RESTRUCTURING PROCESSES AND CRISIS MANAGEMENT - RELEVANT CONCEPTS AND THEIR IMPORT IN ROMANIA

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ABSTRACT
The paper aims to analyse certain fundamental concepts linked to the restructuring and crisis management processes and the manner such concepts were reflected and evolved in the local business and legal environment. The paper also analyses the historical evolution of the restructuring processes in Romania both at the institutional level (privatization methods and some of their effects) and in relation to insolvency procedure with the purpose of defining the most relevant concepts. The methodology used is based on using the comparative, historical and logical research tools. The results of the paper point out the relevance of the concepts used by practitioners and turnaround managers when undertaking leading roles in restructuring and crisis situations.

KEYWORDS: *restructuring, turnaround management, insolvency.*

JEL CLASSIFICATION: *H12, L33*

1. INTRODUCTION

In the common sense, by restructuring an organization or a system it is understood a change in the way they are organized, usually to make them more effective. The concept of restructuring is of recent use in business vocabulary, being introduced in the corporations' language in the 1970s, associated negatively with "economic distress". During that period, corporate America began to think that large, traditional organizations were almost extinct. In the 1980s, the term gained a positive connotation and something more constructive, including opportunities to make structural changes within an organization to increase efficiency and profit (Hirsch & De Soucey, 2006).
Used in the academic world, the term "restructuring" has been traditionally linked to social policies and practices with negative effects. Problems related to job security and employs performance are inevitable in a competitive environment where the globalization phenomenon (in the sense of "voluntary interaction between individuals and companies" according to the World Bank, 1997) is becoming more and more serious. In current business language, the concept of "restructuring" is often associated with acquisitions, takeovers, and various changes in management, and is characterized as effectively reducing costs, improving product and service quality and increasing responsiveness to new opportunities market. Fierce competition, the new economy, sophisticated customers, economic pressure and financial and economic crises are just as many arguments that the resources of an organization are limited and that when they exist, they must be used effectively.
Organizations strive to be more flexible and adaptable to survive competition on the market. Recent developments in technology and changes in international trade arrangements have made as many changes to the terminology used in connection with restructuring "6 sigma", "lean and mean",

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"rightsizing" have also led to the acceptance of the social consequences of restructuring processes. Changing the trajectory of a company undergoing restructuring also requires concepts such as "outsourcing" or "staff cut".
According to Shirivastava, "crises are triggered by a set of elements such as human, organizational, or technical interactions that are mutually interacting" (Shirivastava, 1987). In the same way, Laurence Barton defines crises as "a series of important and unexpected events, with the potential to generate negative outcomes/effects" (Barton, 2001). When defined broadly, the crisis is "a phenomenon that places an individual or group of individuals before a negative situation if no action is taken to remedy or prevent that phenomenon." (Dutton, 1986). Some concepts that circumscribe the presence of a crisis such as "unexpected", "urgent", "restructuring", "crisis management", "insolvency", "bankruptcy" are used in relation to crisis situations.
In the following pages, we will discuss how these concepts were implemented in Romania, how they evolved after the transition to the market economy, in order to determine the links between the concept of "crisis" and "restructuring" and their appended concepts, i.e. "crisis indicators", "crisis management" and some of the consequences of most of the crisis situations faced by an organization, that is "insolvency" or "bankruptcy", with short analyzes on alternative forms of the regulated restructuring, namely the "ad-hoc mandate/voluntary arrangement" and the "arrangement with creditors". The approach subject to this paper deals exclusively with crisis situations determined by the economic evolution of an organization, with the exclusion of crisis situations that may arise due to external conjunctural factors such as, but not limited to natural disasters or profound social phenomena. In other words, among the many factors triggering a crisis, we will only refer to those factors that may cause the need for an organization's restructuring in its normal evolution, and not to intemperate or fortuitous phenomena that trigger immediate effects and reactions.

