GENERAL PERSPECTIVES ON THE POSSIBLE EFFECTS OF PANDEMIC COVID-19 ON JUDICIAL RECOVERY

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Abstract: This article aims to verify the effects of the COVID-19 pandemic on the Judicial Recovery Institute. The study of the subject is important because the pandemic has the capacity not only to aggravate the economic-financial crisis of debtors who were already in the process of restructuring, but also to lead companies to make the request. The hypothesis is that the agents to whom the norm is addressed are restricted, in view of the necessary link with the entrepreneurial nature of the activity, ruling out a large part of activities whose economic relevance is latent. And the method is the deductive one, starting from research to the case.

Keywords: COVID-19; Judicial Recovery; Law 11.101/2005; Pandemic; Enterprise.

1 Introduction

COVID-19 pandemic, the biggest global crisis faced since Second World War (UN, 2020), has generated a global GDP contraction of 5.2% since the beginning of 2020, according to the World Bank (2020). In addition, the International Monetary Fund (IMF) estimates a 5.8% retraction in Brazilian GDP in 2020. This poses the challenge of mitigating the impacts arising from this crisis on the instruments available to insolvent companies and, among them, the Judicial Recovery Institute. This can be understood as a set of acts aimed at overcoming the crisis of viable companies, pursuant to article 47 of Law No. 11,105/2005 (TOMAZETTE, 2017, p. 88).

The study about the possible impacts of the pandemic in the Brazilian scenario is necessary, considering the possibility of an increase in the number of judicial recovery actions. This is because the restrictions imposed and economic impacts resulting from the pandemic have the power to generate consequences not only to companies' restructuring of debts –

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demonstrating the potential for worsening the economic and financial crisis of debtors in restructuring process – but also in leading companies to require recovery, due to the decrease in cash flow (PAULA; ANDRADE, 2020, p. 1).

The ideas developed by Márcio Souza Guimarães (2017) are used as the theoretical framework of this study in relation to the analysis of the normative diploma, as the author addresses how the theory accepted by the legislator is unable to encompass singularities present in the Brazilian social-economic context, a situation that becomes evident with the current pandemic. The ideas developed by Scalzilli; Spinelli and Tellechea (2020) are used regarding the context generated by COVID-19 reflections. The authors address the jurisprudential trend of applying access to Judicial Recovery to other economic actors that are considered "non-entrepreneurs," a measure that lacks initiatives by the Legislative Branch that, based on specific and delimited criteria, determine changes necessary to supply the current deficiency (SCALZILLI, SPINELLI AND TELLECHEA, 2020, p. 68)[6] .

In addition to the literature review on the subject, we used the deductive method, which goes from research to case, verifying hypotheses developed from a pre-established theoretical method (CAPPI, 2017, p. 396). The aim of the study, using this method, consists of provisional assertion status that will be tested in a different context from the one that generated it (MACHADO, 2017, p. 362).

Therefore, the main point of this inquiry is: Are the mechanisms present in Law 11,101/2005 capable of attenuating the effects of the crisis regarding the Judicial Recovery Institute? The hypothesis is that, despite being an essential mechanism for the maintenance of business activity, target agents of the regulation are restricted, considering the necessary link with the business nature of the activity. That is, the fact that the Law only allocates the institute to business economic agents, legal and objective criterion, excludes a large part of activities whose economic relevance is latent[7], preventing the instrument from being able to mitigate the effects of the crisis, due to its lack of effectiveness and adequacy.

This study is divided into five parts. The first is this introduction, which aims at establishing the general lines of the research. The second is aimed at opposing the Institute in Law and in practice. The third, in turn, brings comments on the list of business economic agents. The fourth demonstrates the need to reform Law 11,101/2005, and the last is intended for conclusion.

[6] The insufficiency of the Law under discussion began to be evidenced from the ordinance No. 467/16, a reflection of the crisis experienced by the country between 2014 and 2016 and the response that the bankruptcy and recovery diploma gave in relation to the issue, demonstrating more clearly the need for a reform.

[7] “As provided for in art. 2 of the LRF, some entrepreneurs or business companies "do not have the right to apply for judicial recovery nor do they submit to bankruptcy," since "concurrence rules contained in the LRF are not applicable to public corporations and government-controlled companies, and public or private financial institution, credit cooperative, consortium, supplementary pension entity, healthcare plan operator company, insurance company, capitalization company and other entities legally equivalent to the above” (AYOUB; CAVALLI, 2013, p. 43).”

