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## THE PREVENTIVE RESTRUCTURING OF COMPANIES IN DIFFICULTIES – ONE-SIZE-FITS-ALL OR TAILOR MADE SOLUTIONS?

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### **Summary**

*The Republic of Croatia is facing the biggest restructuring of companies in difficulties with substantial involvement of international financial investors. Restructuring is implemented according to a newly adopted Act on extraordinary administration proceeding in companies of systemic significance for the Republic of Croatia. The latter Act was adopted in the aftermath of the business failure of the major retailer i.e. the Agrokor group. The restructuring of the group has soon become a very sensitive political issue and a topic of heated public discussions. The Act has been heavily criticized both by legal scholarship and by the public for being designed for a single group of companies in Croatia, as well as for being incoherent with constitutional principles and existing insolvency legislation. It created a type of debtor-not-in-possession in-court extraordinary administration designed for systemic significant (group of) companies in state of insolvency or pre-insolvency. Departing from this background, this paper aims to provide a wider restructuring picture by comparing three different legal models of preventive corporate restructurings for firms in difficulties: the German protective shield proceedings, the English schemes of arrangement and the Italian extraordinary administration. The authors attempt to evaluate each model's effectiveness on the basis of relevant studies which indicate their success rate. As far as the Croatian Act is concerned, the paper provides an overview of the development of the preventive restructuring law, while questioning certain aspect of the Act, especially the concept of the company of systemic significance.*

**Keywords:** *companies' restructuring; companies in difficulties; extraordinary administration; group of companies restructuring; companies of systemic significance.*

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## 1. INTRODUCTION

The restructuring models for companies in difficulties may take many forms.<sup>1</sup> Attempts to preserve the continuation of business of the company debtor, who would otherwise be liquidated, can be designed as “debtor-in-possession” or “debtor-not-in-possession” procedure, conducted “at-the-court” or “out-of-court”, “state assisted” or not. The restructuring may start when first pre-insolvency signs become apparent or later, when insolvency or overindebtedness appears. The closer the restructuring procedure is to insolvency, the more is the whole process of negotiation between interested parties (i.e. distressed company and its creditors) influenced by mandatory insolvency law provisions relevant for composition of creditors’ representative body, required majority to render the restructuring plan etc. It has been observed that out-of-court restructurings are generally more efficient.<sup>2</sup> Out-of-court negotiations through less formal procedure allow greater flexibility in reaching a restructuring plan that conciliates interests of many stakeholders, but they suffer from the free-rider issue.<sup>3</sup> In out-of-court restructurings major creditors, or among them, creditors willing to provide new money, usually assume the main role, while state-assisted procedures provide instruments that limit opportunities for free riding.<sup>4</sup>

The timeline of the restructuring procedure also plays a vital role. For successful and efficient company restructuring, an early start is crucial. As is well known, “the later a business initiates restructuring proceedings, the higher the costs of restructuring

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- 1 See generally: Adeyemo, M. M., Zahraiddin-Aravena, R. X. (eds.), *Reorganizing Failing Businesses, A Comprehensive Review and Analysis of Financial Restructuring and Business Reorganization, Volume I*, Business Bankruptcy Committee, American Bar Association, Chicago, 2017, Part I, 1.1-1.13. Adeyemo, M. M., Zahraiddin-Aravena, R. X. (eds.), *Reorganizing Failing Businesses, A Comprehensive Review and Analysis of Financial Restructuring and Business Reorganization, Volume II*, Business Bankruptcy Committee, American Bar Association, Chicago, 2017, Part IV, General Considerations (sec.17). For US law reorganization model (Chapter 11) see generally: Roe, M. J., Tung, F., *Bankruptcy and Corporate Reorganization*, Foundation Press, 4<sup>th</sup> ed., St. Paul, 2016, p. 603 et seq. For comparison between US and UK law which dominate restructuring law, see Mallon, C., Waisman, S., Y., Schrock, R. C., *The Law and Practice of Restructuring in the UK and US*, Oxford University Press, 2<sup>nd</sup> ed., 2017, p. 151-220. For types on corporate restructuring and restructuring in bankruptcy see generally: Gaughan, P. A., *Mergers, Acquisitions and Corporate Restructurings*, Wiley, 6<sup>th</sup> ed., 2015, p. 391-476.
- 2 Eidenmueller, H., van Zwieten, K., *Restructuring the European Business Enterprise: The EU Commission Recommendation on a New Approach to Business Failure and Insolvency*, European Corporate Governance Institute (ECGI) - Law Working Paper No. 301/2015, Oxford Legal Studies Research Paper No. 52/2015, p. 2., available at: <https://ssrn.com/abstract=2662213> (10 May 2018).
- 3 Eidenmueller, H., *Unternehmenssanierung zwischen Markt und Gesetz: Mechanismen der Unternehmensreorganisation und Kooperationspflichten im Reorganisationsrecht*, Otto Schmidt, Cologne, 1999, p. 319 et seq.
- 4 Eidenmueller, H., van Zwieten, K., op. cit., p. 2.

and the lower the management powers and success rate”.<sup>5</sup> Companies in difficulties should have the possibility to restructure their debts when the risk of insolvency becomes apparent, not when it actually occurs. Therefore, “preventive” restructuring is gaining prominence, both at the EU and EU member states’ level. After its 2014 recommendation, which invited EU member states to modernize their restructuring laws, the European Commission proposed a Directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending the Directive 2012/30/EU.<sup>6</sup> Following the recast of European Insolvency Regulation - EIR<sup>7</sup> that came to force on 26 June 2017, significant changes were made in the recasted EIR’s scope of application because some pre-insolvency and debtor-in-possession proceedings (though based only on the laws related to insolvency – Art. 1) were included. EIR provides for the automatic recognition of insolvency proceedings throughout the EU. Scope of application is confined to various corporate entities (and individuals) with their centre of main interest (hereinafter: COMI) within a member state of the EU. Now the COMI concept is explicitly defined in the EIR “the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties”.<sup>8</sup> If the type of proceedings comes into the scope of application of the EIR, this “main” proceedings would have extraterritorial effects (under presumption that secondary proceedings are not opened in another member state) irrespective of debtor’s assets location in the EU - with exception of Denmark.<sup>9</sup> Therefore, some, but not all restructuring models are within the scope of the recast EIR. The most popular restructuring tool, namely the UK’s scheme of arrangements (hereinafter: SoA) is however not within its scope.

Due to diversified national approaches in the EU member states distressed companies’ restructurings cause both restructuring migration and regulatory competition<sup>10</sup> which is extensively discussed by scholars while it borders on forum

5 EC Commission, Impact Assessment, 2016, p. 14 et seq.

6 Proposal COM (2016) 723 final

7 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. 19–72. It has provisions governing jurisdiction for opening insolvency proceedings, provisions regarding the recognition and enforcement of judgments issued in such proceedings, and provisions regarding the law applicable to insolvency proceedings, which is *lex fori concursus*. In addition, EIR aimed to lay down rules on the coordination of insolvency proceedings which relate to the same debtor or to several members of the same group of companies. See more the text in preamble par. (6) et seq.

8 EIR, Art. 3. par. 1, first sentence. Some authors argue that COMI is still not explicitly defined. In that vein see: Block-Leib, S., *Reaching to Restructure across Border (without over-Reaching), Even After Brexit*, *American Bankruptcy Law Journal*, Vol. 92, No. 1, 2018, p. 5. fn. 16.

9 Eidenmueller, H., van Zwieten, K., op. cit., p. 3.

10 *Ibid.*, p. 9.

shopping<sup>11</sup> and abuse of insolvency law.<sup>12</sup> English SoA unquestionably offers a very flexible tool for distressed companies to deal with financial difficulties. It is therefore not surprising that non-UK distressed companies have used UK law to facilitate a corporate rescue that would not have been possible under their domestic laws. It has been documented that important German firms, already in the pre-insolvency stage, moved their centre of main interest (COMI) to England in order to be restructured by using UK SoA model, although the use of SoA, according to English law, is permitted whenever there is “sufficient connection” to UK, which even does not require relocation of COMI.<sup>13</sup> However, these “out-of-home” restructuring models are again on trial when its outcomes (i.e. court sanctioned SoA) should be recognized in the country of the restructured company origin.<sup>14</sup> Therefore, it has been observed that SoA’s involving EU-registered companies should demonstrate that they are enforceable relying on the concept of court-sanctioned SoA, which will be enforceable according to the Brussels II Regulation.<sup>15</sup> The German regulatory response to that emigration followed with ESUG (*Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen*), by which Germany tried to restore its “preventive restructuring” attractiveness, offering early restructuring of operative companies by the introduction of the protection scheme proceedings (*Schutzschirmverfahren*).

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- 11 Ringe, W.-G., Strategic Insolvency Migration and Community Law, in: Ringe, Wolf-Georg at al. (eds.), *Current Issues in European Financial and Insolvency Law*, 1<sup>st</sup> ed., Hart Publishing, 2009, p.75-77. Eidenmueler, H., Free Choice in International Company Insolvency Law in Europe, *Eur. Bus. Org. L. Rev.* No. 6, 2005, p. 423 et seq., available at <https://doi.org/10.1017/S1566752905004234> (10 May 2018); Tribe, J. P., Bankruptcy Tourism in the European Union: Myth or Reality?, available at <https://ssrn.com/abstract=2781500> (20 May 2018). Ringe, W.-G., Forum Shopping under the EU Insolvency Regulation, *Oxford Legal Studies Research Paper No. 33/2008*, available at <https://ssrn.com/abstract=1209822> (15 May 2018).
  - 12 Armour, J., Abuse of European Insolvency Law, A Discussion, in: Rita de la Feria, Stefan Vogenauer (eds), *Prohibitions of Abuse of Law: A new General Principle of EU Law?*, Studies of the Oxford Institute of European and Comparative Law, Hart Publishing, 2011, Ch. 11.
  - 13 Extensive analysis of German (and non- German) companies restructured according to UK SoA model, especially in regard to existing “sufficiency of connections” see: Block-Leib, Susan, op. cit., p. 16 et seq. Author notices that “even presence of the English choice of laws clauses has (...) found sufficient to satisfy jurisprudential requirement of connections between the foreign company and England.”
  - 14 Eidenmüller, H., Frobenius, T., Die internationale Reichweite eines englischen Scheme of Arrangement, *WM* 2011, p. 1210.
  - 15 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ L* 351, 20.12.2012, p. 1–32. See more, Block-Leib, op. cit., p. 19.

