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The Czech Implementation of the Directive on Preventive Restructuring: A Practical Approach to Individual Moratorium and other Implementation Issues.

Diplomová práce

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Content

1. Introduction

In today's interconnected European economy, the concept of preventive restructuring has taken center stage as a key instrument for addressing financial issues among businesses within the European Union, designed to offer companies in financial distress an alternative to formal insolvency proceedings. The concept seeks to help debtors restructure their obligations early to avoid the severe consequences of formal insolvency proceedings while preserving viable enterprises, protecting jobs, and reducing the economic and social fallout typically associated with business failures. The European Union has embraced this philosophy and recognized the importance of harmonized frameworks that ensure businesses across Member States can access effective restructuring tools regardless of their jurisdiction.

The concept of preventive restructuring was legally formalized with the adoption of the *Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132* („**Directive on Preventive Restructuring**"), which introduced minimum standards for preventive restructuring frameworks, including provisions for stays of enforcement actions, debtor-in-possession arrangements, and the facilitation of cross-class cram-downs. These mechanisms aim to balance the interests of debtors and creditors, encourage early intervention, and prevent the escalation of financial difficulties into insolvency. The flexibility allowed in its transposition enables Member States to tailor the provisions of the Directive on Preventive Restructuring to their legal traditions, while contributing to the broader goal of a more resilient European economy through financial stability.

As preventive restructuring continues to evolve, particularly in the Czech Republic, it is crucial to address the implementation challenges that arise and ensure that these frameworks remain effective and fair for all parties involved. Therefore, this thesis seeks to answer the central question: „*What are the key challenges in the Czech implementation of the Directive on Preventive*

Restructuring?“ Specifically, it delves into the problems associated with individual moratoria, exploring their practical implications, potential risks, and avenues for improvement, introduced through a detailed analysis of Czech restructuring law and a focused case study on Liberty Ostrava in Chapter 4. My aim is to shed light on how preventive restructuring can be refined to better adress both local needs and European standards.

The thesis begins with theoretical research on insolvency and restructuring laws in both European Union and Czech contexts, establishing the historical and legal foundations of the Directive on Preventive Restructuring. It then introduces the Czech Republic's legislative framework and shows how preventive restructuring fits within existing legal principles while addressing potencial gaps. A case study of Liberty Ostrava on individual moratoria in the last chapter offers practical insights.

In terms of methodology, this thesis draws on a variety of sources and experiences, mainly consisting of a thorough examination of legal texts and academic literature. I was fortunate to gain first-hand insights into these issues during my internship at a law firm, which added depth to my research. My main sources included legal literature (as listed in the references), the text of Directive on Preventive Restructuring, Czech legislative materials, and relevant legal commentaries. I also relied heavily on scholarly articles to better understand the Directive on Preventive Restructuring and the challenges of its implementation. Throughout the writing process, I used Deepl.com[1] and ChatGPT[2] as supportive language tools to enhance the quality of my text. It helped me find more suitable vocabulary, better structure my sentences, improve my grammar, and find more natural expressions to convey my thoughts effectively. However, I want to emphasize that all conclusions, arguments, and analyses in this thesis are entirely my own and stem from my own research, experience and sources presented herein. I did not use ChatGPT to generate any ideas, sources, arguments or create any original thoughts - it merely acted as

[1] Deepl.com, In deepl.com [online]. Available at: https://www.deepl.com/en/translator
[2] ChatGPT, In chatgpt.com [online]. Available at: https://chatgpt.com/

a inguistic guide and was used fully in line with *Doporučení pro využívání umělé inteligence na Právnické Fakultě Univerzity Karlovy*.[3] I am grateful to our faculty for allowing the use of AI, which allowed me to fully utilize my potential while writing in English and helped me to express my ideas with greater precision and elegance. I hope the resulting work reflects both the depth of my research and the clarity of its presentation.

Having studied in the United States, I felt confident taking on this task, and I saw real value in writing a thesis that could reach a wider audience. To me, preventive restructuring is a topic relevant far beyond the legal community - entrepreneurs, especially those starting businesses or facing financial difficulties, may also find useful guidance here. This broader relevance made it all the more important to present the thesis in a way that resonates with readers across the entire European Union. I hope this thesis contributes to a better understanding of the tools available to protect businesses and boost their financial recovery.

[3] Doporučení pro využívání umělé inteligence na Právnické Fakultě Univerzity Karlovy, dated 7 October 2024, In prf.cuni.cz [online]. Available at: https://www.prf.cuni.cz/doporuceni-pro-vyuzivani-ai or https://www.prf.cuni.cz/sites/default/files/uploads/files/Doporuc%CC%8Ceni%CC%81%20pro%20vyuz%CC%8Ci%CC%81va%CC%81ni%CC%81%20ume%CC%8Cle%CC%81%20inteligence%20na%20Pra%CC%81vnicke%CC%81%20fakulte%CC%8C%20Univerzity%20Karlovy_%C5%99%C3%ADjen%202024.pdf

2. Introduction to Preventive Restructuring

In recent years, the European approach to rescuing businesses has undergone a notable transformation. Alongside the traditional insolvency law, which primarily addresses bankruptcy and liquidation, a new specific framework of restructuring law has emerged. This new approach emphasizes the early recovery of entrepreneurs facing financial difficulties and aims to address issues in their nascent stages and ultimately prevent bankruptcy alltogether.[4]

The focus on restructuring as a preventive tool reflects a recognition of its tangible benefits. Prolonged, costly, and inefficient formal insolvency procedures often result in suboptimal outcomes, consuming resources that could otherwise aid recovery. By equipping entrepreneurs with tools to address challenges at an early stage, the new restructuring framework enables them to avert insolvency and sidestep formal insolvency proceedings.[5]

Recognizing financial difficulties early on is crucial for improving the likelihood of resolving issues effectively.[6] For instance, creditors seem to be generally more willing to cooperate when the problems appear more manageable: „*The earlier that a company engages with this process when it foresees financial difficulties, the more assets it is likely to have to support a turnaround and to convince creditors to cooperate for the benefit of the collective and equitable satisfaction of creditors. If a company waits too long and must enter into an official procedure due to an event of insolvency, even though that procedure may lead to a restructuring of a sort, procedural cost will be incurred and information about the debtor's condition will circulate, to which some degree of reputational stigma will be attached. If the restructuring eventually fails,*

[4] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, page 1

[5] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, page 1

[6] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, page 1

the debtor has to carry the procedural and reputational costs without the benefit of a reorganised capital structure."[7]

The impact of business continuity extends far beyond the enterprise itself, as the closure of a business often leads to considerable job losses and a cascade of negative social consequences.[8] The development and promotion of an effective restructuring mechanism is equally vital from a broader perspective, as it contributes to overall economic stability and resilience. These tools not only support the survival of individual businesses but also help sustain the interconnected networks that underpin the economy as a whole.[9]

2.1 Prior to the traditional Insolvency

The evolution of insolvency law reflects a long historical journey that draws from ancient legal traditions and gradually shapes the modern systems we see today. Early trails of debt resolution can be traced back to some of the first known legal texts, ie. the Code of Hammurabi from the 18th century BCE or the Torah from the 13th century BCE. In ancient Israel, the "Year of Jubilee" introduced an idea of forgiving debts every seventh or forty-ninth year and thereby established an early model of humane treatment for debtors and periodic debt resolution.[10]

Roman law introduced significant advancements in insolvency laws through which it transitioned from personal execution—where debtors could be enslaved—toward a system focused on property execution. Initially, creditors were granted the right to claim the entirety of a debtor's assets through processes called *missio in bona* followed by *venditio bonorum,* or in other words, the sale of all the debtor's assets. Over time, under the influence of late Roman

[7] GANT, J. L., BOON, G.-J. et al. The EU Preventive Restructuring Framework: in Extra Time? Social Science Research Network, In papers.ssrn.com [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3938867 (last visited on 2 December 2024), page 5

[8] JOUROVÁ, V. Early Restructuring and a Second Chance for Entrepreneurs. A modern and Streamlined Approach to Business Insolvency. Factsheet. European Commission. In ec.europa.eu [online]. Available at: https://ec.europa.eu/information_society/newsroom/image/document/2016-48/eu_factsheet_40047.pdf (last visited on 2 December 2024), page 2

[9] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, page 2

[10] WINTEROVÁ, Alena a MACKOVÁ, Alena. *Civilní právo procesní. Díl druhý: řízení vykonávací, řízení insolvenční*. 2. aktualizované vydání. Student. Praha: Leges, 2018. ISBN 978-80-7502-299-8, page 196

jurisprudence, this approach evolved into a more judicious system known as *distractio bonorum*, where the proceeds from the sale of a debtor's assets were distributed among creditors in proportion to the size of their claims, reflecting a commitment to principles of equity.[11]

In the Middle Ages, insolvency laws were highly fragmented, shaped by diverse local and feudal customs. Nevertheless, Roman legal principles persisted, particularly in the Germanic legal traditions such as the Lübeck and Hamburg codes of the 13th century, and later in the Augsburg Auction Ordinance of 1447. The term "bankruptcy" itself originates from the Italian banca rotta - meaning "*broken bench*" - a reference to the symbolic act of breaking a merchant's bench to publicly declare their financial ruin, which is a practice characteristic to Renaissance financial customs. In England, insolvency law began to form with the Tudor-era Statute of Bankrupts, dated 1542, while the French codified their approach in Colbert's Commercial Ordinance of 1673. The term "bankruptcy" developed dual connotations: in private law, it referred to insolvency as a civil matter, whereas in public law, it implied criminal misconduct in relation to insolvency. This dual understanding, which remains relevant in current Czech insolvency law, can be traced back as far as 15th-century German law, where similar distinctions were already in place.[12]

The modern concept of insolvency law emerged in the 19th century, driven by reforms to both substantive and procedural law, mainly noticeable in the French Commercial Code dated 1808, which differentiated between honest and fraudulent insolvency, as well as the German Imperial Bankruptcy Code dated 1877. However, the American Bankruptcy Act, dated 1976, had the greatest global impact, revolutionizing insolvency laws by introducing restructuring mechanisms as a practical alternative to liquidation, which until then had been the only available solution.[13]

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[11] WINTEROVÁ, Alena a MACKOVÁ, Alena. *Civilní právo procesní. Díl druhý: řízení vykonávací, řízení insolvenční*. 2. aktualizované vydání. Student. Praha: Leges, 2018. ISBN 978-80-7502-299-8, page 197

[12] WINTEROVÁ, Alena a MACKOVÁ, Alena. *Civilní právo procesní. Díl druhý: řízení vykonávací, řízení insolvenční*. 2. aktualizované vydání. Student. Praha: Leges, 2018. ISBN 978-80-7502-299-8, page 197

[13] WINTEROVÁ, Alena a MACKOVÁ, Alena. *Civilní právo procesní. Díl druhý: řízení vykonávací, řízení insolvenční*. 2. aktualizované vydání. Student. Praha: Leges, 2018. ISBN 978-80-7502-299-8, page 198

2.2 Evolution of Insolvency Laws in the Czech Republic

In the Czech legal tradition, legal reforms began with the Josephinian General Court Order dated 1783 and continued to develop through Austria-Hungarian and Czechoslovak laws, eventually leading to the 1931 Czechoslovak Bankruptcy and Settlement Order[14], which remained in effect until it was repealed by the Czech Civil Procedure Code in 1950. During the socialist era, although it was formally codified, insolvency law was rarely enforced. This reflected the socialist economy's deep disconnect from market-based insolvency principles, reducing insolvency to liquidation as the sole available option.[15]

The transformation after the Velvet Revolution brought major changes to Czech insolvency law. The Bankruptcy and Settlement Act of 1991 broke away from the old socialist-era system but was often criticized for its rigidity. A real shift came with the Czech Act No. 182/ 2006 Sb. On Insolvency and Methods of its Resolution („**Insolvency Act**"), effective from 2008 until today, which introduced important reforms like stronger creditor rights, enhanced judicial oversight, and new restructuring tools such as reorganization and debt relief. This moved Czech insolvency law closer to modern standards, balancing the need for liquidation with rehabilitation, or in other words, introduced the goal of helping debtors get back on their feet. Since then, amendments and decisions by the constitutional court have refined the law further, improving creditor representation and streamlining procedures.[16]

Insolvency has now become an everyday reality in the Czech Republic which impacts a broad range of stakeholders - debtors, creditors, insolvency administrators, and court staff alike. The Insolvency Act introduced several new methods of resolving insolvency: liquidation[17],

[14] Zákon č. 64/1931 Sb., československý řád konkursní, vyrovnávací a odpůrčí

[15] WINTEROVÁ, Alena a MACKOVÁ, Alena. *Civilní právo procesní. Díl druhý: řízení vykonávací, řízení insolvenční*. 2. aktualizované vydání. Student. Praha: Leges, 2018. ISBN 978-80-7502-299-8, pages 198 - 199

[16] WINTEROVÁ, Alena a MACKOVÁ, Alena. *Civilní právo procesní. Díl druhý: řízení vykonávací, řízení insolvenční*. 2. aktualizované vydání. Student. Praha: Leges, 2018. ISBN 978-80-7502-299-8, page 199

[17] In Czech: konkurz, Sec. 244-315 of the Insolvency Act

reorganization[18], debt relief[19], and special procedures for specific entities[20]. One of its most notable innovations was the introduction of debt relief, allowing individuals who are not entrepreneurs to address their financial difficulties through personal bankruptcy.