2 The Institute of Judicial Recovery: Theory and Practice Today

2.1 The Institute of Judicial Recovery in Law No. 11,101/2005

The Judicial Recovery Institute, provided for in Law No. 11,101/05 has as its main characteristic the incentive to negotiation between debtor and creditors, creating instruments of coordination between these interests. The Law creates provisions capable of stimulating negotiation, promoting a balance between the objectives of the parties involved towards the preservation of the company and its social function[8]. Therefore, it constitutes a framework for institutional improvement of companies according to the best practices internationally adopted, stimulating investment, credit, and employment in Brazil (LISBOA, 2005, p. 21)[9].

One of the examples of these mechanisms is the General Meeting of Creditors, a forum for discussing creditors interests, which can be composed of three classes: workers, creditors with collateral rights or special privileges, and unsecured creditors or with general privileges (LISBOA, 2005, p. 19). Thus, there is also the possibility of creating the Creditors Committee, which formed by representatives of each of the three classes mentioned above, whose function is to oversee the debtor's administration during the process, ensuring transparency of procedures and preventing fraud (LISBOA, 2005, p. 20).

Furthermore, the Law defines in art. 53 the presentation, by the debtor, of a judicial recovery plan that represents the initial proposal of an agreement to be signed with the creditors (TOMAZETTE, 2017, p. 280). In this, all creditors have the opportunity to express themselves by rejecting or accepting the plan; if there is no objection, this is maintained in a tacit way, if there is, the Creditors' Assembly will be responsible for the approval - or not - of the plan[10][11]. Therefore, in general, the Law aims to provide a wide range of economic instruments for the Judicial Recovery to enable the restructuring of the company and the preservation of employment (LISBOA, 2005, p. 17), however, as it will be seen further on, an empirical analysis of the Judicial Recovery Institute is necessary in light of the current economic crisis

[8] Social function is the concern that subjective rights can be instruments for the construction of a fairer society, presenting itself as the ultimate expression of the business activity's commitment to the human dignity, "including to highlight the resulting duties for the company (FRAZÃO, 2009, p. 23)".

[9] The requirements for granting the Judicial Recovery are defined in articles 47 and 48 of the Law. Only by meeting specific requirements recovery can be required. Once the recovery process has been granted, the judge will appoint a receiver to oversee the debtor's assets management and assist the magistrate with the process. The administrator must respect the explicit interests in the contract or statute for the achievement of the corporate purpose, based on the duty of loyalty to the superior relevance of the company to the detriment of its private interest (REIS, 2011, p. 7).

[10] In general terms, if the meeting does not approve the plan, Law determines that the ex-officio judge decrees bankruptcy of the debtor, pursuant to art. 56, paragraph 4. However, if the plan is approved, an agreement between creditor and debtor is allowed and the judicial approval represents the novation of debts under the terms and interest conditions established in the plan (LISBOA, 2005, p. 20).

