclosure statement, which must be approved by the court.[12] The disclosure statement must contain 'adequate information' which is defined in § 1125(a)(1) of the U.S. Bankruptcy Code as 'Information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan (…)'. According to § 1125 (c) of the U.S. Bankruptcy Code, the disclosure statement may vary (in content and detail) depending on the class of creditors involved.

It is also important to note that there is a separate regulation regarding debtors owning small businesses.[13] In these cases, a reorganisation plan

[11] The reality of former functioning of Chapter 11 proceedings is presented by Douglas G Baird, 'The new face of Chapter 11' (2004) 12 American Bankruptcy Institute Law Review 69–99, where he points out that most of the large businesses reorganisations in Chapter 11 are solely '(…) one way in which a business is sold' (ibid 81).

[12] ibid 93–95, regarding practical problems with pre-negotiated plans and binding commitments to support a certain plan.

[13] Which is defined generally in § 1182 (1) of U.S. Bankruptcy Code as 'a person engaged in commercial or business activities (…) that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than $7,500,000 (excluding debts owed to 1 or more affiliates or insiders) not less than 50 percent of which arose from the commercial or business activities of the debtor (…)'. It does not apply to 'any member of group of affiliated debtors under this title that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than $7,500,000 (…)' and 'any debtor that is a corporation subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934 (…)' or its affiliate.

should include a brief history of business operations, a liquidation analysis, and projections demonstrating that the debtor can make payments according to the plan. The plan should also provide that a portion of the debtor's future income will be administered by a trustee to ensure that the plan is executed. Consequently, in small business cases, the court may determine that the information presented in the plan is adequate and that a separate disclosure statement is not required.

As we can see, under the U.S. Bankruptcy Code, the reorganisation plan is a document that primarily focuses on debt and asset restructuring, whereas all information necessary for creditors must be provided in a separate document called the disclosure statement, which is regulated separately.[14] In this sense, the term 'restructuring plan' or 'reorganisation plan' is used similarly in papers published by international organisations, for example, in the World Bank's Principles for Effective Insolvency and Creditor/Debtor Regimes,[15] the Asian Development Bank's Insolvency Law Reforms in the Asian and Pacific Region,[16] and UNICITRAL Legislative Guide on Insolvency Law.[17]

On the other hand, in management studies, the restructuring plan is primarily understood as a document of a strictly operational nature. It should contain the enterprise's history, an analysis of the business environment, an operational restructuring strategy (main products and services, competitive advantages, and the markets in which the company operates), action plans, risk assessments, and financial projections. Its role is to structure and set

14 See Ilona Bastiaansen, Alina Lerman, Frank Murphy, Dushyantkumar Vyas, 'Court Disclosures of Firms in Chapter 11 Bankruptcy' (2024) 8–13, SSRN: <http://dx.doi.org/10.2139/ssrn.4895138> accessed 24 November 2024.

15 World Bank, *Principles for Effective Insolvency and Creditor/Debtor Regimes* (The World Bank Group 2021) 27 <https://documents1.worldbank.org/curated/en/391341619072648570/pdf/Principles-for-Effective-Insolvency-and-Creditor-and-Debtor-Regimes.pdf> accessed 24 November 2024.

16 Asian Development Bank, *Law and Policy Reform at the Asian Development Bank: Insolvency Law Reforms in the Asian and Pacific Region* (2000) 44 <www.asianlii.org/asia/other/ADBLPRes/2000/1.pdf> accessed 24 November 2024.

17 UNCITRAL, *Legislative Guide on Insolvency Law* (United Nations 2005) 28–30 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf> accessed 24 November 2024.

objectives for changes in operational activities.[18] It focuses on the assets side rather than the liabilities side[19] and generally does not require extraordinary instruments provided by insolvency law, such as debt write-downs, postponements, or debt-to-equity exchanges.[20] It serves as a basis for managers to monitor the company's progress and the implementation of measures designed to improve solvency, regardless of formal insolvency proceedings.[21]

3. Overall view of the restructuring plan in Polish Restructuring Law – Act of 15 May 2015[22]

Under Polish Restructuring Law, a legislative model was adopted that separates the operational restructuring plan from the financial/assets restructuring arrangement. Consequently, according to Article 10 of the Restructuring Law, a restructuring plan should contain, i.a.:

1. a description of the debtor's enterprise and the market in which it operates,
2. an analysis of the causes of financial difficulties,

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18 As representative in this regard, I consider the model described by Stuart Slatter and David Lovet, *Restrukturyzacja firmy. Zarządzanie przedsiębiorstwem w sytuacjach kryzysowych* (Dąbrowski P (tr), WIG PRESS 2001) 169–187. See also Sławomir Kłosowski, 'The application of organizational restructuring in enterprise strategic management process' (2012) 16(2) Management 56–60 <www.management-poland.com/The-application-of-organizational-restructuring-in-enterprise-strategic-management,157968,0,2.html> accessed 30 November 2024; Sławomir Witkowski, 'Wykorzystanie planu restrukturyzacji przedsiębiorstw w ramach sądowych procedur naprawczych', (2015) 906(7) Przegląd Organizacji 14–15.

19 See Stanghellini, Mokal, Paulus, Tirado (n 6) 50–61, where authors describe two strategies – 'restructuring of the assets and operations of the debtor ("operational restructuring")' and 'restructuring of the debtor's capital structure and liabilities ("financial restructuring")'.

20 ibid 54–58.

21 Daniel Costea, Stefan Catalin Popa and Florentina Albu, 'Restructuring processes and crisis management – relevant concepts and their import in Romania' in *Proceedings of the 11th International Management Conference 'The Role of Management in the Economic Paradigm of the XXIst Century'* (2017) 424 <https://ideas.repec.org/a/rom/mancon/v11y2017i1p414-427.html> accessed 30 November 2024.

22 Act of 15 May 2015 – Restructuring Law (unified act, Journal of Laws of 2024, item 1428), hereinafter referred to as 'the Restructuring Law'.

3. a presentation of the future strategy and a risk analysis,
4. a schedule for the implementation of restructuring measures,
5. production capacity, sources of financing, and profit and loss forecast for the next five years.

As stated in the Restructuring Law and its rationale, a restructuring plan should allow creditors to assess the proposed restructuring arrangement and to monitor developments in the debtor's operational restructuring.[23] However, these are two separate documents–the restructuring plan is always prepared by a licensed restructuring advisor[24] acting as an extrajudicial authority, while the restructuring arrangement proposals may be prepared and submitted by various parties involved in the proceedings.[25] Therefore, while there is always one restructuring plan in Polish restructuring proceedings that focuses on operational issues, there may be competition between various arrangement proposals and different concepts for asset or debt restructuring. This is because arrangement proposals may be submitted not only by the debtor or the restructuring advisor acting as an extrajudicial authority but also by the creditors' committee (if established in the proceedings) and by a group of creditors holding 30% of voting rights.[26] Given this structure, it is unsurprising that arrangement proposals from the debtor and the creditors may differ substantially.

As we can see, Polish restructuring proceedings place significant emphasis on changes in operational activities by adopting the vision of the restructuring plan derived from management science.[27] This may suggest that modifications to the debtor's liabilities are merely ancillary

23 Explanatory memorandum to the Act – Restructuring Law, no. 2824, 20–21.

24 'Upon consent of the judge-commissioner' it is allowed to 'mandate the preparing of a restructuring plan to third parties'. (Article 10(4) of the Restructuring Law, (tr) Legalis). It is worth noting that this regulation is used extremely rarely. In general, the plan should be prepared in cooperation with the debtor (Article 37(2)(1) and Article 313(1) of the Restructuring Law).

25 In Polish law there is no period during which the debtor has exclusive right to submit propositions, like for example in 11. U.S. Code § 1121.

26 Article 155(1)–(2) of the Restructuring Law.

27 Witkowski (n 18) 17; Zieliński (n 2) 71.

to operational changes. However, such an assumption would not be entirely correct. The role of a restructuring plan varies depending on the type of proceedings. Polish restructuring law provides for four different types of restructuring proceedings: out-of-court proceedings (to approve the arrangement), accelerated arrangement proceedings, arrangement proceedings and remedial proceedings. The first three types primarily focus on debt restructuring and do not assume significant operational changes. In these proceedings, the restructuring plan plays no major role. While it should reflect the debtor's arrangement proposals, it does not have to be updated if these proposals change or if another party submits competing proposals. Only remedial proceedings are deeply focused on restructuring the way the company operates. They also provide unique rights to the administrator appointed by the court to improve the debtor's situation. These rights include, for example: right to terminate unfulfilled agreements or carry out layoffs under the same rules as in bankruptcy. To execute such rights, they must be scheduled in the restructuring plan and approved by the court.[28]

4. Former regulation under Polish Bankruptcy and Recovery Law – Act of 28 February 2003[29]

At this point, it is worth mentioning the regulations in force before the enactment of the Restructuring Law. The introduction of the restructuring plan resulted in the derogation of the institution of the justification of the arrangement proposal.[30] According to the regulations in force prior to the enactment of the Restructuring Law, the party submitting the arrangement proposal in bankruptcy proceedings was obliged to include its justification.[31] It had to contain, among other elements, a description of the enterprise, its

28 I presented these problems in more detail in Zieliński (n 2) 72–77.

29 Act of 28 February 2003 – Bankruptcy and Recovery Law (unified act, Journal of Laws of 2015, item 233), in the version prior to 1 January 2016, hereinafter referred to as 'the Bankruptcy and Recovery Law'.

30 I described current regulation in Zieliński (n 2) 72–77.

31 Zieliński (n 2) 67–69; Witkowski (n 18) 15–16.

financial, legal, and organisational situation, sector and risk analysis, methods and sources of financing the arrangement, and projected revenues and expenses. In recovery proceedings (which was a significantly different procedure from remedial proceedings under the Restructuring Law), the justification had to be expanded to include asset and employment restructuring policies (Article 503(1) of the Bankruptcy and Recovery Law), forming what was referred to as the recovery plan.[32] According to the views expressed in the legal literature, both the justification of arrangement proposals and the recovery plan should be relevant and revised in the event of modifications to the proposals.[33]

As we can see, the former regulations distinguished between proceedings aimed at restructuring the debtor's liabilities, where the party submitting the arrangement proposals was obliged to provide an updated justification together with information and data allowing creditors to make a rational decision, and proceedings aimed at restructuring both the debtor's liabilities and operations, where the debtor was required to prepare a more complex recovery plan, including information and data regarding its assets and employment.[34]

5. **My opinion**

From my perspective, the Polish requirement to prepare a restructuring plan in every restructuring proceeding, regardless of the difficulties a company faces, is excessive and artificial. I disagree with S. Witkowski, who criticised the former regulations because the justification of the arrangement proposal did not present a broader restructuring strategy with changes in operations, which, in his view, led to the perception that the arrangement

[32] Zieliński (n 2) 69; Witkowski (n 18) 16.

[33] Piotr Zimmerman, *Prawo upadłościowe i naprawcze. Komentarz*, Legalis 2014, Article 269; Aleksander Jerzy Witosz and Antoni Witosz (eds) *Prawo upadłościowe i naprawcze. Komentarz*, (5th edn, Wydawnictwo Prawnicze LexisNexis 2014), Article 283; Andrzej Jakubecki and Feliks Zedler (eds) in: *Prawo upadłościowe i naprawcze. Komentarz* (2011) Lex/el., Article 502; Zieliński (n 2) 68–69.

[34] Zieliński (n 2) 69; Witkowski (n 18) 15–16.

in bankruptcy proceedings was solely debt restructuring.[35] I also disagree with the rationale for the Restructuring Law bill, which states that the arrangement with creditors should be presented in the context of 'diverse and planned restructuring'.[36]

It is important to note that not all debtors facing financial difficulties (or at risk of default) require deep operational restructuring. There is nothing wrong with seeking postponements or even write-downs when a company has suffered from temporary difficulties or has been affected by external events. In practice, in most cases, the measures indicated in restructuring plans in Poland are purely focused on the liabilities side (cases involving SMEs).[37] In such cases, preparing a restructuring plan becomes a mere formality that does not align with its original purpose.[38]

In my practice as a restructuring advisor, I have encountered cases where debtors initiated restructuring proceedings due to legal disputes with business partners over lease terminations, and all they needed was a stay of execution to settle the dispute and propose a new payment schedule to creditors. I have also seen highly profitable debtors start restructuring proceedings because they lost a dispute with the tax authority and needed new maturity dates to pay outstanding commercial obligations and tax arrears. In cases where operational restructuring is not required, creditors should be provided with data presenting the debtor's business description, the origins of financial difficulties, sources of financing, and projected revenues and expenses – rather than a formal restructuring plan.

In my opinion, the obligation to prepare an operational restructuring plan should be limited to remedial proceedings. In other types of proceedings, it should be sufficient to provide creditors with a justification of the arrangement proposal, containing the information listed in former Article 280 of the Bankruptcy and Recovery Law.

35 Witkowski (n 18) 16.

36 Explanatory memorandum (n 23) 20.

37 'Micro, small and medium-sized enterprises' – see Article 2(2)(c) of the Directive on preventive restructuring frameworks and second chance.

38 Zieliński (n 2) 73–75.

6. Conclusion

The meaning of the term 'restructuring plan' varies across different legal systems and jurisdictions. In Poland, we have adopted an approach derived from management science, regulating the restructuring plan as a plan for implementing operational changes in the debtor's business, separating it from the arrangement regarding liability restructuring. The enactment of the Restructuring Law has also replaced the previous institution of the justification of the arrangement proposal, which primarily focused on the necessity and feasibility of the proposed arrangement. In my opinion, there is no need to prepare a restructuring plan concerning operational restructuring in all restructuring cases. In many instances, the debtor only requires debt postponement or changes in payment schedules due to external events or temporary difficulties. The restructuring plan, as constructed in Polish insolvency law, should be obligatory only in remedial proceedings. In other types of proceedings, it should be sufficient to provide creditors with a justification of the arrangement proposal, containing the necessary information about the debtor's financial situation and the feasibility of the proposed arrangement.

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The Impact of the Arrangement Adopted in the Restructuring Proceedings on the Payment of Debts Towards the Social Insurance Institution Covered by the Instalment Plan under Polish Law

1. Introduction

The Polish legal system provides for the possibility for a debtor to enter into an arrangement with its creditors through one of the procedures provided for in the Act of 15 May 2015–Restructuring Law.[1] The conclusion of an agreement through restructuring proceedings, which modifies the original rules for the performance of obligations, is aimed, in particular, at protecting a debtor who is insolvent or at risk of insolvency from bankruptcy. In addition to

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1 It should be noted, however, that analogous procedures also exist under the Law of 28 February 2003–Bankruptcy Law (see the provisions on arrangement in bankruptcy–Article 266 et seq. of the Bankruptcy Law, as well as the regulations governing proceedings for the conclusion of an arrangement at a meeting of creditors by a natural person not conducting business activity–Article 491[25] et seq. of the Bankruptcy Law).

the regulations of the Restructuring Law, the Polish legislator has introduced a separate institution of an agreement between the Social Insurance Institution and the debtor, by virtue of which the payment date of contributions may be postponed or spread into instalments (the so-called 'instalment plan with the Social Insurance Institution'). The lack of a clear regulatory solution for the situation where both agreements apply simultaneously to the same contribution liabilities of the same debtor causes significant complications in practice. The purpose of this article is to discuss the impact of the arrangement concluded in restructuring proceedings on the payment of debts to the Social Insurance Institution, which are covered by an instalment plan. It also attempts to address some of the practical uncertainties concerning treatment of interest for the period from the opening of restructuring proceedings.

