I. Introductory questions on the insolvency procedures available in the relevant jurisdiction

1. What insolvency procedures – either liquidation or reorganization procedures – are available for distressed or insolvent companies?

   Law no. 85/2014 on the insolvency prevention proceedings and the insolvency proceedings (the new Romanian law in the field, published on June 25th, 2014) differently treats the measures applicable to debtors who are insolvent and in financial distress. For clarification purposes, it is necessary to define the state of insolvency and financial distress as they are set forth in the indicated regulatory document.

   - under Article 5, paragraph 27 a debtor in financial distress is the debtor who, although executing or able to execute its exigible obligations, has a low level of short-term liquidity and/or a high level of long-term indebtedness, which may affect the fulfillment of the contractual obligations in relation to the resources generated by the operational activity or to the funds raised through the financial activity;

   - under Article 5, paragraph 29 insolvency means the status of the debtor's assets which is characterized by insufficient cash funds available for the payment of certain, payable and exigible debts as follows:

     a) the debtor’s insolvency is presumed when – after 60 days since the due date – it has not paid its debt to the creditor; the presumption is relative;

     b) the insolvency is imminent when it turns out that the debtor shall not be able to pay on the due date the incurred exigible debts by using the cash funds available on the due date;
The difference in the legal regime – expressed as simple as possible – lies in the fact that in the case of the debtor in financial distress, the exigible obligations are still being executed while in insolvency, the payments cease due to the lack of cash funds.

For this reason, in respect of the debtors in financial distress, the pre-insolvency proceedings shall apply, i.e. the ad-hoc mandate or arrangement with creditors (both of them assume, as a overview of the scope, the conclusion of arrangements with the creditors in order to overcome the state of distress).

As regards the insolvency proceedings, the ways to achieve the goal of these proceedings are: the general proceedings and the simplified proceedings and the manner in which they are executed are the juridical reorganization proceedings and the bankruptcy proceedings.

The reorganization proceedings apply to the insolvent debtor that is a legal entity in order to pay its debts pursuant to the debt payment schedule.

The reorganization proceedings involve the drawing up, approval, confirmation, implementation and compliance with a reorganization plan that may jointly or separately provide without limitation to:

a) the debtor’s operational and/or financial restructuring;

b) the corporate restructuring by changing the capital structure;

c) the restriction of the activity by partial or total liquidation of the debtor's assets.

In order to delineate more clearly the two ways of achieving the goal of the insolvency proceedings a debtor can undergo, we should add that a debtor subject to the simplified insolvency proceedings shall have no access to a reorganization plan, which is possible only as part of a general procedure. On the other hand, the general insolvency proceedings in which bankruptcy is ordered implies either that a restructuring plan has failed or that there is no such plan, as detailed below.

1 Scope of proceedings – Article 2, Law no. 85/2014 – the establishment of collective proceedings to cover the debtor’s liabilities, while granting, when possible, the chance for its activity to recover

2 The simplified proceedings are meant to help the debtors quickly exit the commercial circuit, as they are no longer subject to a plan
We should also add that although, as shown above, we can talk about liquidation in the case of a reorganization plan. If the debtor files for bankruptcy the liquidation shall also occur, but as a process for the capitalization of the debtor's assets.

2. **Are there special insolvency procedures available for financial institutions or for other special classes of companies?**

Law no. 85/2014 brings together therein, in addition to the provisions applicable to the insolvency prevention proceedings and the special provisions on the insolvency of the group of companies, provisions regarding the bankruptcy of the credit institutions, provisions regarding the bankruptcy of the insurance/reinsurance companies, provisions on the cross-border insolvency and several international private law rules applicable in the matter.

As seen in the listing of the scope of its provisions, the law refers only to the acts regarding the bankruptcy of the credit institutions and that of the insurance/reinsurance companies. The solution used is explained by the fact that these types of companies are subject to the financial recovery administrative proceedings conducted under the authority of the National Bank of Romania (for the credit institutions) or under the supervision exercised by the Financial Supervisory Authority (for the insurance companies), proceedings that are not executed with the support of courts, but which have an administrative nature.

Except for these types of companies (which are joint stock companies in terms of their form of organization according to the relevant legislation), the law does not exempt from the application of the general insolvency proceedings any other type of legal entity, irrespective of its legal form (note - Law no. 85/2014 applies to all companies regulated by Law no. 31/1990 on the companies (SA, SRL, SNC, SCS, SCA), cooperative societies, cooperative organizations, agricultural companies, economic interest groups, associations and foundations, unions/employers’ associations).

3. **Are there any specific legal provisions that apply to debt restructurings achieved without a full formal insolvency process?**
In September 2010, the Ministry of Finance, the Ministry of Justice and the National Bank of Romania drafted, with the technical support provided by the World Bank and in consultation with the Romanian Banking Association and the Financial Companies Association in Romania, the Guidelines for the extrajudicial restructuring of the obligations assumed by the companies. However the principles set forth in this document are merely for guidance purposes.

On the other hand, Law no. 31/1990 regarding the companies contains special provisions on the liquidation of companies but not through insolvency proceedings. Article 235 of this law provides that in the general partnerships, the limited partnerships and the limited liability companies the shareholders may decide, once the dissolution proceedings start, with the quorum and the majority set forth for the amendment of the Articles of Incorporation, also the method for the liquidation of the company, when they reach an agreement on the allotment and liquidation of the company assets and when they ensure the payment of the liabilities or its adjustment based on a mutual consent with the creditors.