2. SHORT HISTORICAL APPROACH TO RESTRUCTURING

The first use of the concept of restructuring in a formal sense was related to commercial insolvency proceedings, mainly aiming at satisfying the claims of creditors. The legal treatment of commercial insolvency was a special way of forced enforcement, aiming to liquidate the debtor's assets and extinguishing the liability by payment of the debts. The term "**bankruptcy**" has a Latin etymology (in vulgar Latin "fallire" means failure, but also deception), expressing the debtor's inability to pay, defrauding thus the creditor.
In antiquity, Jewish laws regulated a periodic discharge of debtors, so the trader could start a new business. On the other hand, systems that grafted on Greek & Roman laws did not allow such a remedy for the debtor who was no longer able to pay his debts, who was considered infamous (put on the column of infamy - *pilorium*). As a sign of his disgrace, the merchant's counter was broken in public. The first collective action in favor of creditors, whereby they received possession of the debtor's assets, was set up under the Roman law *missio in possessionem*, and after their sale, *venditio bonorum*, the price obtained was distributed to the creditors.
According to these concepts, in the Middle Ages the bankruptcy institution evolved on two distinct coordinates that have been maintained in modern laws, namely the Anglo-Saxon laws, combining the remedies granted to the creditor with the debtor's protection, with a view to discharging his debts and to surviving the business, and those of Latin origin, focused on the creditor's protection.
The first regulation of the 1887 Romanian Commercial Code followed the Italian model, "maintaining a punitive and infamous nature of the law", governed by the unitary, collective, concurrent and egalitarian principle of creditors (Ionescu, 1933). Bankruptcy was ultimately aimed at covering claims held by creditors. All receivables were treated equally and entered the contest, being satisfied proportionally with the share held in the liability and in the legally determined priority order. The consequences on the bankrupt were considered to be particularly serious, as he was deprived of possession of his assets, subject to possible bankruptcy proceeding and real expulsion from the economic life, meaning that he wouldn't be able to carry out economic activity in the future.

In the regulation of the Commercial Code of 1887, the role of the syndic judge was particularly important, exercising both jurisdictional and administrative powers. By virtue of its jurisdictional powers, the syndic judge assesses claims in contradiction with those concerned, rules in contradictory procedure with the bankrupt and the creditors with respect to uncontested claims and claims that do not exceed a certain amount, discusses with creditors the request for a moratorium, participates when the Court judges the application for a moratorium and presides the meeting of creditors with a view to the arrangement, decides by means of ordinance on the amounts reserved for the creditors whose debts have not been entered in the balance sheet, draws up the statement of the distribution of the amounts resulted from the liquidation of the asset and submits it to the court's approval.

The administration duties, corresponding to the managerial tasks of the administrators or liquidators in the current regulation, gave the syndic judge the right to pursue the actions of the bankrupt and to represent him in the actions directed against him, the right to perform the inventory and to seal the estate of the bankrupt, the right to collect receivables, the right to conclude transactions with the approval of the Court of First Instance, to open the correspondence of the bankrupt, to convoke the creditors and preside over the meeting, to propose the Court measures on the debtor's means of subsistence, to liquidate the assets of the bankrupt.

"The bankrupt does not become incapable. He can oblige himself further, but the acts he had made and which had an influence on his assets, subject to the syndic judge's administration, were nil to the concurrent creditors" (Fintescu, 1929). Obligations assumed after the declaratory ruling could not be capitalized during the concurrent procedure in relation to the goods subject to this procedure.

The moratorium, as an incipient method of restructuring, led to the suspension of the bankruptcy decree and gave the bankrupt a time limit to either pay off its debts or reach an agreement with the creditors to postpone the payment. Although the moratorium could have been suspended by the Court for a maximum period of 6 months, period during which the debtor proceeded to the voluntary liquidation of the assets and the extinguishment of the debt with the creditors' meeting participation and under the supervision of the syndic judge. It is worth mentioning that the moratorium had no effect on the state's claims arising from contributions, nor on the rights of creditors with a mortgage, pledge or other privilege" (Codul Comercial, 1887), which seem to come up again in what concerns the two categories of creditors.

