Particularities of the Insolvency Legislative Evolution. Winners, Opportunists and Losers in the Covid-19 Pandemic

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Abstract

The purpose of this paper is to analyse the legislative changes due to pandemic, together with a brief analysis of winners, losers and opportunists due to this legislative changes and Covid-19 impact on economic sector.

This paper presents a legislative approach to the concept of insolvency from 2014 until now, explaining how legislative evolution can be updated for governmental institutions profit.

Insolvency law was an evolution in the regulation of insolvency prevention and insolvency proceedings, but the retrospective analysis of the law and the cases faced by insolvency practitioners are significant in terms of the correctness of this act and the ambiguities regarding the recovery of creditors' claims.

Understanding the legislative changes together with the analysis of the main categories of actors participating in the insolvency procedure is intended to be a contribution in the analysis of future legislative texts.

Key words: legislative evolution, insolvency, Covid-19 pandemic
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1. Introduction

The insolvency procedure is currently regulated by Law no. 85/2014 on insolvency prevention and insolvency proceedings. As an adaptation of the legislation at European level, the Law is an interpretation of the European Parliament's Insolvency Regulation, which seeks to harmonize the legislation on insolvency prevention and the adoption of the second chance principle for the debtor in difficulty. In order to fully understand this stage of reorganization, it is important to review the main legislative issues governing this procedure.

Thus, the Insolvency Law no. 85/2014 is the legislative framework that regulates insolvency, reorganization and bankruptcy proceedings. The Romanian legislative framework applicable from 2014 is an adaptation of the legislative text with the same number from 2006 and a transposition of the applicable legislative framework at the level of the European Union (by Regulation (EC) no. 1346/2000, updated on 12.12.2012). The pandemic effects modified a series of provisions of Law no. 85/2014 with the help of Law no. 113/2020, in the sense of eliminating the amount due to the state budget from the total credit amount, eliminating the possibility of forced execution of amounts due to creditors, assigning tax debts, increasing the time period for settling payment claims, and how to register the amounts due to the state budget and which have been challenged (Law 113/2020, art. 14, paragraph (2), letter (a)).

Law no. 113/2020 promulgated in the sense of providing additional support to the insolvent debtor was criticized not only by the debtors, but by all participants in the insolvency proceedings, in this case creditors, syndic judges, judicial liquidators and credit institutions. The present paper aims to outline the issues raised by these legislative changes, in the sense of the economic losses they cause to the participants in the insolvency procedure and the privilege brought to the state institutions.

2. Theoretical background

When the insolvency proceedings are opened, the debtor's property is often no longer attractive to creditors, which is exempt from assets by the debtor, considering that he is the first to find out about the insolvency of the company. This is not a new practice, the sarcastic poems of the English poet Charls Churchill stating the following:

„*Bankruptcy; full of ease and health,*
And wallowing in wealth". („Faliment; plin de ușurință și sănătate,/Zăbovind în bogăție").

There is a real damage to the detriment of the creditor, Law no. 85/2014 establishes a series of measures, called *the annulment of fraudulent acts* concluded by the debtor to the detriment of commercial and financial creditors. Thus, a creditor may request the revocation of a document that may be concluded by the debtor in order to induce or increase an existing state of insolvency. The indictment must specify the damage caused, the debtor's attempted fraud, the enforceability, liquidity and certainty of a claim held by the creditor. The purpose of this type of appeal is to replenish the debtor's assets to a value as close as possible to that at which he normally carried out his activity, thus restoring the division of the damage caused to the creditors' meeting.

With strict reference to the field of insolvency, which we want to deepen in the case of this paper, the Covid-19 pandemic has caused a series of legislative changes that "announce" a possible future increase in the number of small or impact insolvencies, which lead towards a chain effect estimate and a significant economic decline at the microeconomic level. Legislative changes resulting from the Covid-19 pandemic favor on the one hand the insolvent debtor and on the other hand the state, which can transfer its amounts to be recovered from the state budget to another participant in the insolvency proceedings willing to transfer them , the immediate effect being that of manipulating the creditors 'mass and modifying the creditors' picture, a way increasingly encountered by insolvency practitioners. This divides the participants in the insolvency proceedings into three categories, namely winners, opportunists and losers.

3. Research methodology

When the imminent state of insolvency is established, the debtor is advantaged by the time factor (being the first to find an imminent future inability to pay current debts), which means that he can take a series of measures convenient to him to reduces the adverse financial impact that an insolvency proceeding may impose. In this case, the debtor may be tempted to enter into a series of economic transactions which may on the one hand benefit a number of preferential creditors (through their direct dialogue and the establishment of mutual benefits), on the other hand being in a position to which can deliberately withdraw a series of strategic assets (in this case strategic referring either to the increased value or to their uniqueness).