2. The effects of the arrangement in terms of modification of legal relations

2.1. Legal nature of the arrangement

The scope of the article's subject matter justifies beginning the argument with fundamental issues related to the legal nature of the arrangement concluded in restructuring proceedings. Academics have long sought to answer the question of what an arrangement actually is, and over the years, various views have emerged regarding the origin of this institution. The arrangement has been described as an agreement with creditors,[2] a specific type of court settlement,[3] and even as a construct of a complex (private-public) nature.[4] More recent literature treats the arrangement as an institution of a special type – heterogeneous

[2] Oswald Buber, *Polskie prawo upadłościowe*, (Wydawnictwo Stowarzyszenia Przedstawicieli Handlowych w Warszawie 1936) 147.

[3] The specificity thereof lies in the fact that it did not require the consent of all creditors for its conclusion and that its effects were also binding on creditors who voted against the arrangement or did not personally participate in the proceedings at all (provided that their receivables were covered by the arrangement) – Feliks Zedler, *Prawo upadłościowe i układowe* (Towarzystwo Naukowe Organizacji i Kierownictwa 'Dom Organizatora' 1997) 429.

[4] Antoni Witosz, in Anna Hrycaj, Andrzej Jakubecki and Antoni Witosz (eds), *System Prawa Handlowego. Prawo restrukturyzacyjne i upadłościowe*, vol 6 (C.H. Beck 2020) 494, Legalis.

and beyond the framework of traditional civil law constructs.[5] As a result, it is easier to define the arrangement by identifying the key features it must possess. The doctrine highlights three essential elements: (i) arrangement proposals, (ii) declarations of intent by creditors made in accordance with the prescribed procedure (voting on the arrangement), and (iii) a court decision approving the arrangement.[6] Thus, the arrangement is a multidimensional construct that can be analysed on three levels. The first concerns the adoption of the arrangement, including the determination of its content and acceptance by authorised entities. The second is procedural, relating to the court's approval of the arrangement. The third, and most relevant for the considerations in this article, concerns the modification of legal relations between the debtor and its creditors,[7] which follows as a consequence of the first two.

2.2. **Modification of legal relations**

There can be no doubt about the broad impact of the arrangement on the relationship between the debtor and its creditors. As noted above, it applies in principle to all receivables covered by the arrangement, even if a creditor voted against it, did not vote at all, or was unable to vote due to disqualification, the disputed nature of the receivable, or its conditional status at the time of voting. Thus, regardless of the creditor's position, the arrangement triggers modifications to the legal relations between the debtor and its creditors, as well as to the debtor's assets. These modifications arise both from the content of the arrangement, as approved by a final and non-appealable court decision, and directly from the provisions of law.[8] It should be borne in mind, however, that the mere acceptance and approval of the arrangement signifies only that the creditors have granted the debtor sufficient confidence in the proposed solutions aimed at satisfying their claims and that the court has not identified any obstacles rendering the approval of such an arrangement impermissible (see Article 165 of the Restructuring Law). When the

5 ibid.

6 Bartłomiej Jochemczyk, *Zawarcie i zatwierdzenie układu w postępowaniu upadłościowym* (C.H. Beck 2011) 175 et seq.; see also Łukasz Szuster, *Skutki układu w postępowaniu upadłościowym* (C.H. Beck 2015).

7 Hrycaj, Jakubecki, Witosz (eds) (n 4) 495.

8 ibid 499.

decision approving the arrangement becomes final and non-appealable, the restructuring proceedings formally conclude (Article 324(1) of the Restructuring Law). However, it is only from that moment that the arrangement, as approved by the creditors, begins to take effect. The performance phase of the arrangement is characterised by the temporary and conditional nature of the agreements reached with the creditors. As long as the debtor complies with the arrangement's provisions, no creditor may enforce their claims other than in accordance with the arrangement.[9] Only through full compliance with the arrangement's terms will it be possible to consider the receivables as having been finally restructured.

2.3. **Change of maturity dates of the receivables**

Thus, the modification of legal relations also involves **a change in the maturity date of the receivable**. 'The arrangement modifies the content of existing obligations in such a way that **it creates a new maturity date**,[10] from which the creditor may only demand from the debtor what the arrangement provides for and on the terms indicated therein.'[11] This means that before the new maturity date of the receivable established in the arrangement, the **creditor may not** enforce its claims, and therefore, at that time, the receivable is not due.[12] It is rightly pointed out in the literature that the lawmaker did not introduce any exceptions to this mechanism of the arrangement in favour of public law claims,[13] and therefore, **public law claims are also assigned new**

[9] See the judgment of the Supreme Court of 12 April 2013, case No. IV CSK 591/12, in which it is indicated: 'The acceptance and approval of the arrangement does not affect the very existence of the covered receivable but sets the limits of its enforceability or other means of satisfaction, valid as long as the approved arrangement is binding and provided that it is performed. Setting aside the arrangement revokes the above effects of its conclusion and makes the covered receivable enforceable in its original amount or subject to satisfaction in a manner consistent with the content of the debtor's original obligation.'

[10] Bold font applied by the author.

[11] Aleksander Jerzy Witosz, 'Układ a kwestia przedawnienia' (2017) 10(4) Doradca Restrukturyzacyjny 62.

[12] ibid 62–63.

[13] Also, when the source of a public-law obligation is an administrative decision, it should be noted that 'administrative acts can now only exceptionally be the source of an obligation (...). Economic freedom is now a constitutional principle, which minimises the permissibility of creating individual relations through administrative acts of a nature other than

maturity dates in the arrangement.[14] In practice, public law institutions sometimes resist this position, raising concerns about the statute of limitations of the receivable as indicated in the Tax Ordinance,[15] despite the change in the payment date of the receivable under the provisions of the arrangement. However, this position is entirely unfounded.[16] Given the principle of universality of the arrangement and the completeness of the provisions of the Restructuring Law, some scholars even question the need for a specific regulation on the suspension of the limitation period in the Tax Ordinance or the Act on the Social Insurance System.[17] Nevertheless, by virtue of an amendment to the Act on the Social Insurance System, which entered into force on 18 September 2021, Article 24(5g) was added, stating: 'The limitation period shall not begin, and the one that has begun shall be suspended, from the date on which the contributions receivables referred to in Article 160 of the Law of 15 May 2015–Restructuring Law are covered by restructuring (...), until the date of payment of the last instalment in the case of spreading the payment into instalments, or until the date of payment in the case of postponement.' This amendment should be regarded as further supporting the argument that the arrangement also changes the maturity dates of receivables due to the Social Insurance Institution, as the limitation period for these receivables does not run until the date of their full satisfaction.

2.4. Agreement with Social Insurance Institution

Turning to the other institution under analysis, it should be noted that, in accordance with the Act on the Social Insurance System, the so-called instalment plan concluded between the debtor and the Social Insurance Institution

abstract acts' (cf. Ewa Łętowska, Łętowska E, 'Wprowadzenie do części ogólnej zobowiązań' in E Łętowska (ed) *Prawo zobowiązań – część ogólna. System Prawa Prywatnego. T. 5* (C.H. Beck 2006) 22).

14 Witosz (n 11) 64.

15 Act of 29 August 1997–Tax Ordinance (unified text, Journal of Laws of 2023, item 2383, as amended).

16 See Radomir Szaraniec, 'Problem przedawnienia zobowiązań publicznoprawnych w toku postępowań restrukturyzacyjnych' (2017) 10(4) Doradca Restrukturyzacyjny 68–71; Witosz (n 11) 63–65.

17 Witosz (n 11) 65.

is an agreement, as explicitly stated in Article 29(2) of the Act on the Social Insurance System. An agreement is concluded between the Social Insurance Institution and the debtor if it is justified by business reasons or other important considerations (Article 29(1) of the Act on the Social Insurance System). The modification of the obligatory relationship between the Social Insurance Institution and the debtor may involve postponing the payment date of contributions or spreading the payment into instalments. Remarkably, however, at the level of social security system regulations, there is significant divergence regarding the legal nature of the agreement entered into by the debtor with the Social Insurance Institution. The most important views in this regard have been compiled by P. Dobrowolski:[18] 'The literature describes the agreement in question as **an institution on the borderline between an administrative and civil settlement** (M. Cholewa-Klimek, *Postępowanie*..., chapter 3, point 3.2), **a *quasi*-settlement of substantive law** (K. Antonów, *Sprawy*..., p. 182), **a public law agreement** (L. Klat-Wertelecka, *Czy w egzekucji*..., pp. 472, 476 and 480), ***quasi*-procedural act** (J. Szyjewska-Bagińska, *Umowa odroczenia*..., pp. 31–32; J. Szyjewska-Bagińska, *Normatywny*..., p. 44), **and other than a decision form of settling a case in administrative proceedings** (J. Wantoch-Rekowski, in: *Ustawa*..., ed. J. Wantoch-Rekowski, commentary to Article 29).'[19]

2.5. Lack of grounds for the exclusion of receivables of the Social Insurance Institution from the arrangement concluded in the restructuring proceedings

Regardless of which of the above concepts on the nature of the debtor's bilateral agreement with the Social Insurance Institution should prevail, concluding that, despite the approval of the arrangement adopted in the restructuring proceedings, the debtor remains bound by the instalment plan previously agreed with the Social Insurance Institution would require accepting the thesis that the debtor is more strongly bound by this special institution under the Act on the Social Insurance System. Placing such

[18] Piotr Dobrowolski, in K Antonów (ed), *Ustawa o systemie ubezpieczeń społecznych. Komentarz* (Lex 2024) commentary to Article 29 point 3.3.

[19] Bold font applied by the author.

a thesis in the context of the considerations presented above would require assuming that the broad impact of the arrangement concluded in restructuring proceedings, for some special reason, bypasses those Social Insurance Institution receivables covered by the arrangement, as to the payment of which the debtor has agreed bilaterally with the Social Insurance Institution. The only basis for making an exception in this regard would have to be the existence of a specific legal provision that excludes the Social Insurance Institution's receivables from the arrangement, provided they were covered by the instalment plan. However, no such provision exists. The thesis that the instalment plan would be given priority appears even more implausible given that Article 160(1) of the Restructuring Law itself provides special conditions for the restructuring of debts owed to the Social Insurance Institution, as referred to in that provision. There is no doubt that the lawmaker's intention was to include these receivables in the arrangement in the same manner as any other. It is, therefore, difficult to find grounds for privileging the Social Insurance Institution's receivables in an even more far-reaching manner than the lawmaker has already done under the Restructuring Law by limiting the restructuring options for these receivables and guaranteeing their 100% satisfaction (excluding debt reduction). **Consequently, it must be argued that, in the case of an arrangement in restructuring proceedings involving the Social Insurance Institution's receivables, which were previously subject to a bilateral instalment plan, primacy should be given to the provisions of the arrangement concluded in restructuring. Accordingly, it is the terms of the arrangement that should be considered binding on the debtor with regard to the satisfaction of the Social Insurance Institution's receivables.**

2.6. Doubts about the instalment plan being in force during restructuring

As a side note, it should also be added that the very fact that the instalment plan remains in force during the ongoing restructuring proceedings is a kind of misunderstanding. Admittedly, there is no provision in the Act on the Social Insurance System that would explicitly state that, as a result of the opening of restructuring proceedings or the approval of an arrangement adopted in such proceedings, an instalment plan concerning the Social

Insurance Institution's receivables covered by the arrangement expires. However, such an effect naturally follows from juxtaposing the grounds for the expiration of the instalment plan, as indicated in the aforementioned act, with the prohibition on fulfilling performances resulting from the receivable debts covered by the arrangement, as set out in the Restructuring Law.

Pursuant to Article 29(3) of the Act on the Social Insurance System: 'If the debtor fails to pay instalments within the deadlines set by the Institution, the remaining amount shall become due and payable immediately, together with late payment interest calculated pursuant to the rules set out in the Tax Ordinance.' However, in the case of the initiation of restructuring proceedings, the debtor is generally not allowed to pay the debts covered by the arrangement at all. According to Article 252(1) of the Restructuring Law, which establishes the so-called payment moratorium: 'From the day of the opening of accelerated arrangement proceedings until the day of their completion or the day a ruling on the discontinuance of accelerated arrangement proceedings becomes final and non-appealable, the debtor or receiver may not fulfil performances resulting from the receivable debts which, by operation of law, are covered by the arrangement.'[20] The fulfilment of a performance resulting from the receivable debt covered by the arrangement, despite the aforementioned prohibition, is subject to the sanction of invalidity. Consequently, the creditor is obliged to return the received performance on the basis of the provisions on undue performance, i.e., Article 410(2) of the Civil Code.[21]

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[20] For a detailed discussion on the purpose of the payment moratorium in restructuring proceedings, see Norbert Frosztęga and Mateusz Waberski, 'Zwrot przedmiotu umowy przez dłużnika w kontekście zakazu spełniania świadczeń z wierzytelności objętych układem' (2021) (3) Monitor Prawa Bankowego 91. The prohibition on settling receivables covered by the arrangement also applied in the so-called simplified restructuring procedure provided for in Shield 4.0 (Article 16(3)(3) of the Act of 19 June 2020 on the subsidisation of interest on bank loans granted to entrepreneurs affected by COVID-19 and simplified arrangement approval proceedings due to COVID-19; unified text: Journal of Laws of 2021, item 1072). What needs to be emphasised, however, is that this prohibition **does not** apply in the amended proceedings for approval of the arrangement, even if an announcement was made regarding the determination of the arrangement date in those proceedings.

[21] Stanisław Gurgul, *Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz* (12th edn, Wydawnictwo C.H. Beck 2020) commentary to Article 252 of Restructuring Law, margin number 1, Legalis.

Given the wording of the above provisions, it is difficult to consider that a debtor can effectively perform an instalment plan if it involves receivables covered by the arrangement. However, based on experience, it should be noted that disagreements over payments to the Social Insurance Institution during restructuring proceedings are very common. If a debtor pays contributions for receivables not covered by the arrangement and fails to properly indicate this in the return, the Social Insurance Institution will allocate the payment to any arrears, regardless of whether it is aware of the pending restructuring proceedings. The instalment plan with the Social Insurance Institution should, therefore, expire during the restructuring proceedings as a result of the inability to fulfil the performance resulting from the receivable debts covered by the arrangement.

3. Payment of interest on receivables covered by the arrangement for the period from the date of opening of the restructuring proceedings

In light of the above finding that the provisions of the arrangement concluded in the restructuring proceedings are binding on the debtor in terms of the satisfaction of the receivables of the Social Insurance Institution, the question arises as to whether, in the case of an arrangement proposal created during the restructuring proceedings, which is intended to satisfy the receivable of the Social Insurance Institution, the debtor is obliged to pay interest for the period from the date of the opening of the proceedings. Doubt arises when comparing the regulation of Article 160(1) of the Restructuring Law with the content of arrangement proposals concerning the Social Insurance Institution, which frequently occur in practice. According to the aforementioned provision: 'Restructuring of obligations arising from social insurance contributions, contributions to the Labour Fund, the Guaranteed Employee Benefits Fund, the Bridging Pension Fund, contributions to the debtor's own social and health insurance, and the debtor's other obligations to the Social Insurance Institution, in particular late payment interest on the above-mentioned contributions, enforcement costs, costs of reminders and an additional fee, **may only involve spreading the payment into instalments or**

postponement of the payment date.'[22] Thus, this provision sets forth an absolute statutory prohibition on the reduction of these receivables, which applies equally to interest on receivables.[23]

However, in practice, the wording of the proposal regarding the satisfaction of the Social Insurance Institution's receivables, and consequently the wording of the arrangement, states that the debtor shall repay the Social Insurance Institution **in full**. Thus, a doubt arises as to how the debtor should proceed with respect to interest for a further period, i.e., accruing from the date of the opening of the restructuring proceedings, including after the end of the restructuring proceedings, namely, after the date of final and non-appealable approval of the arrangement.