The shareholders may also decide – based on their majority vote – on the way to distribute among them the assets remaining after the payment of the creditors. In the absence of a unanimous agreement on the distribution of the assets, a liquidation procedure involving the appointment of a liquidator shall be followed. In this latter case, the liquidator shall request the initiation of insolvency proceedings only if the verification of the economic status of the company confirms the compliance with the Insolvency Law (for example the liquidation may be executed – in principle based on the provisions set forth in the Companies Law – without entering into insolvency proceedings if the maximum threshold for the debt is of RON 39,000 - below the maximum threshold required by the Insolvency Law, i.e. of RON 40,000).

4. **What are the commencement criteria for insolvency procedures?**

The conditions for the application of the insolvency proceedings require that **the debtor is classified into one of the categories of entities the insolvency proceedings apply to** and that **it is also insolvent**.

Pursuant to Article 5, paragraph 26, **debtor** means a natural or legal person that may be subject to certain proceedings set forth in the law. These
provisions shall be correlated, on one hand, with those set forth in Article 3 of the Insolvency Law, which require the subject to be professional, and with those set forth in Article 38, which regulate the recipients of the general proceedings and those of the simplified proceedings.

a) The general proceedings shall apply debtors listed by Article 3 of the Law (professionals, as defined in Article 3, paragraph (2) of the Civil Code\(^3\), except for those exercising liberal professions, as well as those subject to special provisions regarding the regime of their insolvency and the autonomous administrations) who are pending insolvency – whether presumed or imminent - as it is defined in section 1 of the questionnaire.

This category of debtors includes: the companies subject to Law no. 31/1990, cooperative societies, cooperative organizations, agricultural companies, economic interest groups, associations and foundations, unions and employers’ associations.

The proceedings set forth in the Insolvency Law do not apply to pre-university and university establishments and institutions and to the entities set forth in Article 7 of the Government Ordinance no. 57/2002 on scientific research and technological development, as amended and completed.

The regional administrative units may also be subject to the insolvency proceedings and may benefit from a separate regulation (the Government Emergency Ordinance no. 46/2013 on the financial crisis and the insolvency of the regional administrative units, published in the Official Gazette no. 299 as of May 24\(^{th}\), 2013).

b) The simplified proceedings apply to the debtors pending insolvency, who fall into one of the following categories:

a) the professionals - individuals who have the obligation to register their names in the Trade Register Office records, except for those exercising liberal professions;

b) family enterprises, members in family enterprises;

c) the debtors who fall into the categories listed in paragraph a) and who meet one of the following conditions:

1. they do not own any property in their patrimony;

\(^3\) Pursuant to Article 3, paragraph 2 of the Civil Code, professionals are all those who operate an enterprise
2. the incorporation or accounting documents can not be found;
3. the administrator can not be found;
4. the headquarters / business office does not exist or does not match the address in the Trade Register Office records;

d) legal persons voluntarily, judicially or lawfully dissolved prior to the submission of the introductory application, even if the liquidator has not yet been appointed or, even if he/she has been appointed, the mention regarding his/her appointment has not been entered in the Trade Register Office records;

e) the debtors who have stated their intention to file for bankruptcy in their introduction application;

f) any person who performs activities specific to professionals, who have not been granted the authorization required by the law for the operation of an enterprise and who is not recorded in the special advertising records; the application of this law to these individuals does not exclude the applicable sanctions for any lack of authorization or registration of such persons.

In addition, the minimum amount of the receivable for the insolvency proceedings initiation application to be recorded, i.e. the maximum threshold, is of RON 40,000 for both the creditors and the debtor (note – previously no maximum threshold for the debtor’s application) and for the employees it covers 6 gross average salaries per economy / employee. The creditors can request the initiation of the insolvency proceedings only if, after the set-off of their mutual debts of any kind, the amount due exceeds the amount indicated above.

5. **Who can propose a restructuring plan? (e.g. corporate bodies, insolvency representatives, creditors)**

The following categories of persons may propose a reorganization plan:

a) the debtor, with the approval of the General Assembly of Shareholders, within 30 days of the publication of the final table of receivables, provided that they inform on their reorganization intention

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4 In the old law, the maximum threshold did not apply to the applications filed by the debtor
pursuant to Article 67, paragraph (1), letter g) if the proceedings were started by it, and during the timeframe set forth in Article 74 (10 days after the initiation of the proceedings) if the proceedings was started following a request filed by one or more of the creditors;

b) the official receiver, starting with the date of its designation until the expiration of a 30-day timeframe since the publication of the final table of receivables;

c) one or more of the creditors holding together at least 20% of the total receivables listed in the final table of receivables within 30 days since its publication; the official receiver has to obligation to provide them with the existing information required for the drawing up of the plan.

6. Please describe whether and to what extent shareholders’ rights can be affected by a situation of distress/insolvency of a company before and/or irrespective of the opening of a formal insolvency proceeding (e.g., are there any fiduciary duties of the shareholders to approve corrective measures/plans proposed by the board?)

