Some of the novelties of the draft law on bankruptcy proceedings in Albania

1. Introduction.

The working group on preparation of the draft law on bankruptcy proceedings took into account:

- The research on the existing situation and relevant findings from the group of local experts;
- Opinions of stakeholders and institutions involved in bankruptcy proceedings, on the causes and difficulties of implementation of the existing law;
- The research on the judicial practice and theanalyzed cases for which it was decided the opening of the bankruptcy proceedings, suspension of them, the termination of them or their outcome;
- The research on the market and financial difficulties from the perspective of businesses and banks as well as the obligatory enforcement through execution authorities etc.;
- The comparative analysis of the current bankruptcy laws, in particular: the American Law of Chapter 11, from which was considered as a model of sub-chapter with definitions and concepts; Italian law from which was taken as a model the subchapter on debt restructuring through an extrajudicial agreement; The German law of bankruptcy out of which was taken into account the amendments made after 2012, since the existing legislation is based on the German legislation; The law of the countries in the region such as Serbia and Montenegro.
- Opinions, comments and suggestions of international experts.

2. Novelties in language and definitions.

The new draft bankruptcy law includes improved language and a subchapter relating to definitions, since it was requested by representatives of institutions and by parties involved in the bankruptcy proceedings. Thus around 40 definitions are envisaged of terms such as: credit, credit of the bankruptcy measure, creditor of lower ranks, the insolvency administrator, monitoring administrator, agricultural families, etc.

3. Innovations associated with entities that are subject to bankruptcy.

3.1 The draft law provides for the expansion of the diameter of the circle of entities, effected by the bankruptcy, including: natural persons (such as individuals, consumers or merchants); legal persons (such as legal, private and public persons, both profit and non-profit); as well as local administrative units.

3.2 Concerning the circle of activities of interest to the public, the draft law provides that these entities will be subject to the general rules of bankruptcy when the bankruptcy is regulated by special laws, remaining at this point within the framework envisaged in the existing law. While the draft law provides that this regulation affect entities that operate in the public interest only as long as they are licensed to carry out such activities. It is also introduced as a novelty in the draft, that if special laws governing public or strategic sector do not envisage bankruptcy rules, then every subject under the first paragraph of this article is entitled to demand the opening of bankruptcy proceedings, only after obtaining prior permission from the relevant regulatory authority. Also, the draft law provides that members of the creditors' committee can be appointed also persons who are not creditors, but representatives of a regulatory authority in cases when the debtor carries out activities in the sector of public interest which is controlled by him.

3.3. Regarding the competence of the court, the decision-making powers and procedures of the court are clarified, making the intervention of the court through its decisions or orders that are only available with consultation based on acts, more flexible and rapid, without the need for a mandatory hearing session.

4. Novelties related to monitoring entities

4.1 The draft suggests that the circle of monitoring entities or such as have the right to be well informed about the bankruptcy proceedings, remain not only within the scope of Bankruptcy Agency, the court of bankruptcy, the supervisor, or the steward (as it is the in the existing law), but to add also the role of the Prosecutor's Office, of the High State Audit or that of the Supervisory Authorities of various sectors in the public interest. The role of these entities pertains receiving information or verification of documents, court decisions, the plan of reorganization, of restructuring debt or transfers of the last three years of the entity before going bankrupt. This aims at avoiding abuse or fraud in bankruptcy proceedings. The draft law provides that "... upon obtaining a copy of the decision to open bankruptcy proceedings, the prosecutor, in order to avoid abuse or fraud with the bankruptcy proceedings, verifies the transfers

and the legal actions related to assets of the debtor and persons related to him/her, carried out at least during the last three years before the opening of insolvency proceedings". The Working Group asks for a confirmation of the inclusion of subjects like the prosecution and the HSA in this monitoring.

