IN THE ARBITRATION PROCEEDINGS FILED UNDER NO. 26696/HBH IN ACCORDANCE WITH THE INTERNATIONAL CHAMBER OF COMMERCE (ICC) RULES

Between

GAMA GUC SISTEMLERI MUHENDISLIK VE TAAHHUT A.S.

Claimant

- v -

REPUBLIC OF NORTH MACEDONIA

Respondent

EXPERT OPINION OF

DEJAN KOSTOVSKI

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25 November 2022

1. PROFESSIONAL BACKGROUND

1. My name is Dejan Kostovski and I am the founder and manager of the consulting company IMAGO-ENA DOOEL Skopje. My business address is at ul. Razlovecko vostanie br. 24-41 (24-41 Razlovec Uprising St.), 1000 Skopje, North Macedonia.

2. My professional qualifications and professional experience are contained in my Curriculum Vitae enclosed in **Error! Reference source not found.** to this Opinion.

3. My professional qualifications, expertise and experience relevant to this Opinion are as follows:

   (a) I was a judge at the Basic Court Skopje I, in its Bankruptcy Division (1996-2004), Commercial Disputes Division (2004-2005) and Labor Disputes Division (2005-2006).

   (b) I was a member of the Working Group drafting the Bankruptcy Law (2005), a member of the Working Group drafting the Professional Standards or Regulations relating to the exam for the acquisition of a Bankruptcy Trustee License, management of the bankruptcy estate and the sale thereof, including the Bankruptcy Trustee's fees and rewards and the Code of Ethics of Bankruptcy Trustees (2006), as well as a member of the Working Group amending the Bankruptcy Law (2013).

   (c) I was an occasional educator at the Academy for Judges and Public Prosecutors of the Republic of Macedonia, an occasional educator at the Chamber of Bankruptcy Trustees of the Republic of Macedonia and an occasional external lecturer in business law master studies at the Faculty of Law "Justinian Prvi" (Iustinianus Primus) Skopje at Ss. Cyril and Methodius University in Skopje.

   (d) I am a member of the first Commission responsible for organizing the exam related to the acquisition of a Licensed Bankruptcy Trustee title, established by the Minister of Justice (2001), I am a former member of the Management Board of the Macedonian Bankruptcy Association, a former member of the Association of Judges of the Republic of Macedonia and a former member of the Publishing Board of the Court Bulletin, a magazine published by the Association of Judges of the Republic of Macedonia.

   (e) I am the author and co-author of a large number of books and professional papers in the area of bankruptcy and reorganization, including "Commentary on the Bankruptcy Law" (2014), Akademik (Academician) Skopje, "*Reorganization of the Debtor in Bankruptcy Proceedings by Adopting a Bankruptcy Plan, Including the Establishment of a New Company*" (legal framework and experiences from practice) Proceedings of the International Conference "*Bankruptcy as an Opportunity for Reorganization*", 2000, Ohrid, Republic of Macedonia, "*Protection of the Rights of Creditors in a Non-bankruptcy Reorganization Procedure according to Macedonian Law*" (Experiences and tendencies for the legislation of Bosnia and Herzegovina), Proceedings, "Public and Private Aspects of Legal Reforms in Bosnia and Herzegovina: How Far We Can Go" – International Conference, Faculty of Law, University of Tuzla and Center for Social Research Tuzla, 2014 Bosnia and Herzegovina, "*Liability of Members of Company's Management and Supervisory Bodies for Damages Caused by Failure to File a Proposal for Opening Insolvency Proceedings*" Current issues of bankruptcy law,

legislation – practice, Proceedings, Association of Bankruptcy Trustees of the Republic of Srpska, Banja Luka, November 2012 etc.

(f) I have given presentations at a number of national and international professional conferences in the area of bankruptcy and reorganization and I was regularly invited by the Association of Lawyers of the Republic of Macedonia to their annual seminars as a presenter on bankruptcy procedure topics.

2. EXPERT DECLARATION

4. This Opinion was prepared for the purposes of arbitration proceedings where GAMA Güç Sistemleri Mühendislik ve Taahhüt A.Ş. is the Claimant (hereinafter "**GAMA**") and the Republic of North Macedonia is the Respondent.

5. I was hired by Georgievski Law Firm on behalf of their client GAMA.

6. I have no previous linkage with either the parties to these arbitration proceedings, their legal counsels or the members of the Arbitration Tribunal.

7. I am independent of the parties to the arbitration proceedings, their legal counsels and members of the Arbitration Tribunal. To the best of my knowledge, and having made my due research, there are no facts or circumstances, whether past or present, which could raise any reasonable doubts as to my impartiality.

8. The opinions contained in this Expert Opinion are based on my genuine belief. My opinion is based on my experience of more than 25 years in the area of bankruptcy and reorganization.

9. This Opinion is prepared in the Macedonian language and if required, I will make my Declaration before the Arbitration Tribunal in the Macedonian language.

3. INSTRUCTIONS AND OPINION SCOPE

10. Georgievski Law Firm requested me to provide an Opinion regarding certain aspects of the pre-bankruptcy reorganization of the Company for Production of Electricity and Heat TE-TO AD Skopje (hereinafter, "**TE-TO**"). In particular, I was asked to provide an Opinion regarding the following matters:

(a) Was under the Bankruptcy Law, the Basic Civil Court Skopje obliged to reject the Proposal for the Implementation of a Reorganization Plan before opening a bankruptcy proceeding, by a Reorganization Plan prepared by the debtor TE-TO dated 24 April 2018?

(b) Did the Basic Civil Court act in accordance with the Bankruptcy Law when at the TE-TO hearing held on 5 June 2018, it ordered TE-TO to submit a revised Reorganization Plan, including modifications to the classes of creditors?

(c) Was the TE-TO Reorganization Plan dated 6 June 2018 prepared in accordance with the Bankruptcy Law, particularly in terms of (i) the division of classes of creditors; (ii) the deadline for the implementation of the Reorganization Plan; and (iii) financial projections, including the projected

Income Statement, Balance Sheet, and Cash Flow Statement for the period of execution of the Reorganization Plan?

(d) Were TE-TO's shareholders that had claims against TE-TO based on loans, treated more favourably than the creditors in the class of unsecured creditors pursuant to TE-TO's revised Reorganization Plan dated 6 June 2018?

(e) Does the TE-TO Reorganization Plan dated 6 June 2018 show beyond any doubt that the unsecured creditors would be more favourably settled thereby, rather than by foreclosure (realization) of TE-TO's assets?

11. For the purposes of drafting this Legal Opinion, I have analysed the documents provided in 0 to this Opinion.

4. OPINION

Was under the Bankruptcy Law, the Basic Civil Court Skopje obliged to reject the Proposal for the Implementation of a Reorganization Plan before opening a bankruptcy proceeding, where such Reorganization Plan was prepared by the Debtor TE-TO dated 24 April 2018?

12. Pursuant to the Bankruptcy Law (hereinafter, the "**Bankruptcy Law**"),[1] the Bankruptcy Judge had to reject the Proposal for the Implementation of a Reorganization Plan before opening a bankruptcy proceeding including a TE-TO reorganization plan dated 24 April 2018 (hereinafter, the "**Proposal**"),[2] because TE-TO had not provided any evidence that the conditions for opening bankruptcy proceedings were met, and the submitted Reorganization Plan dated 4 April 2018 (hereinafter, the "**Reorganization Plan**")[3] was incomplete, unorderly and in contradiction with the Bankruptcy Law.

13. The Bankruptcy Law allows the overcoming of financial difficulties by a debtor that is insolvent by submitting a proposal for opening bankruptcy proceedings together with a plan for reorganization and requesting the court to implement a so-called out pre-bankruptcy reorganization procedure or a reorganization procedure in preliminary proceedings where the conditions for opening bankruptcy proceedings are determined.[4] Pre-bankruptcy reorganization is different from bankruptcy reorganization proceedings, where the Debtor, Creditors or Bankruptcy Trustee propose a Reorganization Plan in the course of already opened bankruptcy proceedings.

14. The implementation of proceedings by submitting a proposal for opening bankruptcy proceedings together with a Reorganization Plan is fundamentally a so-called hybrid procedure, where the Debtor, prior to submitting its proposal for the opening of the bankruptcy procedure, is required to complete a significant part of the actions related to the Reorganization Plan preparation, including negotiations with Creditors,

[1] Bankruptcy Law ("Official Gazette of the Republic of Macedonia" Nos. 34/2006, 126/2006, 84/2007, 47/11, 79/13, 164/13, 29/14, 98/15 and 192/15) (hereinafter, the "Bankruptcy Law")
[2] Proposal for the Implementation of a Reorganization Plan by TE-TO AD Skopje dated 24 April 2018
[3] Reorganization Plan by TE-TO AD Skopje dated 4 April 2018
[4] Article 215-a paragraph 1 of the Bankruptcy Law ("*...reorganization proceedings before the opening of bankruptcy proceedings may only be conducted if the debtor submitted a reorganization plan together with its proposal for opening bankruptcy proceedings...*")

providing information of Creditors, while in the second stage, it is left up to the Court to implement the proceedings for acceptance of the Plan.[5]

15. The role of the Court, which under the Bankruptcy Law is left to an individual judge as a functional jurisdiction, is to make sure that proceedings are lawful, both in terms of meeting the requirements for opening bankruptcy proceedings and controlling the Reorganization Plan submitted. The role of the Bankruptcy Judge envisages independent evaluation of the Reorganization Plan submitted, principally in relation to the application of the mandatory rules prescribed by law which require the Bankruptcy Judge to reject the submitted proposal for opening bankruptcy proceedings and the Reorganization Plan prepared if the requirements for opening bankruptcy proceedings are not met and if the Reorganization Plan is not drawn up in accordance with the Bankruptcy Law.