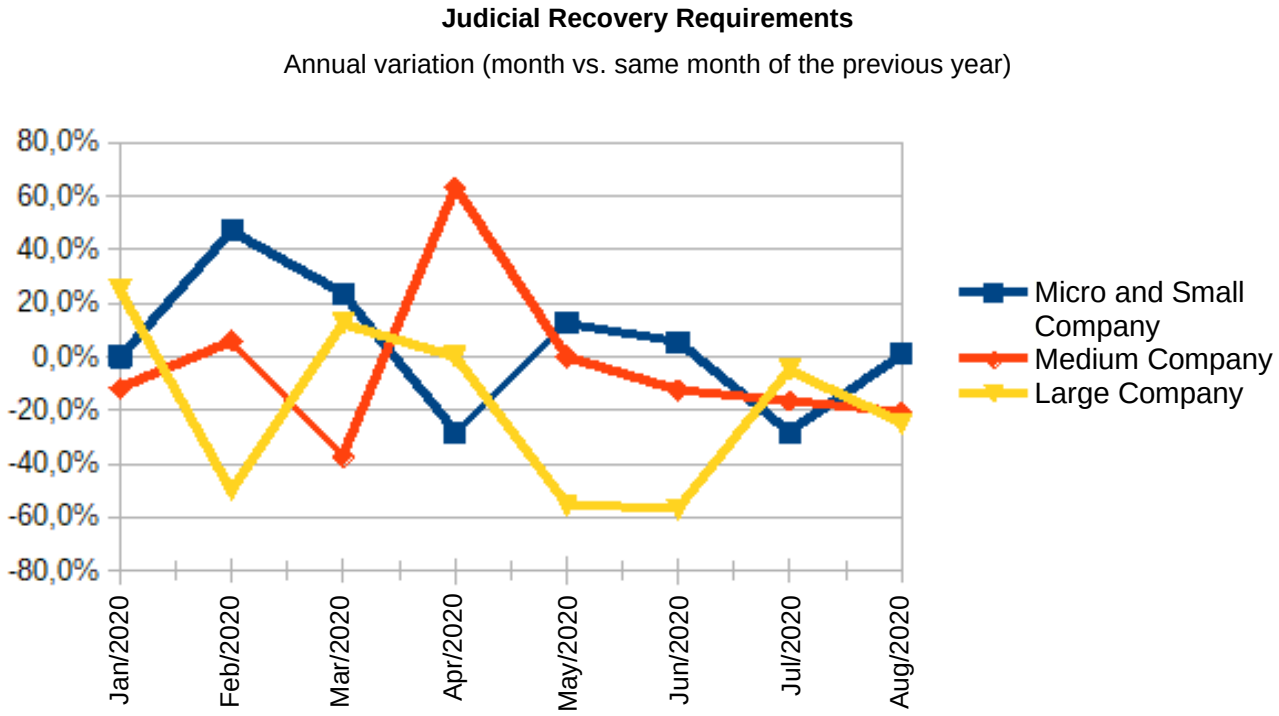
[11] Another point to be highlight is the existence of several mechanisms that accomplish the company's capacity to reorganize itself, such as the forecast that new financing and loans granted to the firm during the recovery should receive privileged treatment in the event of bankruptcy and; the prohibition of sale or removal from the establishment of the debtor of capital goods leased or sold in trust and that are essential to their activity during the stay period (LISBOA, 2005, p. 21).

arising from the COVID-19 pandemic.

2.2 The COVID-19 Pandemic and Judicial Recovery Requirements:

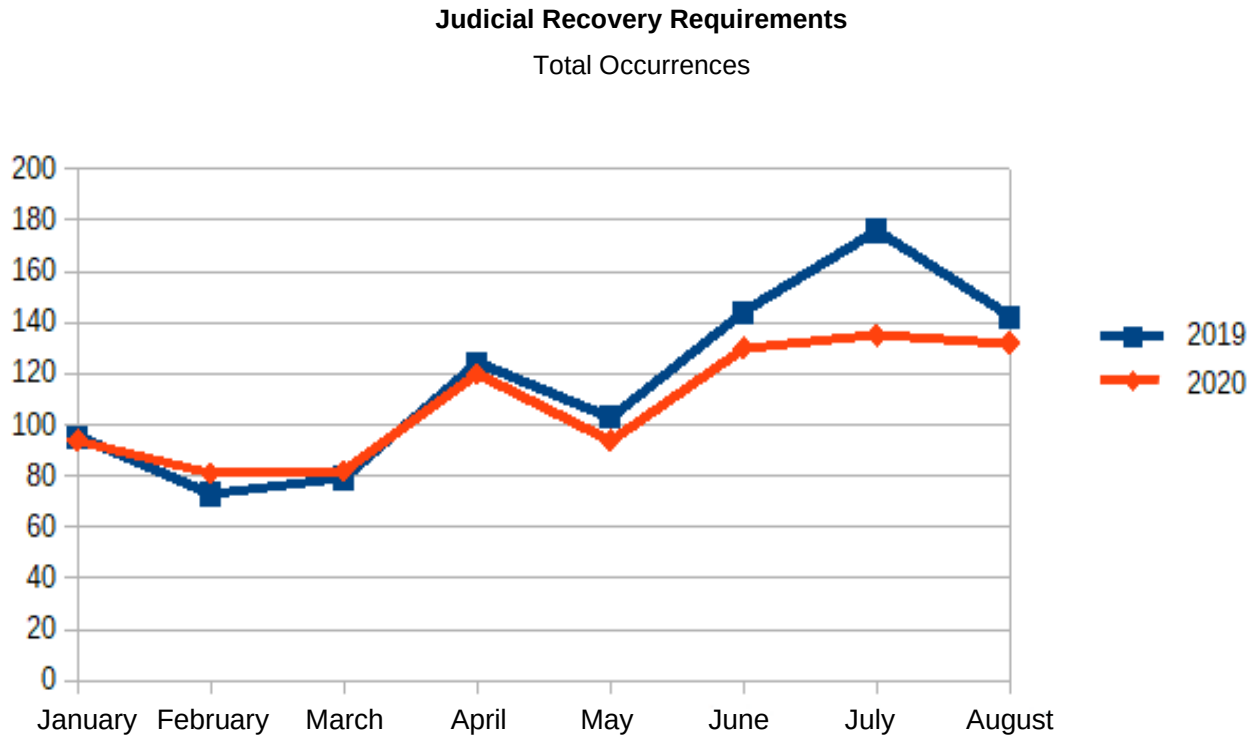
After making considerations about the Judicial Recovery in Law 11,101/05, it is necessary to analyze, albeit superficially, the current scenario regarding the institute. According to the Bankruptcy and Judicial Recovery Indicator, maintained by Serasa Experian (2020), it can be seen that the requests for Judicial Recovery made by large companies have decreased exponentially; when analyzing the accumulated variation between the months of January and August, there is a 28.5% decrease in applications in relation to the same period of the previous year.

