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POKRETANJE POSTUPKA REORGANIZACIJE PREMA ZAKONU O STEČAJU**

Reorganizacija vs. unapred pripremljeni plan reorganizacije

SAŽETAK: U ovom radu se razmatra pokretanje postupka reorganizacije uporednim prikazom pokretanja „klasične“ reorganizacije i pokretanja reorganizacije u skladu sa unapred pripremljenim planom reorganizacije. Analiza pokretanja ove dve vrste reorganizacije će biti sporevedena sagledavanjem tri elementa koja u najvećoj meri određuju pokretanje reorganizacije u jednom pravnom sistemu, i to – kada se pokreće postupak reorganizacije, ko je ovlašćen da pokrene ovaj postupak i koja je obavezna sadržina plana reorganizacije. Način na koji su uređena ova tri elementa može značajno uticati na kvalitet plana reorganizacije i na njegovo uspešno sprovođenje. Cilj ovog rada je da se poređenjem ova tri elementa analizira pokretanje dve vrste reorganizacije u srpskom stečajnom pravu, kao i da se ukaže na neka sporna pitanja koja se javljaju prilikom pokretanja ova dva postupka.

Ključne reči: pokretanje reorganizacije, unapred pripremljeni plan reorganizacije, sadržina plana reorganizacije

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UVOD

Reorganizacija, kao alternativa bankrotstvu unutar stečajnog postupka, predstavlja dragocenu mogućnost za privredna društva, a naročito dobija na značaju u ekonomskim sistemima koji su u tranziciji, kao što je to slučaj u Srbiji.[1] Institut reorganizacije stečajnog dužnika je uveden u srpsko pravo 2004. godine usvajanjem Zakona o stečajnom postupku. Između ostalog, Zakonom o stečajnom postupku se predviđala mogućnost da plan reorganizacije bude podnet zajedno sa predlogom za pokretanje stečajnog postupka, kao i mogućnost da plan reorganizacije podnese stečajni dužnik.[2] Ipak, usled nedovoljne zakonske uređenosti ove mogućnosti, ona nije nikada zaživela u praksi.[3] Međutim, srpsko stečajno pravo dobija svoj hibridni postupak reorganizacije donošenjem Zakona o stečaju 2009. godine, kojim je detaljno uređena mogućnost podnošenja plana reorganizacije istovremeno sa podnošenjem predloga za pokretanje stečajnog postupka. Stoga, Zakon o stečaju poznaje dve vrste reorganizacije – postupak reorganizacije (tzv. obična ili klasična reorganizacija) i postupak reorganizacije u skladu sa unapred pripremljenim planom reorganizacije (u daljem tekstu: UPPR).[4] Reorganizacija u skladu sa UPPR-om je za veoma kratak period od uvođenja u srpsko stečajno pravo postala izuzetno značajan instrument za rešavanje finansijskih problema privrednih društava. Ovom vidu reorganizovanja su pribegla i velika privredna društva, kao što je RTB Bor, Fabrika automobila Priboj, Beohemija i drugi.[5]

[1] Za države koje su u tranziciji je izuzetno važno da uspostave funkcionalan i kvalitetan stečajnopravni sistem. Uspostavljanje takvog sistema, između ostalog, podrazumeva prihvatanje instituta koji su se razvili u državama kapitalističkog pravno-političkog uređenja. Međutim, za dobro funkcionisanje takvih instituta u praksi, nužno je njihovo prilagođavanje osobenostima pravnog sistema u koji su implementirani. V.: Falke, M. (2003). *Insolvency Law Reform in Transition Economies*. Berlin: Frankfurter Institut für Transformationsstudien.

[2] Zakon o stečajnom postupku, *Službeni glasnik Republike Srbije,* br. 84/04. i 85/05, čl. 127, st. 2, čl. 129.

[3] Radović, V. (2018). *Stečajno pravo – knjiga druga*. Beograd: Pravni fakultet Univerziteta u Beogradu, 366.

[4] Prilog „unapred" u srpskom jeziku se koristi za određivanje prostora zbog čega je termin *unapred pripremljeni plan reorganizacije* neprimeren. Pošto je namera zakonodavca bila da odredi vreme a ne prostor, bolji izraz bi bio *prethodno pripremljeni plan reorganizacije*.

[5] Uvođenjem postupka reorganizacije u skladu sa UPPR-om u srpsko stečajno pravo smanjio se značaj obične reorganizacije. Radović, V., Radulović, B. (2018). Prearranged Reorganization Plans in Serbia: Form Over Substance. *European Business Organization Law Review*, Vol. 19, 411.

U radu će biti sagledano vreme pokretanja postupka reorganizacije, lica koja su ovlašćena da pokrenu postupak reorganizacije kao i obavezna sadržina plana reorganizacije. Zakon o stečaju različito uređuje ova tri elementa u zavisnosti od toga da li se radi o klasičnoj reorganizaciji ili o pokretanju reorganizacije u skladu sa UPPR-om. Cilj ovog rada je da se poređenjem ova tri elementa analizira pokretanje dve vrste reorganizacije u srpskom stečajnom pravu, kao i da se ukaže na neka sporna pitanja koja se javljaju prilikom pokretanja ova dva postupka.

U srpskom pravu reorganizacija i reorganizacija u skladu sa UPPR-om se sprovode u okviru stečajnog postupka. Zakon o stečaju detaljno uređuje institut reorganizacije, dok za reorganizaciju u skladu sa UPPR-om ustanovljava neka posebna pravila, propisujući da se u svemu što nije posebno uređeno, primenjuju pravila kojima se uređuje reorganzicija i plan reorganizcacije.[6]

Karakteristike koje se odnose na pokretanje postupka reorganizacije u skladu UPPR-om, a koje razlikuju ovaj postupak od klasične reorganizacije, proizlaze iz cilja koji se ovakvim institutom žele postići – brže reorganizovanje stečajnog dužnika. Cilj koji se želi postići sprovođenjem reorganizacije u skladu sa UPPR-om je reorganizovanje stečajnog dužnika što je moguće ranije, dok finansijski problemi stečajnog dužnika još uvek nisu produbljeni, kao i kraće trajanje samog postupka reorganizacije. Ideja iz koje su nastali hibridni postupci je da je potrebno što ranije i brže pokretanje postupka reorganizacije, jer se smatra da su šanse za oporavak stečajnog dužnika značajno veće ako do reorganizacije dođe u trenutku kada finansijske teškoće još uvek nisu velike i ozbiljne. Reorganizacija u skladu sa UPPR-om predstavlja srpski model hibridnog postupka koji ima za cilj da to omogući. Stoga, posebnosti reorganizacije u skladu sa UPPR-om u odnosu na klasičan postupak reorganizacije proističu upravo iz ovog specifičnog cilja.

KADA JE POKRENUT POSTUPAK REORGANIZACIJE?

Prethodna i naknadna reorganizacija

Postupak reorganizacije je pokrenut podnošenjem plana reorganizacije. Ovaj trenutak će se razlikovati u zavisnosti od toga da li se pokreće klasičan postupak reorganizacije, ili postupak reorganizacije u skladu sa UPPR-om. U prvom slučaju, postupak reorganizacije pokreće ovlašćeni predlagač kad

[6] Zakon o stečaju, *Službeni glasnik Republike Srbije,* br. 104/2009, 99/2011. – dr. zakon, 71/2012. – odluka US, 83/2014, 113/2017, 44/2018. i 95/2018. (u daljem tekstu: ZS), čl. 160, st. 5.

podnese plan reorganizacije u roku koji odredi stečajni sudija, a koji ne može biti duži od 90 dana od dana otvaranja stečajnog postupka.[7] Sa druge strane, reorganizacija u skladu sa UPPR-om se pokreće podnošenjem predloga za pokretanje stečajnog postupka.[8] Već prilikom određivanja trenutka pokretanja postupka reorganizacije može se primetiti razlika između klasičnog postupka reorganizacije i postupka reorganizacije u skladu sa UPPR-om. Naime, klasični postupak reorganizacije se pokreće nakon što je otvoren stečajni postupak, odnosno, tek nakon što je utvrđeno postojanje stečajnog razloga. Suprotno, postupak reorganizacije u skladu sa UPPR-om se pokreće pre otvaranja stečajnog postupka, odnosno, utvrđivanja postojanja stečajnog razloga, jer se plan reorganizacije podnosi zajedno sa predlogom za pokretanje stečajnog postupka. U ovom slučaju stečajni sudija otvara stečajni postupak tek nakon što poverioci usvoje UPPR.

Prema tome, u zavisnosti od trenutka pokretanja postupka reorganizacije, može se reći da postupak reorganizacije u skladu sa UPPR-om predstavlja prethodnu reorganizaciju, dok klasičan postupak reorganizacije predstavlja naknadnu reorganizaciju. Čini se da bi ovakvo imenovanje ove dve vrste reorganizacije predstavljalo jezički lepše rešenje od trenutnog zakonskog rešenja, pre svega zbog jednostavnosti i sugestivnosti navedenih naziva. Takođe, ovakvo imenovanje bi bilo odgovarajuće upravo zbog toga što ono oslikava osnovnu razliku između ova dva instituta. Podnošenje UPPR-a u ranijem trenutku stečajnog postupka u odnosu na klasičan plan reorganizacije ima za cilj postizanje osnovne svrhe ovog instituta – što brža reorganizacija stečajnog dužnika. Usvajanje plana reorganizcije u kratkom roku predstavlja komparativnu prednost sporovođenja reorganizacije u skladu sa UPPR-om u odnosu na klasičnu reorganizaciju.

Odnos dva prethodna stečajna postupka

U praksi se kao sporno postavilo pitanje odnosa dva prethodna stečajna postupka. Naime, postavilo se pitanje da li je moguće istovremeno voditi dva prethodna postupka, i to jedan po predlogu poverilaca za pokretanje stečajnog postupka, a drugi po predlogu za pokretanje stečajnog postupka u skladu sa UPPR-om. U ovom slučaju je bilo sporno da li je opravdano dati prednost postupanju po UPPR-u u odnosu na predlog za pokretanje stečajnog postupka i onda kada je poverilac podneo predlog za pokretanje stečajnog postupka

[7] ZS, čl. 162.

[8] Stečajni dužnik podnosi UPPR istovremeno sa zahtevom za pokretanje stečajnog postupka, pri čemu je dužan da u predlogu za pokretanje stečajnog postupka jasno naznači da se predlaže pokretanje stečajnog postupka u skladu sa UPPR-om. ZS, čl. 158, st. 3.

pre predloga za pokretanje stečajnog postupka u skladu sa UPPR-om. Sud je zauzeo stav prema kom bi sve do donošenja rešenja o otvaranju stečajnog postupka na predlog poverilaca, prednost trebalo dati predlogu stečajnog dužnika za pokretanje stečajnog postupka u skladu sa UPPR-om. Sud je procenio da podnošenje UPPR-a od strane stečajnog dužnika ukazuje na to da je stečajni dužnik uočio probleme u svom poslovanju i da je spreman da ga promeni. Ako predlog za pokretanje stečajnog postupka u skladu sa UPPR-om bude odbačen ili odbijen, stečajni sudija može odlučivati o predlogu za pokretanje stečajnog postupka koji je podneo ovlašćeni predlagač.[9] Ovakav stav je opravdan iz više razloga. Prvo, davanje prednosti predlogu za pokretanje stečajnog postupka u skladu sa UPPR-om može da bude motivacija za privredna društva koja se nalaze u finansijskim poteškoćama da preduzmu određene aktivnosti radi promene načina poslovanja i onda kada je podnet predlog za pokretanje stečajnog postupka, a pre otvaranja stečajnog postupka i da na taj način spreče eventualno bankrotstvo. Zatim, na ovaj način se omogućava brže reagovanje i samim tim se sprečava dalje produbljavanje finansijskih problema privrednog društva. Na kraju, treba imati u vidu da je trajanje prethodnog stečajnog postupka koji se sprovodi na osnovu predloga ovlašćenog lica ograničeno na 30 dana.[10] Izrada UPPR-a svakako može trajati i duže od 30 dana, te je moguće zamisliti situaciju u kojoj je stečajni dužnik uložio resurse u izradu UPPR-a i postigao dogovore sa nekim od poverilaca, a da ga u međuvremenu neko od ovlašćenih predlagača za pokretanje stečajnog postupka „pretekne" i podnese predlog za pokretanje stečajnog postupka. U tom slučaju, opravdano je dati prednost predlogu za pokretanje stečajnog postupka u skladu sa UPPR-om, kako bi se omogućilo iskorišćavanje resursa koje je stečajni dužnik uložio u izradu UPPR-a i eventualno, ako dođe do usvajanja UPPR-a, stečajni dužnik brže reorganizovao. Uprkos tome što je opravdan, može se prigovoriti da je ovakav stav sudske prakse u vreme kada je zauzet bio nezakonit. Prema izmenama Zakona o stečaju iz 2014. godine, ako se plan reorganizacije podnosi istovremeno sa predlogom za pokretanje stečajnog postupka, njegov naziv se menja u UPPR i na njega se primenjuju posebna pravila propisana za sprovođenje stečajnog postupka u skladu sa UPPR-om.[11] Tumačeći ovu odredbu može se zaključiti da je svaki plan koji je podnet nakon podnošenja predloga za pokretanje stečajnog postupka, običan plan reorganizacije i da to

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[9] Odgovori na pitanja privrednih sudova Odeljenja za privredne sporove Privrednog apelacionog suda od 3. 11. 2015, 4. 11. 2015. i 26. 11. 2015. godine i Odeljenja za privredne prestupe i upravno-računarske sporove od 30. 11. 2015. godine – Sudska praksa privrednih sudova – *Bilten,* br. 4/2015.