Italy developed tailor-made state-assisted proceedings extraordinary administration (hereinafter: EA) for large businesses in distress.<sup>16</sup> According to Ghia,<sup>17</sup> the aim of the EA is to preserve a business entity both in its value as a whole and in its value as a group of individual assets. The presumption underlying this concept is that “the presence of contracts, the competitiveness of the product, and its marketability are factors that cannot be dispersed through a liquidation procedure while intangible goods (intellectual property assets and goodwill) greatly lose their value.<sup>18</sup> With the introduction of the EA, bankruptcy proceeding was for the first time designed in a way to encourage the recovery of a debtor-company through composition agreements between the debtor and its creditors.<sup>19</sup> According to some authors and relying on an extensive survey, the EA has proven to be generally efficient, although effects on creditors vary – from significant recovery ratios to ratios not far from the ones the creditors could have if the company had gone bankrupt.<sup>20</sup>

At the moment, Croatia is facing the biggest (group of) companies in difficulties restructuring ever, with a substantial involvement of international financial investors specialized for distressed firms, also known as vultures.<sup>21</sup> The Act on extraordinary administration proceeding in companies of systemic significance for the Republic of Croatia (hereinafter: EAPA)<sup>22</sup> was introduced when the threat of business failure of the major retailer became imminent. It is a type of debtor-not-in-possession in-court EA designed for large companies in state of insolvency or pre-insolvency. The EAPA was seriously criticized both by legal scholarship and the public for being designed for a single group of companies in Croatia, as well as for being incoherent with

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- 16 Castagnola, A., Sacchi, R. (eds.), *La legge Marzano-Commentario*, Torino, 2006, p. 1-290., Pacchi, S., *Alcune riflessioni in tema di insolvenza, impresa e complesso aziendale, derivanti dalla lettura della legge delega per l’emanazione della nuova legge sull’amministrazione straordinaria*, *Giur. comm.*, 1999, I, p. 314; Pacchi, S., *L’amministrazione straordinaria delle imprese di «rilevanti dimensioni»*, in: *Trattato di diritto delle procedure concorsuali*, Apice, Umberto (ed.) III, Torino, 2011; Zanichelli, V., *L’amministrazione straordinaria*, in *Fallimento e altre procedure concorsuali*, diretto da G. Fauceglia, L. Panzani, Torino, 2009. Zanichelli, V., *I concordati giudiziali*, Torino, 2010. Falini, Alberto, *La straordinaria amministrazione: elementi di criticità nella comunicazione e nel controllo delle imprese in amministrazione straordinaria*, Milano, Franco Angeli, 2008, p. 1-146.
  - 17 Ghia, L., *Restructurings and Reorganizations in Italy - An Overview of Italian Bankruptcy Legislation for Large Insolvent Companies*, International Insolvency Institute, Tenth Annual International Insolvency Conference Rome, Italy, June 7-8, 2010, p. 2, available at: [https://www.iiiglobal.org/sites/default/files/Lucio\\_Ghia.pdf](https://www.iiiglobal.org/sites/default/files/Lucio_Ghia.pdf) (10 June 2018).
  - 18 Loc. cit.
  - 19 Manganelli, P., *The Evolution of the Italian and U.S. Bankruptcy Systems: a Comparative Analysis*, *Journal of Business & Technology Law*, Vol. 5, Issue 2, Article 4, p. 242, available at: <http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1146&context=jbtl> (22 June 2018).
  - 20 Danovi, A., *Managing large corporate crisis in Italy: an empirical survey on extraordinary administration*, *Journal of Global Strategic Management*, Vol. 4, No. 2, 2010, p. 61-76.
  - 21 Gilson, S. C., *Creating Value through Corporate Restructuring*, 2<sup>nd</sup> ed., Wiley Finance, 2010, p. 17.
  - 22 *Zakon o postupku izvanredne uprave u trgovačkim društvima od sistemskog značaja za Republiku Hrvatsku*, Official Gazette, No. 32/17.

constitutional principles and the existing insolvency laws.<sup>23</sup> With this law, the Croatian legislator has departed from its general role model in company and insolvency matters, i.e. German law and resorted to the Italian model applied for the first time when Italy faced the financial collapse of the food giant Parmalat.<sup>24</sup>

The EAPA now appears as a “strange puzzle” in the system of preventive restructuring law. Due to its inconsistencies and understatements, its constitutionality was questioned, yet the Constitutional Court dismissed the petitions. The first case of application of the EA in Croatia is still in motion. It seems that this sudden legislative shift needs more probing into both the design and efficiency of the particular preventive restructuring models. This paper focuses on three legal models (as stated above) of preventive corporate restructurings for firms in difficulties, not only to inspect their general features, but also to analyse how they function in practice in terms of their main benefits and drawbacks. As far as the Croatian law is concerned, the paper zooms in on the notion of the company of systemic significance as the cornerstone of the law. On the basis of all findings, the authors offer *de lege ferenda* proposals.

## **2. REVIEW OF THREE (PREVENTIVE) RESTRUCTURING MODELS**

### **2.1. The German Protective Shield Proceedings (PSP)**

The German Insolvency Code (*Insolvenzordnung* – hereinafter: InsO)<sup>25</sup> was significantly changed in 2012 with the Reorganization Facilitation Act (*Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen*, hereinafter: ESUG)<sup>26</sup> with the aim of facilitating early restructuring of operative companies by the introduction of the protection scheme proceedings (*Schutzschirmverfahren*, hereinafter: PSP).<sup>27</sup> With ESUG, the German legislature tried to regain its reorganization attractiveness<sup>28</sup> and prevent further emigration of German companies to the UK in order to be reorganized under the English Scheme of Arrangement (hereinafter: SoA).<sup>29</sup> By virtue of the

23 See Garašić, J., *Izvanredna uprava države nad povezanim društvima*, Zbornik 55. susreta pravnika Opatija, 2017.

24 Legislative Decree 23. Dec. 2003 n. 347 and amended 18 Feb 2004 n. 39.

25 *Insolvenzordnung* of 5 October 1994 (BGBl. I S. 2866), last amendment of 23 June 2017 (BGBl. I S. 1693).

26 This amendment of InsO-a was brought on 13 December 2012, entered into force on 1 March 2012 (BGBl. I S. 2582).

27 See an overview of changes introduced by ESUG in Trilling, P., *Eigenverwaltung und Schutzschirmverfahren nach dem ESUG, Wirkungen dieser Anreizinstrumente auf eine frühzeitige Insolvenzantragstellung des Schuldners*, Igel Verlag, Hamburg, 2014; Kann, van J., Redeker, R., *Reform Act on German Insolvency Law: New Opportunities for Distressed Investors?*, Pratt's Journal of Bankruptcy Law, Vol. 8, No. 5, 2012, pp. 436-442.

28 Sax, S., Poncek, J., Swierczok, A. M., *Ein vorinsolvenzliches Restrukturierungsverfahren für europäische Unternehmen*, Betriebs Berater, Heft 7, 2017, p. 323.

29 English Companies Act 2006, last amended on 26 June 2017, available at: <https://www.legislation.gov.uk/ukpga/2006/46/contents>. On the impact of regulatory competition on development of national preventive insolvency proceedings see Eidenmüller, H., van Zwielen,

ESUG, the German law tried to increase the number of reorganization proceedings.<sup>30</sup>

It is important to emphasise that the German PSP is not a stand-alone preventive restructuring proceeding, but rather the first stage of ordinary preliminary proceedings.<sup>31</sup>

The PSP is initiated by an order of the insolvency court. A petition for opening PSP (i.e. self-administration or *Eigenverwaltung*) is filed by the debtor together with a petition for the opening of insolvency proceedings on the grounds of imminent insolvency - prospective illiquidity (*drohende Zahlungsunfähigkeit*) or over-indebtedness (*Überschuldung*).<sup>32</sup> During the PSP, the debtor remains in control of the company's management.<sup>33</sup> Together with the proposal, a debtor encloses a 'restructuring certificate', provided by a person (tax adviser, accountant or lawyer) experienced in insolvency matters confirming imminent illiquidity or over-indebtedness, absence of illiquidity and providing proof that the intended restructuring does not manifestly lack a prospect of success.<sup>34</sup> Within PSP, the debtor will be granted a certain period of time, not exceeding three months, to submit the insolvency plan (*Insolvenzplan*).<sup>35</sup> Three months is estimated as enough time for debtor to develop the plan for restructuring the company.<sup>36</sup> The competent insolvency court will also appoint a preliminary creditors' trustee (*vorläufiger Sachwalter*).<sup>37</sup> When exercising its appointing powers, the court should generally accept a preliminary creditors' trustee as proposed by debtor and it can only refuse the proposal on the grounds of the candidate's insufficient qualifications.<sup>38</sup> After opening the PSP, individual enforcement measures are prohibited, allowing the debtor in possession to negotiate the plan.<sup>39</sup> At the request of the debtor, the court can allow the debtor to create preferential claims against the estate, to be satisfied in full (e.g. claims of existing suppliers). That encourages providers of the new money to

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K., op. cit., p. 2. See also Schneider, S., Is Germany about to become the most attractive place for business restructurings?, *Insolvency and Restructuring International*, Vol. 10, No. 2, 2016, p. 15.

30 See Ahrens, M., Von der Konkurs- über die Gesamtvollstreckungs- zur Insolvenzordnungs-, *Yonsei Law Journal*, Vol. 6, No. 1&2, p. 134; Grell, F., Hauke, H., Splittgerber, D., Pre-Packaged Insolvencies on the Rise in Germany? Evaluating the German ESUG, *Expert guide: Bankruptcy & restructuring 2014*, March, p. 52, available at: <https://www.lw.com/thoughtLeadership/pre-packaged-insolvencies-on-the-rise-in-germany-evaluating-the-german-esug> (10 May 2018). Authors point that an important result of the ESUG is a thorough change to German insolvency law 'culture'.