The arrangement with creditors is another institution governed by the Commercial Code of 1887 which leads to the suspension of the effects of a bankruptcy. The arrangement with creditors is a convention between the debtor and its creditors, approved by the court, which lays down the conditions for extinguishing a minimum of the bankrupt's liability. The final judgment validating the arrangement with creditors entails the termination of the legal status of bankruptcy. Although admissible at any stage of the bankruptcy procedure, it is noteworthy that those creditors who benefit from collateral do not vote, but at the same time the arrangement with creditors preserves in favor of the creditors a minimum of receivables to be recovered of 60%.

The regulation of the Commercial Code was criticized (Turcu, 2000) mainly for the following inconveniences:

- the infamous and punitive functions prevailed over the protection of creditors, with the focus on punishing the bankrupt debtor and on his exclusion from among traders; in some cases, deprivation of liberty or various non-patrimonial restrictions or prohibitions were also applied;
- the regulation was primarily addressed to the private individual debtor, while companies were regulated briefly and inadequately;
- the absence of any preventive actions and insufficient means of redressing the debtor, capable of avoiding bankruptcy or facilitating the settlement of debts;
- the neglect of the bankrupt's employees, reflection of the concept that the company is subsumed to the trader's ownership concept, the social aspect of bankruptcy being irrelevant;
- managerial attributions are exercised by the syndic judge, with effects on decisions with economic impact, given that judges do not possess an economic and managerial training.

The institution of the moratorium as well as that of the arrangement with creditors were replaced in 1932 when "the Romanian society undergone the great economic crisis (1929-1932), characterized by inflation, unemployment and poverty, followed in 1934-1938 by a period of economic recovery due to the protectionist policy and State intervention in the economy. Among the measures taken are the creation of four legal institutions for the prevention of bankruptcy in order to protect industry and commerce, namely: ante-bankruptcy moratorium, the legal disposal of assets or the abandonment of assets, judicial liquidation and arrangement with creditors. From these legal institutions, the Romanian legislation experienced the ante - bankruptcy moratorium, which proved to be, especially in the last era of the prolonged crisis, only "an anteroom of bankruptcy", as defined by the doctor in law Stelian Ionescu. For this reason, in 1929 the ante-bankruptcy moratorium was abrogated and replaced by the institution of the arrangement with creditors". (Chelariu, 2012)

"This legal institution *[the arrangement with creditors, emphasis added DC]* based on a majority vote of creditors as an essential element, and on the other hand, being able to adapt to any patrimonial situation of a trader undergoing economic difficulties (...) would have certainly have more satisfactory results in Romania if it had been adopted shortly after the crisis broke out, and had its procedural technique not be abusive" (Ionescu,1933).

The centralized economy of the communist state does not know or recognize the concept of insolvency, bankruptcy, arrangement with creditors that it only becomes a current issue again with the transition to the market economy. In fact, the entire Commercial Code, although not explicitly abrogated, falls into disuse and ceases to be applied until 1989. The first regulation on judicial reorganization and bankruptcy is given by Law 64/1995 on the judicial reorganization and bankruptcy, repealing the relevant provisions of the old Commercial Code. As the title itself mentions, Law 64/1995 envisaged judicial reorganization (in the insolvency procedure governed by law) and not measures to prevent insolvency, as much less restructuring measures outside the procedure, measures that, despite the practitioners' steps, are absent until the adoption of Law no.389/2009 on the introduction of the arrangement with creditors and the ad hoc mandate. Though animated by good intentions, the law that reinstates the two institutions proves to be devoid of any practical utility despite the opinion expressed by the initiator of the law (Piperea, 2009), which summarizes as compared to the insolvency procedure, the procedure of the arrangement with creditors:

- does not imply insolvency and, therefore, no stigma associated with it;
- is a confidential or low-profile advertising procedure;
- the debtor does not lose control of its business;
- benefits from the assistance of an insolvency practitioner who supports business restructuring efforts;
- the syndic judge's intervention is minimal.