Before answering the question posed, it is worth identifying the normative basis for the arrangement's coverage of interest claims for the period from the date of the opening of the restructuring proceedings and considering what the cut-off date is until which the interest is calculated.

The general legal basis for the inclusion of interest for the period from the date of the opening of the restructuring proceedings in the arrangement is Article 150(1)(2) of the Restructuring Law. This provision explicitly states that the arrangement covers interest for the period from the date of the opening of the restructuring proceedings (in the case of proceedings for the approval of an arrangement, in which there is no opening by the court, the relevant date will be, pursuant to Article 189(2) of the Restructuring Law, the arrangement day). This principle is not altered by the fact that in the inventory of receivable debts, interest on a monetary receivable debt is recorded in the amount accrued up to and including the day preceding the opening of the restructuring proceedings (the arrangement day). As the Court of Appeal in Gdańsk accurately noted in one of its rulings: 'The voting power of a given creditor will take into account only the interest for the period up to and including the day preceding the opening of the restructuring proceedings, not including the interest for the period from the date of the opening of the proceedings. However, this does not change the fact

[22] Article 160(1) of the Restructuring Law.

[23] Piotr Zimmerman, *Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz* (Legalis 2020), commentary to Article 160 of the Restructuring Law, margin number 2.

that the interest payments for the period from the date of the opening of the proceedings are also covered by the arrangement. This is because the arrangement includes all interest, both past and current, accrued for the period from the date of the opening of the proceedings, pursuant to Article 150(1)(2) of the Restructuring Law. The legal significance of Article 79(2) of the Restructuring Law is that subsequent interest, although covered by the restructuring, does not change the creditor's voting power (Article 107(2) of the Restructuring Law). In principle, interest as an incidental performance will share the fate of the restructured principal receivable.'[24]

As for the cut-off (end) date up to which interest accrues for the period from the date of the opening of the proceedings, it is clear that this date is the **date on which the decision approving the arrangement becomes final and non-appealable**, which also marks the conclusion of the restructuring proceedings (Article 324(1) of the Restructuring Law). It is from this date that the effects of the approved arrangement take effect, and from this date, the arrangement can be performed. This is already indicated, for example, by Article 171(1) of the Restructuring Law, which stipulates that as of the day when the decision approving the arrangement becomes final and non-appealable, the supervisor or receiver shall assume the role of supervisor of performance of the arrangement. This does not mean, of course, that the first repayments must be made on that date, as this depends on the content of the arrangement proposals, which in the vast majority of cases provide for a certain grace period for repayment. This grace period is typically included for practical reasons, allowing an easily identifiable date from which the first payments should be counted – for example, the last business day of the month following the month in which the arrangement was finally approved. Thus, after the completion of the restructuring proceedings, interest on the payment of individual instalments, in accordance with and based on the arrangement, no longer accrues, unless the debtor defaults on the payment of a particular instalment. In such a case, interest will accrue on that specific instalment for the period of delay.

[24] Judgment of the Court of Appeal in Gdańsk of 7 February 2019, V AGa 234/18, Legalis.

4. Conclusion

Given the content of Article 160(1) of the Restructuring Law, which imposes restrictions on the methods of restructuring the receivables of the Social Insurance Institution specified therein, it should be concluded that the prohibition on even partial redemption of these receivables applies both to interest accrued up to and including the day preceding the opening of the restructuring proceedings (the arrangement day) and to interest accruing from that date up to the date on which the arrangement is finally approved.[25] After that date, as a result of the arrangement fixing new payment deadlines, interest does not accrue as long as the debtor duly performs the arrangement. Failure to comply with the arrangement reactivates the running of interest, but only on the instalment not paid on time. Only if the arrangement is set aside as a result of non-performance (Article 176 of the Restructuring Law) can creditors seek recovery of their receivables in their original amount. In such a scenario, interest should be calculated on the receivable in its original amount.[26]

[25] If the arrangement proposals do not explicitly provide for the redemption of at least part of the receivable, while at the same time indicating that the entire receivable is to be satisfied, it should be considered that the proposals, and consequently the subsequent arrangement, provide for 100% satisfaction of the Social Insurance Institution's receivables with no reduction whatsoever. In any other case, the arrangement would not have been approved by the Court on the grounds that it would have violated the law (Article 165(1) in conjunction with Article 160(1) of the Restructuring Law).

[26] Rafał Adamus, *Prawo restrukturyzacyjne. Komentarz* (2nd edn, Legalis 2019) commentary to Article 179 of the Restructuring Law, margin number 11.

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Manifestations of the Publicity Principle in the Bankruptcy Proceedings from a Polish Perspective

1. Introduction

The introduction of an ICT system into bankruptcy proceedings through the Act on the National Register of Debtors (hereinafter 'the ANRD'), has increased the importance of openness in bankruptcy proceedings. This primarily concerns the external publicity of such proceedings. Universal access to information on pending bankruptcy proceedings ensures the security of business transactions. Posting information on the KRZ public portal is not the only manifestation of the principle of publicity in bankruptcy proceedings. This principle is also upheld in the regulations of the Bankruptcy Law (hereinafter 'the BL') and the relevant provisions of the Code of Civil Procedure (hereinafter 'the CCP'). This article attempts to provide a comprehensive analysis of the role of publicity in bankruptcy proceedings on the basis of the Bankruptcy Law.

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1.1. The principle of publicity as one of the supreme principles of the process

The principle of publicity is one of the supreme principles of civil procedure. Procedural rules guide the interpretation and application of the legal framework governing a given proceeding and, as a result, serve as a guarantee of its proper conduct.[1]

The purpose of civil proceedings, as a legally regulated set of actions, is to enforce and concretise legal norms in civil matters in a manner prescribed by law.[2] Bankruptcy proceedings are classified as judicial civil proceedings.[3] A bankruptcy case is a civil case aimed at resolving the conflict of interest between an insolvent debtor and the creditors competing for satisfaction from the bankruptcy estate of a bankrupt entrepreneur or a non-business individual.[4]

It should be borne in mind that bankruptcy proceedings are characterised by a clear distinction between two stages. Broadly speaking, these include the proceedings for the declaration of bankruptcy and the post-declaration of bankruptcy proceedings, which combine elements of classic preliminary proceedings related to the enforcement of claims by the bankrupt's creditors and the stage of enforcement proceedings aimed at distributing the bankrupt's estate among creditors, including covering the costs of the proceedings.

Within the above-mentioned stages of bankruptcy proceedings, both before and after the declaration of bankruptcy, the provisions of the Code of Civil Procedure ('the CCP') should be applied *mutatis mutandis* in matters not regulated by bankruptcy law (Article 35 BL and Article 229(1) BL). At this point, it should be recalled that the CCP systematics indicate that certain general principles of proceedings, including Article 9 CCP concerning the principle of publicity of proceedings, are included in the Preliminary Title –

1 Bogdan Bladowski, *Metodyka pracy sędziego cywilisty* (4th edn, Wolters Kluwer 2013).

2 Andrzej Zieliński and Kinga Flaga-Gieruszyńska (eds), *Kodeks postępowania cywilnego. Komentarz* (Legalis 2022), commentary to Article 1.

3 Bronisław Dobrzański, Marian Lisiewski, Zbigniew Resich and Władysław Siedlecki, *Kodeks postępowania cywilnego. Komentarz*, (Siedlecki W and Resich Z (eds), Wydawnictwo Prawnicze 1969) 12; Stanisław Włodyka, 'Pojęcie postępowania cywilnego i jego rodzaje' in Jerzy Jodłowski and Stanisław Włodyka (eds), *Wstęp do systemu prawa procesowego cywilnego* (Ossolineum 1974) 325; Paweł Janda, *Prawo upadłościowe* (3rd edn, Wolters Kluwer Polska 2023) Lex/el.

4 Janda (n 3), commentary to Article 1, margin number 7.

General Provisions of the Code of Civil Procedure. In turn, the aforementioned Article 35 BL and Article 229(1) BL confirm that, as a rule, the provisions of Book One of Part One of the CCP will be applicable in bankruptcy proceedings, without explicit reference to the Preliminary Title containing the general provisions of that Code. However, it must be accepted that the provisions of the Preliminary Title apply whenever any of the further CCP provisions are applicable.[5] In my opinion, this view will be reflected in bankruptcy proceedings, where, in matters not regulated by the Act, reference is made to the application of Part One of Book One of the CCP. Any different standpoint would contradict the essence and purpose of the regulation, as the shaping and interpretation of the remaining norms of civil proceedings, including its specific form – bankruptcy proceedings – should always take into account the grounds for regulation contained in the introductory provisions, unless specific provisions dictate otherwise. It should also be pointed out that the appropriate application of a regulation means that it may be applied directly, with modifications, or may not apply to certain events.

Against this background, the principle of publicity of proceedings should be emphasised, as it relates to one of the fundamental human and civil rights – namely, the right to a fair trial – enshrined in Article 45(1) of the Constitution of the Republic of Poland and in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome on 4 November 1950.[6] This principle is explicitly expressed in these provisions as a guarantee of due process.

2. The principle of publicity in terms of the general institutions of civil procedure

According to Article 45(1) of the Polish Constitution, everyone has the right to a fair and public hearing without undue delay by a competent, independent, and impartial court. Similar provisions are contained in Article 6 of the

5 Marek Mrówczyński, *Uczestnicy postępowania upadłościowego* (Wolters Kluwer Polska 2019) ch II Lex/el.

6 Journal of Laws of 1993, item 284, as amended.

Convention of 4 November 1950, which stipulates that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law when determining of his civil rights and obligations or of any criminal charge against him. Additionally, attention is drawn to the fact that analogous regulations, as provided for in the Convention, are also found in the International Covenant on Civil and Political Rights of 19 December 1966.[7] Article 14(1) of the Covenant states, *inter alia*, that everyone has the right to a fair and public hearing of their case. These international legal instruments have been ratified by the Republic of Poland and, by virtue of Article 91(1) of the Polish Constitution, form an integral part of the Polish legal order.

At this point, it is important to note that the right to a court and the right to a fair trial or proceeding are absolute rights that cannot be subject to modification. However, the right of a party to have their case heard in public may be limited. The above-mentioned fundamental legal provisions already contain inherent limitations regarding the principle of adjudication in court cases. They indicate that the exclusion of trial openness may be justified on the grounds of morality, state security, and public order, as well as for the protection of the private life of the parties or other important private interests, with the proviso that the verdict must be publicly announced (Article 45(2) of the Constitution of the Republic of Poland). Similarly, the aforementioned international legal instruments impose restrictions on the principle of publicity. While proceedings before a court are generally public, the press and the public may be excluded from all or part of a trial in the interest of morals, public order, or national security in a democratic society. Exclusions may also apply when the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the court's opinion, in special circumstances where publicity would prejudice the interests of justice (cf. Article 6(1) of the Convention and Article 14(1) of the 1966 Covenant).

The constitutional principle of publicity has been explicitly established as a fundamental principle of civil proceedings. Article 9 CCP states that cases are heard in public unless a specific provision stipulates otherwise. It also specifies that parties and participants in the proceedings have the right

[7] Journal of Laws of 1977, margin number 38, item 167.

to inspect the case file and obtain copies, photocopies, or extracts therefrom. External publicity is also manifested in the ability of representatives of the mass media – such as the press, television, and internet media – to participate in proceedings. This is particularly relevant in cases of significant public interest, e.g., the bankruptcy of banks or companies with a large number of employees, where the media inform the public about the initiation of proceedings, their direction, and the decisions or rulings issued.[8] Notably, the European Court of Human Rights does not require the publication of every substantive judgment rendered in a case. It has indicated that the public announcement of a cassation court's judgment may be omitted if the judgments of the lower courts have already been published.[9]

This approach to the principle of publicity distinguishes two aspects: external publicity – for the general public, who may wish to be informed about actions taken and decisions made in the proceedings[10] – and internal publicity, which concerns the parties and participants in the case. The openness of a proceeding, through the availability of information on its course, is an essential element of fair proceedings, with the proviso that it may be fulfilled without the participant having to take any action in the proceedings. The principle of publicity ensures that a party has the right to be informed about what actions and decisions are taken in the proceedings, by whom, and when, even if they do not wish to engage in the procedural dispute.[11]

The distinction between internal and external publicity does not imply that internal publicity is subject to the same limitations as external publicity, including the exclusion of the public from hearings.[12]

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8 Leszek Garlicki, Piotr Hofmański and Andrzej Wróbel (eds) *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz do artykułów 1–18*, vol 1 (Legalis 2010), commentary to Article 6, margin number II.E.1.

9 Janusz Roszkiewicz, 'Jawność postępowania sądowego w świetle Europejskiej konwencji praw człowieka' (2021) 2(27) Radca Prawny. Zeszyty Naukowe 21.

10 Henryk Dolecki (ed), *Kodeks postępowania cywilnego. Komentarz,* vol 1, (Lex 2001), commentary to Article 9.

11 Ryszard Ponikowski, in Jerzy Skorupka (ed), *Jawność procesu karnego* (Wolters Kluwer Polska 2012) Lex/el.

12 Anna Machinkowska, 'Zasada jawności w postępowaniu procesowym - modernizacja czy marginalizacja? Wybrane zagadnienia' (2022) 13(1) Polski Proces Cywilny 80.

External publicity means that, in public court hearings (both trials and other hearings that are not trials), access to the courtroom is open to adults, in addition to the parties and summoned persons.[13] Pursuant to Article 152(1) and (2) CCP, only adult persons who do not carry arms are allowed to attend public court hearings. The age of majority requirement does not apply to the parties, indirect intervenors, their statutory representatives and agents, as well as summoned persons, nor to minors or armed persons who are present with the permission of the presiding judge. On the other hand, only persons who have been summoned (Article 152(3) CCP) may attend *in camera* hearings. The exclusion or limitation of the publicity of a hearing may apply to a single hearing or an entire category of cases.[14] It may also concern specific aspects of the case under consideration during the proceedings, as reflected in Article 153 CCP, which provides for the possibility of conducting proceedings – either wholly or partially – behind closed doors, either *ex officio* or upon request. The principle of publicity is also subject to limitations in relatively new institutions of civil procedural law. It should be noted that Article 148 § 3, in force since 21 August 2019, provides that the court may make an order *in camera*. As a general rule, orders made in trial proceedings are a form of judicial decision on incidental or formal issues. The amendment of Article 148 § 3 CCP and Article 148^1 § 2 CCP resulted in a shift away from specifying the types of orders, e.g. orders for evidence (repealed Article 148^1 § 2 CCP), that may be issued *in camera*. Instead, the general rule of competence under Article 148(3) CCP now allows the issuance of orders *in camera*. Analogously, the case is made for the institution set out, for example, in Article 191^1 § 3 CCP, in force since 7 November 2019, which permits the dismissal of an action *in camera*, without serving the statement of claim on the person named as the defendant or considering motions filed with the statement of claim, if the allegations in the statement of claim clearly show that the action is groundless.

