AMENDMENT OF INSOLVENCY LEGISLATION IN THE CONTEXT OF THE SARS-COV-2 PANDEMIC AND ITS IMPLICATIONS

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Abstract
The health crisis generated by the COVID-19 pandemic that broke out in early 2020 in most economies of the world has forced measures to be taken that have had the effect of closing economic activities to varying degrees. In order to counteract the negative economic effects determined by the measures to limit the spread of COVID-19, it was necessary to amend some legal provisions in order to support companies facing financial difficulties (lack of liquidity, increase in debts, etc.), as well as those in proceedings. of pre-insolvency / insolvency.
In this paper we aim to identify and analyze the legislative changes that the Romanian authorities have operated in the field of insolvency while highlighting their implications on economic activity. Our scientific approach begins with defining and specifying the scope of insolvency as well as identifying legal provisions with an impact on insolvency. The center of gravity of the study is the presentation of the new regulations in the insolvency procedure. We note that some of these have limited applicability only during the alert state and others maintain their applicability even after the cessation of these circumstances.

Key words: *insolvency, threshold value, debtor, creditor, debt, company, law, reorganization plan, alert status*

Clasification JEL: *K22*

I. INTRODUCTION

Practice shows that, like any other subject of law, natural or legal person, but perhaps even more so, professional traders encounter various economic and financial difficulties in the activity of production, trade, and provision of services or execution of works. Starting from the specific circumstances of the commercial activity, the legislator is concerned with the legal regime of the debtors in financial difficulty and regulates various institutions and legal instruments appropriate to the periods of crisis they are going through. (Nemeş, 2018) The main means available to companies in situations of financial decline are insolvency prevention and insolvency procedures.

Insolvency prevention procedures are the ad hoc mandate and the preventive arrangement. We define insolvency as that state of the debtor's patrimony which is characterized by the insufficiency of the funds available for the payment of certain, liquid and due debts. Due debts can no longer be paid, either due to lack of funds or insufficient funds available to the company, excluding the situation in which the debtor company refuses to perform its obligations, regardless of whether this refusal is justified or not.

Unlike insolvency, the insolvency of the company is a state of financial imbalance of its patrimony, in which the value of the passive elements is higher than the value of the active elements, without being the basis for initiating the insolvency procedure.

The crisis generated by the SARS-COV-2 pandemic and the measures adopted by the Romanian authorities have profoundly affected the business environment, which has led to a change in the legislative framework on insolvency and bankruptcy. The amendments concern the essential conditions for the entry of a company into insolvency, the total threshold of debts and debts to the state, the suspension and extension of deadlines (such as the submission of reorganization plans), to support the activity of pre-insolvency companies (preventive arrangement) and insolvency (observation and reorganization).

In this article we will deal with those issues that are of interest not only to those who work regularly in the field of insolvency, but also to those who may have occasional access to such a procedure.

II. THE NOTION, SCOPE AND REGULATION OF INSOLVENCY PROCEEDINGS

Insolvency is regulated by Law no. 85/2014 on insolvency prevention and insolvency procedures (Romanian Parliament, 2014) which includes in its content provisions of common law, regulations applicable to credit institutions and insurance companies but also specific provisions to insolvency prevention procedures. This law also contains rules specific to private international insolvency law. The provisions of this law are supplemented by the common law applicable in the matter. This fact is clear from art. 342 of Law 85/2014 which provides that: *"The provisions of this law shall be supplemented, insofar as they do not contradict, those of the Code of Civil Procedure and the Civil Code. The provisions of chapter I of Title III shall not apply to relations of*

private international insolvency law falling within the scope of Council Regulation (EC) No 1234/2007. 1346/2000".