4.2 An important issue for discussion is the one pertaining the role and status of the FSA, the limits of power and the model to be followed. The role and position of the FSA should be considered as closely related with the possibility of extending the range of controlling and supervisoring subjects, new stakeholders involved who will diligently check not only the procedure of bankruptcy, but especially will supervise cases related to abuse and fraud in bankruptcy. A new competence envisaged in the draft law on FSA is that "... the Agency requires at least every 3 months reporting by the insolvency administrator, a copy of which it sends to the bankruptcy court".

5. Novelties related to the costs and expenses of bankruptcy

The current law provides closure or non-initiation of bankruptcy proceeding and the writting off the national register of the debtor, who has not sufficient means to cover the costs of the bankruptcy procedure. This arrangement creates great opportunities for fraud schemes through bankruptcy. The working group sought to find a solution that would avoid the failure of bankruptcy proceedings, due to the insolvency of the debtor.

The draft law provides for an opportunity to envisage a public fund that will be managed by the FSA, which aims to avoid blocking of the proceedings due to the resignation of the administrator or refusal of duty by him. Prediction of risk of bankruptcy from the starting of a commercial activity does not avoid it altogether, but makes it more realistic. Since from an economic perspective, it takes a business at least three years to understand whether it is operating successfully or not, the draft law allows commercial entities to see whether the curve of their profit turns toward positive figures after three years, they ought to at this moment create the aforementioned deposit. Otherwise, they can move into liquidation when they conclude that they are not successful, without having to lead their financial situation to bankruptcy.

6. Novelties related to the role and status of the administrator and the agency

6.1 Regarding the administrator the draft law has provided as a new development the clarification of persons who take supervisory roles during the bankruptcy proceedings. The draft envisaged three types of administrators: The

insolvency administrator, provisional insolvency administrator and the administrator supervisors, who have the same status and the same selection criteria, but who take roles according to the time frame when they are active or to the specifications of the role that they play.

6.2 Regarding the treatment of the administrator, the draft law provides innovatively the splitting of the remuneration of the administrator in two parts: the insolvency administrator is entitled to monthly salary, as well as the right to compensation as a percentage of the amount of debts settled by the bankruptcy measure as well as reimbursement for expenses incurred in the performance of duty. The amount of compensation is calculated at the time of completion of bankruptcy proceedings. The level of monthly salary is estimated depending on the volume and degree of difficulty during the exercise of the insolvency administrator's task. Detailed rules regarding wages, conditions and criteria for determining the amount of compensation and reimbursement of expenses of the insolvency administrator, are decided by the Council of Ministers Decision. Any insolvency administrator is obliged to carry out for free at least one procedure every three years.

This division is made to motivate administrators in fulfilling their duty to maximize the measure of bankruptcy.

6.3 Also, the bill provides a new guarantee for the completion of the task of the administrator, by sanctioning that the insolvency administrator, before obtaining a license, deposits in the form of a guaranty a certain sum of money. The deposited amount is determined by the National Agency of Bankruptcy.

6.4 Besides the role of the bankruptcy administrator the draft law provides for the role of the heritage guardian or executor of the bankruptcy who are recognized and envisaged also outside the bankruptcy proceedings by the Civil Code.

7. Novelties related to the coordination of procedures for the bankruptcy law with the law on tax procedures.

The draft law stipulates that from the procedural perspective, the bankruptcy law will be preferred as the only law that regulates this procedure in relation to the law on taxes and duties. Therefore, if this solution will be supported by policymakers, the legislation on taxes and duties (Article 104) will be changed/repealed after the enactment of the law of bankruptcy.

8. Regarding the debt restructuring through an extrajudicial agreement to be approved by the court

The draft law provides a set of provisions that envisage the reorganization alongside debt restructuring as part of an extrajudicial settlement through alternative dispute resolution, reaching an agreement that ought to be approved by the court.

9. Regarding the order of preference

For the first time in history of bankruptcy legislation, which was adopted after the 90s, in the new draft there are several provisions that provide a special order of preferment regarding repayment of obligations before and after redistribution.