Pursuant to the Companies Law (Law no31/1990), the administrators represent the company and can execute all the operations required for the fulfillment of the company’s object of business. Their liability is regulated by the Civil Code provisions relating to the contract of mandate and the special law (the Companies Law). The administrators’ mandate is exercised pursuant to the law, with loyalty and in the best interests of the company, and any business decision has to pass this criterion regarding the best interests of the company (as an obligation assumed by the administrator). At any time, an action can be filed against the administrators for the damages caused by them to the company, an action to be decided by the general assembly or by the shareholders holding 5% of the capital (in this case the action for damages is filed in his/her own name, but on behalf of the company). The shareholders’ rights may be affected by financial distress regardless of the initiation of the insolvency proceedings but prior to the incidence of such proceedings, via the information the shareholders have at hand all the time, they should also assess whether or not and to what extent they could postpone the exercising of a right already granted to the shareholder may lead to recovery. In a general plan, starting from Article 14
of the Civil Code, which states that any natural or legal person must exercise their rights and perform their civil duties in good faith, pursuant to the public order and the morals and reaching another step of the timeframe, i.e. Article 169 of the Insolvency Law, which provides for the possibility that the persons who have contributed to the insolvency of the debtor assume the economic liability, the analysis can become extremely thorough at this point in time.

II. Shareholders’ Rights in Companies Subject to Insolvency Proceedings

7. Are shareholders notified of the initiation of an insolvency process? If notification is individualized, what are the mechanisms used to identify shareholders?

Pursuant to Article 99, paragraph (1) of Law no. 85/2014, following the initiation of the proceedings, the official receiver shall notify all creditors indicated in the debtor list filed along with its introductory application, as well as the debtor and the Trade Register Office or, if applicable, the Agricultural Companies Register Office or other register offices the debtor is licensed / registered at for the mention to be made.

The notification is made under the provisions set forth in the Civil Procedure Code and shall also be published on the debtor’s expense in a newspaper of wide circulation and the Insolvency Proceedings Bulletin (BPI).

In order to remove the discussions about the appropriateness of a decision issued by the General Assembly deciding on the initiation of the company’s insolvency proceedings, the Insolvency Law provides that the legal persons’ introductory applications must be signed by persons who, pursuant to the incorporation documents or bylaws, are qualified to represent them without requiring a decision from the shareholders (if the debtor's claim asks for the application of the simplified proceedings, the decision made by the General Assembly of Shareholders in this respect shall also be filed).

Pursuant to Law no. 31/1990 (Companies Law), the administrators can execute all the operations required for the fulfillment of the company’s object of business, apart from the restrictions referred to in its Articles of Incorporation and they shall be accountable to the company for the strict
fulfillment of the obligations required by the law and the Articles of Incorporation and for the exact compliance with the decisions made by the General Assembly. The provisions set forth in the Companies Law stipulate only one expressly regulated case for the joint stock companies, i.e. that the Board of Directors is liable for filing the application for the initiation of the company’s insolvency proceedings (Article 142 of the Law). We can infer that if the Articles of Incorporation expressly provides for the need to call a general assembly deciding on the initiation of the insolvency proceedings, the shareholders would be sure that such an application is not filed by the legal representative without them having knowledge thereof. On the other hand, if we consider that pursuant to the Insolvency Law the early and in bad faith filing by the debtor of an application for the initiation of the proceedings makes the debtor – a natural or legal person – liable for the damages caused, it is obvious that the legislator has no longer been focused – as in the previous wording of the law – on the exclusive sanctioning of the administrator, but it has taken into account the liability of the legal person in considering the close connection presumed to exist between the deliberation body of a company (the general assembly) and the executive body (represented by the administrators). Besides, the debtor’s approval of the proposal for the reorganization plan takes place during the general assembly, which presumes that the shareholders are not unaware of the initiation of the insolvency proceedings.

If the shareholders are also creditors of the company, the situation is covered by the notice regarding the initiation of the proceedings, which is delivered to all creditors, as shown above.

8. **Are shareholders required to file claims in the insolvency proceeding? What are the consequences of not filing a claim?**

   Particularly, we can refer to the creditor - shareholder of the company.

   The creditor entitled to participate in the proceedings is the holder of a right of claim against the assets owned by the debtor who recorded an application for the registration of the receivables, and after its acceptance it is granted the rights and obligations covered by this law for each stage of the proceedings. The capacity of a creditor ceases if it is not deleted or removed from the tables of creditors sequentially prepared during the proceedings, as well as through the closing of the proceedings;
Pursuant to Article 102 of the Insolvency Law, except for the employees whose receivables shall be recorded by the official receiver according to the accounting records, all the other creditors whose receivables were made prior to the initiation of the proceedings shall apply for the admission of the receivables within the timeframe set in the proceedings initiation decision; the receivable admission applications shall be recorded in a register which shall be kept at the Court’s Registry.

The holder of the receivables prior to the initiation of the proceedings, who does not file the receivable admission application until the expiration of the timeframe required by the law shall no longer have – as regards the respective receivables – the right to be recorded in the table of creditors and shall not become a creditor entitled to participate in the proceedings.

9. **Can shareholders continue to trade and transfer shares after the initiation of an insolvency proceeding affecting the company?**

The activity can continue upon the initiation of general insolvency proceedings under the insolvency administrator’s supervision in case the debtor continues to have administration rights.