13 Henryk Dolecki, *Kodeks postępowania cywilnego. Komentarz*, vol 1 (Lex 2011), commentary to Article 9.

14 Machinkowska (n 12).

At this point, it is impossible to overlook the institutions introduced into the Code of Civil Procedure by the amendment in force since 1 July 2023.[15] Particular attention is drawn to the content of Article 224 § 3 CCP, which provides that if the court deems it unnecessary to schedule further hearings in a case, the trial may be closed, provided that the parties are given a time limit – no shorter than seven days – to present their position in a pleading. As pointed out by the legislator, due to the strengthening of the principle of the written nature of civil proceedings, there are no obstacles to hearing the parties in writing after the taking of evidence, and the closing of the trial does not constitute an action for which a public hearing is necessary.[16]

Conversely, it must be assumed that internal publicity cannot be restricted. In practice, there have been attempts to limit the internal openness of proceedings. A relevant example concerns information constituting bank secrecy, where, in a case concerning retention, the Supreme Court held that a bank is obliged to provide the court with information covered by bank secrecy.[17] In the cited ruling,[18] the Supreme Court stated that only the information provided by the bank should reach the court, but this does not mean that the parties or participants in the proceedings will be unable to access the bank's response in the case file.[19] The view is that, in the context of the internal principle of publicity, it is not possible to reconcile the directive that information constituting bank secrecy should not reach the participants in non-contentious or contentious proceedings with the principle that, even when a case is heard *in camera*, the file remains public – i.e., accessible to the participants in the proceedings.[20] Thus, participants in the proceedings always have the right to inspect the case file and to obtain copies or extracts thereof, even when the case is heard *in camera*. Furthermore,

15 Journal of Laws of 2023, item 614.

16 Explanatory memorandum to the Act of 27 September 2022 on amending the Act–Code of Civil Procedure and certain other acts, No. 2650.

17 Resolution of the Supreme Court of 7 December 2006, case No. III CZP 88/06.

18 ibid.

19 Agnieszka Żygadło, *Wyłączenia tajemnicy bankowej a prawo do prywatności* (2011) ch 4 Lex/el.

20 Grzegorz Gorczyński, 'Glosa do uchwały SN z dnia 7 grudnia 2006 r., III CZP 88/06' (2007) (12) Przegląd Prawa Bankowego Lex/el.

a party or participant in the proceedings also has the right to obtain information about the case.[21]

3. Implementation of the principle of publicity in bankruptcy proceedings

Assessing the implementation of the principle of publicity in bankruptcy proceedings should begin by outlining the scope of bankruptcy law regulation. It should be recalled that the structure, function, and purpose of bankruptcy law result in its provisions covering both proceedings on the recognition of a bankruptcy petition and post-declaration bankruptcy proceedings.

Furthermore, it must be remembered that bankruptcy law does not consist solely of regulations within the field of civil procedure law. It also contains numerous substantive legal norms that define the rights and obligations of participants in the proceedings, including third parties in economic transactions, particularly in relation to property rights, one of the most significant spheres of ownership for any legal entity. Within the structure of the Act, substantive bankruptcy provisions are not separated from procedural regulations, as they are arranged according to the chronological order of procedural actions.[22] It should further be recognised that rules of procedure may influence the manner and effectiveness of implementing substantive law norms by defining the principles and rules that govern their application – the realisation of the content of the substantive law norms – rather than the implementation of the substantive law norm itself. An example of such an institution is the tender or auction provided for in bankruptcy proceedings (cf. Article 56ca BL). At this point, it may already be emphasised that, in relation to this institution, bankruptcy law provides for a limitation on the principle of publicity. For example, reference may be made to Article 216ab BL, which prevents certain documents from being made available through the ICT system supporting bankruptcy proceedings. This provision introduces

[21] Karol Weitz, 'Kodeks postępowania cywilnego. Komentarz' in Ereciński T (ed), *Tom I. Postępowanie rozpoznawcze (art. 1-124)* (6th edn, Wolters Kluwer Polska 2023) Lex/el., commentary to Article 9, margin number 8.

[22] Mrówczyński (n 5) ch II.

subjective exclusions regarding application of the ICT system, specifically concerning the submission of pleadings and documents containing classified information, as well as bids submitted in the course of a tender or auction. These are submitted without using the ICT system because the abovementioned documents, taking into consideration their content, must bypass the open ICT system. Submitting them via the system would nullify the documents intended purpose, e.g. by revealing the price offered in a tender and then placing it in the ICT system before the award is made. Consequently, such documents are submitted in paper form and are not subject to digitisation.[23]

3.1. The National Register of Debtors and the ICT system – a new quality in ensuring openness in bankruptcy proceedings

An assessment of the extent to which the principle of publicity in bankruptcy proceedings has been realised should begin with the adopted model of bankruptcy proceedings, which, since 1 December 2021, has been conducted exclusively through the ICT system handling the proceedings, with the National Register of Debtors (Krajowy Rejestr Zadłużonych, KRZ) playing a key role. The functioning of information systems can contribute to enhancing the implementation of the principle of publicity – both externally and internally.

It should be recalled that electronic writ-of-payment proceedings (Article 505^{28} et seq. CCP), established for pecuniary claims in cases where the facts are straightforward and do not require evidentiary proceedings, should be regarded as the first fully computerised proceedings. It should also be observed that, in these proceedings, it is the rule that, even after an electronic enforcement clause has been granted, the court does not serve the enforceable title thus created on the creditor (Article 783 § 4 CCP in conjunction with § 3 and § 7 of the Regulation of the Minister of Justice).[24] Instead, the creditor receives an electronic document containing the content of the enforcement order and the electronic enforcement clause.

[23] Janda (n 3), commentary to Article 21.

[24] Regulation of the Minister of Justice on the activities of the court related to the granting of an enforceability clause to electronic enforcement titles and the manner of storage and handling of electronic enforcement titles (Journal of Laws of 2016, item 1739).

Another procedure that is, in principle, electronic-only is the registration procedure. Pursuant to section 19(7) of the National Court Register Act, in force since 1 July 2021,[25] an application not submitted via the IT system and not paid for shall be returned without a request for correction. This applies to applications relating to entities entered in the register of entrepreneurs.[26] It should be noted that, pursuant to Article 8 ANRD, the Register is public, and everyone has the right to access the data contained therein through the Central Information. Additionally, individuals have the right to obtain, also by electronic means, certified copies, extracts, copies, certificates, and information from the Register. While it should be recognised that the principle of publicity of the National Court Register (*Krajowy Rejestr Sądowy*, KRS) is not equivalent to the procedural principle of publicity in proceedings set out in the Code of Civil Procedure, I believe these principles are closely linked. The principle of publicity of the Register, which is maintained as an electronic system, complements and can contribute to extending the principle of publicity in proceedings. It is argued in the literature that Article 8 ANRD introduces the principle of formal openness of the Register. This means that publicity applies both to the data disclosed in the ICT system and to the documents comprising the register files, and that demonstrating a factual or legal interest is not required for the Central Information to issue a document.[27] In addition to formal publicity, substantive publicity is distinguished in relation to trade security. This principle establishes that an entity obliged to submit an application for entry in the Register may not invoke against third parties acting in good faith any data that have not been entered in the Register or have been deleted from it (the negative aspect of substantive publicity – Article 14 ANRD). Additionally, from the date of publication in the MSiG (*Monitor Sądowy i Gospodarczy*), no one may plead ignorance of the announced entries, subject to the proviso that, in respect of acts effected before the 16th day after publication, an entity entered in the Register may not rely on the entry against a third party if that third party

25 Consolidated text, Journal of Laws of 2023, item 685.

26 Tomasz Szczurowski, in Konrad Osajda (eds), *Ustawa o krajowym rejestrze sądowym. Komentarz* (Legalis 2020), commentary to Article 19, margin number 84.

27 Łukasz Zamojski, *Ustawa o krajowym rejestrze sądowym. Komentarz* (2nd edn Lex 2023), margin numbers 1 and 2.

proves that they could not have known of its content (the positive aspect of substantive publicity).[28]

When assessing the registers/records kept in the IT system, it is necessary to identify those in which the disclosed data are of considerable importance, including for bankruptcy proceedings, if only in relation to the fact of conducting business activity or its duration (Article 7 BL and Article 8(1) BL). The Central Register and Information on Business Activity (CEIDG) should be regarded as the relevant register referred to, albeit under Article 8(1) BL, CEIDG is maintained in an ICT system by the minister competent for the economy. The data and information made available by CEIDG are public. Everyone has the right to access this data and information, which, as a rule, is made available via the Internet (Article 45(1) and (2) of the Act on CEIDG).[29] The above-mentioned Article 45 of the Act on CEIDG establishes the principle of formal publicity of the register, as a result of which every interested party – whether an entrepreneur, a person without such status, a legal or natural person, an administrative body, a state authority, etc. – has the right to access the data made available by CEIDG without needing to demonstrate an interest in obtaining this information.[30] The institution of presumptions established in relation to CEIDG cannot be overlooked, as its establishment is closely tied to the principle of formal openness of the register. According to Article 16(1) of the Act on CEIDG, it is presumed that the data entered in CEIDG are true. Furthermore, an individual registered in CEIDG is, as a rule, liable for damage caused by submitting false data to CEIDG if such data were subject to mandatory entry at their request, as well as for failing to submit data required for entry in CEIDG. This presumption is effective within the sphere of the entrepreneur's interests and affairs, covering both private (civil law) and public (administrative law) domains.

28 Szczurowski (n 26), commentary to Article 8, margin numbers 8, 9, 17.

29 Consolidated text, Journal of Laws of 2022 , item 541.

30 Grzegorz Kozieł (ed), *Ustawa o centralnej ewidencji i informacji o działalności gospodarczej i punkcie informacji dla przedsiębiorcy. Komentarz* (Legalis 2019), commentary to Article 45, margin number 1.

Furthermore, it is presumed that economic activity is carried out by the entrepreneur continuously (Article 16(2) of the Act on CEIDG).

Article 24(1) of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings[31] provides that Member States shall establish and maintain in their territory one or several registers in which information concerning insolvency proceedings is published ('insolvency registers'). That information must be published as soon as possible after the opening of such proceedings. The register operates within an ICT system, ensuring that data can be posted automatically, e.g., following an action such as a court order. Pursuant to Article 24(2) of the aforementioned Regulation (EU) 2015/848, the information published in the insolvency register shall be made available to the public under the conditions set out in Article 27. This provision includes regulations concerning, in principle, free maintenance of and access to the Register, possibility of introducing additional criteria for searching data of individuals not engaged in business activity or individuals engaged in business activity if the proceedings do not concern that activity, and the potential introduction of restrictions on access to data based on a demonstrated legitimate need. These measures are intended to ensure certainty in trade and the widest possible awareness of proceedings, including the ability to react to actions taken in bankruptcy proceedings.[32] Article 4a BL, in force since 1 December 2021, states that whenever the Act refers to the 'Register', it shall be understood to mean the National Register of Debtors. The Register referred to in Article 4a BL constitutes a bankruptcy register within the meaning of Article 24(1) of Regulation 2015/848 (Article 3 ANRD). The Register does not disclose information on cases where a petition for bankruptcy, a petition to open proceedings for the approval of an arrangement at a creditors' meeting, a petition to open secondary bankruptcy proceedings, a petition for the recognition of a decision on the opening of foreign bankruptcy proceedings, a restructuring petition, a petition for a statement of execution, modification or revocation of an arrangement, or a petition for a prohibition order referred to in Article 373(1) BL was filed

[31] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141, 5.6.2015, p. 19.

[32] Janda (n 3), commentary to Article 4a, margin number 7.

before the entry into force of the provisions on the Register. Accordingly, it does not contain information on cases filed before the Register and the IT system became operational, i.e., before 1 December 2021.

Cases initiated and not concluded before the date of entry into force of the provisions on the Register shall be governed by the existing provisions. The files of such cases shall be maintained in paper form and shall not be converted into files maintained in the ICT system supporting court proceedings (Article 30 ANRD).

Pursuant to Article 4 ANRD, the Register is public, and everyone has the right to access the data disclosed therein, as well as the data covered by notices, via the Internet. As with the principle of publicity of the National Court Register, the principle of publicity of the National Register of Debtors should not be equated with the procedural principle of publicity in proceedings, though the two are closely linked. It can certainly be stated that the principle of publicity of the National Register of Debtors extends the principle of external publicity in proceedings, i.e., *inter alia*, access to information on the course of proceedings by third parties who are not, or are not currently at a given stage, a party or participant in, among other things, bankruptcy proceedings.

Unlike the National Court Register, the publicity of the National Register of Debtors can, in principle, be considered only from a formal aspect, relating to access to information and documents without the need to demonstrate an interest in obtaining specific data. In the case of the National Register of Debtors, there are no analogous provisions in the Act to the above-cited Article 14 of the Act on the National Court Register. The regulations concerning the National Register of Debtors do not introduce legal presumptions regarding the data contained therein (e.g. no presumption of the veracity of the data disclosed in the Register), as it does not contain entries similar to those in the National Court Register, but only information – albeit information that carries legal significance.[33] However, while this position is justified by the wording of the Act on the National Register of Debtors, the broader legal system, in which regulations of various laws

[33] Izabella Gil, Jacek Gołaczyński, Łukasz Goździaszek and Krystyna Rogala (eds), *Ustawa o Krajowym Rejestrze Zadłużonych. Komentarz* (Legalis 2023).

complement and even establish an additional aspect of the publicity of the National Register of Debtors, cannot be overlooked. An example of such a regulation is Article 228(3) BL in conjunction with Article 4a BL, which provides that from the date of the announcement in the Register, ignorance of its contents cannot be pleaded unless, despite exercising due diligence, one could not have known about the announcement. Thus, the legislator has introduced the principle of substantive publicity of the National Register of Debtors in insolvency law, analogous to that of the National Court Register. By creating the KRS, the legislator has made participants in legal transactions responsible for examining its content.[34] An analogous solution is provided in Article 206(3) of the Restructuring Law. This raises the question of the nature of the substantive publicity of the National Register of Debtors, as established in the aforementioned provisions of the Bankruptcy and Restructuring Law, in relation to the principle of publicity of the KRZ as provided for in the Act on the National Register of Debtors. In my opinion, this issue should be resolved by recognising that the substantive publicity of the National Register of Debtors applies exclusively to those proceedings that explicitly provide for and establish this principle – cf. Article 228(2) BL and Article 206(3) of the Restructuring Law, within the framework of their own specific regulations. However, this does not constitute a basis for creating a general principle of substantive publicity for all announcements, information, and entries disclosed in the KRZ, except for those made within proceedings whose model is established by provisions introducing the principle of publicity of the KRZ.

ICT systems, as part of the model aimed at the digitisation of court proceedings, serve as a source of information on the status of, *inter alia*, civil cases, including bankruptcy proceedings. They provide EU citizens with access to information, documents, and events related to ongoing proceedings. As these systems continue to be developed, expanded, and supplemented, they contribute to the implementation of the principle of publicity, understood not only as the publicity of individual registers but also as a procedural principle, both in its external and internal aspects. At the same

[34] Rafał Adamus, *Prawo upadłościowe. Komentarz* (Legalis 2021), commentary to Article 228, margin number 2.

time, these systems enable participants to perform procedural acts, such as the service of documents, submission of pleadings, access to case files, and facilitate mutual contact and coordination of actions undertaken by judicial authorities of EU Member States.