In what concerns the relevance of the arrangement with creditors in the Romanian economy, we show that, according to the information we hold, the arrangement with creditors (both in Law 389/2009 and in Law 85/2014) gave in very few cases only the results expected while in many situations judicial validation procedures have canceled any potentially positive outcome. In 2016, the representatives of the Ministry of Justice highlight "Last year [2015 emphasis added DC] we only had 25 arrangements with creditors, which is not satisfactory. We didn't succeed in solving the opposition of the tax bodies to such procedures (…) The tax authority proposes the direct bankruptcy. In this case, we should have a bankruptcy law. I do not think the approach is a law regulating bankruptcy " (Motiu, 2016).

At present, both judicial reorganization and procedures permitting a restructuring outside the procedure are governed by Law 85/2014 on Insolvency Prevention and Insolvency Proceedings. The only consolation to the ineffectiveness of institutions regulated is the title of the law, which sets forth "insolvency prevention" procedures. Practice has shown at least to date, that in the absence of constraints and limitations imposed by insolvency status as such, there is no real restructuring besides the insolvency procedure.

3. STATE AS ADMINISTRATOR OR OWNER; RESTRUCTURING OF OWNERSHIP

Less related to the capitalist economic model until the 1990s, Romania is experiencing restructuring only in the form which concerns employees' jobs. The 1990s brought a new crisis when the Romanian economy "falls from the lack of restructuring measures". The period from 1997 to 2000, although accompanied by some restructuring measures, only leads with few exceptions to the economic viability of the privatized companies or those that the State still retains in its portfolio. The financial and economic crisis triggered by the collapse of the real estate market and real estate-guaranteed loans, triggers a new wave of restructuring completed in many cases with bankruptcies or the transfer of bad debt portfolios.
In the following, we will review the main restructuring steps that marked the evolution of the Romanian economic environment after the transition to the market economy, considering that the restructuring of the State property is also part of the restructuring phenomenon in a broad sense and is inextricably linked.
The Washington Consensus, whose aim was to synthesize the conditions and measures required for a developing country to embark on a sustained development, seems to have led, even without the will of whomever developed the concept, to the conviction that "markets can bear any [measures] "(Williamson, 1990, 2000). The conclusions further to applying the measures, including in the Romanian economy, were summarized by J. Stiglitz, who considered back in 2002 that transition from the centralized communist state to a market economy is disappointing, as the gap between expectations and reality was significant, that the results of implementing the actions and directions provided in the Washington Consensus have not produced the expected results and that those who have suffered the austerity period were still looking after the results of the alleged reforms (Stiglitz, 2002). From the comparative analysis of the results obtained in the reform processes both by the former socialist countries and by the Asian countries including China, Stiglitz considers that capitalism cannot be "short-sighted". In fact, the shortage experienced by some of the countries where the measures were applied, consisted of reducing the concept of "market economy" to some fundamentally considered components, namely prices, private property and profits. At the same time, some of the measures that should have been focused to ensuring a competitive framework, to regulating the activity of institutional financiers, to developing stock exchanges, to preparing a new typology of managers, or the reform of some institutions were neglected or insufficiently substantiated, with significant negative consequences in the long run.
The end of 2004 marks the end of the "transition" to the market economy (2004) by the Prime Minister's investment speech at the time, Călin Popescu Tăriceanu. Broadly speaking, the State had a portfolio of important companies or minority shareholdings were still held by the State in some companies.
A first stage, the so-called restructuring of State property, was carried out in Romania by privatization, starting from the idea that the State cannot assume the role of owner and administrator at the same time, and that the attitude towards State property versus private property determines automatically the right or left preferences of a person. As noted, "privatization is, within the limits of its founding ideas, a means of preventing insolvency" (Piperea, 2008). The first law on privatization, Law 58/1991 had a dual purpose, creating the premises of the mass privatization process (through the free distribution of property certificates and the exchange of shares certificates to the companies subject to privatization) and the large privatization (by selling the shares or assets of the companies subject to privatization to investors. Subsequently, in addition to the legal framework Law 77/1994 was passed, on the associations of employees and members of the management of commercial companies which are privatized according to Law 58/1991.
The Second Privatization Law 55/1995 aimed at accelerating the mass privatization process and closing the privatization process, in accordance with the directives established by Law 58/1991, namely the free transfer of shares to the population and the sale of shares to investors. Law 55/1995 was followed by Government Emergency Ordinance 88/1997 on the privatization of commercial

companies and Law 137/2002 on acceleration of privatization. The legislative framework outlined by the mentioned normative acts was repeatedly amended and supplemented by government decisions and methodological norms, which, as observed, in some cases "complemented, modified or even violated the law" (Piperea, 2008). Existing legal framework of privatization did not prevent governments that have succeeded in the period 1995-2004 to promote special legislation applicable to the privatization of companies that were active in certain sectors (banking companies, tourism, oil and gas, etc.).

