EU RESCUE AND RESTRUCTURING STATE AID GUIDELINES: AN OPPORTUNITY TO RESTRUCTURE CORPORATE GOVERNANCE AND CORPORATE CULTURE

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Summary

Undertakings in difficulty, having exhausted all market options, may resort to State aid to rescue and/or restructure its operations in order to return to viability. the author looks closer into the opportunity for such undertakings to change within so as to abandon practices which may have represented at least one of the roots of the deficiencies leading them to difficulties. The stringent rules of rescue and restructuring of firms in difficulties provide a second chance to restore their business, account of debts, take stock of actions and potentially rise again. Yet, the overall restructuring given as a second chance by the State aid and the role of the state, should not present a carte blanche for old policies and approaches to be repeated with the taxpayers' money. The restructuring should also be a stock-taking opportunity, an internal scrutiny where the corporate culture and the governance of the undertaking changes as well. There should be room to (re)consider corporate governance and audit of corporate culture as elements of restructuring process as well as restructuring plans, to prevent the undertaking on the receiving end of State aid to lapse again. Being given a second chance, applying practices and exercising behaviour that (may) have lead the undertaking to its difficulties, is not a guarantee of successful restructuring and return to viability but may, indeed, represent an internal subjective peril to the objective restructuring goals to be achieved. Hence, the author explores whether non-tangible elements such as an enhanced corporate governance and change of corporate culture, should be introduced

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as mandatory in the course of undertaking restructuring. The author does not probe into corporate governance and corporate culture as such, but perceives them as welcoming factors to achieve the desired outcome of restructuring aid, namely a successful return to viability using restructuring aid.

Keywords: *undertaking in difficulty; restructuring aid; state aid; corporate culture; corporate governance.*

1. INTRODUCTION

Resorting to rescue and/or restructuring aid once all the market options have been exhausted in order to return to viability[1], represents "a last call" for undertakings that have found themselves in difficulty. The use of market option may refer to commercial loans by commercial banks providing sufficient collateral is secured, sale of assets, insolvency proceeding etc. Should no market option be available, the risk of ongoing and potential partners to do business with such an undertaking is higher than the usually accepted and calculated standard under the risk management process. Thus, the undertaking in difficulty may initiate the rescue and/or restructuring aid to attempt, once and for all, to change within its approach (depending on the sector where it operates) to its production, to modernize, downsize, cut costs, implement new policies and change management, take stock of human resources in future restructured circumstances, reorganize marketing and sales, target new opportunities and return to the market.[2] Largely, the undertakings resorting to rescue and/or restructuring aid are of public character, entirely or partially owned by public authorities (namely, the State/Central government), providing services of public or strategic interest of the citizens,[3] yet the privately-owned companies are also eligible to take that path since the relevant soft law applicable to rescue and restructuring aid[4] makes no difference between sources and structures of undertakings' ownership providing that "(…) a well-defined objective of common interest"[5] is to be achieved. Addressing the public resources to overcome difficulties, either in the form of direct financial injection to overcome a liquidity gap or state guarantee(s) to manage getting a loan or other type of rescue and restructuring aid, represents state aid and thus falls under stringent rules of the European Union acquis. Primarily, this refers to the Treaty on the Functioning of the European Union (hereinafter: TFEU)[6] whereby state aid is generally incompatible with internal market as it distorts market competition, but allows for state aid to be

1 European Commission, Communication — Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, OJ C 249, 31.7.2014, point 1.8. (21 July 2018).

2 More on modalities of restructuring see Lubián, F. J. L. L., The Executive Guide to Corporate Restructuring, IE Publishing Series, Palgrave Macmillan UK, 2014.

3 State Aid Scoreboard 2017, http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html), (25 July 2018).

4 R&R Guidelines 2014, point 18.

5 Ibid; point 8.

6 Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390 (15 July 2018).

granted in some exceptions and under specific criteria.[7] Once the undertaking and the State have verified that the given situation appears to fall under the scope of allowed exceptions and criteria, the procedure may start leading to eventual granting of state aid. The procedure as well as the substance of the state aid aim and its expenditure is convened under the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulties (hereinafter: R&R Guidelines 2014). Introduced in 2014 as part of the overall State aid modernization process,[8] R&R Guidelines 2014 aim at ensuring that public expenditure in such cases is used properly to restructure the undertaking in difficulty, that it is effective but also to represent *an investment for future, based on a return on investment principle.*[9] The R&R Guidelines 2014 set forth the baseline of how to present the rescue and restructuring case of the undertaking in difficulty; to consider all elements, outline the expenditure over the course of the rescue and restructuring process, to account for all debts, prepare a sound restructuring plan, including the financial plan and the role of the stakeholders as well as the State. Moreover, key concepts,[10] such as burden sharing, own contribution, measures to limit distortions of competition and behavioural measures need to be encompassed to make sure that viability is ensured and return to market smoothly transitioned. Burden sharing implies that the undertaking in difficulty must account for its losses and debt as well as secure that the State participates in future profits once the restructuring is completed.[11] Own contribution to restructuring cost, free of State aid, must be secured by the undertaking itself, a group to which it belongs or a new investor, in form of e.g. debt write-off or a loan[12] to match the State aid granted in an equal share of 50:50.

7 Ibid, Article 107, paras 2. and 3.

8 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on EU State aid modernisation (SAM), COM(2012) 209 final, 8.5.2012 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2012:0209:FIN (25 July 2018).

9 Obradović Mazal, T. and Butorac Malnar, V., The Discretionary Power of Competent Authorities in Applying State Aid Rules on Rescue and Restructuring, in: Potocan, V., Kalinic, P., Vuletic, A. (eds.), 26th International Scientific Conference on Economic and Social Development - Building Resilient Society, Conference Proceedings, Varaždin, 2017, p. 599-607.

10 Other key issues of the modernization process looking through the last decade of state aid reform, the modernization process and its outcomes can be found in Herwig, H. and Micheau, C., State Aid Law of the European Union, Oxford University Press, 2016, p. 10 et seq.

11 R&R Guidelines 2014, - point 66. „Adequate burden sharing will normally mean that incumbent shareholders and, where necessary, subordinated creditors must absorb losses in full. Subordinated creditors should contribute to the absorption of losses either via conversion into equity or write-down of the principal of the relevant instruments. Therefore, State intervention should only take place after losses have been fully accounted for and attributed to the existing shareholders and subordinated debt holders. In any case, cash outflows from the beneficiary to holders of equity or subordinated debt should be prevented during the restructuring period to the extent legally possible, unless that would disproportionately affect those that have injected fresh equity." point 67. „Adequate burden sharing will also mean that any State aid that enhances the beneficiary's equity position should be granted on terms that afford the State a reasonable share of future gains in value of the beneficiary, in view of the amount of State equity injected in comparison with the remaining equity of the company after losses have been accounted for."

12 R&R Guidelines 2014, - point 62. „A significant contribution to the restructuring costs is required from the own resources of the aid beneficiary, its shareholders or creditors or the business

Measures to limit distortion of competition are applied to restore the balance between the received State aid and current market position of the beneficiary and normally take the form of divestments and/or reduction of business activities.[13] The undertaking in difficulty using State aid to return to viability is also to refrain from such behaviour whilst the restructuring is in process that would enhance the fact that it is using State aid, advertising this fact as a market advantage or pursuing acquisitions instead of spending funds on activities outlined in the restructuring plan.[14] Since its adoption in 2014, the R&R Guidelines have received some attention by legal scholars such as Bacon,[15] Hofmann and Micheau,[16] Phedon.[17] Yet, an important issue to be tackled is the corporate governance culture in future rescued and/or restructured undertaking. In essence, what leads to such an extremely difficult business and financial situation besides the overall market trends, severe crises or some other sector-specific circumstance (e.g. shipbuilding) may also be an insufficient, ineffective, submissive corporate culture and below-standard, ill – managed corporate governance.

Departing from this, the author looks at corporate governance and corporate

group to which it belongs, or from new investors. Such own contribution should normally be comparable to the aid granted in terms of effects on the solvency or liquidity position of the beneficiary. For example, where the aid to be granted enhances the beneficiary's equity position, the own contribution should similarly include measures that are equity-enhancing, such as raising fresh equity from incumbent shareholders, the write-down of existing debt and capital notes or the conversion of existing debt to equity, or the raising of new external equity on market terms. The Commission will take account of the extent to which own contribution has a comparable effect to the aid granted when assessing the necessary extent of the measures to limit distortions of competition in accordance with point 90."