16. The Bankruptcy Law imposes an obligation on the Court to simultaneously assess the orderliness of the proposal for opening bankruptcy proceedings, i.e., whether the requirements for opening bankruptcy proceedings were met and whether the Reorganization Plan proposed is orderly and contains all the substantive elements as per the Bankruptcy Law. The Bankruptcy Judge shall, ex officio or at the proposal of any interested party, reject the proposal to open bankruptcy proceedings and the proposal to implement reorganization based on a prepared Reorganization Plan if:

    (a) The Plan is not in compliance with the Bankruptcy Law; or

    (b) The Plan does not include those Creditors that if were to be included in the Plan, could have influenced the decision to adopt the Plan by their vote; or

    (c) The Plan is incomplete or unorderly, and especially if the Reorganization Plan prepared was not drawn up in accordance with the provisions of the Bankruptcy Law regulating who may submit the Reorganization Plan, the content and deadline for submission of the Reorganization Plan and deficiencies that could be removed but were not removed within the period determined by the Bankruptcy Judge; or

    (d) The Bankruptcy Judge establishes that the requirements for opening bankruptcy proceedings are not met.[6]

17. If the requirements for opening bankruptcy proceedings are not met, the Court shall, ex officio, immediately reject the proposal for opening bankruptcy proceedings and the proposal to implement reorganization according to a Reorganization Plan prepared.[7] The Bankruptcy Law does not allow the Court to order the petitioner to correct its proposal for opening bankruptcy proceedings by submitting evidence under the Bankruptcy Law that the petitioner is insolvent. No appeal is allowed against the decision by which the Court rejected the proposal to open bankruptcy proceedings and the proposal to implement reorganization based on a Reorganization Plan prepared.[8]

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[5] In our legal system, non-bankruptcy reorganization was first regulated by Article 69 of the Law amending the Bankruptcy Law ("Official Gazette of the Republic of Macedonia" No. 79/2013), where five new articles were added after Article 215, namely 215-a, 215-b, 215-v, 215-g and 215-d. Pursuant to Article 82 of the same Law, these provisions began to apply on 1 January 2014.

[6] Article 215-v paragraph 3 of the Bankruptcy Law

[7] Article 215-v paragraph 3 indent 4 of the Bankruptcy Law

[8] Article 215-v paragraph 6 of the Bankruptcy Law

18. On the other hand, if the petitioner submitted evidence that the requirements for opening bankruptcy proceedings were met, but the Reorganization Plan submitted by the petitioner contains deficiencies and technical errors that are not of a substantive nature, in such case, the Court may order the petitioner to correct the Reorganization Plan within eight days.[9] In doing so, the Bankruptcy Judge must be impartial and must not provide any advice or instructions to the petitioner on how to correct the Reorganization Plan. If the petitioner does not correct the Reorganization Plan within the provided period, the Court shall, ex officio, reject the proposal to open bankruptcy proceedings and the proposal to implement reorganization according to a Reorganization Plan prepared.[10] No appeal is allowed against this decision for rejection, either.[11]

19. In this specific case, TE-TO, along with its Proposal, did not submit evidence from which it could be established that the requirements for opening bankruptcy proceedings were met, i.e., that TE-TO was insolvent per the provisions of the Bankruptcy Law. TE-TO submitted evidence that its accounts were blocked for a period of 38 days and did not submit any evidence indicating its imminent insolvency.[12] Under the Bankruptcy Law, the opening of reorganization proceedings is allowed[13] only if the petitioner submits proof that the petitioner is insolvent[14] or is facing imminent insolvency.[15] Considering that TE-TO did not submit evidence that it was insolvent for a period longer than 45 days in the sense of Article 5 paragraph 2 of the Bankruptcy Law or that it was facing imminent insolvency in the sense of Article 5 paragraph 5 of the Bankruptcy Law, the Bankruptcy Judge was required to reject the Proposal in the sense of Article 215-v paragraph 3, indent 4 of the Bankruptcy Law.

20. Also, the Bankruptcy Judge had to reject the Proposal because the Reorganization Plan was incomplete, unorderly and contrary to the provisions of the Bankruptcy Law, particularly because it lacked information as to why reorganization was a more favourable option for unsecured creditors than the liquidation of TE-TO's assets, the formation of creditor classes, the period for the implementation thereof and other elements provided for in the Bankruptcy Law, namely:

21. **First**, the Reorganization Plan did not contain a detailed analysis as to why reorganization was a more favourable option to settle the claims of unsecured creditors of a higher payment priority order, such as GAMA, compared to the option by the liquidation of assets. In that regard, TE-TO's assets were not valuated according to the method of business venture continuation and there was no analysis as to how much of the amount of the estimate value accounted for secured creditors' claims and how much for unsecured creditors' claims. The essence of any rehabilitation plan is precisely this kind of analysis, so without it, the creditors did not and could not get a true picture of the reorganization proposed.

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[9] Article 215-v paragraph 4 of the Bankruptcy Law
[10] Article 215-v paragraph 5 of the Bankruptcy Law
[11] Article 215-v paragraph 6 of the Bankruptcy Law
[12] Proposal for Implementing a Reorganization Plan by TE-TO AD Skopje dated 24 April 2018
[13] Article 5 paragraph 1 of the Bankruptcy Law, "*Bankruptcy or reorganization of the bankrupt debtor shall be carried out when the bankrupt debtor is unable to pay or is facing a future insolvency.*"
[14] Article 5 paragraph 2 of the Bankruptcy Law, "*A debtor shall be considered unable to pay if, within a period of 45 days, from any of the debtor's accounts, with any payment transaction holder, the amount that should have been paid has not been paid pursuant to applicable grounds for payment*."
[15] Article 5 paragraph 5 of the Bankruptcy Law, "*Future inability to pay shall exist if a debtor makes it likely that the debtor will not be able to settle its existing cash liabilities when they come due.*"

22. Instead of providing an analysis of the situation, the Reorganization Plan uses unsubstantiated expressions of the type "*second-class creditors including unsecured creditors whose claims are based on loans granted thereto in the period of construction of the plant through which TE-TO carries out its business venture, created financial problems and hindered the normal operation of TE-TO*"[16] or "*the second class of creditors must understand that their claims shall be settled only after the settlement of secured first-class creditors*"[17] in the sense that, allegedly, in case of potential liquidation of TE-TO's assets, unsecured creditors would receive much less than the foreseen 10%.

23. The statement in the Reorganization Plan that "*If there is a liquidation of assets by activating the mortgages and pledges thereon or liquidation in bankruptcy proceedings, only the secured creditors would be settled, but not fully, due to the fact that the interest for the construction of such plants, which are currently uncompetitive on the market, is very low, so consequently, the value of the equipment that can be subject to liquidation is far lower than the claims of secured creditors.*"[18] is arbitrary and incorrect if one takes into account the fact that the secured creditors' claims of 53.6 million euros[19] amount to less than 1/3 of the book value of TE-TO's assets.[20]

24. **Second**, in the Reorganization Plan, under the effects to be achieved by this Plan, TE-TO specified that its creditors were divided into three classes and that such division would enable TE-TO to stabilize financially and preserve its brand that had been built for years.[21] The effects to be achieved by the Reorganization Plan should be subject to a detailed analysis as to how the Reorganization Plan proposed would affect the position of creditors, and the division of creditors into three classes for the purposes of voting on the Plan is in no way related to facilitating the implementation of the Reorganization Plan. In this regard, TE-TO was obliged to describe the effects that would be achieved for its creditors in terms of analysing the model that accepts the Reorganization Plan and the amount of settlement of its creditors' claims.

25. To that end, it was necessary to analyse why the liquidation of TE-TO's assets in bankruptcy proceedings is a less favourable option for creditors than the model adopted in the Reorganization Plan, i.e., reducing creditors' claims by 90% and payment thereof after 10 years as from the implementation of such Plan. Such analysis, as a rule, is done from the aspect of settling the creditors and not, as it was done in this specific case, from the aspect of what is more favourable for TE-TO.