By the end of 2004, more than 7500 companies had been privatized in all areas. After the privatization, about 3,000 companies were liquidated, of which over 1,300 were large and very large companies, leading to the disappearance of entire sub-sectors of the economy, in various fields, including metallurgy, steel, chemistry, machine building (specialized machine tools, computers, TVs, robots, planes, passenger cars, weapons, tractors), wood industry, textile industry, food industry, light industry, pharmaceutical and cosmetics industry, etc.

Regarding the results of the privatization process in any of the ways in which it was carried out, in the absence of clear statistics, it is worth noting the following consequences:

- fragmentation of participations and shareholders;
- distortion of the privatization process in favor of the employees, by diverting the purpose of the associations formed by the employees;
- disintegration of management, which became a factor that controlled some assets, by means of privatizing companies "without the will of the managers and sometimes even without their knowledge";
- generation of scattered shareholding mammoth companies (SIFs).

However, the constant of the privatization process is, in any form of privatization, only one, namely the transfer of a value from the State patrimony to the private patrimony. We have reservations about the extent to which the goal pursued by each of the legal components of the legal framework for privatization has been achieved or not, as long as the purpose of this article is to argue that, in the broad sense of the concept of restructuring, it has as effect and operates a property exchange. In the case of State property, this transfer is all the more important, as in many of the cases, it ends with the opening of insolvency or bankruptcy procedures by the new owners.

4. BANKRUPTCY AND RESTRUCTURING

The origin of the concept of restructuring is closely linked to the economic and inevitable evolution, the cyclicity of the periods of crisis. Restructuring in the current, strategic reorientation of an organization is the result of a change in optics that has evolved with the global economic environment (from the effects of the oil crisis of the 1970s and the deregulation of the road and air transport industry in the 1980s, characterized by the effervescence of the funded acquisitions) to the role that characterizes "an organization's ability to innovate, develop a competitive edge over other competing organizations, and change practices, processes and products" (Hirsch & De Soucey, 2006).

The first modern procedures of reorganization only appear in 1978, when "Chapter 11" of the American Bankruptcy Code was adopted, which helped the debtor to reach an agreement with its creditors based on which the debtor continues its activity and provide an extension of time, a partial arrangement or a combination thereof, the purpose of the reorganization being to allow the debtor to continue to pursue the activity in the new form without the burden of the existing debts at the start of the proceedings. "In many respects the U.S. Bankruptcy Code is perhaps the most liberal debtor relief bankruptcy system to come into existence since the Jubilee Year of the Old Testament" (Spannaus, 2002).

In the next 25 years, the tide of bankruptcy legislation reform reached Italy in 1979, France in 1985, Great Britain in 1986, New Zealand in 1989, Australia and Canada in 1992, Germany in 1994 and