13 R&R Guidelines 2014 - point 78. „On the basis of an assessment in accordance with the criteria for calibration of measures to limit distortions of competition (set out in section 3.6.2.2), undertakings benefiting from restructuring aid may be required to divest assets or reduce capacity or market presence. Such measures should take place in particular in the market or markets where the undertaking will have a significant market position after restructuring, in particular those where there is significant excess capacity. Divestments to limit distortions of competition should take place without undue delay, taking into account the type of asset being divested and any obstacles to its disposal, and in any case within the duration of the restructuring plan. Divestments, write-offs and closure of loss-making activities which would at any rate be necessary to restore long-term viability will generally not be considered sufficient, in the light of the principles set out in section 3.6.2.2, to address distortions of competition."

14 R&R Guidelines 2014, - point 84. „The following behavioural measures must be applied in all cases, to avoid undermining the effects of structural measures, and should in principle be imposed for the duration of the restructuring plan: (a) Beneficiaries must be required to refrain from acquiring shares in any company during the restructuring period, except where indispensable to ensure the long-term viability of the beneficiary. This aims at ensuring that the aid is used to restore viability and not to fund investments or to expand the beneficiary's presence in existing or new markets. Upon notification, any such acquisitions may be authorised by the Commission as part of the restructuring plan; (b) Beneficiaries must be required to refrain from publicising State support as a competitive advantage when marketing their products and services."

15 Bacon, K., European union law of State aid, 3rd edition, Oxford University Press, 2017.

16 Herwig, H. and Micheau, C., State Aid Law of the European Union, Oxford University Press, 2016.

17 Phedon, N., State Aid uncovered: Critical Analysis of Developments in State aid, Lexxion, 2017.

culture as the contributing elements to the overall restructuring process; namely, the changes that the undertaking undergoes, hopefully successfully, hardly achieve the sustainability of effectiveness unless the approach, core values, respect to external and internal processes and standards are not fully embraced. The Commission has to some extent singled out corporate governance as one of the key performance indicators of the restructurings' effectiveness, which is understandable considering that an overall effect of a restructuring process is dependent upon all individual factors combined. The change of corporate culture is, however, not mentioned. Corporate governance and corporate culture in the context of restructuring aid and the expected viability is presented in more details in section III. The author thus explores corporate governance and corporate culture as potential additional Key Performance Indicators (hereinafter: KPIs) of measuring whether the restructuring has been conducted properly and, moreover and more importantly, whether the (new) corporate governance and corporate culture of the restored undertaking prevents the undertaking to lapse again into difficulty.[18] The author contends that the lack of mandatory introduction to impose restructuring of the existing corporate governance and corporate culture actually deprives the undertaking of the obligation to make sure, internally and by internal rules, more discipline is secured to avoid the repetition of internal factors that lead the undertaking into difficulty yet again. This said, the corporate governance and corporate culture as KPIs should not only be beneficial for the undertaking itself, but also for the State - which has transformed its role from a benefactor trying to "attain particular economic and social objectives"[19] to an investor likely to have direct returns of its investment. Thus, the consideration to have these two elements additionally introduced should be welcomed.[20]

2. STATE AID AS A TOOL TO OVERCOME DIFFICULTIES

2.1. Rescue and restructuring aid at hand

As mentioned above, the undertakings facing serious difficulties in maintaining liquidity and daily business operations due to a lack of capital and financing, having exhausted available market options to secure further liquid capital, may opt to address a public body (the state) to secure aid for either rescue or restructuring. The undertaking is in difficulty when "…without intervention by the State, it will almost certainly be condemned to going out of business in the short or medium

18 R&R Guidelines 2014, - point 52. „Long-term viability is achieved when an undertaking is able to provide an appropriate projected return on capital after having covered all its costs including depreciation and financial charges. The restructured undertaking should be able to compete in the marketplace on its own merits."

19 Bellamy&Child, European Union Law of Competition, 7th ed., Rose, V., Bailey, D. (eds.), Oxford University Press, pp. 1275, para 17.010.

20 More on State as an investor see Obradovic Mazal, T., Butorac Malnar, V., Burden sharing principle in rescue and restructuring – no pain, no gain, 18th International Scientific Conference on Economic and Social Development – "Building Resilient Society", Book of proceedings, Zagreb, 9-10 December 2016, p. 705-716.

term. Therefore, an undertaking is considered to be in difficulty if at least one of the following circumstances occurs:

(a) In the case of a limited liability company, where more than half of its subscribed share capital has disappeared as a result of accumulated losses. This is the case when deduction of accumulated losses from reserves (and all other elements generally considered as part of the own funds of the company) leads to a negative cumulative amount that exceeds half of the subscribed share capital.

(b) In the case of a company where at least some members have unlimited liability for the debt of the company, where more than half of its capital as shown in the company accounts has disappeared as a result of accumulated losses.

(c) Where the undertaking is subject to collective insolvency proceedings or fulfils the criteria under its domestic law for being placed in collective insolvency proceedings at the request of its creditors.

(d) In the case of an undertaking that is not an SME, where, for the past two years:

i. the undertaking's book debt to equity ratio has been greater than 7,5 and

ii. the undertaking's EBITDA interest coverage ratio has been below 1,0."[21]

The State, after the undertaking in difficulty unsuccessfully explored the market options or failed to find an appropriate strategic partner and /or investor, may agree to restore the viability of the undertaking in difficulty by granting restructuring aid. By doing so, the undertaking as well as the State need to adhere to requirements that primarily address the European Commission as to how to act when such a proposal is submitted for its consent. Yet, the reasoning and the decision-making process whether the Member State shall or shall not agree to embark on restructuring aid is entirely left to Member States.[22] Hence, the decision to agree to award the restructuring aid to an undertaking in difficulty is led by Article 107 of the TFEU[23] whereby aid granted "…through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market",[24] unless the aid falls under exceptions that are considered compatible with the internal market. By resorting to these types of aid, the firms in difficulties are essentially given another »go« at trying to sustain their difficulties, overcome them and continue operating at the level-playing field – with a price to pay. They also need to ensure their future actions mitigate the risk of competition being distorted by giving them unlawful market advantage over their competitors. The Commission has adopted the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty 20 years following the adoption of the original

21 Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, Official Journal C 249, 31.07.2014.

22 R&R Guidelines 2014, - point 8. „It follows that undertakings should only be eligible for State aid when they have exhausted all market options and where such aid is necessary in order to achieve a well-defined objective of common interest."

23 OJ C 115, 9.5.2008, p. 91–92.

24 Loc. cit.

Guidelines of 1994, revised several times thereafter.[25] The emphasis of the title itself is on the non-financial sector due to the fact that the financial/banking sector is governed by a different set of rules as regards support to the financial institutions that may find themselves in difficulty.[26] To reiterate, the granting of aid that distorts or threatens to distort competition in the internal market is prohibited by the TFEU, unless it is a question of exceptions such as achieving objectives of common interest and assisting in levelling the functions of the market in specifically defined cases based on stringent criteria. Where the undertaking, due to difficulties in its financial and business operations, needs to exit the market, it should do so without burdening the Member State(s). Nonetheless, there have been a number of examples in the non-financial sector, where market existence of the undertakings was proven vital for the national and/or regional economy in terms of industry, know-how and level of employment, thus justifying the exception and in turn attempt to rescue and/or restructure the undertaking.[27] The R&R Guidelines set forth the conditions under

25 Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 368, 23.12.1994, p. 12) 25 July 2018; Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 283, 19.9.1997, p. 2) (25 July 2018); Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 288, 9.10.1999, p. 2) (25 July 2018); Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2) 25 July 2018; Commission Communication concerning the prolongation of the Community Guidelines on State aid for rescuing and Restructuring Firms in Difficulty (OJ C 156, 9.7.2009, p. 3) (25 July 2018); Commission communication concerning the prolongation of the application of the Community guidelines on State aid for rescuing and restructuring firms in difficulty of 1 October 2004 (OJ C 296, 2.10.2012, p. 3) (25 July 2018).

26 For financial sector and state support to financial sector see Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication') Text with EEA relevance, OJ C 216, 30.7.2013, p. 1–15, 27.7.2018 https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52013XC0730%2801%29 (27 July 2018).