[10] ZS, čl. 67.

[11] Zakon o stečaju, *Službeni glasnik RS*, br. 104/2009, 99/2011. – *dr. zakon*, 71/2012. – *odluka US* i 83/2014, čl. 155, st. 4.

više nije UPPR. UPPR može biti samo onaj plan reorganizacije koji je podnet istovremeno sa predlogom za pokretanje stečajnog postupka.[12] Ako je već podnet predlog za pokretanje stečajnog postupka, bez obzira na to ko je predlagač, postojanje takvog predloga isključuje mogućnost podnošenja UPPR-a. Prema tome, sudska praksa je davanjem prednosti predlogu za pokretanje stečajnog postupka u skladu sa UPPR-om postupala nezakonito odnosno protivno slovu zakona.[13] Ovakav stav sudske prakse je postao zakonit tek nakon što je izmenama Zakona o stečaju iz 2017. godine predviđeno da, iako je poverilački predlog za pokretanje stečajnog postupka podnet ranije, stečajni sudija prvo rešava po predlogu za pokretanje stečajnog postupka u skladu sa UPPR-om.[14]

Iako je stav koji izražava veću naklonost prema UPPR-u opravdan, njegova primena ostavlja mogućnost stečajnom dužniku da zloupotrebljava svoje pravo i da odugovlači postupak stečaja radi oštećenja poverilaca, a u korist vlasnika stečajnog dužnika.[15] Mogućnost zloupotrebe bi se mogla sprečiti još u fazi prethodnog ispitivanja plana reorganizacije, kada stečajni sudija ispituje zakonitost predloženog plana reorganizacije, tako što bi stečajni sudija proveravao da li je plan podnet u skladu sa načelom savesnosti i poštenja. Načelo savesnosti i poštenja je propisano Zakonom o obligacionim odnosima koji, pored ovog načela, sadrži i odredbu kojom izričito zabranjuje zloupotrebu prava, odnosno korišćenje prava protivno cilju zbog koga je ono zakonom ustanovljeno ili priznato (čl. 13).[16] Načelo savesnosti i poštenja i zabrana zlo-

[12] „*Prepack* nije moguće podneti bez predloga za pokretanje stečajnog postupka, niti nakon podnošenja predloga za pokretanje stečajnog postupka." Spasić, S. (2010). *Prepack* kao šansa za srpsku privredu. *Pravo i privreda*, 7–9, 250.

[13] Ovo je dokaz da iako formalnopravno u domaćem pravnom sistemu sudska praksa nije izvor prava, faktički vrlo često sudovi preuzimaju funkciju stvaranja prava. U materiji stečajnog prava poseban značaj imaju shvatanja Privrednog apelacionog suda. U prilog tome v.: Radović, V. (2018). *Stečajno pravo – knjiga prva*. Beograd: Pravni fakultet Univerziteta u Beogradu, 68.

[14] ZS, čl. 158, st. 8. Pored toga što je izmenama Zakona o stečaju iz 2017. godine stav sudske prakse ozakonjen, istim izmenama propisan je jedan izuzetak u kom slučaju bi prednost ipak imao poverilački predlog za pokretanje stečajnog postupka. Zakonom o stečaju se propisuje da ako je predlog za pokretanje stečajnog postupka u skladu sa UPPR-om pravnosnažno odbijen ili je odbačen, a stečajni dužnik naknadno podnese novi predlog novog UPPR-a, pri čemu je pre njegovog podnošenja, protiv stečajnog dužnika poverilac podneo predlog za pokretanje stečajnog postupka, stečajni sudija mora prvo rešavati po poveriočevom predlogu. ZS, čl. 158, st. 10.

[15] Vlasnici stečajnog dužnika imaju interes da odugovlače stečajni postupak i da to vreme koriste za sakrivanje imovine stečajnog dužnika u svoju korist.

[16] „U zasnivanju obligacionih odnosa i ostvarivanju prava i obaveza iz tih odnosa strane su dužne da se pridržavaju načela savesnosti i poštenja." Zakon o obligacionim odnosima, *Službeni list SFRJ*, br. 29/78, 39/85, 45/89. – *odluka USJ* i 57/89, *Službeni list SRJ*, br. 31/93, *Službeni list SCG*, br. 1/2003. – *Ustavna povelja* i *Službeni glasnik RS*, br. 18/2020, čl. 12.

upotrebe prava se smatraju jednim od osnovnih načela srpskog imovinskog prava, zbog čega bi stečajni sudija trebalo da bude dužan da o ovom načelu vodi računa po službenoj dužnosti prilikom ispitivanja zakonitosti plana reorganizacije.[17] Uprkos ovoj izričitoj odredbi koja postoji u Zakonu o obligacionim odnosima, a koja bi trebalo da se primenjuje na sve imovinskopravne odnose, sudska praksa ne smatra da ispitivanje da li je plan podnet u skladu sa načelom savesnosti i poštenja spada u ovlašćenja stečajnog sudije, kao ni da je stečajni sudija dužan da to proverava po službenoj dužnosti prilikom ispitivanja zakonitosti plana.[18] Čini se da ovakav stav domaće sudske prakse ostavlja prostor za zloupotrebu prava na podonošenje UPPR-a, ali i prava na podnošenje plana reorganizacije.

Radi sprečavanja zloupotrebe, stečajni sudija bi trebalo da uzme u obzir i druge okolnosti koje bi ukazivale na to da je plan podnet protivno načelu savesnosti i poštenja. Uprkos tome što načelo savesnosti i poštenja predstavlja pravni standard, stečajni sudija bi mu dao precizne pravne obrise u svakom konkretnom slučaju, za šta bi mogla da mu bude od pomoći već ustanovljena praksa stranih sudova o ovom pitanju.[19] Podnošenje plana reorganizacije u dobroj veri je poseban uslov za potvrdu plana reorganizacije u američkom stečajnom pravu, te je američka sudska praksa osmislila niz okolnosti, kao kriterijuma na osnovu kojih se utvrđuje da li je plan podnet u zloj nameri (nepošteno).[20] Zbog sličnosti američkog uslova dobre vere i srpskog načela savesnosti i poštenja, kriterijumi iz američke sudske prakse bi mogli poslužiti kao pokazatelj i domaćim stečajnim sudijama kada procenjuju da li je plan podnet u skladu sa načelom savesnosti i poštenja. U američkoj literaturi se navodi da treba obratiti pažnju na sledeće okolnosti: imovinu stečajnog dužnika čini samo jedna stvar, nedozvoljeno ponašanje stečajnog dužnika u periodu pre podnošenja plana reorganizacije, mali broj neobezbeđenih poverilaca, pokušaj da se zaustavi realizacija prava založnih poverilaca putem uvođenja moratorijuma na obaveze stečajnog dužnika, postojanje spora između dve strane (od kojih je jedna stečajni dužnik) na koji bi plan reorganizacije uticao, izbegavanje izvršenja sudske odluke, stečajni dužnik ne obavlja privrednu delatnost ili nema zaposlena lica, nedovoljna likvidnost i nemogućnost da se obezbede

[17] Jankovec, I. (1999). *Privredno pravo*. Beograd, 241. Vasiljević, M. (2016). *Trgovinsko pravo*. Beograd: Pravni fakultet Univerziteta u Beogradu, 49.

[18] Odgovori na pitanja privrednih sudova koji su utvrđeni na sednici odeljenja Privrednog apelacionog suda održanoj 23. 10. 2012. godine, *Bilten sudske prakse privrednih sudova*, br. 3/2012, pitanje br. 34, 224.

[19] Vasiljević, M. (2016). *Trgovinsko pravo*. Beograd: Pravni fakultet Univerziteta u Beogradu, 49.

[20] *U. S. Bankruptcy Code* (Stečajni zakonik SAD, u daljem tekstu: SZ SAD), 1978, para. 1129(a)(3).

finansijska sredstva za potrebe reorganizacije.[21] Čini se da bi prilikom ocene da li je plan zakonit, odnosno da li je podnet u skladu sa načelom savesnosti i poštenja, stečajni sudija trebalo da uzme u obzir uslove propisane zakonom, ali i sve druge okolnosti koje bi ukazivale na eventualnu zloupotrebu prava od strane stečajnog dužnika. U teoriji se smatra da primena načela savesnosti i poštenja podrazumeva da „...sud treba da ide jedan korak dalje od zakona, ali ne bez zakona"[22]. Postupajući na taj način stečajni sudija bi mogao da spreči zloupotrebe do kojih bi moglo da dođe ukoliko bi stečajni dužnik namerno podneo predlog za pokretanje stečajnog postupka u skladu sa UPPR-om, a radi sabotiranja poverilačkog predloga za pokretanje stečajnog postupka.

KO POKREĆE POSTUPAK REORGANIZACIJE?

Ovlašćeni predlagači u uporednom pravu

Uporedna zakonodavstva različito uređuju krug lica koja su ovlašćena da podnesu plan reorganizacije i time pokrenu postupak reorganizacije. Za podnošenje plana reorganizacije moguće je ovlastiti veći broj lica ili samo jedno lice. Takođe, postoje i zakonodavstva koja su prihvatila rešenje između ova dva pola, tako da su u različitim periodima stečajnog postupka različita lica ovlašćena za podnošenje plana reorganizacije.[23] Takvo rešenje je prihvaćeno u američkom pravu, prema kom je stečajni dužnik jedino lice ovlašćeno za podnošenje plana u roku od 120 dana od dana otvaranja postupka reorganizacije. Po proteku tog roka, ako stečajni dužnik ne podnese plan reorganizacije, može ga podneti bilo koje zainteresovano lice.[24] Takođe, stečajni sudija može na zahtev zainteresovane stranke skratiti ili produžiti period ekskluziviteta.[25] Kada se prihvati rešenje, prema kom je samo jedno lice ovlašćeno da podnese plan, uobičajeno je da to bude stečajni dužnik ili stečajni upravnik kao zastupnik stečajnog dužnika. Nemačko pravo prihvata uži krug ovlašćenih podnosilaca plana reorganizacije i prema nemačkom rešenju ovlašćeni

[21] Greenstone Miller, J. (1997). Ammendment to provide Good Faith filing Requirement for Chapter 11 debtors. *Commercial Law Journal*, Vol. 102, 184.