26. **Third**, the Reorganization Plan states as a binding action the mandatory exclusion of settlement of claims of creditors that will additionally receive judgments on claims against TE-TO if such judgments refer to any liabilities other than those related to contracts or binding legal relations.[22] This provision conflicts with the provisions of the Bankruptcy Law governing the content of the Reorganization Plan.[23]

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[16] Reorganization Plan by TE-TO AD Skopje dated 4 April 2018, item 1.5. page 15
[17] Reorganization Plan by TE-TO AD Skopje dated 4 April 2018, item 1.5. page 16
[18] Reorganization Plan by TE-TO AD Skopje dated 4 April 2018, item 1.5. page 12
[19] Reorganization Plan by TE-TO AD Skopje dated 4 April 2018, item 1.5. page 8
[20] Reorganization Plan by TE-TO AD Skopje dated 4 April 2018, item 1.5. pages 20-21
[21] Reorganization Plan by TE-TO AD Skopje dated 4 April 2018, item 1.5. page 11
[22] Reorganization Plan by TE-TO AD Skopje dated 4 April 2018, item 1.5. page 11
[23] Article 215-b paragraph 2 indent 1) "*a provision stipulating that any claims of creditors that are not covered by the provisions of the creditor settlement plan shall be settled in the same way and under the same conditions as the claims of other creditors of their class*"

27. **Fourth,** the Reorganization Plan does not contain one of the main pieces of information that must be contained in the Plan, which refers to the data regarding the procedure for preparing the Reorganization Plan, including the data on notifications sent, availability of information to creditors and the course of negotiations.[24] Otherwise, from the additionally submitted data, it can also be concluded that TE-TO did not conduct any negotiations at all, either with the creditors having secured claims or with the creditors with unsecured claims of a higher payment priority order. The submitted evidence attached to the documents I have reviewed is about meetings held with TE-TO's related parties, where the Reorganization Plan is unilaterally presented and they are requested to submit statements under Article 215-b paragraph 2 point 2.[25]

28. **Fifth,** the financial projections (projected Income Statement, Balance Sheet and Cash Flow Statement) for the period of implementation of TE-TO's Reorganization Plan did not include the liabilities based on profit tax that would arise from the proposed write-off of unsecured creditors' claims.[26] Considering the proposed write-off of receivables of approximately 150 million euros, the liabilities for profit tax would be significant, i.e., 10% of this amount, so therefore, the Reorganization Plan had to include them in the financial projections and envisage a way in which they would be settled. For these reasons, the Reorganization Plan is unenforceable.

29. **Sixth,** the period for implementation of the Reorganization Plan[27] is contrary to the provisions of the Bankruptcy Law, according to which the period for implementation of any reorganization plan may not be longer than 5 years, except where the measures for the implementation of such reorganization plan refer to an anticipated repayment of claims in instalments, modification of maturity deadlines, interest rates or other conditions of any loan, credit or other claim or security instruments, the repayment period of any loan or credit taken within the duration of the preliminary procedure or in accordance with the Reorganization Plan, as well as the maturity dates of any debentures issued.[28]

30. The Reorganization Plan provided for an implementation period of 12 years, such that in the first ten years starting from 2018, 100% of the claims of secured creditors should be paid, the claims on unsecured creditors of the second class should be reduced by 90% and interest and the 10% payment should be made in 2028 and 2029, while the third-class unsecured creditors' claims should be paid 100% as they fall due.[29] Given that GAMA's claim does not derive from a loan or credit agreement, the timeframe for implementing the Reorganization Plan cannot be longer than 5 years.

31. **Seventh,** the content part of the Reorganization Plan does not contain the elements of an enforceable deed. The obligations that TE-TO would undertake after the termination of the bankruptcy proceedings are not described; the content part of the Reorganization Plan does not contain clear and precise provisions regarding the settlement of second-class creditors, including exact dates of payment or the period within which they will be paid. The Table related to the payment of second-class

[24] Bankruptcy Law, Article 215-b paragraph 2 point 4
[25] Answer to a letter from TE-TO AD Skopje dated 2 May 2018
[26] Reorganization Plan by TE-TO AD Skopje dated 4 April 2018, pages 27-33
[27] Reorganization Plan by TE-TO AD Skopje dated 4 April 2018, item 2.6. page 19
[28] Article 215-b paragraph 1 indent 2) point 13
[29] Reorganization Plan by TE-TO AD Skopje dated 4 April 2018, item 2.1. page 13

creditors' claims lacks specific dates of claim payments to be able to control the implementation of the Reorganization Plan fully.[30]

32. The content part of the Reorganization Plan does not contain any accurate data about the licenses possessed by TE-TO and how any legal effects of the Plan accepted would affect their validity.[31] Also, the Reorganization Plan does not present the estimated value of the shares TE-TO holds in its related parties and the amount of financial inflow it expects based on the gains from the shares in these companies on an annual level, including the purposes for which such funds would be used.[32]

33. **Eighth**, the Reorganization Plan does not contain an analysis of how TE-TO will deal with any future risks that could threaten its business venture. In the Reorganization Plan, the term "profit" is used in places where it is mentioned that income should be generated to settle creditors, which is very vague.[33] As a rule, any shareholders may not, during the implementation of any plan which, in its substance, is aimed at the company's rehabilitation and where there are creditors whose claims are deferred for payment and reduced by 90%, distribute any profits until the moment of payment of creditors' claims.

34. In the specific case of this type of rehabilitation plan with a massive decrease in the amount of creditor claims, as well as the deferral of creditor claims' payment to 12 years, some clauses should have been incorporated that would lead to the protection of creditors during the payment of claims, especially the unsecured creditors of a higher payment priority order. Such clauses shall refer to the stipulation of a ban on the payment of profits for the purpose of implementing the Reorganization Pan; a ban on further borrowing; a ban on independent disposal of assets; a ban on threatening the capacity of TE-TO to implement the Reorganization Plan; a ban on implementing any organizational, status or ownership changes of TE-TO during the implementation of the Reorganization Plan; and a ban on the company to sell its assets to any third parties after paying the creditors' with secured claims and deleting the mortgages.

35. **Ninth**, the Reorganization Plan does not contain clear criteria based on which second- and third-class creditors were established, namely:

(a) The established method of payment of claims, especially of the third class, is contrary to the legally established principles for equal treatment of creditors in the same class, therefore, the maturity of the claim does not play any role;

(b) The ranking of TE-TO shareholders as creditors of a lower payment priority order compared to the claims of second-class creditors, including GAMA and other creditors with higher-ranking claims. The reasons why GAMA and other creditors with claims of a higher payment priority order are placed in the second class and will be settled last, together with TE-TO shareholders, were not specified;

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[30] Reorganization Plan by TE-TO AD Skopje dated 4 April 2018, item 2.4. page 18

[31] The Reorganization Plan by TE-TO AD Skopje dated 4 April 2018, page 5 states that TE-TO holds licenses for electricity and thermal energy production, electricity trade and natural gas trade.

[32] The Reorganization Plan by TE-TO AD Skopje dated 4 April 2018, page 5 states that TE-TO is the sole partner in TE-TO Trade DOOEL Skopje and TE-TO Gas Trade DOOEL Skopje.

[33] The Reorganization Plan by TE-TO AD Skopje dated 4 April 2018, page 12 states that "*...the company has a stable profitable business venture and the Reorganization Plan ensures the maximum possible recovery by creditors in line with the actual financial possibilities of TE-TO AD.*"

(c) The shareholders obtained a privileged position compared to that determined by law, i.e., their claims are privileged.

36. The Reorganization Plan stipulates that the creditors whose claims were accepted will be settled over twelve years in the following order:

(a) Secured creditors – with the right to separate settlement, will be paid 100% according to the existing payment schedule and existing loan agreements up until 2028;

(b) Creditors with unsecured claims based on loans and investments, whose claims derive from loans given to TE-TO as claims arising during the period of plant construction, where regarding the plant construction, a full write-off of all interest will be made and a write-off of the principal in the amount of 90% will be made. The remaining 10% of the principal debt will be paid to them within 10 years, or by 2028 and 2029, after the full payment of secured creditors;

(c) The third class includes creditors with unsecured claims based on TE-TO's ongoing operations, without which TE-TO cannot maintain its business venture and which will be duly paid 100% pursuant to existing contracts. The tabular part presented later in the Plan describes who those creditors are. The second-class creditors encompass TE-TO shareholders and other creditors that had extended loans to TE-TO and are described as creditors creating financial problems and hindering the normal operation of TE-TO.[34]

37. The Bankruptcy Law ranks creditors as creditors with secured claims or separate claims and creditors with unsecured claims of a higher order of payment priority and a lower order of payment priority.[35] The group of creditors with secured claims includes all creditors that have some claims against the Debtor by having a pledge or mortgage on some assets or all the assets of the Debtor. [36] These creditors have the right to vote on the Reorganization Plan proposed, only if they have some claim and their liens on the property are covered by the Plan.[37]

38. According to the Bankruptcy Law, unsecured creditors of a higher payment priority order are classified as creditors with claims for which the law stipulates a right to priority payment of such claims[38] and creditors of a higher payment priority order that are paid after the payment of creditors with priority. Claims of lower-ranked creditors are paid only after the full settlement of unsecured higher-ranked creditors.[39] There are five ranks of lower-ranking creditors and this order of payment priority is followed only after the full payment of the claims of creditors of the previous order of payment priority.