31 Kann, van J., Redeker, R., op. cit., p. 440. See also, Study for the JURI Committee, The Commission Insolvency Proposal and its Impact on the Protection of Creditors, June 2017, p. 32., available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583155/IPOL\\_STU\(2017\)583155\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583155/IPOL_STU(2017)583155_EN.pdf) (12 May 2018).

32 § 270.b (1) InsO.

33 Moravec, T., Pastorčak, J., Valenta, P., European Regulation of Insolvency Status in the Hybrid Proceeding, *US- China Law Review*, Vol. 12, 2015, p. 459.

34 § 270.b (1) InsO.

35 § 270.b (1) InsO.

36 Kann, van J., Redeker, R., op. cit., p. 441.

37 § 270.c InsO.

38 § 270.b (2) InsO.

39 § 270.b (2) InsO together with § 21 InsO.



invest in the distressed company.<sup>40</sup> In order to provide for the successful development of an insolvency plan, during a short period of the PSP, the collaboration of at least 51% of the major creditors is required.<sup>41</sup> Preliminary Proceedings and the PSP end when a court initiates the insolvency proceedings.

According to the general opinion, ESUG has proven a success for it enabled both creditors and debtors to use German insolvency law more efficiently with a view to procuring their legitimate interests.<sup>42</sup> Its effectiveness was tested in various independent studies. For our purpose we single out the findings of the following three studies. The first one, carried out by the Boston Consulting Group Study in 2013<sup>43</sup> showed a relatively low number of initiated PSPs in relation to total insolvency proceedings, i.e. only 2.4%.<sup>44</sup> The typical entity using PSP was rather large, with an annual turnover of at least € 15 million and a minimum of 150 employees.<sup>45</sup> In another 2015 McKinsey and Noerr InsO study,<sup>46</sup> German insolvency law received top marks from restructuring and insolvency experts.<sup>47</sup> Improved opportunities for creditors to exercise influence, speediness of restructuring procedure under PSP were deemed a success. However, it was observed that 1/3 of the self-administrations applied for, went into insolvency which was not a sign of high success rate.<sup>48</sup> The weakest point for self-administration proceedings was found in the management's lack of competence. Continued absence of group insolvency law was highlighted by many experts as a considerable drawback.<sup>49</sup> The third, the 2017 Boston Consulting Group study<sup>50</sup> assessed the first 5 years of ESUG since its enactment. It concluded that the law has been largely successful, with a few exceptions. The positive effects include the average duration of the PSP which is shorter than the regular insolvency proceedings.<sup>51</sup> On the other side, there was no evidence that restructuring applications are being submitted any sooner than before the introduction of the ESUG.<sup>52</sup> The study further pointed out some additional noteworthy facts. First, self-administration of corporate restructuring indeed remains

40 Clifford & Chance, A Guide to European Restructuring and Insolvency Proceedings, September 2015, str. 98 available at: [https://www.cliffordchance.com/briefings/2015/09/a\\_guide\\_to\\_europeanrestructuringandinsolvenc.html](https://www.cliffordchance.com/briefings/2015/09/a_guide_to_europeanrestructuringandinsolvenc.html) (12 May 2018).

41 § 272 InsO.

42 Schneider, S., op. cit., p. 17.

43 The Boston Consulting Group, Zwei Jahre ESUG, Hype weicht Realität, March 2014, [http://www.ifus-institut.de/fileadmin/pdf/Newsletter/BCG/BCG\\_2\\_Jahre\\_ESUG.pdf](http://www.ifus-institut.de/fileadmin/pdf/Newsletter/BCG/BCG_2_Jahre_ESUG.pdf) (15 April 2018).

44 Ibid., p. 3.

45 Ibid., p. 7.

46 McKinsey & Noerr, InsO study 2015, Are German insolvency statutes internationally competitive after 3 years of ESUG?, Berlin June 2015, available at: [https://www.noerr.com/~media/Noerr/PressAndPublications/News/2015/insolvenzstudie/Insolvency-Study-EN\\_short.pdf](https://www.noerr.com/~media/Noerr/PressAndPublications/News/2015/insolvenzstudie/Insolvency-Study-EN_short.pdf) (20 April 2018).

47 Ibid., p. 5.

48 Ibid., p. 8.

49 Ibid., p. 17.

50 The Boston Consulting Group, Fünf Jahre ESUG, Wesentliche Ziele erreicht, March 2017, available at: <http://media-publications.bcg.com/13mar2017-Studie.pdf> (15 April 2018).

51 Ibid., p. 11.

52 Ibid., p. 3.

the exception. The current share of self-administration proceedings remains at a stable 2.6% of all insolvency proceedings.<sup>53</sup> Second, self-administration remains important for large companies, but is increasingly interesting to small companies as well.<sup>54</sup> More than half (58%) of the largest 50 corporate bankruptcies in 2016 were handled as self-administered proceedings. Third, self-administration remains very attractive to shareholders. In more than half of the proceedings (58%), shareholder's rights were not affected.<sup>55</sup> Fourth, in 90% of total proceedings creditors have had to renounce more than 50% of their claims,<sup>56</sup> which generates a rather modest success for them.

## ***2.2. The English Scheme of Arrangement***

In the UK, the preventive restructuring framework is composed of two different proceedings:<sup>57</sup> Company Voluntary Arrangements (hereinafter: CVA)<sup>58</sup> and Scheme of Arrangement (hereinafter: SoA).<sup>59</sup> The latter has been increasingly used in financial restructuring of international (group of) companies.<sup>60</sup>

The CVA is primarily designed for small companies, although it is available to any company, regardless of its size. The moratorium period of up to three months for the company is available to small companies only (companies which satisfy at least two of the following three requirements: turnover of not more than £6.5 million, assets of not more than £3.26 million; and less than 50 employees).<sup>61</sup> One of the reasons why the moratorium is not available to large companies is the legislative intention that large companies should follow administrative procedure and preventive restructuring introduced by SoA.<sup>62</sup> For the CVA proposal to be approved, more than one half (in

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53 Ibid., p. 5.

54 Ibid., p. 6.

55 Ibid., p. 16.

56 Loc. cit.

57 For an overview of UK Insolvency Law and the preventive, i.e. rescue proceedings, see Finch, V., Milman, D., *Corporate Insolvency Law, Perspectives and Principles*, Cambridge University Press, 2017, pp. 409 – 450. See also Armour, J., Hsu, A., Walters, A., *Corporate Insolvency in United Kingdom: The Impact of the Enterprise Act 2002*, Vol. 5, No. 2, June 2008, pp. 148-171. For comparison with US law, see: Mallon, Christopher, Waisman, Shai, Y., Schrock, Ray C., op. cit., p. 151-220.

58 Regulated in Insolvency Act 1986, in Articles 1 – 7B (<http://www.legislation.gov.uk/ukpga/1986/45/contents>)

59 Part 26 (articles 895 – 901) of English Companies Act 2006.

60 Sax, S., Swierczok, A., *The Recognition of an English Scheme of Arrangement in Germany Post Brexit: The Same But Different?*, *International Corporate Rescue*, Vol. 14, No. 1, 2017, p. 38.

61 The moratorium period for small companies using the CVA was introduced by the amendment in 2000 (Insolvency Act 2000), which came into force on 1 January 2003. See Article 3 (2) of Schedule A1 of Insolvency Act 1986. See a brief overview in Finch, V., *Corporate rescue: a game of three halves*, *Legal Studies*, Vol. 32, No. 2, June 2012, p. 320.

62 Fletcher, I.F., *UK Corporate Rescue: Recent Developments – Changes to Administrative Receivership, Administration, and Company Voluntary Arrangements – The Insolvency Act 2000, The White Paper 2001, and the Enterprise Act 2002*, *European Business Organization Law Review*, Vol. 5, No. 1, 2004, p. 131.

value) of the shareholders and more than three quarters in value of the creditors must vote in favor of it. The creditors' decision holds precedence subject to an appeal by the shareholders before the court,<sup>63</sup> after which the scheme becomes binding. Thus, it makes the decision a compromise between the creditors and the shareholders, without having to involve the court (except for the possibility of appeal).<sup>64</sup> However, there is no clear conclusion whether the CVAs are actually successful in practice.<sup>65</sup>

SoA is a court-assisted reorganization procedure regulated in Part 26, Section 895-901 of the Companies Act 2006. It allows the court to sanction a "compromise or arrangement" that has been agreed between the relevant class or classes of creditors or members and the company.<sup>66</sup> As opposed to CVAs, SoAs are commenced by initial application to the court, which decides whether to order a meeting of the creditors and members of the company.<sup>67</sup> The application for SoA can be filed by the company itself; any creditor of a member of the company, liquidator or administrator.<sup>68</sup> Any arrangement brought by the creditors and shareholders shall be binding if the majority which represents 75% in value of creditors (or class of creditors) or members (or class of members) which are present at the meeting agree, subject to a subsequent court's approval (i.e. to sanction the agreement).<sup>69</sup> Thereby, the majority of creditors binds the minority (cram-down mechanism within each class of creditors) which makes SoA a very efficient restructuring mechanism.<sup>70</sup> Also, a company is free to choose the creditors or class of creditors with whom it wishes to reach an arrangement, all of those subject to a court's final approval.<sup>71</sup> Although the court assumes a more prominent role within the SoA, SoA still remains primarily a private-law agreement between the creditors and shareholders. Directors stay in control, as the SoA does not require engaging an insolvency practitioner in formulating and exercising the scheme.<sup>72</sup>

SoA is a flexible procedure, which could allow for example, a simple extension of duration of the claims, debt to equity swap for highly complicated restructuring measures or combination of different measures.<sup>73</sup> The overall timing of a SoA implementation depends on the complexity of the restructuring but generally, it is

63 Article 4.A (2) of the Insolvency Act 1986 and articles 1.19 – 1.20 of Insolvency Rules 1986. See also McKenzie-Skene, D. W., *How insolvency works in Scotland*, *Juta's Business Law*, Vol. 11, No. 2, 2003, p. 108.