[22] Perović, S. (1990). *Obligaciono pravo*. Beograd, 57.

[23] Radović, V. (2018). *Stečajno pravo – knjiga prva*. Beograd: Pravni fakultet Univerziteta u Beogradu, 2019.

[24] SZ SAD, para. 1121 (a), (b), (c).

[25] SZ SAD, para. 1121 (d)(1). Zakon o stečaju Srbije je ranije prihvatao rešenje po kom je sudija mogao, pod određenim uslovima, da produži rok za podnošenje plana reorganizacije. Izmenama Zakona o stečaju ova mogućnost je ukinuta i rok ne može trajati duže od 90 dana od dana otvaranja stečajnog postupka. ZS, čl. 162.

podnosioci plana reorganizacije su stečajni upravnik i stečajni dužnik.[26] Propisivanjem ovog prava kao isključivog prava stečajnog dužnika želi se podstaći uprava stečajnog dužnika na što brže delovanje. Sa druge strane, cilj zakonske odredbe koja na podnošenje plana reorganizacije ovlašćuje veći broj učesnika postupka jeste da se u postupak reorganizacije uključi širi krug lica na čije interese plan reorganizacije može da utiče.[27]

Ovlašćeni predlagači prema Zakonu o stečaju

Balansirajući između ova dva cilja, Zakon o stečaju prihvata rešenje prema kom za podnošenje plana reorganizacije ovlašćuje veći broj učesnika postupka reorganizacije i to: stečajnog upravnika, razlučne poverioce, stečajne poverioce i lica koja su vlasnici najmanje 30 % kapitala stečajnog dužnika.[28] Ovako širok krug lica koja su ovlašćena za podnošenje plana reorganizacije je nastao kao rezultat nastojanja da položaj poverilaca bude što ravnopravniji.[29] Prema prethodnom zakonskom rešenju, razlučni i stečajni poverioci su mogli podneti plan reorganizacije ako su imali određeni procenat učešća (30 %) u ukupnim obezbeđenim odnosno neobezbeđenim potraživanjima. Prema tome, sagledavajući poslednje zakonske izmene, može se zaključiti da u srpskom pravu postoji tendencija širenja kruga podnosilaca plana reorganizacije. Ovako široko određen krug predlagača može da dovede do velikog broja predloženih planova reorganizacije, što dodatno usložnjava i odugovlači postupak reorganizacije.[30] Ipak, ovakvo rešenje je opravdano, jer se na ovaj način uzimaju u obzir interesi svih učesnika reorganizacije. Takmičarski pristup koji dovodi do konkurencije više planova podstaći će predlagače da ponude kvalitetnije planove koji će biti sinteza interesa svih učesnika reorganizacije.[31] Sa druge

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[26] *Insolvenzordnung* (Nemački Insolvencijski zakon, u daljem tekstu: SZ NEM), 1994, para. 218 (1).

[27] Ovakvo rešenje je ocenjeno kao maksimalno liberalizovano. Slijepčević, D. (2009). *Pravni aspekti reorganizacije stečajnog dužnika*. Beograd: Pravni fakultet Univerziteta u Beogradu, [doktorska disertacija], 161.

[28] ZS, čl. 161, st. 1.

[29] Radović, V. (2019). Pravna analiza poslednjih izmena Zakona o stečaju – korak napred, dva koraka unazad. *Pravo i privreda*, 4–6, 625.

[30] Zakonodavac ukidanjem zahteva za određenim procentom učešća (30 %) u ukupnim potraživanjima ostavlja mogućnost da beznačajni poverioci predlože plan reorganizacije, koji nema izgleda za usvajanje, a koji bi neminovno doveo do odugovlačenja postupka. Međutim, logična pretpostavka zakonodavca je da beznačajni poverioci, koji nemaju velika potraživanja prema stečajnom dužniku, neće ni biti zainteresovani da ulažu sredstva u sačinjavanje plana reorganizacije.

[31] UNCITRAL, *Legislative Guide on Insolvency Law*, New York, 2005, 213.

strane, podnošenje UPPR-a je isključivo pravo stečajnog dužnika.[32] U ovom slučaju dolazi do izražaja specifičnost reorganizacije u skladu sa UPPR-om, kao instituta kojim se želi obezbediti reorganizacija stečajnog dužnika u što ranijem trenutku, zbog čega zakonodavac blagovremeno delovanje vrednuje kao značajnije od uključivanja većeg broja učesnika postupka i njihovih interesa. Takođe, propisivanje prava na podnošenje UPPR-a kao isključivog prava stečajnog dužnika je podstaknuto i praktičnim razlozima. Stečajni dužnik je jedini učesnik postupka koji poseduje informacije na osnovu kojih bi mogao blagovremeno da reaguje i podnese UPPR, zbog čega bi propisivanje takvog prava za ostale učesnike postupka bilo praktično neupotrebljivo, s obzirom na to da oni ne poseduju informacije na osnovu kojih bi mogli da izrade UPPR.

SADRŽINA PLANA REORGANIZACIJE

Elementi plana

Zakon o stečaju uređuje obaveznu sadržinu plana reorganizacije propisujući elemente koje sadrži plan reorganizacije.[33] Zatim, uzimajući u obzir specifičnosti UPPR-a, Zakon o stečaju propisuje dodatnih šest elemenata koje sadrži UPPR.[34] Prema tome, svi elementi bi mogli biti podeljeni na opšte i posebne. Opšti su oni elementi koje mora da sadrži svaki plan reorganizacije, dok su posebni elementi oni koje sadrži samo UPPR. Zakon o stečaju propisuje posebne elemente koje sadrži UPPR, ali su detaljnije uređeni Pravilnikom o načinu sprovođenja reorganizacije po unapred pripremljenom planu reorganizacije i sadržini unapred pripremljenog plana reorganizacije.[35] Propisivanje posebnih šest elemenata je motivisano prirodom postupka prethodne reorganizacije, koje karakteriše brže odvijanje i kraće trajanje formalnog sudskog postupka, kao i priprema i pregovaranje UPPR-a van suda i to, po pravilu, samo sa najvećim poveriocima stečajnog dužnika. Prema tome, zakonodavac uočava potrebu za dodatnim informisanjem i ostalih poverilaca, radi ostvarivanja stečajnog načela jednakog tretmana i ravnopravnosti, te propisuje ovih

[32] ZS, čl. 158.

[33] Iako je ovakvo definisanje sadržine plana reorganizacije podložno različitim tumačenjima, treba zauzeti stav prema kom su ovi zakonski elementi nužni, bitni i minimalni, te da plan može sadržati i neke druge elemente onda kada je to potrebno. Radović, V. (2018). *Stečajno pravo – knjiga druga*. Beograd: Pravni fakultet Univerziteta u Beogradu, 228.

[34] ZS, čl. 156.

[35] Pravilnik o načinu sprovođenja reorganizacije po unapred pripremljenom planu reorganizacije i sadržini unapred pripremljenog plana reorganizacije (u daljem tekstu: Pravilnik), *Službeni glasnik RS*, br. 57/2018.

posebnih šest elemenata kojim se otklanja nesigurnost i informišu svi poverioci. S obzirom na to da opšte elemente sadrži i klasičan plan reorganizacije i UPPR, u nastavku rada će se sadržine ove dve vrste planova porediti analizom posebnih elemenata.

Informisanje drugih poverilaca o dejstvu plana

Bez obzira na to da li se radi o naknadnoj ili prethodnoj reorganizaciji, svi poverioci stečajnog dužnika se mogu podeliti u dve grupe – one poverioce koji učestvuju u postupku (sudskom postupku ili neformalnom postupku pripreme UPPR-a) i one koji nisu učestvovali u postupku i koji nisu bili obavešteni o podnetom planu reorganizacije. Tretman druge grupe poverilaca se razlikuje u zavisnosti od toga da li se radi o naknadnoj ili o prethodnoj reorganizaciji. Kod naknadne reorganizacije, plan reorganizacije se ne primenjuje neposredno na poverioce koji nisu obuhvaćeni planom reorganizacije, odnosno poverioce koji nisu blagovremeno prijavili svoje potraživanje u stečajnom postupku. Takvi poverioci su dužni da podnesu tužbu za osudu na činidbu kako bi parnični sud uskladio njihova prava iz odnosa sa stečajnim dužnikom sa pravima koja bi oni imali da su bili obuhvaćeni planom.[36] Ova grupa poverilaca se drugačije tretira u prethodnoj reorganizaciji jer ih ne tereti obaveza podnošenja tužbe i na njih se usvojeni plan reorganizacije primenjuje direktno, iako oni nisu učestvovali u postupku njegove pripreme. Zbog toga je potrebno da UPPR sarži odredbu kojom se određuje da će potraživanje poverilaca koje nije obuhvaćeno odredbama plana o namirenju poverilaca biti namireno na isti način i pod istim uslovima kao potraživanja drugih poverilaca njegove klase.[37] U prethodnoj reorganizaciji, neophodno je obavestiti poverioce koji nisu izričito pomenuti u planu da se plan odnosi i na njih.[38] Na primeru ovog posebnog elementa koji sadrži UPPR se oslikava još jedna razlika između prethodne i naknadne reorganizacije. Kod naknadne reorganizacije se pretpostavlja da svi poverioci učestvuju u stečajnom postupku koji je u toku, štaviše, oni su i ovlašćeni da podnesu plan reorganizacije, dok kod prethodne reorganizacije važi pretpostavka da su o UPPR-u obavešteni samo neki, obično najveći poverioci stečajnog dužnika, koji su i učestvovali u njegovoj pripremi zbog čega je ova odredba neophodan posebni element UPPR-a.

[36] „Zapravo, oni će biti namirivani kao da su obuhvaćeni planom, ali ne na osnovu plana kao izvršne isprave, već na osnovu presude." Radović, V. (2018). *Stečajno pravo – knjiga druga*. Beograd: Pravni fakultet Univerziteta u Beogradu, 320 i 321.

[37] ZS, čl. 156, st. 4, t. 1.

[38] Radović, V. (2018). *Op. cit.*, 370.

Izjava većinskih poverilaca da su saglasni sa planom

UPPR sadrži i potpisanu izjavu većinskih poverilaca po vrednosti potraživanja svake planom predviđene klase da su saglasni sa sadržinom plana reorganizacije i spremni da glasaju za njegovo usvajanje.[39] Karakter ove izjave je neobavezujući, što znači da bi poverilac na ročištu mogao da glasa i protiv usvajanja UPPR-a, osim ako je izričito izjavio da se izjava smatra glasačkim listićem u smislu odredaba zakona kojim se uređuje stečaj, a koje regulišu glasanje pisanim putem.[40] Dva cilja se žele postići propisivanjem ovog posebnog elementa. Prvo, zahtevajući da većinski poverioci izraze saglasnost povodom UPPR-a, makar i opozivu, zakonodavac sprečava zloupotrebe prethodne reorganizacije i podnošenje UPPR-a bez prethodno postignutog dogovora sa najznačajnijim poveriocima. Drugo, na ovaj način se stečajni dužnik obavezuje da vodi pregovore sa najvećim poveriocima van suda, što utiče na to da sudski postupak kraće traje.[41] Ciljevi koji se žele postići ovakvom izjavom ukazuju zbog čega ona nije potrebna kod običnog plana reorganizacije. Pre svega, s obzirom na to da se kod naknadne reorganizacije plan reorganizacije može usvojiti bez dogovora stečajnog dužnika i poverilaca (na primer, kada poverilac predloži plan reorganizacije koji kasnije bude usvojen), odnosno bez saglasnosti stečajnog dužnika, nije potrebno zakonskim odredbama stvarati podsticaje za pregovaranje između ove dve strane. Zatim, kratak sudski postupak je *differentia specifica* hibridnih postupaka, odnosno prethodne reorganizacije. U naknadnoj reorganizaciji, iako se primenjuje načelo hitrine postupka, ne postoji potreba za požurivanjem postupka pred sudom na način na koji je to potrebno u prethodnoj reorganizaciji.[42]

Izjava ovlašćenog lica podnosioca plana o verodostojnosti podataka

Izjava o verodostojnosti podataka i informacija navedenih u planu reorganizacije je izjava kojom ovlašćeno lice podnosioca plana potvrđuje, pod punom materijalnom i krivičnom odgovornošću, u svoje ime i u ime podnosioca plana reorganizacije, da su podaci i informacije navedeni u njemu tačni i

[39] ZS, čl. 156, st. 4, t. 2.