27 See TFEU, Article 107.2 and 3. „2. The following shall be compatible with the internal market: (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.; 3. The following may be considered to be compatible with the internal market: (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation; (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State; (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest; (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest; (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission."

which State aid for rescuing and restructuring non-financial undertakings in difficulty may be considered compatible with the internal market to minimize its negative effects and the approach of the Commission when deciding whether or not to consent to State aid to be granted. The Guidelines address primarily the Commission: when approached by the Member State(s) to approve the intention to grant rescue and/or restructuring aid, the Guidelines set the procedure, criteria and requirements for the Commission to follow in addressing the Member State(s)' request. Naturally, the Member States follow that path as well which opens the issue of the very nature of the Guidelines.[28] The Guidelines also focus on providers of services of general economic interest (SGEI);[29] where the providers in difficulty fall under its scope, initially the assessment is carried out based on the Guidelines' principles taking into account the need to ensure the continuity of the service provision in line with Article 106(2) of the Treaty. The Guidelines foresee three variations of aid format: rescue aid,[30] restructuring aid[31] and temporary restructuring aid.[32] Rescue aid represents an urgent and temporary assistance of the public authority to keep an undertaking in difficulty in operations for a short period of time whilst preparing a thorough restructuring or liquidation plan. Thus, the undertaking is given time to consider its circumstances and make an appropriate decision as regards its business future (liquidation or restructuring). As regards the restructuring aid, it enables the undertaking to prepare such a plan that would enable it to "…restore the long-term viability of the beneficiary on the basis of a feasible, coherent and far-reaching restructuring plan, while at the same time allowing for adequate own contribution and burden sharing and limiting the potential distortions of competition."[33] Lastly, a temporary restructuring support - liquidity assistance designed to support the restructuring of an undertaking by providing the conditions needed for the beneficiary to design and implement appropriate action to restore its long-term viability. Temporary restructuring support may only be granted to SMEs and smaller State-owned undertakings.[34]

Compliance with the Internal Market needs to be secured and proven – in lieu to the principles of common interest that need to be verified, avoidance of serious social hardship that are certain to be caused by undertaking exiting the market. To that respect, the aid needs to be proportionate and limited to the minimum.[35] In case of

28 More on legal nature of soft law see Cini, M., From Soft Law to Hard Law?: Discretion and Rule-making in the Commission's State Aid Regime, Robert Schuman Centre for Advanced Studies, RSC No. 2000/35 at https://www.researchgate.net/publication/2395336_From_Soft_Law_to_Hard_Law_Discretion_and_Rule-making_in_the_Commission's_State_Aid_Regime (21 July 2018).
29 More on State aid and SGEI see Liszt, M., Čulinović-Herc, E., Certain Aspects of State Aid to Services of General Economic Interest, in: EU Competition and State Aid Rules- Public and Private Enforcement (Eds): Tomljenović, V., Bodiroga-Vukobrat, N., Butorac Malnar, V., Kunda, I. Springer 2017, str. 291-313.
30 R&R Guidelines 2014, point 26.
31 R&R Guidelines 2014, point 27.
32 R&R Guidelines 2014, point 28.
33 R&R Guidelines 2014, point 27.
34 R&R Guidelines 2014, point 32.
35 R&R Guidelines 2014, point 38 (e).

rescue aid, it should only represent the amount sufficient for the undertaking to get by whilst preparing a restructuring or liquidation plan as prescribed by the Guidelines.[36] The process becomes further difficult in case of restructuring aid: the amount of aid represents a minimum "investment" to enable the process of restructuring and must take all financial and operational circumstances into account – the existing financial resources of the recipient undertaking, its shareholders or its wider group of business. The undertaking is obliged to provide enough own contribution to the restructuring costs, completely free of state aid, amounting to minimum 50% of the total restructuring cost.[37]

From the point of view of the investor, the State has an interest to oversee the restructuring process via the corporate bodies under the company law to make sure its investment is protected by sound management decision and in consequence, its return on investment secured. Apart from the State's legitimate (and economic) interest to (over)see the implementation of the restructuring process in line with the restructuring plan and Commission's decision to approve the process, the author suggests it is in the undertaking's best interest to pursue, identify and target those corporate governance gaps, deficiencies and practices as well as to analyse its corporate culture not to allow the repetition of those relations, practices and policies that prevented the undertaking from reacting promptly to circumstances that had lead it to difficulties.

2.2. Restructuring plan – the "how" to ensure viability

When it comes to restructuring aid, it needs to be limited to the necessary and argued minimum "…on the basis of a feasible, coherent and far-reaching restructuring plan."[38] If the State is awarding aid in form of debt write off, capital or grants to the firm in difficulty, such a move may bring it into a more favourable position in the market and distort the position of its competitors. Thus, the restructuring plan must include a number of measures to mitigate that risk and make the firm adopt painful decisions in order to proceed further.[39] Therefore, all restructuring plans must, amongst others, contain own contribution to restructuring costs and, as introduced by R&R Guidelines 2014, the burden sharing principle. Own contribution may take different forms but what represents a common denominator is that it is normally as high as 50% of the total restructuring cost and its source is own (re)sources free of State aid. It is expected that the beneficiary of restructuring aid participates in the overall costs by its own finances, debt-to equity conversion or e.g. raising fresh equity. What is necessary is that the own contribution results neither from future profits nor from State aid to be received, but to be the result of present activities, significant and real. On the other

36 Timewise, rescue aid is limited to 6 months after the rescue aid measure has been authorised or, in the case of non-notified aid, not later than six months after disbursement of the first instalment to the beneficiary. After that time allocation, the Member States should demonstrate, e.g. that the rescue aid has been reimbursed, that the guarantee has been terminated or, *inter alia*, that the restructuring plan has been prepared for approval (p. 55(d)).

37 R&R Guidelines 2014, point 64.

38 R&R Guidelines 2014, point 27.

39 For details on content of a restructuring plans, see Annex II of the R&R Guidelines 2014.

hand, burden sharing assumes that the beneficiary has accounted for all the losses and is ready to, once the restructuring plan has been implemented fully and the firm has regained its viability, "return" the aid from the future profit to taxpayers or, as the R&R Guidelines 2014 define it, "… afford the State a reasonable share of future gains in value of the beneficiary, in view of the amount of State equity injected in comparison with the remaining equity of the company after losses have been accounted for..."[40] This way a balance is established between the State giving aid and the firm receiving it; both are in the process together and both have a vested interest to see the process succeed. To ease the process and enable that both the undertaking and the Member State are unanimously aware what needs to be submitted to the Commission, the R&R Guidelines 2014 offer an indicative content of what a restructuring plan needs to contain. The indicative content includes the description of the beneficiary, the description of the market or markets where the beneficiary operates, demonstration of the social hardship that the aid aims to prevent or the market failure that it aims to address, comparison with a credible alternative scenario not involving State aid, demonstrating how such objective or objectives would not be attained, or would be attained to a lesser degree, in the case of the alternative scenario. The content also includes, the description of the sources of the beneficiary's difficulties (including an assessment of the role of any flaws in the beneficiary's business model or corporate governance system in causing those difficulties and the extent to which the difficulties could have been avoided through appropriate and timely management action) and SWOT analysis, the description of possible plans to remedy the beneficiary's problems and comparison of those plans in terms of the amount of State aid required and the anticipated results of those plans, the description of the State intervention, full details of each State measure (including the form, amount and remuneration of each measure) and demonstration that the State aid instruments chosen are appropriate to the issues that they are intended to address. Further, the undertaking needs to provide, an outline of the process for implementing the preferred plan with a view to restoring the beneficiary's long-term viability within a reasonable timescale (in principle, not to exceed three years), including a timetable of actions and a calculation of the costs of each action, a business plan setting out financial projections for the next five years. Most importantly, the undertaking needs to demonstrate the return to long-term viability, demonstration of the return to viability under both a baseline and a pessimistic scenario, presentation and justification on the basis of a market survey of the assumptions used and sensitivity analysis, proposed own contribution and burden-sharing measures and proposed measures to limit distortions of competition.[41] The content is primarily built around the steps to be taken to return to viability, demonstrating precisely how as well as presenting means to bridge the circumstances that lead the undertaking to its worsened position, not implying the streamlines nor the substance of the "restructuring", leaving it up to the undertaking. Looking at the indicative content, the author observes that first half reflects on the past, including the identification of whether corporate governance system has contributed to undertaking's

40 R&R Guidelines 2014, point 67.
41 R&R Guidelines 2014.

ending up in difficulties. This is a correct step to take – to reflect whether internal as well as external rules, procedures and standards have been adhered to or the business decisions made recklessly and with an unusual amount of management's discretion, for instance. Yet, the author is of the opinion that the second half of the indicative content of restructuring plans should, if the corporate governance system was already highlighted as a potential past contributor to difficulties, contain a future reference to corporate governance as well as culture as significant contributors to the future viability of the undertaking, once having successfully completed a restructuring process. The question is why, if corporate governance is significant to the outline as an issue of the past, the same is not requested to be taken into mandatory account in future accordingly.