64 Finch, V., Milman, D., *op. cit.*, p. 418.

65 See an overview of conducted CVAs in Walters, A., Frisby, S., *Preliminary Report to the UK Insolvency Service into Outcomes in Company Voluntary Arrangements*, available at <https://ssrn.com/abstract=1792402> (8 May 2018); Armour, J., Hsu, A., Walters, A., *op. cit.*, p. 158.

66 Article 895 (1) of Companies Act 2006. Both terms „compromise“ and „arrangement“ have no legal statutory meaning, but rather ordinary commercial meaning. Thus they pose no obstacle in application of the SoA. See Payne, J., *Schemes of Arrangement: Theory, Structure and Operation*, Cambridge University Press, Cambridge, 2014, p. 20.

67 Article 896 (1) of Companies Act 2006. See more in Payne, J., *op. cit.*, p. 36.

68 Article 896 (2) of Companies Act 2006.

69 Article 899 (1) of Companies Act 2006.

70 Sax, S., Swierczok, A., *op. cit.*, p. 38.

71 Payne, J., *op. cit.*, p. 42.

72 Finch, V., Milman, D., *op. cit.*, p. 412.

73 Sax, S., Swierczok, A., *op. cit.*, p. 38.

completed in approximately eight weeks which is one of its most important benefits.<sup>74</sup> However, in contrast to the CVA, there is no moratorium period granted towards the company's creditors, which is considered to be one of the main disadvantages of SoAs.<sup>75</sup>

The court not only has the authority to review the SoA and, if satisfied, approve it, but also enjoys a rather wide discretion in this regard. There are three main criteria established in the settled case law which courts examine before sanctioning the scheme: compliance with the statutory requirements; making sure that the majority fairly represents the class (which includes the test if the majority of relevant creditors are acting in good faith and are not simply coercing the minority in order to promote their own interests), and that the scheme is such that an intelligent and honest person who may be affected by the scheme might reasonably approve it.<sup>76</sup> The SoA becomes legally effective when filed with the Registrar.<sup>77</sup>

English courts have allowed the application for the SoA even for companies which do not have COMI or an establishment in England, under a relatively flexible condition of having "sufficient connection with England".<sup>78</sup> Thus, the SoA has been successfully used even for restructuring of foreign (predominantly German) companies, including group of companies.<sup>79</sup> These cases are for example *Telecolumbus* in 2010, *Rodenstock GmbH* in 2011, *Apcoa Parking Holding GmbH* in 2014, *CBR Fashion* in 2016 and others.<sup>80</sup>

However, the main risk for foreign companies is whether the scheme will be recognized in the relevant jurisdiction.<sup>81</sup> The likelihood of recognition in targeted (foreign) country is also one of the factors which English courts take into account when deciding on their jurisdiction.<sup>82</sup> Within the EU, the SoA falls outside of the scope of the Insolvency Regulation (2015/848).<sup>83</sup> On the other side, the prevailing opinion

74 See Weil, *Schemes of Arrangement as Restructuring Tools*, 2015, p. 11, available at: [https://eurorestructuring.weil.com/wp-content/uploads/2015/01/140553\\_LO\\_BFR\\_Schemes\\_Arrangement\\_Brochure\\_v12.pdf](https://eurorestructuring.weil.com/wp-content/uploads/2015/01/140553_LO_BFR_Schemes_Arrangement_Brochure_v12.pdf) (25 April 2018).

75 Finch, V., Milman, D., *op. cit.*, p. 414.

76 For an overview of the case law and standards for approving the scheme under SoA see in Payne, J., *Schemes of Arrangement, Takeovers and Minority Protection*, *Journal of Corporate Law Studies*, Vol. 11, 2011, p. 93 and further.

77 Article 899 (4) of Companies Act 2006.

78 Goldrein, A., *Ready, Willing and Able, but Perhaps Not Always Acceptable: UK Schemes of Arrangement in Europe*, *Pratt's Journal of Bankruptcy Law*, Vol. 7, No. 2, 2011, p. 115. See also Moravec, T., *The Choice of Insolvency Regime in Hybrid Proceeding by Entrepreneurs*, *Curentul Juridic*, 2014, Vol. 57, No. 2, p. 142. Block-Leib, Susan, *op. cit.*, p. 15 et seq.

79 Sax, S., Swierczok, A., *op. cit.*, p. 38.

80 See Weil, *op. cit.*, p. 10. See also, Study for the JURI Committee, *cit.*, p. 17.

81 Sax, S., Swierczok, A., *op. cit.*, p. 39. Block-Leib, Susan, *op. cit.*, p. 1-51.

82 See Sax, S., Swierczok, A., *op. cit.*, p. 39. See also Goldrein, A., *op. cit.*, p. 117 and further; Payne, J., *Cross-border Schemes of Arrangement and Forum Shopping*, *European Business Organization Law Review*, Vol. 14, No. 4, 2013, p. 581.

83 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. 19–72. The SoA is not listed in the Annex A which defines which insolvency proceedings fall within the scope of the Insolvency Regulation. See also Eidenmüller, H., Zwieten, van K., *op. cit.*, p. 20. Payne, J., *op. cit.*, p. 582.

in scholarly writings<sup>84</sup> and in settled case law<sup>85</sup> is that the SoA, i.e. a judgement of the English court should be recognized in EU member states (in accordance with the Brussels I Recast Regulation<sup>86</sup> or in accordance with the Rome Convention<sup>87</sup>). However, this standpoint was seriously questioned by the ruling of a German court in the case of *Equitable Life Assurance Society*,<sup>88</sup> where it was argued that the scheme does not qualify as a “judgement” within the Brussels I Recast Regulation, and thus cannot be recognized in Germany.<sup>89</sup> Still, it remains unclear whether German courts will follow this line of reasoning or not, as there are dissenting views on this matter in the German case from 2010 before the Potsdam Regional Court.<sup>90</sup> Some authors argue that this is a matter for the interpretation by the Court of Justice of the European Union.<sup>91</sup>

After Brexit, i.e. the official withdrawal of the UK from the EU, the issue of the recognition of SoAs in EU member states remains even more unclear. In the opinion of some German authors, there are several other paths to recognize the SoA after Brexit in Germany, rendering it a useful and effective restructuring tool even after Brexit.<sup>92</sup>

### ***2.3. The Italian Model for large companies – EA***

Although Italy has one of the most developed legal systems, with various available insolvency and pre-insolvency restructuring tools for the restructuring of large companies, the EA constitutes the most important. The history of the Italian model for restructuring of large (but insolvent) corporations begins with the Prodi Law,<sup>93</sup> whereby EA was introduced and then revised and replaced with the Prodi-

84 See Sax, S., Swierczok, A., op. cit., p. 39. See also Kuipers, J-J., Schemes of Arrangement and Voluntary Collective Redress: A Gap in the Brussels I Regulation, *Journal of Private International Law*, Vol. 8, No. 2, 2012, p. 229.

85 See *Re Rodenstock GmbH* [2011] EWHC 1104, par. 76. *Re Primacom Holding GmbH* [2012] EWHC 164.

86 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1–32. Applicable articles should be Article 2 (a) together with Article 36 of the Brussels I Recast Regulation.

87 80/934/EEC: Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, OJ L 266, 9.10.1980, p. 1–19.

88 OLG Celle 8 U 46/09, 8 September 2009.

89 For an overview of the case see Payne, J., op. cit., p. 584 and further.

90 LG Potsdam, 2 O 501/07. Likewise, following the appeal on the *Equitable Life Assurance Society Case*, in the BGH ruling this issue remains rather vague. See BGH, 15.2.2012 – IV ZR 194/09.

91 For an overview of the case see Payne, J., op. cit., p. 586.

92 See Sax, S., Swierczok, A., op. cit., p. 46. Block-Leib, Susan, op. cit., p. 1-51, discussing extensively forum shopping issues.

93 Legislative Decree no. 95 of April 3, 1979. For an overview of historical development of Italian law see D’Ambrosio, A., *Le nuove tendenze della disciplina sull’amministrazione straordinaria delle grandi imprese alla luce della l. 166/08*, doctoral thesis, Università degli studi di Napoli Federico II, 2011, p. 9-28. See also Panzani, Luciano, *The Italian Bankruptcy Law Reform*

bis Law.<sup>94</sup> The Prodi-bis Law applied to companies that have (i) debts equal to two-thirds of both the assets and the ordinary gross profits shown in a company's last fiscal year financial statement; and (ii) more than 200 employees in the last fiscal year. A few years later, in the last days of 2003, Italy was the scene of collapse of the Parmalat group.<sup>95</sup> While none of the restructuring instruments was adequate to handle such complex bankruptcy, the Marzano Law<sup>96</sup> was introduced with "special" EA procedure for "very large" corporations. Its most significant amendment was the Alitalia Decree,<sup>97</sup> because of the state of insolvency of the national air carrier Alitalia, offering a special restructuring tool for providers of public services.<sup>98</sup> While Prodi-bis procedures can be started by: the creditor, debtor, public prosecutor or the court, only the debtor can initiate the Marzano procedure.<sup>99</sup> From the formal standpoint, under the EA insolvency proceedings are separate and distinct for each legal entity of the group, but are coordinated on a common basis.<sup>100</sup>

The Marzano law applied to large businesses that cumulatively fulfill the following criteria: an actual prospect of recovery, by way of an economic and financial restructuring of the business on the basis of a restructuring plan whose duration cannot be more than 2 years or through a transfer of the company's assets, a minimum of 500 employees for at least one year and debts, including obligations arising from guarantees, for an aggregate amount not lower than € 300 million. Once the company has been admitted to the procedure, no individual action may be brought by any creditor.

The Marzano Law represented a significant break with the punitive tradition of Italian bankruptcy law, while for the first time the law was designed to favor a composition of the agreements between the debtor and its creditors.<sup>101</sup> In case of a group of companies, once the parent company has been admitted to the EA, the other insolvent companies belonging to the same group may be involved in such insolvency procedure as well, even if they do not meet the above dimensional and indebtedness

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Act III, Norton Annual Review of International Insolvency, 2009, pp. 301-310, where autor highlights the main purposes of the reform of Italian Insolvency Law.