[40] Pravilnik, čl. 3, st. 6.

[41] Radulović, B. (2015). Unapred pripremljeni planovi reorganizacije i problem negativne selekcije. *Anali Pravnog fakulteta u Beogradu*, 1, 153.

[42] Kratko trajanje postupka pred sudom je osnovna prednost hibridnih postupaka odnosno prethodne reorganizacije.

potpuni prema njegovom saznanju u momentu podnošenja.[43] Podnosilac plana i njegovo ovlašćeno lice krivično odgovaraju za netačnost i nepotpunost podataka i informacija navedenih u planu reorganizacije, a propisivanje ove izjave kao posebnog elementa UPPR-a olakšava utvrđivanje te odgovornosti. Dakle, zbog veće asimetrije informacija koja postoji u postupku prethodne reorganizacije i prostor za zloupotrebu od strane podnosioca plana je veći. Upravo zbog toga je moguće zamisliti situaciju u kojoj bi podnosilac plana iskoristio to što se u prethodnoj reorganizaciji plan reorganizacije brže usvaja, te lažno prikazao ili prikrio činjenice koje mogu značajno da utiču na odluku poverilaca o usvajanju UPPR-a ili odluku suda o potvrđivanju usvajanja UPPR-a, oslanjajući se na to da ostali učesnici u postupku neće imati dovoljno vremena da provere verodostojnost podataka i informacija navedenih u UPPR-u. Poseban podsticaj za ovakvu zloupotrebu podnosiocu plana bi predstavljalo to, što bi bilo izuzetno teško dokazati njegovu krivičnu odgovornost. Međutim, prilaganjem ovakve izjave u UPPR-u se krivična odgovornost olakšano utvrđuje i samim tim se prostor za zloupotrebu značajno smanjuje. Ovaj posebni element UPPR-a, kao i prethodni, proizlazi iz najvažnije karakteristike postupka prethodne reorganizacije – brzine – koja je u naknadnoj reorganizaciji manje značajna.

Vanredni izveštaj revizora

Vanredni izveštaj revizora o finansijskim izveštajima stečajnog dužnika se sastavlja sa stanjem poslovnih knjiga utvrđenim najkasnije 90 dana pre dana podnošenja plana reorganizacije. Ovaj izveštaj sadrži i pregled svih potraživanja i procentualno učešće svakog poverilaca u odgovarajućoj klasi plana reorganizacije.[44] Specifična mogućnost zloupotrebe UPPR-a do koje dolazi usled asimetrije informacija koja je naročito naglašena u prethodnoj reorganizaciji, a o kojoj je bilo reči u prethodno navedenim posebnim elementima, jeste *ratio legis* i ovog posebnog elementa UPPR-a. Propisivanje ovog elementa ima za cilj sprečavanje lažnog prikazivanja ili prikrivanja u finansij-

[43] Ovom izjavom ovlašćeno lice podnosioca plana izričito potvrđuje i da: 1) ne postoje poverioci čija potraživanja nisu izričito navedena u planu a koji bi, da su obuhvaćeni planom, mogli, pojedinačno ili zajedno, da svojim glasanjem utiču na odluku o usvajanju plana; 2) su u planu navedeni svi zahtevi trećih lica prema podnosiocu plana za koje podnosilac plana smatra da nisu osnovani u celosti ili delimično; 3) su pri oceni i obračunu osnova, visine i vrste potraživanja svakog poverilaca pojedinačno uzeti u obzir svi raspoloživi podaci i informacije; 4) u plan nisu unete izmene nakon što su poverioci potpisali izjave da su saglasni sa planom i spremni da glasaju za njegovo usvajanje. Pravilnik, čl. 4, st. 1, t. 1–6.

[44] Pravilnik, čl. 5, st. 1.

skim izveštajima stečajnog dužnika, kao i u evidenciji potraživanja i učešću poverilaca u planu reorganizacije. Na ovaj način se povećava poverenje poverilaca u verodostojnost finansijskih izveštaja stečajnog dužnika ali i u UPPR.

Izjava revizora ili stečajnog upravnika o izvodljivosti plana reorganizacije

Izjava o izvodljivosti plana reorganizacije je izjava koja sadrži mišljenje revizora ili stečajnog upravnika o izvodljivosti i celishodnosti mera predviđenih planom i opravdanosti pretpostavki na kojima se plan zasniva.[45] Ova izjava sadrži analizu i mišljenje da li su mere za realizaciju plana koje su sadržane u planu celishodne, analizu i mišljenje da li su pretpostavke na kojima su zasnovane mere za realizaciju plana opravdane i obrazloženo mišljenje da je predloženi plan izvodljiv.[46]

Izvodljivost plana reorganizacije je najvažniji uslov za uspešno sprovođenje postupka reorganizacije. U američkom pravu, koje je kolevka instituta reorganizacije, ali i u nemačkom pravu, uočen je značaj ovog uslova zbog čega američki i nemački stečajni zakoni ovlašćuju stečajnog sudiju da, ako su ispunjeni određeni uslovi, ne potvrdi plan (američko rešenje)[47] ili da odbaci plan (nemačko rešenje).[48] Nasuprot tome, domaći zakonodavac je zauzeo drugačiji stav prema kome je procena o izvodljivosti plana reorganizacije faktički u potpunosti prepuštena odluci poverilaca. Formalnopravno, zahtev za ispunjenjem ovog uslova je propisan i za naknadnu i za prethodnu reorganizaciju. Nacionalni standard br. 6 propisuje podnošenje izjave stečajnog upravnika o izvodljivosti plana u naknadnoj reorganizaciji ako plan nije podneo stečajni upravnik već neko od drugih ovlašćenih predlagača.[49] Međutim, Zakon o stečaju ne propisuje ovu izjavu kao obavezan element plana reorganizacije, što znači da stečajni sudija nije ovlašćen da odbaci plan reorganizacije ako se

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[45] Pravilnik, čl. 8, st. 1.

[46] Pravilnik, čl. 8, st. 2.

[47] Američko pravo propisuje da će stečajni sudija potvrditi plan reorganizacije samo ako utvrdi da nije verovatno da će ga pratiti bankrotstvo ili potreba za daljom finansijskom reorganizacijom dužnika ili bilo kog lica koje je, prema planu reorganizacije, sukcesor dužnika. SZ SAD, para. 1129 (a) (11).

[48] Nemačko pravo stečajnim sudijama daje ovlašćenje da tokom prethodne kontrole odbace plan reorganizacije kada je očigledno da neće biti usvojen u svim klasama, kada je izvesno da neće biti naknadno odobren od strane stečajnog sudije, ili ako je očigledno da se plan ne može izvršiti. SZ NEM, para. 231 (1).

[49] Pravilnik o utvrđivanju nacionalnih standarda za upravljanje stečajnom masom, *Službeni glasnik RS*, br. 62/2018, Nacionalni standard o podacima koje treba da sadrži plan reorganizacije.

ona ne dostavi.[50] Kod prethodne reorganizacije je prihvaćeno suprotno rešenje, prema kome je izjava o izvodljivosti obavezan element UPPR-a, i stečajni sudija bi bio dužan da ga odbaci ako se ova izjava ne dostavi uz UPPR. Imajući u vidu da je domaća sudska praksa zauzela stav da ovaj poseban element predstavlja samo formalni uslov i da stečajni sudija ne može diskreciono da ocenjuje izvodljivost UPPR-a, faktički ova izjava nema veliki značaj.[51] U prilog tome govori i stav sudske prakse prema kom je stečajni sudija dužan da stavi plan na glasanje i kad su poverioci podneli dokaze o neizvodljivosti UPPR-a.[52] Slično rešenje je prihvaćeno i u italijanskom stečajnom pravu. Prema italijanskom stečajnom zakonu, formalni uslov za podnošenje plana reorganizacije i pokretanje sudskog postupka preventivnog restrukturiranja (tzv. preventivni dogovor, ital. *Concordato preventivo*) je podnošenje izveštaja stručnjaka u kome potvrđuje verodostojnost podataka navedenih u planu, kao i izvodljivost plana reorganizacije.[53] Stručnjak je nezavisno lice koje je upisano u registar revizora, a koje određuje stečajni dužnik. U italijanskom pravu se pravi razlika između predloga dogovora i plana reorganizacije na kom se taj predlog zasniva.[54] Izveštaj se sačinjava isključivo radi obaveštavanja poverilaca o izvodljivosti plana reorganizacije, a konačnu odluku o prihvatanju dogovora donose poverioci.[55]

Ovaj posebni element UPPR-a je najkontroverzniji, jer se smatra da ne postoje razlike prethodne i naknadne reorganizacije, koje bi opravdale to što se ovaj element delimično (samo u određenom slučaju) i fakultativno (ne postoje sankcije u slučaju nepodnošenja) zahteva u naknadnoj reorganizaciji, dok je u prethodnoj reorganizaciji obavezan. U teoriji se navodi da je različitim tretmanom izjave o izvodljivosti plana u prethodnoj i naknadnoj reorganizaciji „veštački stvoren razdor u srpskom sistemu reorganizacije”[56]. Međutim, čini se da zbog načina na koji se Zakonom o stečaju uređuje ovaj obavezan element UPPR-a, a koji ovaj uslov svodi samo na formalni zahtev, nije uči-

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[50] Radović, V. (2018). *Stečajno pravo – knjiga druga*. Beograd: Pravni fakultet Univerziteta u Beogradu, 308.

[51] *Bilten sudske prakse privrednih sudova*, br. 3/2017, 260.

[52] Odgovori na pitanja privrednih sudova Odeljenja za privredne sporove Privrednog apelacionog suda od 16. 11. 2017, 17. 11. 2017, 20. 11. 2017. i 30. 11. 2017. godine i Odeljenja za privredne prestupe od 17. 11. 2017. godine.

[53] *Regio Decreto 16 marzo 1942, n. 267* (Kraljevski dekret od 16. marta 1942. godine, br. 267 u daljem tekstu: SZ ITA), para. 161 (3).

[54] Stečajni dužnik u predlogu dogovora predlaže procenat namirenja poverilaca dok u planu reorganizacije prikazuje vreme i način na koji će predlog biti ispunjen. SZ ITA, para. 160 (1), (2).

[55] Fabiani, M. (2011). Il concordato preventivo. *Consiglio superiore della magistratura, Incontro di studio Roma*, 26.

