

Ukrainian Preventive Restructuring – First Transposition of Directive (EU) 2019/1023 by a Non-Member State

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Abstract

Having been granted candidate status for EU membership, Ukraine must transpose Directive (EU) 2019/1023 into its national law. Furthermore, the transposition of the Directive is an explicit requirement for the EU's micro-financial aid to Ukraine. Ukraine faces a rather unique situation, being called to reform its insolvency legislation in line with the Directive during a time of war and within tight deadlines set by the EU. Currently, two bills have been filed with Parliament aimed at revising the 2018 Code on Bankruptcy Procedures in accordance with the Directive. The proposed modernizations aim to address the current problems that Ukrainian businesses face when using the existing rescue mechanism and could prove useful for Ukraine's post-war economic recovery.

Keywords: preventive restructuring, Directive (EU) 2019/1023, viable businesses, micro and small enterprises, restructuring plan, second chance, cramdown, transposition

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1. Introduction

1.1. Economic situation and war

1. Russia's unprovoked aggression against Ukraine resulted in the largest military conflict in Europe since World War II. Naturally, the ongoing fighting represents a heavy burden for the Ukrainian economy and unprecedented challenges for business. In 2023, Ukraine's estimated GDP was only 74 % of the 2021 GDP.² Between February 2022 and December 2023, Ukraine suffered direct damages (attributed to Russia's invasion) amounting to almost USD 152 billion, while the cumulative economic loss exceeded USD 499 billion.³ Surprisingly, the number of initiated bankruptcies did not multiply contrary to what might have been expected under the circumstances. In 2022, Ukrainian commercial courts opened 9,725 bankruptcy cases (vs. 16,791 in 2021).⁴ This can be explained by wartime disruptions in the work of Ukrainian judiciary, and very often by an objective impossibility for the affected businesses to comply with all legal requirements to initiate respective proceedings.⁵ It is safe to assume that once the hot phase of the war is over, the number of bankruptcies will dramatically increase.

1.2. EU accession dimension

2. It is only natural that Ukraine needs efficient legal tools to keep businesses out of bankruptcy. Hit especially hard by the COVID-19 pandemic and the war, the country's small and medium-sized enterprises (SMEs) comprising more than

2 Ukraine. Third Rapid Damage and Needs Assessment (RDNA3). February 2022 – December 2023 (The World Bank, the Government of Ukraine, the European Union, the United Nations 2024) 10.

3 *ibid.*

4 Data by the Supreme Court of Ukraine cited from *Ievropeis'ki standartu restrukturyzatsii: mozhlyvosti ta vyklyky dlia Ukraïny* [European Restructuring Standards: Opportunities and Challenges for Ukraine] (*Ib.ua*, 14 June 2023), <https://lb.ua/blog/pravo_justice/560497_ieuropeyski_standarti.html> accessed 17 April 2024. 2023 data have not been available as of this writing.

5 The 'war factor' is mentioned by Judge Oleh Vaskovsky, Secretary of the Bankruptcy Chamber, Cassation Commercial Court under the Supreme Court of Ukraine. See Anatolii Hvozdet'skyi, 'Borhovi vymohy ie aktyvom, iakiy mozhe buty zarakhovany v interesakh Ukraïny do derzhavnoho biudzhetu' – Oleh Vaskovsky, Sekretar sudovoi palaty dlia rozhliadu sprav pro bankrutstvo KHS VS ['Debt Claims Are Assets that Can Be Credited to the Interests of Ukraine Towards the State Budget' says Oleh Vaskovsky, Secretary of the Bankruptcy Chamber, Cassation Commercial Court under the Supreme Court of Ukraine] (*Pravo.ua*, 20 March 2023) <<https://pravo.ua/borhovi-vymohy-ie-aktyvom-iakiy-mozhe-but-y-zarakhovanyi-v-interesakh-ukrainy-do-derzhavnoho-biudzhetu-oleh-vaskovskyi-sekretar-sudovoi-palaty-dlia-rozhliadu-sprav-pro-bankrutstvo-khs-vs/>> accessed 4 April 2024.

99 % of all national enterprises⁶ could benefit from a system providing for an efficient insolvency prevention, debt restructuring and a second chance for ‘honest’ entrepreneurs such as those embedded in Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency)(hereinafter – ‘PRD’).⁷

3. Transposition of the PRD into Ukrainian law is imminent for two reasons: (1) on 23 June 2022 the European Council officially granted Ukraine the candidate status for EU membership.⁸ Thus, the country must transpose the Directive as part of the EU *acquis*. (2) conditions of providing EU’s micro-financial aid to Ukraine explicitly require *“Improving the regimes of bankruptcy of legal entities (corporate bankruptcy) and insolvency of individuals by preparing legislation allowing individuals a full discharge of debt in line with the main principles of Directive EU 2019/1023 on preventive restructuring frameworks, and by adopting a roadmap for capacity building activities to support the implementation of the bankruptcy code”* by the end of Q3 2023.⁹

2. Current state of play

2.1. Ukrainian scheme of arrangement – Art. 5 of the Code of Bankruptcy Procedures

4. Preventive restructuring is not a new concept for Ukraine. Certain elements like those in the PRD can be found in Art. 5 of the Code of Ukraine on Bankruptcy Procedures (hereinafter – ‘BCU’)¹⁰ setting out procedures for the so-called

6 Commission, ‘Staff working document Ukraine 2023 Report Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2023 Communication on EU Enlargement policy’ SWD/2023/699 final, p. 80.

7 [2019] OJ L172/18.

8 European Council, ‘Meeting (23 and 24 June 2022) – Conclusions’ EUCO 24/22, para. 11; Commission (n 6) 28.

9 Memorandum of Understanding between the European Union as Lender and Ukraine as Borrower of 16 January 2023 – Instrument for providing support to Ukraine for 2023 (micro-financial assistance+) of up to EUR 18 billion, Annex I, section B <https://economy-finance.ec.europa.eu/system/files/2023-01/Memorandum%20of%20Understanding_EU-UA.pdf> accessed 17 April 2024.

10 Code of Ukraine on Bankruptcy Procedures of 18 October 2018 (in force since 21 October 2019).

'rehabilitation of a debtor prior to opening of bankruptcy proceedings' (*sanatsiia borzhnyka do porushennia spravy pro bankrutstvo*) sometimes referred to as the 'pre-trial rehabilitation' (*dosudova sanatsiia*).¹¹ The Code defines the procedure as "a system of measures to recover the debtor's solvency, which can be carried out by a founder (participant, shareholder) of a debtor, the owner of the property (a body authorised to manage the property) of a debtor, and other persons, in order to prevent the debtor's bankruptcy by taking organisational and business, managerial, investment, technical, financial and economic, legal measures in accordance with the legislation prior to the opening of bankruptcy proceedings."¹²

5. The existing Ukrainian terminology is somewhat confusing and often misleads both debtors and creditors. It conflates the rehabilitation of a debtor before the commencement of bankruptcy proceedings with the debtor's rehabilitation (*sanatsiia borzhnyka*) as an alternative to liquidation after the commencement of bankruptcy proceedings.¹³ Another issue arises with the proper translation of the term '*dosudova sanatsiia*' into English, which has been rendered as 'pre-trial rehabilitation',¹⁴ 'pre-trial restructuring',¹⁵ 'preventive rescue proce-

11 The term itself was coined in the old bankruptcy legislation that preceded the BCU. The abbreviated version can often be found in court decisions (mentioned in this writing), reports, scholarly publications etc. See, for example, Postanova Plenumu Vyschchoho Hospodarskoho Sudu Ukrainy No. 15 vid 17 hrudnia 2013 roku "Pro zatverdzhennia Polozhennia pro poriadok provedennia sanatsii do porushennia provadzhennia u spravi pro bankrutstvo" [Resolution of the Plenum of the Higher Commercial Court of Ukraine No. 15 of 17 December 2013 on Approving Regulations on Restructuring Prior to the Opening of Bankruptcy Proceedings] para 1.3 *et seq.* (no longer in force) <<https://zakon.rada.gov.ua/laws/show/v0015600-13#Text>> accessed 17 April 2024; Postanova Verkhovnoho Sudu Ukrainy vid 26 sichnia 2022 roku u spravi No. 910/965/21 [Decision of the Supreme Court of Ukraine of 26 January 2022 in case No. 910/965/21] <<http://iplex.com.ua/doc.php?regnum=103281542&red=100003f94d-b00a96e7aa1200660f4604beb3ec&d=5>> accessed 17 April 2024; Arne Engels, Oleksandr Biriukov & Roman Chumak, *Protsedury bankrotstva v Ukraini: porivnialny analiz (II). Lypen 2019 – serpen 2020, proekt dokumenta 25_2020/09/06 [Bankruptcy Procedures in Ukraine: Comparative Analysis (II). July 2019 – August 2020, Draft Document 25_2020/09/06]*, (Pravo Justice 2020), p. 69; <<https://www.pravojustice.eu/storage/app/uploads/public/5ff/c3b/b1d/5ffc3bb1d2c95028982223.pdf>> accessed 17 April 2024.

12 BCU, Art. 4(5). Definition from the official English translation of the BCU <<https://zakon.rada.gov.ua/laws/show/2597-19?lang=en#Text>> accessed 17 April 2024.

13 This procedure is covered by BCU, Arts. 50 – 57.

The problem of the existing terminology had been pointed out by experts. See, for example, Engels, Biriukov & Chumak, n 11 *supra*; Oleksiy Kononov, 'Post-War Economic Recovery of Ukraine: What Role Could the EU Preventive Restructuring Directive 2019/1023 Play for the Ukrainian Small and Medium-Sized Enterprises?' (2023) 97(4) *The American Bankruptcy Law Journal* 801 (note 186).

14 The term is used in the official English translation of the BCU, n 12 *supra*.

15 'Restructuring across borders – Ukraine' (Allen & Overy January 2022) <https://www.allenoverly.com/global/-/media/allenoverly/2_documents/practices/restructuring/pdf_updates_301023/ukriane.pdf?rev=7c1278c513c749999cd8b8226afa19ae> accessed 17 April 2024; Kononov (n 13).

dure,¹⁶ ‘pre-insolvency rehabilitation,’¹⁷ to name a few. To eliminate confusion, the existing procedure under Art. 5 of the BCU will be referred to as ‘pre-trial restructuring’ unless explicitly stated otherwise in the text.

6. In sum, the current Ukrainian pre-trial restructuring under Art. 5 of the BCU resembles “*the English scheme of arrangement under the UK Companies Act and embraces some features of the Chapter 11 US Bankruptcy Code restructuring procedure,*”¹⁸ yet it is much less structured and less developed compared to its UK and US analogues.¹⁹ In other words, the existing procedure under Art. 5 of the BCU represents a restructuring arrangement between the debtor and creditors under strict judicial control.²⁰ Before applying with a commercial court, the debtor must develop the restructuring plan and have it approved by creditors.²¹ The court verifies compliance with the BCU, reviews creditors’ objections (if any), exercises oversight over the restructuring which is manifested in its powers regarding the suspension of the restructuring administrator from performing their duties, replacement of the administrator, making changes to the restructuring plan, consideration of debtor or creditor applications for termination of the restructuring procedure in case of violation of the plan execution, and applications for approval of the report on the implementation of the restructuring plan, etc.²²

2.2. Financial restructuring

7. The Law on Financial Restructuring of 14 June 2016²³ was adopted with the aim of addressing the issue of non-performing loans (NPLs). It enables debtors who have substantial financial indebtedness to at least one financial institu-

16 Olha Stakheyeva-Bogovyk, ‘New Bankruptcy Code of Ukraine: What to Expect’ (2019) 26 Eurofenix <<https://www.insol-europe.org/download/documents/1585>> accessed 17 April 2024.