3. RESTRUCTURING (AND) CORPORATE GOVERNANCE AND CORPORATE CULTURE

3.1. Turning around "how things are done"

On the premises that restructuring aid prevails, the undertakings in difficulty seek to pursue further business operations in a somewhat different shape and size, diversifying portfolio and with the notion that for a decade post the restructuring, they are not eligible for new state aid. In other words, the restructuring process, based on a comprehensive restructuring plan to return to viability needs to reflect all actions to sustainably achieve that target. Hence, the R&R Guidelines suggest, for guiding purposes, the minimum content that restructuring plans need to encompass. Prior to looking at these elements closely, the consultancy practises in restructuring business suggest that turnaround strategies[42] of underperforming undertakings may take different streamlines.

The objective(s) of turnaround strategies is to have the undertaking perform efficiently, effectively with a sound management and financial indicators. For instance, financial streamline serves to protect share/stakeholders' position, arrange appropriate debt restructuring, development of contingency plans, assessing short-term liquidity requirements, developing cash-flow forecast of the company. It includes (radical) cost-cutting measures, reductions in overheads and headcount reductions leading to redundancies. Operational turnaround focuses, along with the financial restructuring, on improving productivity in the long run, making systems and processes perform better, getting more out of the processes and people, managing projects more

42 For overall approach to turnaround strategies and different approaches see e.g. Lohrke, F. T., Bedeian, A. G. and Palmer, T. B., The Role of Top Management Teams in Formulating and Implementing Turnaround Strategies: A Review and Research Agenda. International Journal of Management Reviews Vol. 5-6, No. 2, pp. 63-90, June 2004. Available at SSRN: https://ssrn.com/abstract=608489 (27 August 2018). In terms of consultancy practice, more on turnaround strategies and models can be found at, e.g. https://home.kpmg.com/ie/en/home/services/advisory/restructuring/corporate-restructuring.html (10 August 2018), https://www.mckinsey.com/business-functions/organization/our-insights/five-fifty-the-t-word (10 August 2018).

efficiently, structuring team work better to get more with less (during and after the financial restructuring against the background of cash-flow challenges, stakeholders' and creditors' pressure) to achieve tangible results in the long run. Technical/technological restructuring is focused on achieving better performance along with cost cutting with a simultaneous investment into new technologies, updates, the modernization of technical approaches and standards in the given business sector. Legal restructuring follows the executive decision to merge, dissolve, abandon, reregister or diversify the portfolio of the undertaking, specifically if the undertaking represents a larger group or has different business operations. Thus, the legal restructuring, following the business strategy of returning to viability, ensures that the undertaking has implemented the actions in terms of internal (re)organization of the production portfolio. Human (resources) turnaround looks at cutting cost, but not only; it looks at overheads and at the available talent that may respond to challenge of future business strategy and be mobilized to sustain the change. Eventually, with the technical and technological restructuring, introducing modernization of technology used in the line of business, the undertaking inevitably weights the redundancy plan as one of the contributing elements to returning to viability. It is the human resources management in future circumstances that is the key element to overall restructuring in the context of corporate governance and corporate culture. In the author's opinion, the latter element is where restructuring and viability meet. None can be executed nor implemented without psychological twist and different approach of (future) bodies of the undertaking but also all the employees, embracing new corporate culture of different kind and different approach to how business is done and reported on to undertaking's bodies and interested public (such as e.g. regulatory agencies). The undertaking ready and eligible to take the restructuring aid is, as mentioned earlier, bound to deliver a comprehensive restructuring plan that objectively outlines measures to take in order to return to viability.

Neither the guiding, illustrative content nor the body of R&R Guidelines 2014 foresee or detect the need to change within. Apart from objective, *force majeure*, outside circumstances that the undertaking could not have prevented from influencing its operations, we should allow for circumstances where the management, culture and corporate governance were insufficient to detect early on and prevent liquidity gap, risk enhancement and eventually, inability to be further credited. The Ex-post study,[43] commissioned by the Commission – DG Competition showed that 18 out of 60 undertakings participating in the survey indicated internal reasons that lead to difficulty on account of poor management and internal structure problems.[44] In the aftermath of the restructuring process, some firms partaking in the study reported a substantial behavioural change in management and strategy. Although this was not explicitly mentioned in the restructuring plan, it has been vital for the survival of the company. Actively studying the market and searching for opportunities has resulted in

43 Ex-post evaluation of the impact of restructuring aid decisions on the viability of aided (non-financial) firms, 2016, https://publications.europa.eu/en/publication-detail/-/publication/3f86b7cd-f196-11e5-8529-01aa75ed71a1/language-en (25 July 2018).

44 Ibid., p. 24.

more diversification and a more flexible attitude. This, in turn, has helped to transform the company back into a viable business.[45]

Change management that looks into financial, operational, technical and otherwise restructuring, can rarely be performed streamlined by the same approaches, values and communication that failed to detect and overcome critical circumstances. Hence, the way an undertaking was governed in the framework of corporate culture needs to be targeted as well. State aid, coming from public resources and being granted after a stringent process by the Commission, calls for not only governance, but culture change as well.

The opportunity to go beyond and further than the illustrative content of the restructuring plan by the R&R Guidelines may be anchored, for instance, in point 9, whereby "the moral hazard" is highlighted as a problem created by State aid itself. Receiving State aid and not adhering fully to commitments undertaken by restructuring plans may result in *"Undertakings anticipating that they are likely to be rescued when they run into difficulty may embark upon excessively risky and unsustainable business strategies."*[46]

Though equally applicable to privately and publicly owned companies, one may reason that, in the event of public companies, the corporate culture would reflect upon the ownership as a safety cushion whereby, the daily operations, business strategy, the main logic to operate sustainably and with profit is actually the responsibility of the State rather than the outcome of a sound corporate governance and management responsibility. To that sense, the R&R Guidelines prevent the recipient of State aid from those behavioural deviations that would lead to misuse of granted aid, making sure that aid is *"... used only to finance the restoration of long-term viability and that it is not abused to prolong serious and persistent market structure distortions or to shield the beneficiary from healthy competition."*[47]

However, the behavioural measures do not aim at the overall corporate culture and governance but are limited to specific behaviour to be mandatory excluded during the restructuring process.[48]

3.2. The corporate governance and corporate culture interplay

The corporate culture is the entirety of "how things here are done" – the culture of the undertaking is a total of all relationships of a company. Thus, identifying of

45 Ibid., p. 83.

46 R&R Guidelines 2014, point 83.

47 Loc. cit.

48 R&R Guidelines 2014 - point 84 „The following behavioural measures must be applied in all cases, to avoid undermining the effects of structural measures, and should in principle be imposed for the duration of the restructuring plan:(a) Beneficiaries must be required to refrain from acquiring shares in any company during the restructuring period, except where indispensable to ensure the long-term viability of the beneficiary. This aims at ensuring that the aid is used to restore viability and not to fund investments or to expand the beneficiary's presence in existing or new markets. Upon notification, any such acquisitions may be authorised by the Commission as part of the restructuring plan; (b) Beneficiaries must be required to refrain from publicising State support as a competitive advantage when marketing their products and services."

all the stakeholders and employees with the undertaking and how precisely they all identify (themselves with) the corporate culture, defines it. Ogorec and Skendrović, when addressing the corporate identity and its meaning state that the "Identity of organisation, respect of corporation as an institution and subsequently affirmative relationship towards work and the work of colleagues is something that is, from the aspect of managing large systems, of enormous importance but often lacking in corporate practice. Treatment of subordinated, superiors and colleagues as primarily persons that occupy a specific working place first rather than as human beings, deteriorates the company's image (it becomes faceless), has a negative effect on work atmosphere and, in the end, leads to interpersonal problems that result in diminished effectiveness of particular department or the undertaking as a whole, problems in daily leadership and management thus increasing "non-productive space" in the work process."[49]

Corporate culture represents recognizable written but also unique personality of the undertaking and the individuals representing it, being its integral elements. The culture of the undertaking is reflected upon its symbols, what the undertaking is and represents, the level of employee's care, securing and updating internal procedures, compliance, transparency, understanding of expectations by the entire workforce, the sense of belonging to the undertaking, understanding the informal/unwritten rules, communication. Different factors prevail in defining the corporate culture whether it is by every individual, ratio of sexes, clients, buyers, type of business, location/seat of the undertaking, mission, vision and values, management of undertaking, communication between the management as well as the management communication towards the employees.[50] To define an undertaking's corporate culture, several key issues are to be verified beforehand:

- Management as the source of the corporate culture,
- Roles of all the stakeholders: owners, shareholders, corporate governance bodies, key functions, employees,
- Business orientation: further growth and development,
- Corporate social responsibility,
- Labour relations and respect of the labour legislation,
- General corporate working climate as well as the presence and influence (positive and negative) of the micro-climates,
- Architecture of the space: open plan, competitive, collaborative or hierarchical,
- Communication of internal and external character,
- Support infrastructure to employees,
- Client/buyer relations.