[56] Radović, V. (2018). *Op. cit.*, 375.

njena značajna razlika u prethodnoj i naknadnoj reorganizaciji u pogledu ovog uslova.[57] Prema tome, može se zaključiti da, iako je formalnopravno razdor u srpskom sistemu reorganizacije učinjen, zbog načina primene ovih odredbi u sudskoj praksi, faktički on ne postoji. U srpskom stečajnom pravu, poverioci na ročištu za glasanje o planu odlučuju o izvodljivosti plana. S obzirom na to da je jednako važno da plan reorganizacije bude izvodljiv bez obzira na to da li se radi o prethodnoj ili naknadnoj reorganizaciji, *de lege ferenda* bi trebalo razmišljati o prihvatanju jedinstvenog rešenja u pogledu izjave o izvodljivosti plana. Potencijalno rešenje bi bilo propisivanje izjave o izvodljivosti plana kao opšteg elementa, koji bi bio obavezan i za običan plan reorganizacije i za UPPR, kao i propisivanje određenih diskrecionih ovlašćenja stečajnog sudije u pogledu suštinske procene ove izjave. Pri tome, ne treba zanemariti da je jedan od značajnih faktora kojim bi se moglo uticati na kvalitet ove izjave postojanje funkcionalnog sistema profesionalne odgovornosti njenog davaoca.[58]

Izveštaj o očekivanim bitnim događajima

Izveštaj o očekivanim bitnim događajima nakon sačinjavanja plana je poslednji posebni element UPPR-a koji je propisan Zakonom o stečaju. Ovaj izveštaj sadrži pregled očekivanih troškova poslovanja i obaveza koje proističu iz poslovanja u narednih 90 dana od dana sačinjavanja plana, a koje će se namirivati tokom postupka odlučivanja i glasanja o planu pred nadležnim sudom, kao troškovi redovnog poslovanja.[59] Potreba za propisivanjem ovog izveštaja kao obaveznog elementa UPPR-a postoji zbog trenutka pokretanja postupka prethodne reorganizacije, odnosno zbog toga što se postupak prethodne reorganizacije pokreće pre otvaranja stečajnog postupka. Kod naknadne reorganizacije, plan reorganizacije se podnosi u trenutku kada je stečajni postupak otvoren i kada su nastupile sve posledice otvaranja stečajnog postupka, uključujući i prekid postupaka u kojima učestvuje stečajni dužnik i zabranu izvršenja i namirenja.[60] Pošto su pravne posledice otvaranja stečaj-

[57] U teoriji se navodi da nedopuštanje stečajnom sudiji da suštinski ocenjuje izjavu o izvodljivosti plana omogućava stečajnom dužniku da nađe prijateljski nastrojenog stečajnog upravnika ili revizora koji će dati pozitivno mišljenje o izvodljivosti plana bez suštinskog preispitivanja plana. V.: Radulović, B. (2013). Unapred pripremljeni planovi reorganizacije u Republici Srbiji – uporedno pravna i empirijska analiza, u: Radović, V. (ur.) *Usklađivanje poslovnog prava Srbije sa pravom Evropske unije*. Beograd: Pravni fakultet Univerziteta u Beogradu, 87.

[58] Radulović, B., Radović, M. (2019). Nezakonitost u postupanju povodom unapred pripremljenih planova reorganizacije. *Pravo i privreda*, 4–6, 665.

[59] Pravilnik, čl. 9.

[60] ZS, čl. 88, 93.

nog postupka već nastupile, malo je verovatno da će nakon sačinjavanja plana reorganizacije doći do bitnog događaja koji bi značajno uticao na poslovanje stečajnog dužnika. Sa druge strane, ovakav razvoj situacije je moguć kod prethodne reorganizacije jer u trenutku sačinjavanja UPPR-a stečajni postupak još uvek nije otvoren i nisu nastupile posledice njegovog otvaranja.[61] Iz tog razloga je važno da se u UPPR-u poverioci obaveste o očekivanim bitnim događajima i da se na taj način spreče eventualne zloupotrebe od strane dužnika koji bi, po sačinjavanju i podonošenju UPPR-a, poslovao na štetu poverilaca i pogoršao svoj položaj u odnosu na onaj koji je predstavio u planu.[62] Ovaj posebni element je naročito važan da bi se sprečilo pogoršanje položaja stečajnog dužnika do pokretanja prethodnog postupka jer nakon njegovog pokretanja stečajni sudija može da izrekne meru obezbeđenja – sprečavanje promena finansijskog i imovinskog položaja stečajnog dužnika.

ZAKLJUČAK

Iz prethodno navedenog se može zaključiti da se pokretanje prethodne i naknadne reorganizacije u srpskom stečajnom pravu značajno razlikuje i po vremenu pokretanja, ovlašćenim podnosiocima plana ali i po sadržini plana reorganizacije. Posebne odredbe kojima je uređeno pokretanje prethodne reorganizacije, u kombinaciji sa opštim odredbama koje se primenjuju i na prethodnu i na naknadnu reorganizaciju, u velikoj meri uvažavaju suštinske razlike između ove dve vrste postupaka. Uprkos razlikama, prethodna i naknadna reorganizacija u srpskom stečajnom pravu dele isti problem – neizvodljivost planova reorganizacije i zloupotreba ovih postupaka. Pri tome, neizvodljivost planova reorganizacije ne znači nužno da se radi o zloupotrebi postupka, već može biti rezlutat nestručnosti ili nedovoljne obaveštenosti podnosioca plana. S druge strane, pravo na pokretanje ovih postupaka se često zloupotrebljava upravo podnošenjem i usvajanjem neizvodljivih planova reorganizacije, mada na zloupotrebu mogu da ukazuju i neke druge okolnosti. Regulacija pokretanja ove dve vrste postupka je izuzetno značajna jer je ovo faza postupka koja bi trebalo da eliminiše neizvodljive planove ili planove

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[61] Kod prethodne reorganizacije neće ni doći do otvaranja stečajnog postupka ako stečajni sudija odbaci predlog za pokretanje stečajnog postupka i UPPR, ili ako poverioci ne usvoje UPPR.

[62] Radulović, B. (2013). Unapred pripremljeni planovi reorganizacije u Republici Srbiji – uporedno pravna i empirijska analiza, u: Radović, V. (ur.) *Usklađivanje poslovnog prava Srbije sa pravom Evropske unije*. Beograd: Pravni fakultet Univerziteta u Beogradu, 89.

kojima se vrši zloupotreba prava na pokretanje postupka reorganizacije. Prostor za poboljšanje ove regulacije postoji, i čini se da bi se efikasna eliminacija planova kojima se zloupotrebljava ovo pravo kao i neizvodljih planova mogla postići na dva načina – preciznijim i jedinstvenim uređenjem uslova o izvodljivosti plana reorganizacije i omogućavanjem stečajnim sudijama da prilikom provere zakonitosti plana reorganizacije ocenjuju i njegovu usklađenost sa načelom savesnosti i poštenja.

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INITIATING THE REORGANIZATION PROCEDURE ACCORDING TO THE LAW ON BANKRUPTCY**
Reorganization vs. prepackaged reorganization plan

ABSTRACT: This paper discusses the initiation of the reorganization procedure by comparing the initiation of the "classic" type of reorganization and the initiation of the reorganization in accordance with the prepackaged reorganization plan. The analysis of the initiation of these two types of reorganization will be conducted based on an overview of the three elements most important for the initiation of the reorganization procedure within one legal system; namely, when the reorganization procedure is initiated, who is authorized to initiate this procedure and what the mandatory content of the reorganization plan is. The way in which these three elements are arranged can significantly affect the quality of the reorganization plan and its successful implementation. The aim of this paper is to analyze the initiation of two types of reorganization in the Serbian Law on Bankruptcy by comparing these three elements, as well as to point out some controversial issues that arise when initiating these two proceedings.

Keywords: initiating reorganization proceedings, prepackaged reorganization plan, contents of the reorganization plan

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INTRODUCTION

Reorganization, as an alternative to bankruptcy within the bankruptcy procedure, represents a valuable opportunity for companies, and is especially gaining in importance in economic systems that are in transition, as is the case with Serbia.[1] The institute of reorganization of the bankruptcy debtor was introduced into Serbian law in 2004 with the adoption of the Law on Bankruptcy Procedure. Among other things, the Law on Bankruptcy Procedure provided for the possibility for the reorganization plan to be submitted together with the proposal for initiating bankruptcy proceedings, as well as the possibility for the reorganization plan to be submitted by the bankruptcy debtor.[2] However, due to insufficient legal regulation of this possibility, it was never applied in practice.[3] Yet, Serbian bankruptcy law gained its hybrid reorganization procedure by passing the Law on Bankruptcy in 2009, which regulated in detail the possibility of submitting a reorganization plan at the same time as submitting a proposal to initiate bankruptcy proceedings. Therefore, the Law on Bankruptcy recognizes two different types of reorganization – reorganization proceedings (so called regular or classical reorganization) and the process of reorganization according to the pre-packed reorganization plan (hereinafter: PPRP).[4] Reorganization according to the PPRP has become an important instrument for solving companies' financial issues during the short period of time since it has been introduced to Serbian bankruptcy law. Large companies, such as RTB Bor, Priboj Automobile Factory, Beohemija and others, also resorted to this type of reorganization.[5]

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[1] It is extremely important for countries in transition to establish a functional and quality bankruptcy law system. The establishment of such a system, among other things, implies the acceptance of institutes, which have developed in the states of the capitalist legal and political systems. However, for the good functioning of such institutes in practice, it is necessary to adapt them to the specifics of the legal system in which they are implemented. See: Falke, M. (2003). Insolvency Law Reform in Transition Economies. Berlin: Frankfurter Institut für Transformationsstudien.

[2] Law on Bankruptcy, Official Gazette of the Republic of Serbia, no. 84/04 and 85/05, art. 127, p. 2, art. 129.

[3] Radović, V. (2018). Стечајно право – књига друга. Belgrade: Faculty of Law of the University of Belgrade, 366.

[4] The Serbian regulation uses the spatial adverbial "forward" in Serbian for the prepackaged reorganization plan, with the intended meaning of ahead of time, which makes it an unsuitable term.

[5] The introduction of the reorganization procedure in accordance with the PPRP in Serbian bankruptcy law reduced the importance of regular reorganization. Radović,V., Radulović, B. (2018). Prearranged Reorganization Plans in Serbia: Form Over Substance. *European Business Organization Law Review*, Vol. 19, 411.

This paper will consider the time of initiating the reorganization procedure, the persons authorized to initiate the reorganization procedure, as well as the mandatory content of the reorganization plan. The Law on Bankruptcy regulates these three elements differently depending on whether it is a classic reorganization or the initiation of a reorganization in accordance with the PPRP. The aim of this paper is to analyze the initiation of the two types of reorganization in Serbian bankruptcy law by comparing these three elements, as well as to point out some controversial issues that arise when initiating these two proceedings.

In Serbian law, reorganization and the reorganization according to the PPRP are conducted within the framework of bankruptcy proceedings. The Law on Bankruptcy regulates the institute of reorganization in detail, while for reorganization in accordance with the PPRP it establishes some special rules, prescribing that for everything that is not specifically regulated, the rules governing the reorganization and the reorganization plan apply.[6]

The characteristics related to the initiation of the reorganization procedure in accordance with the PPRP, which distinguish this procedure from the classic reorganization, derive from the aim that such an institute attempts to reach - faster reorganization of the bankruptcy debtor. The goal to be achieved by implementing the reorganization in accordance with the PPRP is to reorganize the bankruptcy debtor as early as possible, while the financial problems of the bankruptcy debtor have not yet deepened, as well as the shorter duration of the reorganization procedure. The idea from which the hybrid procedures arose is that it is necessary to start the reorganization procedure as soon as possible, because it is considered that the chances for a bankruptcy debtor to recover are significantly higher if the reorganization occurs at a time when financial difficulties are still not great and serious. The reorganization in accordance with the PPRP is a Serbian model of a hybrid procedure that aims to make this possible. Therefore, the specifics of the reorganization in accordance with the PPRP in relation to the classical reorganization procedure arise precisely from this specific goal.

[6] Law on Bakruptcy, *Official Gazette of the Republic of Serbia,* no. 104/2009, 99/2011 – other law, 71/2012 – decision CC, 83/2014, 113/2017, 44/2018 and 95/2018 (hereinafter: “LOB”), art. 160, p. 5.

WHEN IS THE REORGANIZATION PROCEDURE INITIATED?

Prior and subsequent reorganization

The reorganization procedure is initiated by submitting a reorganization plan. This moment will differ depending on whether the classic reorganization procedure is initiated, or the reorganization procedure in accordance with the PPRP. In the first case, the reorganization procedure is initiated by the authorized proposer when he submits the reorganization plan within the deadline determined by the bankruptcy judge, which cannot be longer than 90 days from the day of opening the bankruptcy procedure.[7] On the other hand, the reorganization in accordance with the PPRP is initiated by submitting a proposal for initiating bankruptcy proceedings.[8] The difference between the classical reorganization procedure and the reorganization procedure in accordance with the PPRP can already be noticed when determining the moment of initiating the reorganization procedure. Namely, the classic reorganization procedure is initiated after the bankruptcy procedure has been opened, i.e. only after the existence of the bankruptcy reason has been established. On the other hand, the reorganization procedure in accordance with the PPRP is initiated before the opening of the bankruptcy procedure, i.e. the determination of the existence of the bankruptcy reason, because the reorganization plan is submitted together with the proposal for initiating the bankruptcy procedure. In this case, the bankruptcy judge initiates bankruptcy proceedings only after the creditors adopt the PPRP.