The supervision exercised by the official receiver, provided that the debtor continues to have administration rights, consists in the permanent analysis of its activity and the prior approval of the actions involving the debtor's patrimony, as well as those designed to lead to its restructuring / reorganization; the endorsement is made based on a report drawn up by the special administrator\(^5\), which also indicates that the conditions regarding the existence and appropriateness of the legal operations to be endorsed have been verified and fulfilled. Following the cancelation of the administration right, the debtor is represented by the official receiver / liquidator who also manages its business activity and the mandate of the special administrator shall be reduced to the representation of the shareholders / members’ interests. In this context, the assignments are permitted provided that the official receiver assesses their suitability. In the case of the insurance/reinsurance companies, after the initiation of the bankruptcy proceedings, under penalty of nullity, the major shareholders of the debtor

\(^5\) The general assembly of shareholders or members of the legal entity shall be convened by the official receiver or the liquidator for the appointment of the special administrator within 10 days of the notification regarding the initiation of the proceedings by the official receiver / provisional liquidator
insurance/reinsurance company or the persons having occupied management positions are prohibited to alienate the shares held by them in the debtor insurance/reinsurance company without the prior approval of the FSA( Financial Supervision Authority) and without the approval issued by the bankruptcy judge. The bankruptcy judge shall order the unavailability of the shares in special records kept by the debtor insurance/reinsurance company or in independent registries.

10. **Do shareholders have the right to request that a shareholders’ meeting is held, even if the company is insolvent? (If there are separate reorganization and liquidation procedures, does this affect the response?)**

The Insolvency Law provides for the suspension of the activity carried out by the general assembly of shareholders /members after the initiation of the proceedings and the appointment of the special administrator, so that it can be convened upon the call made by the official receiver in the cases expressly and exhaustively stipulated by the insolvency law. One of these cases is represented by the initiation – during the general assembly – of a reorganization plan by the debtor.

11. **Do shareholders have the right to request information in an insolvent company? Do they have information rights as to the progress of a reorganization procedure? Can they exercise that right vis-à-vis the directors of the company -if they remain in charge of the company-or vis-à-vis the insolvency representative?**

The right to information shall survive during the proceedings but the role of the statutory administrator in providing these pieces of information is transferred to the special administrator who shall represent the company's interests or the shareholders / members' interests if the debtor's right of administration has been canceled.

During the reorganization proceedings, under the Insolvency Law, the shareholders and members with limited liability, are not entitled to interfere in the management of the business of the administration of the debtor's assets, except for and within the limits expressly and exhaustively stipulated by the plan.
12. **Can shareholders make proposals for nomination of directors, if the directors continue managing the company?**

Under the conditions in which the debtor’s administration right is not suspended, and we are therefore in a general insolvency procedure in which the legal administrator only has a role of supervising the debtor’s activity, the general assembly can decide on the changes occurring in the case of the managers. One must mention that, in this case, the term “manager” does not refer to the administrator (because after opening an insolvency procedure, the statutory administrators are replaced by a special administrator) but to the managers that are not part of the board of administration.

13. **If special categories of shares exist whose holders are granted additional governance rights, are these additional rights affected by the opening of an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?)**

Such categories of shares are not provided in the companies’ law, which would generate special leading rights. According to the Companies’ Law, the shares must have an equal value, as they are granting equal rights to their owners. The law admits the possibility of issuing shares with a priority dividend without the right to vote, which confers the holder the right to a priority dividend taken from the distributable benefit of the financial year before any other takeoffs, as well as the right to participate in the general assembly, except for the right to vote.

14. **Can shareholders challenge the decisions of the shareholder meeting, if it is still active? Do they retain the possibility of taking action against the acts of the directors? And against the acts of an insolvency representative? Is any authorization by a judicial or administrative body required to do so or, more generally, to exercise corporate rights? (If there are separate reorganization and liquidation procedures, does this affect the response?)**

Pursuant to the Companies Law, Article 132, the General Assembly decisions contrary to the law or the articles of incorporation may be challenged in court within 15 days since being published in the Official Gazette of Romania, Part IV, by any of the shareholders who have not
participated in the general assembly or who voted against and have asked it to be inserted in the minutes of the meeting, and when grounds of absolute nullity are being claimed, the right of action is inalienable, and any interested party can file an action in court so that the decisions made by the General Assembly during the proceedings may be challenged according to this current provision. The current practice proves that the general assembly continues to decide on the amendment of the Articles of Incorporation - even after the initiation of the bankruptcy proceedings – as the decisions made by the General Assembly are approved by the official receiver, therefore such actions occur even during the insolvency proceedings.

Regarding the appeals filed by any interested person (this category can include at least in theory shareholders / members) against the actions taken by the administrator or liquidator, they may be appealed before the bankruptcy judge.

15. **Do shareholders have the right to call a special investigation of the affairs of the insolvent company?**

Besides the reports drawn up by the official receiver until the confirmation of a reorganization plan, the debtor, through the special administrator, or, if necessary, the official receiver shall have to submit quarterly reports to the creditors' committee on the financial status of the debtor's property when such a plan is under progress. The official receiver shall also submit the report on the expenditures for the proper progress of the business, in order to recover them, which shall be approved by the creditors’ committee. In theory, nothing impedes the shareholders from asking for a special audit but this appropriateness of such a demand shall always be assessed by the official receiver and the creditors' committee (if such a committee was formed) / the creditors’ assembly.

16. **Does the law provide for the establishment of a shareholders’ committee (or several committees, in case of different share classes)? What are their powers? Who bears the related costs?**

No such possibility is being set forth.

17. **Can shareholders voluntarily transfer shares of the company undergoing insolvency proceedings against any provisions in the**
articles/bylaws restricting transfers of shares?

No such transfer can be operated as it is subject to the specific rules set forth in the Companies Law, so the Articles of Incorporation remains the law of the parties and the prohibition / restriction of such a transfer remains valid even when the insolvency proceedings are being initiated.

18. Can outstanding shares of the company undergoing insolvency proceedings be assigned to third parties without the consent of the relevant shareholders? If yes, under what conditions? Are existing shareholders entitled to compensation? What other safeguards are provided? (e.g., does the law include a principle according to which the affected shareholders should not receive less than in a liquidation procedure?)