39. Any claims of shareholders regarding loan repayment fall in the last payment priority order, regarding the claims that are paid to creditors of a lower payment priority order. These rules are mandatory for TE-TO when determining the classes of creditors in its Reorganization Plan. When classifying its creditors in the second

[34] Reorganization Plan by TE-TO AD Skopje dated 4 April 2018, page 13
[35] Bankruptcy Law, Article 116
[36] Bankruptcy Law, Article 128
[37] Bankruptcy Law, Article 231(1)
[38] Bankruptcy Law, Article 117
[39] Bankruptcy Law, Article 118

group, TE-TO did not make a distinction between shareholders that had given loans and other unsecured creditors with claims of a higher payment priority order. Thus, TE-TO shareholders having claims of the lowest payment priority order, were equalized with creditors having claims of a higher payment priority order, contrary to the Bankruptcy Law.

40. While examining both the Proposal and the Reorganization Plan, the Bankruptcy Judge found that TE-TO did not provide any evidence that it was insolvent, i.e., that it faced imminent insolvency and that the Reorganization Plan was incomplete, unorderly and not in compliance with the Bankruptcy Law.[40] The Bankruptcy Judge, instead of rejecting the Proposal pursuant to Article 215-v paragraph 3 indent 4 of the Bankruptcy Law, took a series of procedural actions in flagrant violation of the provisions of the Bankruptcy Law, namely:

41. **First**, on 26 April 2018, the Bankruptcy Judge issued Decision 3 ST-124/18 determining security measures ("**Decision on Security Measures**"),[41] before deciding to proceed with a preliminary proceeding, thus acting contrary to the provisions of 215-g of the Bankruptcy Law. Pursuant to Article 215-g of the Bankruptcy Law, the decision to initiate preliminary proceedings must be made within three days as from the date of submission of an orderly proposal in the sense of Article 215-v of the Bankruptcy Law.[42] When the Debtor filed a Proposal for opening bankruptcy proceedings, including a Reorganization Plan, the Bankruptcy Judge, instead of applying the provisions of the Bankruptcy Law referring exclusively to the procedure thereof, applied the provisions of the Bankruptcy Law referring to taking action upon a proposal submitted for opening bankruptcy proceedings, which is particularly wrong if the proposal for opening bankruptcy proceedings was submitted by a creditor and it had nothing to do with pre-bankruptcy reorganization.

42. Considering the fact that in this particular case, a Proposal was submitted for opening bankruptcy proceedings with a Plan drawn up for reorganization, the determination of security measures depends primarily on whether the Court received an orderly proposal for opening such proceedings. It is obvious that neither the Proposal nor the Reorganization Plan was orderly. Hence, contrary to Article 215-g paragraph 1 of the Bankruptcy Law, in conditions where both the Proposal and the Plan were unorderly in the sense of Article 215-v of the Bankruptcy Law and without making a decision to initiate preliminary proceedings, the Court rendered the Decision on Security Measures.

43. **Second**, the security measures determined by the Court in its Decision on Security Measures were not in accordance with the objectives that should be achieved by the implementation of pre-bankruptcy reorganization. Security measures that can be imposed differ from the so-called regular security measures.[43] In any pre-bankruptcy reorganization, it is possible to decide on security measures aimed solely at prohibiting or temporarily postponing the determination or implementation of enforcement and to appoint a temporary bankruptcy trustee, whose competence in the

[40] Request for duly preparing a proposal for opening bankruptcy proceedings by the Basic Civil Court Skopje dated 30 April 2018
[41] Decision by the Basic Civil Court Skopje on Security Measures 3 ST-124/18 of 26 April 2018
[42] Bankruptcy Law, Article 215-g paragraphs 1 and 2
[43] The Bankruptcy Law, Article 58, stipulates the regular security measures that can be imposed in the event a proposal for the opening of bankruptcy proceedings is submitted.

procedure to make a proposal for opening bankruptcy proceedings including a prepared reorganization plan, is established by law.[44]

44. The Court, by its Decision on Security Measures, determined a general ban on the disposal of all movable and immovable assets owned by TE-TO; prohibited the management body of TE-TO from taking any legal actions aimed at disposal, encumbrance or conclusion of agreements that are unfavourable for its creditors; prohibited any implementation of enforcement or security against the Debtor; prohibited any payments from the Debtor's accounts, except for payments solely regarding matters related to the Debtor's core business.[45] All these measures determined are problematic in terms of implementing the procedure upon the submitted Proposal for opening bankruptcy proceedings including a Reorganization Plan in accordance with law, especially in terms of TE-TO's functioning during such proceedings and the actions taken therein by the management bodies.

45. By the determination of a general ban on the disposal of assets and the appointment of a temporary bankruptcy trustee, the authority to dispose of the Debtor's assets passes to the temporary bankruptcy trustee who receives special powers,[46] which contradicts the essence of pre-bankruptcy reorganization and the role of the management bodies in a non-bankruptcy reorganization. Consequently, all actions taken by TE-TO's management bodies during the reorganization procedure, without any special authorization by the temporary bankruptcy trustee, do not produce any legal effect.

46. **Third,** Article 215-g paragraph 2 of the Bankruptcy Law stipulates that the court shall appoint the temporary bankruptcy trustee through electronic selection from among those bankruptcy trustees who have special knowledge in the area of reorganization plans. When appointing the temporary bankruptcy trustee of TE-TO, the Court did not respect these mandatory requirements of the Law, nor did it proceed with the appointment of the bankruptcy trustee under the electronic selection method nor did it choose a bankruptcy trustee who can be identified as having special knowledge in the area of reorganization plans.

47. In addition, the appointment of the temporary bankruptcy trustee in pre-bankruptcy reorganization is not like in preliminary proceedings, which is initiated upon a proposal submitted for opening bankruptcy proceedings. The Bankruptcy Law precisely regulates the powers of the temporary bankruptcy trustee and any expansion of these powers is contrary to the provisions of the Bankruptcy Law which regulate the procedure for overcoming the debtor's financial difficulties by submitting a proposal for opening a bankruptcy proceeding including a reorganization plan prepared.

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[44] Bankruptcy Law, Article 215-d paragraph 2 "*the temporary bankruptcy trustee shall perform an assessment of the amount of claims for the purposes of voting according to the reorganization plan prepared*", Article 215-g(2) "*...The temporary bankruptcy trustee shall perform the duties determined by the Decision of the Bankruptcy Judge, and if required, the bankruptcy trustee may be tasked with examining all the data on which the prepared reorganization plan is based.*"

[45] Decision by the Basic Civil Court Skopje on Security Measures 3 ST-124/18 of 26 April 2018

[46] Article 59 paragraph 1 of the Bankruptcy Law establishes the rules for special powers of the temporary bankruptcy trustee during the implementation of a regular preliminary proceeding to examine the conditions for opening bankruptcy proceedings.

48. **Fourth,** on 26 April 2018, the Court deposited the Reorganization Plan in the bankruptcy file of TE-TO for the purpose of examination thereof by its creditors, even though it was incomplete, unorderly and in contradiction with the provisions of the Bankruptcy Law.

49. **Fifth,** the Court, instead of by a written decision, asked TE-TO to correct the Reorganization Plan by a letter dated 30 April 2018.[47] By acting in this way, the Bankruptcy Judge acted contrary to Article 215-v paragraph (4) of the Bankruptcy Law, according to which if the drawn up reorganization plan contains any deficiencies and technical errors that can be corrected, the bankruptcy judge shall order the debtor to correct it within eight days. Instead, in the last sentence of the letter, the Bankruptcy Judge asked TE-TO to submit its proposal, evidence and corrected Reorganization Plan to the Court within eight days as from the receipt of the letter, otherwise the Court would act in accordance with Article 215-a of the Bankruptcy Law.[48]

50. The failure to issue a legally binding written decision including sanctions in accordance with the Bankruptcy Law, which stipulates that if the proposal for opening bankruptcy proceedings i.e. the reorganization plan is not corrected, it will result in the rejection of the proposal, is a flagrant violation of the provisions of the Bankruptcy Law. In addition, by the letter returning the Proposal to be corrected, the Court, beyond its powers established by the Bankruptcy Law, presumed when TE-TO would become unable to pay and suggested to TE-TO "*that the Debtor's account was blocked for 38 days, so the requests the Debtor to correct its proposal since within the deadline in the letter, its accounts would be blocked for more than 45 days, so the Debtor should submit a confirmation from the Central Registry of the Republic of Macedonia that the Debtor is insolvent in the sense of Article 5 of the Bankruptcy Law*".[49] Also, the Court requested from TE-TO to submit a report on its economic and financial status signed by the TE-TO management body that TE-TO was facing future insolvency.[50]