A fundamental change in the new bankruptcy draft law is the one that provides a clear and predictable order of priorities aligned with Albania's modern context. For this reason, the draft law provides the obligation that before the start of the settlement of creditors' claims in order of preference, initially to be set aside the bankruptcy proceedings expenses. Afterwards in the draft law it has been added a new article with a preference order in which it is projected the order of distribution of wealth, starting with the claims ensured up to the value of property that serves as collateral. Thereafter, are listed the priority claims, including: (i) claims arising from the termination of employment for a period of three months before the date of application of the claim or the date of termination of business, for the payroll, including annual and health leaves, but not more than 500 thousand AL Leke in total; funding received in the form of a loan; (ii) claims for unpaid alimony when the debtor is an individual; (iii) Employee claims for damage to life and health incurredduring their work for the debtor, as well as damages of the same kind of third persons as a result of unlawful actions of the debtor; (iv) claims for unpaid taxes for the period of one year before application; (v) the remuneration of the insolvency administrator; (vi) the costs of reorganization; (vii) the not insured claims, except those of lower rank; (viii) claims of lower ranks and claims of the partners, shareholders, founders, members. The Working Group needs a confirmation of this policy proposed in the draft law.

10. Novelties regarding penalties

Regarding penalties, the draft law provides conclusively that in the case of abuse of the bankruptcy proceedings, there will be administrative

responsibilities, whereas those penal ones ought to be provided only in the Criminal Code.

Administrative offense are envisaged in cases of statements that contain false information; concealment, transfer or alienation of property or documents to the bankruptcy administrator or court order of preventing bankruptcy proceedings; lack of enforcement of court orders by the Administrator; insolvency administrator's refusal to hand over the assets and relevant documentation when he is discharged of duty.

11. Novelties associated with cross-border insolvency

Regarding the cross-border bankruptcy, the draft law envisages the incorporation in a separate chapter with the strategic objective of the adoption of the Model Law of UNCITRAL on Cross Border Insolvency Proceedings as it would send a strong signal of credibility to foreign investors in search of higher levels of predictability in the Albanian system of bankruptcy.

12.

To avoid suspensions and dismissals of insolvency proceedings due to failure to cover the costs it is recommended an extension of the concept of judicial expenses, including: court of law expenses; administrator’s salary; creditors' committee expenses, operating expenses of the administrator; obligations under bilateral contracts, to be paid after the opening of insolvency as well as obligations arising from unjust enrichment.

13. Electronic communication

The draft provides for quick communication among different stakeholders (e.g., the Bankruptcy Court and the Bankruptcy Agency) including also the electronic communication. Also, banking entities, IPRO, NCR, etc., are obliged to submit to the bankruptcy administrator the relevant records and documents pertaining the legal actions of the debtor.

14. Conversion of the case

Each creditor has the right to request conversion of procedure due to: failure to pay of obligations at maturity; supervising administrator's notification on the debtor's failure to implement the plan.

Bankruptcy Court at the request of the supervisory administrator or upon the complaint of creditors, after hearing the debtor decides converting reorganization proceedings to liquidation. Against this intermediate decision can be filed a special complaint in the court of appeal.

15. Expertise process

Borrowing from Administrative K.Pr, is introduced the following concept: the expert of the parties or the court, and that there is only a session that brings in the report or act. During the judicial investigation, the bankruptcy court may take as evidence the expert opinion of the party involved and/or that of the expert appointed by the bankruptcy court.

16. Proposal for amendments of other legal acts

Taking into account the problems of de-registration of entities under Law no. 129/2014 ON SOME AMENDMENTS TO LAW NO. 9901/2008 ON TRADING COMPANIES. Articles 43/99/187/5 which makes possible the "*dissolution of the company, in case of insufficient assets to cover the costs of bankruptcy proceedings, decided by the bankruptcy court when ... the court decides to reject the request for opening insolvency proceedings due to insufficient assets of the company to cover the costs of the bankruptcy procedure*", is provided only the interruption of bankruptcy proceedings through suspension, in the event that the bankruptcy measure is insufficient to cover the costs.

Proceedings are resumed once the sufficient funds to cover the costs are found through the special public fund or by the financing of stakeholders.