Figure 1 - Judicial Recovery Requirements between January and August 2020.



Source: Bankruptcy and Judicial Recovery Indicator maintained by Serasa Experian (2020).

Figure 2 -: Judicial Recovery Requirements in 2019 and 2020.



Source: Bankruptcy and Judicial Recovery Indicator maintained by Serasa Experian (2020).

Large companies showed greater retraction in Judicial Recovery requirements compared to micro, small, and medium-sized companies. The requests made by micro, small and medium-sized companies, in comparison with the same period in 2019, fell 2.6% and 3.9%, respectively. In micro and small companies there was a drop from 573 to 558 requests. Medium-sized companies, on the other hand, reduced their requests from 205 to 197, considering the aforementioned period. However, in the period between March and June, there was a significant increase in such requests in relation to micro, small and medium-sized companies.

In March, May, and June, small and micro companies increased their requirements by, respectively, 23.4%, 12.5%, and 5.4%. Medium-sized companies, on the other hand, expanded requests by 63% in the month of April, when compared to the same period of the previous year. According to the results presented in the research analyzed, there is a downward trend in the requests for Judicial Reorganization in relation to the accumulated variations compared to previous years: There was a total retraction of 7.3% in judicial recovery requests, when compared to the January to August 2019 period.

Notwithstanding this finding, in the data analysis by sector, a drop in requests for judicial recovery can be seen in all segments, except for commerce and industry, whose requirements increased by 29.2% and 9.5%, respectively, in August. That said, with regard to the index drop in relation to large enterprises, some hypotheses are raised, namely, (i) larger

companies, as they have greater capital, did not suffer severely from the economic impacts caused by the new coronavirus and are recovering more quickly, or (ii) the negotiation between creditors and debtors, through out-of-court instruments, is being widely used[12].

Therefore, from a preliminary analysis, it appears that the main impacts of the COVID-19 pandemic focused on micro and small entrepreneurs – especially in the commercial sector, as a consequence of trade restrictions and social isolation established in most states of the country. On the other hand, when assessing data from this same segment, there is a projection of contraction of the Judicial Recovery requests in the accumulated variation until August 2020 in relation to the same period of the year 2019. From the above, it appears that there is a discrepancy between what was expected – increase in requests due to economic instability – and what is evidenced by the data. However, nothing prevents this context from changing in the following months, since the effects of the COVID-19 pandemic tend to be delayed over time. Furthermore, it is important to remember that the agents excluded by Law 11,101/2005, when facing the economic crisis, resisted without any help, which can also generate a false perception of economic control.

3 The Effects of the Pandemic on the Deficiencies of Law No. 11,101/2005: The Case of Economic Activities Excluded by Art. 1 of the Legal Diploma

It is not difficult to think that one of the reasons for the number of requests for Judicial Recovery not reaching absolutely high values – as expected at the beginning of the pandemic period – is due to the fact that Brazilian legislation, on the contrary to what is seen in other countries, establishes a limitation so that only entrepreneurs and business companies (art. 1 of Law 11,101/2005) can use its instruments.