49 Ogorec, M. i Skendrović, K., Utjecaj vojnog modela vođenja na sustav korporativnog upravljanja, Polemos: časopis za interdisciplinarna istraživanja rata i mira, str. 78., Vol. XVII, No. 33-34, 2014., str. 71-88. (30 July 2018.).

50 For more on corporate culture see e.g. Kotter, J. P. and Heskett J. L., Corporate Culture and Performance, Simon and Schuster, 2008.

As Groysberg et al.[51] and Hickman and Silva[52] point out, corporate culture has its different types and styles and types. Of all the definitions of corporate cultures, the author has chosen the 6-element analysis model by Sikavica and Novak[53] that takes the following elements into consideration to define the type of corporate culture:

- Dominant culture/subculture,
- Strong/weak culture,
- Clear/unclear culture,
- Excellent/flawed culture,
- Stable/adaptable (open, flexible) culture,
- Participative/non-participative culture.

An inseparable concept in the context of communicating values and managing the undertaking is the governance of the undertaking. The Communication on European company law and corporate governance (hereinafter: the Action plan) determines corporate governance as "… the way a corporation polices itself. In short, it is a method of governing the company like a sovereign state, instating its own customs, policies and laws to its employees from the highest to the lowest levels."[54]

Corporate governance, simplified, represents a set of agreed rules and procedures by which the company is managed and controlled. Bloomfield, for instance, having analysed definitions of corporate governance over the last two decades, suggests two different(ial) definitions of corporate governance, from the ownership point of view.[55] Corporate governance of private companies "… is the governing structure and processes (procedural governance) in an organisation that exists to oversee the means by which limited resources are efficiently directed to competing purposes for the use of organisation and its stakeholders; including the maintenance of the organisation and its long-run sustainability (behavioural governance), set and measured against a framework of ethics (structural governance) and backed by regulation and laws (systemic governance)."[56] Bloomfield differentiates a corporate governance of public companies and defines it as "A series of principles, which are usually embodied in formal controls, in agencies which seek to redress market imperfections by acting for, on behalf of and with the express approval of the State, through all or some of the activities of policy-making, management, and regulation; mostly using resources without the intention of generating a profit and providing more or less appropriately-transparent information about the means of arriving at the allocation of resources

51 Groysberg, B., et al, The Leader's Guide to Corporate Culture, Harvard Business Review, January-February, 2018.

52 Hickman, C. R. and Silva, M. A., Managing Corporate Culture, Strategy, and Change in the New Age, Routledge, 2018.

53 Sikavica, P. i Novak, M., Poslovna organizacija, Informator, Zagreb, 1999, str. 593.

54 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies, /*COM/2012/0740 final*/ (27 July 2018).

55 Bloomfield, S., Theory and Practice of Corporate Governance: An Integrated Approach, Cambridge University Press, 2013., p.19.

56 Loc. cit.

in the absence of a set of rational economic methods of achieving those ends."[57] Corporate governance defines the relationship between the bodies of the undertaking – the general assembly, the management board, supervisory board (dependant of the legal entity and applicable law).[58] Namely, it establishes and reflects how the undertaking is managed, how the crucial information is shared and streamlined and what the controlling mechanisms are. It is the result of the legislative framework – EU acquis and national legislation combined but it is the culture of the undertaking that directs the course of promoting either better governance (or not) for the benefit of the undertaking or a benefit in the short run, dependant of the undertaking's milestones.

3.3. The European Union way forward

In the aftermath of the financial crisis, the Commission launched its Green Paper on the EU corporate governance framework[59] (hereinafter: the 2011 Green Paper) to see how to overcome shortcomings detected "…in the application of the corporate governance codes when reporting on a 'comply or explain' basis"[60] and improve the effectiveness of the corporate governance across the board. In the context of undertakings in difficulties that consider or are going through restructuring using State aid, of all the components that the 2011 Green Paper took into consideration, the ones that raise interest are the risk management and the corporate governance reporting oversight by national authorities.[61]

In terms of risk management, the 2011 Green Paper correctly establishes that risk management cannot be developed on the premises that "one-size-fits-all" as undertakings are diverse, operate in different sectors and are facing different challenges. Yet, the overall improvement of risk management needs to be determined across the board, defining "early warning" operating procedures as well as the roles and responsibilities of all the stakeholders in the risk management process.[62]

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57 Loc. cit.

58 Wright, M., Siegel, D. S., Keasey, K. and Filatotchev, I., The Oxford Handbook of Corporate Governance, Oxford University Press, 2013, p.15.

59 COM(2011) 164 final at http://ec.europa.eu/internal_market/company/docs/modern/com2011-164_en.pdf, 5.4.2011 (1 August 2018).

60 Ibid, p. 18.

61 More on risk management and risk governance can be found in e.g. Aven, T. and Renn, O., Risk Management and Governance: Concepts, Guidelines and Applications Springer, 2010, p. 46-64.

62 COM(2011) 164 final, point 1.5. – „According to their specificities (field of activity, size, international exposure, complexity) they should develop an adequate risk culture and arrangements to manage them effectively. Some companies may face risks that significantly affect society as a whole: risks related to climate change, to the environment (e.g. the numerous dramatic oil spills witnessed in recent decades), health, safety, human rights, etc. Others operate critical infrastructure, the disruption or destruction of which could have major cross-border impacts. However, activities that might potentially generate such risks are subject to specific sectoral legislation and to monitoring by competent authorities. Thus, taking into account the diversity of situations, it does not seem possible to propose a 'one-size-fits-all' risk management model for all types of companies. It is, however, crucial that the board ensures a proper oversight of the risk management processes."

The author is of the opinion that it would seem justified and legitimate to expand the behavioural expectation onto the sound corporate governance as well as mandatory external third-party risk assessment to mitigate the possibility of recurring circumstances that lead to difficulties in the first place. Whereby the State grants State aid, the State is overly keen to protect its "investment" by enhanced oversight of undertaking going through a restructuring process, making sure that the corporate governance reporting is adhered to according to the standards. The reporting mechanism and above all, its content, is the next issue to consider for scrutiny by national authorities, *erga omnes*. However, considering that the State steps in to assist and invest into undertaking's return to viability with the taxpayers' money, the State has a vested interest to harden its grip over an undertaking in difficulty to present the content of corporate governance report in a concise manner and substance to present that risks are mitigated. Even though the 2011 Green Paper states that "The authorities should not, however, interfere with the content of the information disclosed or make business judgements on the solution chosen by the company.", nonetheless, from the point of burden-sharing principle under the R&R Guidelines and the mere fact that the State aid versus own contribution in the total restructuring cost is set at 50:50, with the prospect of the State participating in future gains of the undertaking, the author is of the opinion that additional attention payed to such undertaking should be secured. If for no other reason, then for the reason of precisely questioning business judgements, from the point of restructuring aid being granted and put into effect, to avoid again falling into difficulties on account of, apart from other contributing factor, ill-managed company, poor corporate culture and "relaxed" corporate governance. In addition, the author considers that it should be at least secured through undertaking's bodies whereby the State may insist, on account of equity share or via monitoring of the restructuring process, having its expert representative, besides the external monitoring tool as foreseen by the R&R Guidelines.

To that respect, the Action plan launched initiatives to be taken to modernise, besides the company law, the corporate governance framework – establishing three streamlines of actions: enhancing transparency, engaging stakeholders and supporting growth and competitiveness. The transparency is to be enhanced by increasing the quantity and quality of information provided on corporate governance of the undertakings. The shareholders are to be offered increased possibilities to take part in (defining) the corporate governance whereas the growth and competitiveness of the companies is to be supported by simplifying cross-border operations of European businesses.[63] The above streamlines recognized by the Commission in taking (then) future path additionally contribute to author's opinion that restructuring process of the undertakings in difficulty should take action in terms of "soft" measures such as governance and culture.

As regards transparency, the Action Plan emphasises the value of diversity of the board – the more diversity the more ideas and different views are accumulated and shared, and the more focus is secured onto the work of management, executive directors and other key stakeholders calling the decisions and developing business

63 2011 Green Paper, p. 14.

strategies.[64] Looking at the role of the supervisory board, the Commission finds that the supervisory board's role should be strengthened in terms of risk management, to receive reports of non-financial character that would provide an overall risk assessment perspective potentially threatening the undertaking. Hence, not only a broader picture but also risk projections along with a long(er) term business strategy would contribute to undertaking's firm adherence to restructuring principle, allowing the State – through corporate governance, to have a closer look and firm(er) grip over decisions influencing the course of its "investment".