51. **Sixth,** the Court ignored the fact that TE-TO submitted its Proposal and Reorganization Plan due to the fact that its shareholders Bitar Holdings Limited and Toplifikacija AD Skopje initiated proceedings to enforce their claims against TE-TO based on loans given.[51] The Court did not at all assess the fact that TE-TO's account

[47] Request for duly preparing a proposal for opening bankruptcy proceedings by the Basic Civil Court Skopje dated 30 April 2018

[48] Request for duly preparing a proposal for opening bankruptcy proceedings by the Basic Civil Court Skopje dated 30 April 2018, page 3 "*The Court orders you to submit your Proposal, evidence and revised Debtor's Reorganization Plan to the Court within 8 days following the receipt of this Request in order for the Court to act on your Proposal in accordance with the Bankruptcy Law, otherwise the Court will act in accordance with Article 215-a of the Bankruptcy Law.*"

[49] Request for duly preparing a proposal for opening bankruptcy proceedings by the Basic Civil Court Skopje dated 30 April 2018, item 2 paragraph 2 on page 1

[50] Request for duly preparing a proposal for opening bankruptcy proceedings by the Basic Civil Court Skopje dated 30 April 2018, item 2 on page 1

[51] Point 1.2. of the Reorganization Plan, which describes the reasons that led to the occurrence of conditions for opening the bankruptcy procedure, specifies that due to the unexpected claim by the creditors that are also shareholders based on loans for the construction of the plant, the company is threatened by future insolvency. It was a claim by Toplifikacija AD based on a judgment passed by the Supreme Court of the Republic of Macedonia and a claim by Bitar Holdings Limited that came due for collection. Otherwise, the due date for the collection of Bitar Holdings Limited's claim was agreed in

was blocked by its shareholders that had claims of a lower payment priority order and whether those claims could at all be the grounds for insolvency in conditions where under the provisions of the Bankruptcy Law, they are classified as so-called contingent claims.[52]

52. **Eighth,** after receiving TE-TO's response to the letter, the Bankruptcy Judge did not request that such remarks be included in the Reorganization Plan. In other words, contrary to the intention of the legislator, instead of the submitted Plan being duly prepared, the creditors had insight into the initial text of the Reorganization Plan. Thus, the creditors that did not participate in the negotiations for accepting the Reorganization Plan were denied a full insight into the Reorganization Plan and all the corrections made in the initial text.

Did the Basic Civil Court act in accordance with the Bankruptcy Law when at the TE-TO hearing held on 5 June 2018, it ordered TE-TO to submit a revised Reorganization Plan including modifications to the classes of creditors?

53. The Basic Civil Court acted contrary to the Bankruptcy Law when it ordered TE-TO to submit a revised Reorganization Plan including modifications to creditor classes.

54. Pursuant to Article 215-g of the Bankruptcy Law, the bankruptcy judge passes the decision to initiate preliminary proceedings and determine security measures within 3 days from the day of submission of an orderly proposal as in Article 215-v of the Bankruptcy Law. Together with the adoption of such decisions, the court also prepares an announcement that is published on a bulletin board, in the Official Gazette of the Republic of Macedonia and in at least two high-circulation daily newspapers that are distributed on the territory of the Republic of Macedonia. Mandatory elements of such announcement include: a notification to creditors that they can inspect the prepared reorganization plan deposited in the bankruptcy file and a call to all interested stakeholders that have remarks on the proposed reorganization plan disputing its content, particularly regarding the grounds or amount of claims included therein, to submit such remarks to both the court and the debtor within 15 days as from the day of publication of such announcement in the "Official Gazette of the Republic of Macedonia".

55. The petitioner of the plan shall submit its response to such remarks to the competent court within 8 days as from the day of receipt thereof in the court. The same provision sets out that the bankruptcy judge can schedule a hearing at which certain issues shall be considered regarding the reorganization plan prepared. Scheduling a hearing at which certain issues shall be considered regarding the reorganization plan prepared is just a possibility and is by no means mandatory for the bankruptcy judge, and it depends on whether any of the creditors or interested stakeholders will submit any remarks.

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agreements concluded with TE-TO and there is nothing unexpected here. Also, the judgment of the Supreme Court in the Toplifikacija case was passed in December 2017.

[52] Bankruptcy Law, Article 116 paragraph 2 "*The claims of bankruptcy creditors of a lower payment priority order may be settled only after the claims of creditors of the previous (higher) payment priority order have been settled in full. Claims of bankruptcy creditors of the same payment priority order shall be settled in proportion to the amount of their claims*."

56. On 26 April 2018, the Court deposited the Reorganization Plan in the bankruptcy file of TE-TO for the purpose of inspection by creditors and on the same date it rendered the Decision on Security Measures, by which, among other things, it appointed a temporary Bankruptcy Trustee until deciding to initiate a preliminary proceeding.[53]

57. On 30 April 2018, the Court requested from TE-TO in writing to correct both the Proposal and the Reorganization Plan.[54] On 2 May 2018, TE-TO submitted a response to this letter.[55] On the same day, the Bankruptcy Judge passed a Decision to initiate preliminary proceedings and re-determined security measures and appointed a temporary Bankruptcy Trustee, stating that the previous security measures had ended. [56]The decision to initiate preliminary proceedings and the call to the creditors were published in the Official Gazette of the Republic of Macedonia No. 80 of 7 May 2018 and in the daily press, including the "Nova Makedonija" and "Vecher" newspapers of 8 May and 7 May 2018, respectively.[57] Along with the Decision to initiate preliminary proceedings, he also scheduled a hearing for deciding on the Proposal and voting on the Plan for 5 June 2018.

58. The Bankruptcy Judge, contrary to the provisions of Article 215-v paragraphs 3, 4 and 5 and in connection with Article 215-g paragraph 1 of the Law, deposited the Reorganization Plan in the bankruptcy file for inspection by creditors. By doing so, he prevented the creditors from receiving timely information about the changes in the Reorganization Plan, such that they could submit remarks to the revised Plan submitted.

59. Following the published announcement, several creditors submitted remarks to the Plan[58] after which the Debtor promptly submitted replies[59] and instead of the Court holding a hearing to decide on the Proposal and vote on the Reorganization Plan, it decided to hold a Meeting of the Assembly of Creditors to review the objections by the creditors submitted regarding the previously prepared Reorganization Plan.[60] By doing so, the Bankruptcy Judge acted contrary to the provision of Article 215-g paragraph 6 of the Bankruptcy Law. The Bankruptcy Law does not provide for the possibility to review creditors' remarks on a submitted plan at a hearing scheduled for voting on a reorganization plan.

60. Considering that the review of certain issues related to a submitted reorganization plan is not mandatory and may be held, after receiving the Statement of TE-TO, the Court had to convene a separate hearing regarding the remarks submitted, and not as the court named it "Meeting of the Assembly of Creditors to review the written

[53] Decision of the Basic Civil Court Skopje on Security Measures 3 ST-124/18 of 26 April 2018
[54] Request for duly preparing a proposal for opening bankruptcy proceedings by the Basic Civil Court Skopje dated 30 April 2018
[55] Response to the letter by TE-TO AD Skopje dated 02 May 2018
[56] Decision to initiate preliminary proceedings against TE-TO AD Skopje by the Basic Civil Court Skopje dated 2 May 2018
[57] Announcement for initiating preliminary proceedings against TE-TO AD Skopje by the Basic Civil Court Skopje dated 8 May 2018
[58] Remarks on the Reorganization Plan by Komercijalna Banka AD Skopje dated 21 May 2018; Comments on the Reorganization Plan by Toplifikacija AD Skopje dated 21 May 2018; Objections and Remarks on the Reorganization Plan by GAMA dated 22 May 2018
[59] Response to the Remarks of Komercijalna Banka by TE-TO AD Skopje dated 29 May 2018; Response to the Remarks of Toplifikacija AD Skopje by TE-TO dated 29 May 2018; Response to the Remarks of GAMA by TE-TO AD Skopje dated 30 May 2018
[60] Records from the hearing of the Basic Civil Court Skopje dated 5 June 2018

objections on the Reorganization Plan submitted". It should be particularly noted here that the bankruptcy procedure against TE-TO was not initiated in order to talk about the formation of an Assembly of Creditors. Also, it is a hearing at which certain disputed issues are considered, and no decisions are made, nor at this stage has the Law established that it is possible to submit any revised Reorganization Plan. In that sense, the voting rights of Creditors are not determined, as was done by the Court.

61. The Bankruptcy Judge ordered TE-TO to submit a revised or consolidated text of the Reorganization Plan within 3 days as from the day of the hearing and to submit it to the Creditors for inspection in order to familiarize themselves with the new text.[61] The Bankruptcy Judge concluded that some of the remarks were of an essential nature and that the Plan should be changed in terms of grouping the creditor classes, so therefore, a new Reorganization Plan should be prepared.