Therefore, depending on the moment of initiating the reorganization procedure, it can be said that the reorganization procedure in accordance with the PPRP represents a prior reorganization, while the classic reorganization procedure represents a subsequent reorganization. It apperas that naming these two types of reorganizations in such a manner would represent a linguistically better solution than the current legal solution, primarily due to the simplicity and suggestiveness of the mentioned names. Also, naming them this way would be appropriate precisely because it reflects the basic difference between these two institutes. The submission of the PPRP at an earlier moment of the bankruptcy procedure in relation to the classic reorganization plan aims to achieve the basic purpose of this institute – the fastest possible reorganization

[7] LOB, art. 162.

[8] The bankruptcy debtor submits the PPRP at the same time as the request for initiating bankruptcy proceedings, whereby he is obliged to clearly indicate in the proposal for initiating bankruptcy proceedings that it is proposed to initiate bankruptcy proceedings in accordance with the PPRP. LOB, art. 158, p. 3.

of the bankruptcy debtor. Adopting the reorganization plan within a short term represents a comparative advantage of conducting the reorganization in accordance with the PPRP in relation to the classical reorganization.

The relationship between two prior bankruptcy proceedings

In practice, the issue of the relationship between two prior bankruptcy proceedings was raised as disputable. Namely, the question arose whether it was possible to conduct two prior proceedings simultaneously, one on the proposal of the creditors for initiating bankruptcy proceedings, and the other on the proposal for initiating bankruptcy proceedings in accordance with the PPRP. In this case, it was disputable whether it was justified to give priority to acting according to the PPRP in relation to the proposal for initiating bankruptcy proceedings in the case when the creditor submitted a proposal for initiating bankruptcy proceedings before the proposal for initiating bankruptcy proceedings in accordance with the PPRP as well. The court took the position that until the decision on opening bankruptcy proceedings is made on the proposal of the creditor, priority should be given to the proposal of the bankruptcy debtor to initiate bankruptcy proceedings in accordance with the PPRP. The court assessed that the submission of the PPRP by the bankruptcy debtor indicates that the bankruptcy debtor has noticed problems in his business and that he is ready to change it. If the proposal for initiating bankruptcy proceedings in accordance with the PPRP is rejected, the bankruptcy judge may decide on the proposal for initiating bankruptcy proceedings submitted by the authorized proposer.[9] This position is justified for several reasons. First, giving priority to the proposal to initiate bankruptcy proceedings in accordance with the PPRP can be a motivation for companies that are in financial difficulties to take certain activities to change the way of doing business even at the moment when the proposal to initiate bankruptcy proceedings is submitted, and before opening bankruptcy proceedings and thus prevent possible bankruptcy. Furthermore, in this way, a faster reaction is enabled and thus the further deepening of the financial problems of the company is prevented. Finally, it should be borne in mind that the duration of the prior bankruptcy proceedings conducted on the basis of the proposal of the authorized person is limited to 30 days.[10] The preparation of the

[9] Answers to the questions of the commercial courts of the Commercial Disputes Department of the Commercial Appealate Court from November 3, 2015, November 4, 2015 and November 26, 2015 and Departments for Economic Crimes and Administrative-Computer Disputes from 30 November 2015 – Case law of commercial courts – Bulettin no. 4/2015.

[10] LOB, art. 67.

PPRC can certainly take longer than 30 days, so it is possible to imagine a situation in which the bankruptcy debtor invested resources in the preparation of the PPRP and reached agreements with some of the creditors, and in the meantime some of the authorized proposers to initiate bankruptcy procedure "precedes" and submits a proposal for initiating bankruptcy proceedings. In that case, it is justified to give priority to the proposal to initiate bankruptcy proceedings in accordance with the PPRP, to enable the use of resources invested by the bankruptcy debtor in drafting the PPRP and possibly, if the PPRP is adopted, to provide a chance to the bankruptcy debtor to reorganize. Despite the fact that it is justified, it can be argued that this position of the court was illegal at the time when it was taken. According to the amendments to the Law on Bankruptcy from 2014, if the reorganization plan is submitted at the same time as the proposal for initiating bankruptcy proceedings, its name is changed to the PPRP and special rules prescribed for conducting bankruptcy proceedings in accordance with the PPRP are applied to it.[11] By interpreting this provision, it can be concluded that any plan submitted after the submission of the proposal for initiating bankruptcy proceedings is an ordinary reorganization plan and that it is no longer PPRP. Only the reorganization plan that was submitted at the same time as the proposal to initiate bankruptcy proceedings can be the PPRP.[12] If a proposal for initiating bankruptcy proceedings has already been submitted, regardless of who the proposer is, the existence of such a proposal excludes the possibility of submitting the PPRP. Therefore, the courts actions were illegal, i.e. contrary to the letter of the law, by giving priority to the proposal for initiating bankruptcy proceedings in accordance with the PPRP.[13] This position in case law became legal only after it was stipulated by the amendments to the Law on Bankruptcy from 2017 that, although the creditor's proposal for initiating bankruptcy proceedings was submitted earlier, the bankruptcy judge first decides on the proposal for initiating bankruptcy proceedings in accordance with PPRP.[14]

[11] Law on Bankruptcy, *Official Gazzete of the Republic of Serbia*, no. 104/2009, 99/2011 – *other law*, 71/2012 – *decision CC* and 83/2014, art. 155, p. 4.

[12] "*Prepack cannot be submitted without a proposal to initiate bankruptcy proceedings, nor after the submission of a proposal to initiate bankruptcy proceedings",* Spasić, S. (2010). *Prepack* kao šansa za srpsku privredu. *Pravo I privreda*, 7–9, 250.

[13] This is proof that although case law in the domestic legal system is formally not a source of law, in fact courts often take over the function of creating rights. In the matter of bankruptcy law, the position of the Commercial Appealate Court is of special importance. See: Radović, V. (2018). *Stečajno pravo – knjiga prva*. Belgrade: Faculty of Law of the University of Belgrade, 68.

[14] LOB, art. 158, p. 8. In addition to the fact that the amendments to the Bankruptcy Law from 2017 legitimized the position taken in case law, the same amendments prescribe one exception in which the creditor's proposal for initiating bankruptcy proceedings would

Although the position that inclines towards the PPRC is justified, its application leaves the possibility for the bankruptcy debtor to abuse his right and to delay the bankruptcy procedure so as to damage the creditors in favor of the owner of the bankruptcy debtor.[15] The possibility of abuse could be prevented as early as in the phase of preliminary examination of the reorganization plan, when the bankruptcy judge examines the legality of the proposed reorganization plan, and it could be done by the bankruptcy judge checking whether the plan was submitted in accordance with the principle of conscientiousness and honesty. The principle of conscientiousness and honesty is prescribed by the Law of Contract and Torts, which, in addition to this principle, also contains a provision which explicitly prohibits the abuse of rights, i.e. the use of rights contrary to the purpose for which it was established or recognized by law (Article 13).[16] The principle of conscientiousness and honesty and the prohibition of abuse of rights are considered one of the basic principles of Serbian property law, which is why the bankruptcy judge should be obliged to take this principle into account ex officio when examining the legality of the reorganization plan.[17] Despite this explicit provision in the Law of Contract and Torts, which should apply to all property relations, examining whether the plan was submitted in accordance with the principle of conscientiousness and honesty does not fall within the powers of the bankruptcy judge in case law, nor is the bankruptcy judge obligated to check it ex officio when examining the legality of the plan.[18] It seems that this attitude in domestic court practice leaves room for abuse of the right to file a PPRC, but also the right to file a reorganization plan.

still have priority. The Bankruptcy Law stipulates that if the proposal for initiating bankruptcy proceedings in accordance with the PPRC is legally rejected, and the bankruptcy debtor subsequently submits a new proposal for a new PPRC, whereby before its submission, the creditor filed a proposal against the bankruptcy debtor to initiate bankruptcy proceedings, the bankruptcy judge must first decide on the creditor's proposal. LOB, art. 158, p. 10.

[15] The owners of the bankruptcy debtor have a vested interest in delaying the bankruptcy proceedings and using that time to hide the assets of the bankruptcy debtor in their favor.

[16] “In establishing obligatory relations and exercising the rights and obligations from those relations, the parties are obliged to adhere to the principles of conscientiousness and honesty.” Law of Contract and Torts, *Official Gazette of the SFRY*, no. 29/78, 39/85, 45/89 – *decision USJ* and 57/89, *Official Gazzete of FRY*, no. 31/93, *Official Gazette of Serbia and Montenegro*, no. 1/2003 – *Constitutional Charter and Official Gazette of the Republic of Serbia*, no. 18/2020, art. 12.

[17] Jankovec, I. (1999). *Privredno pravo*. Belgrade, 241. Vasiljević, M. (2016). *Trgovinsko pravo*. Belgrade: Faculty of Law of the University of Belgrade, 49.

[18] Answers to the questions of the commercial courts that were determined at the session of the department of the Commercial Appealate Court held on October 23, 2012, *Bulletin for commercial courts case-law*, no. 3/2012, question no. 34, 224.

In order to prevent abuse, the bankruptcy judge should take into account other circumstances that would indicate that the plan was submitted contrary to the principle of conscientiousness and honesty. Despite the fact that the principle of conscientiousness and honesty is the legal standard, the bankruptcy judge would give it exact legal outlines in each specific case, for which the already established practice of foreign courts regarding this issue could be helpful.[19] Filing a reorganization plan in good faith is a special condition for confirming a reorganization plan in U.S. bankruptcy law, and U.S. case law has devised a number of circumstances, as criteria, to determine whether a plan was filed in bad faith (unfairly).[20] Due to the similarity of the American condition of good faith and the Serbian principle of conscientiousness and honesty, the criteria from American court practice could serve as an indicator to domestic bankruptcy judges when assessing whether the plan was submitted in accordance with the principle of conscientiousness and honesty. American literature states that attention should be paid to the following circumstances: the property of the bankruptcy debtor consisting of only one thing, illegal behavior of the bankruptcy debtor in the period before submitting the reorganization plan, a small number of unsecured creditors, an attempt to stop the realization of the rights of pledge creditors by introducing a moratorium on the obligations of the bankruptcy debtor, the existence of a dispute between two parties (one of which is the bankruptcy debtor) which would be affected by the reorganization plan, avoidance of execution of the court decision, the bankruptcy debtor not performing economic activity or there being no employees, insufficient liquidity and inability to provide funds reorganization.[21] It seems that when assessing whether the plan is legal, i.e. whether it was submitted in accordance with the principle of conscientiousness and honesty, the bankruptcy judge should take into account the conditions prescribed by law, but also all other circumstances that would indicate a possible abuse of rights by the bankruptcy debtor. In theory, it is considered that the application of the principles of conscientiousness and honesty implies that "... the court should go one step further then the law, but still respect the law."[22] By doing so, the bankruptcy judge could prevent the abuses that could occur if the bankruptcy debtor intentionally submitted a proposal to initiate the bankruptcy proceedings in accordance with the PPRC, in order to sabotage the creditor's proposal to initiate bankruptcy proceedings.

[19] Vasiljević, M. (2016). *Trgovinsko pravo*. Belgrade: Faculty of Law of the University of Belgrade, 49.

[20] *U.S. Bankruptcy Code* (hereinafter: "BC U.S"), 1978, para. 1129 (a) (3).

[21] Greenstone Miller, J. (1997). Ammendment to provide Good Faith filing Requirement for Chapter 11 debtors. *Commercial Law Journal*, Vol. 102, 184.