94 Legislative Decree No. 270 of 8 July 1999.

95 For an overview of the Parmalat case see Kaufman Aaron M., *The European Union goes COMI-tose: Hazards of harmonizing corporate insolvency laws in the global economy*, *Houston Journal of International Law*, Vol. 29, No. 3, 2007, pp. 626-632.

96 Legislative Decree No. 347 of 23 December 2003, and Law No. 39 of 18 February 2004.

97 Legislative Decree No. 134 of 28 August 2008.

98 Piergrossi, Alberto, *Restructurings and reorganizations in Italy, Extraordinary Administration v. Bankruptcy: The Italian Way to Economic Relief of Large Companies in Distress*, *International Insolvency Institute, Tenth Annual International Insolvency Conference Rome, Italy June 7-8, 2010*, p. 1-11, available at [https://www.iiglobal.org/sites/default/files/Alberto\\_Piergrossi.pdf](https://www.iiglobal.org/sites/default/files/Alberto_Piergrossi.pdf) (20 June 2018).

99 Panzani, L., *op. cit.*, p. 323.

100 Gianni et al., *The new extraordinary administration proceedings for large insolvent companies in Italy*, p. 1, available at [http://www.gop.it/doc\\_pubblicazioni/19\\_kdnktpfn9\\_ita.pdf](http://www.gop.it/doc_pubblicazioni/19_kdnktpfn9_ita.pdf) (22 June 2018).

101 Manganelli, P., *op. cit.*, p. 242. Beye, Mema, Nasr, Joanna, *Repaying creditors without imprisoning debtors*, available at <http://www.doingbusiness.org/~media/WBG/DoingBusiness/Documents/Reforms/Case-Studies/2008/DB08-CS-Italy.pdf> (22 June 2018).

requirements. In particular, the notion of the group of companies includes also those companies which are linked in a substantially exclusive way – by contractual relations with the company admitted to the EA for the supplying of services necessary to the performance of their relevant activities.<sup>102</sup>

The EA is a debtor not-in-possession proceeding. The company willing to enter the EA files both an application with the Italian Ministry for Economic Development (hereinafter: MED) and a petition to the bankruptcy court. A petition for the insolvency declaration is a condition for admission to the EA. Once the company enters into EA, one or more extraordinary commissioners are appointed by the MED. The Court ascertains the state of insolvency of the company.<sup>103</sup> The extraordinary commissioners have the same powers and duties as trustees in bankruptcy proceedings. Once the insolvent company is admitted to the EA, creditors are no longer entitled to initiate or continue any enforcement or cautionary proceedings.<sup>104</sup> However it is not clear does the rule apply to all creditors, irrespective whether claims have arisen before or after the insolvent company is admitted to the EA.

The extraordinary commissioner is the one who should file a restructuring plan within 180 days of his/her appointment, to be implemented either through financial restructuring or an assets sale. This period may be extended for a further 90 days. The extraordinary commissioner may provide, as part of the restructuring plan, the payment of creditors through composition agreement, i.e. an agreement among the debtor company and the creditors. The procedure ends when its goals have been achieved, i.e. when the company, after the implementation of the plan, is in a sound financial position. Otherwise, the company will be declared insolvent pursuant to the Bankruptcy Act.

The most notable characteristic of the Marzano Law is the renewed composition agreement procedure (*Concordato* procedure). Creditors are divided in classes, subject to different treatments. *Concordato* must be accepted by creditors representing the majority of allowed claims. If different classes of creditors are formed, *concordato* should be voted for by the creditors representing the majority of allowed claims in each class. Secured creditors are allowed to vote if they give up all or part of their security rights; if so, they can vote only in proportion to the amount of the claim that subsequently becomes unsecured. This instrument was successfully used in the Parmalat case for the first time, whereas the reform of ordinary insolvency procedure that followed during the period 2005-2007 was influenced by it.<sup>105</sup>

While the first version of Marzano law was enacted in the wake of the Parmalat case, and its amendment promptly followed because of Alitalia group of company insolvency,<sup>106</sup> more recently the EA has been applied to Ittierre group, one of the leading payers in the luxury goods sector, that designs, produces and distributes high-

102 Gianni et al., op. cit., p. 1.

103 Ibid., p. 2.

104 Loc. cit.

105 Azzarà, A., Manganelli, P., Klimbacher, S., Italy - The Marzano Law: a Special Procedure for Large Insolvent Companies, Analysis of the Amendments Brought by the Alitalia Case, p. 2, available at <https://www.paulhastings.com/docs/default-source/PDFs/1134.pdf> (22 June 2018).

106 D'Ambrosio, A., op. cit., p. 79-83.

quality products under fully owned brands such as Gianfranco Ferré, Malo and Extè or under license agreement such as Just Cavalli, VJC Versace, Galliano etc.<sup>107</sup>

According to some authors and their findings<sup>108</sup> there were 360 companies subject to Marzano and Prodi-bis law. Thereof 215 companies were part of 73 business groups and employed 39,119 people. In 49 (out of 73) of these cases the companies were sold to third parties and 15,343 employees were transferred. The other 145 companies, which employed 32,191 workers, were part of large enterprise groups. 15,980 of these employees were relocated in the transferring companies. Other sources reveal that if the companies under EA were sorted by a descending number of “depending persons”, the first ten in EA sorted that way, ended with transfer (cession) or restructuring (*ristrutturazione*) and none of these ended with liquidation.<sup>109</sup> A closer look into the biggest Italian EA (Alitalia group) reveals that Alitalia - Società Aerea Italiana S.p.a. newly entered in EA by Ministerial Decree of May, 2, 2017 and its group of companies (Alitalia Servizi S.p.a., Alitalia Airport S.p.a., Alitalia Express S.p.a. and Volare S.p.a.) are also admitted into EA. Namely, Alitalia was put under EA again in 2017 after its staff rejected a plan to cut jobs and salaries.<sup>110</sup> Lufthansa, British low-cost carrier EasyJet and U.S. private equity fund Cerberus are among companies that have expressed an interest in Alitalia, but the restructured “NewAlitalia” in their opinion should be smaller in terms of both staff and its fleet.<sup>111</sup>

The flexibility of the EA that allows the company debtor to carry out its business was described as the main advantage of the (amended) Marzano law. On the other hand, less transparent private negotiations, substantial political involvement, weaker role of creditors due to their lack of involvement in the restructuring plan and ability to sell business units even before declaring state of insolvency were underlined as the main disadvantages of the (amended) Marzano law.<sup>112</sup> The above mentioned authors expressed the need to unify, simplify and harmonize that part of the law, because, while the Prodi law applies to medium- and large-sized insolvent companies, the amended Marzano law applies to large-sized insolvent companies, therefore, the unification of those two laws would create a clearer and simplified system in which professionals, creditors and distressed investors can operate.<sup>113</sup> The model in question has three submodels: EA for large corporations (Prodi-bis Law), EA for very large corporations (Marzano Law) and EA for very large corporations offering public services (Alitalia Law). Although the restructuring of Alitalia group is still not a finished story, it poses serious doubt as to the effectiveness of the state driven and assisted restructuring

107 Gianni et al., op. cit., p. 1.

108 Ghia, L., op. cit., p. 8. Danovi, A., op. cit., p. 62.

109 Pellerone, G., *Gli strumenti a disposizione delle imprese in crisi per la salvaguardia della continuità aziendale: una valutazione comparativa attraverso case studies*, University del Piemonte Orientale, Dipartimento di studi per l'economia e l'impresa, 2014, p. 45.

110 See more at <http://www.alitaliaamministrazionestraordinaria.it/> (10 April 2018).

111 Wissenbach, I., Exclusive: Lufthansa CEO calls for significant Alitalia cuts – letter, available at <https://www.reuters.com/article/us-alitalia-m-a-lufthansa-exclusive/exclusive-lufthansa-ceo-calls-for-significant-alitalia-cuts-letter-idUSKBN1F01RW> (12 January 2018).

112 Azzarà, A., Manganelli, P., Klimbacher, S., op. cit., p. 3.

113 Ibid., p. 4.



procedure.<sup>114</sup>

### 3. THE CROATIAN (PREVENTIVE) RESTRUCTURING LAW

The legislative history of the Croatian pre-insolvency restructuring procedure is not a lengthy one. The pre-insolvency settlement was introduced by the Law on the financial operation and pre-insolvency settlement.<sup>115</sup> Underlying the said legislative experiment was a wrongful assumption that acute nonliquidity and insolvency crisis of domestic companies could be solved by construing a separate law.<sup>116</sup> It was a combination of an administrative and court proceedings with the court as a rather formal vericator of the restructuring plan.<sup>117</sup> Due to serious inconsistencies with existing insolvency laws and criticism in the process of the implementation of that law, this preventive reorganization tool was thoroughly reformed in 2015. With implementation of the new 2015 Insolvency Act (hereinafter: IA 2015), pre-insolvency procedure superseded the abandoned pre-insolvency settlement. That substantial novelty was considered as the regulatory response<sup>118</sup> to 2014/135/EU Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency.<sup>119</sup> Pre-insolvency procedure was, *inter alia*, put back into the hands of the (commercial) court. Imminent insolvency (*prijeteća nesposobnost za plaćanje*) was introduced as a reason to propose the opening of pre-insolvency procedure. Except pre-insolvency debtor, eligible petitioners were also creditors but only if the debtor had consented to that.<sup>120</sup> When filing the proposal to open pre-insolvency proceedings, a restructuring plan<sup>121</sup> should be attached accordingly.<sup>122</sup> Although the IA 2015 - in terms of provisions on determination of voting rights of creditors and voting majority necessary for the acceptance of the restructuring plan - provided that the rules applicable to the insolvency plan apply by analogy,<sup>123</sup> the restructuring plan departed from its role-model, i.e. the insolvency plan and the law was silent on the cram-down rule.<sup>124</sup>

Several drawbacks were noticed in the pre-insolvency proceedings even after the major IA 2015 reform. Creditors were deprived of their representing body in the

114 Grigò, E., Ogljo, L., *The Alitalia Decree: How Insolvency Affects Antitrust Law*, *Insolvency and Restructuring International*, Vol. 4, No. 2, 2010, p. 20.