62. Pursuant to Article 215-b paragraph 1 indent 2 of the Bankruptcy Law, the content part of the Reorganization Plan shall, among other things, contain a List of Creditors, including a division into creditor classes and the basis on which such classes are formed. The Bankruptcy Judge, based on an assessment of the Plan as per Article 215-v paragraph 3 of the Law, established that the Reorganization Plan contained some deficiencies, and among other deficiencies, it was stated that the creditor classes were incorrectly determined. According to the above mentioned provision, the Bankruptcy Judge had to reject the Proposal and the Reorganization Plan as being prepared contrary to the Law, i.e., they do not comply with the general provisions of the Bankruptcy Law that refer to the orders of payment priority of creditors' claims and the priority for the collection of claims, he allowed the proceeding under the Reorganization Plan to continue despite the fact that the requested corrections to the Plan that were of an essential nature were not made to the Reorganization Plan.[62]

63. The Bankruptcy Judge, in addition to not rejecting the Reorganization Plan, allowed the review of the written remarks by creditors on the proposed Reorganization Plan at the hearing scheduled for voting on the Reorganization Plan,[63] instead of convening a separate hearing according to Article 215-g paragraph 6 of the Bankruptcy Law,[64] where certain issues related to the submitted Reorganization Plan would be considered.[65] There is no legal grounds to revise the Reorganization Plan at a later stage of the proceeding if this is not done in accordance with Article 215-v of the Bankruptcy Law.[66] However, the Bankruptcy Judge allowed the start of a development of a new Reorganization Plan during a hearing scheduled for voting on the proposed Reorganization Plan, particularly to amend the provisions of the content part of the Reorganization Plan that refer to the formation of creditor classes and the manner of their settlement.

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[61] Records from the hearing of the Basic Civil Court Skopje dated 5 June 2018

[62]Response to Remarks of GAMA by TE-TO AD Skopje dated 30 May 2018

[63]Remarks on the Reorganization Plan by Komercijalna Banka AD Skopje dated 21 May 2018; Comments on the Reorganization Plan by Toplifikacija AD Skopje dated 21 May 2018; Objections and Remarks on the Reorganization Plan by GAMA dated 22 May 2018

[64]Bankruptcy Law, Article 215-g paragraph 6, "*During the preliminary proceeding, the bankruptcy judge may schedule a hearing at which certain issues related to the previously drawn up reorganization plan shall be considered*."

[65]Records from the hearing of the Basic Civil Court Skopje dated 5 June2018

[66]Bankruptcy Law, Article 215-v paragraph 4, "In the event that the prepared reorganization plan contains deficiencies and technical errors that can be corrected, the bankruptcy judge shall order the debtor to duly prepare it within eight days."

64. Pursuant to Article 215-g paragraph 5 of the Bankruptcy Law[67], the creditors could contest the Reorganization Plan's content by their remarks submitted, particularly the grounds and amount of the claims included. So, at the hearing scheduled regarding any remarks, certain issues related to the content of the reorganization plan may be reviewed.

65. The bankruptcy judge does not have the possibility, in accordance with law, to order the preparation of a new reorganization plan in terms of creditor classes determined, because it is a matter that the bankruptcy judge duly observes *ex officio* in the sense of Article 215-v paragraph 3 of the Bankruptcy Law and not following an objection by creditors. As we have already indicated, Article 215-v paragraph 3 of the Bankruptcy Law sets out the possibility of a preliminary examination of the proposal for initiating bankruptcy proceedings and of the plan submitted. As part of such examination, the bankruptcy judge shall thoroughly examine whether the plan proposed is in compliance with law, and it was TE-TO that was obliged to regulate the issues related to the creditor classes in its Plan according to law.

Was the TE-TO Reorganization Plan dated 6 June 2018 prepared in accordance with the Bankruptcy Law, particularly in terms of: (i) the division of creditor classes; (ii) the deadline for execution of the Reorganization Plan; and (iii) financial projections, including the projected Income Statement, Balance Sheet and Cash Flow Statement for the period of execution of the Reorganization Plan?

66. On 6 June 2018, TE-TO submitted a consolidated text of its Reorganization Plan.[68] Along with the consolidated text of the Reorganization Plan, it also submitted new plan acceptance statements by the shareholder Bitar Holdings Limited and Landensbank Berlin dated 12 June 2018, that they accepted the consolidated text of the Reorganization Plan.[69] It is evident from content of the consolidated text of the Reorganization Plan that it is not a consolidated text of the Reorganization Plan, but a submission of a new Reorganization Plan where changes have been made in terms of determining new creditor classes.[70]

67. The Bankruptcy Judge acted contrary to the Bankruptcy Law, especially the provisions of Article 215-v paragraphs 3, 4 and 5, when he allowed TE-TO to submit a new Reorganization Plan after holding the hearing for deciding on the proposal for initiating the bankruptcy proceeding and the Reorganization Plan prepared. The mentioned legal provisions set out that the bankruptcy judge shall fully discuss this issue in a preliminary proceeding for the examination of the proposal for initiating bankruptcy proceedings and reorganization plan, considering that it is an issue of the so-called "substantive legal nature", which makes the Plan illegal and against the law.

68. Therefore, it is not a deficiency that can be corrected, nor is it a technical error in the sense of Article 215-v paragraph 4 of the specified Law. Hence, it is an intervention in the content part of the Reorganization Plan and a wrong determination of creditor

[67]Bankruptcy Law, Article 215-g paragraph 5, "*... all interested stakeholders having objections to the proposed reorganization plan disputing its content, and especially the grounds or the amount of included claims therein, shall submit such objections to both the court and the debtor within 15 days as from the day of publication of the announcement in the "Official Gazette of the Republic of Macedonia"*."

[68] Consolidated text of the Reorganization Plan of TE-TO AD Skopje dated 6 June 2018

[69] Records from the hearing of the Basic Civil Court Skopje dated 14 June, 2018

[70] Consolidated text of the Reorganization Plan of TE-TO AD Skopje dated 6 June 2018, p. 31-37

classes contrary to law. The formation of creditor classes according to the Bankruptcy Law is also important in terms of establishing the voting rights of creditors and the conducting of a proceeding for Plan adoption in accordance with the Bankruptcy Law. This is another reason why the Court had to assess the Plan as to whether it was drawn up in accordance with law.

69. The Reorganization Plan dated 6 June 2018 contained the same substantial deficiencies as the Reorganization Plan dated 4 April 2018 (see paragraphs 21-40 of this Opinion), contrary to the Bankruptcy Law.

Division of Creditor Classes

70. TE-TO establishes two classes of creditors by its Reorganization Plan submitted on 6 June 2018 to both the Court and other Creditors, where the first class consists of creditors with secured claims, while the second group includes creditors with unsecured claims, which also includes TE-TO shareholders.[71] This classification of creditors is contrary to the legal provisions envisaging that the claims of shareholders shall be treated as of a lower order of payment priority, i.e., in a separate class. All the more so that the majority shareholder of TE-TO, Bitar Holdings Limited had a majority of 66.61% in the second class, which means that it had a decisive influence to accept the Plan. Shareholders should not have the right to vote at all on the Reorganization Plan or possibly, they had to be grouped into a separate class.

71. The Bankruptcy Law stipulates that the claim of a partner or shareholder, which refers to the return of a loan, shall belong to the last order of payment priority, for any claims paid to creditors of a lower order of payment priority.[72] These rules are mandatory for TE-TO when determining its creditor classes in its Reorganization Plan. When classifying its creditors in the second group, TE-TO did not make a distinction between its shareholders that provided loans and other unsecured creditors with claims of a higher order of payment priority.

Period of Implementation of the Plan

72. The Bankruptcy Law[73] stipulates that the period for implementation of the Reorganization Plan may not be longer than five years, except in case where the measures for implementation of the Reorganization Plan refer to:

    (a) Any anticipated repayment of claims in instalments, modification of maturity dates, interest rates or other conditions of the loan, credit or other claim or security instruments;

    (b) The repayment period of the credit or loan taken during the term of the preliminary proceeding or in accordance with the Reorganization Plan; as well as

    (c) The maturity dates of the debentures issued.

73. The Reorganization Plan submitted on 6 June 2018 set out a period of 12 years for the implementation of the Plan. In the first ten years as from 2018, the claims of secured

[71] Consolidated text of the Reorganization Plan of TE-TO AD Skopje dated 6 June 2018, p. 31-37
[72] Bankruptcy Law, Article 118 paragraph 1 point 5
[73] Bankruptcy Law, Article 215-b paragraph 1 point 2 indent 13

creditors should be paid, while the claims of unsecured creditors shall be reduced by 90% and their payment shall be made in 2028 and 2029.