[22] Perović, S. (1990). *Obligaciono pravo*. Belgrade, 57.

WHO INITIATES THE REORGANIZATION PROCEDURE?

Authorized proposers in comparative law

Comparative legislation differently regulates the scope of persons who are authorized to submit a reorganization plan and thus initiate the reorganization procedure. It is possible to authorize a larger number of persons or only one person to submit a reorganization plan. Also, there are legislations that have accepted the solution found between these two options, so that in different periods of the bankruptcy procedure, different persons are authorized to submit a reorganization plan.[23] Such a decision is accepted in American law, according to which the bankruptcy debtor is the only person authorized to submit the plan within 120 days from the day of the opening of the reorganization procedure. After the expiration of that period, if the bankruptcy debtor does not submit the reorganization plan, it can be submitted by any interested person.[24] Also, the bankruptcy judge may, at the request of the interested party, shorten or extend the period of exclusivity.[25] When a decision is accepted according to which only one person is authorized to file a plan, it is customary for it to be the bankruptcy debtor or the administrative receiver as the bankruptcy debtor's representative. German law accepts the narrow scope of authorized applicants for the reorganization plan and according to the German solution, the authorized applicants for the reorganization plan are the administrative receiver and the bankruptcy debtor.[26] The aim of prescribing this right as the exclusive right of the bankruptcy debtor is to encourage the management of the bankruptcy debtor to act as quickly as possible. On the other hand, the aim of the legal provision that authorizes a larger number of participants in the procedure to submit a reorganization plan is to include in the reorganization procedure a wider circle of persons whose interests may be affected by the reorganization plan.[27]

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[23] Radović, V. (2018). *Stečajno pravo– knjiga prva*. Belgrade: Faculty of Law of the University of Belgrade, 2019.

[24] BC U.S, para. 1121 (a), (b), (c).

[25] BC U.S, para. 1121 (d)(1). Serbian Law on Bankruptcy previously accepted the decision according to which the judge could, under certain conditions, extend the deadline for submitting the reorganization plan. Amendments to the Law on Bakruptcy abolished this possibility and the deadline cannot be longer than 90 days from the day of opening the bankruptcy procedure. LOB, art. 162.

[26] *Insolvenzordnung* (German Insolvency Law, hereinafter: "GIL"), 1994., para. 218 (1).

[27] This solution was assessed as maximally liberalized. Slijepčević, D. (2009). *Pravni aspekti reorganizacije stečajnog dužnika*. Belgrade: Faculty of Law of the University of Belgrade, Ph.D. dissertation, 161.

Authorized proposers according to the Law on Bankruptcy

Balancing between these two goals, the Law on Bankruptcy accepts the solution according to which it authorizes a larger number of participants in the reorganization procedure to submit a reorganization plan: the administrative receiver, separate creditors, bankruptcy creditors and persons who own at least 30 % of the bankruptcy debtor's capital.[28] Such a wide scope of persons authorized to submit a reorganization plan was created as a result of efforts to make the position of creditors as equal as possible.[29] According to the previous legal solution, secured and bankruptcy creditors could file a reorganization plan if they had a certain percentage of participation (30 %) in the total secured or unsecured claims. Therefore, considering the latest legal changes, it can be concluded that in Serbian law there is a tendency to expand the scope of applicants for the reorganization plan. Such a wide range of proponents can lead to a large number of proposed reorganization plans, which further complicates and delays the reorganization process.[30] However, such a solution is justified, because in this way the interests of all participants in the reorganization are taken into account. A competitive approach that leads to competition of several plans will encourage the proposers to propose better plans that will be a synthesis of the interests of all participants in the reorganization.[31] On the other hand, the submission of the PPRP is the exclusive right of the bankruptcy debtor.[32] In this case, the specific features of the reorganization in accordance with the PPRP come to the fore, as features of an institute that seeks to ensure the reorganization of the bankruptcy debtor as early as possible, which is why the legislator evaluates timely action as more important than involving more participants and their interests. Also, prescribing the right to file PPRP as the exclusive right of the bankruptcy debtor is encouraged by practical reasons. The bankruptcy debtor is the only participant in the proceedings who has information on the basis of which he could react in a timely manner and submit a PPRP, which is why prescribing such a right for other participants in the proceedings would be practically useless, given that they do not have the information based on which they would create a PPRP.

[28] LOB, art. 161, p. 1.

[29] Radović, V. (2019). Pravna analiza poslednjih izmena Zakona o stečaju – korak napred, dva koraka unazad. *Pravo i privreda*, 4–6, 625.

[30] By abolishing the requirement for a certain percentage of participation (30 %) in the total claims, the legislator opens the possibility of insignificant creditors proposing a reorganization plan which has no prospects for adoption, and which would inevitably lead to a delay in the procedure. However, the logical assumption of the legislator is that insignificant creditors, who do not have large claims against the bankruptcy debtor, will not be interested in investing funds creating a reorganization plan.

[31] UNCITRAL, *Legislative Guide on Insolvency Law*, New York, 2005., 213.

[32] LOB, art. 158.

CONTENTS OF THE REORGANIZATION PLAN

Elements of the plan

The Law on Bankruptcy regulates the mandatory content of the reorganization plan by prescribing the elements contained in the reorganization plan.[33] Moreover, taking into account the specifics of the PPRP, the Law on Bankruptcy prescribes an additional six elements contained in the PPRP.[34] Therefore, all elements could be divided into general and special ones. General are those elements that must be contained in each reorganization plan, while special elements are those that are contained only in the PPRP. The Law on Bankruptcy prescribes special elements contained in the PPRP, but they are regulated in more detail by the Rulebook on the method of implementing a pre-packaged reorganization plan and the contents of the plan.[35] Prescribing the special six elements is motivated by the nature of the prior reorganization procedure, which is characterized by a faster and shorter duration of formal court proceedings, as well as preparation and negotiation of the PPRP out of court, as a rule, only with the largest creditors of the bankruptcy debtor. Therefore, the legislator recognizes the need to additionally inform other creditors as well, in order to achieve the bankruptcy principle of equal treatment and equality, and prescribes these special six elements which eliminate uncertainty and inform all creditors. Having in mind that the general elements are contained both in the classic reorganization plan and the PPRP, in the remaining part of the paper the contents of these two types of plans will be compared by the analysis of special elements.

Informing other creditors about the effect of the plan

Regardless of whether it is a subsequent or prior reorganization, all creditors of the bankruptcy debtor can be divided into two groups - those creditors who participate in the proceedings (court proceedings or informal proceedings for the preparation of the PPRP) and those who did not participate in the

[33] Although this definition of the content of the reorganization plan is subject to different interpretations, a position should be taken according to which these legal elements are necessary, important and minimal, and that the plan may contain some other elements when necessary. Radović, V. (2018). *Stečajno pravo – knjiga druga*. Belgrade: Faculty of Law of the University of Belgrade, 228.

[34] LOB, art. 156.

[35] Rulebook on the method of implementing a pre-packaged reorganization plan and the contents of the plan (hereinafter: "*Rulebook*"), *Official Gazette of the Republic of Serbia*, no. 57/2018.

proceedings and who were not notified of the submitted reorganization plan. The treatment of the second group of creditors differs depending on whether it is a subsequent or prior reorganization. In the case of subsequent reorganization, the reorganization plan does not apply directly to creditors who are not covered by the reorganization plan, i.e. those creditors who did not file their claim in the bankruptcy procedure on time. Such creditors are required to file a claim in order for the civil court to reconcile their rights in the relationship with the bankruptcy debtor with the rights they would have had had they been covered by the plan.[36] This group of creditors is treated differently in the prior reorganization because they are not burdened with the obligation to file a lawsuit and the adopted reorganization plan is applied directly to them, even though they did not participate in preparing it. Therefore, it is necessary for the PPRP to contain a provision which stipulates that a creditor's claim that is not covered by the provisions of the creditor settlement plan will be settled in the same manner and under the same conditions as the claims of other creditors of their class.[37] In the case of prior reorganization, it is necessary to inform the creditors who are not explicitly mentioned in the plan that the plan applies to them as well.[38] The example of this special element contained in the PPRP shows another difference between prior and subsequent reorganization. In the case of subsequent reorganization, it is assumed that all creditors participate in the ongoing bankruptcy proceedings; what is more, they are authorized to submit a reorganization plan, while in prior reorganization it is assumed that only some, usually the largest creditors of the bankruptcy debtor, who also participated in its preparation, are informed about the PPRP, which is why this provision is a necessary special element of the PPRP.

Statement of the majority creditors that they agree with the plan

The PPRP also contains a signed statement of the majority creditors on the value of claims of each class envisaged by the plan that they agree with the content of the reorganization plan and are ready to vote for its adoption.[39]

[36] "In fact, they will be settled as if they were covered by the plan, but not on the basis of the plan as an executive document, but on the basis of a judgment." Radović, V. (2018). *Stečajno pravo – knjiga druga*. Belgrade: Faculty of Law of the University of Belgrade, 320 and 321.

[37] LOB, art. 156, p. 4, point 1.

[38] Radović, V. (2018). *Stečajno pravo – knjiga druga*. Belgrade: Faculty of Law of the University of Belgrade, 370.

[39] LOB, art. 156, p. 4, point 2.

The nature of this statement is non-binding, which means that the creditor at the hearing could vote against the adoption of the PPRP, unless he explicitly stated that the statement is considered a ballot in terms of the provisions of the law governing bankruptcy, which regulate written voting.[40] Two goals are to be achieved by prescribing this particular element. First, by requiring majority creditors to express consent on the PPRP, even if revoked, the legislator prevents abuses of prior reorganization and filing of the PPRP without prior agreement with the most important creditors. Second, in this way, the bankruptcy debtor is obligated to conduct negotiations with the largest creditors out of court, which makes the court procedure last shorter.[41] The goals to be achieved by such a statement indicate why it is not needed in the case of a regular reorganization plan. First of all, considering that in the case of subsequent reorganization, the reorganization plan can be adopted without the agreement of the bankruptcy debtor and creditors (for example, when the creditor proposes a reorganization plan which is later adopted), i.e. without the consent of the bankruptcy debtor, there is no need for legal provisions which would enable negotiations between these two parties. Furthermore, a short court procedure is *differentia specifica* of hybrid proceedings, i.e. previous reorganization. In case of a subsequent reorganization, although the principle of conducting the proceedings in a reasonable manner is applied, there is no need to expedite the proceedings before the court in the manner required in prior reorganization.[42]

Statement of the authorized person substantiating the validity of data

A statement on the authenticity of the data and information stated in the reorganization plan is a statement by which the authorized person of the petitioner of the plan confirms, under full material and criminal responsibility, in his own name and on behalf of the petitioner, that, to the best of his knowledge, the data and information stated in it are accurate and complete at the time of submission.[43] The petitioner and his authorized person are criminally

[40] Rulebook, art. 3, p. 6.

[41] Radulović, B. (2015). Unapred pripremljeni planovi reorganizacije i problem negativne selekcije. *Annals of the Faculty of Law in Belgrade*, 1, 153.

[42] The short duration of court proceedings is the main advantage of hybrid proceedings, that is, previous reorganization.

[43] With this statement, the authorized person of the one who submits the plan explicitly confirms that: 1) there are no creditors whose claims are not explicitly stated in the plan and who, if included in the plan, could, individually or together, influence the decision to adopt the plan; 2) the plan lists all claims of third parties against the submitter of the plan that the submitter of the plan considers to be unfounded in whole or in part; 3) when as-

responsible for the inaccuracy and incompleteness of the data and information stated in the reorganization plan, and prescribing this statement as a special element of the PPRP facilitates the determination of that responsibility. Therefore, due to the greater asymmetry of information that exists in the process of prior reorganization, the space for abuse by the petitioner is greater. Precisely because of that, it is possible to imagine a situation in which the petitioner would take advantage of the fact that in case of prior reorganization the reorganization plan is adopted faster, and falsely present or conceal facts that may significantly affect the creditors' decision to approve the PPRP, relying on the fact that other participants in the procedure will not have enough time to check the authenticity of the data and the information stated in the PPRP. A special incentive to the petitioner of the plan for such abuse would be the fact that it would be extremely difficult to prove his criminal responsibility. However, by enclosing such a statement in the PPRP, criminal liability is more easily determined and thus the space for abuse is significantly reduced. This special element of the PPRP, like the previous one, derives from the most important characteristic of the prior reorganization procedure, speed, which is less significant in subsequent reorganization.