Liquidation remains the most used method of addressing insolvency. In contrast, reorganization, which lets a debtor keep their business running while paying off debts, is rarely used.[21] This is likely due to delays in filing applications or insufficient support from creditors.

Statistics show that since 2008, the number of insolvencies steadily increased, peaking in 2013. After this point, the trend reversed, with the number of insolvency filings gradually declining in the following years.[22] The highest numbers of filings occur in regions with high unemployment rates, such as Ostrava, while regions with more stable economic conditions, such as České Budějovice, report the lowest numbers.[23]

However, the effectiveness of insolvency proceedings is sometimes subject to controversies, as creditors often recover little to nothing from the process[24]. Some people argue that insolvencies may even raise moral concerns, suggesting that everyone is responsible for fully repaying their debts.

2.3 Evolution of Preventive Restructuring Laws in the European Union

The adoption of the Directive on Preventive Restructuring was introduced in response to a significant shift in insolvency law, both within individual Member States and across the European Union. This change was largely prompted by the 2007 - 2008 financial crisis, which

[18] In Czech: reorganizace, Sec. 316 - 364 of the Insolvency Act
[19] In Czech: oddlužení, Sec. 389 - 418 of the Insolvency Act
[20] In Czech: úpadek finančních institucí, Sec. 367 - 388e of the Insolvency Act
[21] Vývoj povolených reorganizací. Vývoj prohlášených konkurzů. In insolcentrum.cz [online]. [cit. 2024-12-3]. Available at: https://www.insolcentrum.cz/reorganizace/
[22] Počet insolvencí - insolvenční řízení zahájena v období mezi 1. 1. 2008 a 1. 1. 2020. In insolcentrum.cz [online]. [cit. 2024-12-3]. Available at: https://isir-explorer.opendatalab.cz/statistiky/pocet_insolvenci?obdobi=&typOsoby=&zpusobReseni=&poLetech=1
[23] Mapa všech insolvencí v ČR k 31. 12. 2023. In isir-explorer.opendatalab.cz [online]. [cit. 2024-12-3]. Available at: https://www.insolcentrum.cz/mapa-insolvence-vse/
[24] Mapa insolvence: obraz Česka jako rizikové země neplatičů je falešný. In advokatnidenik.cz [online]. [cit. 2024-12-3]. Available at: https://advokatnidenik.cz/2019/10/30/mapa-insolvence-obraz-ceska-jako-rizikove-zeme-neplaticu-je-falesny/

highlighted the need to support businesses struggling with their finances but lacking the means to recover independently. In response, many Member States introduced new restructuring tools or recodified existing laws. While these efforts improved resilience within their respective business environments, they also led to a fragmented legal framework across the European Union.[25]

Recognizing this fragmentation and its economic implications, the European Union initiated efforts to harmonize insolvency laws across Member States. One of the foundational steps in this process was the 2011 "*Lehne Report*," commissioned by the European Parliament. The report offered an in-depth review of insolvency practices in all 28 Member States, revealing the economic drawbacks and high costs caused by differing legal approaches. It became clear that greater consistency - particularly in strategies to prevent insolvency and support entrepreneurial recovery - was essential for the European Union's economic cohesion moving forward.[26]

In 2012, the European Commission introduced the document *New European Approach to Business Failure and Insolvency*[27], which articulated the need to modernize insolvency frameworks to promote economic recovery and protect jobs across the European Union. The document identifies the severe consequences of business failures, noting that between 2009 and 2011, approximately 200,000 companies went bankrupt annually in the European Union, resulting in the loss of 1.7 million jobs each year.[28] These figures emphasized the need for efficient insolvency systems that could help viable businesses survive financial difficulties and offer entrepreneurs a second chance.

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[25] The structure and fundamental theses underpinning the analysis in this chapter are based on the publication: ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Pages 13 and 14

[26] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Page 13

[27] Commission Communication 'A New European Approach to Business Failure and Insolvency' In eur-lex.europa.eu [online]. [cit. 2024-12-3]. Available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52012DC0742

[28] Commission Communication 'A New European Approach to Business Failure and Insolvency' In eur-lex.europa.eu [online]. [cit. 2024-12-3]. Available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52012DC0742, Part 1 - Introduction: Justice for growth

In this document, the European Commission highlights how differences in national insolvency laws create uncertainty, discourage cross-border investment, and complicate creditor recovery, all of which hinder the effective functioning of the internal market. Addressing these issues is seen as essential to achieving the Europe 2020 strategy objectives, which include improving justice efficiency: „*To achieve the Europe 2020 objectives, we need to focus on the general objective of improving the efficiency of justice in the EU. Efficient justice systems can greatly contribute to reducing risks and legal uncertainties and encouraging cross-border business, trade and investment. In its experience with the Member States under an economic recovery programme, the Commission has identified the key role of judicial reforms. Reforms of national insolvency law are an important tool to promote economic recovery*."[29]

The proposed reforms focused on making it easier for businesses to avoid insolvency, removing the stigma and barriers tied to bankruptcy,[30] and creating a level playing field for businesses operating within the internal market. The Commission highlights key areas where harmonization could make a real difference, such as standardizing discharge periods for honest entrepreneurs[31], simplifying the rules for starting insolvency proceedings, and encouraging the use of effective restructuring plans.[32] Special attention is given to the needs of small and medium-sized enterprises (SMEs), as restructuring costs often disproportionately affect them and limit their ability to recover. The document emphasizes the value of early warning tools and out-of-court

[29] Commission Communication 'A New European Approach to Business Failure and Insolvency' In eur-lex.europa.eu [online]. [cit. 2024-12-3]. Available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52012DC0742, Part 1 - Introduction: Justice for growth

[30] Commission Communication 'A New European Approach to Business Failure and Insolvency' In eur-lex.europa.eu [online]. [cit. 2024-12-3]. Available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52012DC0742, Part 3.1 - Second chance for entrepreneurs in honest bankruptcies

[31] Commission Communication 'A New European Approach to Business Failure and Insolvency' In eur-lex.europa.eu [online]. [cit. 2024-12-3]. Available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52012DC0742, Part 3.2 - Discharge periods that do not encourage a second chance

[32] Commission Communication 'A New European Approach to Business Failure and Insolvency' In eur-lex.europa.eu [online]. [cit. 2024-12-3]. Available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52012DC0742, Part 3.6 - Promoting restructuring plans

settlements to make insolvency systems more efficient and calls for reforms to align insolvency rules across borders to create a more seamless and fair system.

However, by 2014, the number of insolvencies surged once more, prompting the Commission to issue *Recommendation of 12 March 2014 on a new approach to business failure and insolvency*[33] (the „**Recommendation**"). Despite these efforts, the results fell short of expectations, as only a few Member States implemented meaningful reforms in response to the Recommendation. Consequently, a more assertive approach was deemed necessary, ultimately paving the way for the proposal of the Directive on Preventive Restructuring.[34]

The adoption of a binding harmonized standard for addressing financial distress was viewed as a critical step toward establishing a competitive and integrated European capital market.[35] Nevertheless, the journey from the European Commission's initial proposal in 2016 to the adoption of the Directive on Preventive Restructuring in 2019 revealed the struggle of balancing differing national interests. Debates centered around issues such as cross-class cram-down provisions, stays on enforcement actions, and whether debtors could retain control of their businesses during restructuring. The disagreements during the drafting process led to significant changes, resulting in a Directive on Preventive Restructuring that takes a flexible "adopt or adapt" approach, allowing Member States to tailor preventive restructuring frameworks to their specific legal and economic contexts. The flexibility of the Directive on Preventive Restructuring is especially clear in its procedural elements, designed to create a process that is efficient, transparent, and cost-effective while remaining accessible and consistent[36] across the European Union. Although several procedural models were explored during its drafting, the final version

[33] Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency. In eur-lex.europa.eu [online]. [cit. 2024-12-3]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014H0135

[34] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. C.H. Beck, 2024. ISBN 978-80-7400-969-3, Page 14

[35] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. C.H. Beck, 2024. ISBN 978-80-7400-969-3, Page 14

[36] Commission staff working document impact assessment. In eur-lex.europa.eu [online]. [cit. 2024-12-4]. Available at: https://eur-lex.europa.eu/legal-content/DE/TXT/?uri=CELEX:52016SC0357, Introduction

prioritizes adaptability to respect and preserve the unique characteristics of each Member State's legal system.[37]

2.4 Evolution of Preventive Restructuring Laws in the Czech Republic

Preventive restructuring is a new addition to the Czech legal system, introduced through the implementation of the Directive on Preventive Restructuring. Historically, restructuring in the Czech context was mainly informal and relied on consensus between debtors and creditors. This approach relied on tools provided by contract and corporate law to resolve financial issues.[38] However, the lack of a formal legal framework often limited its effectiveness, particularly in situations where dissenting creditors obstructed the negotiations. With the adoption of the Directive on Preventive Restructuring, preventive restructuring is now established as a formal mechanism for business rescue, which offers a structured path to recovery and stability.[39]

This mechanism offers debtors protection and strengthens their leverage, especially when negotiating with uncooperative creditors. Preventive restructuring is designed to reorganize the debtor's financial affairs and address financial challenges before insolvency becomes imminent. A key feature is its emphasis on supporting negotiations, which can often take place without any court intervention. Court intervention becomes necessary only to approve the restructuring plan.[40] Its core objective is to help viable businesses remain operational by restructuring their debts.

[37] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. C.H. Beck, 2024. ISBN 978-80-7400-969-3, Page 14

[38] HAVEL, B., ŽITŇANSKÁ, L. *Hranice využitelnosti preventivní restrukturalizace a insolvency governance - český a slovenský pohled*. Právní rozhledy. 2022, no. 1, Page 1

[39] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Page 9

[40] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Pages 11 and 12

3. Legal Basis of Preventive Restructuring

3.1. Legal order of the European Union

The legal order of the European Union is a distinctive construct, reflecting its nature as a unique supranational entity. While it shares some characteristics with other international organizations, the European Union stands out due to the depth and scope of powers transferred to it by Member States. These powers not only shape the relationships between the Member States but also directly impact individuals and businesses within.[41] At its core, the European Unions's legal structure is built on a hierarchy that is carefully designed to promote integration while respecting the sovereignty of its members.