3.2. Publicity of the information on the opening of bankruptcy proceedings

As already emphasised, bankruptcy proceedings comprise two stages – the bankruptcy proceedings and the proceedings conducted after the bankruptcy declaration. Bankruptcy proceedings are opened upon petition. The publicity of the adjudication of a case also extends to the publicity of the opening of insolvency proceedings. The National Register of Debtors, through the principle of publicity of the register, though separate from the procedural principle of openness of proceedings, constitutes an important source of knowledge for market participants. Given the specificity and objectives of bankruptcy proceedings, the information available in the register is crucial for assessing the potential insolvency of a given entity, including both current and potential counterparties. Pursuant to Article 25a BL, an order to enter a bankruptcy petition filed by the debtor in the repertory, a final order returning the petition, a final order rejecting or dismissing the petition, or a final order discontinuing the proceedings for examining the petition are all subject to notice in the National Register of Debtors. The participants in bankruptcy proceedings are the debtor and anyone who has filed a bankruptcy petition. This provision indicates that information about the filing of a bankruptcy petition is only announced when the petition has been filed by the debtor, not by other entities. This is because a petition filed by the debtor signifies that the debtor is already insolvent or at risk of insolvency, which impacts trading security.[35] At the same time, the aforementioned provision excludes the notification of such documents and resolutions where the bankruptcy petition was filed by a creditor, as the creditor may have acted rashly or with the intent to cause damage to another market operator.[36] The same rules, including notice of

35 Janda (n 3), commentary to Article 25a.

36 ibid.

an order to enter a bankruptcy petition in the repertory, apply in bankruptcy proceedings against a non-business individual (Article 491^2(1) BL).

Thus, the notification of the order for entry of a case in the register is not only an implementation of the principle of publicity of the register but also of the principle of publicity of proceedings in its external aspect, which is, in principle, equated with the publicity of trials and hearings. In bankruptcy proceedings, however, it is important to consider the scope of regulation – the enforcement of creditors' claims against the insolvent debtor – and the objectives of the procedure, including the highest possible satisfaction of creditors. Unlike specific civil cases, information on the opening of bankruptcy proceedings is relevant to a much larger number of market participants, as such proceedings affect the entire legal situation of the entity subject to a bankruptcy petition. It is also noteworthy that, in ordinary civil proceedings, the publicity of proceedings at the stage of filing a claim or petition is, in practice, excluded, and the publicity of internal proceedings is significantly restricted. An example illustrating these considerations is the institution of the return of a statement of claim or petition in the context of bankruptcy proceedings regulations, in terms of the publicity of proceedings. In civil proceedings, when a statement of claim or application is returned, not only is information about such an event unavailable to the public, but it is also unavailable to the party against whom the statement of claim has been filed or who would have become a party to the proceedings had the application been granted (Article 130 § 4 CCP in conjunction with Article 13 § 2 CCP).

Pursuant to Article 130 § 4 CCP, an order for the return of a letter shall be served on the plaintiff, but not on the defendant or other participants in the proceedings.[37] The situation is different in bankruptcy proceedings. As indicated above, even formal aspects of the proceedings become public in bankruptcy cases. This openness arises not only from the publicity of the register but also from the publicity of proceedings in its external–public– aspect. In bankruptcy proceedings, actions such as the return or rejection of a petition become public, as a final order returning the petition

[37] Tadeusz Wiśniewski (ed) *Kodeks postępowania cywilnego. Komentarz,* vol 1 (Lex 2021), commentary to Article 36, margin number 2.

and a final order rejecting the petition, in the case of a petition filed by the debtor, are subject to publicity. The internal aspect of the principle of publicity of proceedings – publicity for the parties and participants – in bankruptcy cases often has a one-sided dimension, concerning only the debtor. This is because if the bankruptcy petition is filed solely by the debtor, then only the debtor is a participant in the proceedings.[38] At this point, it cannot be overlooked that in bankruptcy proceedings, the event described in Article 25a BL, concerning the notice of the order to enter the bankruptcy petition in the repertory, is not the only instance providing information about the filing of such a petition. In the course of bankruptcy proceedings, it is noteworthy that the institutions of bankruptcy law indirectly disclose that such a petition has been filed with the court, except that these notices do not explicitly indicate whether the petition was filed by the debtor or the creditor. First and foremost, attention should be drawn to the institution of the appointment of an interim court supervisor (Article 38(1a) BL). According to this provision, the order appointing an interim court supervisor shall be promulgated. The appointment of an interim court supervisor serves as a means – though not the only one – of securing the debtor's assets. It should be noted that after a bankruptcy petition is filed, the court may, either on request or *ex officio*, secure the debtor's assets. Whether the request for security comes from the debtor or the creditor is irrelevant.[39] Thus, market participants receive information about the filing of a bankruptcy petition, even if the petition was filed by a creditor. This knowledge is provided indirectly through the notice of events that the law requires to be disclosed in the National Register of Debtors. The legislator has therefore prioritised the principle of security in trade over the possible disclosure – albeit indirect – of the fact that a petition has been filed by a creditor. As already indicated, a creditor's petition may be rash or submitted with the intent to cause damage to the debtor. It is also worth mentioning that the data referred to in Article 5 ANRD are entered automatically by the ICT system handling court proceedings,

[38] Anetta Malmuk-Cieplak, in Jerzy Aleksander Witosz (ed), *Prawo upadłościowe. Komentarz* (Lex 2021), commentary to Article 26, margin number 1.

[39] Janda (n 3), commentary to Article 36, margin number 2.

simultaneously with the announcement or any other action to which the law links the effect of disclosure in the Register (§ 2(1)).[40]

While the indicated events realise the principle of publicity in bankruptcy proceedings by providing knowledge of the filing of a bankruptcy petition and the opening of such proceedings not only to its participants but also to market participants, any announcement, in view of the principle of formal publicity of the KRZ, should also be considered a means of implementing the principle of publicity by granting access to information on events and actions performed during the proceedings at its various stages (cf. section 3.5).

3.3. **Publicity of hearings in bankruptcy proceedings**

The openness of hearings is the most comprehensive implementation of the principle of publicity in legal proceedings, particularly in relation to the consideration of a case in both external and internal dimensions. The public nature of proceedings is a fundamental principle enshrined in Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms. It is accepted that the public conduct of hearings is linked to the primacy of the oral nature of the proceedings and the right of the public to scrutinise the administration of justice, so that court judgments are not made in secret, without public scrutiny.[41] As the European Court of Human Rights points out, in proceedings before a court of first and only instance, the right to a public hearing is strictly connected to the right to an oral hearing, except in cases of exceptional circumstances justifying the dispensing with such a hearing. Furthermore, in proceedings before two instances, if no such exceptional circumstances are at hand, at least one instance must, in general, provide such a hearing.[42] However, expressly indicated exceptions are permitted, including civil cases of a purely technical nature, cases that do not require the taking of evidence from witnesses, or simple cases that do not necessitate proceedings on the merits – where only questions of law

[40] Regulation of the Minister of Justice on the manner of posting and processing of data in the National Register of Debtors of 22 November 2021 (Journal of Laws 2021, item 2173).

[41] Judgment of the ECtHR in case *Saccoccia v Austria*, No. 69917/01.

[42] Judgment of the ECtHR in case *Mirovni Inštitut v Slovenia*, No. 32303/13.

are addressed or where there are no disputed issues of credibility or disputed facts.[43] It follows from the above that derogation from public hearings is, in principle, based on the nature of the issues to be decided by the court in the proceedings. An *in camera* hearing should be an exception and must have a clear statutory basis. This does not mean, however, that the refusal to hold a public hearing can only be justified in rare cases, subject to the proviso that the courts must, by the proper design of the proceedings, decide the case fairly and reasonably on the basis of the parties' submissions and other written materials.[44] The types of civil proceedings and their distinct modes perform different functions and have a model and structure adapted accordingly, which inevitably affects the implementation of general procedural principles in such proceedings.[45] However, this does not mean that the decision to hold cases *in camera* rests solely with the legislator. It is notable that institutions of civil procedure grant a certain right in this respect to a party to the proceedings. An example of such a regulation is Article 374 CCP, which provides that the court of second instance may hear a case in an *in camera* hearing if a trial is not necessary, except when a party, in an appeal or response to an appeal, has requested a trial, unless the statement of claim or appeal has been withdrawn or the proceedings are invalid. It follows from the second sentence of Article 374 CCP that the appellate court is bound by a request for an appeal trial contained in the appeal or response to the appeal. In such a case, the trial of the case is mandatory, and if the appellate court hears the case *in camera*, the situation should be treated as a procedural defect, as it contravenes the legal requirement to hold the trial.[46]

The amendment[47] to the Code of Civil Procedure of 7 July 2023 introduced provisions for the conduct of remote hearings. The primary, yet casuistic, regulations concerning the conduct and organisation of public court

43 *Saccoccia v Austria* (n 41).

44 *Mirovni Inštitut v Slovenia* (n 42).

45 Anna Kościółek *Zasada jawności w sądowym postępowaniu cywilnym* (Wolters Kluwer 2018) 162.

46 Judgment of the Supreme Court of 10 January 2023, case No. II CSKP 816/22.

47 Act amending the Act–Code of Civil Procedure, the Act–Law on the System of Common Courts, the Act–Code of Criminal Procedure, and certain other acts (Journal of Laws 2023, item 1860).

hearings in remote form are contained in Article 151 CCP and Article 263[1] CCP, which addresses the possibility of objecting to the hearing of a witness remotely. This solution, in the era of new technologies, should be considered an extension of the principle of publicity of proceedings, as remote access, which eliminates the need for physical presence in the court building, may contribute – depending on the extent to which remote hearings are used in practice – to a fuller realisation of the principle of publicity, both in its internal and external aspects.

At the other end of the spectrum are *in camera* hearings, which are conducted without the presence of the public and without the participation of the parties or other participants in the proceedings. Such hearings do not require summonses to be sent to the parties or even notification of the *in camera* hearing date, thereby significantly restricting the principle of publicity of proceedings and, in principle, excluding it in one of its key elements – the publicity of court hearings.

The *in camera* hearing has therefore been envisaged by the legislator as a procedural tool for cases that, due to their nature or purpose, require a deviation from the formula of public hearings. This always requires an express legal basis allowing for an *in camera* hearing, prioritising the principles of speed and efficiency of proceedings, sometimes at the expense of the principle of publicity. Thus, while a closed hearing is permissible, it must still comply with the requirements of a fair trial. The exclusion of the holding of a public hearing in favour of the hearing of the case by *in camera* hearing suggests that the legislator has greater discretion in this regard when the case concerns purely legal assessments and the court does not decide on questions of fact.[48] The court must consider whether the subject matter of the hearing is limited to questions of law or whether the proceedings involve an assessment of facts requiring the taking of evidence.[49] In light of the bankruptcy proceedings model, the bankruptcy court and the judge-commissioner generally do not have the competence to independently determine the status of the bankruptcy proceedings, establish facts, or take legal action,

48 Judgment of the ECtHR in case *Malhous v the Czech Republic*, No. 33071/96.

49 Marek Antoni Nowicki, *Nowy Europejski Trybunał Praw Człowieka. Wybór orzeczeń 1999–2004* (Zakamycze 2005) 570.

such as bringing claims against the bankrupt's counterparties. In principle, the role of the judge-commissioner, as well as that of the bankruptcy court, is limited to the oversight of non-judicial bodies involved in the bankruptcy proceedings, particularly the trustee. The trustee is responsible for determining the composition of the bankruptcy estate, a task that involves various factual and legal determinations as part of their duties.

In bankruptcy proceedings, the general rule is that the court will hear the case *in camera*. The purpose of this regulation is to streamline proceedings as much as possible and eliminate the need to schedule a hearing for purely formal reasons, though this does not preclude the court from scheduling a hearing when necessary.[50] This possibility arises from the general principles of the Code of Civil Procedure (in particular Article 148 § 2 CCP) and, indirectly, from the wording of Article 27(2) BL, for example, in cases where it is necessary to hear the creditor who filed the bankruptcy petition and the debtor.[51] Given that the circle of participants in bankruptcy proceedings is limited, yet the proceedings themselves may impact a wide range of entities – namely, the debtor's creditors – adjudication *in camera* constitutes a restriction on the principle of publicity of proceedings. Pursuant to Article 27(2) BL, the setting of a hearing is not necessarily dictated by the need to take evidence, as the court may take evidence *in camera*, either in part or in full, even if a hearing has already been scheduled.[52] It should also be noted that even when evidentiary proceedings commence at trial – either in whole or in part – the bankruptcy court is not obligated to continue the trial.[53] The court, even if it has conducted proceedings at trial, may continue them *in camera*. If a trial is scheduled, it will be public, including for third parties – the public, other creditors, or potential counterparties – unless there are grounds for excluding publicity (Article 153 CCP in conjunction with Article 35 BL). Such grounds may include a party's request to hold a hearing or part of it behind

50 Janda (n 3), commentary to Article 27, margin number 1.

51 Piotr Zimmerman, *Prawo upadłościowe. Komentarz* (7th edn, Legalis 2020), commentary to Article 27, margin number 1.

52 Janda (n 3), commentary to Article 27, margin number 2.

53 Stanisław Gurgul, *Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz* (12th edn, C.H. Beck 2020), commentary to Article 27 BL, margin number 1, following: Zimmerman (n 51), commentary to Article 27, margin number 3.

closed doors when business secrets may be disclosed (Article 153 § 1^1 CCP). The structure of the bankruptcy proceedings model indicates that the court may extend the publicity of proceedings by holding public hearings to decide all circumstances of the case. Alternatively, the court may, even in cases of disputed positions between the debtor and the creditor filing the bankruptcy petition, and regardless of the amount, form, or content of the evidence, conduct proceedings excluding the publicity of hearings. Finally, as indicated above, the court retains the discretionary power to 'restore' or 'exclude' the publicity of hearings in insolvency proceedings. This discretion extends to deciding the scope of such actions, such as limiting the publicity of hearings to certain elements of the proceedings. The court also determines the stage at which publicity will be restored or, if already restored, excluded once again.

In post-declaration bankruptcy proceedings, the rule is that the court decides in an *in camera* hearing, unless the law provides otherwise (Article 214 BL). This represents a reversal of the basic model of civil proceedings, as expressed in Article 148(1) CCP, according to which court hearings shall be public and the adjudicating court shall hear the case at a hearing, thus excluding, in bankruptcy proceedings, the principle of publicity in the aspect relating to the publicity of hearings. It is worth mentioning that in bankruptcy proceedings it is possible to distinguish between activities related to the recovery of creditors' claims, proceedings concerning the conclusion of an arrangement, and liquidation proceedings involving the distribution of estate funds and the sums obtained from the disposal of assets and rights encumbered by property.[54] In both arrangement and liquidation proceedings, the court generally does not adjudicate on rights, whereas such adjudication takes place in proceedings related to the enforcement of creditors' claims, with the proviso that bankruptcy law regulations – e.g., Article 263 BL – indicate that the enforcement of creditors' claims takes place for the purposes of bankruptcy proceedings, which has made it a rule that the court adjudicates *in camera*.[55] The bankruptcy court shall adjudicate at a trial on the deprivation of the right to conduct business and other rights set out in

[54] Andrzej Jakubecki and Feliks Zedler (eds), *Prawo upadłościowe i naprawcze. Komentarz* (3rd edn, Lex 2010), commentary to Article 214.

[55] ibid.

Article 376(1) and (2) BL and decide on the conclusion of an arrangement (Article 266f BL in conjunction with Article 164 of the Restructuring Law). Optionally, the judge-commissioner may appoint a trial when considering an objection to the list of claims (Article 259(1) BL).[56] The petition of the bankrupt to establish a repayment plan for creditors, to write off the remainder of debts, or to write off debts without establishing a repayment plan, as well as to amend or revoke the repayment plan, shall also be heard at trial (cf. Article 369(1b) BL, Article 370ea BL). In proceedings conducted in relation to individuals who are not engaged in business activity, issues concerning the establishment of a repayment plan, refusal to establish a repayment plan, or cancellation or conditional cancellation of the bankrupt's liabilities (Article 491^{14}(4) BL) shall be decided by the court after a hearing if the bankrupt, trustee, or creditor has requested one (Article 491^{14}(4) BL). In the case of modification or cancellation of a repayment plan, a hearing is obligatory regardless of the initiative of the parties in this respect.