However, current legislation provides for a period of time, called a "suspicious period", in which certain types of transactions fall under the auspices of verification by the competent bodies (in this case the judicial administrator and the syndic judge), a legal mechanism to annul fraudulent acts concluded by a debtor on whom a state of insolvency is planning. Given that not all significant transactions carried out by the debtor during the suspect period (the last three reporting periods of the debtor) are subject to thorough checks, there is a possibility of questioning the significant transactions of the debtor to the detriment of creditors. The types of transactions and economic acts that fall under the aegis of verifications are:

- Free transfers;
- Economic operations in which the debtor's performance (sale of goods or services) exceeds the financial value received (goods sold below the cost of production, services without taking into account the materials necessary to complete the work, etc.);
- Commercial acts concluded with the obvious purpose of stealing high value goods from creditors;
- Establishing a real guarantee for an unsecured claim in the last 120 days before the opening of the insolvency procedure;

- Transactions between the debtor and his associates with a share in the share capital of at least 20%, if they are to the detriment of creditors.

Economic practice has shown that these types of transactions are not the only ones that can be perceived as suspicious transactions because, being stated in the text of the law, these types of unfair and sometimes illegal practices will be avoided by the debtor and illicit acts to the detriment of creditors will be carried out through other mechanisms, other than those stated above. Thus, insolvency practice has shown that even onerous contracts may have an explicit interest in reducing the debtor's assets during the suspect period.

Thus, in this case, there are two cases in which the debtor's assets may be affected in these types of transactions. The first case would be the sale to a third party of a movable or immovable property of significant value before the declaration of insolvency proceedings and the use of monetary resources acquired by the debtor in a current unprofitable activity, to explain the future disappearance of capital. This practice brings together the constituent elements of a money laundering activity, which cannot always be proven or the money recovered. Another specific case in respect of sales for consideration is the act of trade in which the debtor transfers to a creditor a movable or immovable property of high value on commercial credit, and will recover the amount of money from the creditor before entering insolvency.

As the receivable is not recovered within the term established by the Fiscal Code of 360 days, it is provisioned and upon entering insolvency the debtor establishes by mutual agreement with the creditor the compensation of the recoverable amount from the sale of the property with the amounts payable to the latter in either the non-presentation at the credit table of the creditor with which the compensation was made, or the presentation with a much lower recoverable value, making at the same time the specification that the debtor evaluates the good at a price much distorted compared to reality. This usually happens between debtors and creditors who have a turnover below the threshold of 1 million euros, with low trade activity and between whom there are friendly relations. The purpose of this type of 'artifice' is clear, that of favoring a creditor over other creditors, before the insolvency proceedings actually take place.

The proposals of insolvency practitioners regarding the ferend law also call into question the prevalence of the debtor to the detriment of creditors through what is called "preferential treatment of the debtor", a concept applied in granting a second chance to the debtor, but which excludes the interests and damages to creditors with blocked amounts, in particular to those whose unrecovered amounts bring them into the same pre-insolvency situation as in the case of the debtor. Thus, the legislative treatment of suspicious transactions committed by the debtor during the suspicious period obliges the creditor to prove the debtor's obvious intention to act to his / their detriment, evidence that is not always easy to establish.

Even if there is a relative presumption of fraud around the debtor, which he is obliged to dismantle, in the case of a third-party natural or legal person there is no suspicion of fraud, even if the fraudulent economic transaction was carried out on one of the above models, aspect that represents a real problem in the application of the principle of continuity of creditors' activity. Also in connection with this aspect, insolvency practitioners request in future legislative changes the obligation of the judicial administrator (or liquidator) to carry out additional checks on these types of suspicious transactions, currently this procedure is a faculty provided by law, and not a mandatory procedure.