The methods for the transfer of the shares regulated by the Companies Law differ depending on their category. Hence, the ownership over the nominal shares issued in a physical form (printed on a physical medium) is transmitted through a statement entered in the shareholders’ register and through the specification made on the document, signed by the assignor and the assignee or by their agents. The ownership over the nominal shares issued in a non-physical form (they are registered into the account and their proof is done through a statement of account) is transmitted through a statement entered in the shareholders’ register, signed by the assignor and the assignee or by their agents.

The ownership over the shares issued in a non-physical form and traded on a regulated market or within an alternative trading system shall be transferred pursuant to the provisions set forth in the capital market legislation.

The subsequent subscribers and assignees are severally liable for the payment of the shares for 3 years from the date when the transmission is recorded in the shareholders’ register.

The ownership over the bearer shares (they can be issued only in a physical form and their holder is recognized as a shareholder) shall be transferred by merely handing them over.

If the insolvency proceedings are being initiated, the Insolvency Law contains a reference related to the companies subject to the capital market
legislation in that until the confirmation of the reorganization plan the
shares of the issuing companies – as set forth in Law no. 297/2004, as
amended and completed – can no longer be traded starting from the receipt
of the notice by the Financial Supervisory Authority. When the Financial
Supervisory Authority receives the notice regarding the initiation of the
bankruptcy proceedings, the withdrawal of the real-estate properties from
the regulated market they are traded on shall start.

Except for this provision, in the other cases, the transfers can be
executed even without the consent of the relevant shareholders (if the
Articles of Incorporation includes no contrary provisions).

19. Can outstanding shares of the company undergoing insolvency
proceedings be cancelled without the consent of the relevant
shareholders? If yes, under what conditions? Are existing shareholders
entitled to compensation? What other safeguards are provided? (e.g.,
does the law include a principle according to which the affected
shareholders should not receive less than in a liquidation procedure?)

No

20. Do shareholders of the company undergoing insolvency
proceedings have pre-emption rights over new issues of shares? (6) Are
there special conditions for the suppression of pre-emption rights if the
company is insolvent (if there are separate reorganization and
liquidation procedures, does this affect the response?).

In the case of share issuance, the Companies Law regulates a
preferential right of the existing shareholders, the shares issued for the
capital increase are being offered for subscription to the existing
shareholders first, directly proportional to the number of shares they hold.

If the share issuance can be done prior to the confirmation of a
reorganization plan or if the capital increase through the shares issuance is a
solution provided for by a reorganization plan proposed by the debtor and
confirmed by the bankruptcy judge, the preferential right shall be
maintained for the existing shareholders.

(*) Please, note that the power to decide new issues or conversions of shares, as well as the power to decide
operations that affect the structure of the corporate entity (e.g., by merger, spin-off, or change of the legal form)
are dealt with in Questions 33 and 34 below.
If we refer to a capital increase through the issuance of new shares, as set forth in a reorganization plan confirmed by the bankruptcy judge, but proposed by the creditors, we could conclude that this right is canceled as set forth in Article 133, paragraph 6 of the Insolvency Law, which permits the derogation from the Companies Law, the amendment of the Articles of Incorporation in such a case being executed through the plan without any need for the consent of the General Assembly and implicitly the granting of the preferential right.

21. Can shareholders retain a participation in the company that has emerged from an insolvency process (or in the company to which the insolvent company’s assets have been transferred) even if the company was insolvent according to a balance-sheet test? (i.e., where the value of its liabilities exceeds the value of its assets) If yes, under what conditions? (If there are separate reorganization and liquidation procedures, does this affect the response?)

According to the Companies’ Law, one of the consequences of merger/division is the fact that the shareholders or partners of the absorbed or divided company become shareholders, i.e. partners of the absorbing company, namely of the beneficiary companies, according to the distribution rules established in the merger/division project (the project must include the conditions of allocating the shares to the absorbing company or to the beneficiary companies, as well as the date starting when the shares or social shares allocated this way give the holders the right to participate in benefits and any special conditions affecting this right).

The Insolvency Law does not make special provisions regarding the manner of performing the merger/division, so the partner dispositions shall be applicable, with certain differences though. Thus, the fusion/division project shall not be performed separately, but shall be included in the reorganization plan, and the creditors which had a quality in expressing the opposition to the project under the conditions of the companies’ law, can in this case formulate an appeal under the Insolvency Law. In the case of a merger of two companies subject to the insolvency procedure, for each of them, it is imperative that the syndic judge confirm the reorganization plan which provides the merger. The new company acquires the assets but must pay for all the amounts of the debts payment program (NOTE – the debts payment program is their payment schedule mentioned in the reorganization
plan, which includes:

a) the amount of the sums which the debtor obliges itself to pay to the creditors, but not more than the due amounts according to the definitive debts table; in the case of the creditors beneficiary of a right of first refusal, the amounts may also include the interests;

b) the deadlines upon which the debtor would pay for these sums). In the case of division, the Insolvency Law has however set derogation from the companies’ law. Thus, if the latter provided that, in the situation in which a creditor has not obtained the recovery of his debt from the company to which the debt is distributed by division, all the companies participating in the division are responsible for the obligation in question, until the concurrence of the net assets value which have been distributed to them by division, except for the company to which the respective obligation has been distributed, which is unlimitedly liable, by means of the Insolvency Law, this provision is not applicable to the division operation. The interesting fact is that, in the situation of the assets/liabilities transfer to a newly established company, this could not directly emerge from insolvency, although according to the law, an insolvency procedure cannot be closed until the obligations provided in the payment program related to the reorganization plan are not fulfilled. A solution in this case would be the possibility that all creditors which have been transferred further to the division to the new company agree to remove the debts from the plan.