In connection with the adopted principle that, in bankruptcy proceedings, decisions are generally made *in camera*, and that the holding of a public hearing is required only in cases specified in the bankruptcy regulations, including those where the obligation to hold a hearing depends on an appropriate request by an interested participant, the question arises as to whether, in situations where the regulations do not provide for a trial, it is possible to change the nature of the hearing from *in camera* to a public hearing. It should be assumed that a hearing may also take place in cases where the law does not provide for an obligatory or optional trial, if the insolvency court or the bankruptcy judge deems it necessary, pursuant to Article 148 § 2 CCP in conjunction with Article 229 BL.[57] There are cases where, due to the nature of the matter, it is most effective to confront the positions of the parties at a trial in order to reach a decision, such as an application by the creditors' council for the removal of the trustee, based on a negative assessment of the trustee's performance.[58]

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56 Janda (n 3), commentary to Article 214, margin number 2.

57 Janda (n 3), commentary to Article 214, margin number 3 together with the literature cited therein.

58 Zimmerman (n 51), commentary to Article 27, margin number 4.

As with the publicity of the hearing of the bankruptcy petition, discussed above, in post-declaration bankruptcy proceedings, the bankruptcy court and the judge-commissioner have the discretion to restore the publicity of hearings, even in cases where the law prescribes that a specific issue be resolved in an *in camera* hearing.

As far as the evidence procedure is concerned, it is relevant to point out that it is conducted both in proceedings for the declaration of bankruptcy (Article 27 BL) and after its declaration (Article 229(1) BL in conjunction with Articles 227–309 BL and Articles 217–218 BL). Without repeating the issues already discussed regarding the publicity of hearings at which the court takes evidence, it should be recalled that the need for a trial is not determined solely by the need to take evidence, although a trial remains the most appropriate forum for the taking of evidence and deliberation on its results.[59] Prioritising the principle of speed in proceedings, the legislator limits, *a priori*, the scope of evidence proceedings in cases concerning the recognition of a bankruptcy petition. An example of this is the exclusion – except in the case of pre-packaged liquidation (Article 56b BL) – of the possibility of conducting expert evidence. For assessing the implementation of the principle of publicity in bankruptcy proceedings, Article 30 BL is relevant, as it provides for the possibility of hearing the debtor and the creditor, in cases where the creditor has filed a bankruptcy petition. Notably, the court has the discretion to hear only one of the participants or other selected persons with relevant knowledge.[60] The hearing of the creditor, witnesses, and other persons is merely informative, whereas the hearing of the debtor follows the procedure prescribed in the Code of Civil Procedure for party hearings, including the taking of a formal oath.[61] It should also be noted that a written hearing of the debtor is possible, and such a hearing also constitutes evidence in the case. This raises the question of how to assess the implementation of the principle of publicity in bankruptcy proceedings in light of evidence rules. If the court hears the debtor or creditor at a hearing, the procedural principle of publicity – both in its external and internal aspects – is fully implemented. This applies even

59 Gurgul (n 53), commentary to Article 27, margin number 3.

60 Janda (n 3), commentary to Article 30, margin number 1.

61 Janda (n 3), commentary to Article 30, margin number 2.

when only a limited number of persons are heard, such as only the debtor, only the creditor, or other necessary persons. The situation is different when the hearing takes place in writing. In that case, the publicity aspect of the proceedings is not ensured by holding a public hearing. Instead, the principle of publicity is realised through access to the content of the written hearing in the case file, thereby ensuring that the principle of publicity is upheld, albeit primarily in its internal aspect

In post-declaration bankruptcy proceedings, the extent to which the principle of publicity is realised should be preserved wherever the circumstances of the case are established beyond the resolution of legal issues and questions. The manner in which evidentiary proceedings are conducted, particularly in terms of personal sources of evidence, should be analysed. Pursuant to Article 217 BL, if there is a need to take evidence from the hearing of the bankrupt, trustee, creditor, member of the creditors' council, or other persons, including witnesses or experts, the court or the judge-commissioner, as the case may be, shall hear them at a hearing and prepare minutes of the hearing, regardless of the presence of other interested persons.

As a trial is an exception in bankruptcy proceedings, the legislator has given the court and the judge-commissioner the power to admit evidence, including hearsay evidence, at a hearing.[62] The literal wording of the provision indicates that questioning may take place in full observance of the principle of publicity of proceedings, ensuring that not only participants in the proceedings but also members of the public may attend a public hearing. This allows participants to actively engage in the questioning process, including by asking questions. At the same time, the provision allows for interrogation to take place regardless of the presence of other persons concerned, implying that the questioning of a particular person may occur *in camera*.[63] Once again, the legislator grants both the bankruptcy court and the judge-commissioner the discretion to set the limits of the publicity of bankruptcy proceedings. This is an exclusive competence of the court or the judge-commissioner, and the decision in this matter is not subject to appeal.[64] Another option, aimed

62 Witosz (n 38), commentary to Article 217, margin number 1.

63 Zimmerman (n 51), commentary to Article 217, margin number 2.

64 Janda (n 3), commentary to Article 217, margin number 2.

at speeding up proceedings and making them more efficient, is conducting interrogation in written form by obtaining a written statement. This applies not only to persons listed in Article 217 § 1 CCP, which contains an open catalogue of entities that may be heard in such proceedings, but also to witnesses and experts, who are explicitly listed in the provision (Article 217 § 3 CCP). Interrogation in the form of written statements may be reinforced by requiring the collection of a written statement with a notarised signature, and such statements constitute evidence in the case. In the case of a hearing held *in camera*, as well as when written statements are collected, the publicity of proceedings extends only to its internal aspect. However, actions in the proceedings – even those related to obtaining evidence from personal sources – remain open to participants in the proceedings by allowing them to read the content of the minutes of an *in camera* hearing or the content of a written statement through access to the case file.

With such a construction of bankruptcy proceedings, which allows for the exclusion of publicity in its external aspect while maintaining it only in its internal aspect through access to the case file, the model of bankruptcy proceedings does not appear to align with the direction of the European Court of Human Rights' rulings cited earlier. These rulings indicate that closed hearings should be limited to the consideration of legal issues. As demonstrated above, in bankruptcy proceedings, the determination of facts is what dictates the application of the law. This is further confirmed by case law concerning the extension of the evidentiary procedure in bankruptcy proceedings, as reflected in a Supreme Court resolution, which stated that an objection may be based on evidence not indicated in the claim application.[65] Against this background, limiting the principle of publicity in proceedings by taking evidence *in camera* or in writing appears to be a far-reaching restriction of the right to open proceedings. The question, however, is whether, given the purpose of these proceedings – and the primacy given to their speed – there exists a mechanism that, in light of the exceptions where hearings are public (i.e., trials), ensures the participation of parties in the proceedings and allows them to present their position on the case.

[65] Resolution of the Supreme Court of 26 January 2023, case No. II CSKP 816/22.

In my opinion, this possibility remains preserved in bankruptcy proceedings. In this regard, I note that bankruptcy law provides for the manner of filing pleadings in the proceedings; however, it does not regulate the scope of when certain pleadings may be filed by participants in those proceedings. Therefore, reference should be made to the relevant application of the rules of civil procedure. First of all, in civil proceedings, there is a general rule that a party or participant may file a reply to a pleading initiating the proceedings (Article 205^1 § 1 CCP in conjunction with Article 13 § 2 CCP).

In bankruptcy proceedings, the possibility of filing a response to a party's action is provided for in Article 258a(1) BL, which sets out the rules for filing a response to an objection as a means of challenging the list of claims. Additionally, Article 35 BL and Article 229(1) BL provide for the appropriate application of civil procedure – specifically, the provisions of Part One of Book One of the CCP. At the same time, it should be noted that the indicated provisions of bankruptcy law exclude the application of the rules on the organisation of civil proceedings, including Article 205^1 CCP and Articles 205^2 and 205^4–205^{12} CCP. The two provisions mentioned – Articles 35 and 229(1) BL – contain identical regulations in this respect. However, neither of them excludes the application of one organisational provision of civil proceedings, namely Article 205^3 CCP, concerning the filing of further pleadings in civil proceedings, as appropriate. For this reason, I believe that if a participant in bankruptcy proceedings considers it necessary to present its position on actions taken, evidence held, material on file, or information relevant to the proceedings, it should take advantage of the opportunity to present its position in writing to the court and the judge-commissioner.

As can be seen from the above, the principle of publicity in bankruptcy proceedings has been marginalised in relation to the publicity of court hearings under bankruptcy law. The competence to alternately 'reinstate' or 'exclude' this principle – except in situations where insolvency law mandates a trial – is vested in the court or the judge-commissioner. The hope of restoring or at least extending the principle of publicity of hearings in bankruptcy proceedings lies in the previously signalled computerisation of proceedings, particularly through the remote holding of public hearings, which was introduced into civil procedure on 14 March 2024 (cf. Article 151 § 3–§ 9 CCP in conjunction with Articles 35 and 229(1) BL). In my opinion, an example

of an activity where remote hearings will not only restore the principle of publicity in proceedings by holding public hearings while ensuring speed and efficiency is the hearing activity set out in Article 217 BL Holding a public hearing remotely will expedite proceedings far more than waiting for written, even electronic, testimony or statements from a participant. At the same time, it will allow for the active participation of other parties in the process, as they will have the opportunity to join the remote hearing from virtually anywhere. However, it cannot be overlooked that civil procedure, as amended on 14 March 2024, imposes a significant limitation in this respect. Pursuant to Article 263^1 of the Civil Procedure Code, introduced on the aforementioned date, a party may object to the examination of a witness outside the courtroom in a remote hearing but must do so within seven days from the date of receiving notice of the intention to conduct evidence in this manner. If the objection is upheld, the court shall summon the witness to appear in person in the courtroom. However, attention should be given to the fact that the provisions of bankruptcy law prescribe the appropriate application of civil procedure provisions, meaning that these provisions may be applied directly, with modifications, or not applied at all. I would resolve the issue of objections by conducting a public hearing in a remote format and disregarding objections raised by participants regarding the form of interrogation. However, this does not change the fact that the above procedure remains at the discretion of the court or the judge-commissioner, as even the recent amendments do not alter the model of bankruptcy proceedings, where closed hearings remain the rule. It is also possible that the introduction of remote sittings into civil procedure will lead to amendments in bankruptcy law.

3.4. Access to the file in bankruptcy proceedings – balancing the principle of publicity of the proceedings against the principle of *in camera* hearings

As discussed above, closed hearings limit the principle of publicity in both its external and internal aspects. In insolvency law, public hearings and trials are exceptions, restricted to cases explicitly indicated in the law, unless the insolvency court or the commissioner judge identifies and recognises the need for a public hearing. Thus, the ability to respond to particular events in the proceedings and to take a substantive position requires that

the participant be aware of the positions, actions, or decisions presented or taken by other parties or the authorities conducting the proceedings. This is realised through access to the case file. In bankruptcy proceedings, this duty does not rest solely with the court. In insolvency proceedings, access to the case file by participants is subject to the general rules arising from the appropriate application of the provisions of Part One of Book One of the CCP. Access to files in civil cases heard in a procedural setting does not provide for their availability to persons other than the parties and participants in the proceedings, as follows from Article 9 § 1, second sentence, CCP, which states that parties and participants have the right to inspect the case file and to receive copies, duplicates, or extracts from the file.[66]

The participants in bankruptcy proceedings are the debtor and the entity that filed the bankruptcy petition. The participants in the proceedings always have the right to inspect the files of the insolvency proceedings, which implements the principle of publicity in its internal aspect. However, the legislator has extended the principle of publicity in proceedings, as reflected in the possibility, effective from 1 December 2021, for anyone who sufficiently justifies such a need, in the event that a bankruptcy petition is dismissed, to view the case files. The specificity of this solution means that the principle of publicity, in terms of access to the case files, materialises only in the case of the final dismissal of the bankruptcy petition, i.e., after the proceedings have concluded. This provision is set out in Article 13 BL, where, as of 1 December 2021, paragraph 7 has been added, allowing access to the files of the proceedings via an ICT system.[67] This solution should be considered part of the external aspect of publicity in proceedings, though only after their conclusion, as access to the files is granted to anyone who justifies the need to inspect them. This measure allows the debtor's counterparties to gain awareness of the debtor's position and documents relating to its financial situation. The same applies to future counterparties, who, before deciding to conduct business with the debtor, may seek information regarding the grounds for filing the bankruptcy petition and the content of documents relating to that petition.

66 Kościółek (n 45) 271.

67 Janda (n 3), commentary to Article 13, margin number 8.

In the event of bankruptcy, access to the proceedings file is already provided under the rules governing post-declaration bankruptcy proceedings. However, it should be recalled that the duty to keep a file of proceedings does not, in post-declaration bankruptcy proceedings, lie solely with the court. As of 1 December 2021, the obligation for the trustee and court supervisor to keep files in electronic form arises from Article 228a(3) BL, Article 491^{24}(3) BL, and Article 491^{37}(3) BL, which regulate access to these files. The office of the trustee or court supervisor must be open on weekdays for at least four consecutive hours between 8:00 a.m. and 8:00 p.m. The claims file is part of the court file. The receiver shall make the debt claim file available via the ICT system to participants after they have confirmed their identity and to other persons after they have sufficiently justified the need to consult the file.[68] For completeness, it should be added that in bankruptcy proceedings following the declaration of bankruptcy of non-business individuals, the trustee is not only responsible for maintaining the claims file but also for setting up and maintaining the file for the proceedings in their entirety after the declaration of bankruptcy. The same principle applies to the court supervisor in arrangement proceedings conducted at a creditors' meeting. Thus, the obligation to maintain and provide access to the proceedings file does not lie solely with the court but also with the non-judicial bodies of the proceedings.

The principle of publicity in proceedings is realised not only through the orality of trials and hearings but also through the principle that the files of bankruptcy proceedings are public. This conclusion follows from the above-mentioned rules governing conduct and access to the case file. It is noteworthy that, while in civil proceedings the case file is, in principle, only accessible to the parties – reflecting the internal aspect of publicity – in bankruptcy proceedings, publicity extends beyond this internal aspect. The rules on access to the file also reflect the external aspect of publicity in proceedings. While participants in the proceedings are granted full access to the case file, other individuals must justify their need to inspect the file.

It is necessary to emphasise that access to the case file via the ICT system is subject to certain limitations, particularly regarding documents

[68] ibid.

and pleadings containing classified information and bids submitted in the course of an invitation to tender or auction. Such documents are submitted outside the ICT system, and if filed in paper form, they are not subject to digitisation. Filing such documents via the ICT system would defeat the purpose of protecting classified information and compromise institutions such as auctions and tenders – for example, by revealing the price offered in a tender before the award process is completed.[69]

An additional aspect of the implementation of the principle of publicity is not only the formal possibility of obtaining access to the case file but also the technical and organisational feasibility of exercising this right. As previously indicated, participants in proceedings have access via an ICT system, allowing them to access the case file from any location and at any time. However, for non-participants and those without remote access, access to the case file via the ICT system is provided at the court registry.

The solution for obtaining documents from the files of bankruptcy proceedings should be regarded as a strengthening of the principle of publicity. While there is no doubt that publicity is ensured by the possibility of obtaining copies of documents (Article 9 § 1 CCP), in bankruptcy proceedings, the electronic form of obtaining documents, letters, and judgments from the ICT system significantly facilitates and accelerates access to the material contained in the case file.