Law 85/2014 on insolvency proceedings was undoubtedly an evolution in the regulation of insolvency prevention and insolvency proceedings, but a retroactive analysis of the text of the law and the cases faced by insolvency practitioners showed shortcomings. significant in terms of the correctness of the wording of this act and ambiguities regarding the recoverability of creditors' claims. This is due to the fact that, unlike Law no. 85/2006, the current legislation is aimed at the debtor and not at the recovery of trade receivables, this aspect affecting the safety of the economic circuit, the efficiency of economic operators and the investment attractiveness on the Romanian markets (Godîncă-Herlea, 2018). Legislation on economic insolvency committed around the debtor leads to the diversion of the purpose for which the insolvency proceedings were originally imagined, thus becoming a way to protect the debtor and not a way to maximize the recoverability and recovery of assets held by him. (Ludușan, 2015). The legislative approach to the rules currently applicable is criticized by both creditors and insolvency practitioners, the reasons being the lack of real

reorganization plans of the insolvency procedure, the failure of insolvency prevention procedures (so-called pre-insolvency proceedings). insolvency), lack of adequate mechanisms to discipline participants in insolvency proceedings (especially the privileged debtor), very long time to resolve insolvency cases which implicitly attracts very high costs from creditors who have debtor, not bearing penalty interest and subject to devaluation (by applying trade rates, inflation, etc.) (Tabacu, 2014).

According to the legislative analyzes carried out by insolvency practitioners, the current rules applicable in the field of insolvency do not develop real recovery plans, but represent successive delays in the moment of bankruptcy of the debtor (at least for businesses where the minimum chance of bankruptcy is obvious. recovery), and the absence of levers through which external financing can be accessed for creditors who find themselves at the date of insolvency of the debtor with amounts blocked in his account are aspects that materialize in the development of a general conduct of creditors fraudsters, cases specific fraud factors mentioned above (from the study of retroactive and prospective analyzes of insolvency practitioners and their own experience in the field of financial audit and accounting) being an asset that supports the theory stated above.

All of these "risks" to creditors to the detriment of debtors translate into economic practice by significantly reducing their interest in supporting a viable reorganization plan and providing a second chance for a debtor who probably has no intentions. obscure. The "point-by-point" legislative analysis of insolvency specialists materialized a series of proposals for the Ferenda law because, unfortunately, after 4 years from the elaboration of the current legislation, it is necessary to improve and update these regulations. Among the proposals of the Ferenda law are the correction of grammatical errors (eg "until proven otherwise" to the detriment of "contrary evidence", "encumbering their tasks" instead of "encumbering their tasks", phrases such as "companies"). on limited liability companies "in" joint stock companies and limited liability companies ", etc.), amending, merging or breaking down articles of law (for example art. 3, paragraph (1) and art. 38, para. (2) in order not to exclude the liberal professions from the scope of insolvency law, proposals such as foreclosures performed simultaneously for all categories of creditors for each type of insolvency separately - ad-hoc mandate or concordat-preventive, change the phrase "Judicial administrator" in "judicial liquidator" in case of liquidation, simplification of valuation and liquidation procedures, possibility to change the position of creditors in the table of claims according to preferences to them - on the basis of a tender - this aspect is not only imposed by the normative text, but can also be modified according to the preferences of creditors regarding the type and rank of their claims, etc.), full transparency and the possibility of participation of all actors insolvency to absolutely all meetings, valuations, revaluations, decisions or proposals that are made or take place with respect to the debtor's assets and result in the impairment of creditors and creditors who find themselves with blocked amounts.

Insolvency practitioners' proposed laws will be a way to establish equity between creditors and debtor, transparency and fairness imposed by both parties (and not just promoting the debtor's interests) can reduce and why not eliminate fraud committed to the detriment of interests creditors and the state. In the opinion of insolvency practitioners, a change in the current legislative text is imperative due to the fact that Romania occupies the lowest degree of recovery of creditors' claims (in insolvency proceedings) in the European Union.

4. Winners, losers and opportunists in the pandemic period

The role of amending and constantly updating legislative rules is to cover the legislative clichés that governed previous laws, the constancy of legal rules in line with the evolution of consumer society and business, the treatment of specific cases not previously notified, and fairness and fairness on all parts of a trade act. At least from a theoretical point of view, the legislative rules aim at equality and fairness in order to avoid situations such as speculation, injustice, fraud, deception or other illicit elements that may cause financial or image damage to one or more parties involved in acts of trade (Băhnăreanu, 2020). However, there is not always a happy ending in the procedures applied according to the law, evasions and preferential interpretations of legislative rules (which sometimes encourage this practice through ambiguity in expression) still exist. Analyzing the annual reports made by the European Commission regarding the degree of recovery of creditors' claims at the end

of insolvency proceedings, it is found that Romania occupies in each reporting year (2015-2019) codified places in terms of debt recovery, and the perspective the future does not have good expectations for the creditors of insolvency proceedings. This aspect leads to the idea of breaking the actors of insolvency proceedings into winners, opportunists and losers.