The Civil Code of 2002, moving away from the old Theory of Commerce Acts, adopted the Theory of the Company, in order to discipline this field of knowledge. Thus, it defines in art. 966 that "it is considered an entrepreneur who professionally performs an economic activity organized for the production or circulation of goods or services." The sole paragraph of this provision, in turn, excludes from the concept of entrepreneur those who exercise an intellectual, scientific, literary or artistic profession, except for cases in which the exercise of the profession constitutes a mere element of a company.

Likewise, Associations and Cooperatives, either because of a priori absence of the economic element, or because of the legal determination that removes them from the entrepreneur character, are outside the scope of Law 11,101/2005. Similarly, Rural Producers

[12] In this sense, it is worth mentioning CNJ Resolution No. 71, which creates Conflict and Citizenship Solution Centers – Cejusc Empresarial, in order to promote the out-of-court resolution of business nature conflicts. In addition, the State Courts of Justice have been guided by this perspective, such as TJPR, which implemented the Cejusc Corporate Recovery, TJSP, which created a pre-procedural mediation project for business disputes through Provision CG 11/2020, and TJRJ, which implemented the Special Regime for the Treatment of Disputes Relating to Corporate Recovery and Bankruptcy (RER) by Normative Act 17/2020.

registered for less than 2 years with the Board of Trade are excluded.

Despite the reasons that justify such exclusions, it is certain that the Brazilian legislator did not adhere to certain singularities of the country's socioeconomic context, which became evident with the advent of the COVID-19 pandemic. A regulation limited to certain subjects as chosen, leaving others at the mercy of their own liquidation instruments or even civil insolvency, without access to reorganization instruments.

Indeed, the necessary measures to contain Coronavirus directly affected the economy, being sufficient to generate crisis situations in its most diverse sectors. Thus, those covered by the instruments of recovery and bankruptcy legislation find, to a certain extent, the support they need to maintain the activities carried out. This circumstance, however, is not enough to conclude that economic agents are protected and that the current system is sufficient.

There are institutions that, although they are not formally entrepreneurs, carry out predominantly economic activities, whose results reach the entire community. Furthermore, in contemporary reality, the intellect reaches other dimensions which are capable of elevating it to a place of singular economic importance (GUIMARÃES, 2017, p. 10).

However, even though these enterprises function as true engines of the Brazilian economy, they find it difficult to use mechanisms to overcome the crisis to which they are victims. They withstand, day after day, the pernicious effects of the pandemic, without finding the necessary help for the continuity of the impacts they generate in the social sphere.

Thus, it is observed that, although the Judicial Recovery institute is based on the principle of the continuity of activity and its social function, in practice, Law 11,101/2005 chases away elementary characters, leaving them without effective instruments to uplift of the returned activity.

In fact, it can be seen that the dichotomy between civil society and business society, for example, is already largely insufficient for the country's socioeconomic reality (CAVALCANTI FILHO; CORREIA JÚNIOR, 2018, p. 253). With technological advances and the significant changes that these have generated in social scenario, there is an infinity of new legal relationships. This differentiation, therefore, "no longer responds to the needs arising from these recent phenomena in an adequate and compatible way with the underlying reality (CAVALCANTI FILHO; CORREIA JÚNIOR, 2018, p. 253)."

Therefore, it is undoubted that the current dynamic is no longer limited to the merely formal distinction between "business agents" and "non-business agents," as the latter are sometimes responsible for the development of activities that are in full harmony with art. 966 of private coding, acting in tune with market competitiveness. Although they are formally non-entrepreneurs, they develop professional activities organized for the production or circulation of goods or services, materially becoming entrepreneurs.

Indeed, the circumstances to which economic agents were exposed, due to the

disastrous consequences of the outbreak of COVID-19, made clear the insufficiencies of the current legislation for dealing with situations of generalized crisis. Social isolation measures, accompanied by reductions in revenue in a large part of the economy, lead the country to an unprecedented economic crisis, revealing the need for legislative reforms capable of guaranteeing access to recovery and bankruptcy instruments for all those who effectively exercise relevant role for the home economy[13].