Having mentioned the reporting – both financial and non-financial, the Commission established that the quality of the corporate governance reports[65] raised criticism; that relates to "comply or explain" principle whereby the undertaking would merely state not to have complied with a particular code yet without providing the comprehensive and sufficient explanation. From the perspective of the State as grantor of aid, during the e.g. 3-year restructuring process, comply or explain principle should require more scrutiny: the OECD corporate governance principles correctly observe that the "Public authorities should have effective enforcement and sanctioning powers to deter dishonest behavior and provide for sound corporate governance practices."[66]

However, the enhanced interest of the State in corporate governance and corporate culture of the undertaking on the receiving end of the State aid may have a double-edge sword effect; on one hand, making sure that the undertaking under restructuring adheres to and complies with corporate governance codes may, on the other hand, tempt the State into misusing its role of the misuse guardian, thus allowing itself to make steps otherwise not being able to make. As Enrico Perotti points out: "One of the greatest problems in state ownership, even when originally established for justifiable causes, is that it is most difficult to remove once established."[67] Similarly, Crnković, Požega and Karačić conclude that "The problem, on one hand, of corporate governance may emerge due to overly, mostly politically motivated, intervention of the state in the undertaking's business, whereas, on the other hand, the problems may emerge due to complete passive role of the state in managing the undertakings."[68] Similarly conclude Milhaupt and Pargendler when they state that, "Moreover, at least a level of informal observation, the quality of SOE governance appears to be quite closely correlated with the quality of political governance in a given country."[69]

64 2011 Green Paper, point 2.1.
In contrast, insufficient diversity could lead to a so-called group-think process, translating into less debate, fewer ideas and challenges in the boardroom and potentially less effective oversight of the management board or executive directors.

65 2011 Green Paper, point 2.2: produced by listed companies.

66 OECD (2015), G20/OECD Principles of Corporate Governance, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264236882-en (16 August 2018).

67 Perotti, E., State Ownership: A Residual Role?, University of Amsterdam, World Bank Policy Research Working Paper 3407, September 2004, p. 12 (16 August 2018).

68 Crnković, B. i drugi, Izazovi korporativnog upravljanja u državnim poduzećima – hrvatske perspektive, str. 279-292, Ekonomski vjesnik: Review of Contemporary Entrepreneurship, Business, and Economic Issues, Vol. XXIV No. 2 Prosinac 2011, str. 283 (30 August 2018).

69 Milhaupt, C. J. and Pargendler, M., Governance Challenges of Listed State Owned Enterprises around the World: National Experiences and a Framework for Reform, ECGI Law Working

Assuming the role of an ordinary share/equity holder leaves the State a passive role whereby a corporate culture of the undertaking develops into a self-sufficient organism accountable to the State to a minimum required standard. OECD corporate governance for state-owned enterprises lay out the role of the State as an owner, amongst others, to act as an informed and active owner, exercising its ownership rights according to the legal structure of each enterprise. This involves *inter alia*, in the context of close monitoring and influencing the course of the business strategy of the undertaking in difficulty, "Setting and monitoring the implementation of broad mandates and objectives for SOEs, including financial targets, capital structure objectives and risk tolerance levels…"[70] as well as "Setting up reporting systems that allow the ownership entity to regularly monitor, audit and assess SOE performance, and oversee and monitor their compliance with applicable corporate governance standards…."[71]

The middle of the two ends lies built around exhaustion of rights arising from the burden – sharing principle where "any State aid that enhances the beneficiary's equity position should be granted on terms that afford the State a reasonable share of future gains in value of the beneficiary, in view of the amount of State equity injected in comparison with the remaining equity of the company after losses have been accounted for."[72] The middle, in the author's view, should be legislated in the illustrative content of the restructuring plan, annexed to the R&R Guidelines to have undertaking in difficulty, under the restructuring process, mandatory audit its corporate culture, corporate governance code and content of its reports.

4. DOES STATE AID HELP MOTIVATE THE CHANGE WITHIN?

Directorate-General for Competition (hereinafter: DG Competition) commissioned the study to examine the effects of granted aid through restructuring plans and evaluate the EC's ex-ante assessment of restructuring plans submitted by the Member States. Twelve evaluation questions were defined by the Commission, categorized through descriptive questions, effectiveness questions and efficiency questions. Namely, "Particular focus is given to investigating whether support was provided only in the context of a restructuring plan that was likely to return the firms to long-term viability within a reasonable period of time." Details of the report, methodology, questions as well as findings can be found in the aforementioned Ex-post study of the impact of restructuring aid decisions on the viability of aided (non-financial) firms.[73] This is not the only interview-based and data analytical study on the

Paper N° 352/2017, April 2017, p. 59 (30 August 2018).

70 OECD (2015), OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264244160-en, p.19 (16 August 2018).

71 Loc. cit.

72 R&R Guidelines 2014, point 67.

73 Ex-post evaluation of the impact of restructuring aid decisions on the viability of aided (non-financial) firms, 2016, https://publications.europa.eu/en/publication-detail/-/publication/3f86b7cd-f196-11e5-8529-01aa75ed71a1/language-en, (25.7. 2018).

effectiveness of State aid. Some legal and economics scholars have so far looked into the effectiveness of restructuring by State aid such as Nulsch (2014)[74] or Glowicka.[75] The undertakings that participated in the study,[76] identified reasons and circumstances that lead them to difficulties; amongst the ones such as economic and financial crises, failure of contracts, market decline etc., the companies identified "…poor management and problems associated with structure, human resources and strategy…"[77]

From the aspect of corporate governance and corporate culture that contribute (or not) to the overall success of the restructuring process of an undertaking in difficulty, the "effectiveness" evaluation (Question 9) – "Are there common features to the restructuring measures that impact the outcome in terms of viability? What conditions on the delivery of restructuring aid seem most effective in ensuring the viability of the aided undertakings?" offered the feedback that "… the financial restructuring and the strengthening of the efficiency of the (internal) organisation are assessed to be the key measures in order to ensure the future survivability. There should be a balanced mix of measures with predictable outcomes and more desired outcomes (e.g. behavioural change, winning more work) is important."[78] Additionally, the findings of the study pointed at the non-tangible factors such as overall "forward looking atmosphere"[79], a psychological moment to turnaround internally. For instance, the study showed that "forward looking atmosphere" also "…had a positive impact on the behavioural change which was needed in the companies … Also the (urgent) need to restructure the company forces the management to reformulate their mission and strategy and rethink the strengths and weaknesses of the company, which can result in a 'new start' for the company and its employees."[80]

The study offers numerous recommendations based on the survey and feedback provided by the companies. In the context of corporate governance as well as corporate culture, the author selected a few relevant for the subject such as that the restructuring plans should have carefully formulated KPIs that should be accurately monitored over the restructuring period and beyond which can help provide crucial insights to explain

74 Nulsch, N., Is Subsidizing Companies in Difficulties an Optimal Policy? An Empirical Study on the Effectiveness of State Aid in the European Union, IWH Discussion Papers, No. 9/2014, Leibniz-Institut für Wirtschaftsforschung Halle (IWH), Halle (Saale), available at: http://hdl.handle.net/10419/9874 (25 July 2018).

75 Glowicka, E., State Aid and Competition Policy: The Case of Bailouts in the European Union (Dissertation), available at https://edoc.hu-berlin.de/bitstream/handle/18452/16450/glowicka.pdf?sequence=1&isAllowed=y (25.7.2018).

76 60 companies were included in the study. „The objective was to provide an overview of the positive (compatible aid) restructuring decisions concerning individual firms in difficulty, adopted between 1 January 2000 and 31 December 2012, with the exclusion of the following categories according to the ToR:
• Aid granted to financial institutions; • Aid granted to firms active in the agriculture or fisheries sectors; • Aid granted to firms in the former German Democratic Republic in connection with the reunification of Germany; and • Aid granted to firms in the steel sector in connection with the accession of new Member States."

77 Ex-post Study, p.24.

78 Ex-post Study, p.viii.

79 Ex-post Study, p. 82.

80 Loc. cit.

the effect of the restructuring aid on company performance (Evaluation Question 4 and 6)[81]. Corporate governance and corporate culture could be actually broken down per ponders to be measured via individual KPIs (reporting mechanism, transparency, feedback of stakeholders/shareholders, satisfaction employees' feedback etc.). The fact that the content, overall speaking, is of concern and central in the feedback during the study shows that it seeks further looking into. The feedback reflected that a more concrete template or protocol to complement the indicative model restructuring plan in the R&R 2014 Guidelines should be required to allow the EC in effective and efficient decision making (Evaluation Question 11 and 12).[82] Tying management behaviour to the proven quality of corporate governance as well as improved and conscientious corporate culture to minimize (at least from that perspective) the possibility of discretionary, ill-managed, poor-cultured bodies to fall into difficulties again.