The European Commission's reports clearly qualify the debtors of insolvency proceedings as the big winners in the event of liquidation, given the alleged or proven fraud, the possibility of fraudulent acts by debtors, the ability to verify the suspicious period by the bailiff (which in almost no case does not verify the suspicious period without the express request of creditors through the credit council), the financial situation of the debtor at the time of declaration of insolvency and difficult procedures for recovery of debts by bidding the debtor's assets, even in the liquidation phase.

The category of opportunists may include preferential creditors who benefit from the entry of a debtor into insolvency either through unfair (and even illegal) agreements with the debtor in the pre-insolvency phase, or through the priority they have at the creditors' table. The subject of prioritizing the credit table is also a discussed topic, as the situations in which this priority can be obtained by assigning receivables (governmental or private) or by overriding other categories (such as unsecured creditors) are known. Remaining in the scope of classification of opportunists, although it is not often mentioned in insolvency practices, the state through the representative bodies is a category that can be imposed without difficulty as privileged, being the decision-making body of the applicable rules. The opportunism of government institutions lies in their ability to assign their receivables to a third party, active or not at the creditors' table, the primary interest of the state being to recover the amounts owed by debtors, rather than taking part in a insolvency proceedings which may extend for a period of up to 5 years and for which the exact purpose is not known.

The declared losers of an insolvency procedure are mainly represented by the creditors who fail to recover their debts, the impact on them being manifested not infrequently by the subsequent declaration of the impossibility of payment by them, due to the long-term blocking of some amounts of money that constituted their current economic circuit, and participation in an insolvency procedure as a component part entails other costs, not deductible from a fiscal point of view. Another category of losers is employees of the company who, although they were aware of the insolvency of the company they worked for, may not be able to find a similar job in the field, especially if the entity for which they were reporting is located in a disadvantaged area or was the only one in the nearby geographical area that provides activities specific to the profile of employees (mention here the case of insolvency Oltchim Râmnicu-Vâlcea, closure of Jiu Valley, Roșia Montană, disadvantaged and poor area of Moldova, etc.).

5. Findings

The Romanian economy registered one of the largest decreases in the entire EU bloc (12.3% according to Eurostat), being behind the states that rely strictly on tourism as an impact on gross domestic product (Spain, Greece, Croatia, France, Italy , etc.). The European Union's response is considered by the same analyst to be the strongest and most impactful since the establishment of the European Union, focusing on two strategic axes: combating the Covid-19 pandemic and limiting the economic effects generated by this movement. The most important instrument developed by the European Union was the NGEU Program, which refers to the allocation of considerable monetary resources for the states affected by the pandemic, the program taking place between 2021 and 2027, where it can be deduced that the opinion of European Commission analysts is the return in the medium and long term at the economic level after the pandemic.

If 2020 has had a direct impact on the Ho.Re.Ca and transport sectors, it is estimated that 2021 will have an unfavorable impact on related sectors such as automotive, manufacturing, aviation, tourism, dairy, meat, bakery, agriculture and growth. animals, thus generating a chain effect.

Agriculture, trade, industry and energy are the sectors of activity that recorded the most impactful insolvencies in 2020.

The number of insolvencies in these sectors of activity as a whole is lower than in previous years, with a number of insolvencies 42% higher compared to 2019. This is mainly due to the closure of courts, the statistics of the National Office of the Trade Register showing a number of impact companies (with assets of over one million euros representing pillars of the economy of a city,

county, region and generates approximately 70% of the cumulative turnover at national level) who resorted to insolvency proceedings, decreasing from 139 in 2019 to 80 in 2020.

6. Conclusions

The health crisis and the measures that followed were an additional blow to insolvent debtors, without taking into account those whose business was closed by the pandemic. The effects of the pandemic on the number of insolvencies from a statistical point of view are not yet felt, and this is due to the fact that the courts have not operated for a period of 3 calendar months. A simple calculation of extrapolation of the number of insolvencies in 2020 (of which only 9 operational months) results in an approximate number of 8,699 insolvent companies (the calculation being based on dividing the number of insolvencies reported in 2020 to 9 operational months, multiplying later with 12 months of a year - 6,524 / 9 = 725, 725 * 12 = 8,699). This simple calculation does not take into account the human factor, here we are referring to the panic generated by the pandemic and the need to protect our own assets, which would probably have further amplified the number of reported insolvencies. The support measures offered to borrowers during the pandemic represent a "mouth of oxygen" in the current crisis, but an entire "oxygen cylinder" is needed to save vulnerable entities (Borges, 2020).

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