At the apex of the hierarchy is primary law that consists of the treaties that form the constitutional foundation of the European Union, namely the Treaty on European Union[42] and the Treaty on the Functioning of the European Union[43]. These treaties define the objectives of the European Union, establish its institutions, and set out how powers are shared between the European Union and its Member States. Building on this foundation is secondary law, which is derived from and operates under the authority of the primary law. This category includes legally binding acts like regulations, directives, and decisions, as well as non-binding acts like recommendations and opinions.[44]

Directives hold a unique and important place among the Eropean Union's secondary legal instruments. Unlike regulations, which are directly applicable and uniformly enforced across all Member States, directives are binding only in terms of the outcomes they aim to achieve. Member States retain the discretion to choose the form and methods of implementation. This flexibility

[41] TOMÁŠEK, Michal; TÝČ, Vladimír; PETRLÍK, David; MALENOVSKÝ, Jiří; PELIKÁNOVÁ, Irena et al. *Právo Evropské unie*. 3. aktualizované vydání. Student. Praha: Leges, 2021. ISBN 978-80-7502-491-6, Page 95

[42] Treaty on European Union. In eur-lex.europa.eu [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016M/TXT

[43] Treaty on the Functioning of the European Union. In eur-lex.europa.eu [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016E/TXT

[44] TOMÁŠEK, Michal; TÝČ, Vladimír; PETRLÍK, David; MALENOVSKÝ, Jiří; PELIKÁNOVÁ, Irena et al. *Právo Evropské unie*. 3. aktualizované vydání. Student. Praha: Leges, 2021. ISBN 978-80-7502-491-6, Page 95

is intended to ensure that objectives are achieved without compromising the diversity of Member States. However, this is sometimes constrained when directives become overly specific, edging closer in substance to functioning as a regulation.[45]

Directives require Member States to either transpose or implement them, depending on the nature of the directive and the state's existing legal framework. Transposition means adapting the directive into national law by modifying or adding to existing legal provisions to ensure compliance with the directive's goals. In contrast, implementation often involves the creation of entirely new laws, which are necessary when the directive's requirements cannot be met through adjustments to existing legislation.[46]

Very interesting about directives is their potential for direct effect. While directives are initially aimed at Member States, individuals can invoke their provisions before national courts when the directive has not been transposed within the deadline, and its provisions are sufficiently clear and unconditional. [47]

3.2. The Directive on Preventive Restructuring

3.2.1. Overview

A defining feature of directives, as a form of secondary European Union law, is their focus on achieving specific results, while giving Member States the freedom to choose how to achieve them. This flexibility is essential not only during the transposition of the directive into national law but also in the application of the resulting measures, as national courts are required to interpret domestic laws in light of its objectives to ensure the intended outcome.[48]

[45] TOMÁŠEK, Michal; TÝČ, Vladimír; PETRLÍK, David; MALENOVSKÝ, Jiří; PELIKÁNOVÁ, Irena et al. *Právo Evropské unie*. 3. aktualizované vydání. Student. Praha: Leges, 2021. ISBN 978-80-7502-491-6, Page 105

[46] TOMÁŠEK, Michal; TÝČ, Vladimír; PETRLÍK, David; MALENOVSKÝ, Jiří; PELIKÁNOVÁ, Irena et al. *Právo Evropské unie*. 3. aktualizované vydání. Student. Praha: Leges, 2021. ISBN 978-80-7502-491-6, Page 105

[47] TOMÁŠEK, Michal; TÝČ, Vladimír; PETRLÍK, David; MALENOVSKÝ, Jiří; PELIKÁNOVÁ, Irena et al. *Právo Evropské unie*. 3. aktualizované vydání. Student. Praha: Leges, 2021. ISBN 978-80-7502-491-6, Page 106

[48] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Pages 15 to 18

The purpose of the Directive on Restructuring and Insolvency must be understood within the context of the European Unions's effort to develop a restructuring culture and promote the "second chance" concept for entrepreneurs. Fragmented national laws were discouraging investment and causing inefficiencies, including debtors relocating to countries with more favorable rules. To address this, the Directive on Preventive Restructuring aims to harmonize restructuring laws across Member States with the intetion of building a more competitive and unified European Capital market.[49]

In recent years, there has been a noticeable shift toward restructuring-focused solutions for insolvency and efforts to prevent financial crises before they occur. This reflects the growing role of economic principles in shaping insolvency law. The goal is to improve economic efficiency and reduce the costs of insolvency, not only for those directly involved, like debtors and creditors, but for society as a whole.[50]

There's now a stronger focus on the broader economic consequences of insolvencies, such as harm to the economy and rising unemployment. This has driven efforts to minimize these impacts and develop tools to reduce the ripple effects of financial failure.[51]

The Directive on Preventive Restructuring builds on these ideas. It requires Member States to introduce laws that help businesses tackle financial difficulties early - before they spiral into insolvency. These measures are designed to protect the value of businesses, save jobs, and promote economic stability, while aligning legal approaches with economic goals.

The Directive on Preventive Restructuring emphasizes efficiency and aims to make restructuring faster and less costly. It encourages out-of-court negotiations as the main way to resolve financial troubles and addresses challenges like cross-border cases and group

[49] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Page16

[50] DOHNAL, Jan. *Správa a řízení obchodní korporace v hrozícím úpadku*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-949-5, Pages 18 to 21

[51] DOHNAL, Jan. *Správa a řízení obchodní korporace v hrozícím úpadku*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-949-5, Pages 18 to 21

restructurings. To prevent misuse, it includes safeguards against relocating a debtor's main business operations (COMI) to countries with more favorable laws. Rather than imposing a one-size-fits-all procedure, the Directive on Preventive Restructuring gives Member States flexibility to design systems that best suit their legal and economic needs. Judicial or administrative involvement is deliberately limited, reflecting a preference for informal negotiations, with intervention occurring only to provide necessary oversight or protection.[52]

The Directive on Preventive Restructuring places a strong emphasis on speed and efficiency in the restructuring process. As acting quickly is often crucial to the success of these processes, delays can jeopardize a business's survival, making timely procedures essential to keeping operations running.[53]

3.2.2. Structure of the Directive on Preventive Restructuring

The Directive on Preventive Restructuring is meticulously organized into six titles, each focusing on distinct elements essential to preventive restructuring and related procedures.

Title I, General Provisions, lays the groundwork by defining the subject matter and scope of the Directive on Preventive Restructuring[54] indicating which debtors and types of insolvency situations are covered. It outlines the applicability of the Directive on Preventive Restructuring to preventive restructuring for debtors in financial difficulties, procedures for discharging debt for insolvent entrepreneurs, and measures to increase procedural efficiency. Importantly, it excludes specific entities, such as financial institutions and public bodies under national laws, from its scope while allowing Member States to extend its application to natural persons who are not entrepreneurs. This title also provides essential definitions[55] to clarify key terms like "restructuring", "affected parties" or "stay of individual enforcement actions".

[52] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Page 17
[53] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Page 17
[54] Article 1 of the Directive on Preventive Restructuring
[55] Article 2 of the Directive on Preventive Restructuring

Title II, Preventive Restructuring Frameworks, forms the core of the Directive on Preventive Restructuring by introducing the key principles of preventive restructuring and explaining how negotiations between debtors and affected parties should be carried out. It includes provisions on access to preventive restructuring frameworks to ensure that debtors with a likelihood of insolvency are able to avoid insolvency and thereby protects jobs and helps maintaining business activity.[56] Debtors are granted to maintain control over their assets[57] and to benefit from a stay of individual enforcement actions[58] so that serious discussions about a restructuring plan can take place. This title also covers the content of restructuring plans, ensuring comprehensive coverage of the debtor's economic situation, proposed measures, and creditor arrangements.[59] Finally, the title specifies conditions for the adoption and confirmation of restructuring plans[60] and introduces mechanisms like the cross-class cram-down to bind dissenting creditor classes under specific conditions.[61] It also contains a chapter on the protection of new or interim financing, making sure these fundings aren‘t later invalidated or penalized in the event of the debtor’s insolvency.[62] Duties for directors of companies facing potential insolvency are also outlined, making sure they act responsibly and in the interest of creditors, employees, and other stakeholders.[63]

Title III, Discharge of Debt and Disqualifications, focuses on giving insolvent entrepreneurs a fair chance at a fresh start. It ensures access to procedures leading to a full discharge of debt within a maximum period of three years, subject to compliance with national obligations.[64] This title also addresses the disqualification period that allows enterpreneurs to be released from their remaining debts and lifts any professional disqualifications tied solely to

[56] Article 4 of the Directive on Preventive Restructuring
[57] Article 5 of the Directive on Preventive Restructuring
[58] Article 6 of the Directive on Preventive Restructuring
[59] Article 8 of the Directive on Preventive Restructuring
[60] Articles 9 and 10 of the Directive on Preventive Restructuring
[61] Article 11 of the Directive on Preventive Restructuring
[62] Chapter 4 of the Directive on Preventive Restructuring
[63] Article 19 of the Directive on Preventive Restructuring
[64] Article 20 of the Directive on Preventive Restructuring

their insolvency.[65] To prevent abuse, the Directive on Preventive Restructuring allows for certain derogations, enabling Member States to impose longer discharge or disqualification periods under defined circumstances, such as dishonesty or bad faith on the part of the debtor.[66]

Title IV, on Measures to Increase Efficiency, underscores the importance of procedural efficiency in restructuring cases. Member States have to ensure that judicial and administrative authorities handling such procedures are suitably trained and have the necessary expertise.[67]

Title V, on Monitoring of Procedures, introduces mechanisms for monitoring the performance of restructuring procedures. Member States are required to collect and report data annually, including metrics like procedure durations, costs, and outcomes.[68]

Title VI, Final Provisions, concludes the Directive on Preventive Restructuring with provisions on its relationship with other European Union legal acts, introduces amendments to related legislation, establishes a review mechanism to assess its impact and sets forth transposition timelines for Member States. The final articles confirm its entry into force and address it to all Member States.[69]

3.2.3. Objectives of the Directive on Preventive Restructuring

The objectives of the Directive on Preventive Restructuring are clearly articulated in its preamble: „*The objective of this Directive is to contribute to the proper functioning of the internal market and remove obstacles to the exercise of fundamental freedoms, such as the free movement of capital and freedom of establishment, which result from differences between national laws and procedures concerning preventive restructuring, insolvency, discharge of debt, and disqualifications. Without affecting workers' fundamental rights and freedoms, this Directive aims to remove such obstacles by ensuring that: viable enterprises and entrepreneurs that are in*

[65] Article 22 of the Directive on Preventive Restructuring
[66] Article 23 of the Directive on Preventive Restructuring
[67] Article 25 of the Directive on Preventive Restructuring
[68] Article 29 of the Directive on Preventive Restructuring
[69] Articles 31 to 36 of the Directive on Preventive Restructuring

financial difficulties have access to effective national preventive restructuring frameworks which enable them to continue operating; honest insolvent or over-indebted entrepreneurs can benefit from a full discharge of debt after a reasonable period of time, thereby allowing them a second chance; and that the effectiveness of procedures concerning restructuring, insolvency and discharge of debt is improved, in particular with a view to shortening their length."[70] In other words, it aims to reduce differences in national laws so that businesses across the European Union can quickly and effectively restructure before reaching insolvency, stressing that viable businesses in financial trouble should have access to early and efficient restructuring frameworks which will allow them to keep operating and preserve jobs. It also aims to give honest entrepreneurs the chance to start over after a period of time, rather than face lifetime of debt, with the belief that creditors and other stakeholders should benefit from fair, clear and predictable rules.[71]

Further, the preamble points to the need to cut unnecessary delays (and thereby caused costs) when dealing with restructuring, with the intent to make processes shorter and more transparent.[72] It emphasizes its intentions to harmonize these procedures among Member States in order to lower the uncertainty investors face, to boost confidence in the European Unions's internal market[73] and to stop businesses from collapsing unnecessarily, protecting them from being forced into liquidation too soon, which helps save not only the companies as well as jobs and know-how.[74] Throughout these aims, there is a balance: on one hand, ensuring that struggling yet promising companies have a chance to recover, and on the other, making sure that clearly non-viable businesses do not linger and cause more harm to the economy and their creditors.[75]

[70] Clause 1 of the Preamble of the Directive on Preventive Restructuring
[71] Clause 1 of the Preamble of the Directive on Preventive Restructuring
[72] Clause 6 of the Preamble of the Directive on Preventive Restructuring
[73] Clauses 7 and 8 of the Preamble of the Directive on Preventive Restructuring
[74] Clauses 2 and 16 of the Preamble of the Directive on Preventive Restructuring
[75] Clause 3 of the Preamble of the Directive on Preventive Restructuring

3.3. Transposition of the Directive on Preventive Restructuring into Czech Law

The integration of the Directive on Preventive Restructuring into Czech law marks an adjustment rather than a complete departure from the existing legal structure. While the Directive on Preventive Restructuring introduces a systemically novel approach to restructuring, it aligns with principles already present in Czech civil and corporate law. By combining these established principles with the requirements of the Directive on Preventive Restructuring, the Czech legal system aims to enhance its capacity to address financial crises while adhering to European standards.[76]

Czech law has long emphasized preventive actions in corporate management. The Civil Code requires individuals to act responsibly to avoid harm[77], and corporate leaders must exercise loyalty, care, and competence. This principle extends to corporate governance, where members of corporate bodies must exercise their duties with loyalty, knowledge, and care[78] to protect company's assets and manage risks to prevent insolvency. Further, corporate governance laws hold members of statutory bodies accountable for failing to prevent insolvency if it was reasonably avoidable and outline steps, such as convening shareholder meetings, to address potential threats to a company's stability.[79]

While these principles form a solid foundation for managing financial distress, existing Czech law lacked certain tools that were introduced by the Directive on Preventive Restructuring. For instance, the coverage gap[80] rule and the protective moratorium[81] provide important stopgaps