17 ‘Business Reorganisation Assessment – Ukraine’ (EBRD, 2022) 4 <[https://ebrd-restructuring.com/storage/uploads/documents/13472%20EBRD%20\(Ukraine%20Country%20Profile%20ARTWORK\).pdf](https://ebrd-restructuring.com/storage/uploads/documents/13472%20EBRD%20(Ukraine%20Country%20Profile%20ARTWORK).pdf)> accessed 17 April 2024.

18 Stakheyeva-Bogovyk (n 16).

19 For more information on the procedure, relevant Ukrainian case-law, and problems with its practical application see Kononov (n 13) 796–822.

20 Postanova Kasatsiinoho hospodars’koho sudu Verkhovnoho Sudu Ukraïny vid 10 serpnia 2023 roku u spravi No. 911/166/23 [Decision of the Cassation Commercial Court within the Supreme Court of Ukraine of 10 August 2023 in case No. 911/166/23], para 47 <https://protocol.ua/ua/postanova_kgs_vp_vid_10_08_2023_roku_u_spravi_911_166_23/> accessed 17 April 2024.

21 This also explains the pre-trial (*dosudovy*) component in the name of the procedure itself.

22 N 20.

23 Zakon Ukraïny “Pro finansovu restrukturizatsiiu” vid 14 chervnia 2016 roku, Vidomosti Verkhovnoi Rady Ukraïny (VVRU), 2016, No. 32, Item 555.

tion and whose businesses are considered financially distressed yet viable to undergo financial restructuring (*finansova restrukturyzatsiia*). This process is entirely consensual.²⁴ It is important to emphasize that financial restructuring is exclusively available to businesses with significant NPLs and is applicable solely to claims by financial institutions, predominantly banks.²⁵ Businesses with outstanding debts to suppliers, the tax office, etc., are not eligible for this procedure.

2.3. Current problems

8. One of the most notable distinctions between the Ukrainian pre-trial restructuring procedure and the preventive restructuring defined in the PRD is that pre-trial restructuring, as articulated in Art. 5 of the BCU, functions primarily as a mechanism to compel creditors toward rehabilitation or restructuring without establishing a communication framework between creditors and the debtor concerning measures to restore solvency.²⁶ To elaborate, once the debtor submits a draft restructuring plan to creditors, the draft cannot be changed or amended in any way. If any creditor objects, the plan is either not approved, or the debtor must incorporate amendments and resubmit the plan to creditors, initiating the entire approval procedure anew. The debtor and creditors cannot negotiate prior to voting on the plan; the existing wording of the BCU simply does not allow for such negotiations. These communication ‘deficiencies’ posed challenges during recent efforts made by a major Ukrainian electronics retail chain, ELDORADO (the debtor), to obtain approval for a pre-trial restructuring plan. Despite initially securing approval from 300 unsecured creditors and subsequently applying to the Kyiv Commercial Court for plan sanctioning, objections arose from several creditors. They contended that the voting process for plan approval lacked transparency and highlighted numerous procedural violations during the creditors’ meeting. As a result, the court ruled against the approval of the restructuring plan.²⁷

24 For more information on the procedure see Gordon W. Johnson, Olexander Droug & Konstantin Penskoj, *Guide to Law on Financial Restructuring of Business in Ukraine* (Kyiv, Master Druk 2018).

25 Law on Financial Restructuring, Arts. 1(1)(5), and 4(1).

26 Poiasniuvai'na zapyska do zakonoproektu No. 10143 vid 12 zhovtnia 2023 roku [Explanatory Note to Bill No. 10143 of 12 October 2023] (12 October 2023) <<https://itd.rada.gov.ua/billInfo/Bills/pubFile/2025003>> accessed 17 April 2024.

27 Ukhvala Hospodars'koho Sudu mista Kyieva vid 30 lystopada 2023 roku u spravi No. 910/15087/23 [Ruling of the Commercial Court of the City of Kyiv of 30 November 2023 in case No. 910/15087/23] <<https://opendatabot.ua/court/115969380-cbd7bfb563b15d97c69141a06863d284>> accessed 17 April 2024.

9. Communication problems as well as the complexity of the procedure, inconsistencies in the wording of BCU Art. 5, ignorance about the procedure itself within business circles, bankruptcy stigma, low trust in the Ukrainian judiciary did contribute to low popularity of pre-trial restructuring.²⁸ Between 2019 and late 2023, only 14 pre-trial restructuring plans were approved by Ukrainian courts.²⁹ The comparison between restructuring under the BCU and the Law on Financial Restructuring suggests a notably higher utilization of the latter, with 63 cases registered between 2017 and 2023. Notably, from 2017 until late 2021, non-performing loans (NPLs) amounting to UAH 72.3 billion³⁰ underwent the financial restructuring procedure. Following the full-scale Russian invasion on February 24, 2022, ten new cases emerged, with nine occurring in 2022 and one in 2023.³¹
10. Nevertheless, the ‘popularity’ of financial restructuring remains questionable due to various reasons. Firstly, the eligibility criteria for debtors are limited. Secondly, registered cases predominantly involve NPLs related to large and medium-sized enterprises located in major Ukrainian cities. Thirdly, there exists a lack of trust in the procedure from the perspectives of both debtors and creditors. Lastly, the intricate nature of the process necessitates professional counsel, adding another layer of complexity to its utilization.³²

3. Reforms

3.1. Capacity-building roadmap

11. On 26 September 2023, the Ukrainian Ministry of Justice adopted the Roadmap for Capacity-Building Activities designed to facilitate the implementation

28 Kononov (n 13) 819 – 822.

29 The data is based on published court decisions approving pre-trial restructuring plans. The number can be inaccurate and in fact lower due to non-publication of any official data on the subject by the Department of Bankruptcy, Ministry of Justice of Ukraine. Besides, it is not uncommon for the Supreme Court to quash decisions of trial courts approving pre-trial restructuring plans many months after the approval by the trial court.

30 Approx. USD 2.67 billion (according to the pre-war exchange rate).

31 Financial Restructuring Secretariat, Publications on the Procedure of Financial Restructuring <<https://fr.org.ua/en/publikatsiyi-po-protseduri-finansovoyi-restrukturizatsiyi.html>> accessed 17 April 2024.

32 Kononov (n 13) 827–828; Iurii Moiseiev, ‘Pozychalnyky i kredytory poku shcho ne doviriayut’ mekhanizmu restrukturyzatsii’ [‘Lenders and Creditors Have Been Skeptical about the Mechanism of Debt Restructuring This Far’] (*Ligroup.com.ua*, 20 May 2021) <https://www.ligroup.com.ua/yurij-moiseyev-pozychalnyky-j-kredytory-poky-ne-doviryayut-mehanizmu-restrukturyzatsiyi-borgiv/#pll_switcher> accessed 17 April 2024.

of the Code of Ukraine on Bankruptcy Procedures.³³ This roadmap includes various measures aimed at improving the application of the BCU and aligning Ukrainian law with the EU's legal framework. Notable measures within the roadmap involve organizing educational events tailored for Ukrainian judges and insolvency practitioners, compiling comprehensive reports, and conducting in-depth examinations of the experience and statistical data from EU Member States in the domain of preventive restructuring.

3.2. Bills transposing the PRD

12. On 12 October 2023, in the Parliament of Ukraine (*Verkhovna Rada*) a group of MPs from the ruling Servant of the People party introduced a Bill aimed at implementing the PRD ('Bill #10143' or 'the Bill').³⁴ Subsequently, on 10 November 2023, the Cabinet of Ministers of Ukraine presented its own bill concerning the same subject ('Bill #10228' or 'the Alternative Bill').³⁵ Already on 9 November 2023, the Parliamentary Committee for Economic Development (chaired by MPs from the ruling party) recommended the adoption of Bill #10143 in the first reading.³⁶ This article will primarily focus on the details of the latter Bill, given the recommendations by the lead parliamentary committee and exten-

33 Dorozhnia karta shchodo diial'nosti z rozbudovy potentsialu dlia pidtrymky vprovadzhennia Kodeksu Ukraïny z protsedur bankrutstva, zatverdzhena nakazom Ministerstva iustytzii Ukraïny No. 3427/5 vid 26 veresnia 2023 roku <<https://minjust.gov.ua/news/ministry/minyust-zatverdiv-doroinyu-kartu-u-sferi-bankrutstva>> accessed 17 April 2024.

34 Proekt No. 10143 pro vnesennia zmin do Kodeksu Ukraïny z protsedur bankrutstva ta inshykh zakonodavchykh aktiv Ukraïny shchodo implementatsii Direktyvy levropeiskoho parlamentu ta Rady levropeiskoho Soïuzu 2019/1023 ta zaprovadzhennia protsedur preventyvnoi restrukuryzatsii [Bill # 10143 of 12 October 2023 on amending of the Code of Ukraine on bankruptcy procedures and other legislative acts of Ukraine regarding the implementation of Directive 2019/1023 of the European Parliament and the Council of the European Union and the introduction of preventive restructuring procedures] <<https://itd.rada.gov.ua/billInfo/Bills/pubFile/2025002>> accessed 17 April 2024. The text of the bill was drafted by lawyers representing the debtor (ELDORADO) in case No. 910/15087/23 (n 27).

35 Proekt No 10228 vid 8 lystopada 2023 roku pro vnesennia zmin do deiakykh zakonodavchykh aktiv Ukraïny shchodo vdoskonalennia preventyvnykh protsedur ta zapobihannia bankrutstvu [Bill #10228 of 8 November 2023 on amending some legislative acts of Ukraine regarding the improvement of preventive procedures and prevention of bankruptcy] (text presented on 10 November 2023) <<https://itd.rada.gov.ua/billInfo/Bills/pubFile/2064509>> accessed 17 April 2024.

36 Vysnovok na proekt Zakonu Ukraïny pro vnesennia zmin do Kodeksu Ukraïny z protsedur bankrutstva ta inshykh zakonodavchykh aktiv Ukraïny shchodo implementatsii Direktyvy levropeiskoho parlamentu ta Rady levropeiskoho Soïuzu 2019/1023 ta zaprovadzhennia protsedur preventyvnoi restrukuryzatsii [Opinion on Bill # 10143 on amending of the Code of Ukraine on bankruptcy procedures and other legislative acts of Ukraine regarding the implementation of Directive 2019/1023 of the European Parliament and the Council of the European Union and the introduction of preventive restructuring procedures] (Parliamentary Committee for Economic Development, 9 November 2023) <<https://itd.rada.gov.ua/billInfo/Bills/pubFile/2064454>> accessed 17 April 2024.

sive discussion among stakeholders. Any significant discrepancies found in the Alternative Bill will be briefly mentioned.