115 *Zakon o financijskom poslovanju i predstečajnoj nagodbi*, *Official Gazette*, 108/12, 144/12, 81/13, 112/13, 71/15, 78/15.

116 Miladin, P., Markovinović, H., *Stečajni plan i nagodba u postupku izvanredne uprave*, *Zbornik 56. susreta pravnika, Opatija 2018*, Hrvatski savez udruga pravnika u gospodarstvu, Zagreb, 2018, p. 68.

117 Dika, M., *Predstečajni postupak*, *Pravo u gospodarstvu*, No. 3, 2016, p. 368.

118 Garašić, J., *Najznačajnije novine Stečajnog zakona iz 2015. godine*, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, Vol. 38, No. 1, 2017, p. 140.

119 OJ L 74, 14.3.2014., p. 65–70.

120 Art. 25 par. 1 *Insolvency Act 2015*.

121 Mandatory elements of the plan are provided in Art. 27 IA.

122 Art. 26. *Insolvency Act 2015*, see: Dika, M., *op. cit.*, p. 388.

123 Art. 56 of *Insolvency Act*.

124 Garašić, J., *op. cit.*, p. 143.

pre-insolvency proceedings while the judge and trustee were sole procedural bodies.<sup>125</sup> A functional distinction between the pre-insolvency plan and insolvency plan was not clearly confined.<sup>126</sup> Likewise, the legal position of the providers of new money loans was not made clear, although the latter drawback was clarified by virtue of a new Article 62.a in IA 2017 Amendment of the 2015 Insolvency Act.<sup>127</sup>

Unlike the pre-insolvency restructuring plan, the introduction of the main insolvency reorganization tool called the “insolvency plan” (*stečajni plan*), dates back to 1996 reform of the Croatian insolvency law and was inspired by the German *Insolvenzplan* and left substantionally unaltered by the IA 2015 reform.<sup>128</sup>

At the beginning of 2017, Croatia witnessed the financial distress of the Agrokor group. As a fast-track salvatory measure it introduced the tailor-made restructuring law for (group of) companies of systemic significance – i. e. EAPA, creating for the second time a legal experiment outside the scope of the main insolvency law.<sup>129</sup> The problem of insolvency or insolvency-like status of the large (group of) companies is very well known in practice, although the question whether they, due to their size, pose a systemic risk has not been unanimously answered. It has been observed that such intervention would be justified only in case if it seriously threatened the collapse of the entire financial system.<sup>130</sup> However, opinions have been voiced that “ongoing-liquidity-state-guarantee” is *de facto* provided for socially “too-important-to-fail”

125 Ibid., p. 142.

126 Dika, M., op. cit., p. 425.

127 The mentioned article ensures priority to providers of the new money (based on previous agreement reached between debtor and creditors who hold more than two thirds of the legally approved claims). The new money creditors shall be given priority before the other insolvency creditors, except for the creditors of the “first higher payment rank” (i. e. employees and former employees’ claims). According to par. 7 of the same new article this “new money creditors” are protected from avoidance actions based on the grounds of “non-equal” or “preferential” treatment of the creditors.

128 The right to file the insolvency plan belongs to debtor but it should be accompanied with the petition to open insolvency procedure. If insolvency procedure is already opened, insolvency administrator has also the right to file the plan, but this can be ordered to insolvency administrator also by creditors’ assembly. Creditors are divided in classes and every class votes separately for the plan. The required majority within a class is accomplished if the value of the claims of the creditors who voted for the plan exceeded twice the value of the claims of the creditors who voted against it (absent creditors are not considered in calculation). The plan could not place any creditor into a worse position than that the creditor would face if the plan didn’t exist (art. 337 IA). The law has cram down rule (protects majority from dissenting minority). Namely, if a voting group has not accepted the plan with the required majority, the majority is deemed to be accomplished if following conditions are cumulatively met: (a) the creditors in that group are not in placed in a position worse than if the plan would not exist, (b) they should adequately participate in the economic benefits of the plan and (c) if majority of the voting groups has accepted the plan with the required majority (art. 331 in relation to 330/1 IA). The plan must be accepted by creditors and debtor (334/1) before confirmed by the court’s resolution. The court’s confirmation of the plan has erga omnes effect. The court has monitoring powers in implementation of the plan.

129 Miladin, P., Markovinović, H., op. cit., p. 68.

130 In this vein for Croatian law see: Garašić, J., *Izvanredna uprava nad povezanim društvima*, cit., p. 11.

non-financial institutions such as major hospitals, utility providers or even major employers.<sup>131</sup> Therefore, it remains an open question whether the business failure of a major employer or major utility provider justifies state intervention and/or requires tailor-made solutions, especially if “systemic significance” is the underlying concept of the EAPA.

In the explanatory part of the legislative proposal on EAPA the Government stated: “systemic risk (...) arises from the number of employed persons, business relationship with other business subjects in economy, business ramifications in the entire territory of the Republic of Croatia and/or dominant economic position in the part of the territory of the Republic of Croatia”.<sup>132</sup> However, the said proposal did not offer a method for measurement of systemic risk, it merely stated the number of employees and amount of liability as thresholds that should imply the existence of “systemic significance”. Yet, a systemic risk is a measurable category. In fact, there are many specialized tools that allow for comprehensive assessment of systemic risk, from complementary perspective including banks and non-banks.<sup>133</sup> As a result of the underlying “systemic significance” concept, it is possible that companies do generate a systemic risk – even if they do not fulfil the respective requirements, and vice versa, i.e. companies that fulfil requirements need not pose systemic risk, but are still admitted to EA procedure.

Adopted in a fast-track parliamentary procedure, the EAPA was heavily criticized in many aspects. The excessiveness of state intervention, absence of requirements related to formal qualification of a person who will act as the extraordinary trustee, absence of firm procedural rules ensuring the protection of substantial rights of the creditor, especially minor and medium creditors, the breach of the fundamental principle of insolvency law which calls for the equality of legal position of the creditors, their right to influence the composition of the bodies relevant for rendering decisions have been pinpointed as the most critical points.<sup>134</sup> Twelve petitioners hence required judicial review of EAPA before the Constitutional Court of the Republic of Croatia. In its 182 pages long decision (not rendered unanimously), the Court discussed in length all of these alleged unconstitutional elements of EAPA, but in the end rejected petitions for review. Although the mentioned allegation warrants further elaboration from the perspective of insolvency laws, but this paper will only focus on the EAPA’s concept of “a company of systemic significance to the Republic of Croatia”, since it defines *the ratione personae* application of the law.

131 See generally: Azgad-Tromer, S., Too Important to Fail: Bankruptcy versus Bailout of Socially Important Non-Financial Institutions, *Harvard Business Law Review*, Vol. 7, 2017. p. 164-169, available at <https://ssrn.com/abstract=2551237> (20 June 2018).

132 As quoted in the explanatory part of the Decision of the Constitutional Court of the Republic of Croatia, 2<sup>nd</sup> May 2018, p. 4.

133 Cortes, F., Lindner, P., Malik, S., Segoviano, M. A., A Comprehensive Multi-Sector Tool for Analysis of Systemic Risk and Interconnectedness (SyRIN), IMF Working Paper, WP/18/14, International Monetary Fund, 2018, pp. 1-46. The paper elaborates the tool (SyRIN) that produces various metrics to evaluate systemic risk from complementary perspectives, including tail risk, cross-entity interconnectedness and the contribution to systemic risk by different entities and sectors.

134 Garašić, J., op. cit., p. 5 et seq.

This notion is defined in Art. 4 (2) EAPA. It is a joint-stock company (and not a company with limited liability, or any other type of company!) which individually or together with its subsidiaries or affiliates, cumulatively meets the condition consisting in the number of employees and amount of balance sheet liabilities. As to the first threshold, the company should individually or together with its subsidiaries or affiliates in the calendar year preceeding the year in which the proposal for opening an EA procedure has been submitted, employ more than 5,000 employees on average. As to the second threshold, the existing balance sheet liabilities alone or together with their subsidiaries or affiliated companies should amount to more than 7,5 billion of HRK (aprox. 1€ billion) or, in HRK counter value, if denominated in another currency (at the day of submission of proposals for opening of the EA procedure). When comparing the said employee and liability threshold with the one applicable under Italian law, the authors stress that the number of employees is set ten times higher at the annual level in Croatian law, while the second threshold is approximately three times higher. However, while the Croatian employee threshold takes into account the number of employees at the level of a single company or respectively, at the level of the group, the Italian threshold is calculated at the level of the single company.<sup>135</sup> The existence of insolvency, imminent insolvency or overindebtedness of the company is the legal ground to initiate EA proceedings, while in Italian law the state of insolvency is a mandatory precondition for the institution of the EA proceedings. When comparing the above thresholds it is noteworthy that the Italian is tied to the concept of a very large company (and from the Alitalia decree to companies that provide public services), while the Croatian does not rely on the concept of large company, but a company which is capable of creating a systemic risk. As explained in the Government Proposal this is a type of company whose “uncontrolled collapse” can cause a “chain reaction” and could “seriously jeopardize the entire Croatian economic system”.<sup>136</sup> It implies a possibility to generate systemic risk, which is linked primarily to banks or to non-banking financial institutions such as investment funds, hedge funds and as of recently, even insurance sector companies. However, as already mentioned, systemic risk is an event which could have important consequences on the entire economic system, but nevertheless a measurable category. Therefore, setting up the “number of employees” and “amount of liabilities” as relevant criteria for *ratione personae* application has two drawbacks. It unjustifiably excludes companies that are not of that “size”, but are otherwise capable of generating systemic risk, and vice versa “targeted” companies admitted in tailor-made state-assisted procedure, do not necessarily need to generate a systemic risk which is the implied term under EAPA. Therefore, the authors find that the notion “company of systemic significance” should not be the underlying concept of this law.

Another important difference between the Italian and Croatian law is the

135 There are announcements that the number of employees at the group level in the legislative reform would increase to “at least 800 employees”. See Manganelli, P., Chiarugi, A. G., The proposed in-depth reform of the Italian extraordinary administration proceedings, available at: <https://www.ashurst.com/en/news-and-insights/legal-updates/the-proposed-in-depth-reform-of-the-italian-extraordinary-administration-proceedings/> (28 June 2018).