This feedback may possibly push the Commission to consider corporate governance and corporate culture as mandatory elements of restructuring plans in future, when the opportunity arises to revise the present Guidelines; precisely, the corporate culture is that invisible yet strong influence; "The attempt to revitalise and restructure the company may result in new ideas and a new positive vibe."[83]

5. CONCLUSION

The decision to restructure using State aid is a bilateral decision: of the undertaking in difficulty and the State. Both sides agree and should be made aware that restructuring using State aid comes with a price. Using public money to return to viability at least means having the State participate in future gains and to do so, keep the State properly informed within the legal framework and corporate governance code of the undertaking; having its representative in the Supervisory Board allows the State to have prompt information at minimum. Irrespective of what precisely lead the undertaking to difficulty, two facts remain: that it is indeed in difficulty beyond repair using market tools and that the public money is used to overcome the difficulty. It is a legitimate expectation of the public to see and track the return of the undertaking to its viability in a changed internal and external environment. It is legitimate to expect that the business decision-making process, the flow of information, the culture of the undertaking are taking a positive course. Hence, the author sees the restructuring process as an opportunity to change within and to abandon ill-proven practices. There is sufficient time to (re)consider corporate governance and audit of corporate culture as elements of restructuring process and to add them as *pro futuro* elements, to prevent the undertaking on the receiving end of State aid to lapse again on account of these two issues. The Commission's adding corporate governance and corporate culture as elements of restructuring plans may only be in both the State's and undertaking's best interest to pursue, identify and target those corporate governance gaps, deficiencies and practices as well as to analyse its corporate culture not to allow the repetition of

81 Ex post Study p. 96.
82 Ex post Study p. 100.
83 Ex post Study p. 98.

those relations, practices and policies that prevented the undertaking from reacting promptly to circumstances that had lead it to difficulties.

The author is of the opinion that it would seem justified and legitimate to expand the behavioural expectation onto the sound corporate governance as well as mandatory external third-party risk assessment to mitigate that possibility.

LITERATURE

Books and articles:

1. Bacon, Kelyn, European Union Law of State aid, 3rd edition, Oxford University Press, 2017
2. Bellamy&Child, European Union Law of Competition, 7th ed., Rose, Vivien, Bailey, David (eds.), Oxford University Press
3. Bloomfield, Stephen, Theory and Practice of Corporate Governance: An Integrated Approach, Cambridge University Press, 2013
4. Cini, Michelle, From Soft Law to Hard Law?: Discretion and Rule-making in the Commission's State Aid Regime, Robert Schuman Centre for Advanced Studies, RSC No. 2000/35 at https://www.researchgate.net/publication/2395336_From_Soft_Law_to_Hard_Law_Discretion_and_Rule-making_in_the_Commission's_State_Aid_Regime (21.7.2018)
5. Crnković, Boris et al., Izazovi korporativnog upravljanja u državnim poduzećima – hrvatske perspektive, str. 279-292, Ekonomski vjesnik: Review of Contemporary Entrepreneurship, Business, and Economic Issues, Vol.XXIV No.2 Prosinac 2011. (30 August 2018)
6. Glowicka, Elzbieta, State Aid and Competition Policy: The Case of Bailouts in the European Union (Dissertation), available at https://edoc.hu-berlin.de/bitstream/handle/18452/16450/glowicka.pdf?sequence=1&isAllowed=y (25.7.2018)
7. Groysberg, Boris et al, The Leader's Guide to Corporate Culture, Harvard Business Review, January-February, 2018
8. Herwig, C. H. Hofmann, Micheau, Claire, State Aid Law of the European Union, Oxford University Press, 2016
9. Hickman, Craig R., Silva, Michael A., Managing Corporate Culture, Strategy, and Change in the New Age, Routledge, 2018
10. Kotter, John P., Heskett, James L., Corporate Culture and Performance, Simon and Schuster, 2008
11. Liszt, Marijana, Čulinović-Herc, Edita, Certain Aspects of State Aid to Services of General Economic Interest, in: Vesna Tomljenović, Nada Bodiroga-Vukobrat, Vlatka Butorac Malnar, Ivana Kunda (eds.), EU Competition and State Aid Rules Public and Private Enforcement, vol. 3, Springer, Berlin, Heidelberg, 2017, p. pp. 291-313.
12. Lohrke, Franz T. et al., The Role of Top Management Teams in Formulating and Implementing Turnaround Strategies: A Review and Research Agenda. International Journal of Management Reviews Vol. 5-6, No. 2, pp. 63-90, June 2004. Available at SSRN: https://ssrn.com/abstract=608489 (27.8.2018)
13. Lubián, Francisco, J. Lopez Lopez, The Executive Guide to Corporate Restructuring, IE Publishing Series, Palgrave Macmillan UK, 2014.
14. Milhaupt, Curtis J., Pargendler, Mariana, Governance Challenges of Listed State Owned Enterprises around the World: National Experiences and a Framework for Reform, ECGI Law Working Paper N° 352/2017, April 2017, pp.59, (30.8.2018.)
15. Nulsch, Nicole, Is Subsidizing Companies in Difficulties an Optimal Policy? An Empirical Study on the Effectiveness of State Aid in the European Union, IWH Discussion Papers,

No. 9/2014, Leibniz-Institut für Wirtschaftsforschung Halle (IWH), Halle (Saale), available at: http://hdl.handle.net/10419/9874, (25.7.2018.)
16. Obradović Mazal, Tamara, Butorac Malnar, Vlatka, The Discretionary Power of Competent Authorities in Applying State Aid Rules on Rescue and Restructuring, in: Potocan, Vojko, Kalinic, Pavle, Vuletic, Ante (eds.), 26th International Scientific Conference on Economic and Social Development - Building Resilient Society, Conference Proceedings, Varaždin, 2017, p. 599-607.
17. Obradović Mazal, Tamara, Čulinović-Herc, Edita, New rules for rescuing and restructuring state aid - sharing burden of present to share gains of future, SGEM 2015 Conference Proceedings on Political Sciences, Law, Finance, Economics & Tourism, Book 2, Vol. 1, 2015, pp. 615 – 622.
18. Ogorec, Marinko, Skendrović, Kruno, Utjecaj vojnog modela vođenja na sustav korporativnog upravljanja, Polemos : časopis za interdisciplinarna istraživanja rata i mira, str. 78., Vol.XVII No.33-34, Prosinac 2014., Pregledni rad, str. 71-88 (30.7.2018)
19. Perotti, Enrico, State Ownership: A Residual Role?, University of Amsterdam, World Bank Policy Research Working Paper 3407, September 2004 (16.8.2018)
20. Phedon, Nicolaides, State Aid uncovered: Critical Analysis of Developments in State aid, Lexxion, 2017
21. Sikavica, Pere, Novak, Mijo, Poslovna organizacija, Informator, Zagreb, 1999
22. Wright, Mike et al. The Oxford Handbook of Corporate Governance, Edited by Oxford University Press, 2013

Other sources:

1. Commission Communication — Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, OJ C 249, p. 1–28, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2014.249.01.0001.01.ENG 31.7.2014 (15.7.2018)
2. Community Guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 368, 23.12.1994, p. 12. (25.7.2018)
3. Community Guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 283, 19.9.1997, p. 2 (25.7.2018) Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 288, 9.10.1999, p. 2. (25.7.2018) Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2. (25.7.2018) Commission Communication concerning the prolongation of the Community Guidelines on State aid for rescuing and Restructuring Firms in Difficulty (OJ C 156, 9.7.2009, p. 3. (25.7.2018)
4. Commission Communication concerning the prolongation of the application of the Community guidelines on State aid for rescuing andrestructuring firms in difficulty of 1 October 2004 (OJ C 296, 2.10.2012, p. 3) (25.7.2018)
5. Commission's Green paper The EU corporate governance framework COM(2011) 164, http://ec.europa.eu/internal_market/company/docs/modern/com2011-164_en.pdf (21.7.2018)
6. Communication from The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies, /* COM/2012/0740 final */ - 27 July 2018
7. Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication') Text with EEA relevance, OJ C 216, 30.7.2013, p. 1–15, 27.7.2018, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52013XC0730%2801%29 (27 July 2018)

8. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on EU State aid modernisation (SAM), COM(2012) 209 final, 8.5.2012, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2012:0209:FIN (25.7.2018)
9. Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390 https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ%3AC%3A2012%3A326%3ATOC (15.7.2018)
10. Ex-post evaluation of the impact of restructuring aid decisions on the viability of aided (non-financial) firms, 2016, https://publications.europa.eu/en/publication-detail/-/publication/3f86b7cd-f196-11e5-8529-01aa75ed71a1/language-en, (25.7.2018)
11. OECD (2015), OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264244160-en, p.19, (16.8.2018)
12. OECD (2015), G20/OECD Principles of Corporate Governance, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264236882-en, (16.8.2018)
13. State Aid Scoreboard 2017 http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html (25 July 2018)