13. In the Explanatory Note accompanying Bill #10143, the drafters underscored several deficiencies within the current regulations governing pre-trial restructuring. They highlighted the lack of practical clarity in their application, numerous contradictions with other provisions of the BCU, and the absence of clear guarantees for both debtors and creditors. These shortcomings hindered the secure restructuring of debts before the initiation of bankruptcy proceedings.³⁷ In addition to that, The Explanatory Note highlights discrepancies in the current BCU wording on pre-trial restructuring compared to the PRD. According to the Note, the BCU lacks critical requirements including:
- State authorities'³⁸ responsibilities beyond statistical reporting, encompassing practical aid for SMEs in restructuring (early warning tools, templates, guidance);
 - Processes for obtaining and safeguarding 'interim' and 'new' financing crucial for restructuring;
 - Involvement and rights of debtor employees and equity holders in the restructuring process;
 - Protecting debtor rights during restructuring (enforcing a stay on enforcement actions, prohibiting bankruptcy initiation);
 - Securing creditors' rights (information access, expert appointment, safeguards against abuse, verification of creditor claims, and bankruptcy petition rights);
 - Preventing creditors from abusing their rights to refuse approval a restructuring plan, when such a plan is economically advantageous compared to bankruptcy proceedings or the absence of such a plan, and ensuring the restructuring of obligations of *bona fide* debtors.³⁹

3.2.1. *General approach of the reform*

14. Unlike the strategy adopted by certain EU Member States,⁴⁰ Bill #10143 diverges in its approach to transpose the PRD into Ukrainian law. Instead of proposing the creation of a distinct law exclusively dedicated to preventive restructuring, separate from the existing bankruptcy regulations, the Bill

37 Explanatory Note to Bill No. 10143 (n 26).

38 As of this writing, this is the Bankruptcy Department under the Ministry of Justice of Ukraine.

39 Explanatory Note to Bill No. 10143 (n 26).

40 For example, Estonia, Finland, Germany, Hungary, Luxembourg, or Sweden.

advocates for amending the BCU. Specifically, it suggests revising Articles 4⁴¹ and 5 while introducing 19 new articles⁴² that specifically address preventive restructuring. If approved, this alteration would transform the structure of the BCU. Rather than featuring a single lengthy Art. 5 with its 11 paragraphs, the revised Code will adopt a well-organized section entirely devoted to preventive restructuring with specific options available to micro and small enterprises. The Alternative Bill transposes the minimum requirements of the PRD and is less advanced compared to Bill #10143.

15. Bill #10143 carries particular significance by introducing the concept of preventive restructuring (*preventyvna restrukturyzatsiia*)⁴³ and aims to resolve terminological discrepancies within the existing framework of the BCU described in para 5 above. It specifically targets the confusion between pre-trial restructuring⁴⁴ and restructuring conducted after the initiation of bankruptcy proceedings,⁴⁵ offering an alternative avenue to liquidating the debtor. This clarification is pivotal since the terminological ambiguity often dissuades potential debtors – those who might be eligible for pre-trial restructuring – and might help alleviate the stigma associated with bankruptcy.
16. The current wording of the BCU's Art. 5 specifically addressing pre-trial restructuring, lacks any definition or description of the circumstances under which the procedure can be initiated. Instead, in practice the debtors rely on the general rules for triggering bankruptcy procedures under the Code,⁴⁶ despite pre-trial restructuring being considered a measure to prevent bankruptcy.⁴⁷

To be able to initiate pre-trial restructuring (and any other procedure under the BCU for that matter) the debtor must be in a situation when the satisfaction of claims of one or several creditors will lead to the impossibility of fulfilling the debtor's monetary obligations in full to other creditors (*zahroza neplatospromozhnosti* – risk of insolvency).⁴⁸ In 2020, due to the absence of specific criteria for initiating proceedings under the BCU, the Supreme Court

41 Art. 4 provides an outline of various measures aimed at preventing bankruptcy.

42 Arts. 5-1 – 5-19.

43 Bill #10143, Art. 4(5).

44 BCU, Art. 5.

45 BCU, Art. 6(1), Arts. 50 – 57.

46 BCU, Art. 34.

47 BCU, Art. 4(5). In practical terms it is common in Ukraine to address all procedures under the BCU, including pre-trial restructuring, as “bankruptcy proceedings.”

48 BCU, Art. 34(6).

intervened, clarifying that any failure to meet a monetary obligation constitutes a valid reason to commence proceedings under the Code. This holds true even in cases where there has been no prior attempt to pursue legal action against the debtor.⁴⁹ In 2021, the Supreme Court acknowledged the practical challenges in determining the state in which the debtor is at risk of becoming insolvent, and clarified that the following legal facts must be present simultaneously:

- (1) the existence of obligations of the debtor to at least two creditors, the deadline for the performance of which has expired and is determined by the rules of the law regulating the respective legal relations (sales, supply, subcontracting, loans, budget relations, taxes, etc.);
 - (2) the total assets of the debtor must be less than the total obligations (with expired deadlines) to all creditors as specified by relevant laws governing various legal relations (e.g., sales, loans). The debtor's overall financial condition, including fixed assets, accounts receivable, and obligations with expired deadlines, clearly indicates an inability to satisfy obligations to all creditors, whose deadlines have passed, neither voluntarily nor in accordance with the law.⁵⁰
17. In line with the PRD's 'likelihood of insolvency',⁵¹ both Bill #10143 and Bill #10228 aim to clarify the concept of the 'risk of insolvency.' According to Bill #10443, the 'risk of insolvency' pertains to the financial and economic condition of the debtor. It is evidenced by circumstances indicating the debtor's inability to meet monetary obligations or fulfill regular current payments within the specified timeframe for such obligations.⁵² This clarification may indeed prove instrumental in averting potential misunderstandings and better addressing future cases.

49 Postanova Verkhovnoho Sudu Ukraïny vid 3 chervnia 2020 roku u spravi No. 905/2030/19 [Decision of the Supreme Court of Ukraine of June 3, 2020 in case No. 905/2030/19], paras 28 – 29 <https://verdictum.ligazakon.net/document/89707066?utm_source=biz.ligazakon.net%20&utm_medium=news&utm_content=bizpress01> accessed 17 April, 2024.

50 Postanova Verkhovnoho Sudu Ukraïny vid 15 chervnia 2021 roku v spravi No. 910/2971/20 [Decision of the Supreme Court of Ukraine of 15 June 2021 in case No. 910/2971/20], para. 7.6 <<https://verdictum.ligazakon.net/document/97903200>> accessed 17 April 2024.

51 PRD, recitals 24, 79, 96, Arts. 1(1)(a), 2(2)(b), 3(1), 4(1), 19.

52 Bill #10143 inserts the respective definition in the BCU, Art. 1. Bill #10228 contains a similar definition, but it refers to inability to fulfill obligations within the next three months.

18. Bill #10143 specifies the parties involved in preventive restructuring, identifying the debtor, creditors, employees, equity holders, and the property owner (the entity authorized to manage the debtor's property) as the parties to preventive restructuring.⁵³ The Bill delineates the distinction between affected and unaffected parties based on their inclusion in the preventive restructuring plan and the impact of the plan on their claims, rights, or interests.⁵⁴ Under the Bill, affected parties include creditors with monetary claims against the debtor, whether the deadlines for these claims have passed before the opening of the preventive restructuring procedure or are scheduled to occur during the procedure, including secured creditors. Additionally, it encompasses creditors with a vested interest in the debtor, employees, and equity holders whose claims, rights, or interests undergo alteration due to the preventive restructuring plan.⁵⁵ These defined categories lack equivalents in the current wording of Art. 5 of the BCU, signifying a departure from the existing framework in terms of outlining parties involved and affected by the restructuring process.
19. Aligned with the principles of the PRD, Bill #10143 introduces a range of opt-in/opt-out provisions tailored for micro- and small-sized enterprises,⁵⁶ acknowledging their vulnerability to insolvency and their limited financial and informational capabilities for managing restructuring processes. Notably, the Bill omits any explicit provisions for medium-sized enterprises,⁵⁷ focusing primarily on

53 Art. 5(7) in the wording proposed by Bill #10143.

54 *ibid.*

55 Art. 5-9(1) subpara. 4.

56 The Economic Code of Ukraine (ECU), Art. 55(3), introduces definitions depending on the number of employees and gross income from any annual activities.

- Micro-enterprises shall be those who have an average number of employees during the reporting period (calendar year) not exceeding 10 persons and annual income from any activity not exceeding the amount equivalent to EUR 2 million, determined according to the yearly average exchange rate of the National Bank of Ukraine (NBU).

- Small enterprises shall be deemed those who have an average number of employees during the reporting period (calendar year) not exceeding 50 persons and annual income from any activity not exceeding the amount equivalent to EUR 10 million, determined according to the NBU's yearly average exchange rate.

See Economic Code of Ukraine of 16 January 2003 (official English translation as amended) (26 May 2021), Art. 55(3) <<https://zakon.rada.gov.ua/laws/show/436-15?lang=en#Text>> accessed 17 April 2024. Ukrainian definitions comply with the EU's classification available in Commission, 'Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises' C(2003) 1422 [2003] OJ L 124/36.

57 Medium-sized enterprises shall be deemed all those not meeting the criteria for micro- or small enterprises with an average number of employees during the reporting period (calendar year) up to 250 persons and annual income from any activity not exceeding the amount equivalent to EUR 50 million determined according to the NBU's yearly average exchange rate. See ECU, Art. 55(3).

the most vulnerable categories (micro- and small). Conversely, the Alternative Bill does not propose any specific measures or tailored options for smaller businesses, lacking the specialized treatment offered by Bill #10143 to address the unique challenges faced by micro- and small-sized enterprises.

3.2.2. *Early warning tools – Art. 3 of the PRD*

20. The concept of early warning is not novel within Ukrainian law. Under the current wording of the BCU, distressed company management is obligated to inform equity holders of a debtor or the property owner (an institution authorized to manage the property)⁵⁸ about any indications of impending bankruptcy.⁵⁹ Subsequently, equity holders or the property owner are required to undertake essential measures to forestall bankruptcy,⁶⁰ with pre-trial restructuring identified as one potential measure among others.

21. Bill #10143 aims to amend existing provisions to improve their clarity. Notably, alongside the debtor's management, state and municipal authorities will also be held accountable for promptly implementing measures to prevent the debtor's insolvency.⁶¹ Moreover, in alignment with the PRD,⁶² the Bill appears to adopt a German-inspired approach toward early warning mechanisms.⁶³ It mandates auditors,⁶⁴ accountants, and lawyers offering professional services to the debtor to notify the debtor's manager upon detecting any indications of insolvency.⁶⁵ Subsequently, the manager is required to inform the owners.⁶⁶ The owners or an authorized institution managing the debtor's assets are then obligated to take preventive measures to avert insolvency. These measures may involve initiating preventive restructuring proceedings or submitting a petition to commence bankruptcy procedures.⁶⁷

58 Normally those cover state-owned and municipal enterprises. The State Property Fund of Ukraine or a respective ministry can exercise management of state-owned enterprises. Municipal authorities at the level of local communities can decide who will manage municipal property.

59 BCU, Arts. 4(2), 34(6).

60 BCU, Art. 4(1).

61 Bill #10143, Art. 4(1).

62 Art. 3.

63 Unternehmensstabilisierungs- und -restrukturierungsgesetz [StaRUG], Dec. 22, 2020, BGBl. I S. 3256 as amended by Gesetz [G], Aug. 10, 2021, BGBl. I S. 3436, § 102.