As for the situation given as an example, in which the value of the liabilities exceeds the value of the assets, the Romanian law distinguishes between insolvency and insolvability, while the latter overlaps over the example proposed as a reference. A state of insolvability of the debtor which is insolvent shall not favour a reorganization. As a matter of fact, precisely art. 38 paragraph (2) letter c) item 1 of Law no. 85/2014 provides that the debtors which do not own any asset in their patrimony shall directly go to the simplified procedure.

22. Are the ranking of classes of shares and the preferential rights of classes of shares affected (and if yes, to what extent) by the fact that the company is undergoing an insolvency process? (If there are separate reorganization and liquidation procedures, does this affect the response?)

Not applicable
23. Can shareholders, in the course of an insolvency procedure, supply goods, services or financial resources to the company? If yes, under what conditions (e.g., judicial authorization)? What would their ranking position be towards other creditors?

If shareholders become creditors, after the opening of an insolvency procedure there is no need for the claim to be recorded in the table of creditors (until a reorganization plan is finished; if the debtor, after such a plan, becomes bankrupt, the unpaid claims will be recorded in a suplimentary table). In both cases, they will be paid with priority, especially if the claim is secured (secured claims have a privileged position in the proceedings).

24. Can shareholders, in their capacity as counterparties, be under a duty to continue a contractual relationship with the insolvent company during an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?)

There are no provisions of the Insolvency for partners or shareholders, which would impose the obligation of maintaining the development of a contract concluded between the partner and the company. The manner of managing the ongoing contracts concluded by the debtor is broadly presented in question 38. However, two more observations must be made: One can imagine in practice the situation in which the partner has the quality of services provider - electricity, natural gas, water, telephony, or the like for the debtor, in which case this is not entitled, during the observation period and in the reorganization period, to change, refuse or temporary interrupt such a service to the debtor or his estate, if the debtor has the quality of a captive customer, according to the insolvency law (the captive customer is the customer which, for technical, economic or regulation-related reasons, cannot choose the provider). A second observation refers to the fact that, during the procedure, one shall analyse the situation of the documents and operations concluded by the debtor before its opening, so that one can come to bringing an action for annulment by the legal administrator if the documents have been concluded during the 2 years prior to the date on which the procedure has been opened:

a) with a general partner or a partner owning at least 20% of the
company’s capital, or as the case may be, of the rights to vote of the partners in the general assembly, in the situation in which the debtor is that co limited partnership, i.e. an agricultural company, unlimited company or limited liability company;

b) with a member or administrator, when the debtor is an economic interest group;

c) with a shareholder owning at least 20% of the debtor’s shares, or as the case may be, of the rights to vote of the shareholders in the general assembly, in the situation in which the debtor is the respective joint stock company;

d) with an administrator, manager or member of the debtor’s supervision bodies, building society, joint stock company with a limited liability, or as the case may be, an agricultural company;

25. Can shareholders (or companies of the same group) holding credit claims against the company under insolvency procedure participate in the creditors’ meeting and vote on the insolvency plan without restrictions? (If there are separate reorganization and liquidation procedures, does this affect the response?)

The foundation of the vote for approving the reorganization plan has considered, in the new law, clear criteria, while providing an equal treatment among the same degree creditors, the admission of the comparative priorities and acceptance of a decision of the majority, followed by offering the other creditors equal or larger parts than those they would receive in case of bankruptcy. For this reason, the plan is exclusively voted by the creditors which can be constituted into 5 distinct categories, depending on their debts - a) the debts benefiting from the rights of first refusal; b) salary debts; c) budgetary debts; d) the debts of the indispensable creditors; e) the other unsecured loans.

26. If shareholders (or companies of the same group) do not hold credit claims against the company under insolvency procedure, must/can they participate in the creditors’ meeting? If that is the case, what rights or duties do they have in that meeting? (If there are separate reorganization and liquidation procedures, does this affect the response?)
There are no such consecrated provisions

27. **Do shareholders in an individual company have information rights as to the filing of insolvency proceedings by the parent or other related companies?**

There are no such consecrated provisions

### III. The Role of the Shareholders’ Meeting in Companies Subject to Insolvency Proceedings

28. **Does the shareholders’ meeting continue to exist in insolvency proceedings? (If there are separate reorganization and liquidation procedures, does this affect the response?)**

After opening the insolvency procedure, the role of the general assembly is limited, and according to the law, it can suspend its activity, and may be convened only upon the convocation of the official receiver. In practice, one has not given up the approval of the modifications in the constitutive document within the general assembly, so that during the entire period of the development of an insolvency procedure – judicial reorganization, the general assembly would continue to function. Also, the annual financial statements of the insolvent company would be approved by the general assembly (according to the provisions of the Companies’ Law).

29. **Does the shareholders’ meeting preserve all of its competences, generally? (If there are separate reorganization and liquidation procedures, does this affect the response?)**

As detailed at the question 28

30. **Does the shareholders’ meeting need to approve the accounts of the distressed/insolvent company?**

This is not a must but this approval protects in practice the activity of the special administrator.

31. **Does the shareholders’ meeting have the power to dismiss directors – if directors are still in charge of the insolvent company? Can the shareholders’ meeting request the removal of the insolvency representative? (If there are separate reorganization and liquidation procedures, does this affect the response?)**
procedures, does this affect the response?)