1999, Sweden in 1996, Japan and Mexico in 2000. China, Russia and most post-communist countries have introduced or amended bankruptcy laws after 1990 (Daianu et al., 2006).
Efforts by international organizations such as UNCITRAL and the World Bank have contributed significantly to generating insolvency regulatory models, guides to good practice, and facilitated the implementation of legislative reforms. However, effective insolvency law is significantly different in various countries. According to a World Bank analysis, "in 88 countries, bankruptcy procedures run over very long periods, are costly and ineffective in maintaining the continuity of a business in financial difficulty; only in 36% of the analyzed countries, the company in difficulty is kept in activity, while about 48% of the value of the business is lost during the procedures for capitalizing and satisfying the receivables" (World Bank Report, 2016). In 2014, it was concluded that out of 38 indicators used by the World Bank to analyze the regulatory framework, the rate of recovery of claims by a secured creditor was the most relevant indicator in analyzing the effectiveness of insolvency proceedings.
According to a 2004 study (Daianu et al., 2006), the average age of bankruptcy legislation in the top ten best practice countries - Belgium, Canada, Finland, Ireland, Japan, the Republic of Korea, Latvia, the Netherlands, Norway, Singapore - was only six years. Under these circumstances, Romania's legislative efforts to regulate insolvency and bankruptcy procedures, in particular through the adoption of Law 85/2006, which repeals Law 64/1995, are part of the international trends.
Law 85/2006 on insolvency proceedings is basically the first local regulation that formally recognizes the role of "restructuring" in insolvency proceedings. In the concept of Law 85/2006, "judicial reorganization" is the insolvency procedure that applies to the debtor in order to pay his debts, according to the payment schedule of the receivables. The reorganization procedure involves drawing up, approving, implementing and complying with a plan, called a reorganization plan, which may provide, jointly or separately:
a) the debtor's operational and/or financial restructuring;
b) corporate restructuring by modifying the share capital structure;
c) restrict the activity by liquidating some of the assets from the debtor's wealth.
The relevance of the regulation under Law 85/2006 lies in the importance it attaches to the relationship between the sponsor of a reorganization plan (in most cases even the debtor interested in recovery) and the different classes of creditors, which is basically the one that can ensure the success or the failure a reorganization plan. However, legislative inconsistencies that allow debtors to influence voting, the lack of regulation of the conflicts of interest, the ineffectiveness of the enforcement of guarantees even by guaranteed creditors or the legislator's omission to ensure fair and equal treatment between a company in financial difficulty, and one outside the procedure are aspects that make the insolvency procedure, even in the form of judicial reorganization, a way to postpone a predictable end, i.e. the opening of bankruptcy proceedings and the sale of assets. By way of example, we will show that for all economic organizations operating in various sectors in which subsidies are granted (such as usually commercial companies with agricultural or agribusiness business), the financial difficulty or the initiation of insolvency proceedings are per se a reason for not receiving the grant. Virtually any company operating in subsidized sectors, even with recovery prospects in a judicial reorganization procedure, only has the option of bankruptcy, preferably a fast one. The disappearance of the subsidy as part of the revenue of a subject liable to recovery (including if all the parties concerned agree on a reorganization plan) removes any chance of recovery as long as potential competitors benefit from the subsidy.
Law 85/20014 the insolvency and insolvency prevention procedures brought together the same rules, both for the purpose of declaring insolvency and for insolvency proceedings. However, the new regulations "are not more flexible or more efficient" and do not seem to remedy "the conceptual mistakes of Law no. 381/2009 (e.g. disqualifications from arrangement proceedings for criminal offenses of the shareholders) and the requirement that the tax authority's vote be preceded by a procedure of approval of the State aid; in addition, the 75% approval threshold is prohibitive "(Piperea, 2014).

5. RESTRUCTURING MANAGEMENT

In parallel with the evolution of bankruptcy legislation and in the absence of a formalistic approach to restructuring prior to the opening of insolvency proceedings, the business environment has developed the concept of "restructuring management" in connection with efforts to rescue an organization and return to profitability. According to Grant Newton, 2009 **"management restructuring"** is "a process that aims to identify solutions to the operational problems of an organization by improving position and differentiate products and services" (Newton, 2009). The goal of the process is to reinvent the organization and restore it to profitability, as well as to identify the causes that have determined or determine operational performance or low profitability in order to remedy them. The key features of management restructuring are the added value and expertise of the restructuring manager as well as the openness, read as fair-play, in the relationships with employees, creditors, suppliers, shareholders and clients.

Restructuring management typically involves the identification of causes that generate performance or lack of performance, organization manager analysis, SWOT analysis, all to determine the causes of low or declining performance. Following the analysis, a strategic restructuring plan is prepared, which may or may not involve the initiation of insolvency or bankruptcy proceedings. If the restructuring plan is implemented, the restructuring manager assumes its implementation, regularly reviewing the progress and making the necessary adjustments to ensure the organization returns to the solvency status.