64 This obligation is based on International Standards on Auditing. See International Standard on Auditing (ISA) 570 (Revised), Going Concern <<https://www.ifac.org/system/files/publications/files/ISA-570-%28Revised%29.pdf>> accessed 17 April 2024.

65 Bill #10143, Art. 4(2).

66 Bill #10143, Art. 4(3).

67 *ibid.*

Furthermore, a new provision proposed by Bill #10143 stipulates that both creditors and the debtor's employees have the right to request the debtor to initiate preventive restructuring.⁶⁸ Upon receiving such a request, the debtor is required to assess it and provide a reasoned response.⁶⁹

22. While the Bill introduces innovative warning mechanisms, which mark a progressive step within Ukrainian law, certain limitations and uncertainties are evident. Firstly, there's a lack of clarification regarding the specific timeframe within which professionals like lawyers, upon detecting signs of insolvency, should notify the debtor (its owner, shareholders etc.), and similarly, the obligation for the debtor's management to inform the owner remains unspecified. Secondly, the consequences or actions resulting from the failure to fulfil the obligation to notify the debtor remain unclear and unspecified in the Bill.⁷⁰ It is not helpful at all given that the national company law does not provide any answers either. These aspects necessitate further specification and definition for the effective implementation of the proposed warning tools. Furthermore, the applicability of warnings from auditors, accountants, lawyers, etc., raises questions concerning their relevance for smaller businesses. Micro and small-sized enterprises often operate without external services due to their small turnovers. In many cases, accounting and financial reporting are managed by the owner-manager. These businesses might benefit more from online tools provided by the Ministry of Justice (as mentioned below).

68 Bill #10143, Art. 5(2).

69 *ibid.*

70 The issue was highlighted in the assessments of Bill #10143 conducted by the Parliamentary Committee for European Integration and the Main Scientific and Expert Department of the *Verkhovna Rada* of Ukraine. See *Vysnovok na proekt Zakonu pro vnesennia zmin do Kodeksu Ukrainy z protsedur bankrutstva ta inshykh zakonodavchykh aktiv Ukrainy shchodo implementatsii Direktyvy levropeiskoho parlamentu ta Rady levropeiskoho Soiuzu 2019/1023 ta zaprovadzhennia protsedur preventyvnoi restrukturyzatsii (reistr N. 10143)* [Opinion on Bill # 10143 on Amending the Code of Ukraine on Bankruptcy Procedures and Other Legislative Acts of Ukraine Regarding the Implementation of Directive (EU) 2019/1023 of the European Parliament and of the Council and Introducing the Preventive Restructuring Procedures], Main Scientific and Expert Department of the *Verkhovna Rada* of Ukraine (6 November 2023), at 2-3 <<https://itd.rada.gov.ua/billInfo/Bills/pubFile/2060462>> accessed 17 April 2024; *Vysnovok shchodo projektu Zakonu pro vnesennia zmin do Kodeksu Ukrainy z protsedur bankrutstva ta inshykh zakonodavchykh aktiv Ukrainy shchodo implementatsii Direktyvy levropeiskoho parlamentu ta Rady levropeiskoho Soiuzu 2019/1023 ta zaprovadzhennia protsedur preventyvnoi restrukturyzatsii (reistr N. 10143)* [Opinion on Bill # 10143 on Amending the Code of Ukraine on Bankruptcy Procedures and Other Legislative Acts of Ukraine Regarding the Implementation of Directive (EU) 2019/1023 of the European Parliament and of the Council and Introducing the Preventive Restructuring Procedures], Parliamentary Committee for European Integration (8 December 2023), at 2 <<https://itd.rada.gov.ua/billInfo/Bills/pubFile/2116258>> accessed 17 April 2024.

The same is true with Bill #10228.

3.2.3. *Broader authority of the Ministry of Justice. On-line tools – Arts. 3, 8(2), 29 of the PRD*

23. Bill #10143 expands the jurisdiction of the Ministry of Justice,⁷¹ assigning it crucial responsibilities for bankruptcy prevention. These responsibilities include:
- (1) Formulating and implementing state policies aimed at preventing debtors' insolvency, including those undergoing preventive restructuring procedures;
 - (2) Ensuring the creation and maintenance of a web portal dedicated to preventing insolvency;
 - (3) Creating and sanctioning a template preventive restructuring plan tailored for micro- and small-sized enterprises;⁷²
 - (4) Setting forth the procedure and deadlines for preventive restructuring administrators, as well as for managers of debtors, to submit necessary data required for maintaining the insolvency prevention web portal;
 - (5) Developing and authorizing standardized documents pertinent to preventive restructuring procedures, in addition to providing methodological recommendations;⁷³
 - (6) Collecting, processing, transmitting information according to the PRD;⁷⁴
 - (7) Exercising other functions as mandated by law.⁷⁵

Given the need to educate stakeholders about preventive restructuring and tools to prevent insolvency, the importance of these provisions of the Bill can hardly be overestimated. Aligned with the PRD,⁷⁶ these provisions signify a crucial step forward. The Ministry of Justice, equipped with its capabilities, stands well-prepared for this task. Notably, it already deals with matters related to insolvency/bankruptcy such as insolvency practitioners and their training, and maintaining the register of enterprises under bankruptcy proceedings.

71 The Bill uses the term 'the state body in charge of bankruptcy prevention,' avoiding direct mention of the Ministry of Justice due to the historical transfer of bankruptcy-related responsibilities. These functions, such as training administrators and aiding judges in bankruptcy cases, shifted between the Agency on Prevention of Bankruptcy, the Ministry of Economy, and currently reside with the Bankruptcy Department under the Ministry of Justice of Ukraine. The Ministry's Directorate for Justice and Criminal Justice shapes bankruptcy policy and oversees its implementation. However, there's a possibility of these duties moving to another ministry or executive agency in the future.

72 No similar provision in Bill #10228.

73 Bill #10143, Art. 3(2).

74 Bill #10143, Art. 3(4).

75 Bill #10143, Art. 3(2).

76 Art. 3(1).

The transposition of the PRD will not therefore be something completely new for the ministry and the officials concerned.

24. Ukraine has demonstrated leadership in Europe since 2020 by implementing diverse digital solutions catering to businesses, from online license applications to addressing reporting and tax-related issues.⁷⁷ Preventive restructuring now emerges as another promising area for innovative digital solutions. Bill #10143 outlines a general framework, emphasizing the establishment of a dedicated web portal focused on preventing insolvency. This portal will offer information on early warning tools provided by public authorities,⁷⁸ details about preventive restructuring measures and procedures, and comprehensive guidance tailored for developing preventive restructuring plans specifically attuned to the needs of micro- and small-sized enterprises.⁷⁹

3.2.4. Opening the procedure. Restructuring plan – Arts 1, 4, 8, 17 of the PRD

25. Both Bill #10143⁸⁰ and Bill #10228⁸¹ grant debtors the option to employ procedures resembling the existing pre-trial restructuring in cases where the debtor already possesses a restructuring plan approved by creditors before applying to court. However, instead of mandating the submission of a plan pre-approved by creditors to the commercial court to initiate pre-trial restructuring, both bills propose that debtors can present a draft restructuring plan. This draft plan can be negotiated with creditors subsequent to the court's opening the preventive restructuring procedure. It may also undergo modifications before obtaining final approvals from both creditors and the court.⁸² Notably, in contrast to the current BCU wording, Bill #10143 specifies highly detailed requirements for the contents of the restructuring plan, aligning with the stipulations set forth in the PRD⁸³ (see Table 1 below).

77 Kononov (n 13) 831–832; Cat Zakrzewski, Gerrit De Vynck, 'The Ukrainian Leader Who Is Pushing Silicon Valley to Stand Up to Russia' *The Washington Post* (Washington, D.C., 2 March 2022) <<https://www.washingtonpost.com/technology/2022/03/02/mykhailo-fedorov-ukraine-tech/>> accessed 17 April 2024; Tom Simonite, Gian M. Volpicelli, 'Ukraine's Digital Ministry Is a Formidable War Machine' (*Wired*, 17 March 2022) <<https://www.wired.com/story/ukraine-digital-ministry-war/>> accessed 17 April 2024.

78 It remains unclear whether those warning tools are to be provided only for debtors representing state-owned and/or municipal enterprises or will be available for all businesses regardless of ownership.

79 Bill #10143, Art. 3(3).

80 Art. 5-18.

81 Art. 4-1.

82 Bill #10143, Arts. 5-3(2), 5-9(10), 5-11; Bill #10228, Arts. 4-2(1), 5, 5-1.

83 Art. 8(1).

Table 1. Contents of the pre-trial restructuring plan (BCU, Art. 5) vs. contents of the preventive restructuring plan (Bill #10143, Art. 5-9)

The pre-trial restructuring plan must contain:	The preventive restructuring plan must contain the following information:
<ul style="list-style-type: none"> (1) The amounts, procedure, and timelines for settling the claims of creditors participating in the restructuring; (2) Measures for implementing the restructuring plan⁸⁴ and monitoring its execution; (3) The extent of the powers of the restructuring administrator (if appointed). 	<ul style="list-style-type: none"> (1) The debtor, his financial condition, reasons for insolvency, or threat of insolvency; (2) Monetary obligations of the debtor, the deadlines for which have elapsed before the opening of the preventive restructuring or will occur during the procedure. This includes obligations secured by the debtor's assets, obligations to creditors interested in the debtor, and obligations to employees, specifying the amount of penalties, fines, or other financial sanctions for breaching these obligations; (3) Other non-monetary obligations of the debtor that significantly affect the debtor's assets; (4) The affected parties; (5) Classes into which the affected parties are divided and the amount of claims for each class of creditors;
<p>The pre-trial restructuring plan may contain:</p> <ul style="list-style-type: none"> (1) categorization of participating creditors based on the nature of their claims and the presence (or absence) of collateral securing their claims; 	

84 According to the BCU, Art. 51(2), those measures can be:

- 1) enterprise restructuring (the implementation of organizational, business, financial and economic, legal, technical measures aimed at reorganizing the enterprise, in particular, by splitting it off, with the transfer of debt obligations to a legal entity not subject to rehabilitation, at changing type of ownership, management, organizational and legal form that will contribute to the financial recovery of the enterprise, increase in production efficiency, increase in the volume of competitive products, and to full or partial satisfaction of creditors' claims);
- 2) production conversion;
- 3) closure of unprofitable productions;
- 4) extension of a period for or postponement, or cancellation (write-off) of debts or part thereof;
- 5) fulfilment of the debtor's obligations by third parties;
- 6) other means to satisfy creditors' claims that does not contradict the BCU;
- 7) liquidation of receivables;
- 8) restructuring of the debtor's assets in accordance with the requirements of the BCU;
- 9) sale of part of the debtor's property;
- 10) fulfilment of the debtor's obligations by the debtor's owner and its/his responsibility for non-fulfilment of the undertaken obligations;
- 11) alienation of property and settlement of creditors' claims by replacing assets;
- 12) dismissal of the debtor's employees who cannot be involved in the process of implementation of the restructuring;
- 13) obtaining a loan to settle redundancy payment to the debtor's employees who are dismissed in accordance with the restructuring plan, which is reimbursed in accordance with the requirements of the BCU on an extraordinary basis, through the sale of the debtor's property;
- 14) obtaining loans and credits, purchasing goods on credit;
- 15) other measures to recover the debtor's solvency.