The general assembly designates a special administrator, after opening the insolvency procedure, but on this occasion does not dismiss the statutory administrators, because according to the law, their mandate is terminated *ipso jure*. As for the elimination of the insolvency representative, this action cannot be taken by the partners’/shareholders’ general assembly. The action taken by him within the procedure can however be disputed by any interested person.

32. **Is a shareholders’ meeting authorisation required to start an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?)**

Art 68 paragraph 5 of Law no. 85/2014 provides that the requests of the legal entities regarding the commencement of the procedure shall be signed by the persons who, according to the constitutive documents or statuses, have the quality to represent them, without requiring a decision of the partners/shareholders. Only in the case in which by the debtor’s request, it is requested to apply the simplified procedure, shall the decision of the partners’/shareholders’ general assembly also be submitted in this respect (in this latter case, the procedure exclusively implies the liquidation of the debtor’s estate).

33. **Does the shareholders’ meeting need to approve an insolvency or reorganization plan? Can shareholders, even individually, challenge an insolvency or reorganization plan?**

In case the reorganization plan is proposed by the debtor, the law provides that the partners’/shareholders’ general assembly approves such a proposal. The vote of a proposed plan however belongs to the creditors.

The shareholders can dispute a reorganization plan voted by creditors for illegality reasons.

34. **Is a shareholders’ meeting decision required to issue new shares of the company undergoing insolvency proceeding? Can a new share issue be decided by the board? Can a new share issue be decided by the
insolvency representative? (7) If a capital increase has to take place through the conversion of claims into new shares, does this affect the response?

In the content of the reorganization plan, one can provide the transmission of all or some of the goods of the debtor’s estate to one or several natural or legal entities, constituted prior or after the confirmation of the plan; the merger or division of the debtor; the issuance of securities by the debtor under the conditions provided by Law no. 31/1990, republished, with the subsequent modifications and additions (the companies’ law) and by Law no. 297/2004, with the subsequent modifications and additions (the capital market law). In order to include in the plan an issuance of securities, one needs the express written approval of the creditor who would receive the issued securities, approval which is given before the expression of the vote on the reorganization plan by the creditors. The reorganization plan cannot however provide the conversion of the budgetary debts into securities;

The increases of capital decided upon outside the reorganization plan proposed by the creditors and confirmed by the syndic judge after their approval by the creditors, or within the plan proposed by the debtor and confirmed, can be developed especially according to the Companies’ Law in the sense of approving them in the general assembly. If the company’s right of administration has not been suspended, the delegation of attributions of the shareholders’ general assembly to the administrators as provided by the Companies’ Law could also be applicable in the case of the special administrator who can decide on increasing the social capital without requiring the convening of a shareholders’ extraordinary general assembly.

35. Can an insolvency/reorganization plan affect the structure of the corporate entity (e.g., by merger, spin-off, or change of the legal form)? Is a shareholders’ meeting authorization required for this?

By derogation from the provisions of the Companies’ Law no. 31/1990, republished, with the subsequent modifications and additions, the plan proposed by creditors or the legal administrator can provide the

(7) These questions are aimed at understanding whether the fact that the company is subject to insolvency proceedings allows or causes deviations from the company law rules determining the body competent to take decisions on the issue of new shares of the company, and/or from the company law rules establishing the criteria and purposes with which such decisions must comply.
modification, without the statutory approval of the members or of the
debtor’s partners/shareholders of the constitutive document, the registration
with the trade register, followed by its request by the legal administrator on
the creditor’s expense, based on the court decision for confirming the
reorganization plan. Such a plan can therefore generate structural changes
without the approval of the shareholders/partners/members. If in the capital
companies this aspect poses no problem, within the companies of persons,
based on an *intuitu personae* nature, the option of the legislator can raise
some questions, directly running into *affectio societatis*. On the other hand,
if we consider the purpose of the law (covering the liabilities by granting the
chance of rectification of the debtor’s activity, whenever possible) in the
situation of the creditors and plan proposed by them, the solution seems
optimal.

36. **On what conditions can the company carry on business during an
insolvency procedure? (If there are separate reorganization and
liquidation procedures, does this affect the response?) Is a
shareholders’ meeting authorisation required?**

The debtor can develop current activities – those activities of
production, trade or services provision and financial operations, proposed to
be performed by the debtor during the observation period (the observation
period is the period between the date the insolvency procedure is opened
and the date the reorganization plan is confirmed, or as the case may be, the
date of the bankruptcy) and in the period of reorganization, during the
normal course of its activity, such as:

a) proceeding with the contracted activities and signing new contracts,
according to the object of activity;

b) performing cashing operations and related payments;

c) providing the financing of the working capital within current limits.

The administration documents are prepared by the special administrator
in the name and in the account of the company (if the debtor’s
administration right has not been suspended, situation in which the activity
is entirely led by the legal administrator).

After confirming the plan, the special administrator manages the
debtor’s activity, under the supervision of the legal administrator, also only
in the situation in which the debtor’s administration right has not been suspended;

37. **In the course of an insolvency procedure, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business operation of the company? Is a shareholders’ meeting authorisation required? (If there are separate reorganization and liquidation procedures, does this affect the response?)**

The dispositions of the Insolvency Law are especially applied, without requiring the approval of the general assembly.