136 Decision of the Constitutional Court of the Republic of Croatia, 2 May 2018, p. 4.

involvement of affiliated companies into the EA of the main company. In Italy, in case of a group of companies, once the parent company has been admitted to the EA, the other insolvent companies belonging to the same group may be involved in such insolvency procedure, even though they do not meet the above dimensional and indebtedness requirements. The notion of “group of companies” includes also those companies which are linked, in a substantially exclusive way, by contractual relations with the company admitted to the EA for the supplying of services necessary to the performance of the relevant activities. In that sense the Italian concept of related company is wider, while it relies not only on the concept of control of the parent company, but also involves companies that are suppliers of “substantial goods or services” to the company admitted to the EA. Indeed, the last revision of the Italian law has designed EA as a special restructuring tool for providers of public services.<sup>137</sup> Providers of public services, also sometimes called providers of services of general economic interests are the type of economic activity that deserve special treatment, in light of the fact that the delivery of such services is essential for citizens. Nevertheless, providers of SGEI and companies in difficulties both have access to particular state aid.<sup>138</sup> When comparing the Italian and Croatian concept of affiliated companies eligible to be admitted into the EA, the Croatian solution is based on the concept of control (at least 25% share capital in depending/related company is held by major/parent company), while the Italian is more a “single economic entity” approach.

Under Croatian law, affiliated companies must be involved in the EA of the main company if they are: depending companies (*ovisno društvo*) in the sense of Art. 475 of the Companies Act or related companies (*povezano društvo*). In order to be admitted to the EA of the main/parent company, depending or related company should be established according to Croatian law and have its seat in Croatia, and the main/parent company should hold in it at least 25% of the shares. The main drawback in this respect is that related/dependent companies will be involved in the EA, whether insolvent or not. That is a corollary of the provision under Art. 4 EAPA which clearly states that the EA procedure will be instituted regardless of fulfilling the state of (pre)

137 The concept is close to “services of general economic interest”. Services of general economic interest (SGEI) are economic activities that public authorities identify as being of particular importance to citizens and that would not be supplied (or would be supplied under different conditions) if there were no public intervention. Examples are transport networks, postal services and social services. They have special state aid regime. [http://ec.europa.eu/competition/state\\_aid/overview/public\\_services\\_en.html](http://ec.europa.eu/competition/state_aid/overview/public_services_en.html). See more: Liszt, M., Čulinović-Herc, E., Certain Aspects of State Aid to Services of General Economic Interest, in: Tomljenović, V., Bodiřoga-Vukobrat, N., Butorac Malnar, V., Kunda I., (eds), *EU Competition and State Aid Rules Public and Private Enforcement*, vol. 3, Springer, Berlin, Heidelberg, 2017, pp. 291-313.

138 On state aid from companies in difficulties – i.e. rescue and restructuring state aid see: Obradović Mazal, T., Butorac Malnar, V., The Discretionary Power of Competent Authorities in Applying State Aid Rules on Rescue and Restructuring, Potocan, V. Kalinic, P. Vuletic, A. (eds.), 26<sup>th</sup> International Scientific Conference on Economic and Social Development - Building Resilient Society, Conference Proceedings, Varaždin, 2017, p. 599-607. Obradović Mazal, T., Čulinović-Herc, E., New rules for rescuing and restructuring state aid - sharing burden of present to share gains of future, SGEM 2015 Conference Proceedings on Political Sciences, Law, Finance, Economics & Tourism, Book 2, Vol. 1, 2015, pp. 615–622.

insolvency of dependant or related company of the main company.<sup>139</sup> The involvement of solvent members of the group should depend on consent of the respective solvent member, since the legal interests of the respective company's creditors should also be protected.<sup>140</sup>

The involvement of a group of companies in the EA and envisaged "single settlement approach" for the main/parent company with all its depending/related companies (Art. 42. (6) EAPA), opens the question concerning the nature of consolidation intended in the EAPA. According to Garašić, EAPA opted for substantive consolidation - which allows the creation of one single estate liable for all claims of all creditors of respective members of the group (coupled with involvement of the dependent companies in the EA irrespective of their solvency status). In opinion of Garašić by opening the door to substantive consolidation, the law abandoned the principle of legal separability – the principle which calls that each legal entity with regard to his obligation should be liable with its own assets therefore leading to an unjustified lifting of the corporate veil, which is extremely rarely permitted in insolvency law.<sup>141</sup> Miladin and Markovinović consider that EAPA should be interpreted so as to allow only procedural consolidation, because other interpretation (i.e. substantive consolidation) would be difficult to justify from the constitutional-law point of view and would cause a serious departure from the fundamental principle of private law whereby every person should be liable for its own debt with its own assets.<sup>142</sup> In the text of the Settlement Proposal that was submitted to the Commercial Court in Zagreb on 20 June 2018, it is stated that extraordinary administration will be realized as a concept of procedural consolidation, "where each creditor's right of settlement is determined separately for each of its claims filed against each company admitted to the EA".<sup>143</sup> Since the Settlement was rendered by required majority it was confirmed by the decision of the Court.<sup>144</sup> Now, extraordinary trustee should commence a process of its recognition and enforcement abroad. This could cause problems since the recognition of the effects of the initiation of the EA EAPA procedure was declined

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139 Miladin, P., Markovinović, H., op. cit., p. 97.

140 Garašić, J., op. cit., p. 21.

141 Loc. cit. Author in her article gives a comprehensive set of critical remarks: from wrongfully defined aim of the law, excessiveness of the state intervention and insufficient rules as to qualifications and impartiality of the extraordinary commissioner to the absence of a satisfactory procedural guarantees that protect substantial rights of the creditors (especially creditors with minor and medium claims) as well as violation of the cornerstone insolvency principle which calls for equal legal position of insolvency debtor's creditors and many other that violates fundamental constitutional values. See in particular p. 8-28.

142 Miladin, P., Markovinović, H., op. cit., p. 98. Authors base their interpretation on following arguments: a single procedure for all companies in the group is conducted, unique procedural bodies for all companies involved in the process are established, all creditors of all involved entities are united and unique proposal of the settlement is submitted, but the law does not require unification of all assets of all involved companies in order to create single insolvency estate.

143 Settlement Proposal of 20<sup>th</sup> June, 2018, p. 91.

144 Decision of the Commercial Court in Zagreb, 47. St – 1138/17 – 28 23 of 6<sup>th</sup> July 2018

in several adjacent jurisdictions: i.e. Slovenia, Bosnia and Hercegovina, Srbija<sup>145</sup> with the exception of Switzerland, while in England&Wales the case is still pending. The competent court in the UK has initially recognized the effects of EAPA as the “main foreign proceedings” according to EIR, causing the stay of all actions of creditors against the debtor in England & Wales. While the discontented creditor demanded an appeal, the stay of actions remains in force until the final decision on recognition of the effects of EAPA is rendered.<sup>146</sup>

#### **4. CONCLUSION(S)**

Solving the (preventive) restructuring puzzle for (large) companies in distress is not an easy task. The here presented regulatory models differ markedly – from fast-track minimally-court-assisted proceedings to very complex restructuring schemes with massive state involvement.

The most impressive feature of the UK SoA model is certainly its predictive timeline and well-established course of actions of the involved stakeholders. The willingness of UK courts to sanction the particular scheme even if the respective company does not have its COMI in the UK (but solely selected English law as applicable law), reveals a high level regulatory competition in the domain of preventive restructuring. Restructuring emigration from Germany to UK borders to abuse and forum shopping, but also confirms the effectiveness of the English reorganization tool. As to the German PSP model, the studies demonstrate general satisfaction in regard to speediness of the procedure and greater creditors’ involvement. From the normative point of view, the PSP seems to fit very well into the German concept of two-stage insolvency proceedings. However, at empirical level the data show that proposals of opening PSP, after ESUG came into force, were not made any sooner than prior to its enactment, and that there is a relatively high rate of self-administrations that ended with insolvency. The management’s lack of competence was considered as the weakest point in PSP self-administration proceedings. As to the Italian model, it is worth emphasizing that the Italian EA, through its many changes brought about three EA submodels. With a handful of other available restructuring tools, the Italian preventive restructuring law has become extremely complex. It is important to stress that the EA in Italy is conducted in order to preserve separability of each legal entity of the member of the group, but coordinated on a common basis.<sup>147</sup> The notion of the

145 Case is still pending before respective national constitutional courts.

146 Settlement Proposal of 20 June, 2018, p. 49.

147 That is confirmed as a rule in the new law. Legge 19 ottobre 2017, n. 155 Delega al Governo per la riforma delle discipline della crisi di impresa e dell’insolvenza. Official Gazette, n. 254 del 30-10-2017, available at [http://www.gazzettaufficiale.it/atto/stampa/serie\\_generale/originario](http://www.gazzettaufficiale.it/atto/stampa/serie_generale/originario). In Art. 3 (1) d) it is clearly stated that if there is unified debt restructuring settlement (un accordo unitario di ristrutturazione dei debiti) in all cases the autonomy of respective active and passive masses should be respected (“ferma restando in ogni caso l’autonomia delle rispettive masse attive e passive”). Moreover in Art. 2 per. 2 b) it is stated that when procedure concentrated for all members of the group, simultaneous and separate voting for creditors of each company should be ensured (“nell’ipotesi di gestione unitaria della procedura di concordato preventivo

group of companies follows not only the “control”, but also the “single economic entity” approach. Since the number of employees’ threshold is set relatively low, the number of companies eligible to be admitted in the EA is relatively high. On the side of effectiveness, the available studies have shown that none of the companies admitted into EA ended in liquidation, which speaks for general efficiency of that procedure. However, repeated use of the same tool in case of identical company (Alitalia group) shows that restructuring problems could not be solved “for all times”. Substantial political involvement and a relatively weak role of creditors due to lack of their involvement in the restructuring plan were detected as the main drawbacks of the EA. Others are calling for unification and simplification of that part of the insolvency law, especially because of the mentioned submodels.