<ul style="list-style-type: none"> (2) different terms for satisfying the claims of creditors in different categories; (3) measures for obtaining loans or credits; (4) measures to be taken for restructuring in accordance with the BCU. 	<ul style="list-style-type: none"> (6) Unaffected parties, along with explanations for why it is proposed not to involve them in the procedure; (7) The debtor's assets, including those serving as collateral and their value determined based on an assessment conducted within six months before the date the debtor filed for the opening of the preventive restructuring procedure or according to the debtor's accounting data as of the latest reporting date; (8) Measures of the preventive restructuring plan, the order, and deadlines for their execution, including the order and deadlines for settling the claims of the involved creditors; (9) The number of employees (staffing levels) and the consequences for the debtor's employees due to the implementation of the preventive restructuring plan, such as layoffs, staff reductions, changes in working conditions, alterations in remuneration, and other measures affecting the rights and duties of employees, as well as mechanisms for informing about the implementation of such measures; (10) Justification for the necessity of obtaining new financing, if envisaged by the preventive restructuring plan; (11) Forecasts regarding the debtor's activities and cash flows during the period of preventive restructuring; (12) Justification that the preventive restructuring plan complies with the criterion of the best interests of the creditors. This means that no involved creditor will be in a worse position, including in terms of the satisfaction of claims, according to the preventive restructuring plan, compared to the scenario of initiating bankruptcy proceedings against the debtor and recognizing the debtor as bankrupt or in the event of a court's rejection of the preventive restructuring plan and closure of the preventive restructuring procedure.
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The Bill clearly aligns with the requirements stipulated in the PRD and notably broadens the scope of the restructuring plan's contents in comparison to the current provisions outlined in the BCU. This expansion signifies that the development of the plan might pose a more complex task for all parties engaged in preventive restructuring.

26. The Bill offers an alternative for debtors representing micro- or small-sized enterprises to submit a condensed version termed the ‘concept of preventive restructuring plan’ (*kontseptsia planu preventyvnoi restrukturyzatsii*)⁸⁵ which serves as a succinct rendition of the comprehensive restructuring plan. This condensed submission is required to encompass essential information, including:
- (1) details about the debtor, his financial situation, and the underlying causes leading to insolvency or the looming threat of insolvency;
 - (2) a comprehensive breakdown of the debtor’s outstanding obligations at the time of initiating preventive restructuring. This includes secured obligations, liabilities to interested creditors, commitments to employees, and estimations of potential penalties and financial sanctions against the debtor;
 - (3) a listing of involved creditors, inclusive of employees, and owners (shareholders);
 - (4) explanation regarding uninvolved parties accompanied by justifications clarifying why their involvement is not necessary;
 - (5) inventory of the debtor’s assets;
 - (6) proposed measures aimed at averting the debtor’s insolvency.⁸⁶
27. The innovation of an opt-in solution for micro- and small businesses presents a two-fold perspective. On one hand, presenting a concept, rather than a comprehensive plan (in its draft form), prior to initiating preventive restructuring proceedings in court might be more manageable for the debtor. However, as stipulated in Bill #10143, if the concept is submitted concurrently with the application to initiate preventive restructuring, the plan must be collaboratively developed with the preventive restructuring administrator within court-imposed deadlines.⁸⁷ This compulsory involvement of the administrator, as outlined in the Bill, raises concerns, particularly regarding the typically limited resources of micro- and small businesses. Such mandatory engagement might potentially escalate costs for the debtor. Furthermore, the effectiveness of smaller businesses benefiting from template plans available on the dedicated web portal aimed at preventing insolvency remains uncertain.

85 Bill #10143, Art. 5-9(9). There is no such option in Bill #10228. The latter allows the debtor either to submit a draft plan or no plan. If no plan was submitted, then the involvement of an administrator becomes mandatory.

86 Bill #10143, Art. 5-9(9).

87 *ibid.*

28. Bill #10143 expands the grounds for rejecting a debtor's application and the initiation of preventive restructuring proceedings compared to the existing provisions within the BCU. According to the Bill, the court will reject the opening of preventive restructuring proceedings if:
- the debtor's application does not meet the requirements of the BCU;
 - preventive restructuring is not applicable to the debtor;⁸⁸
 - bankruptcy proceedings (insolvency) have commenced against the debtor, or a preventive restructuring plan in the implementation stage has already received approval;
 - the debtor is undergoing liquidation or has completed liquidation;
 - the state has registered the termination of entrepreneurial activity for a natural person-entrepreneur;
 - a preventive restructuring procedure involving the debtor occurred within the same calendar year preceding the submission of the petition for the initiation of preventive restructuring;
 - the debtor is subjected to administrative or criminal liability due to unlawful actions related to bankruptcy (insolvency) within the preceding three years.⁸⁹
29. The Bill introduces a provision mandating the court, upon granting the application to initiate preventive restructuring, to issue a corresponding ruling⁹⁰ that includes specific mandatory elements:
- (1) an indication of initiation of preventive restructuring;
 - (2) the application of protective measures (if requested by affected parties);⁹¹
 - (3) the appointment of a preventive restructuring administrator (if applicable);
 - (4) specification of the time and place for the final court hearing, scheduled to occur no earlier than two months and no later than six months from the date of the ruling accepting the application.

88 The circumstances under which this situation may apply are not clearly defined. According to the current wording of the BCU, Art. 2(4), no bankruptcy proceedings can be initiated against the so-called *kazenni* enterprises (special category of state-owned enterprises), state non-commercial enterprises and institutions funded from the state budget. The same applies to the state mining enterprises under the Law on the Restoration of Solvency of State Coal Mining Enterprises of 13 April 2017 (as amended), VVRU, 2017, No. 43, Item 1328.

89 Bill #10143, Art. 5-3(6).

90 Art. 5-3(4).

91 See section 3.2.5. *infra*.

30. Bill #10143 explicitly stipulates a maximum duration of six months for court proceedings and ensures that all affected parties are afforded a minimum of two months to finalize and approve the preventive restructuring plan. These introduced provisions are noteworthy as the current BCU lacks such specifications. These novelties are poised to provide all involved parties in the procedure with a crucial period to negotiate and reach a compromise.
31. In conclusion regarding the innovations pertaining to the initiation of preventive restructuring, it's crucial to note that as per Bill #10143,⁹² upon the approval of the application to commence the preventive restructuring procedure, the court is obligated to publish an information notice about it on the official web portal of the Ukrainian judiciary.⁹³ Furthermore, similar notices may be published on the official bankruptcy portal administered by the Ministry of Justice or through other permissible means as outlined by the law.⁹⁴

3.2.5. *Stay and protective measures – Arts. 5-7, 17-18 of the PRD*

32. The current BCU lacks a provision preventing creditors from starting bankruptcy proceedings despite court-approved pre-trial restructuring,⁹⁵ notably missing a statutory moratorium on creditor actions. This absence, unique to Ukraine's pre-trial restructuring,⁹⁶ poses challenges,⁹⁷ compelling debtors to hide their plans until the final stages to prevent creditors from instigating bankruptcy proceedings, undermining the preventive measures against insolvency.⁹⁸
33. To tackle this issue in accordance with the PRD, which mandates that "*[M]ember States shall ensure that debtors can benefit from a stay of individual enforcement actions to support the negotiations of a restructuring plan in a preventive restructuring framework,*"⁹⁹ Bill #10143 proposes the following measures once the court sanctions the commencement of preventive restructuring:

92 Art. 5-3(5).

93 <<https://court.gov.ua/>> limited access since 24 February 2022.

94 Bill #10143, Art. 5-3(5).

95 BCU, Art. 5(7).

96 Kononov (n 13) 814, 822.

97 *ibid.*

98 Round table 'Preventive Restructuring according to Bill #10143' (Kyiv, Ukraine, 8 December 2023) (in Ukrainian) <<https://www.facebook.com/Pravojusticeukraine/videos/262958836778151>> accessed 17 April 2024.

99 PRD, Art. 6(1).

- (1) Prohibiting affected creditors from initiating insolvency procedure against the debtor;
 - (2) Allowing foreclosures and any other security measures against the debtor's assets only within the framework of the restructuring procedure, provided they do not obstruct the restructuring process itself;
 - (3) Suspending any financial sanctions/penalties against the debtor;
 - (4) Mandating that the debtor must exercise its corporate rights in strict compliance with the BCU;
 - (5) Requiring that any disposal of the debtor's assets align with the preventive restructuring plan;
 - (6) Suspending the statute of limitations concerning the affected creditors claims.¹⁰⁰
34. The Bill also empowers the debtor to petition the court for the implementation of protective measures. These measures encompass several facets, such as prohibiting enforced collection from the debtor based on enforcement documents, except during the stage of distributing proceeds. Protective measures cannot apply to the collection of wage or salary arrears, alimony, compensation for harm caused by mutilation, other health-related damages, or the death of a natural person. Additionally, the protective measures encompass a prohibition on foreclosure, whether executed judicially or extrajudicially, on collateral.¹⁰¹
35. The debtor has the liberty to submit this petition concurrently with the application for initiating the preventive restructuring procedure or later during the course of preventive restructuring.¹⁰² These protective measures can endure for up to three months, with the potential for a three-month extension at the court's discretion. Notably, the effect of both protective measures and the measures defined in points 1-3 of para 33 above automatically ceases after six months from the date of initiating the preventive restructuring procedure, without the possibility of extension by the court.¹⁰³
36. In order to forestall potential abuses by debtors attempting to prolong inevitable insolvency or impede court decisions' enforcement, Bill #10143 intro-

100 Bill #10143, Art. 5-4(1).

101 Art. 5-5.

102 Art. 5-5(1).

103 Bill #10143, Art. 5-6(5).

duces a guideline specifying that the court can institute protective measures solely under specific conditions:

- The debtor must present a substantiated plan or the concept of preventive restructuring plan,¹⁰⁴ and there should be reasonable grounds to believe that such a plan will be effectively executed;
- The debtor is obligated to furnish comprehensive and reliable information regarding his financial situation, assets, and liabilities;
- Non-implementation of protective measures would lead to the impracticality of carrying out preventive restructuring or result in the debtor's insolvency.¹⁰⁵

37. Indeed, the proposed changes could offer new opportunities for debtors seeking to restructure their debts in good faith and relying on a second chance as promoted by the PRD. However, it is not entirely clear how these changes, if implemented, might impact the enforcement of court decisions in general.¹⁰⁶ During discussions regarding Bill #10143, representatives from the State Bailiff Service of Ukraine, as well as private bailiffs, showed a degree of caution, if not outright hostility, towards the concept of suspending enforcement proceedings against the debtor.¹⁰⁷

3.2.6. *Preventive restructuring administrator. Debtor-in-possession – Arts. 2, 5, 9, 26–27 of the PRD*

38. As per the existing provisions in Art. 5 of the BCU, the appointment of a restructuring administrator (*keruiuchy sanatsieiui*)¹⁰⁸ is discretionary. Whether with or without an administrator, the debtor or management retains control over all assets and daily operations. Nevertheless, the restructuring plan itself may specify certain constraints and delineate the extent of authority granted to the restructuring administrator.¹⁰⁹ This administrator is selected from the cadre of individuals known as arbitration managers (*arbitrazhni keruiuchi*), who are

104 Para 26 *supra*.

105 Art. 5-5(4).

106 Problems with the enforcement of court decisions were directly pointed out by the European Commission in its report on Ukraine's application for EU membership. See Commission (n 6), 28 – 29.