Law no. 85/2014 on insolvency prevention and insolvency procedures underwent some substantial changes in 2020 which were determined by the need to adopt measures to protect and support companies facing financial difficulties (lack of liquidity, increasing debts, etc.), as well as those in pre-insolvency / insolvency proceedings, which have been affected by measures to limit the negative effects of the spread of COVID-19. These changes were made through Law no. 55/2020 on some measures to prevent and combat the effects of the COVID-19 pandemic (Romanian Parliament, 2020) and Law no. 113/2020 regarding the approval of the Government Emergency Ordinance no. 88/2018 for the amendment and completion of some normative acts in the field of insolvency and other normative acts (Parliament of Romania, 2020).

In the specialized literature, the insolvency procedure was defined as a *"set of legal norms aimed at obtaining funds for the payment of debts of the insolvent debtor to its creditors under the conditions established differently by categories of debtors, by judicial reorganization based on a reorganization plan or through bankruptcy*".(Cărpenaru, 2016, p. 725).

Art. 5 point 29 of Law no. 85/2014 offers the definition of insolvency as *"that state of the debtor's patrimony which is characterized by the insufficiency of the funds available for the payment of certain, liquid and due debts"*. Unlike insolvency, the insolvency of the company is a state of financial imbalance of its patrimony, in which the value of the passive elements is higher than the value of the active elements, without being the basis for initiating the insolvency procedure.

Not every amount owed by the debtor entity is likely to attract the application of the procedure, but the law takes into account an important value, representative of the debtor's economic situation and which demonstrates its precarious financial situation. Thus, a threshold value necessary for the admission of the debtor's or creditor's request is provided, including for the requests formulated by the liquidator appointed in the liquidation procedure provided by Law no. 31/1990, in the amount of at least 50,000 lei, or of 6 average gross salaries per economy due to each employee who formulates the request to open the insolvency procedure.

The scope of application of the insolvency procedure is specified by art.3 of Law 85/2014. From the analysis of the legal provision we deduce that the insolvency procedure applies to professionals, as defined in art.3 paragraph (2) of the Civil Code, except for those exercising liberal professions, as well as those for which special provisions are provided regarding their insolvency regime. This procedure also applies to autonomous utilities.

The insolvency procedure does not apply to the territorial administrative units and to the pre-university and university education units and institutions, and to the entities provided in art.7 of the Government Ordinance no. 57/2002, on scientific research and technological development (Government of Romania, 2002).

III. NEW REGULATIONS IN INSOLVENCY PROCEEDINGS

Law no. 113/2020 for the approval of GEO no. 88/2018 (Government of Romania, 2018) brings significant amendments to Law no. 85/2014 on insolvency prevention and insolvency proceedings. The same law underwent some temporary amendments (applicable only during the alert state), on May 18, 2020, by Law no. 55/2020. The purpose of these changes was to support companies whose activity has been affected by the Covid-19 pandemic.

Next we present the main legislative amendments introduced by Law no. 113/2020.

Changes to the conditions for opening insolvency proceedings

The amending normative act sets the threshold value for opening the insolvency procedure at 50,000 lei. The amount of 50,000 lei is valid both for the creditors 'requests and for the debtors' requests, including for the requests formulated by the liquidator appointed in the liquidation procedure provided by Law no. 31/1990. Regarding the salary claims, the threshold value for opening the insolvency procedure remained unchanged, namely 6 average gross salaries per economy / employee. The measure is paradoxical, because on the one hand the debtor is protected from the initiation of insolvency proceedings by creditors, but at the same time the debtor is difficult to access this procedure.

Regarding the requests for opening the insolvency procedure introduced by the debtors, according to GEO no. 88/2018, they had to meet an additional condition, namely the amount of budget receivables had to be less than 50% of the declared total of the debtor's receivables. If this requirement was not met, the debtors' claims were rejected by the court. By the amending law, the additional requirement regarding the proportion of tax receivables in the total credit mass was eliminated.

The doctrine (Ana Atanasiu, Delia Lepadatu, 2020) shows that the amendment is justified and auspicious given that GEO no. 88/2018 imposed an additional condition that was in contradiction with another provision of the insolvency Law, respectively with the obligation of the debtor to request the opening of the procedure within

maximum 30 days from the occurrence of insolvency, objective state of the debtor's assets that does not account and has nothing to do with the quality of the creditor and the type of his claims.