74. The analysis of the cited provisions indicates that the claims of unsecured creditors of higher priority which are not based on loans or credits and which are due, cannot be subject to suspension of longer than five years.

Financial Projections, Including the Projected Income Statement; Balance Sheet and Cash Flow Statement for the Period of Execution of the Reorganization Plan

75. In its financial projections, TE-TO did not project its liabilities based on profit tax and written-off receivables and thus created conditions where the Reorganization Plan could not be implemented, that is, considering the amount of assets that should be paid off on this ground, the Reorganization Plan is non-implementable.

Were TE-TO shareholders who had claims against TE-TO based on loans treated more favourably than the creditors in the unsecured creditor class pursuant to TE-TO's revised Reorganization Plan dated 6 June 2018?

76. Financing of a joint stock company is done either through borrowing or through the issue of securities. In this specific case, the construction of TE-TO plant was financed by borrowing, mostly through loans from commercial banks, loans from other trading companies and loans from legal entities that were shareholders of TE-TO.

77. The Bankruptcy Law regulates, in a general way, the treatment of any claims that legal entities have against an insolvent company, regardless of whether it is a proceeding for the collective settlement of creditors in a bankruptcy proceeding or a reorganization procedure in a preliminary proceeding based on a proposal and reorganization plan filed by the debtor, that is, in this specific case, TE-TO. The treatment of banks based on loans extended for TE-TO's needs in this specific case have the character of secured claims, considering the fact that they have acquired a right of lien – mortgage or pledge over movable assets or immovable assets that are the property of TE-TO. Claims held by third-party legal entities that provided loans based on the investment activity of TE-TO are creditor claims that belong to a higher order of payment priority depending on whether they were secured or not.

78. The claims of shareholders that financed the company with loans belong to claims of the last order of payment priority.[74] The claims of shareholders or partners of a lower order of payment priority can be settled only after the claims of the creditors of the previous order of payment priority, that is, the creditors of the higher payment priority order, have been fully settled.[75]

79. The Court, by accepting the Reorganization Plan submitted on 6 June 2018, by which TE-TO treated is shareholders' claims based on loans in the Reorganization Plan as

[74]Bankruptcy Law, Article 118 paragraph 1 point 5

[75]Bankruptcy Law, Article 116 paragraph 2, *"The claims of bankruptcy creditors of a lower order of payment priority may be settled only after the claims of creditors of the previous (higher) payment priority order have been settled in full. Claims of bankruptcy creditors of the same payment priority order shall be settled in proportion to the amount of their claims."*

second-class creditors, i.e., creditors of a higher order of payment priority, acted contrary to the Bankruptcy Law to the detriment to all other creditors ranked in the second class – creditors with unsecured claims. The Court allowed for these creditors to be placed in a preferential position and treated them as creditors of a higher order of payment priority. Thus, based on the loans granted in violation of the Bankruptcy Law, according to the consolidated text of the Reorganization Plan, the shareholders:

(a) Acquired a preferential position in the payment of their claims, together with other creditors of a higher order of payment priority;

(b) Were given voting rights just like creditors of a higher order of payment priority and thus, considering the amount of their claims, they had a majority in this creditor class.

80. The rights of creditors ranked as creditors of a lower order of payment priority are very limited given their nature as contingent claims, the settlement of which can only be considered if other creditors' claims are settled in full. This conditional role of these claims does not give these creditors the possibility to be proposers for the initiation of a bankruptcy proceeding, to have a procedural role in the bankruptcy proceeding like the creditors of a higher order of payment priority and they cannot vote at the Assembly of Creditors. Upon a proposal submitted in a reorganization procedure for initiating a bankruptcy proceeding with a reorganization plan, these general bankruptcy proceeding rules regulated by the Bankruptcy Law shall apply.

81. By the consolidated text of the Reorganization Plan, the ranking of unsecured creditors was done contrary to the general provisions of the Bankruptcy Law. TE-TO was obliged to apply the general rules of the bankruptcy proceeding during the preparation of its Reorganization Plan and thus prevent the occurrence of harmful consequences and preferential treatment of creditors.

82. When deciding on the Reorganization Plan dated 24 April 2018 and the corrected (new) Reorganization Plan dated 6 June 2018, the Court had to apply the provisions of Article 215-v and reject such Plan during a preliminary evaluation of the Reorganization Plan since it was not in accordance with law.

83. In this specific case, the fact that Article 215-d paragraph 6 of the Bankruptcy Law sets out that the provisions regulating the reorganization procedure shall also apply to non-bankruptcy reorganization, means that the special provisions of the Bankruptcy Law shall also apply to non-bankruptcy reorganization. This is supported by the fact that the Bankruptcy Law does not regulate the reorganization proceeding as a procedure separate from the liquidation procedure, so in this regard, the criteria for the ranking of creditors incorporated in the Bankruptcy Law are common provisions for all procedures.

Does the TE-TO Reorganization Plan dated 6 June 2018 show beyond any doubt that the unsecured creditors would be more favourably settled thereby rather than by the realization of TE-TO assets?

84. The Bankruptcy Law contains provisions specific to the procedure for realization of assets, reorganization procedure under the conditions of an initiated bankruptcy proceeding and reorganization procedure in a preliminary proceeding according to a plan drawn up by the debtor.

85. Given that the Reorganization Plan dated 24 April 2018 and the revised (new) Reorganization Plan dated 6 June 2018 do not contain sufficient information that any reorganization plan submitted along with a proposal for opening bankruptcy proceedings must contain, namely: data on the estimated value of TE-TO's entire immovable and movable assets, while indicating both values in terms of continuing the business venture and in terms of foreclosure (realization) of assets, an inventory of such assets is not attached to identify what property TE-TO avails of, so unsecured creditors cannot estimate the percentage offered for payment amounting to 10% of the claims without interest established within two years after a ten years' lapse of time, within which secured creditors shall be paid, nor TE-TO argued that with facts.

86. In a situation where both Reorganization Plans contain a series of deficiencies that make them contrary to law, and where the Court made a series of procedural errors, including the one that allowed the creditors to discuss creditor classes, and did not apply the Bankruptcy Law when evaluating the criteria for creation of creditor classes and allowed the formation of a creditor class which includes the shareholders of TE-TO, who according to all the rules should have been in another class that would wait for the settlement of creditors of a higher order of payment priority so that their claims can be paid, which the Law ranks as a claim of a lower order of payment priority, it is reasonable to expect that a bankruptcy proceeding including a foreclosure (realization) of assets and collective settlement would be more favourable for them.

Dejan Kostovski
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Skopje, 25 November 2022

ANNEX 1 List of Documents Reviewed

1. Proposal for the Implementation of a Reorganization Plan by TE-TO AD Skopje dated 24 April 2018

2. Reorganization Plan by TE-TO AD Skopje dated 4 April 2018 with annexes

3. Decision of the Basic Civil Court Skopje on Security Measures dated 26 April 2018

4. Submission by Toplifikacija AD Skopje dated 25 April 2018

5. Agreement on the Regulation of Rights and Obligations between Bitar Holdings Limited and TE-TO AD Skopje dated 8 March 2018 solemnized under ODU no. 78-18

6. Agreement on the Regulation of Rights and Obligations between Bitar Holdings Limited and TE-TO AD Skopje dated 8 March 2018 solemnized under ODU no. 79-18

7. Agreement on the Regulation of Rights and Obligations between Bitar Holdings Limited and TE-TO AD Skopje dated 8 March 2018 solemnized under ODU no. 85-18

8. Agreement on the Regulation of Rights and Obligations between Bitar Holding Limited and TE-TO AD Skopje dated 8 March 2018 solemnized under ODU no. 83-18

9. Submission by Toplifikacija dated 30 April 2018

10. Request for duly preparing a proposal for initiating bankruptcy proceedings by the Basic Civil Court Skopje dated 30 April 2018

11. Reply to a letter by TE-TO AD Skopje dated 2 May 2018, with annexes

12. Decision to initiate preliminary proceedings against TE-TO AD Skopje by the Basic Civil Court Skopje dated 2 May 2018

13. Announcement for initiation of preliminary proceedings against TE-TO AD Skopje by the Basic Civil Court Skopje dated 8 May 2018

14. Submission by Toplifikacija AD Skopje dated 14 May 2018

15. Remarks on the Reorganization Plan by Komercijalna Banka AD Skopje dated 21 May 2018

16. Response to Remarks of Komercijalna Banka by TE-TO AD Skopje dated 29 May 2018

17. Comments on the Reorganization Plan by Toplifikacija AD Skopje dated 21 May 2018

18. Response to Comments of Toplifikacija AD Skopje by TE-TO dated 29 May 2018

19. Objections and Remarks on the Reorganization Plan by GAMA dated 22 May 2018

20. Response to Remarks of GAMA by TE-TO AD Skopje dated 30 May 2018

21. Report on the economic and financial status of TE-TO AD Skopje by Bankruptcy Trustee Marinko Sazdovski dated 4 June 2018

22. Submission by TE-TO AD Skopje dated 4 June 2018

23. Records from the hearing of the Basic Civil Court Skopje dated 5 June 2018

24. Submission by Toplifikacija AD Skopje dated 8 June 2018

25. Consolidated text of the Reorganization Plan of TE-TO AD Skopje dated 6 June 2018, with attachments

26. Submission by Toplifikacija AD Skopje dated 12 June 2018

27. Objection and Remarks by GAMA dated 12 June 2018

28. Submission by Ilirika dated 13 June 2018

29. Submission by Toplifikacija AD Skopje dated 13 June 2018

30. Records from the hearing of the Basic Civil Court Skopje dated 14 June 2018

31. Decision of the Basic Civil Court Skopje on the Adoption of a Reorganization Plan dated 14 June 2018

32. Decision of the Appellate Court Skopje dated 30 June 2018

33. Notice from the State Attorney of the Republic of North Macedonia dated 24 December 2019, with annexes

ANNEX 2 CV

Dejan Kostovski
Bankruptcy Expert
IMAGO - ENA DOOEL Skopje
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AREAS OF EXPERTISE

- Bankruptcy and reorganization;
- Corporate Law/Mergers and Acquisitions
- Commercial disputes
- Labor disputes.