107 Round table (n 98).

108 Those are qualified practitioners in the field of bankruptcy licensed by the Ministry of Justice of Ukraine.

109 BCU, Art. 5(2).

licensed professionals specializing in bankruptcy, insolvency, restructuring, and liquidation processes.¹¹⁰

39. In accordance with the existing jurisprudence, if no administrator is designated, the restructuring plan would explicitly state that the company's management bears the responsibility for ensuring compliance with the plan.¹¹¹ The debtor retains the option to propose a specific candidate for appointment as a restructuring administrator.¹¹² However, unlike the PRD which does not explicitly provide for the creditor's right to make choices regarding the administrator, existing Ukrainian regulations support the idea that the ultimate decision rests with the creditors, who determine the administrator through a voting process. As stipulated by the BCU, the administrator selection occurs during the creditors' meeting, where the claims represented collectively exceed 50 % of the total value of claims outlined in the restructuring plan.¹¹³ The appointment is subject to subsequent confirmation by the commercial court. Upon applying to the court for the approval of a restructuring plan, either the debtor or creditor(s) can petition the court to appoint an administrator. This appointed administrator would be responsible for taking measures to safeguard creditors' claims and mitigate the impact of the moratorium on the satisfaction of such claims.¹¹⁴
40. Bill #10143 introduces several changes regarding administrators. Firstly, it introduces the concept of a 'preventive restructuring administrator' (*administrator preventyvnoï restrukturyzatsii*).¹¹⁵ Secondly, in contrast with the current

110 The Ministry of Justice keeps the Unified State Register of Arbitration Managers. Arbitration managers are insolvency practitioners like those indicated in Annex B of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) [2015] OJ L 141/19.

111 Postanova Verkhovnoho Sudu Ukraïny vid 15 kvitnia 2021 roku v spravi No. 904/3325/20 [Decision of the Supreme Court of Ukraine of 15 April 2021 in case No. 904/3325/20], para 3.8, <<https://verdictum.ligazakon.net/document/96501402>> accessed 17 April 2024.

112 Postanova Verkhovnoho Sudu Ukraïny vid 9 chervnia 2021 roku v spravi No. 924/1083/20 [Decision of the Supreme Court of Ukraine of 9 June 2021 in case No. 924/1083/20], <<http://iplex.com.ua/doc.php?regnum=97735108&red=100003a134181032b08b44025ba3f92604ad78&d=5>> accessed 17 April 2024.

113 BCU, Art. 5(7); Ukhvala Hospodars'koho sudu Kharkivskoï oblasti vid 23 bereznia 2020 roku v spravi No. 922/326/20 [Ruling of the Commercial Court of Kharkiv Region of 23 March 2020 in case No. 922/326/20], <<https://zakononline.com.ua/court-decisions/show/88430457>> accessed 17 April 2024.

114 BCU, Art. 5(7).

115 Bill #10143, Art. 5-1.

wording of the BCU, the Bill outlines scenarios when the administrator's involvement becomes mandatory, namely:

- (1) If, at the time of the debtor's petition to the commercial court to initiate preventive restructuring, no preventive restructuring plan has been developed, and a concept of preventive restructuring has been submitted along with the application for the initiation of the preventive restructuring procedure (in this case, the debtor suggests a candidate for appointment).
- (2) When the commercial court has imposed protective measures (in this case, the debtor suggests a candidate).¹¹⁶
- (3) In instances where cross-class cramdown has been utilized (in this case, creditors propose a candidate for appointment).¹¹⁷
- (4) If the preventive restructuring plan stipulates monitoring the plan's implementation (in this case, creditors propose a candidate for appointment).¹¹⁸

If creditors propose the candidate, they must agree on the candidate and the amount of his/her remuneration and the candidate must declare in writing his/her willingness to be a restructuring administrator in the case concerned.¹¹⁹ Regardless of who suggested the candidate, the final appointment is to be made by the court. Even if the administrator's participation is not mandatory under the circumstances, either the debtor or creditors can petition the court to appoint one.¹²⁰

41. The Bill provides clarity on the administrator's powers,¹²¹ which were previously vaguely outlined in the current wording of Art. 5. The Bill underscores the administrator's pivotal role in fostering negotiations between the debtor and creditors and in crafting a restructuring plan. In particular, the restructuring administrator's powers include providing recommendations to prevent insolvency of the debtor; participating in the development of the restructuring plan; assessing the plan's compliance with legal requirements.¹²² The administrator monitors compliance with protective measures, handles complaints,

116 See section 3.2.5. *supra*.

117 Bill #10143, Art. 5-2(2).

118 Bill #10143, Art. 5-2(3), subpara 3. At the same time, Art. 5-2(11) states that the failure of creditors to submit a candidate for the appointment of an administrator in cases where the appointment of an administrator is mandatory under the BCU upon their submission shall not be a reason for refusing to approve the preventive restructuring plan. In such a case, further proceedings in the preventive restructuring procedure are conducted without the involvement of an administrator.

119 Bill #10143, Art. 5-2(7).

120 Bill #10143, Art. 5-2(6).

121 Bill #10143, Art. 5-7.

122 *ibid*.

and provides necessary information to the court and creditors. Additionally, they have the authority to request documents and take action in case of violations. Another aspect of their role involves providing consent for certain transactions and overseeing their execution in accordance with the restructuring plan.¹²³ Interestingly, the Alternative Bill is less specific on the administrators' powers, it only states that "the scope of their authority, and the duration of their performance are determined by an agreement concluded with the debtor or with the creditor(s)."¹²⁴

Additionally, in cases where no restructuring administrator has been designated, Bill #10143 allows the debtor the authority to engage the services of experts or expert organizations to assist in formulating a restructuring plan and supervising the preventive restructuring procedure.¹²⁵

42. Bill #10143 additionally introduces several provisions empowering the adjustment of the restructuring administrator's compensation. If the administrator's appointment is obligatory, the debtor is responsible for the expenses; otherwise, the party requesting the appointment bears the costs.¹²⁶ Creditors are allowed to reach an agreement among themselves regarding the payment to the administrator.¹²⁷ Upon the debtor's or creditor's request, or at its own discretion, the court is authorized to modify the remuneration amount based on factors such as the anticipated duration of the restructuring process, the administrator's workload, the complexity of the case.¹²⁸ The financial circumstances of the debtor if identified as a micro- or small enterprise, may serve as grounds to decrease the compensation amount.¹²⁹ It should be noted that according to the BCU, the minimum compensation amount must equate to four times the minimum wage¹³⁰ per month¹³¹ (UAH 32,000 or EUR 758). No matter how small it may seem, considering the Ukrainian context, this amount might impose a burden on small businesses, particularly those impacted by the ongoing war.

123 *ibid.*

124 Bill #10228, Art. 4-1(4).

125 Bill #10143, Art. 5-8(4).

126 Art. 5-2(5)(6).

127 Art. 5-2(7).

128 Art. 5-2(8)(9).

129 Art. 5-2(8).

130 The minimum wage is regularly revised according to the laws governing the state budget for each respective year. As of 1 April 2024, it equates to UAH 8,000 (EUR 190 according to the rate of exchange as of 1 April 2024).

131 BCU, Art. 30(2).

43. The Ukrainian law is fundamentally acquainted with the concept of debtor-in-possession (DIP). There are no specific restrictions for DIP outlined in the current provisions of the BCU, nor are there any mandates to replace the debtor's management. As per prevailing practices, in instances where no administrator is appointed, typically, the restructuring plan includes a direct provision holding the company's manager responsible for implementing the plan and overseeing compliance with it.¹³² Despite administrators being appointed in the majority of existing pre-trial restructuring cases, the concept of DIP has faced substantial criticism from arbitration managers.¹³³ They note that not a single court-approved restructuring plan has included provisions for a change in the debtor's management.¹³⁴ Given that the mandatory change would be non-compliant with the PRD, these remarks on the part of Ukrainian insolvency practitioners clearly demonstrate the existing stigmatization of the debtor, the lack of knowledge and the need to further promote the ideas of a second chance and preventive restructuring for viable businesses.
44. Based on the PRD, Art. 5 and Art. 19, Bill #10143 clarifies that in the preventive restructuring procedure the debtor's chief executive¹³⁵ is obliged to act conscientiously and reasonably, taking into account the interests of both the debtor and creditors, and not to take actions to the detriment of creditors.¹³⁶ The debtor must at all times comply with the court-approved restructuring plan, provide information to the administrator, the court and to the creditors.¹³⁷ According to the Bill, for the entire duration of preventive restructuring, the debtor is banned to

132 Postanova Verkhovnoho Sudu Ukraïny vid 15 kvitnia 2021 roku v spravi No. 904/3325/20 [Decision of the Supreme Court of Ukraine of 15 April 2021 in case No. 904/3325/20], para 3.8, <<https://verdictum.ligazakon.net/document/96501402>> accessed 17 April 2024.

133 Round table 'Pre-trial restructuring: First Successful Cases and Current Jurisprudence' (Kyiv, Ukraine, 31 January 2023) (in Ukrainian) <<https://www.facebook.com/Pravojusticeukraine/videos/852362872691173/?app=fbl>> accessed 2 January 2024.

134 *ibid.*; Vitaliy Nestor, 'Dosudova sanatsiia: dialoh borzhnyka i kredytoriv na foni viïny' [Pre-trial restructuring: Dialogue Between the Debtor and the Creditors Amidst the War] (*Pravo.ua*, 25 July 2023) <<https://pravo.ua/dosudova-sanatsiia-dialoh-borzhnyka-i-kredytoriv-na-foni-viiny/>> accessed 17 April 2024.

135 The Bill speaks of the CEO only, not of the directors as provided in the PRD.

136 Art. 5-8(1).

These provisions complement the general provisions on the duty of care found in Art. 89 of the Law on Joint Stock Companies of 27 July 2022 (as amended), Art. 40 of the Law on Limited Liability Companies of 6 February 2018 (as amended), Arts. 23 and 62 of the Law on Business Associations of 19 September 1991 (as amended).

137 Art. 5-8(3).

- (1) engage in transactions that worsen the debtor's financial condition or harm the interests of creditors;
 - (2) fulfil monetary obligations to creditors arising from transactions conducted outside the ordinary course of business, the claims of which should be included in the restructuring plan;
 - (3) give loans, financial assistance, guarantees, warranties, alienate or encumber property, except in cases specified in the court-approved restructuring plan;
 - (4) pay dividends to equity holders, bonuses to management;
 - (5) engage in other actions explicitly prohibited by the BCU.¹³⁸
45. To conclude, it remains uncertain how the innovations introduced by the Bill will impact the prevailing stigmatization of the debtor (especially when it goes about the DIP concept) in Ukraine or the current legal practices concerning the appointment of administrators. There are even more uncertainties regarding the utility of these innovations for micro- and small-sized enterprises.