The introduction of this amendment removes the practical difficulty of fulfilling the legal obligation to file a request to open insolvency proceedings when the condition regarding the proportion of budget receivables is not met, with the effect of removing a possible criminal liability for the crime of simple bankruptcy.

Changes in current receivables

The amending law contains some provisions regarding the suspension of the forced execution of current receivables with maturities exceeded by more than 60 days and the extension of the term for settlement by the judicial administrator of the payment request.

Law no. 113/2020 eliminated the possibility for creditors to start the forced execution of claims arising after the opening of the procedure, as previously established by GEO no. 88/2018. In this case, a creditor who has a current claim must submit a request for payment, which will be examined by the court administrator. Thus, the recovery of such claims can be made only in the insolvency proceedings, and not through enforcement.

The parallelism of insolvency proceedings with enforcement has always been a contentious issue, which has often received different solutions both in previous legislation and in practice. It should be noted that the interpretation must start from the fundamental principles of insolvency proceedings, namely its competitive, collective and egalitarian character.

Another amendment introduced by Law no. 113/2020 concerns the deadline for the judicial administrator's analysis of the creditor's request, which was increased from 10 days from the transmission of the request by the creditor, to 15 days from the receipt of the request by the judicial administrator. We consider that the decision of the legislator to change the way the term is calculated has been justified, which thus starts to run from the moment of receiving the request and not from the date of its transmission by the creditor. The change may be justified by the volume of activities that judicial administrators carry out in insolvency proceedings. In addition, the granting of a longer response period has the possible effect of a closer examination of their request for payment.

An undesirable consequence of this amendment is that creditor entities will receive a response to payment requests in longer terms and will therefore be paid later, which is not pleasant for a creditor who chooses to continue working with a company in the process of insolvency.

We also note that Law 113/2020 comes with another clarification concerning current receivables, applicable to the reorganization period. Thus, the original regulation provided that if the debtor did not comply with the plan or new debts were accumulated, any of the creditors or the judicial administrator could at any time request the syndic judge to order the debtor's bankruptcy. By GEO no. 88/2018 further regulated that the request to open bankruptcy proceedings will be rejected by the syndic judge in case the debtor concludes a payment agreement with this creditor.

In order to complete this amendment, the amending law also introduced a definition for the payment agreement, namely as *"the agreement between the debtor and the creditor regarding the settlement in one or more installments of the obligations at terms other than those due under the contractual or legal provisions"* (Parliament of Romania, 2020, Point 3, Sole Article of Law No.113).

Although at first glance these changes are not important, we appreciate that any clarification or definition is appropriate, in order to remove the unclear situations that may occur when the law is incomplete. Law 85/2014 on insolvency prevention and insolvency proceedings, although broadly regulated, has often proved insufficient, and most of the issues raised in practice have been resolved by insolvency practitioners and ultimately by the courts, reaching in some cases to contradictory court decisions.

Changes in the way contested budgetary receivables are entered

Law 113/2020 (Parliament of Romania, 2020, Point 9, Sole Article of Law no. 113) provides that *"Tax claims established by a contested tax administrative act and whose enforcement has not been suspended by a final court decision will be admitted at the credit table and passed provisionally until the end of the appeal by the administrative contentious court "*. Therefore, the way of registering the contested budget receivables was changed, establishing that they will be provisionally registered in the table of receivables; unlike GEO no. 88/2018 which provided that they must be registered under a resolutory condition. According to Law no.85/2014, the provisionally registered receivables will have all the rights provided by law except for the right to collect the amounts proposed for distribution. These will be recorded in the single account until the finalization of the claim, respectively until the settlement of the appeal filed against it.