38. **Does the shareholders’ meeting have any power in relation to a decision of the board or the insolvency representative to continue or reject any favourable, unfavourable or essential contract during an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?)**

The ongoing contracts are considered to be maintained on the date the procedure is opened (exception to the enforcement of art. 1,417 of the Civil Code). Any contractual clauses for the cancelation of the ongoing contracts, for deadline violation or statement of the anticipated exigibility for the procedure opening reason are void. In order to increase to the maximum the value of the debtor’s estate, within a prescription deadline of 3 months from the procedure opening date, the legal administrator/liquidator can denounce any contract, the unexpired rentals, other long-term contracts, as long as these contracts have not entirely or substantially been executed by all the parties involved. The legal administrator/Liquidator must reply, within 30 days from the receipt, to the contractor’s notification, formulated in the first 3 months from the procedure opening, in which he is requested to denounce the contract (for lack of such a reply, the legal administrator/liquidator shall not be able to request the execution of the contract, as it is considered denounced). In case a contract is denounced, an action for damages can be brought by the co-contracting party against the debtor. The indispensable creditors are also maintained – the unsecured creditors providing services, raw materials, materials or utilities, in the absence of which the debtor’s activity cannot take place, and which cannot be replaced by another provider offering services, raw materials, materials or utilities of the same type, under the same financial conditions. The shareholders’ general
assembly has no role in this case either.

39. If an insolvency plan can be presented for a whole corporate group, must that plan be approved by the shareholders’ meetings of each company of the group, including of those that are balance-sheet insolvent? How are the different meetings’ decisions coordinated? Are there specific safeguards (e.g., any veto power or other remedy) for the minority shareholders of the companies that are not insolvent?

Introduced due to the pressure of practice but also of the European regulations, the dispositions regarding the group of companies as included in Law no. 85/2014 are based on the joint dispositions provided by Chapter I of Title II of the law, completed by special dispositions, as we shall further analyse.

One must mention from the very beginning the fact that for each member of the group of companies, a separate insolvency file is prepared, even if we are in the presence of a joint request of opening the procedure formulated by a part of the group members. In order to avoid the subsequent opening of the insolvency procedure against him, a member of a group who is not insolvent or imminently insolvent, can subscribe to a joint request for opening an insolvency procedure, while, in this case, the joint request for opening the insolvency procedure requires the approval of the partners’/shareholders’ general assembly of the respective group member.

As in Article 188 from the Insolvency Law, in case the creditors owning at least 50% of the statement of affairs are the same for each group member, the same legal administrator or consortium of legal administrators shall be appointed for each group member.

Article 189 provides also another solution for the case the structure of the statement of affairs does not allow for the enforcement of art. 188: the appointed legal administrators shall be bound by the cooperation obligation. The cooperation obligation shall be materialized including by signing a cooperation protocol, which would contain a summary of the way in which the economic, juridical and operational activities shall take place in an integrated manner, at the group level.

The legal administrator appointed for any of the group members shall have the legal standing to propose a reorganization plan within the
procedure(s) of the other members. Based on the cooperation obligation, the legal administrators shall put at the disposal of the other legal administrators the necessary information, in order to prepare compatible and coordinated reorganization plans.

40. If companies belonging to the same group file separate insolvency proceedings, are there specific requirements/mechanisms to provide for coordination of those proceedings? Are shareholders’ meetings of the relevant companies involved in the coordination mechanisms, if any?

Thus, as we showed at item 39, two or more insolvent debtors, members of a group, or one or more members of the group of companies complying with the conditions of the law (they are not insolvent but subscribe to a joint request for opening the procedure), can submit to the competent court a joint request for opening the insolvency procedure. A creditor owning debts against two or more members of a group, who complies with the law, can also bring a joint request for opening the insolvency procedure but irrespective of the manner of bringing the request, a separate file is prepared for each group member. The partners’/shareholders’ general assemblies of the group members shall appoint the same special administrator for each group member, and approve the proposal of the reorganization plan for each company but do not have attributions consacrated by the insolvency law in the coordination mechanisms, as provided by it.

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8 The cooperation obligation is the duty of the courts of law and insolvency practitioner to provide the procedural coordination by means of:
   a) exchange of information regarding the procedure, especially regarding debts, assets and action taken by the legal administrator/liquidator;
   b) the concomitant opening of the insolvency procedures of the group members, at the request of the debtors or creditors;
   c) the correlated setting of the procedural deadlines, as well as the meeting of the creditors’ assembly;
   d) in case the same insolvency practitioner has not been appointed for each group member, the coordination of communication between the insolvency practitioners by the practitioner designated in the file regarding the parent company or, as the case may be, the company with the highest turnover according to the latest annual published financial statement
IV. Other Obstacles for Insolvency Procedures Found in Company Law

41. Please list any other legal provision in company law that, in your opinion or in your experience, may interfere with the insolvency procedure of a company in your jurisdiction.

- The role of the special administrator as provided in the Insolvency Law is not put in any agreement with the Company Law.

- Liquidation proceedings as established in Company Law are different from the Insolvency Law in approximately similar situations (for example maximum threshold for the debt is of RON 39,000 and Company Law is applicable because is below the maximum threshold required by the Insolvency Law, i.e. of RON 40,000).

- There may arise cases when the sole associate of an insolvent company is also special administrator and creditor - there is no legal interdiction (in both Company and Insolvency Law) to appoint the former statutory administrator as special administrator or a provision to impose another person for this role in the situation when the sole associate was also the statutory administrator.

- There are no special provisions in Insolvency Law regarding a clear role of the General Assembly during the insolvency proceedings.