[76] SCHÖNFELD, Jaroslav; KUDĚJ, Michal; HAVEL, Bohumil a SPRINZ, Petr. 2023: *Start preventivní restrukturalizace: nová šance pro podnikatele, nebo velký problém pro věřitele?* V Praze: C.H. Beck, 2023. ISBN 978-80-7400-930-3, Pages 17 and 18

[77] Section 2900 of the Czech Civil Code

[78] Section 159 of the Czech Civil Code

[79] SCHÖNFELD, Jaroslav; KUDĚJ, Michal; HAVEL, Bohumil a SPRINZ, Petr. 2023: *Start preventivní restrukturalizace: nová šance pro podnikatele, nebo velký problém pro věřitele?* V Praze: C.H. Beck, 2023. ISBN 978-80-7400-930-3, Page 18

[80] Section 3(3) of the Insolvency Act

[81] Section 125 of the Insolvency Act

for companies on the verge of insolvency. Even though these provide some protection, they lack a structured framework for creating enforceable restructuring plans.[82]

The Czech legislation views preventive restructuring as a predominantly private process facilitated by a latent judicial framework. This approach ensures that court intervention is limited to instances where it is strictly necessary, such as confirming restructuring plans or approving cross-class cram-downs. This minimizes reputational risks for businesses while preserving the privacy of their negotiations. Unlike models in some neighboring countries,[83] the Czech system limits judicial intervention and thus maintains the private-law nature of the process.[84]

Central to the framework is the restructuring plan, which originates from a collaborative process initiated by the debtor. This process begins with the submission of a recovery project,[85] a document that outlines the debtor's financial situation, diagnoses the causes of financial distress, and proposes solutions. The recovery project serves as the foundation for negotiations, requiring credibility and detailed analysis to inspire trust among creditors. The restructuring plan itself expands on the recovery project and specifies the legal and financial measures needed to restore the debtor's solvency and secure the continued operation of his business.[86] The creditors may approve the restructuring plan without court intervention if it receives the support of a three-quarters majority within affected parties. However, if there is no consensus, courts can approve the plan through a mechanism that prevents dissenting creditors from blocking progress, provided

[82] SCHÖNFELD, Jaroslav; KUDĚJ, Michal; HAVEL, Bohumil a SPRINZ, Petr. 2023: *Start preventivní restrukturalizace: nová šance pro podnikatele, nebo velký problém pro věřitele?* V Praze: C.H. Beck, 2023. ISBN 978-80-7400-930-3, Pages 19 and 20

[83] i.e.: Slovakia or Germany

[84] SCHÖNFELD, Jaroslav; KUDĚJ, Michal; HAVEL, Bohumil a SPRINZ, Petr. 2023: *Start preventivní restrukturalizace: nová šance pro podnikatele, nebo velký problém pro věřitele?* V Praze: C.H. Beck, 2023. ISBN 978-80-7400-930-3, Page 20

[85] In Czech: sanační projekt

[86] SCHÖNFELD, Jaroslav; KUDĚJ, Michal; HAVEL, Bohumil a SPRINZ, Petr. 2023: *Start preventivní restrukturalizace: nová šance pro podnikatele, nebo velký problém pro věřitele?* V Praze: C.H. Beck, 2023. ISBN 978-80-7400-930-3, Page 21

the plan ensures fair treatment, including compliance with the "best interest of creditors" test.[87][88] Although the framework emphasizes private negotiations, judicial oversight remains essential for ensuring compliance with the principles of fairness and proportionality. For instance, when approving a restructuring plan under a cross-class cram-down, courts review them to confirm they are feasible, lawful, and fair to all creditors.[89]

The legislation establishes clear conditions for entering preventive restructuring. The debtor must not be insolvent in the legal sense but must face financial difficulties severe enough to risk insolvency without intervention. The business must also demonstrate the potential for recovery through restructuring and act in good faith during negotiations with creditors.[90]

Although Czech law already includes effective measures for handling financial difficulties, the proposed changes offer significant improvements. They provide a clear structure for creating binding restructuring plans without unanimous creditor approval and introduce safeguards for interim financing to encourage creditor participation. By emphasizing private negotiations and minimizing court involvement, the framework reduces the stigma and disruption often associated with formal insolvency proceedings.[91]

3.4. The Act on Preventive Restructuring

The Czech *Act No. 284/2023 Sb. on Preventive Restructuring, adopted to implement Directive (EU) 2019/1023 on restructuring and insolvency* (the „**Act on Preventive Restructuring**“) introduces a procedural and substantive mechanism for corporate restructuring

[87] Article 2 (1)(6) od the Directive on Preventive Restructuring

[88] SCHÖNFELD, Jaroslav; KUDĚJ, Michal; HAVEL, Bohumil a SPRINZ, Petr. 2023: *Start preventivní restrukturalizace: nová šance pro podnikatele, nebo velký problém pro věřitele?* V Praze: C.H. Beck, 2023. ISBN 978-80-7400-930-3, Pages 22 and 23

[89] SCHÖNFELD, Jaroslav; KUDĚJ, Michal; HAVEL, Bohumil a SPRINZ, Petr. 2023: *Start preventivní restrukturalizace: nová šance pro podnikatele, nebo velký problém pro věřitele?* V Praze: C.H. Beck, 2023. ISBN 978-80-7400-930-3, Page 23

[90] SCHÖNFELD, Jaroslav; KUDĚJ, Michal; HAVEL, Bohumil a SPRINZ, Petr. 2023: *Start preventivní restrukturalizace: nová šance pro podnikatele, nebo velký problém pro věřitele?* V Praze: C.H. Beck, 2023. ISBN 978-80-7400-930-3, Page 21

[91] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Page 63

designed to prevent insolvency. The law faced significant delays in its enactment, entering into effect over a year after the extended deadline for transposition,[92] and was accompanied by an amendment law revising the Insolvency Act[93] and other related statutes.[94]

3.4.1. Conceptual Framework of the Act on Preventive Restructuring

The Act on Preventive Restructuring introduces a novel procedural framework distinct from the traditional insolvency proceedings. It aims to provide a lighter, more efficient alternative that aligns with the emphasis on reducing formalities, costs, and delays (as outlined in the Directive on Preventive Restructuring). The Act on Preventive Restructuring prioritizes private negotiations between the debtor and creditors while reserving judicial intervention for specific instances where it is necessary to protect stakeholders or ensure procedural integrity.[95]

The Act on Preventive Restructuring also attempts to address perceived shortcomings of insolvency proceedings, particularly their procedural rigidity, which has often deterred debtors from timely intervention due to fear of negative consequences or the complexity of collective court proceedings.[96]

Substantive and procedural norms are combined by the Act on Preventive Restructuring, which unfortunately complicates its conceptual clarity. While substantive norms cover restructuring measures and the responsibilities of the parties involved, procedural norms outline the court's role and the rights of creditors and other stakeholders. Bringing these together in one law was practical because the issues are interrelated but has resulted in certain ambiguities.[97]

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[92] Article 34 of the Directive on Preventive Restructuring

[93] In Czech: Zákon č. 285/2023 Sb., kterým se mění zákon č. 182/2006 Sb., o úpadku a způsobech jeho řešení (insolvenční zákon), ve znění pozdějších předpisů, zákon č. 312/2006 Sb., o insolvenčních správcích, ve znění pozdějších předpisů, a další související

[94] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Page 62

[95] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Page 63

[96] SCHÖNFELD, Jaroslav; KUDĚJ, Michal; HAVEL, Bohumil a SPRINZ, Petr. 2023: *Start preventivní restrukturalizace: nová šance pro podnikatele, nebo velký problém pro věřitele?* V Praze: C.H. Beck, 2023. ISBN 978-80-7400-930-3, Page 33

[97] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Page 65

3.4.2. The Hybrid Nature of the Procedural Framework

The procedural framework established by the Act on Preventive Restructuring has been described as "hybrid,"[98] a term that has sparked significant debate among legal experts and law practitioners. The term "hybrid" refers to the combination of private negotiations and public law oversight, which allows the restructuring process to proceed largely without judicial intervention unless necessary to protect key interests.

The explanatory memorandum to the Act on Preventive Restructuring acknowledges this duality, stating that the restructuring framework emphasizes private law negotiations between the entrepreneur and affected parties while permitting court intervention only in necessary cases.[99]

The private law aspect of the restructuring process involves voluntary negotiations between the debtor and concerned parties. The public law aspect comes into play primarily through judicial confirmation of restructuring plans or approval of moratoria. However, this approach has been criticized for lacking coherence, particularly concerning the relationship between the substantive and procedural provisions.[100] Zemandlová argues that: „*The notion of proceedings in matters of preventive restructuring as "hybrid" in the sense of combining elements of private-law negotiation and judicial intervention into a single entity in a procedural sense must be rejected. However, it cannot be overlooked that procedural law is intended to provide protection for subjective material rights and legitimate interests. To fulfill this purpose, it should take into account the needs defined by substantive legal regulation. Such connections between substantive and procedural law, however, do not give the legal regulation of preventive restructuring any special or even "hybrid" character. Similarly, it cannot be considered desirable to use the term "restructuring proceedings"*

[98] Explanatory memorandum to the Act on Preventive Restructuring, In psp.cz [online]. Available at: https://www.psp.cz/sqw/text/tiskt.sqw?O=9&CT=371&CT1=0, Page 54

[99] Explanatory memorandum to the Act on Preventive Restructuring, In psp.cz [online]. Available at: https://www.psp.cz/sqw/text/tiskt.sqw?O=9&CT=371&CT1=0, Page 55

[100] ZEMANDLOVÁ, Anna. Procesní aspekty preventivní restrukturalizace. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Pages 65 and 66

outside the procedural context of preventive restructuring, as this blurs the distinctions between the substantive and procedural components of the legal regulation of preventive restructuring."[101]

Academics have also highlighted that the procedural rules should minimize transaction costs and prevent the depletion of resources needed for the debtor's business stabilization. To achieve this, the framework must avoid unnecessary legal hurdles and excessive procedural requirements.[102]

3.4.3. Procedural Structure

The procedural framework is concentrated in Part Three of the Act on Preventive Restructuring, which is structured into two chapters. This separation reflects a legislative approach that distinguishes procedural from substantive and deviates from systems like the German StaRUG, where both aspects are unified into a single framework.[103]

The general provisions seem intended to apply broadly to all restructuring cases while also serving as a foundation for coordinating specific restructuring proceedings. However, the lack of clarity about their exact role has caused confusion. The explanatory memorandum suggests that these rules have a dual purpose: they provide a foundation for individual proceedings but also establish a distinct "general restructuring proceeding"[104] designed to coordinate the initiation and progression of all restructuring proceedings.[105] Zemandlová criticizes this "multi-layered" aproach to the restructuring process, which reflects a combination of two models - a unified system and

[101] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Page 66

[102] SCHÖNFELD, Jaroslav; KUDĚJ, Michal; HAVEL, Bohumil a SPRINZ, Petr. 2023: *Start preventivní restrukturalizace: nová šance pro podnikatele, nebo velký problém pro věřitele?* V Praze: C.H. Beck, 2023. ISBN 978-80-7400-930-3, Page 33

[103] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Page 80

[104] Explanatory memorandum to the Act on Preventive Restructuring, In psp.cz [online]. Available at: https://www.psp.cz/sqw/text/tiskt.sqw?O=9&CT=371&CT1=0, Page 109

[105] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Page 81

a toolbox of separate mechanisms, arguing that it does not meet the requirements for efficiency and speed set out in the Directive on Preventive Restructuring.[106]

Proponents of a simplified procedural framework argue that a single overarching procedure, which would include limited court interventions for narrowly defined situations, could reduce procedural inefficiencies and foster quicker resolutions.[107]

The explanatory memorandum clarifies the legislative intent, describing restructuring proceedings as a formal, court-supervised process that operates alongside private negotiations between the debtor and stakeholders: „"*Restructuring proceedings to some extent represent a formal public law 'process' directed by the court, which runs parallel to the less formal private law negotiations conducted by the debtor. The design of preventive restructuring assigns this public law element a rather supportive role, as its aim is not to achieve the fulfillment of the purpose of preventive restructuring (i.e., the preservation or restoration of the debtor's business operations through restructuring measures as per Section 4 of the proposal), but rather to facilitate court intervention in situations exceeding the capabilities of the debtor as a private individual (e.g., providing temporary protection against creditors, overcoming objections of dissenting parties to the proposed restructuring plan, etc.).*"[108] Judicial intervention is limited to critical situations where private negotiation proves insufficient.[109] Thus, the "general restructuring proceeding" seems to function as a procedural shell, activated only when specific actions or interventions are required.[110]