"Restructuring Managers" are experts, people who in many cases take over temporary or as long as is necessary, management positions to implement the restructuring plan. It should be mentioned that one of the first stages of the restructuring process is to replace the management with persons with expertise in their field. The management of the organization includes members of the board of directors and those in key positions, with the fundamental aim of ensuring transparency, access to relevant information and ensuring the efficiency of the case assessment process, while providing key stakeholders in the organization (creditors, financiers, clients, employees) the confidence that the assessment of the opportunities for recovery is an objective one. Restructuring mandates may vary between a few months and several years, depending on the size of the organization and the complexity of the tasks assumed. Restructuring management is not necessarily linked to companies in difficulty, being perceived as necessary in any situation in which the direction, strategy or a general change in the conduct of business becomes necessary or must be implemented. That is why restructuring management is considered to be close to the notions of change management, transformation management and post-acquisition integration management.

At the level of the regulatory framework, "restructuring" and concerns about giving a real chance to recovery to financially troubled organizations seem to be on the rise, triggering concerns only after the latest financial and economic crisis, only in the context in which European restructurings were, with some exceptions, exercises that were largely completed through bankruptcy or did not have the expected effect, mainly due to the ineffective claim of restructuring measures. Including in 2013, in the context of the need to restructure bad loans, the National Bank of Romania estimated that "in the case of the population portfolio, about 70% of the non-performing debtors (who own either real estate loans or mortgage-guaranteed consumer loans) for more than one year or reported multiple non-repayments (in June 2013). Banks have used relatively large restructuring/rescheduling and enforcement solutions, but the efficiency of these bad credit management techniques has so far remained below the potential. Consequently, the National Bank assumed that "removing non-performing exposures generated by companies from the balance sheet (by assignment or cancellation of receivables operations) would reduce non-performance rate related to this sector from 23.4% (value in August 2013) to 7.5%. In the same year, 2013, "the non-performing rate for foreign currency loans stood at 11.1% in June 2013 (compared with 8.9% for RON), up 2.5 percentage points versus December 2011. The volume of non-performing loans in foreign currency for companies reported a

73.7% increase between December 2011 and August 2013 (against 53% in the case of loans in RON in the same period)."

This decrease is due to a reduction in the high volume of non-performing loans generated by debtors who have a low probability of honoring their debt service. The attempts of local banks to implement restructuring, the results of these processes, and the effects produced by the "suggested" solutions in the Financial Stability Report in 2013 are not covered by this article, but we will only conclude that in the case of receivables, the effects were mainly negative, generating confusion about the structure of the traded portfolios, the manner of establishing transfer pricing, the quality of the transferees, all of which are still in the phase of crystallization, and regarding the debt cancellation operations, with some exceptions regarding accessory penalties (interest, increase, late charges), local institutional financiers did not apply this method.

6. THE NEED FOR FORMALIZING THE RESTRUCTURING

Recent initiatives by the European Commission, as well as the findings of studies conducted by the World Bank, converge to give priority to the theory of business network) and "structure of business relationships interconnected" reports at a global environment, the "network is theoretically infinite and all relationships are directly or indirectly connected to one another" (Håkansson & Snehota, 1995). Consequently, affecting the network at one-point triggers negative effects in multiple other points within the network. This adds to the risk posed by innovative companies that, in order to grow, need a larger market at least in the first part of their existence. However, with regard to the consequences of the financial and economic crisis as well as the relatively recent insolvency practice, it becomes obvious the need to regulate restructuring in the sense of giving a second chance to companies in difficulty. In the new context, restructuring is seen as a stage that is preferable prior to triggering insolvency proceedings.

The initiative of the regulation is grafted on an objective reality:

(a) in today's Europe, half of all businesses survive less than five years;

(b) the number of insolvency cases among businesses has increased since 2009, the peak year of the economic crisis;

(c) in several Member States there is a trend for viable businesses facing financial problems to be directed towards liquidation rather than towards early restructuring;

(d) in the EU, 200,000 companies are bankrupt a year (600 per day), resulting in 1.7 million direct job losses each year;

(e) one in four cases is a cross-border insolvency case involving creditors and debtors from at least two EU Member States;

(f) among European citizens, 11.4% are constantly behind payments, often in utility bills.