LANGUAGES

- Macedonian
- Serbian
- Croatian
- English

EDUCATION

- International Insolvency Institute, Arizona State Institute, Russian and East European Studies Consortium, Tempe State University, Arizona, USA, bankruptcy training, held in USA (November – December 1998);
- The American Bar Association and the Association of Judges of the Republic of Macedonia – educator training (November 1998);
- The American Bar Association and the Association of Judges of the Republic of Macedonia, Court Administration and Technology Program training held in the United States (September 1 – 21, 1997);
- Institute for the International Development of Law of Rome, Republic of Italy and the Association of Economic Lawyers of the Republic of Macedonia, training on bankruptcy reform, law and practice held in Mavrovo, Republic of Macedonia (December 1-5, 1997);
- Bar exam, "Ministry of Justice of the Republic of Macedonia" (1986);
- Ss. Cyril and Methodius University in Skopje, Republic of Macedonia, Faculty of Law, graduated in law (1979 – 1983).

CAREER

- Legal advisor, founder and manager of the consulting company IMAGO – ENA DOOEL Skopje (2009 - ongoing);
- Judge in the Basic Court Skopje I - Skopje - Labor Disputes Division (2005 - 2006);
- Judge in the Basic Court Skopje I - Skopje - Commercial Disputes Division (2004 - 2005);
- Judge in the Basic Court Skopje I - Skopje - Bankruptcy Division (1996-2004);
- Legal trainee and associate at the Basic Court of Joint Labor, Republic Court of Joint Labor and District Commercial Court (1985 – 1995).

OTHER ACTIVITIES

- **WORK ON BANKRUPTCY REGULATION**
  - Member of the Working Group for amendments to the Law on Bankruptcy (2013);
  - Member of the Working Group for drafting of professional standards, regulations relating to the examination for obtaining a license for an Licensed Bankruptcy Trustee, the management of the bankruptcy estate and the sale thereof, including Bankruptcy Trustee's fees and rewards and the Code of Ethics of Bankruptcy Trustees (2006);
  - Member of the Working Group for drafting the Bankruptcy Law (2005);
  - Member of the Working Groups for drafting the Securities Law (2005);
  - Member of the Working Group for drafting the Law Amending the Bankruptcy Law from 1997 (2000 and 2004);
  - Member of the Working Group for drafting by-laws (2000).

- **TEACHING EXPERIENCE**
  - Occasional educator at the Academy of Judges and Public Prosecutors of the Republic of Macedonia (2009 – 2019);
  - Occasional educator at the Chamber of Bankruptcy Trustees of the Republic of Macedonia (2009- to date);
  - Occasional external lecturer in business law master studies at the Faculty of Law "Justinian Prvi" (Iustinianus Primus) Skopje at Ss. Cyril and Methodius University in Skopje

- **COMMISSIONS AND MEMBERSHIPS**
  - Member of the first commission for the exam for acquiring the title of Licensed Bankruptcy Trustee, established by the Minister of Justice (2001);
  - Member of the Bar Association of the Republic of Macedonia;

- Former member of the Management Board of the Macedonian Bankruptcy Association;
- Former member of the Association of Judges of the Republic of Macedonia;
- Former member of the publishing board of the Court Bulletin, a magazine published by the Association of Judges of the Republic of Macedonia.

- **PROJECTS**
  - The "Debt Resolution and Exit from the Market" project financed by the International Financial Corporation, World Bank Group (2018 and ongoing);
  - The "Strengthening the Administrative Capacities for Implementing the Legal Framework for Bankruptcy and Liquidation of Commercial Companies" project financed by the European Union (2016 to 2018);
  - The "Monitoring Governance for the Growth of Justice" project, implemented by the Institute for European Politics - EPI Skopje, financed by the Regional Cooperation Council (2016);
  - The project for Legal and Judicial Implementation and Institutional Support (LJIIS) of the World Bank and the Ministry of Justice of the Republic of Macedonia (2009-2011);
  - The Legal Reform Project – Harmonization of Commercial Law in the Region – Bankruptcy Law, which was organized by the GTZ Open Regional Fund for South East Europe (2008 to 2009);
  - The project for Business Environment - Legal and Regulatory Framework, of the US Agency for International Development - USAID and the Ministry of Economy of the Republic of Macedonia, implemented by Booz Allen Hamilton, (2007);
  - The Commercial Law Project, organized by the Center for Financial Engineering in Development (CFED) of USAID – Macedonia, in Skopje, Republic of Macedonia (1998);
  - The Bankruptcy Administration Project, financed by the World Bank and in cooperation with the Association of Judges of the Republic of Macedonia, in Skopje. Republic of Macedonia (1997 – 1999).

- **CONFERENCES:**
  - Panelist at the Regional Insolvency Conference entitled "Current Issues in Bankruptcy Law - Legislation and Practice" organized by the Chamber of Bankruptcy Trustees, in Banja Luka, Republika Srpska, Bosnia and Herzegovina, November 2012;
  - Panelist at the First International Conference of Southeast European Countries, entitled "Modern Trends in International Insolvency Law - The Role of Bankruptcy Trustees", organized by the Bankruptcy Trustee Licensing Agency of the Republic of Serbia and GTZ Open Regional Fund for Southeast Europe, Belgrade, Republic of Serbia, December 2008;

- Panelist at the Regional Insolvency Conference "Law and Practice", organized by GTZ Open Regional Fund for Southeast Europe, in Banja Luka, Republika Srpska, Bosnia and Herzegovina, February 2008;
- Panelist at the regional insolvency conference "Bankruptcy Law of Montenegro - Further Directions of Reform in the Regional Context", organized by GTZ Open Regional Fund for South-East Europe, in Herceg Novi, Montenegro, June 2008;
- Panelist at the conference organized by INSOL Europe and the Bankruptcy Licensing Agency of the Republic of Serbia entitled "Insolvency, Reorganization and Failed Investment in Eastern Europe", organized in Belgrade, Republic of Serbia, May 2007;
- Panelist at a conference on the harmonization of the Bankruptcy Law and the new Bankruptcy Law Procedure, organized by the Faculty of Law in Nis, Republic of Serbia, November 2005;
- Panelist at the "European Judicial Area" conference organized by the University of Maribor, Faculty of Law, Republic of Slovenia, August 2005;
- Panelist at a conference on bankruptcy in the countries of Central and Eastern Europe as an opportunity for reorganization organized by the Bankruptcy Association of the Republic of Macedonia in Ohrid, Republic of Macedonia, June, 2000.
- American Bankruptcy Institute Winter Leadership Conference held December 3-5 in Tucson Arizona USA, 1998.
- Participated in several round tables, workshops and was invited several times by the Bar Association of the Republic of Macedonia to annual consultations as a lecturer on bankruptcy proceeding topics.

PUBLICATIONS

- **BOOKS**
  - Commentary on the Bankruptcy Law, Akademik, Skopje, Republic of Macedonia, 2014, author
  - Bankruptcy Law, Bylaws, Professional Standards, Code of Ethics for Bankruptcy Trustees – Commentary, USAID Business Environment Project and Ministry of Economy Skopje, Republic of Macedonia, 2007 author
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  - Basics of Corporate Risk Management – Practical Aspects, Skopje, Republic of Macedonia, Printing House Europa 92, January 2003 co-author

- Handbook for the Protection of Creditors' Rights in Bankruptcy Proceedings, Skopje, Republic of Macedonia, Printing House TIV TOP March, 1999, co-author
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  - "The Bankrupt Debtor as a Participant in the Payment Transaction According to the Legislation of the Republic of Macedonia", The Law of the States in the Region, Institute for Comparative Law, Belgrade, 2010, Republic of Serbia, p. 218, co-author.
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