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[106] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Page 81

[107] SCHÖNFELD, Jaroslav; KUDĚJ, Michal; HAVEL, Bohumil a SPRINZ, Petr. 2023: *Start preventivní restrukturalizace: nová šance pro podnikatele, nebo velký problém pro věřitele?* V Praze: C.H. Beck, 2023. ISBN 978-80-7400-930-3, Page 36

[108] Explanatory memorandum to the Act on Preventive Restructuring, In psp.cz [online]. Available at: https://www.psp.cz/sqw/text/tiskt.sqw?O=9&CT=371&CT1=0, Page 109

[109] Explanatory memorandum to the Act on Preventive Restructuring, In psp.cz [online]. Available at: https://www.psp.cz/sqw/text/tiskt.sqw?O=9&CT=371&CT1=0, Pages 70 and 71

[110] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Page 81

The relationship between the general proceeding and specific restructuring proceedings remains unclear. The general proceeding might act as a procedural shell for discrete processes such as the confirmation or annulment of a restructuring plan or the declaration of a general or individual moratorium. Yet, the Act on Preventive Restructuring does not clearly articulate how these elements interact. For instance, certain provisions, such as Section 52 of the Act on Preventive Restructuring on evidentiary rules, seem broadly applicable, while others, like Sections 47 and 48 of the Act on Preventive Restructuring on starting and ending the general proceeding, appear tied specifically to the overarching process. This lack of clarity could cause confusion, particularly in applying procedural rights and obligations at different stages.[111]

The initial draft of the Act on Preventive Restructuring initially proposed a fragmented system with up to eleven separate restructuring processes. During legislative discussions, this was replaced with a unified procedure to improve efficiency and reduce the burden of excessive judicial involvement.[112]

Further complicating matters, the general proceeding's role appears overly passive. For instance, the court's involvement begins only upon specific actions by the debtor or other stakeholders. This view is inconsistent with modern principles of civil procedure, which emphasize active judicial oversight to ensure efficiency and fairness. Additionally, the general proceeding lacks a clearly defined purpose, which weakens its function since judicial processes require a concrete legal issue to address.[113]

In practice, this structural ambiguity may lead to significant challenges. The unclear division of responsibilities between general and specific proceedings could cause inefficiencies

[111] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Page 83

[112] SCHÖNFELD, Jaroslav; KUDĚJ, Michal; HAVEL, Bohumil a SPRINZ, Petr. 2023: *Start preventivní restrukturalizace: nová šance pro podnikatele, nebo velký problém pro věřitele?* V Praze: C.H. Beck, 2023. ISBN 978-80-7400-930-3, Page 34

[113] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Page 84

or even conflicts. For instance, it is uncertain whether objections, such as challenges to judicial impartiality, should be addressed during the general proceeding or within a specific process. Similarly, while Section 69 of the Act on Preventive Restructuring regulates cost allocation for specific proceedings, no guidance seems to exist for the general proceeding.[114]

According to Zemandlová, the procedural framework of the Act on Preventive Restructuring would benefit from greater clarity and cohesion. The lack of attention to the relationship between the two layers throughout the process is evident and could potentially harm the very individuals the framework is intended to protect.[115]

3.5. The Role of Courts and Regulatory Bodies

Consistent with the philosophy of the Directive on Preventive Restructuring, judicial involvement is intentionally limited, intervening only when necessary to provide oversight and maintain fairness. The Directive on Preventive Restructuring promotes a "light-touch" approach, which aims to establish a flexible, minimally formal, and cost-effective process that is fundamentally uniform and equally accessible across all Member States.[116]

In the Czech framework, according to the Directive on Preventive Resructuring, courts are expected to facilitate rather than dominate the restructuring process. Their primary role is to oversee specific legal and procedural aspects, particularly those where creditor and debtor interests may conflict or where significant rights are at stake. For instance, the court shall be involved in evaluating creditor voting rights and classifications, which is crucial to ensure fairness in decision-making. Proper classification prevents manipulation or undue advantage being given to specific creditor groups, thus safeguarding the equity of the process. Similarly, judicial oversight is required for the confirmation of restructuring plans, which is essential for their binding nature.

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[114] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Page 85

[115] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Pages 84 to 85

[116] PONDIKASOVÁ, Tereza a Anna ZEMANDLOVÁ. *Preventivní restrukturalizace - procesualistický pohled*. Právní rozhledy. C. H. Beck, 2022, roč. 30, č. 20, s. 702-708. ISSN 1210-6410, Chapter III.

The court must assess whether the plan complies with statutory requirements, respects the interests of creditors, and has the potential to avert insolvency while ensuring the debtor's long-term viability. This includes conducting a "best-interest-of-creditors" test to determine whether creditors would receive a better outcome under the plan than in a liquidation scenario. Additionally, the Directive on Preventive Restructuring obliges Member States to empower courts with the discretion to reject a restructuring plan if it fails to prevent the debtor's imminent insolvency or secure the viability of their business.[117]

The Act on Preventive Restructuring also allows courts to enforce cross-class cram-downs, enabling the approval of restructuring plans even if some creditor classes dissent, provided all groups are treated fairly and no one is disproportionately disadvantaged. Additionally, courts manage stays on enforcement actions, which temporarily suspend creditors' claims to give debtors time to negotiate and create a restructuring plan.[118]

3.6. The Risks of Preventive Restructuring

The success of preventive restructuring is inherently tied to managing a host of risks. These risks arise from uncertainties in financial planning, operational execution, and external economic factors, each of which can significantly impact the outcomes of a restructuring effort.

One of the most prominent risks is the implementation of cost-saving and restructuring measures. These measures often lead to conflicts among stakeholders with differing interests. For example, employees, creditors, and shareholders may have conflicting priorities, making it challenging to reach consensus on critical decisions.[119]

Another central challenge lies in achieving key financial targets, particularly those tied to operating performance. Metrics like EBITDA are vital benchmarks for recovery, but risks arise

[117] PONDIKASOVÁ, Tereza a Anna ZEMANDLOVÁ. *Preventivní restrukturalizace - procesualistický pohled*. Právní rozhledy. C. H. Beck, 2022, roč. 30, č. 20, s. 702-708. ISSN 1210-6410, Chapter III.

[118] PONDIKASOVÁ, Tereza a Anna ZEMANDLOVÁ. *Preventivní restrukturalizace - procesualistický pohled*. Právní rozhledy. C. H. Beck, 2022, roč. 30, č. 20, s. 702-708. ISSN 1210-6410, Chapter III.

[119] HAVEL, B. a kol. *Zákon o preventivní restrukturalizaci.* Komentář s ekonomickým průvodcem preventivní restrukturalizací. Praha: Wolters Kluwer ČR, 2024, Page 405

at two levels: achieving positive EBITDA, which is essential for financial stability, and reaching the required EBITDA margin to sustain operations and meet creditor expectations. Failure to hit these targets raises doubts about the restructuring's feasibility, especially considering the high transaction costs involved. If profitability remains unattainable, creditors may favor liquidation as a more predictable recovery option.[120]

Cash flow generation presents another critical area of vulnerability. Shortfalls in cash flow to meet ongoing obligations risk pushing the company into insolvency and undermine the entire premise of preventive restructuring. Risks can include immediate liquidity shortages and an overall failure to restore financial stability. While temporary cash flow gaps may be bridged through additional investment from stakeholders or third parties, such interventions require careful assessment of their economic rationale.[121]

The company's projected worth is tied to its ability to generate future free cash flow which is a key determinant in restructuring plans. Should these projections fail to materialize, the valuation may fall short of expectations, discouraging potential investors and creditors. In some cases, liquidation might even become the preferable route if the liquidation value exceeds the enterprise value, reducing the appeal of continuing restructuring efforts.[122]

Beyond internal factors, external factors like macroeconomic instability and geopolitical uncertainties add layers of complexity. Shifts in monetary policy, supply chain disruptions, or global crises can derail even the most solid plans, particularly in volatile industries.[123]

Finally, it is crucial to recognize that each company undergoing restructuring also faces unique risks. Industry-specific risks, competitive pressures, and market conditions often outweigh

[120] HAVEL, B. a kol. *Zákon o preventivní restrukturalizaci.* Komentář s ekonomickým průvodcem preventivní restrukturalizací. Praha: Wolters Kluwer ČR, 2024, Page 405

[121] HAVEL, B. a kol. *Zákon o preventivní restrukturalizaci.* Komentář s ekonomickým průvodcem preventivní restrukturalizací. Praha: Wolters Kluwer ČR, 2024, Page 406

[122] HAVEL, B. a kol. *Zákon o preventivní restrukturalizaci.* Komentář s ekonomickým průvodcem preventivní restrukturalizací. Praha: Wolters Kluwer ČR, 2024, Pages 406 and 407

[123] HAVEL, B. a kol. *Zákon o preventivní restrukturalizaci.* Komentář s ekonomickým průvodcem preventivní restrukturalizací. Praha: Wolters Kluwer ČR, 2024, Pages 408 and 409

broader economic concerns. Identifying these risks thoroughly and addressing them transparently within the restructuring plan is essential. While it may seem counterproductive, openly discussing risks builds credibility and demonstrates professionalism. Conversely, downplaying or hiding risks can erode trust among creditors and investors and ultimately jeopardize the success of the restructuring effort.[124]

3.7. The Ending of Preventive Restructuring

If preventive restructuring worked as intended, the debtors and concerned parties would negotiate a restructuring plan based on the recovery project. The plan would then be submitted for a vote,[125] and become effective[126] either through approval by the parties, court confirmation, or at a later date specified in the plan.[127]

The Act on Preventive Restructuring also introduces a dual-track system for ending preventive restructuring in other cases. Firstly, the process can terminate automatically when certain statutory conditions[128] are met.[129] On the other hand, the restructuring court may cancel the effectiveness of the restructuring plan upon a motion by a concerned party or the debtor, which returns both sides to their pre-restructuring positions.[130] Problems arise if the automatic end of the preventive restructuring occurs before the court-ordered cancellation can be secured. In such a scenario, creditors remain subject to the constraints of a restructuring plan that is no longer effective, but they can no longer initiate the cancellation that would restore their rights.[131]

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[124] HAVEL, B. a kol. *Zákon o preventivní restrukturalizaci.* Komentář s ekonomickým průvodcem preventivní restrukturalizací. Praha: Wolters Kluwer ČR, 2024, Page 409
[125] Section 29 of the Act on Preventive Restructuring
[126] Section 39 of the Act on Preventive Restructuring
[127] BROŽEK, Tomáš, *Dvoukolejnost „konce" preventivní restrukturalizace a hrozba kolize při překřížení obou režimů*. Bulletin advokacie. 2024, 1-2, Page 50
[128] Section 42 of the Act on Preventive Restructuring
[129] BROŽEK, Tomáš, *Dvoukolejnost „konce" preventivní restrukturalizace a hrozba kolize při překřížení obou režimů*. Bulletin advokacie. 2024, 1-2, Page 50
[130] Section 101 et seq. of the Act on Preventive Restructuring
[131] BROŽEK, Tomáš, *Dvoukolejnost „konce" preventivní restrukturalizace a hrozba kolize při překřížení obou režimů*. Bulletin advokacie. 2024, 1-2, Page 50

This conflict is particularly significant after the restructuring plan has already taken effect. If the debtor fails to meet its obligations under the restructuring plan, it can lead to the automatic termination of preventive restructuring. Once preventive restructuring is automatically terminated,[132] creditors generally lose the right to ask the court to revoke the effect of the restructuring plan. This leaves the creditors bound by an arrangement that should have been canceled due to the debtors's non-performance. The Act on Preventive Restructuring does provide limited exceptions (i.e.: the debtor's formal declaration of insolvency, where the plan loses effect automatically) but they are narrow and do not fully address the complexities of these timing and procedural conflicts.[133]

To reduce the risk of these problematic "collisions" between the automatic and court-driven terminations, the debtor has a well-defined informational duty, providing frequent and accurate updates to creditors, which enables them to detect early signs of non-performance and react promptly by initiating court proceedings prior to the automatic termination of the restructuring plan.[134]

Another key step is to expressly specify in the plan which obligations are "material" so that any breach can trigger timely legal action under Section 101 of the Act on Preventive Restructuring, without leaving creditors stuck in an impasse. The current framework strongly incentivizes creditors to adopt a cautious and proactive stance from the outset of the restructuring process to prevent being caught in a situation where the plan is terminated automatically and leaves them without any remedy.[135]

[132] Section 42 of the Act on Preventive Restructuring
[133] BROŽEK, Tomáš, *Dvoukolejnost „konce" preventivní restrukturalizace a hrozba kolize při překřížení obou režimů*. Bulletin advokacie. 2024, 1-2, Page 51
[134] BROŽEK, Tomáš, *Dvoukolejnost „konce" preventivní restrukturalizace a hrozba kolize při překřížení obou režimů*. Bulletin advokacie. 2024, 1-2, Page 52
[135] BROŽEK, Tomáš, *Dvoukolejnost „konce" preventivní restrukturalizace a hrozba kolize při překřížení obou režimů*. Bulletin advokacie. 2024, 1-2, Page 52

3.8. Implementation Strategies in Other European Union Countries

The implementation of the Directive on Preventive Restructuring frameworks has revealed slight diversity across Member States, shaped mainly by their distinct legal traditions. Originally due for transposition by July 17, 2021,[136] the deadline was extended for countries facing significant difficulties, yet even this additional time proved insufficient for some Member States, including the Czech Republic.[137] This chapter explores the implementation approaches in France, Germany, the Netherlands, Slovakia, and Austria, exploring their strategies, innovations, and challenges.