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Sažetak

SMJERNICE EU O DRŽAVNIM POTPORAMA ZA SANACIJU I RESTRUKTURIRANJE - PRILIKA ZA RESTRUKTURIRANJE KORPORATIVNOG UPRAVLJANJA I KORPORATIVNE KULTURE

Poduzetnici u poteškoćama, nakon što su iscrpili sve tržišne opcije, mogu se podvrgnuti državnim potporama kako bi spasili odnosno restrukturirali svoje poslovanje u cilju vraćanja održivosti. U posezanju za ovom mogućnošću, autorica pobliže ispituje mogućnost takvog poduzetnika da provede promjene iznutra kako bi napustio onu praksu koja je možebitno bila jedan od korijena manjkova koji su doveli do poteškoća. Stroga pravila spašavanja i restrukturiranja poduzetnika u poteškoćama pružaju priliku za davanje druge šanse u obnovi svog poslovanja, sagledavanje dugovanja, analizu potrebnih koraka i potencijalni novi rast. No, cjelokupno restrukturiranje kao druga šansa koju daje državna potpora te uloga države, ne predstavljaju *carte blanche* za nastavak stare prakse i pristupa koji će se ponoviti s novcem poreznih obveznika. Restrukturiranje bi trebalo analizirati cjelinu, obuhvatiti internu analizu pri čemu se korporativna kultura i upravljanje također podvrgavaju promjenama. Autorica vjeruje da postoji prostor za razmišljanje o korporativnom upravljanju i analizi korporativne kulture kao elementima procesa restrukturiranja i planova restrukturiranja kako bi se spriječilo poduzetnika koji prima državnu potporu, da ponovno posrne. Dobivanje druge šanse, primjenom onih ponašanja koji su doveli poduzetnika u poteškoće, nije jamstvo uspješnog restrukturiranja i povratka održivosti već, uistinu, može predstavljati subjektivnu opasnost ostvarenju objektivno postavljenih ciljeva. Stoga, autorica istražuje ne bi li neopipljivi elementi poput korporativnog upravljanja i promjene korporativne kulture bili prepoznati kao obvezni elementi procesa restrukturiranja. Autorica ne zahvaća dubinski korporativno upravljanje i korporativnu kulturu već ih sagledava kao dobrodošle faktore doprinosa željenom cilju potpore za restrukturiranje – uspješan povratak održivosti korištenjem državne potpore.

Ključne riječi: *poduzetnik u poteškoćama; potpora za restrukturiranje; korporativna kultura; korporativno upravljanje.*

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Zussamenfassung

EU-LEITLINIEN FÜR STAATLICHE BEIHILFEN ZUR RETTUNG UND UMSTRUKTURIERUNG VON UNTERNEHMEN IN SCHWIERIGKEITEN: EINE GELEGENHEIT FÜR UMSTRUKTURIERUNG DER UNTERNEHMENSFÜHRUNG UND UNTERNEHMENSKULTUR

Unternehmen in Schwierigkeiten können nach Erschöpfung aller Marktmöglichkeiten auf staatliche Beihilfen zur Rettung und Umstrukturierung von Unternehmen in Schwierigkeiten zurückgreifen, um die Rentabilität wiederzuerlangen. In diesem Beitrag befasst man sich detaillierter mit der Möglichkeit der Veränderung innerhalb des Unternehmens, beispielsweise mit der Möglichkeit der Beseitigung von Verhaltensweisen, welche wenigstens eine der Wurzeln der Mängel darstellen, die diese Schwierigkeiten verursacht haben. Die strengen Regeln der Rettung und Umstrukturierung von Unternehmen in Schwierigkeiten geben ihnen eine zweite Chance, ihre Rentabilität wiederherzustellen, sich die Schulden anzuschauen und die notwendigen Maßnahmen sowie auch potentiellen Wachstum zu analysieren. Aber die ganze Umstrukturierung als die vom Staat gegebene zweite Chance und die Rolle des Staates stellen keine Carte blanche für die Fortsetzung mit der alten Praxis und dem Ansatz dar, welche sich auf das Geld der Steuerpflichtigen stützen werden. Die Umstrukturierung sollte die Ganzheit analysieren und eine interne Unternehmensanalyse darstellen, bei welcher sowohl die Unternehmenskultur als auch die Unternehmensführung verändert werden. In diesem Beitrag vertritt man die Ansicht, dass es Raum für Überlegungen gibt, die Unternehmensführung und die Analyse der Unternehmenskultur als Elemente des Umstrukturierungsprozesses und –planes anzusehen, um zu verhindern, dass das Beihilfe empfangende Unternehmen wieder stolpert. Falls das Unternehmen bei der zweiten Chance die Verhaltensweisen, dank welchen es in Schwierigkeiten geraten ist, wiederholt, kann erfolgreiche Umstrukturierung und Wiedererlangung der Rentabilität nicht gewährleistet werden, sondern eher eine subjektive Gefahr für die Erreichung objektiver Ziele darstellen. Deshalb wird in diesem Beitrag untersucht, ob immaterielle Elemente wie Unternehmensführung und Änderung der Unternehmenskultur als obligatorische Elemente des Umstrukturierungsprozesses anerkannt werden können. Dabei werden die Unternehmensführung und –kultur nicht detaillierter bearbeitet, sondern nur als willkommene Beiträge zur erfolgreichen Wiedererlangung der Rentabilität durch die staatliche Beihilfe, dem gewünschten Ziel der Umstrukturierungsbeihilfe, angesehen.

Schlüsselwörter: *Unternehmen in Schwierigkeite; Umstrukturierungsbeihilfe, Unternehmenskultur; Unternehmensführung.*

Riassunto

LINEE GUIDA DELL'UE SUGLI AIUTI DI STATO PER IL RISANAMENTO E LA RISTRUTTURAZIONE – UN'OCCASIONE PER LA RISTRUTTURAZIONE DELLA *CORPORATE GOVERNANCE* E DELLA CULTURA AZIENDALE

Gli imprenditori in difficoltà, dopo avere esaurito tutte le opzioni del mercato, possono sottoporsi agli aiuti di stato al fine di salvare ovvero di ristrutturare la propria attività con l'intento di ripristinarne la sostenibilità. Nel cogliere tale possibilità, l'autrice indaga nel dettaglio circa la possibilità di tale imprenditore di portare a termine tale cambiamento dall'interno, al fine di abbandonare quella prassi che probabilmente rappresentava una delle radici delle lacune che hanno portato alle difficoltà. Le rigorose regole per il salvataggio e la ristrutturazione dell'imprenditore in difficoltà offrono l'opportunità per dare una seconda chance nel rinnovamento dell'attività, nella valutazione dei debiti, nell'analisi dei passi necessari e nella potenziale nuova crescita. Tuttavia, l'intera ristrutturazione quale seconda opportunità concessa dagli aiuti di stato, come anche il ruolo dello Stato, non danno carta bianca per il proseguimento della vecchia prassi ed approccio che si ripeterebbero con il denaro dei contribuenti. La ristrutturazione andrebbe analizzata nell'intero, ricomprendendo l'analisi interna e con ciò la cultura aziendale e la corporate governance andrebbero altresì soggette a cambiamenti. L'autrice crede che esista spazio per ripensare alla corporate governance e per l'analisi della cultura aziendale quali elementi del processo di ristrutturazione e dei piani di ristrutturazione al fine di evitare che l'imprenditore, che si avvalga degli aiuti di stato, vada nuovamente in crisi. Ricevere una seconda opportunità, mettendo in essere quei comportamenti che hanno trascinato l'imprenditore nelle difficoltà, non rappresenta la garanzia di una buona ristrutturazione e di recupero della sostenibilità, ma può rappresentare un pericolo soggettivo nella realizzazione dei fini postisi. Pertanto, l'autrice valuta se degli elementi impalpabili quali la corporate governance e la cultura aziendale non debbano divenire elementi obbligatori del processo di ristrutturazione. L'autrice non entra in profondità nella corporate governance e nella cultura aziendale, bensì li osserva quali fattori ben accetti nell'apporto al raggiungimento del fine del sostegno alla ristrutturazione – un ritorno di successo alla sostenibilità mediante l'uso degli aiuti di stato.

Parole chiave: *imprenditore in difficoltà; aiuto per la ristrutturazione; cultura aziendale; corporate governance.*