Due to the amendment of Article 9 § 1^1 CCP, which came into force on 14 March 2024, the solutions implemented in bankruptcy law will now be extended to civil procedure. However, the amendment allows the court to make the files available through the ICT system but does not specify the possibility of independent downloading. This should be understood to mean that the amendment applies to cases where documents outstanding in the case file, which were not originally filed through the system, will be digitally reproduced by the court and then made available to the parties via the ICT system.

The amendment to civil procedure does not, unlike insolvency law, specify that documents from such files may have the status of officially certified copies or extracts. Thus, the possibility of self-printing from a computer,

[69] ibid., commentary to Article 216ab.

in connection with the principle of filing pleadings and conducting bankruptcy proceedings via the ICT system, of judgments, pleadings, and documents recorded in the ICT system having the status of officially certified copies and extracts, provided they contain features enabling their verification with data in the system, should be considered an indirect extension of the principle of publicity in proceedings, as it ensures that such documents are not only available to participants in the proceedings but, due to their special status, also possess the legal power of officially certified extracts and copies. Additionally, this solution enhances their usability in legal and commercial transactions, making them accessible to a wider group of entities (cf. Article 228(2) BL).

For example, documents that serve as the basis for entry in the National Court Register or that are required to be filed in the registration files must be submitted in originals or officially certified copies or extracts (Article 694^4 § 1 CCP). The same rules apply, *mutatis mutandis*, to the status of documents from proceedings for the examination of a bankruptcy petition (Article 35 BL in conjunction with Article 228(2) BL).

Among individuals who are not participants in the proceedings but who may have access to the case file, representatives of the media and the press should be included. Press and media coverage of the proceedings and their course constitutes an element of the principle of publicity, particularly in its external aspect, ensuring public access to information and the activities of the proceedings. The question arises as to whether journalists and press representatives have a special status or whether they should be treated like other individuals who may access the case file only after justifying their need to do so. This question must be answered by distinguishing between the press's right to obtain and collect information and the sources and materials from which such information is derived. Pursuant to Article 11 of the Press Law, the right to obtain information is one of the fundamental guarantees ensuring press access to information.[70] The relationship between the court and the mass media is regulated by the Rules of Procedure of common courts. According to § 143 of the Rules, tasks related to the court's cooperation

[70] Anna Augustyniak, in Bogusław Kosums, Grzegorz Kuczyński (eds), *Prawo prasowe. Komentarz* (Legalis 2018), commentary to Article 11, margin number 1.

with the mass media are performed by the president or vice-president of the court. Additionally, this provision states that in district and appellate courts, these tasks may be performed by a press spokesperson, who reports directly to the president of the court. In district courts, the authority responsible for contacting the press and providing information is the president or vice-president of the court. This confirms that the principle of publicity extends far beyond court hearings.[71] The identification of actions or events in bankruptcy proceedings that are subject to publicity does not mean that all other information remains confidential. As already observed, there is a legal basis for obtaining information on the status of bankruptcy proceedings and events that have occurred, regardless of whether that information was subject to publicity. Such information may be provided to the press by the president or vice-president of the court or a designated representative appointed to handle media relations. This conclusion is supported not only by Press Law but also by the right to information enshrined in Article 61 of the Constitution of the Republic of Poland, Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, and Article 10 of the International Covenant on Civil and Political Rights, ratified by Poland in 1977. Furthermore, there is no legal obstacle to the provision of information to the press, considering the nature of the information provided, even before a particular issue in the proceedings has been resolved. This follows from Article 13(1) of the Press Law, which prohibits the expression of opinions in the press regarding the outcome of court proceedings before a first-instance ruling. The essence of this provision is to prevent the expression of 'pre-judgments' in the press. Moreover, the way the provision is drafted indicates that the legislator intended the term 'adjudication' to apply solely to rulings that determine the case on its merits.[72]

It is clear from the foregoing that the principle of publicity in proceedings should not be viewed one-dimensionally. While the publicity of court hearings forms the basis of external publicity, the fact that certain issues are adjudicated in an *in camera* hearing does not mean that the proceedings themselves are secret. The limitation of the principle of publicity, which

71 Kinga Flaga-Gieruszyńska, *Prawo upadłościowe i naprawcze* (C.H. Beck 2005) 18-19.

72 Augustyniak (n 70), commentary to Article 11, margin number I.2.

results from adjudication at an *in camera* hearing, may be compensated by other measures that ensure publicity in its external aspect. Undoubtedly, one such solution that balances the general exclusion of public hearings, is the organisation of access to the bankruptcy proceedings case files, with particular attention to access to those files for persons who justify the need for such access. The obligation to assess the degree of justification for access to the file, as well as restrictions on access to specific information – such as classified information, business secrets, or restrictions arising from Press Law – does not impose far-reaching limitations on the principle of publicity in this respect. It should also be noted that access may be granted in various forms, including via an ICT system or through the possibility of accessing files at the registry of a court other than the one conducting the proceedings in the case.

3.5. Instruments to ensure access to information on the state of the proceedings – a solution to reinforce the principle of publicity in bankruptcy proceedings

The publicity of civil judicial proceedings means the possibility of accessing information arising in connection with those proceedings.[73] Regarding access to information on the state of proceedings, this issue should be assessed as an element of publicity in both its external and internal aspects. It is not only through attendance at court hearings or access to the case file that parties and participants obtain information on the state of a case. The scope of information provided and the manner of its provision are specified in § 29 and § 123 of the Rules of Procedure of Common Courts. Information available to entitled parties includes, among others, the status of proceedings based on data from court information and communication systems, details of relevant organisational units where certain actions may be performed, as well as information on court forms and specimen writs. Importantly, without establishing the identity of the caller, court employees – via designated contact telephone numbers – provide open information on pending cases, identical to the data available on the court docket. They also provide information on the date and manner of case resolution after the caller provides

[73] Kościółek (n 45) 117.

the reference number or the designation of the parties, or at least one participant in non-contentious proceedings and the subject matter of the case. On the other hand, a party, participant in the proceedings, their representative, or attorney may obtain additional information on the proceedings without appearing in court in person if they send an electronic request to the court, signed with a qualified electronic signature, a trusted signature, or a personal signature, or from an electronic mail address that was previously indicated in person before the court or a court clerk as an address for receiving public information on pending cases. It is significant that in bankruptcy proceedings, a new solution has been introduced in relation to the methods mentioned above – namely, the institution of announcements of certain information, rulings, or events during the proceedings in the National Register of Debtors. The openness of this register, as previously discussed, stems from constitutional provisions that establish and define its principles of operation. This mechanism serves to implement the principle of publicity in proceedings. The National Register of Debtors is the first ICT system where information is published, starting with disclosures related to the filing of a bankruptcy petition – such as the notice of an order to enter a petition in the repertory (Article 25a BL) – through to notices concerning decisions made in the proceedings (cf. e.g. Article 53(1) BL), their validity (cf. e.g. Article 54b BL), and information on the manner and time limit for lodging an appeal (cf. Article 221(1) BL), where the time limit runs from the date of the notice. Additionally, the register includes information on significant events in the proceedings, such as details of a tender or auction (cf. Article 320(1)(2) BL) or the hearing of a cassation appeal (cf. Article 370b(4) BL). The publication of notices applies not only to proceedings against economic operators but also to proceedings against non-business individuals. This broadly defined scope of notices undoubtedly represents a new standard in realising both the external and internal aspects of the principle of publicity in proceedings.

It should also be highlighted that, in connection with the principle of publicity of the register, the constitutional principle expressed in Article 54 of the Constitution of the Republic of Poland, which guarantees everyone the freedom to express their views and to obtain and disseminate information, as well as in Article 61 of the Constitution of the Republic of Poland,

which establishes the right to information on the activities of public authorities and persons performing public functions, is implemented. However, it must be recognised that the right enshrined in Article 61 and the guarantees provided by Article 54(1) should be distinguished. Not every piece of information that may be obtained and disseminated under Article 54 can also be considered information that must be made available.[74] The primary means by which this right to information is exercised is access to documents, which should primarily refer to official documents, including acts and other administrative and judicial rulings.[75] It is essential to acknowledge that Article 61(1) and (2) of the Constitution indicates that the scope of the right to information set out therein is largely determined by the Constitution itself, subject to the admissibility and necessity of supplementary statutory regulations on this matter.[76] Although the right of citizens to access information is regulated in the Constitution – both regarding the entities obliged to provide access and the content of such information – it cannot be ruled out that there remains a need to clarify the range of entities required to provide information, the content of that information, and the manner in which it is obtained.[77] The Act on Access to Public Information serves as the primary regulation in this regard.[78] Within the meaning of Articles 1(1) and 6 of the said Act, public information includes any information on public matters, particularly the matters listed in Article 6. Case law generally accepts that public information encompasses any information created by or related to public authorities, as well as other entities performing public functions, insofar as they carry out public authority tasks or manage communal property or the property of the State Treasury. Pursuant to Article 4(1) of the Act, public authorities and other entities performing public tasks are obliged to make public information available. However, the right to public information is subject to restrictions, which are applied in accordance with laws on the

74 Mikołaj Wild, in Marek Safjan and Leszek Bosek (eds), *Konstytucja RP. Tom I. Komentarz* (Legalis 2016), commentary to Article 6, margin number III.3.

75 ibid.

76 Judgment of the Supreme Court of 16 September 2002, case No. K 38/01.

77 ibid.

78 Consolidated text: Journal of Laws of 2022, item 902.

protection of classified information, the protection of statutorily protected secrets, as well as the privacy of individuals and business confidentiality.

Against this background, the question arises as to whether, in bankruptcy proceedings, the instruments provided for in the Access to Public Information Act can be used in individual cases. While there is no doubt – setting aside the issue of distinguishing the scope of public information as 'simple information' and 'processed information' – that courts, as judicial bodies, may provide data on the number of cases filed with a given court, the number of cases adjudicated, the manner in which specific case categories have been resolved, taking into account the proportions and comparison of a particular resolution method, the question of whether the Access to Public Information Act applies to specific bankruptcy proceedings is more complex. This issue is particularly significant given the specific nature of bankruptcy proceedings, which aim not only to safeguard the collective interests of creditors by ensuring maximum satisfaction of claims but also to impact third parties, including other market participants. This latter effect is reflected, for example, in the possibility of declaring certain legal acts performed by the bankrupt debtor ineffective (cf. Article 127 et seq. BL). Certainly, in such situations, the state of the case will primarily be determined by access to the case files. The debtor's counterparty, who does not submit a claim for inclusion in the list in the proceedings, should be deemed entitled to inspect the files and obtain information from the proceedings through this means. The need for access to the file would be justified by the fact that a transaction was conducted with the bankrupt debtor. However, the situation may be different for successive purchasers of an asset that was part of an ineffective legal act by the bankrupt debtor.

The indicated issue should be considered in relation to the objectives served by the mechanisms provided for in the Act on Access to Public Information. Access to public information is intended to uphold the public good, ensuring transparency of the state, openness of administration, and accountability of other public bodies. However, the purpose of the Act is not to satisfy individual (private) needs for obtaining information when the request serves purposes other than those mentioned above.[79] Such individual

[79] Judgment of the Supreme Administrative Court of 7 July 2023, case No. III OSK 939/22.

information requests should be handled under the standard rules governing the relevant type of legal relationship.[80] It should be assumed that the case file of proceedings is not an official document as defined in the Act on Access to Public Information. Consequently, access to such files is regulated by the provisions specific to the given proceedings, with the reservation that the rules concerning access to individual official documents within the case file may differ.[81]

It is important to note that the situation is different when it comes to court decisions. In light of Article 6(1)(4)(a) of the Act on Access to Public Information, it is evident that the category of administrative acts or decisions of common courts primarily includes decisions in individual cases that determine the rights and obligations of individuals. Court judgments with justifications, issued as part of a court's adjudicatory activity, based on universally binding law, constitute public data. As such, they are subject to public access in accordance with the procedures and principles set out in the Act on Access to Public Information.[82]

The openness of bankruptcy proceedings, in the context of access to information, must be considered in relation to the Act on Access to Public Information and its interaction with Bankruptcy Law, particularly given the instruments introduced in the National Register of Debtors, as previously discussed. This register serves as a mechanism that significantly extends the principle of publicity. Pursuant to Article 1(2) of the said Act, the provisions of the Act do not prejudice the provisions of other Acts that establish different rules and procedures for access to public information. Therefore, it should be assumed that the provisions of the Act on Access to Public Information do not apply to information that is already covered by and made available under the rules of the National Court Register Act. The same position is presented in relation to the provisions on the National Court Register, which indicates that it is unacceptable to apply the provisions of

[80] Judgment of the Supreme Administrative Court of 12 May 2023, case No. III OSK 4024/21.

[81] Marek Chmaj, in Marek Chmaj and Przemysław Szustakiewicz, *Ustawa o dostępie do informacji publicznej. Komentarz* (4th edn, Legalis 2023), commentary to Article 6, margin number 24.

[82] Judgment of the Supreme Administrative Court of 1 June 2023, case No. III OSK 631/22.

the Act on Access to Public Information when the requested information, having the nature of public information, is available in another mode. This is because the Act on Access to Public Information itself contains limitations in its application and may not override the provisions of other acts that regulate such matters differently.[83] Regarding access to public information in bankruptcy proceedings, it should be further noted that, in addition to the bankruptcy court, actions are undertaken by the judge-commissioner and extra-judicial bodies involved in the proceedings, such as the trustee. This raises the question of whether these bodies are obliged to provide information or at least consider such requests. One must agree with the position of the Provincial Administrative Court in Gdańsk, which stated that, considering the appointment process and responsibilities of the trustee, the receiver, to whom the application for access to public information was addressed, does not fall within the category of entities obliged by the legislator to consider such an application under the principles of the Act on Access to Public Information.[84] The court also held that the judge-commissioner is not the entity obliged to process the applicant's request under the Act on Access to Public Information, as, under that regulation, the only authority entitled to disclose public information is the President of the Court, as a public authority.[85]

The availability of information from bankruptcy proceedings, both to parties and third parties, is essential in assessing the implementation of the principle of publicity in these proceedings. It should be borne in mind that access to information in bankruptcy proceedings, as a type of civil proceedings, is primarily governed by the provisions of the Bankruptcy Law. This does not exclude, however, the possibility that solutions arising from other regulations, including the Act on Access to Public Information, may apply in such proceedings. However, its provisions do not serve as a mechanism for obtaining information when it cannot be accessed through the appropriate procedure for bankruptcy proceedings. Its application requires the

83 Gil, Gołaczyński, Goździaszek, Rogala (n 33), commentary to Article 8, margin number 62.

84 Order of the Voivodship Administrative Court in Gdańsk of 10 March 2021, case No. II SAB/Gd 27/21.

85 ibid.

fulfilment of all prerequisites, both in terms of subject matter and the circle of entities entitled to request information, in order to use the solutions provided for therein and obtain information under this procedure. Moreover, special mechanisms for providing information to parties, participants, and third parties should be taken into account, such as the National Register of Debtors (Article 4a BL) and the institution of publicity of information, events, and decisions made and issued in bankruptcy proceedings. These mechanisms should be regarded as an extension and reinforcement of the principle of publicity in bankruptcy proceedings.