3.8.1. France

France's approach to transposing the Directive on Preventive Restructuring benefited from its pre-existing framework, which featured well-developed tools for pre-insolvency restructuring. The French model is built on the principle of a "second chance" for debtors, cultivated over decades.[138] Core mechanisms, including "*mandat ad hoc*," "*procédure de conciliation*," and "*procédure de sauvegarde*," were already aligned with many of the requirements by the Directive on Preventive Restructuring, emphasizing voluntary negotiation, debtor autonomy, and minimal court involvement, which allowed for an easy adaptation process. The access to these restructuring tools is directly linked to the financial state of the debtor.[139]

"*Mandat ad hoc*"[140] offers a flexible and confidential platform for voluntary negotiations between debtors, creditors and a mediator-like third party, with minimal court involvement.[141]

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[136] Article 34 of the Directive on Preventive Restructuring

[137] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Page 32

[138] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Page 33

[139] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Pages 33 to 36

[140] Prevention of Company Difficulties. République Franchise: Le site officiel d'information administrative pour les entreprises. In entreprendre.service-public.fr [online]. Available at: https://entreprendre.service-public.fr/vosdroits/F22290?lang=en

[141] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Pages 34 and 35

Similarly, "*Procédure de conciliation*"[142] facilitates pre-insolvency agreements under limited judicial oversight, offering fundamental creditor protections.[143] In contrast, "*Procédure de sauvegarde*"[144] represents a more formalized court-supervised process aimed at restructuring viable businesses before insolvency.[145] These mechanisms reflect France's longstanding emphasis on voluntary, cooperative restructuring, which is both efficient and discreet.[146]

Despite its efficiency, the system has faced criticism for favoring debtors at the expense of creditors. As part of the transposition of the Directive on Preventive Restructuring, France reassessed creditor protections to ensure compliance with the European Union's mandate to balance stakeholder interests.[147]

3.8.2. Germany

Germany adopted an innovative model with its Stabilization and Restructuring Framework („**StaRUG**"), introduced on 1 January 2021 under the SanInsFoG law. StaRUG reflects a "toolbox approach," providing debtors with a suite of restructuring tools that can be applied flexibly without requiring a unified judicial proceeding.[148] This approach minimizes formalities which makes it aligned with the goal of reducing procedural burdens, set out in the Directive on Preventive Restructuring.

Debtors can initiate measures when insolvency is likely within 24 months but once insolvency occurs, they must file for bankruptcy, unless continuation of the restructuring serves

[142] Conciliation procedure. République Francaise: Le site officiel d'information administrative pour les entreprises. In entreprendre.service-public.fr [online]. Available at: https://entreprendre.service-public.fr/vosdroits/F22295?lang=en

[143] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Pages 35 to 36

[144] Backup Procedure. République Francaise: Le site officiei d'information administrative pour les entreprises. In entreprendre.service-public.fr [online]. Available at: https://entreprendre.service-public.fr/vosdroits/F22311?lang=en

[145] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Pages 36 to 38

[146] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Page 34

[147] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Page 33

[148] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Page 44

creditors' interests.[149] StaRUG's hallmark is its reliance on the debtor's initiative and responsibility, emphasizing the principle that proactive management is crucial to successful restructuring, as well as mandating that corporate boards recognize financial distress early.[150] Judicial oversight is limited to key interventions, such as plan confirmation or the issuance of stays on enforcement actions.[151]

3.8.3. Netherlands

The Netherlands implemented the Wet Homologatie Onderhands Akkoord („**WHOA**") on 1 January 2021. Inspired by the UK's Scheme of Arrangement and the US Bankruptcy Code, WHOA offers an innovative, flexible framework that allows debtors to pursue either public or private restructuring processes.[152] This dual-path system reflects the emphasis on confidentiality and efficiency set out in the Directive on Preventive Restructuring

WHOA's processes require very limited court intervention, which focuses primarily on plan confirmation and cross-class cramdowns and ensures compliance with the requirements of the Directive on Preventive Restructuring.[153]

Since its enactment, WHOA has gained traction among both small companies and large corporations. Dutch courts have confirmed numerous plans, including complex financial restructurings and distressed M&A transactions. This early success positions the Netherlands as a leader in implementing preventive restructuring measures.[154]

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[149] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Page 44

[150] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Page 44

[151] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Page 48

[152] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Pages 39 and 40

[153] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Page 40

[154] SCHÖNFELD, Jaroslav; KUDĚJ, Michal; HAVEL, Bohumil a SPRINZ, Petr. 2023: *Start preventivní restrukturalizace: nová šance pro podnikatele, nebo velký problém pro věřitele?* V Praze: C.H. Beck, 2023. ISBN 978-80-7400-930-3, Page 140

3.8.4. Slovakia

Slovakia's Act No. 111/2022 Sb., on resolving imminent insolvency, introduced a dual framework of public and non-public preventive restructuring.[155] Public restructuring requires greater transparency, involving court approval, creditor committees and temporary protections,[156] while non-public restructuring allows debtors to negotiate discreetly with select creditors (which have to be regulated by the Slovak National Bank).[157]

The Slovak public model is characterized by procedural rigor and requires a submission of restructuring plan at the outset, which later has to be approved by the creditors.[158]

Although the Slovak model aligns with the goals set out in the Directive on Preventive Restructuring, its strict eligibility requirements and procedural complexity may limit access for a significant number of businesses.[159]

3.8.5. Austria

Austria implemented the Directive on Preventive Restructuring through the Restrukturierungsordnung[160] on 17 July 2021. The Restrukturierungsordnung complements Austria's existing *Sanierungsplan* framework, which has long proved a reliable restructuring tool within formal insolvency proceedings. Despite its strengths, the Restrukturierungsordnung has faced criticism for its complexity and cost, which may deter smaller companies from utilizing it.[161]

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[155] SCHÖNFELD, Jaroslav; KUDĚJ, Michal; HAVEL, Bohumil a SPRINZ, Petr. 2023: *Start preventivní restrukturalizace: nová šance pro podnikatele, nebo velký problém pro věřitele?* V Praze: C.H. Beck, 2023. ISBN 978-80-7400-930-3, Page 126

[156] SCHÖNFELD, Jaroslav; KUDĚJ, Michal; HAVEL, Bohumil a SPRINZ, Petr. 2023: *Start preventivní restrukturalizace: nová šance pro podnikatele, nebo velký problém pro věřitele?* V Praze: C.H. Beck, 2023. ISBN 978-80-7400-930-3, Pages 126 and 127

[157] SCHÖNFELD, Jaroslav; KUDĚJ, Michal; HAVEL, Bohumil a SPRINZ, Petr. 2023: *Start preventivní restrukturalizace: nová šance pro podnikatele, nebo velký problém pro věřitele?* V Praze: C.H. Beck, 2023. ISBN 978-80-7400-930-3, Pages 129 and 130

[158] SCHÖNFELD, Jaroslav; KUDĚJ, Michal; HAVEL, Bohumil a SPRINZ, Petr. 2023: *Start preventivní restrukturalizace: nová šance pro podnikatele, nebo velký problém pro věřitele?* V Praze: C.H. Beck, 2023. ISBN 978-80-7400-930-3, Page 128

[159] SCHÖNFELD, Jaroslav; KUDĚJ, Michal; HAVEL, Bohumil a SPRINZ, Petr. 2023: *Start preventivní restrukturalizace: nová šance pro podnikatele, nebo velký problém pro věřitele?* V Praze: C.H. Beck, 2023. ISBN 978-80-7400-930-3, Page 131

[160] Austrian Restructuring Code (Restrukturierungsordnung), Federal Law Gazette Nr. I 2021/147

[161] SCHÖNFELD, Jaroslav; KUDĚJ, Michal; HAVEL, Bohumil a SPRINZ, Petr. 2023: *Start preventivní restrukturalizace: nová šance pro podnikatele, nebo velký problém pro věřitele?* V Praze: C.H. Beck, 2023. ISBN 978-80-7400-930-3, Pages 139 and 140

3.8.6. Comparative Insights

The implementation of the Directive on Preventive Restructuring across member states reflects a dynamic interplay between harmonization and local adaptation. France leveraged its mature restructuring framework, requiring only minor adjustments, while Germany and the Netherlands introduced innovative models emphasizing debtor autonomy and flexibility. Slovakia and Austria, in contrast, adopted more formalized frameworks and balanced procedural rigor with creditor protections.[162]

[162] ZEMANDLOVÁ, Anna. *Procesní aspekty preventivní restrukturalizace*. Právní instituty. V Praze: C.H. Beck, 2024. ISBN 978-80-7400-969-3, Page 51

4. Implementation Issues in Preventive Restructuring

4.1. Individual Moratorium: Concept and Legal Framework

In this chapter, will introduce the concept of moratoria within the context of preventive restructuring.

4.1.1. Preliminary measures

Preliminary measures are temporary legal instruments designed to address urgent situations within judicial proceedings. Their purpose is not to conclusively resolve disputes but to prevent harm, stabilize conditions, or preserve the ability to enforce rights until a formal court decision is made. These measures rely on swift action and are based on a lower standard of evidence than that required for a final court decision, emphasizing their provisional and immediate nature.[163]

Unlike a final court decision, a preliminary measure does not resolve the legal relationship between the parties or retrospectively address past violations. It focuses on mitigating the threat or violation of the applicant's rights and their primary function remains limited to temporary protection and leaves the full examination of facts and the final decision to the main judicial proceeding.[164]

The flexibility of preliminary measures stems from their lower evidentiary threshold, which enables courts to act quickly without fully verifying the facts presented. This is a deliberate feature designed to prioritize urgency over certainty. Courts issue these measures without prejudging the final outcome, as the evidence and arguments considered in the final court decision often lead to entirely different conclusions.[165]

Importantly, this approach does not constitute a violation of the principle of legal predictability. Transparency and consistency in applying the law remain intact, because the

[163] ŠÍNOVÁ, Renáta a HAMUĽÁKOVÁ, Klára. *Civilní proces*. Vydání druhé. Academia iuris. V Praze: C.H. Beck, 2020. ISBN 978-80-7400-787-3., Pages 140 and 141

[164] ŠÍNOVÁ, Renáta a HAMUĽÁKOVÁ, Klára. *Civilní proces*. Vydání druhé. Academia iuris. V Praze: C.H. Beck, 2020. ISBN 978-80-7400-787-3., Pages 140 and 141

[165] ŠÍNOVÁ, Renáta a HAMUĽÁKOVÁ, Klára. *Civilní proces*. Vydání druhé. Academia iuris. V Praze: C.H. Beck, 2020. ISBN 978-80-7400-787-3., Pages 140 and 141

temporary and exceptional nature of preliminary measures is clearly defined within the legal framework. Their purpose is solely to provide immediate protection or maintain the status quo, ensuring that neither party's rights are unfairly compromised while the case is still pending.[166]

The rules that apply to a general moratorium also extend to an individual moratorium, but with certain modifications set out by the Act on Preventive Restructuring. For instance, according to Section 87 of the Act on Preventive Restructuring, Section 77a of the Civil Procedure Code is not excluded. Under this provision, the applicant is required to compensate for any damage caused if the preliminary measure ceases to exist for reasons other than the satisfaction of their action.[167] Nevertheless, a critical distinction exists between the two types of moratoria (as described in Chapter 4.1.2. of this thesis). An individual moratorium is further governed by the rules on preliminary measures outlined in the Civil Procedure Code,[168] with certain provisions being explicitely excluded by the Act on Preventive Restructuring. [169]

This combination of moratorium rules with preliminary measures introduces an untested approach in practice, likely to generate interpretative uncertainties.[170]

4.1.2. Moratoria

Under the Act on Preventive Restructuring, moratoria serve as essential safeguards in the entire restructuring process. Their importance lies in their dual impact: providing strong protections for debtors while significantly restricting creditor rights. This inherent tension between debtor protection and creditor limitation underscores the need for a unified and coherent regulatory approach to moratoria.