3.2.7. *Classes of creditors – Arts. 8 – 10 of the PRD*

46. As per the current wording of the BCU, categorizing creditors into classes is not an essential component of the pre-trial restructuring plan.¹³⁹ The Code permits the segmentation of creditors participating in pre-trial restructuring based on the nature of their claims and the presence or absence of security for those claims. Furthermore, it is at the discretion of the debtor and/or creditors to include different conditions for satisfying claims for creditors of different categories.¹⁴⁰
47. Following the requirements of the PRD,¹⁴¹ Bill #10143 makes it mandatory to divide creditors and other affected parties into classes and include the respec-

138 BCU, Art. 5-8(2).

139 *ibid.*

140 *ibid.* The Supreme Court emphasized the discretionary nature of dividing creditors into classes. See *Postanova Verkhovnoho Sudu Ukraïny vid 15 kvitnia 2021 roku u spravi No. 904/3325/20* [Decision of the Supreme Court of Ukraine of 15 April 2021 in case No. 904/3325/20], para 8.3 <<https://verdictum.ligazakon.net/document/96501402>> accessed 17 April 2024; *Postanova Kasatsiïnoho hospodars'koho sudu Verkhovnoho Sudu Ukraïny vid 10 serpnia 2023 roku u spravi No. 911/166/23* [Decision of the Cassation Commercial Court within the Supreme Court of Ukraine of 10 August 2023 in case No. 911/166/23], para 59 <https://protocol.ua/ua/postanova_kgs_vp_vid_10_08_2023_roku_u_spravi_911_166_23/> accessed 17 April 2024.

141 Art. 8(1)(c)-(d).

tive classification in the restructuring plan.¹⁴² According to the Bill, for the purposes of preparing a preventive restructuring plan and its subsequent approval, the affected parties are divided into the following classes:

- (1) Secured creditors;
- (2) Unsecured creditors;
- (3) Unsecured creditors interested in the debtor;
- (4) Equity holders, owners of the assets (an institution authorized to manage the assets of the debtor).¹⁴³

The restructuring plan may include other classes, which must be properly differentiated, taking into account various factors such as: the deadline for fulfilling obligations, the amount or deadline for satisfying claims, the entity of the affected creditor – representatives of micro- and small businesses, suppliers, government authorities, and so on. The criteria for class differentiation must be clearly defined in the preventive restructuring plan.¹⁴⁴ The class of the debtor's employees must be created if the proposed restructuring includes employees' claims to the debtor.¹⁴⁵ The preventive restructuring plan cannot provide for different proportions of satisfying the claims of creditors within one class. Otherwise, all creditors within that class who find themselves in a worse position must agree in writing to the deterioration of their situation.¹⁴⁶

48. If appointed, the preventive restructuring administrator is obliged to verify the formation of the classes of affected parties and the justification for the amount of monetary claims from the affected creditors, and subsequently inform both the affected parties and the court about the results.¹⁴⁷ Another safeguard for creditors can be found in the Bill's provisions authorizing any affected creditor, before the final hearing of the court, to apply to the court for a review of the formation of classes and the justification of the amount of monetary claims of the affected creditor if no agreement has been reached between the debtor and the creditor regarding the size of the claims.¹⁴⁸

142 Art. 5-9(1), subpara 5.

143 Art. 5-10(1).

144 Art. 5-10(2).

145 *ibid.*

146 Art. 5-10(4).

147 Bill #10143, Art. 5-10(5).

148 Art. 5-10(6).

49. In summary, the stipulations outlined in Bill #10143 regarding the mandatory classification of creditors and other involved parties will not be a big surprise; Ukrainian jurisprudence is accustomed to this practice. However, the classifications proposed in the Bill are more intricate than the optional prerequisites for pre-trial restructuring. This increased level of detail is likely to pose greater challenges for debtors in adhering to these requirements. Regrettably, neither Bill #10143 nor the alternative Bill #10228 provide micro- and small enterprises with the flexibility to refrain from segregating affected parties into separate classes.¹⁴⁹ Very often smaller Ukrainian businesses will be dealing with suppliers and tax authorities as creditors with no secured creditors at all, and tax authorities are most often hostile to the very idea of debt restructuring. Considering that smaller businesses might have fewer creditors, and affected parties retain the ability to contest class formation in court, debtors representing smaller enterprises could find an added deterrent in utilizing preventive restructuring. In the author's opinion, this problem must be addressed by the Ukrainian legislature.

3.2.8. Approval of the restructuring plan. Cross-class cramdown

3.2.8.1. Approval by creditors – Art. 9 of the PRD

50. Like in the case with the contents of preventive restructuring plan, Bill #10143 provides for a very detailed procedures regarding the approval of the restructuring plan by the creditors' meeting.¹⁵⁰ To approve the preventive restructuring plan, the debtor convenes the meeting of creditors by sending written notices to all affected parties according to the plan. The notice includes:

- (1) the preventive restructuring plan;
- (2) the conclusion of the preventive restructuring administrator, if appointed, regarding the assessment of the preventive restructuring plan for compliance with the requirements stipulated in the BCU, its feasibility, adherence to the criterion of creditors' best interests, and the amount of claims by creditors where objections exist;
- (3) if the preventive restructuring plan involves obtaining new financing, the agreement for the provision of new financing;
- (4) if available, court decisions on the outcomes of considering applications for the formation of classes of affected parties and the size of creditors' claims.¹⁵¹

149 As provided in the PRD, Art. 9(4).

150 Art. 5-11.

151 Art. 5-11(3).

51. To approve the preventive restructuring plan, each class of affected creditors must review the preventive restructuring plan and make a decision regarding its approval. The plan is considered approved by the secured creditors' class if it is supported by creditors who have the right to vote and possess 2/3 of the votes of creditors from the total amount of secured claims included in the plan within this class.¹⁵² If the preventive restructuring plan entails a change in the priority of claims of secured creditors, the plan must be approved by each such creditor. The preventive restructuring plan is considered approved by the unsecured creditors' classes if it is supported by creditors who hold more than 50 % of the votes of creditors from the total amount of unsecured claims included in the plan in each class.
52. The Bill specifies that certain creditors will not be allowed to vote on the plan:
- (1) secured creditors who have an interest in the debtor;¹⁵³
 - (2) specific class of creditors if the preventive restructuring plan settles all their claims right after the plan gets approved;
 - (3) equity holders if the preventive restructuring plan does not change the company's capital or their rights;
 - (4) tax and other authorities if the preventive restructuring involves deferral, postponement, or discharge of debts related to taxes, and other mandatory payments). However, these terms must be as good as or better than those offered to ordinary unsecured creditors.¹⁵⁴
53. Bill #10143 aims to enhance the specificity of voting procedure requirements in alignment with the PRD. This includes establishing a methodology for calculating votes among equity holders and incorporating advisory votes from affected parties without decisive voting rights.¹⁵⁵ Compared to the current language in the BCU, these amendments have the potential to prevent abuses highlighted in a well-known recent case (case No 910/15087/23).¹⁵⁶ In this instance, dissenting creditors alleged numerous violations in the process of convening the meeting and casting votes on the restructuring plan.

152 Art. 5-11(4).

153 Bill #10143, Art. 5-11(4). According to the BCU, Art. 1, secured creditors who have an interest in the debtor can be represented by affiliated persons, equity holders, debtor's managers, chief financial officer, their relatives, as well as other persons who may have an interest.

154 Bill #10143, Art. 5-11(4).

155 Bill #10143, Art. 5-11(2)(4).

156 N 27 *supra*. As of 1 April 2024, the case is pending in the court of appeal.

54. Under the existing wording of the BCU, if a restructuring plan proposes deferment or instalment repayment of any tax debts, the consent of the tax authority is not required. The Code explicitly states that any tax debts that exist three years prior to the approval of the plan must be written off, and any later-matured tax liabilities may be deferred or allowed for instalment repayment under the same conditions as unsecured creditors.¹⁵⁷ It's not uncommon for Ukrainian tax authorities to contest decisions affirming a restructuring plan. For instance, in Case No. 924/1083/20, the tax authority lodged a cassation appeal with the Supreme Court. Their claim included an argument that the approved pre-trial restructuring plan had disregarded an outstanding tax debt. The Supreme Court dismissed the appeal, highlighting that a tax authority representative had actively participated in the creditors' meeting and had even voted against the plan's approval. Furthermore, the Supreme Court pointed out that the trial court had partially written off the existing tax claims,¹⁵⁸ encompassing fines and penalties. These were excluded from the category of monetary obligations defined by the BCU, unlike the debtor's debt to one of its main creditors.¹⁵⁹ Excluding tax and other authorities from participating in the voting process regarding the plan could potentially decrease the instances of baseless appeals filed against trial court rulings that approve restructuring plans.

157 BCU, Art. 5(3).

158 Postanova Verkhovnoho Sudu Ukraïny vid 9 chervnia 2021 roku v spravi No. 924/1083/20 [Decision of the Supreme Court of Ukraine of 9 June 2021 in case No. 924/1083/20] <<http://iPLEX.com.ua/doc.php?regnum=97735108&red=100003a134181032b08b44025ba3f92604ad78&d=5>> accessed 17 April 2024.

159 *ibid.*

BCU, Art. 1 defines monetary obligations as the debtor's obligation to pay a creditor a certain amount of money based on a civil transaction (contract) or other legal grounds in accordance with Ukrainian legislation. Monetary obligations also include obligations to pay taxes, fees (mandatory payments), and insurance contributions for compulsory state pension and other social insurance, as well as obligations arising from the inability to fulfill contracts, such as storage contracts, leases, and annuity agreements, that must be expressed in monetary units.

Monetary obligations do not include forfeits (fines, late payment interest) or other financial sanctions determined on the date of the application to the commercial court, obligations arising from causing harm to the life and health of citizens, obligations to pay royalties, or obligations to the founders (participants) of a debtor – a legal entity that arose from such participation.

The amount of monetary obligations, including the amount of indebtedness for goods transferred, work performed, services rendered, and loans (including interest) to be paid by a debtor, shall be determined on the day of filing an application with the commercial court for opening bankruptcy proceedings unless otherwise stipulated in the law.

When filing an application for opening bankruptcy proceedings, the amount of monetary obligations shall be determined as of the date of submission of such an application to the commercial court.

3.2.8.2. Approval by the court – Art. 10 of the Directive

55. Under the current wording of the BCU, when approving pre-trial restructuring plans, Ukrainian courts juxtapose the restructuring plan with a potential liquidation of the debtor.¹⁶⁰ This comparative analysis aims at verifying the advantages for creditors in implementing the plan over liquidating the debtor's assets.¹⁶¹ Successfully meeting this test allows for the imposition of the plan on creditors who did not vote or voted against it. Besides, the court must also use the best-interest-of-creditors test like the one provided by the PRD; however, under existing law, the test is applied *ex officio*. The Code specifies that the terms and conditions of a plan, concerning the satisfaction of claims from creditors who either abstained from voting or voted against the debtor's plan, should not be less favourable than those for creditors who supported the plan's approval.¹⁶² In line with the PRD, Bill #10143 introduces an amendment stipulating that the best-interest-of-creditors test will be applied by the court only if the plan is challenged.¹⁶³
56. Bill #10143 gives the debtor seven calendar days prior to the final session of the court to submit the plan (approved by creditors) to the court for the final approval.¹⁶⁴ Along with the plan the debtor must submit: (1) objections of affected parties (regarding the plan itself, the amount of claims, and/or formation of classes); (2) preventive restructuring administrator's (if appointed) assessment of the plan for compliance with the BCU, its feasibility, adherence to the criterion of creditors' best interests, and the amount of claims by creditors subject to objections; (3) contract on new and/or interim financing (if any).¹⁶⁵

160 For these purposes the debtor must submit a liquidation analysis along with the restructuring plan.

161 Postanova Verkhovnoho Sudu Ukraïny vid 15 kvitnia 2021 roku v spravi No. 904/3325/20 [Decision of the Supreme Court of Ukraine of 15 April 2021 in case No. 904/3325/20], para 8.7 <<https://verdictum.ligazakon.net/document/96501402>> accessed 17 April 2024. The same reasoning was applied in Postanova Verkhovnoho Sudu Ukraïny vid 9 chervnia 2021 roku v spravi No. 924/1083/20 [Decision of the Supreme Court of 9 June 2021 in case No. 924/1083/20], <<http://iPLEX.com.ua/doc.php?regnum=97735108&red=100003a134181032b08b44025ba3f92604ad78&d=5>> accessed 17 April 2024; Ukhvala Hospodars'koho sudu Kharkivskoi oblasti vid 23 bereznia 2020 roku v spravi No. 922/326/20 [Ruling of the Commercial Court of Kharkiv Region of 23 March 2020 in case No. 922/326/20] <<https://zakononline.com.ua/court-decisions/show/88430457>> accessed 17 April 2024.