As to the Croatian law, a few conclusions seem relevant. If “systemic significance” is the key notion which defines *ratione personae* field of application of EAPA, then it should be measured differently than with lump-sum threshold criteria. It would be more compatible with its Italian role-model, if the Croatian legislator followed “large” or “very large company” as a *ratione personae* criterion. As to thresholds, the number of employees is set ten times higher than in the corresponding Italian model, and three times higher in respect of the amount of liabilities. In terms of the number of companies who are *de facto* candidates for the EA, it seems that in Croatia only ten groups of companies match those criteria,<sup>148</sup> which renders it discriminatory. On the other hand, EAPA is inherently incoherent, while it unjustifiably excludes the companies which surpass both criteria, but are not founded as a joint stock company (but e.g. a limited liability company), hence additionally narrowing the “systemic significance” content and reaffirming the thesis that the law was indeed tailor-made for one single (group of) company.

The procedural drawbacks of EAPA go far beyond the scope of this paper and are in length discussed in one Constitutional Court decision, as well as criticised by law scholars. It seems that the main problem lies behind the law and is tied to a general approach towards the (pre)insolvency status of large corporate groups. In addition, it seems that tailor-made solutions are needed, but regulatory responses vary, especially if the topic is substantial v. procedural consolidation or concentration v. coordination approach. Croatian scholars agree that the procedure should be structured *per minimum* so as to allow the separation of legal personality for each member of the group and for the claim of every creditor of each company. Substantial consolidation is not a solution.<sup>149</sup> Croatian authors thus agree that at least procedural consolidation should be applied, but support a coordination approach, favoured in the German legislation.<sup>150</sup> Recent changes in Italian law strongly confirm that the

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di gruppo devono essere previsti (...) la contemporanea e separata votazione dei creditori di ciascuna impresa”).

148 According to Explanatory part of the Decision of Constitutional Court of 2 May 2018, p. 69, par. 42.7.

149 Formulating agencies such as UNCITRAL limit substantive consolidation to exceptional circumstances. See UNCITRAL legislative guide on insolvency law: Part Three: Treatment of enterprise groups in insolvency, New York, p.32 Recommendation 202-210.

150 See Garašić, J., op. cit., p. 20. Miladin, P., Markovinović, H., p. 98.



autonomy of respective active and passive masses should be observed in group of companies' restructurings if there is a unified debt restructuring settlement. In order to increase the efficiency and specialization of Italian courts handling insolvency matters, specialized courts adjudicating corporate-law matters shall have exclusive competence in EA proceedings.

To conclude, whether one-size fits all or tailor made solution are appropriate in preventive restructuring for companies in difficulty, authors are of opinion that one size fits all approach should be observed without any deviation in regard fundamental insolvency principles. As far as tailor made approach is concerned, insolvency or insolvency-like status of corporate groups certainly requires tailor made solutions - either by using concentration or coordination approach and not material consolidation, but in any case respecting the principle of legal certainty. Therefore, any new piece of legislation in the field of preventive restructuring should be aligned with basic principles in the existing insolvency laws. However, on the basis of the results of the empirical studies regarding efficiency of analyzed regulatory models, authors find that even when the new law is perfectly matching into the system, it would not be as effective as aimed if the competences of key stakeholders (especially managers and trustees) are not developed as well.

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Sažetak

## **PREVENTIVNO RESTRUKTURIRANJE TRGOVAČKIH DRUŠTAVA U POTEŠKOĆAMA – ISTI KROJ ZA SVE ILI ODIJELO PO MJERI?**

Republika Hrvatska je trenutno suočena s najvećim restrukturiranjem društva u poteškoćama uz značajno sudjelovanje inozemnih investitora. Restrukturiranje se provodi prema novom Zakonu o postupku izvanredne uprave u trgovačkim društvima od sistemskog značaja za Republiku Hrvatsku. Taj zakon je usvojen u vrijeme izbijanja krize najvećeg trgovačkog diva - Agrokor grupe. Restrukturiranje grupe postalo je ubrzo prvorazredno političko pitanje koje je plijenilo pozornost javnosti. Navedeni zakon kritiziran je u pravnoj doktrini i u javnosti da je osmišljen samo radi spašavanja jedne poslovne grupacije u Hrvatskoj te i da nije u skladu s ustavnim načelima i postojećim stečajnim zakonodavstvom. Njime je kreiran model izvanredne uprave kao posebnog sudskog postupka u kojem glavnu ulogu igra izvanredni povjerenik, a koji je namijenjen trgovačkim društvima od sistemskog značaja za Republiku Hrvatsku koja se nalaze u stanju insolventnosti ili predinsolventnosti. Pošavši od toga ovaj rad namjerava istražiti širu sliku modela restrukturiranja usporedbom tri različita pravna modela restrukturiranja društva u poteškoćama: njemački model *Shutzschirmverfahren*, engleski *Schemes of Arrangement* i talijanski model izvanredne uprave. U radu će se istražiti učinkovitost svakog od pojedinih modela na temelju relevantnih studija koje upućuju na njihovu uspješnost. U radu se daje pregled razvoja hrvatskog prava kojim se uređuje tzv. preventivno restrukturiranje, te se propituju određena pitanja vezano uz navedeni zakonski akt, posebice koncept trgovačkog društva od sistemskog značaja.

***Ključne riječi:*** *restrukturiranje trgovačkih društava; društva u poteškoćama; izvanredna uprava; restrukturiranje povezanih društava; društva od sistemskog značaja.*

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Zusammenfassung

**VORBEUGENDE RESTRUKTURIERUNG VON  
UNTERNEHMEN IN SCHWIERIGKEITEN – EIN  
UNIVERSALANSATZ ODER MASSGESCHNEIDERTE  
LÖSUNGEN?**

Die Republik Kroatien wird mit der größten Restrukturierung von Unternehmen in Schwierigkeiten konfrontiert. Dabei werden im Wesentlichen internationale Investoren einbezogen. Die Restrukturierung wird gemäß dem kürzlich erlassenen Gesetz über das Verfahren der Sonderverwaltung von den für die Republik Kroatien systemrelevanten Unternehmen umgesetzt. Das Gesetz wurde nach dem Zusammenbruch des größten privaten Einzelhandelsunternehmens (der Agrokor Gruppe) erlassen. Die Restrukturierung der Gruppe wurde bald zu dem politischen Problem und zu einem aktuellen Thema öffentlicher Diskussionen. Das Gesetz wurde sowohl von den Rechtswissenschaftlern als auch von der Öffentlichkeit stark dafür kritisiert, dass es nur für eine Gruppe von Unternehmen entworfen wurde und dass es mit den verfassungsrechtlichen Grundsätzen und den geltenden Insolvenzgesetzen inkohärent ist. Das Gesetz ermöglichte die Sonderverwaltung als ein besonderes Gerichtsverfahren, in dem der Sonderverwalter die größte Rolle spielt, und wurde den für die Republik Kroatien systemrelevanten Unternehmen gewidmet, welche in Insolvenz gegangen sind oder später in Insolvenz gehen werden. Ausgehend von diesem Hintergrund ist es das Ziel dieses Beitrags ein Gesamtbild der Restrukturierung zu verschaffen, indem man drei unterschiedliche Rechtsmodelle der vorbeugenden Restrukturierung von Unternehmen in Schwierigkeiten vergleicht: das deutsche Schutzschirmverfahren, das englische *Scheme-of-Arrangement* Verfahren, und das italienische Verfahren der Sonderverwaltung. Im Beitrag wird versucht, die Wirksamkeit jedes Modells anhand relevanter Forschungen über ihre Erfolgsquoten einzuschätzen. Bezüglich des kroatischen Gesetzes wird im Beitrag die Entwicklung des Gesetzes über vorbeugende Restrukturierung dargestellt, wobei bestimmte Aspekte des Gesetzes, insbesondere der Begriff des systemrelevanten Unternehmens, hinterfragt werden.

**Schlüsselwörter:** *Unternehmensrestrukturierung; Unternehmen in Schwierigkeiten; Sonderverwaltung; Restrukturierung der Unternehmensgruppe; systemrelevante Unternehmen.*



Riassunto

## LA RISTRUTTURAZIONE PREVENTIVA DI SOCIETÀ IN CRISI – LA STESSA TAGLIA PER TUTTI O UN ABITO SU MISURA?

La Repubblica di Croazia in questo momento si trova dinanzi alla più grande ristrutturazione di società in crisi con una significativa partecipazione di investitori stranieri. La ristrutturazione viene condotta nel rispetto della nuova Legge sull'amministrazione straordinaria nelle società commerciali, che ha un valore sistemico per la Repubblica di Croazia. Tale legge è stata emanata nel momento dell'esplosione della crisi del più grande colosso commerciale – il gruppo Agrokor. La ristrutturazione del gruppo è presto diventata una questione di primo ordine anche sul piano politico, che ha catturato l'attenzione dell'intera collettività. La legge menzionata è stata criticata nella dottrina giuridica e nella collettività in quanto pensata esclusivamente per il salvataggio di un gruppo in Croazia e perché non ritenuta conforme ai principi costituzionali ed all'esistente legislazione in materia fallimentare. Con tale legge viene creato un modello di amministrazione straordinaria alla stregua di un procedimento giudiziale speciale nel quale il ruolo principale viene giocato dal commissario straordinario, rivolto alle società commerciali di valore sistemico per la Repubblica di Croazia, che si trovino in stato di insolvenza oppure di pre-insolvenza. Partendo da ciò il presente lavoro intende indagare circa il più ampio quadro del modello di ristrutturazione mediante la comparazione di tre differenti modelli giuridici di ristrutturazione di società in crisi: il modello tedesco dello *Shutzschirmverfahren*, l'inglese *Schemes of Arrangment* ed il modello italiano di amministrazione straordinaria. Nel lavoro verrà analizzata l'efficienza di ciascuno dei modelli in base a studi rilevanti che orientano verso la loro fattibilità. Nel lavoro si passa in rassegna lo sviluppo del diritto croato mediante il quale si disciplina la c.d. ristrutturazione preventiva e ci si interroga circa determinate questioni relative all'atto legislativo, in particolare al concetto di società commerciale di valore sistemico.

**Parole chiave:** *ristrutturazione di società; società in crisi; amministrazione straordinaria; gruppo di società in ristrutturazione; società di valore sistemico.*