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[166] ŠÍNOVÁ, Renáta a HAMUĽÁKOVÁ, Klára. *Civilní proces*. Vydání druhé. Academia iuris. V Praze: C.H. Beck, 2020. ISBN 978-80-7400-787-3., Pages 140 and 141

[167] KUČERA, Vít, *Předběžné opatření v civiliním procesu sporném*, leges, ISBN: 978-80-7502-478-7, Page 153

[168] Section 74 et seq. of the Act No. 99/1963 Sb. on Civil Procedure *(In Czech: Občanský řád soudní*)

[169] SIGMUND, Adam; BROŽ, Jaroslav; KAČEROVÁ, Lucie; KALIŠ, Petr; MACHÁČEK, Roman et al. *Zákon o preventivní restrukturalizaci*. Praktický komentář. Praha: Wolters Kluwer, 2023. ISBN 978-80-7676-479-8., Section 87

[170] SIGMUND, Adam; BROŽ, Jaroslav; KAČEROVÁ, Lucie; KALIŠ, Petr; MACHÁČEK, Roman et al. *Zákon o preventivní restrukturalizaci*. Praktický komentář. Praha: Wolters Kluwer, 2023. ISBN 978-80-7676-479-8., Section 87

The Act on Preventive Restructuring introduced moratoria as vital mechanisms for stabilizing a debtor's financial position during critical periods. Far from being mere procedural measures, they play a central role in the restructuring process by protecting the debtor from creditor actions and creating a controlled space for negotiation. Such protections closely resemble those triggered by the initiation of insolvency proceedings. These include preventing creditors from initiating insolvency petitions, suspending enforcement and execution actions, and halting the realization of secured assets. Furthermore, moratoria restrict creditors from establishing new security interests, terminating underperforming long-term contracts, or refusing performance under such agreements.[171]

4.1.3. Difference between General and Individual Moratoria

The Act on Preventive Restructuring establishes two types of moratoria: general and individual. This division reflects the flexibility provided by Article 6(3) of the Directive on Preventive Restructuring: „*Member States may provide that a stay of individual enforcement actions can be general, covering all creditors, or can be limited, covering one or more individual creditors or categories of creditors*."

4.1.4. General Moratoria

General moratoria are declared by public notice and are broad in scope, impacting the rights of all creditors. They are typically invoked once preventive restructuring proceedings have commenced.[172] However, their public nature carries inherent risks, particulary reputational harm to the debtor, which can lead to difficulties in maintaining business operations: „*Negative publicity further worsens the entrepreneur's access to credit financing and weakens the position of the*

[171] KAČEROVÁ, Lucie. *Prodloužení moratoria*. Bulletin advokacie. 2024, 1-2, page 36.
[172] KAČEROVÁ, Lucie. *Prodloužení moratoria*. Bulletin advokacie. 2024, 1-2, page 36.

entrepreneur's business brand in the relevant market, as potential new business partners logically take into account (and reflect in pricing) the increased risk of failure.“[173]

4.1.5. Individual Moratoria

Conversely, individual moratoria offer a more tailored solution. They can be invoked even before preventive restructuring proceedings begin[174] and are limited to specific creditors[175] chosen by the debtor. This targeted application minimizes the disruption to the debtor’s overall business relationships and avoids the negative publicity[176] associated with general moratoria. Importantly, individual moratoria align with the debtor’s need for strategic flexibility, particularly during the early stages of restructuring efforts.[177]

4.2. Case Study Analysis of Individual Moratorium

4.2.1. Introduction

I chose to focus on the preventive restructuring case of Liberty Ostrava a.s. („**Liberty Ostrava**“) because I had the unique opportunity to observe it firsthand during my internship at a law firm, where we represented one of the creditors - or, in the language of preventive restructuring, a "concerned party" (*in Czech: dotčená strana*). Given that preventive restructuring was only introduced last year, it was particularly compelling to witness its practical application so closely. This case provided a great opportunity to engage with a new legal mechanism and be among the first in the field to gain direct experience with its implementation.

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[173] Explanatory memorandum to the Act on Preventive Restructuring, In psp.cz [online]. Available at: https://www.psp.cz/sqw/text/tiskt.sqw?O=9&CT=371&CT1=0, page 49 (*In Czech: Negativní publicita dále zhoršuje přístup podnikatele k úvěrovému financování a zhoršuje postavení obchodní značky podnikatele na relevantním trhu, neboť eventuální noví obchodní partneři logicky zahrnují do úvahy (a promítají do ceny) zvýšené riziko selhání.*)

[174] Section 85 art. 3 of the Act on Preventive Restructuring

[175] Section 86 art. 1 of the Act on Preventive Restructuring - maximum of 3 creditors

[176] Section 53 art. (2)(a) of the Act on Preventive Restructuring

[177] KAČEROVÁ, Lucie. *Prodloužení moratoria*. Bulletin advokacie. 2024, 1-2, page 37.

4.2.2. Factual Background of the Case

On 28 November 2023, Liberty Ostrava, facing significant financial difficulties, petitioned the Regional Court in Ostrava for an individual moratorium against its energy supplier, TAMEH Czech s.r.o. („**TAMEH**“). This measure was sought under the Act on Preventive Restructuring to safeguard the company's operations while preparing for preventive restructuring.

Liberty Ostrava's petition highlighted the urgent need to stabilize relations with TAMEH and avoid a potential insolvency filing from them. The company argued that insolvency proceedings would hinder its ability to implement necessary restructuring measures, harm its reputation, and jeopardize thousands of jobs at its facilities and related operations in the region. The petition emphasized that securing protection through an individual moratorium would allow Liberty Ostrava to initiate preventive restructuring and preserve the company's going concern value.[178]

On 29 November 2023, the Regional Court in Ostrava granted the individual moratorium for a period of three months. The court confirmed that Liberty Ostrava fulfilled all the statutory conditions under the Act on Preventive Restructuring - it confirmed the company’s eligibility for protection as a commercial corporation that had not yet initiated insolvency or preventive restructuring proceedings. The court noted that Liberty Ostrava had declared its intent to commence preventive restructuring soon and demonstrated that it met the qualifying criteria for such proceedings, including compliance with obligations toward the Commercial Register, the provision of a liquidity statement showing a minimal coverage gap, and the identification of a single creditor, TAMEH, impacted by the moratorium. The court clarified that the individual moratorium serves as a temporary measure and does not require prior commencement of restructuring proceedings. The ruling took immediate effect upon delivery to TAMEH and included an order for Liberty Ostrava to begin restructuring proceedings within 30 days. While the

[178] Individual Moratorium filing by Liberty Ostrava against TAMEH dated 28 November 2023

decision granted targeted protection to Liberty Ostrava from TAMEH, other creditors were not initially affected by this measure.[179]

The individual moratorium gave Liberty Ostrava a brief window to negotiate energy supply conditions with TAMEH under standard market terms. However, in early December 2023, a general moratorium was issued, extending insolvency protection to all of Liberty Ostrava's creditors for three months. During this time, TAMEH appealed the moratorium with the High Court in Olomouc.[180]

On 14 December 2023, TAMEH, the energy supplier subject to Liberty Ostrava's individual moratorium, was forced to file for insolvency due to Liberty Ostrava's failure to pay outstanding debts. TAMEH, which served as Liberty Ostrava's sole energy provider, reported that it was owed nearly 2 billion CZK, with approximately 1.2 billion CZK overdue. Designed specifically to meet Liberty Ostrava's energy needs, TAMEH's business model left it highly exposed to Liberty Ostrava's financial instability.[181]

TAMEH justified its insolvency filing with the Regional Court in Ostrava on several grounds. TAMEH emphasized that it primarily supplies Liberty Ostrava with critical energy and operational inputs under a long-term framework agreement.[182] Despite fulfilling its contractual obligations, TAMEH reported that Liberty Ostrava either failed to make payments or made partial payments with substantial delays. These defaults left TAMEH with significant outstanding receivables, totaling over 1.2 billion CZK.[183]

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[179] The Ruling of the Regional Court in Ostrava dated 29 November 2023, Case No. 12 Nc 1/2023-9

[180] Moratorium ochrání huť Liberty před věřiteli, In idnes.cz [online]. Available at: https://www.idnes.cz/ostrava/zpravy/hut-liberty-tameh-sedivy-jednani-krize-dluhy-ostrava-vyroba.A231221_093736_ostrava-zpravy_palj

[181] Tameh míří do insolvence, ostravská huť mu přes půl roku nezaplatila, In novinky.cz [online]. Available at: https://www.novinky.cz/clanek/ekonomika-vycerpali-jsme-vsechno-tameh-miri-do-insolvence-ostravska-hut-mu-pres-pul-roku-nezaplatila-40454351

[182] Insolvency filing of TAMEH Czech s.r.o. dated 14 December 2023, In isir.justice.cz [online]. Available at: https://isir.justice.cz/isir/doc/dokument.PDF?id=56766828, Clause 1

[183] Insolvency filing of TAMEH Czech s.r.o. dated 14 December 2023, In isir.justice.cz [online]. Available at: https://isir.justice.cz/isir/doc/dokument.PDF?id=56766828, Clause 2 and 17

TAMEH described its operations as inherently tied to Liberty Ostrava. Its facilities are designed to provide energy products such as electricity, steam, and demineralized water exclusively to Liberty Ostrava, while also relying on high furnace and coke gases supplied by Liberty Ostrava for production.[184] This interdependence meant that the financial difficulties faced by Liberty Ostrava directly impacted TAMEH's ability to operate independently or secure alternative revenue sources.[185]

Efforts to resolve the situation amicably, initiated by TAMEH at the end of 2022, proved unsuccessful. Liberty Ostrava's commitments to settle its debts were not fulfilled, and payments for energy products remained overdue.[186] TAMEH further noted that this worsened its financial strain. Without sufficient cash flow to cover its own obligations, TAMEH was forced to scale down operations, which nonetheless failed to stabilize its deteriorating economic condition.[187]

Crucially, TAMEH argued that Liberty Ostrava's individual moratorium directly caused its insolvency. TAMEH contended that Liberty Ostrava misused the protective mechanism of the individual moratorium to harm its supplier while evading its own insolvency obligations. As a result, TAMEH was unable to procure essential coal supplies or maintain operations, which ultimately led to its complete shutdown.[188] TAMEH alleged that Liberty Ostrava, already insolvent,[189] misused the protective mechanism to shift the financial burden onto its supplier rather than addressing the challenges facing both companies constructively.

[184] Insolvency filing of TAMEH Czech s.r.o. dated 14 December 2023, In isir.justice.cz [online]. Available at: https://isir.justice.cz/isir/doc/dokument.PDF?id=56766828, Clause 9 and 10

[185] Insolvency filing of TAMEH Czech s.r.o. dated 14 December 2023, In isir.justice.cz [online]. Available at: https://isir.justice.cz/isir/doc/dokument.PDF?id=56766828, Clause 10 and 11

[186] Insolvency filing of TAMEH Czech s.r.o. dated 14 December 2023, In isir.justice.cz [online]. Available at: https://isir.justice.cz/isir/doc/dokument.PDF?id=56766828, Clause 11

[187] Insolvency filing of TAMEH Czech s.r.o. dated 14 December 2023, In isir.justice.cz [online]. Available at: https://isir.justice.cz/isir/doc/dokument.PDF?id=56766828, Clause 11 and 12

[188] Insolvency filing of TAMEH Czech s.r.o. dated 14 December 2023, In isir.justice.cz [online]. Available at: https://isir.justice.cz/isir/doc/dokument.PDF?id=56766828, Clause 12

[189] And thereby not eligible for protection under preventive restructuring because they do not meet the conditions outlined in Section 4(2) of the Act on Preventive Restructuring.