Although apparently a nuanced change, the issue of disputed tax claims has received contradictory solutions over time. Before GEO no. 88/2018, such claims were entered under a suspensive condition, which meant that their holders were not entitled to vote or to distributions made during the procedure until the respective condition was met.

Registration under resolutive condition under the empire of GEO no. 88/2018 conferred full rights to the budgetary creditors, enjoying all the benefits of the insolvency procedure until the fulfillment of the resolving condition, respectively the admission of the appeal and / or of the administrative contentious litigations formulated regarding the registered claim and its annulment. The issue became urgent when, in the absence of a deadline for resolving appeals against tax claims, theoretical administrative litigation disputes could take place for an even longer period than the insolvency proceedings.

The doctrine states that the solution imposed by Law no.113/2020 is a middle one (Ana Atanasiu, Delia Lepadatu, 2020) given that on the one hand, the contested budget receivables will have the right to vote in the procedure, and on the other hand, the amounts that normally would be allocated for their payment will be placed in the single insolvency account and released only after the resolution of the substantive dispute regarding the existence and extent of the tax claim.

Changes regarding the possibility to recuse the professionals appointed by the judicial administrator

Law no. 113/2020 introduces the express possibility of recusing a lawyer, accountant, evaluator or any other specialist employed by the judicial administrator, who would be in a conflict of interest and who would not refrain from providing the requested service.

The old legal provision only provided for the prohibition of appointing a specialist who would be in a conflict of interest, but without providing for a remedy (recusal), if this prohibition was not complied with. The interested party could request the recusal of that specialist only on the basis of the general provisions of the Code of Civil Procedure, but the jurisprudence was not uniform in the possibility of formulating such a request.

Changes regarding the assignment of tax debts

The budgetary receivables of the insolvent debtors may be assigned by the budgetary creditor without the conditions imposed by the Fiscal Procedure Code being met, respectively:

- the transfer price must be at least equal to the amount of the budget receivables in order to ensure the full recovery of the budget receivables entered in the final table of receivables;
- the payment of the transfer price and recovery of budget receivables must be made within a maximum of three years from the date of conclusion of the transfer contract;
- the transferee justifies a public interest in the transfer of the claim.

Temporarily applicable changes (during alert status)

As shown above, Law 85/2014 on insolvency prevention and insolvency procedures has undergone some amendments by Law no. 55/2020 on some measures to prevent and combat the effects of the COVID-19 pandemic. Some amendments were also maintained in Law no. 113/2020 and others will apply only during the alert state. They are intended to support both companies facing financial difficulties (lack of liquidity, increased debt, etc.) and those currently in pre-insolvency / insolvency proceedings, which could be affected by measures to limit adverse effects of the spread of COVID-19.

The most important change with temporary application brought by Law no. law or will appear during the alert state (Romanian Parliament, Law no. 55). Therefore, the opening of insolvency proceedings becomes an option available to the debtor, and not a legal obligation of the debtor, the legal term of 30 days starting from the date of cessation of the state of alert.

Also, until the end of the state of alert, the period of 5 days in which the debtors, engaged in extrajudicial negotiations or, as the case may be, carried out within an ad-hoc mandate or arrangement with creditor procedure, had the obligation to submit the opening request of the procedure.

Thus, the companies in difficulty will be able to analyze during this time the possibilities of relaunching the business, the chances of returning to the market and the prospects of paying the outstanding debts. If they find that the state of difficulty is maintained, they will have the obligation to formulate the request for submission under the protection of the insolvency law.

At the same time, in the case of the debtor who has ceased its activity totally or partially as a result of the measures adopted during the alert state, "creditors may formulate, during the alert state, a request to open insolvency proceedings only after reasonable proof communicated between the parties by any means, including by electronic means, of concluding a payment agreement"(Parliament of Romania, Law no. 55).

Law no. 55/2020 also contains some provisions regarding the companies undergoing financial recovery procedures and during the observation period applicable during the alert state.