(g) in half of the Member States, the duration for solving insolvency cases is between two and four years;

(h) the persistence of non-performing loans in the European Union is an indicator of the need for additional measures to ensure that the negative reaction between poor asset quality, delays in credit growth and low growth rates does not become a current phenomenon;

(i) in the comprehensive assessment carried out by the European Central Bank in 2015, it was found that the non-performing exposures in the banking system reached EUR 980 billion.

It is estimated that "related companies and jobs could be saved to a significant percentage if preventive procedures were instituted in all Member States where the companies in question had their headquarters, assets or creditors, or if there were rapid preventive restructuring procedures to ensure that measures are taken before commercial companies are no longer able to pay off their loans. It would thus help to reduce the risk that loans become inefficient in the downstream phases of the economic cycle and thus reduce the negative impact of such a situation on the financial sector."

The new regulation contains the requirement for Member States to ensure that their national preventive restructuring procedures comply with certain minimum efficacy principles. Crucial in this

context are some complementary elements: first, to allow companies to restructure more easily and thus to return more quickly to financial viability and to honor their debts, and second, to take the necessary steps for banks to recover their assets if debtors do not have prospects of returning to viability.

7. CONCLUSIONS

Internal organization crises can be generated by various internal or external factors that put the organization at a negative potential, and usually lead, in a short period, to the degradation of financial indicators. Crises that are not accompanied by restructuring outside the procedure, determine the rule, triggering insolvency proceedings. Although the effect of a crisis situation is foreseeable and in many cases commensurable, there is currently no regulatory framework to force organizations to resort to crisis management or restructuring.

Between crisis situations and the need for restructuring there is a causal relationship, meaning that restructuring is the necessary and immediate effect of a managed crisis situation, in the sense of taking action to remove the consequences with negative potential to an organization.

Between restructuring and insolvency there is a necessary but at the same time the insoluble link, in the sense that the restructuring may be part of an insolvency process, can predict the state of insolvency or can exist independently without being followed by an insolvency proceeding. Alternative methods of restructuring outside the procedure are not applied or are insufficiently applied and do not lead to the expected results. As noted in the Directive itself, "restructuring, insolvency and the second chance are heavily regulated at national level and are linked to other areas of law such as company law, labor law, tax law and state aid law" but without these connections necessarily implying a different approach to restructuring. Moreover, the primary goal of fiscal law doesn't seem to be, through the developed mechanisms, to ensure the survival of the business but to recover, under any condition and sometimes outside the procedure, the tax receivables.

From the point of view of the evolution of the restructuring concept, both the legal framework in Romania and the practice reflected on one hand the "shortage" used for the transition process to the market economy and, on the other hand, the necessity of developing alternatives outside of insolvency proceedings. In other words, the inefficiency of local restructuring only underlines the need - in line with current trends - to prioritize methods that allow for the survival of the debtor and, in particular, to preserve/continue the business and to give a new chance of bankrupt by setting up a restructuring framework at the stage in which insolvency is likely to be prevented and the continuation of the activity assured. Without a regulated framework for restructuring, alternative institutions (the arrangement with creditors and the ad-hoc mandate) are ineffective, too little understood or distorted from their real purpose.

EU efforts to converge towards the identification of mechanisms where interpretation of data and information on an organization should be able to generate an early warning on the possibility of triggering an insolvency, where such a warning is in the interest of all parties (unsecured creditors, guaranteed creditors, tax creditors, employees). The initiative could oblige third parties having access to relevant information such as accountants, auditors, tax authorities to report negative developments before debtors meet the conditions for triggering collective insolvency proceedings with as consequence, the total or partial desistance of the debtor and the appointment of a liquidator. Of course, such an approach should involve accountability of the debtor's management, the practitioners, the syndic judges and, last but not least, the legislator.

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