TAMEH filed an appeal against the decision of the Regional Court in Ostrava to grant a general moratorium on Liberty Ostrava's assets, but the High Court in Olomouc dismissed the appeal. The presiding Judge Martin Hejda ruled that TAMEH, along with Devimex and other creditors, lacked the legal authority to appeal the restructuring court's decision to declare the general moratorium.[190]

The creditors had argued that Liberty Ostrava did not meet the conditions for the moratorium, alleging that the company was insolvent, thus failing to satisfy the requirement under Section 4 (2) of the Act on Preventive Restructuring, which excludes insolvent entities from initiating preventive restructuring. They further alleged that Liberty Ostrava acted in bad faith by initiating the preventive restructuring process.[191]

The court's legal interpretation raises broader concerns about the constitutionality of the restructuring process. Creditors like TAMEH, who are unable to challenge the moratorium through appeals, may argue that such a limitation infringes upon their right to a fair trial. This restriction effectively leaves creditors with limited legal remedies, potentially forcing them to pursue constitutional complaints (*In Czech: ústavní stížnost*) as their only mean of recourse. Such developments raise significant questions about the balance between debtor protection and creditor rights within the framework of preventive restructuring.

TAMEH argued that Liberty Ostrava's prolonged financial mismanagement, combined with its failure to file its own insolvency petition despite clear indications of insolvency, created a domino effect that ultimately rendered TAMEH insolvent.[192] By December 2023, TAMEH was no longer able to generate sufficient income to meet its obligations to suppliers and creditors,

[190] Tameh ani Devimex nejsou oprávněni podat odvolání proti moratoriu na Liberty Ostrava, In irozhlas.cz [online]. Available at: https://www.irozhlas.cz/ekonomika/liberty-vrdchni-soud-ostrava-tameh-devimex-moratorium_2404301839_har

[191] Tameh ani Devimex nejsou oprávněni podat odvolání proti moratoriu na Liberty Ostrava, In irozhlas.cz [online]. Available at: https://www.irozhlas.cz/ekonomika/liberty-vrdchni-soud-ostrava-tameh-devimex-moratorium_2404301839_har

[192] Insolvency filing of TAMEH Czech s.r.o. dated 14 December 2023, In isir.justice.cz [online]. Available at: https://isir.justice.cz/isir/doc/dokument.PDF?id=56766828, Clause 3 and 12

leaving it insolvent under the Insolvency Act.[193] The company initially pursued reorganization, citing the economic and logistical impracticality of liquidation due to its interdependent operations with Liberty Ostrava.[194] However, these efforts were unsuccessful, ultimately resulting in TAMEH's liquidation.[195]

4.3. Practical Approaches to Overcoming Challenges

The core issue lies in the ability of a debtor, as seen with Liberty Ostrava, to trigger the insolvency of its creditors by merely filing for an individual moratorium. In my view, the current system lacks adequate protection for creditors, particularly since those affected by moratoria have no right to appeal the decision and are left with no option but to endure its consequences. In extreme cases, as seen in the case of TAMEH, this can result in the creditor's complete financial collapse.

To address this imbalance, courts should be required to carefully evaluate the potential impact of an individual moratorium on the targeted creditor(s) before approving it. If the consequences are likely to be severe, courts should have the authority to reject such applications. This is particularly important given that, as demonstrated in the Liberty Ostrava case, an individual moratorium can be sought even before the formal commencement of preventive restructuring proceedings, allowing it to arise unexpectedly and with potentially devastating consequences for creditors.

Additionally, it would be beneficial to create a protective mechanism, similar to an appeal process, to challenge individual moratoria. The High Court in Olomouc's ruling underscores the absence of such recourse, leaving creditors with the burdensome and often impractical option of pursuing a constitutional complaint (*In Czech: ústavní stížnost*). Adding an appeals process or

[193] Insolvency filing of TAMEH Czech s.r.o. dated 14 December 2023, In isir.justice.cz [online]. Available at: https://isir.justice.cz/isir/doc/dokument.PDF?id=56766828, Clause 19 and 20

[194] Insolvency filing of TAMEH Czech s.r.o. dated 14 December 2023, In isir.justice.cz [online]. Available at: https://isir.justice.cz/isir/doc/dokument.PDF?id=56766828, Clause 26

[195] Resolution on TAMEH's proposal to convert reorganization into bankruptcy dated 9 August 2024. In isir.justice.cz [online]. Available at: https://isir.justice.cz/isir/doc/dokument.PDF?id=59120636

similar safeguard would make the system fairer and give creditors a way to protect their rights. These changes would create a more balanced approach to restructuring and ensure that creditors are not left unprotected.

4.4. Other potential implementation issues

Another significant implementation issue is the fact that the debtor determines the scope of "concerned parties" affected by the restructuring. This allows the debtor to manipulate the process and potentially make a general moratorium immune to cancellation, as it can be revoked through a motion filed by the concerned parties. For instance, in the Liberty Ostrava case, the company excluded TAMEH, despite it being its largest creditor, by claiming that TAMEH's claim was disputed, even though their involvement was critical. This decision is solely at the debtor's discretion, leaving even major creditors without any ability to influence the course of preventive restructuring. Excluded creditors are sidelined and have no say in the decisions made by the so-called "majority" of concerned parties.

To prevent such misuse, courts should have the authority to decide—or at least review— the debtor's list of concerned parties. This oversight would ensure that the restructuring process remains fair and prevents potential abuses of discretion by the debtor.[196]

[196] Personal consultation with JUDr. Martin Froněk on 3 December 2024.

5. Conclusion

The thesis provides an in-depth examination of the Czech Republic's implementation of Directive on Preventive Restructuring, focusing particularly on individual moratoria as a novel and contentious aspect of the legislative framework. The analysis centers on the Liberty Ostrava case, which highlights the significant challenges posed by the preventive restructuring framework and emphasizes the gaps in creditor protections under the current Czech implementation.

The Directive on Preventive Restructuring represents a significant step in harmonizing restructuring laws across the European Union. Its primary goal is to provide businesses facing financial distress with the tools to address their difficulties early, thus avoiding insolvency and its detrimental economic consequences. The Czech adaptation of the Directive on Preventive Restructuring reflects the broader European effort but introduces unique challenges, particularly concerning individual moratoria, which are explored in detail in this thesis.

The key challenge identified is the debtor's ability to trigger individual moratoria, which can result in severe consequences for affected creditors. The Liberty Ostrava case exemplifies how this mechanism, intended to temporarily protect a debtor, can lead to a creditor's financial demise. In the case of TAMEH, Liberty Ostrava's invocation of an individual moratorium led directly to TAMEH’s insolvency, underscoring the imbalance inherent in the current system. The lack of an effective appellate mechanism further deepens this issue, leaving creditors with limited recourse to challenge the application of individual moratoria, a situation that raises concerns about procedural fairness and the right to a fair trial.

The thesis argues for critical reforms to address these shortcomings. In my oppinion, courts should be mandated to assess the specific impact of individual moratoria on creditors before granting them and reject applications where the harm to creditors outweighs the debtor’s need for protection. Furthermore, introducing a review or appeal mechanism for decisions regarding individual moratoria would enhance procedural fairness and balance the interests of debtors and creditors more effectively.

Another systemic issue discussed is the discretion granted to debtors in determining the scope of "concerned parties" in restructuring processes. This allows for manipulation, as seen in the Liberty Ostrava case, where TAMEH, the largest creditor, was excluded from the list of concerned parties under the pretext of a disputed claim. Such exclusions prevent major creditors from influencing critical decisions, undermining the fairness of the process. The thesis advocates for judicial oversight or at least stricter scrutiny of the debtor's determination of concerned parties to prevent abuses of discretion.

In summary, the introduction of preventive restructuring in the Czech Republic represents an important step forward in the area of (pre)insolvency law. However, as this thesis has shown, the framework still needs adjustments to better achieve its goal of balancing the rights and interests of both debtors and creditors. Resolving key issues, especially those related to individual moratoria, is vital for creating a more fair, effective, and resilient restructuring system. Such improvements are not only critical for the Czech Republic but also for supporting the broader implementation and alignment of the Directive on Preventive Restructuring across the European Union.

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7. Abstrakt

Implementace Směrnice o preventivní restrukturalizaci v České republice: Praktická rovina individuálního moratoria a dalších implementačních problémů.

Abstrakt

Tato diplomová práce se zabývá implementací Směrnice o preventivní restrukturalizaci („**Směrnice**“) v České republice, přičemž klade důraz na praktické problémy spojené s touto implementací. Směrnice si klade za cíl poskytnout podnikům v ekonomických obtížích účinné mechanismy včasné restrukturalizace, které umožní předejít úpadku, ochránit pracovní místa a zachovat ekonomickou hodnotu. V českém kontextu, ačkoliv bylo zavedení individuálního moratoria Směrnicí předpokládáno, jeho implementace vyvolává zásadní otázky týkající se ochrany věřitelů a spravedlnosti celého procesu.

Primárním cílem této práce bylo identifikovat a analyzovat nejvýznamnější problémy spojené s implementací individuálních moratorií. Můj výzkum kombinuje podrobnou právní analýzu s případovou studií Liberty Ostrava, jednoho z prvních příkladů praktického využití preventivní restrukturalizace v České republice.

Zjištění odhalují významné nedostatky v současném právním rámci. Individuální moratoria umožňují dlužníkům omezit práva věřitelů, aniž by byly zavedeny dostatečné záruky, protože soudy nejsou povinny posuzovat jejich celkový dopad. V případě Liberty Ostrava vedlo využití individuálního moratoria přímo k insolvenci jejího největšího věřitele, společnosti TAMEH Czech s.r.o. Navíc mají dlužníci příliš velkou volnost při definování „dotčených stran“, což jim umožňuje vyloučit klíčové věřitele z procesu restrukturalizace. Tyto problémy podle mého názoru narušují rovnováhu zájmů, kterou Směrnice zamýšlela.

Aby bylo možné tyto výzvy překonat, práce navrhuje několik reforem, přičemž zdůrazňuje, že soudy by měly důkladně posuzovat dopady individuálních moratorií na věřitele a zamítat žádosti, které by způsobily nepřiměřenou újmu. Pro zajištění procesní spravedlnosti by měl být zaveden opravný prostředek pro věřitele. Za účelem předcházení možným manipulacím je rovněž nezbytné, aby soudy dohlížely na rozhodnutí dlužníků o tom, kdo je považován za dotčenou stranu.

Práce dochází k závěru, že ačkoliv preventivní restrukturalizace nabízí cenné nástroje pro zajištění ekonomické stability, její účinnost v České republice závisí na nalezení rovnováhy mezi ochranou dlužníků a právy věřitelů. Zohlednění těchto doporučení by mohlo posílit právní rámec a lépe jej sladit s cíli Směrnice.

Klíčová slova: Preventivní restrukturalizace, Směrnice o preventivní restrukturalizaci, Individuální moratorium

8. Abstract

The Czech Implementation of the Directive on Preventive Restructuring: A Practical Approach to Individual Moratorium and other Implementation Issues.

Abstract

This thesis addresses the implementation of the Directive on Preventive Restructuring („**Directive**“) in the Czech Republic, focusing on its practical challenges. The Directive seeks to provide businesses in financial difficulties with robust mechanisms for early restructuring which allow them to avert insolvency, protect jobs, and preserve economic value. In the Czech context, although the introduction of individual moratorium was anticipated by the Directive, its implementation raises critical concerns about creditor protection and fairness of the entire process.

The primary aim of this thesis was to identify and analyze the most significant implementation issues associated with implementing individual moratoria. The research combines a detailed legal analysis with a case study of Liberty Ostrava, one of the first instances of the Czech preventive restructuring in practice.

The findings reveal significant weaknesses in the current framework. Individual moratoria allow debtors to impose restrictions on creditors without sufficient safeguards, as courts are not required to assess their full impact. In the case of Liberty Ostrava, the use of an individual moratorium directly led to the insolvency of its largest creditor, TAMEH Czech s.r.o. Furthermore, debtors are granted excessive discretion in defining “concerned parties,” which enables them to exclude key creditors from the restructuring process. These issues, in my opinion, disrupt the balance of interests intended by the Directive.

To address these challenges, this thesis proposes several reforms, emphasizing that courts should thoroughly evaluate the effects of individual moratoria on creditors and reject applications that would result in disproportionate harm. An appeal mechanism for creditors should be introduced to ensure procedural fairness. Additionally, judicial oversight of the debtor’s decision on concerned parties is essential to prevent manipulation.

The thesis concludes that, although preventive restructuring offers valuable tools for economic stability, its effectiveness in the Czech Republic depends on balancing debtor protection with creditor rights. Considering these recommendations could potentially strengthen the framework and better align it with the Directive’s objectives.

Key words: Preventive restructuring, Directive on Preventive Restructuring, Individual moratorium