Supplementary auditor's report

The auditor's supplementary report on the financial statements of the bankruptcy debtor shall be compiled with the state of the business records determined no later than 90 days before the day of submission of the reorganization plan. This report also contains an overview of all claims and the percentage share of each creditor in the appropriate class of the reorganization plan.[44] A specific possibility of abuse of the PPRC, which occurs due to the asymmetry of information that was particularly emphasized in the case of prior reorganization, and which was discussed in the aforementioned special elements, is the *ratio legis* and of this special element of the PPRP as well. Prescribing this element aims to prevent misrepresentation or concealment in the financial statements of the bankruptcy debtor, as well as in the records of claims and the participation of creditors in the reorganization plan. In this way, the creditor's trust both in the credibility of the financial statements of the bankruptcy debtors and the PPRP increases.

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sessing and calculating the basis, amount and type of claims of each creditor, all available data and information are taken into account individually; 4) no changes have been made to the plan after the creditors have signed statements that they agree with the plan and are ready to vote for its adoption. Rulebook, art. 4, p. 1, point 1-6.

[44] Rulebook, art. 5, p. 1.

The statement of an auditor or a licensed administrative receiver confirming the feasibility of the pre-packaged plan of reorganisation

The statement on the feasibility of the reorganization plan is a statement containing the opinion of the auditor or the administrative receiver on the feasibility and expediency of the measures envisaged by the plan and the justification of the assumptions on which the plan is based.[45] This statement contains an analysis and opinion on whether the measures for the implementation of the plan contained in the plan are appropriate, an analysis and opinion on whether the assumptions on which the measures for the implementation of the plan are based are justified and an opinion that the proposed plan is feasible with the rationale.[46]

The feasibility of the reorganization plan is the most important condition for the successful implementation of the reorganization procedure. In American law, which is the cradle of the institute of reorganization, but also in German law, the importance of this condition is recognized, which is why American and German bankruptcy laws authorize a bankruptcy judge not to confirm a plan (the American solution)[47] or reject it (the German solution).[48] On the other hand, domestic legislature took a different approach, according to which the assessment of the feasibility of a reorganization plan was in fact entirely left to the creditor's decision. Formally, the requirement for fulfilling this condition is prescribed for both subsequent and prior reorganization. National standard no. 6 prescribes the submission of the statement of the administrative receiver on the feasibility of the plan in the subsequent reorganization if the plan was not submitted by the administrative receiver but by one of the other authorized proposers.[49] However, the Law on Bankruptcy does not prescribe this statement as a mandatory element of the reorganization plan, which means that the bankruptcy judge is not authorized to reject the reorganization plan if it is not

[45] Rulebook, art. 8, p. 1.

[46] Rulebook, art. 8, p. 2.

[47] American law prescribes that a bankruptcy judge shall confirm a reorganization plan only if it is established that it is not likely that it shall lead to bankruptcy or the need for further financial reorganization of the debtor or any persons that is, pursuant to the reorganization plan, the successor of the debtor. BC U.S., para. 1129 (a)(11).

[48] German law gives bankruptcy judges the power to reject a reorganization plan during a preliminary review when it is obvious that it will not be adopted in all classes, when it is certain that it will not be subsequently approved by the bankruptcy judge, or if it is obvious that the plan cannot be executed. GIL, para. 231 (1).

[49] Rulebook on establishing national standards for bankruptcy estate management, *Official Gazette of the Republic of Serbia*, no 62/2018, National standard on data to be included in the reorganization plan.

submitted.[50] In case of prior reorganization, the opposite solution was accepted, according to which the feasibility statement is a mandatory element of the PPRP, and the bankruptcy judge would be obligated to reject it if this statement is not submitted with the PPRP. Keeping in mind that domestic case law has taken the position that this special element is only a formal condition and that the bankruptcy judge cannot assess the feasibility of the PPRP at his discretion, this statement is not of great importance.[51] This is supported by the position in case law according to which the bankruptcy judge is obliged to put the plan to a vote even when the creditors have submitted evidence of the impracticability of the PPRP.[52] A similar solution was accepted within Italian bankruptcy law as well. According to the Italian Bankruptcy Law, the formal condition for submitting a reorganization plan and initiating a court procedure of preventive restructuring (so-called preventive agreement, Italian *Concordato preventive*) is submitting an expert report confirming the reliability of the data in the plan and the feasibility of the reorganization plan.[53] An expert is an independent person who is entered in the register of auditors, and who is determined by the bankruptcy debtor. Italian law distinguishes between a draft agreement and the reorganization plan on which the proposal is based.[54] The report is made exclusively to inform the creditors about the feasibility of the reorganization plan, and the final decision on accepting the agreement is made by the creditors.[55]

This special element of the PPRP is the most controversial one, because it is considered that there are no differences between prior and subsequent reorganization which would justify the fact that this element is partially (only in a certain case) required and optional (there are no sanctions in case of non-submission) in subsequent reorganization, while it is obligatory for prior reorganization. The theory states that the different treatment of the statement on the feasibility of the plan in the prior and subsequent reorganization

[50] Radović, V. (2018). *Stečajno pravo – knjiga druga*. Belgrade: Faculty of Law of the University of Belgrade, 308.

[51] *Bulletin for commercial courts case-law*, no. 3/2017, 260.

[52] Answers to the questions of the commercial courts of the Commercial Disputes Department of the Commercial Appealate Court from November 16, 2017, November 17, 2017, November 20, 2017, and November 30, 2017, and of the Department for Economic Offences from November 17, 2017.

[53] *Regio Decreto 16 marzo 1942, n. 267* (Royal decree from March 16, 1942, no. 267, hereinafter: “*BLI*”), para. 161 (3).

[54] In the draft agreement, the bankruptcy debtor proposes the percentage of creditors' settlement, while the reorganization plan shows the time and manner in which the proposal will be fulfilled. BLI, para. 160 (1), (2).

[55] Fabiani, M. (2011). Il concordato preventivo. *Consiglio superiore della magistratura, Incontro di studio Roma*, 26.

"artificially created a rift in the Serbian system of reorganization."[56] However, it seems that due to the manner in which the Law on Bankruptcy regulates this mandatory element of the PPRP, which reduces this condition only to a formal request, no significant difference has been made in the prior and subsequent reorganization regarding this condition.[57] Therefore, it can be concluded that, although formally a rift in the Serbian system of reorganization has been made, due to the manner of application of these provisions in court practice, in fact it does not exist. In Serbian bankruptcy law, creditors decide on the feasibility of a plan at a hearing on the plan. Given that it is equally important that a reorganization plan be feasible regardless of whether it is a prior or a subsequent reorganization, *de lege ferenda* should consider accepting a single solution regarding the statement of feasibility of the plan. A possible solution would be to prescribe a statement on the feasibility of the plan as a general element, which would be mandatory for both an ordinary reorganization plan and the PPRP, as well as prescribing certain discretionary powers of the bankruptcy judge regarding the substantive assessment of this statement. It should not be overlooked that one of the important factors that could affect the quality of this statement is the existence of a functional system of professional responsibility of its provider.[58]

The report on expected important developments

The report on expected important developments after the plan is made is the last special element of the PPRP prescribed by the Law on Bankruptcy. This report contains an overview of the expected operating costs and liabilities arising from the business within within 90 days following the plan formulation, which will be settled during the procedure of deciding and voting on the plan before the competent court, as regular operating costs.[59] The need to prescribe this report as a mandatory element of the PPRP exists due to the moment

[56] Radović, V. (2018). *Stečajno pravo – knjiga druga*. Belgrade: Faculty of Law of the University of Belgrade, 375.

[57] In theory, not allowing a bankruptcy judge to substantially assess a plan's feasibility statement allows the bankruptcy debtor to find a friendly administrative receiver or auditor who will give a positive opinion on the plan's feasibility without substantially reviewing the plan. See: Radulović, B. (2013). Unapred pripremljeni planovi reorganizacije u Republici Srbiji – Uporedno pravna i empirijska analiza *in:* Radović, V. (edit.) *Usklađivanje poslovnog prava Srbije sa pravom Evropske unije*. Belgrade: Faculty of Law of the University of Belgrade, 87.

[58] Radulović, B., Radović, M. (2019). Nezakonitost u postupanju povodom unapred preipremljenih planova reorganizacije. *Pravo i privred*a, 4–6, 665.

[59] Rulebook, art. 9.

of initiating the prior reorganization procedure, i.e. because the previous reorganization procedure is initiated before the opening of the bankruptcy proceedings. In the case of subsequent reorganization, the reorganization plan is submitted at the time when the bankruptcy proceedings are opened and when all the consequences of opening the bankruptcy proceedings have occurred, including the termination of proceedings in which the bankruptcy debtor participates and the prohibition of execution and settlement.[60] Since the legal consequences of opening bankruptcy proceedings have already occurred, it is unlikely that after the reorganization plan is drawn up, a significant event will occur that would significantly affect the business of the bankruptcy debtor. On the other hand, such a development of the situation is possible in the case of prior reorganization, because at the time of compiling the PPRP, the bankruptcy proceedings were still not initiated and the consequences of initiating them did not occur.[61] Because of this, it is important to inform the creditors in the PPRP about the expected important developments and in that way to prevent possible abuses by the debtor who, after compiling and submitting the PPRP, would act to the detriment of the creditor and worsen his position compared to the one presented in the plan.[62] This special element is especially important because it prevents the deterioration of the bankruptcy debtor's position until the moment of initiation of the prior procedure, because after its initiation the bankruptcy judge can impose a security measure - preventing changes in the financial and property position of the bankruptcy debtor.

CONCLUSION

From the abovementioned, it can be concluded that the initiation of prior and subsequent reorganization in Serbian bankruptcy law differs significantly in the time of initiation, authorized petitioners of the plan, but also in the content of the reorganization plan. The special provisions governing the initiation of a prior reorganization, combined with the general provisions applicable to both the prior and subsequent reorganization, largely respect the essential differences between these two types of proceedings. Despite the differences,

[60] LOB, art. 88, 93.

[61] In the case of the prior reorganization, the bankruptcy proceedings will not be opened if the bankruptcy judge rejects the proposal for initiating the bankruptcy proceedings and the PPRP or if the creditors do not adopt the PPRP.

[62] Radulović, B. (2013). Unapred pripremljeni planovi reorganizacije u Republici Srbiji – Uporedno pravna i empirijska analiza, in: Radović, V. (edit.) *Usklađivanje poslovnog prava Srbije sa pravom Evropske unije*. Belgrade: Faculty of Law of the University of Belgrade, 89.

prior and subsequent reorganization in Serbian bankruptcy law share the same problem - the infeasibility of reorganization plans and the abuse of these procedures. At the same time, the infeasibility of a reorganization plans does not necessarily mean that the procedure is abused, but may be the result of incompetence or insufficient information by the petitioner. On the other hand, the right to initiate these procedures is often abused precisely by submitting and adopting unfeasible reorganization plans, although some other circumstances may indicate abuse as well. Regulating the initiation of these two types of procedures is extremely important because this is a phase of the procedure that should eliminate unfeasible plans or plans that abuse the right to initiate a reorganization procedure. There is room for improvement regarding this regulation, and it seems that the effective elimination of plans abusing this right as well as non-feasible plans could be achieved in two ways - by more precise and uniform regulations of the conditions on the feasibility of the reorganization plan and by enabling bankruptcy judges to assess its compliance with the principle of conscientiousness and honesty when assessing the legality of the reorganization plan.

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