Thus, considering the triple trans-individual interest, which aims to overcome the debtor's economic and financial crisis to allow the maintenance of workers' source of employment and creditors' interests, the restrictions imposed by the Law could violate the constitutional principles of free competition and the company's social function (GUIMARÃES, 2017, p. 22). Since recovery instruments aim to provide opportunities for the reorganization of the viable activity, in order to guarantee its extension, it does not seem reasonable to exclude subjects of exponential importance, who face severe financial tribulations, with imminent risk of reaching unsustainable conditions of maintenance.

In this sense, given the pandemic scenario experienced, there is a jurisprudential tendency to expand access to Judicial Recovery to other economic actors considered "non-entrepreneurs," such as rural producers, who are not yet registered in the Board of Trade for sufficient time, and associations (SCALZILLI, SPINELLI and TELLECHEA, 2020, P. 68). However, these measures, to constitute real advances, lack initiatives by the Legislative Branch that, based on specific and delimited criteria, determine the necessary changes to make up for the current deficiency.

It is opportunely noteworthy that it does not advocate the indiscriminately use of the Judicial Recovery institute by all those excluded by the LREF. However, the analysis of activities similar to those of entrepreneurs and business companies is urgently needed, as they meet the requirements of private codification, in order to allow them, with a focus on the preservation of the company and its inherent social function, the benefits of Law No. 11,101/2005.

4 The Crisis and the Need to Adapt to Law No. 11,101/2005

In this order of ideas, legal institutes for the recovery of efficient and adequate companies are needed to boost economic growth, as the International Monetary Fund (IMF) estimates a 5.8% retraction in the Brazilian GDP in the year of 2020. In this context, LREF

[13] In that sense, “metaphorically speaking, it is as if they have 'taken the economy out of the outlet' — and no one knows when and how it is going to turn it back on. To a large extent, money stopped circulating. Whoever has resources holds them to the maximum; those who do not have them just say that there is no way to pay. It is something unprecedented, a crisis whose impacts are still incalculable” (SCALZILLI; SPINELLI; TELLECHEA, 2020, p.29). Just think, for example, of educational associations, theater companies, soccer clubs, and liberal professionals such as engineers and architects. These, among many others, directly felt the effects of the pandemic, as they had to stop their activities without any provision being made to restore the deficit they had incurred.

fulfills the role of regulating and allowing, through Judicial Recovery, the restructuring and reallocation of assets of economic agents in crisis, in order to resume the positive curve of their economic activity. Meanwhile, as provided for in the foregoing analysis, although the national economic situation has worsened, data show a retraction in the use of this mechanism, including by those covered by the Law, giving rise to the question about the adequacy and efficiency of the recovery instruments in the Brazilian context.

It is observed that the reflection of COVID-19 pandemic containment measures will only aggravate the deficiencies of the LREF. In fact, there is only a new guise for pre-existing problems that today demand an immediate solution (SCALZILLI; SPINELLI; TELLECHEA, 2020, p. 104). Among them, one can mention the limitation of the list of benefited economic agents; not subjecting all credits to the procedure, enabling hold-up[14] and; the absence of specific rules on contracts in progress during the Judicial Recovery.

In fact, to overcome this moment of generalized crisis, the necessary prioritization of the principles and purposes of the Law prevails to the detriment of its purely legal provisions, with an emphasis on the activity in its essence, as well as on the specificities inherent to it. In this regard, the very unique nature of the crisis generated by the new coronavirus "requires punctual, emergency and provisional changes in Law 11,101/05 (LREF), capable of adapting their legal regimes to deal with the exceptional nature of the coming challenges (SCALZILLI; SPINELLI; TELLECHEA, 2020, p. 24)."

It cannot be forgotten, for example, that bureaucratic procedures and the immobilization of the procedure, as impediments to the application for judicial recovery, become evident in the pandemic context. On the one hand, the health crisis prevents the movement of people and, consequently, of information; on the other hand, the legislation advocates the presentation of certificates, spreadsheets and documents that are far beyond the quick reach of entrepreneurs who need the immediate help of the law. This situation, far from being punctual in the Brazilian reality, became the object of Bill No. 2373/2020[15] (BRASIL, 2020), which through art. 5, item IV, extends the term for the documentation submission listed by items II to IX of art. 51 of Law 11,101/2005.