4. Publicity of rulings made in bankruptcy proceedings

The publicity of the outcome of a case consists in making the ruling public or otherwise making it available to the public, with the proviso that it is essential that the ruling that concludes the proceedings in the case – whether a judgment, an order on the merits, or an order formally ending the proceedings – is made public, together with the reasons for it or an oral statement of its rationale.[86] It is noteworthy that legal literature indicates that the publicity of judgments only extends to their public announcement, which seems plausible only if this announcement comprises not only the reading of the operative part of the judgment but also an oral statement of the essential reasons for the decision or a full oral justification.[87] However, it should be kept in mind that when considering speed and efficiency of proceedings as key elements of public policy that may justify the exclusion of publicity in court proceedings, one must also take into account that these elements are linked to the right to a trial without undue delay, which is guaranteed by Article 45(1) of the Constitution. This right has a direct influence on the interpretation of the first sentence of Article 45(2).[88] The principle of speed

[86] Karol Wietz, in Tadeusz Ereciński (eds), *Kodeks postępowania cywilnego. Komentarz. Tom I. Postępowanie rozpoznawcze. Artykuły 1-124* (6th edition, Lex 2023), commentary to Article 9, margin number 8.

[87] Kościółek (n 45) 303.

[88] Karol Wietz and Paweł Grzegorczyk, in Marek Safjan and Leszek Bosek (eds), *Konstytucja RP. Tom I. Komentarz* (Legalis 2016), commentary to Article 45, margin number 113.

and efficiency of proceedings is particularly prominent among the principles governing bankruptcy proceedings. It should be recalled that, in accordance with the legislator's position on expanding the possibility of adjudicating cases at an *in camera* hearing within the basic model of civil proceedings, it was explicitly stipulated that such changes do not imply the abandonment of the principle of publicity. The principle that, as a general rule, court hearings are public and cases are examined in hearings unless a specific provision states otherwise remains in force. Moreover, these changes do not limit internal publicity – that is, publicity towards the parties and participants in the proceedings – since decisions made at *in camera* hearings are delivered *ex officio*.[89] The same principle applies in bankruptcy proceedings, with the proviso that rulings, at the time of their issuance, are recorded solely in the ICT system supporting court proceedings, using templates made available in that system, and affixed with a qualified electronic signature. Participants in the proceedings, as well as persons authorised by them, have access to the case files through the ICT system (Article 219(1)–(1b) BL). Thus, it should be concluded that the internal aspect of the principle of publicity does not suffer any limitations. On the contrary, through the ICT system, which covers substantive or procedural decisions (rulings) as well as decisions on technical issues (orders), rulings are practically accessible to participants and the authorities conducting the proceedings at any place and time, fully enabling them to obtain knowledge of the decisions made. Regarding the external aspect of the principle of publicity, its materialisation consists in the announcement of various rulings, as specified in the provisions of the Bankruptcy Law, in the National Register of Debtors, which is publicly accessible. As indicated above, proceedings held in closed hearings determine that rulings are issued at such hearings. It should be remembered, however, that the court and the commissioner judge have the authority to 'restore' the publicity of hearings, including the publicity of rulings and their justifications or the most important reasoning behind the verdict, concerning any issue considered in bankruptcy proceedings, even when the law does not require a hearing. A measure that may contribute to extending proceedings

[89] Explanatory memorandum to the Act of 8 November 2019 on amending the Act–Code of Civil Procedure and certain other acts, No. 2137.

held in open hearings – and consequently the issuance of decisions in such hearings – is the institution of remote hearings, introduced into the Code of Civil Procedure and in force from 14 March 2024.

5. The publicity of bankruptcy proceedings and the protection of the personal data of the participants in the proceedings

It is crucial to underline that the filing of a bankruptcy petition, as well as the subsequent post-declaration bankruptcy proceedings results in a restriction of the debtor's right to privacy. The most glaring example of this is bankruptcy conducted in relation to an individual, particularly a non-business individual. To begin with, the mere announcement of the bankruptcy filing and, before that, the order that the debtor's petition be entered in the repertory, will be publicly disclosed in the National Register of Debtors. Moreover, the data subject to public disclosure is not limited to the debtor's name and surname but also includes information such as the place of residence and PESEL number. Additionally, in the course of the proceedings, details concerning the bankrupt's financial situation and, in the case of natural persons, their family status or even sensitive data – such as information regarding their health – may be revealed.

In the case of personal data, access to such data included in the case file in civil proceedings should be assessed through the prism of the principle of publicity, as expressed in Article 9 § 1 CCP, and in other provisions that serve as counterparts to this regulation in different modes and types of civil court proceedings.[90] The above relates to the issue discussed earlier concerning access to the case file not only by participants in the proceedings but also by third parties, as well as to the operation of the National Register of Debtors, where personal data of participants in bankruptcy proceedings is also processed. Furthermore, it should be kept in mind that information concerning personal data is not limited to the relationship between the bankrupt and their creditors but also extends to the

[90] Kościółek (n 45) 397.

protection of creditors' data in terms of their mutual status as participants in the proceedings or as persons who justify the need for access to the file, thereby gaining access to the personal data of other participants. Moreover, as the CJEU has held, the fact that a court makes temporarily available to journalists documents from court proceedings containing personal data, falls within the exercise, by that court, of its 'judicial capacity', within the meaning of the provision in Article 55(3) of the General Data Protection Regulation (hereinafter 'the GDPR').[91]

With regard to ongoing proceedings, it must be emphasised that bankruptcy proceedings – and, consequently, the processing of personal data within those proceedings – concern data processed in judicial proceedings, which, as bankruptcy proceedings, constitute the exercise of justice. Thus, according to Article 55(3) GDPR,[92] supervisory authorities shall not be competent to oversee processing operations carried out by courts acting in their judicial capacity. Consequently, the President of the UODO, within the scope of their statutory competences, may not interfere with the course of proceedings or the manner in which they are conducted by other authorities authorised under separate regulations, including, in particular, the courts. Similarly, the President of the UODO may not interfere with the rules governing the preparation and collection of documents ordered by the courts, which form part of the evidentiary material in such proceedings.[93] However, it should be borne in mind that courts, even when administering justice, must adhere to the principles set out in the GDPR, albeit with certain modifications as permitted by national law.[94] Nevertheless, the President of the Office for the Protection of Personal Data retains full jurisdiction over the activities of the supervisory authority in areas outside the judicial

91 Case C-245/20 *Autoriteit Persoonsgegevens* [2022] ECLI:EU:C:2021:822.

92 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1.

93 Decision of the President of the Office for Personal Data Protection of 28 June 2019, ref No. ZSOŚS.440.50.2019.II.

94 Marlena Sakowska-Baryła, *Ogólne rozporządzenie o ochronie danych osobowych. Komentarz* (Legalis 2018), commentary to Article 55, margin number 4.

capacity.[95] The controllers of personal data processed in court proceedings, whether in the exercise of judicial administration or in the performance of tasks related to legal protection, shall be the courts. Supervisory functions in this regard shall be exercised, respectively, by the president of the regional court for district court activities, by the president of the appellate court for regional court activities, and by the National Council of the Judiciary for appellate court activities.

According to Article 8(1) of the Charter of Fundamental Rights of the European Union and Article 16(1) of the Treaty on the Functioning of the European Union, every person has the right to the protection of personal data concerning them. In addition, Article 51(2) of the Constitution stipulates that the processing by public authorities of 'information about a citizen' – that is, information allowing a person to be identified – is only permitted if necessary for the realisation of a purpose justified by the public interest.

The principles governing the processing of ordinary personal data are set out in Article 6 of the GDPR, while the processing of sensitive data, including data concerning a person's health, is regulated by Article 9 of the GDPR, which, in paragraph 2, provides a catalogue of exemptions from the prohibition on processing sensitive data. It is worth noting that a significant portion of the grounds listed in Article 9(2) of the GDPR for excluding the prohibition on processing sensitive data are independent of the data subject's consent, and some of these exemptions may even be applied against the will or interests of the person whose sensitive data is being processed.[96] The processing of sensitive data is permitted if it is necessary for the establishment, investigation, or defence of claims in judicial, administrative, or other extra-judicial proceedings.[97] However, it should be pointed out that

[95] Paweł Fajgielski, 'Komentarz do rozporządzenia nr 2016/679 w sprawie ochrony osób fizycznych w związku z przetwarzaniem danych osobowych i w sprawie swobodnego przepływu takich danych oraz uchylenia dyrektywy 95/46/WE (ogólne rozporządzenie o ochronie danych)', in Paweł Fajgielski, *Ogólne rozporządzenie o ochronie danych. Ustawa o ochronie danych osobowych. Komentarz* (2nd edn, Wolters Kluwer Polska 2022) Lex/el., commentary to Article 55, margin number 5.

[96] Maciej Siwicki, 'Anonimizacja jako narzędzie służące ochronie danych osobowych' (2022) 2 Przegląd Sądowy, margin number 2.2.3.

[97] Magdalena Kuba, in Edyta Bielak-Jomaa, Dominik Lubasz (eds), *RODO ogólne rozporządzenie o ochronie danych osobowych. Komentarz* (Wolters Kluwer Polska 2018) 451.

the court file is not a collection of data, as it is not structured according to criteria relating to natural persons but is organised according to different rules, including the order in which evidence was taken, events that occurred in the course of the case, or procedural threads.[98] Against this background, it should be noted that, from 1 December 2021, bankruptcy proceedings have been conducted using an ICT system. In this regard, it should be pointed out that, with respect to ICT systems, the controllers of personal data processed in ICT systems supporting court proceedings, ICT systems maintaining court registers, and ICT systems using record-keeping devices (court ICT systems), are the courts – regarding the exercise of justice or the performance of tasks in the field of legal protection – the presidents of relevant courts, and the Minister of Justice concerning the tasks performed (Article 175da of the Act on the Organisation of Common Courts).

Given the creation of extensive databases for the acquisition, processing, and storage of personal data, the processing of such data in information systems must have a specific legal basis.[99] In addition to the ICT system for bankruptcy proceedings, the National Register of Debtors, which provides information on a number of relevant events occurring in the proceedings, remains crucial from the perspective of bankruptcy proceedings as part of the court's administration of justice or legal protection tasks. The KRZ serves both a communication and an information and registration function.[100] The issue of data protection in insolvency registers has already been addressed in Regulation 2015/848,[101] where Article 79(1) and (2) stipulate that it is the responsibility of Member States to implement technical measures to ensure the security of personal data processed in their national insolvency registers. Furthermore, Member States must indicate, for the purposes of publication on the European e-Justice portal, the details of the entity

98 Explanatory memorandum to the government draft Act on the protection of personal data processed in connection with preventing and combating crime, 8th term Sejm print No. 2989.

99 Paweł Fajgielski, 'Wykorzystanie systemów informatycznych w sądach a ochrona danych osobowych' (2014) 4 Krajowa Rada Sądownictwa 13.

100 Rafał Kowalczyk, *Zakres ujawnianych danych w KRZ – zagadnienia dotyczące postępowania restrukturyzacyjnego i upadłościowego* (Lex 2022), margin number 8.

101 Regulation (EU) 2015/848 (n 31).

designated by national law to act as the data controller. The Minister of Justice is the controller of the data collected in the KRZ and the data covered by the content of the notices. The right to the protection of personal data is not an absolute right; it must be considered in the context of its social function and balanced against other fundamental rights in accordance with the principle of proportionality.[102] As indicated by the legislator, the processing of personal data entered in the KRZ is necessary for the performance of a task carried out in the public interest, which consists in ensuring the security of legal transactions – not only in the sphere of economic activity. The legislator further indicated that citizens are entitled to information on circumstances relevant to their legal position, and such information certainly includes details on the solvency of a participant in legal transactions.[103] It is therefore necessary to disclose such data, including PESEL numbers, to ensure the unambiguous identification of persons covered by the KRZ.[104]

He points out that, pursuant to Article 11(1) ANRD, data contained in the Register may not be removed from it unless otherwise provided by law. The legislator also establishes a general rule that, unless specific regulations apply, data shall cease to be disclosed 10 years after the final termination or discontinuance of the proceedings to which they relate. The legislator introduces exceptions to this rule, specified in paragraphs 3–7 of Article 11 ANRD. The cessation of data disclosure is not equivalent to the deletion of data from the Register. Instead, under paragraphs 2–5 of Article 11 ANRD, cessation of disclosure applies to notices made in the proceedings to which the data referred.[105] The retention period for data relating to entities involved in bankruptcy and restructuring proceedings has been limited, taking into account the need to ensure the security of trading.[106] The regulation stipulating that, as a rule, data on bankruptcy and restructuring proceedings cease to

102 Regulation (EU) 2016/679 (n 92), preamble, recital 4.

103 Explanatory memorandum to the government draft Act on the National Register of Debtors, 8th term Sejm print No. 2637.

104 ibid.

105 Łukasz Goździaszek, in Gil, Gołaczyński, Goździaszek, Rogala (eds) (n 33), commentary to Article 11, margin number 2.

106 Rafał Kowalczyk, *Zamieszczanie i usuwanie danych z KRZ – zagadnienia dotyczące postępowania restrukturyzacyjnego i upadłościowego* (Lex 2022), margin number 18.

be disclosed after 10 years (subject to exceptions) introduces a fundamental change compared to the previous system, in which publication in the Court and Economic Monitor meant that a given fact was disclosed indefinitely and could not be removed.[107] The solution adopted in the KRZ is objectively more beneficial to data subjects and individuals.[108]

6. Conclusion

Where the rules governing bankruptcy proceedings do not explicitly refer to the general principles of civil procedure, it is reasonable to consider an approach in which these principles are applied subsidiarily, guiding the interpretation of bankruptcy proceedings regulations. The principle of publicity in proceedings is not only one of the principles of civil procedure – Article 9 CCP – but it also reflects the constitutional principle of publicity in proceedings and adjudication, aligning with international and European standards defining fair trial principles. At the opposite end of the spectrum is the negation of the principle of publicity, which results in the secrecy of proceedings. In my opinion, bankruptcy proceedings, as a form of civil proceedings, implement the principle of publicity – both externally, for the public, including the media, and internally, for the participants in the proceedings. Although one may attempt to challenge this by pointing to the principle of *in camera* hearings for the settlement of issues in bankruptcy proceedings, such objections are illusory. When considering this aspect of bankruptcy proceedings – aimed at ensuring the speed and efficiency of the process – against the background of instruments introduced to facilitate access to information in bankruptcy law regulations, as well as taking into account the possibilities offered by new technologies and information and communication systems, it is impossible to conclude that access to information on the proceedings is restricted or excluded. Moreover, regarding *in camera* hearings, it is important to recall the earlier-mentioned possibility

107 Explanatory memorandum (n 103).

108 Goździaszek, in Gil, Gołaczyński, Goździaszek, Rogala (eds) (n 33), commentary to Article 11, margin number 3.

of 'restoring' the publicity of this aspect of the proceedings through decisions of the bankruptcy court or the commissioner judge, allowing public hearings even where the legislator has initially provided for *in camera* proceedings. The amendment to civil procedure, which introduces remote hearings as a permanent element of the civil process – not merely during extraordinary events such as a pandemic – offers further potential to expand the scope of public hearings in bankruptcy proceedings. This amendment, which came into force on 14 March 2024, is another example of the increasing use of new technologies in the judiciary. Consideration of the principle of publicity in bankruptcy proceedings, in my opinion, should not be limited to domestic regulations. It is also important to acknowledge, for example, the European e-Justice Portal, which provides access to information on bankruptcy proceedings conducted within the European Union. The above considerations lead to the conclusion that the regulations governing bankruptcy proceedings have effectively implemented the procedural principle of publicity – both in its external and internal aspects. By introducing the institution of announcements in the National Register of Debtors, the current regulations, considering their scope and the principle of formal publicity of the KRZ, have extended the application of this principle.

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