162 BCU, Art. 5(3).

163 Art. 5-14(3). See also para 57 *infra*.

164 Art. 5-12.

165 Bill #10143, Art. 5-12(2).

57. The court verifies the plan's compliance with the outlined requirements for its contents (see Table 1 above) and the formation of classes among affected parties. If there is non-compliance with these requirements or if the amount of claims of an affected creditor are deemed unjustified the court has the authority to return both the application and the plan for revision, and it postpones the final hearing within the stipulated time limit.¹⁶⁶ Alternatively, if everything complies, during the final hearing, the court is mandated to approve the plan. Approval of the plan will be rejected if:
- (1) the creditors' meeting and approval of the preventive restructuring plan occurred in violation of the requirements stipulated in the BCU;¹⁶⁷
 - (2) the principle of equal treatment of creditors within the same class has been breached;
 - (3) the inclusion of new financing is unnecessary for executing the preventive restructuring plan and causes harm to the rights and interests of affected creditors;
 - (4) the plan does not align with the criterion of creditors' best interests;¹⁶⁸
 - (5) there are grounds to believe that the plan lacks a reasonable prospect to prevent insolvency or ensure the debtor's viability;
 - (6) the debtor has provided inaccurate information in the plan;
 - (7) by the final hearing date, the debtor has not rectified the violations regarding the plan's contents, formation of classes or the amount of creditors' claims.¹⁶⁹

3.2.8.3. Cross-class cramdown – Arts. 11 and 12 of the PRD

58. Under Bill #10143, in instances where the preventive restructuring plan fails to receive unanimous approval from all classes of affected parties, the debtor is empowered to petition the court for a cross-class cramdown.¹⁷⁰ The respective provisions within the Bill echo those outlined in the Directive.¹⁷¹ The plan is subject to confirmation by the commercial court if the following conditions are met:

¹⁶⁶ Bill #10143, Art. 5-12(3).

¹⁶⁷ See section 3.2.8.1. *supra*.

¹⁶⁸ Based on the PRD, Art. 14, Bill #10143 allows for valuation of the restructuring plan to verify an alleged failure to satisfy the best interest of creditors test, an alleged breach of the conditions for a cross-class cramdown. The Bill is very specific that it can be done only if the plan is challenged by an affected creditor. See Bill #10143, Art. 5-14.

¹⁶⁹ Bill #10143, Art. 5-12(7).

¹⁷⁰ Art. 5-13.

¹⁷¹ PRD, Art. 11.

- a. There are no grounds to reject confirmation of the plan;¹⁷²
 - b. The plan has been approved:
 - by a majority of the voting classes of affected parties, provided that at least one of those classes is a secured creditors class or is senior to the ordinary unsecured creditors class; or
 - at least one of the voting classes of affected parties with the right to vote other than equity-holders or the institution authorized to manage the debtor's assets or any other class which would not receive any payment or keep any interest if the normal ranking of liquidation priorities were applied under the BCU;
 - c. The plan ensures that dissenting voting classes of affected creditors are treated at least as favourably as any other class of the same rank and more favourably than any junior class; and
 - d. No class of affected parties can, under the restructuring plan, receive or keep more than the full amount of its claims or interests.¹⁷³
59. In summary, the Ukrainian draft transposition of the PRD under both Bill #10143 and Bill #10228 demonstrates that Ukraine will implement the 'relative priority rule' instead of the 'absolute priority rule.' Additionally, neither of the two alternative bills chooses to exclude equity holders from the approval process, as optionally provided by the Directive.¹⁷⁴ Given the novelty of the 'cross-class cramdown' in Ukrainian law, it is difficult to determine at this stage whether it is a good solution. In Governmental Bill #10228, it is explicitly stated, for example, that the preventive restructuring plan of a state-owned enterprise or company, in which more than 50 % of shares belong to the state, is subject to approval by the authorized state institution.¹⁷⁵ In Ukrainian realities, where state-owned enterprises are patronized in various ways,¹⁷⁶ this requirement can create additional obstacles to the adoption of the restructuring plan, exactly as envisaged by the PRD.¹⁷⁷
60. The cross-class cramdown provisions outlined in Bill #10143 come with certain obvious caveats. Firstly, the Bill overlooks the option provided in the

172 Section 3.2.8.2. *supra*.

173 Bill #10143, Art. 5-13(2).

174 Arts. 9(3)(a), 12.

175 Bill #10228, Art. 5. See also n 58 *supra*. The wording of the proposed amendments is such that the mentioned approval (*pohodzhennia*) seems to be additional to voting on the proposed plan.

176 See n 88 *supra*.

177 Art. 12.

PRD to limit the requirement of obtaining the debtor's consent solely to cases involving SMEs.¹⁷⁸ Additionally, the term 'cross-class cramdown' poses a challenge in Ukrainian legal terminology as it remains unfamiliar. While the authors of the Bill attempted a Ukrainian translation, it raises both linguistic and legal questions. In contrast, the authors of the alternative Bill #10228 successfully implemented cross-class cramdown without explicitly naming it.¹⁷⁹ It seems that the latter approach is notably more effective compared to the approach used in Bill #10143 and may eliminate unnecessary deliberations during the legislative procedures.

3.2.9. *Consequences of the plan's approval. Monitoring – Arts. 15 – 16, 18 of the PRD*

61. Both Bill #10143 and Bill #10228 introduce several innovations concerning the outcomes following the plan's approval and procedures for court oversight regarding the implementation of the restructuring plan. Notably, unlike the current practice where pre-trial restructuring could extend for up to fifteen years,¹⁸⁰ Bill #10143 proposes restricting the implementation of the preventive restructuring plan to a maximum duration of four years.¹⁸¹ Interestingly, the Alternative Bill does not include this limitation.
62. In contrast to the current language in the BCU, which indicates that the pre-trial restructuring plan sanctioned by the court is binding solely for creditors whose claims were included in the plan,¹⁸² both bills propose a change. According to the suggested amendments, the approved plan would become binding not only for all creditors, including those whose claims were part of the plan, but also for all affected parties, regardless of their vote against the plan.¹⁸³
63. Under both bills, either the debtor or the appointed restructuring administrator will be responsible for submitting reports on the implementation of the

178 PRD, Art. 11(1).

179 Bill #10228, Art. 5(4).

180 Ukhvala Hospodars'koho sudu Kyivs'koï oblasti vid 10 chervnia 2020 roku v spravi No. 911/482/20 [Ruling of the Commercial Court of Kyiv Region of 10 June 2020 in case No. 911/482/20] cited from Artur Megeria, 'Dosudova sanatsiia abo riativna solomynka dlia borzhnyka' [Pre Trial Restructuring or Catching at a Straw for the Debtor], *Yurydychna Gazeta Online* (Kyiv, 14 January 2021) <<https://yur-gazeta.com/publications/practice/bankrutstvo-i-restrukturizaciya/dosudova-sanaciya-abo-ryativna-solominka-dlya-borzhnika.html>> accessed 17 April 2024.

181 Bill #10143, Art. 5-9(8).

182 BCU, Art. 5(10).

183 Bill #10143, Art. 5-15(1); Bill #10228, Art. 5-1(5).

plan to the commercial court.¹⁸⁴ If it becomes evident that the restructuring plan is unfeasible or if its execution fails to avert the debtor's insolvency, the court is empowered to terminate the preventive restructuring at the request of an affected party or the restructuring administrator.¹⁸⁵ While neither of the bills proposes radical changes compared to the existing language in the BCU, Art. 5, they aim to offer enhanced clarity and structure. These amendments are designed to provide affected parties, particularly creditors, with a comprehensive set of tools to monitor the plan's implementation. Additionally, they enable swift petitioning of the court in case of any issues that may arise.

64. The restructuring procedure reaches its conclusion upon the submission of the report detailing the fulfilment of the preventive restructuring plan to the commercial court by either the debtor or the administrator.¹⁸⁶ Notably, the Alternative Bill provides more avenues for affected parties to contest the conclusion of preventive restructuring and offers the possibility to extend the duration of the procedure.¹⁸⁷ Conversely, Bill #10143 focuses on the aspect of "successful" completion but lacks explicit provisions regarding objections by the affected parties.

4. Conclusion

65. PRD's transposition by Ukraine marks an unprecedented instance where a non-Member state undergoes such transposition. This situation is notably unique for several reasons: Firstly, the transposition is being carried out amidst extreme wartime conditions under martial law. Secondly, Ukraine was explicitly requested to transpose the Directive as part of the EU's micro-financial aid, an unconventional requirement. Thirdly, the deadlines for transposition are considerably tight, allowing the national legislator significantly less time compared to EU Member States for this process, and Ukraine has already missed the deadline.
66. Additionally, as of the present moment, it remains unclear which of the two bills introduced in Parliament will prevail. Bill #10143 has more chances consid-

184 According to Bill #10143, Art.5-16(4), reports must be filed on a monthly basis. Under Bill #10228, frequency of reporting is determined by the court in the decision sanctioning the restructuring plan, see Art. 5-1(3).

185 Bill #10143, Art. 5-17(8); Bill #10228, Art. 5-2(4), clause 4.

186 Bill #10143, Art. 5-19; Bill #10228, Art. 5-2.

187 Bill #10228, Art. 5-2.

ering the involvement of the ruling party. However, the Bill's complexity and certain caveats pointed out by stakeholders¹⁸⁸ raise doubts about that. There is a possibility that legislators might eventually seek to combine the strengths of both bills to achieve a more comprehensive approach to transposition.

67. Given the circumstances, the efficiency of the transposition process remains uncertain. It's evident that challenges loom large, and stakeholders universally acknowledge the improbability of the new preventive restructuring mechanism being fully operational immediately upon the enactment of the corresponding law.¹⁸⁹ However, both bills present a solid foundation to address the deficiencies inherent in the existing pre-trial restructuring system. Notably, Bill #10143 takes a specific initiative to assist micro- and small enterprises. The new preventive restructuring procedure may well serve as an additional tool for the national economy's recovery post-war. Despite the anticipated hurdles and the gradual implementation process, these legislative initiatives can significantly contribute to the economic rehabilitation and revitalization of the country.

188 Roundtable (n 98); IX Forum on Restructuring and Bankruptcy (Kyiv, Ukraine, 20 March 2024) (in Ukrainian) <<https://www.youtube.com/watch?v=WvMHFQ9XF0>> accessed 17 April 2024.

189 Roundtable (n 98).