In the meantime, without a definitive word from the legislature, the Judiciary was led to make first decisions in the midst of the crisis, opting to make the application of the LREF provisions more flexible[16]. Measures were taken to preserve the viability of the companies and

[14] (...) power to prevent the efficient allocation of assets that can be used to extract distributive priorities" (CAVALLI, 2020, p. 4).

[15] As the project's justification points out, "[if] medium and long-term reforms should seek to strengthen the creditor's position in the insolvency system, emergency and provisional reforms should facilitate debtor's access to judicial recovery procedures and make conversion more difficult to judicial recoveries in bankruptcy."

[16] The judgment of the 6th Civil Chamber of the Court of Justice of Rio de Janeiro accepted the request for judicial recovery of Universidade Cândido Mendes in case no. 0031515-53.2020.8.19.0000. In process no. 0802252-11.2020.8.10.0026, the Law judge of the 2nd Court of Balsas/MA approved the request for judicial recovery of the

expand the possibilities of Judicial Recovery[17], with an impediment to the suspension of essential services such as power, water, and internet of establishments, even in the face of default; possibility of extending the stay period and suspension of compliance with the judicial recovery plan; release of amounts and court orders prioritizing liquidity in addition to the virtual realization or suspension of creditors' meetings (SCALZILLI; SPINELLI; TELLECHEA, 2020, p. 43-63).

It appears, therefore, that the judicial recovery mechanisms deserve punctual reforms to effectively implement their premises. Although the jurisprudential innovations are commendable in the face of crisis, it does not seem reasonable for the Courts to keep their decisions in the exceptional, being necessary that the normative framework of the LREF becomes more dynamic and more adequate to the Brazilian reality. In fact, it is not intended to defend the alteration of the current legislation in any way, but a necessary analysis of the aspects that prevent its use to guarantee faster, more efficient, and easily accessible mechanisms. Only from an orderly and rational restructuring, it will be possible to promote the reduction of the problems that were evidenced in this context of generalized crisis and, above all, to guarantee the preservation of viable economic activities.

5 Final Considerations

The present study aimed to understand if the mechanisms present in Law No. 11,101/2005 are capable of attenuating the effects of the COVID-19 crisis in relation to the institute of judicial recovery. In this sense, the imagined hypothesis is substantiated in the idea that, despite constituting an essential mechanism for the maintenance of business activity, the agents to whom this rule is intended are restricted due to the necessary link with the entrepreneurial nature of the activity.

The guarantee of the preservation of viable economic activities translated through the principle of company preservation – primary objective of the Law when referring to Judicial Recovery mechanisms – is restricted due to the legal criterion and objective brought by art. 966 of CC/2002. The Law, encompassing the outdated Theory of the Company and allocating the Judicial Recovery Institute only to business economic agents, excludes a large part of economic activities that, although formally non-entrepreneurs, develop professional activities organized for the production or circulation of goods or services, constituting materially entrepreneurs.

The effect of such a measure is to make the diploma inefficient, to a large extent, to

Maldane Group (rural producers).

[17] It is worth mentioning the case of a fish company that is dependent on cold chambers and refrigerators; it would have its power cut due to default, something that was not allowed considering that it would be permanently unfeasible. TJSC, 1st Court of the District of Balneário Piçarras , process no. 5002102-19.2020.8.24.0048, judge Dr. Iolmar, j. 04/14/2020; In this case, labor appeal deposits were released under the pretext of reinforcing the liquidity of the company TJSP, 1st Bankruptcy and Judicial Recovery Court, process no. 1084733-43.2018.8.26.0100, judge Dr. Paulo Furtado de Oliveira Filho, j. 04/16/2020.

reduce the effects of the COVID-19 pandemic, generating negative effects in terms of helping viable companies that are facing crises. Thus, although jurisprudence has widened the possibility of accessing the reorganization regime to some non-business economic agents, such a measure, in order to be effective, must start from a legislative effort to improve and adapt the Law.

Thus, it is possible to confirm the hypothesis established above, noting that, although based on the principle of continuity of activity and its social function, in practice, Law No. 11,101/2005 leaves elementary characters without effective instruments to uplift returned activity, as taught by Márcio Souza Guimarães (2017). Therefore, it may be interesting to review the list in the recovery and bankruptcy standard so that more subjects can be covered and thus, benefit directly from the innovations it brings.

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