Thus, in the case of arrangement with creditor procedures in progress on the date of entry into force of the new law, the period in which negotiations on the draft of the arrangement with creditor take place, respectively the period of elaboration or negotiation of the agreement offer, as appropriate, is extended by a maximum of 60 days. Also, the period for satisfying the receivables established by the arrangement with creditor is extended by two months, in the case of the debtor in the execution of the agreement on the date of entry into force of the law.

Debtors in the observation period on the date of entry into force of the law will benefit from a legal extension by three months of it, as well as the term in which a reorganization plan can be proposed (even when this term has already started to flow).

Also, if a reorganization plan has been submitted, but the company's recovery prospects have changed as a result of the effects of the COVID-19 pandemic, the possibility of submitting an amended reorganization plan has been regulated within three months of entry into force of the law, provided that the intention to amend is notified to the creditors, within 15 days from the entry into force of the law.

In the case of the debtor in judicial reorganization on the date of entry into force of Law 55/2020, the duration of the execution of the reorganization plan is extended by two months. Also, the execution of the plan can be suspended for a maximum period of two months, at the request of the debtor in judicial reorganization who has completely interrupted his activity as a result of the measures adopted by the authorities to prevent the spread of the COVID-19 pandemic. The suspension can be requested to the syndic judge within 30 days from the entry into force of the law.

In the case of the debtor in judicial reorganization on the date of entry into force of Law no.55/2020, which interrupted its activity totally or partially as a result of measures adopted by the competent public authorities according to law, to prevent the spread of COVID-19 pandemic, execution of the reorganization plan may be extended without exceeding a total duration of its development of 5 years. On the other hand, if a company that has ceased its activity totally or partially as a result of the measures adopted by the competent public authorities according to law, to prevent the spread of the COVID-19 pandemic, during the state of alert, the initial duration of the plan of reorganization (maximum 3 years) can be 4 years, with the possibility of its extension and modification under the law, without exceeding a total duration of the 5-year plan (Romanian Parliament, Law no. 55).

IV. CONCLUSION

The study conducted by this paper is the basis for drawing conclusions on the change in the legislative framework in the field of insolvency in the context of the Sars-Cov-2 pandemic and the implications of these changes on the activity of companies in financial decline.

We find that the changes that were made on Law no. 85/2014 on insolvency prevention and insolvency procedures have different applicability. Some apply only during the alert state and were introduced by Law no. 55/2020 on some measures to prevent and combat the effects of the COVID-19 pandemic. The most important of these is the suspension of the obligation of companies to request the opening of proceedings within a maximum of 30 days from the state of insolvency, regardless of whether this state existed on the date of entry into force of the law or will occur during the state of alert. . Thus, the opening of the insolvency procedure becomes an option available to the debtor, and not a legal obligation of the debtor, the legal term of 30 days starting to run from the date of cessation of the state of alert.

The amendments with indeterminate applicability were made through Law no. 113/2020 for the approval of GEO no. 88/2018 and they refers to: the conditions for opening the insolvency procedure, the current receivables, the way of registering the contested budgetary receivables, the possibility of recusing the professionals appointed by the judicial administrator and the assignment of the fiscal debts.

The measures taken are auspicious, but they take into account the form rather than the substance. These changes in the legislative framework have created the premises for companies in financial difficulty or insolvency to wait for the emergence of liquidity in the company. The official data available on the website of the National Office of the Trade Register (https://www.onrc.ro/index.php/ro/statistici?id=252) confirms the fact that to a large extent, due to these changes in the insolvency legislation, the number of professionals who went into insolvency between 01.01.2020 - 31.12.2020 compared to the same period last year is lower, despite the fact that there was a double health and economic crisis.

On the other hand, the avoidance of the insolvency of companies that have ceased their activity totally or partially, as a result of the measures taken by the competent public authorities according to the law, to prevent the spread of the COVID-19 pandemic, allowed them to access some measures adopted by The Government of Romania for supporting the business environment, namely access to finance for SMEs and postponing the payment of bank installments.

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