INSOL Europe High-Level Course on Insolvency in Romania

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INTRODUCTORY REPORTS

INTRODUCTION TO ROMANIA'S INSOLVENCY SYSTEM

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There has always been a difference between theory and practice. The legislation in Romania looked good on paper, but in practice, the insolvency Law 85/2006 had a number of shortcomings and, as a result, throughout the procedure, creditors could hope for a recovery rate of approximately 35 cents on the dollar in 3.3 years, according to the World Bank study. After years of practical remedies, the insolvency Law 85/2014 entered into force.

The paper is an introduction to Romania's insolvency law and it aims to assess the implementation of Law 85/2014, four years after its entry into force. As with any evaluation, the starting point will be the objectives set out for the new regulation, its functionality and the end result.

1. An introduction to corporate insolvency in Romania

The Romanian corporate insolvency framework is aimed at rescuing the insolvent debtor, while also ensuring payment of debts towards creditors. Today, we can definitely argue that it is one of the most modern insolvency frameworks out there in Europe, with a coagulated local body of insolvency practitioners, with an Institute for insolvency practitioners professional training, an online public insolvency registry, through which procedural documents are transmitted. We also have specialised syndic judges, with short time periods between court appointments, and a so called "liquidation fund" which is meant to cover the costs of insolvency proceedings, when there is no available money for it. There are, of course, some issues that can and will be solved by the jurisprudence or with the intervention of the legislator.

The Insolvency Code defines insolvency as the patrimonial status of a debtor characterised by lack of sufficient funds for the payment of the due debts, with two forms; presumed insolvency – when the insolvent debtor has not paid debts towards creditors for more than 60 days as of their due date; and imminent insolvency – when it is proved that the insolvent debtor will not have sufficient available funds to pay its debts at the due date.

The syndic judge rules on the commencement of the insolvency procedure at request of either the insolvent debtor itself or a creditor who has a certain, liquid and due claim of at least 40.000 lei (1 Euro = 4.65 lei, approximately 8.600 E) which has not been paid for more than 60 days as of the due date.

The syndic judge appoints an authorised insolvency practitioner as judicial administrator of the insolvent debtor at the proposal of the majority creditors or, in certain cases, at the proposal of the insolvent debtor. The judicial administrator manages or supervises the day-to-day business of the insolvent debtor during the reorganisation phase of the insolvency procedure.

The general meeting of the shareholders of the insolvent debtor appoints a special administrator upon the commencement of the insolvency procedure. The special administrator manages the activity of insolvent debtor's activity under the supervision of the judicial administrator, during the observation and the reorganisation phase of the insolvency procedure if the management and representation right of the insolvent debtor is not lifted by the court.

Upon commencement of the insolvency, all court and enforcement actions against the insolvent debtor's assets are automatically suspended and claims against the insolvent debtor can be pursued only within the framework of the insolvency procedure.

Certain acts and operations concluded and performed within a period of two years before the commencement of the insolvency procedure may be annulled by the syndic judge at the request of the judicial administrator, judicial liquidator, creditors' committee or creditor holding more than 50% in total claims. If such annulment occurs, the insolvent debtor's counterparty should return the assets received from the insolvent debtor and shall have a claim for reimbursement of price, which may be recovered in the insolvency procedure together with the claims of the other creditors. The Insolvency Code provides two general types of acts and operations which can be annulled operations concluded in the last six months before the commencement of the insolvency procedure where fraud against the creditors' interests is presumed, such as operations where the performance of the insolvent debtor obviously exceeded the value of the counter performance received by the insolvent debtor, and acts and operations concluded with the insolvent debtor during the last two years before commencement of the insolvency procedure by a shareholder holding at least 20% of the share capital of the insolvent debtor or a member of the management or supervision bodies of the insolvent debtor or any other person holding a position of control over the insolvent debtor.

Ongoing contracts may continue to be carried out after the commencement of the insolvency procedure and any contractual clause providing for termination of a contract due to the opening of the insolvency procedure is null. However, within three months as of the commencement of the insolvency procedure, for the purposes of maximising the patrimony of the insolvent debtor, the judicial administrator or liquidator may terminate (with payment of damages for the contractor) any contract, unexpired leases or other long-term contracts as long as such contracts have not been totally or substantially performed.

All creditors should register their secured and/or unsecured claims with the competent court within 45 days as of the opening of the insolvency procedure in order to take part to the insolvency procedure. Upon such registration, creditors become members of the creditors' assembly, which may propose the appointment of a certain judicial administrator or liquidator and assess its activity, approve reorganisation plans, decide upon important aspects during the insolvency procedure such as new financings for the insolvent debtor; and appoint a creditors' committee of three or five creditors. Secured creditors will have a general priority to proceeds obtained from the sale of their duly perfected collateral**.**

The general insolvency procedure may take an insolvent debtor in two directions reorganisation or bankruptcy and liquidation.

The reorganisation is aimed at rescuing the insolvent debtor, while also ensuring (at least, partial) payment of debts towards creditors, it is based on a reorganisation plan proposed by the insolvent debtor, judicial administrator or creditor(s) holding at least 20% in total claims. The reorganisation plan is approved by the creditor's assembly (on the basis of classes of creditors) and confirmed by the syndic judge and it may cover operational and/or financial restructuring of the insolvent debtor, corporate restructuring by way of changing the share capital structure of the insolvent debtor; or decrease of the activity by liquidation of assets.

Bankruptcy and liquidation are aimed at liquidating all assets of the insolvent debtor and the distribution of the proceeds to its creditors according to the preference order set out under the Insolvency Code, followed by the dissolution of the insolvent debtor. If the reorganisation of an insolvent debtor is not possible and/or the insolvency procedure leads to bankruptcy, the liquidation of the assets of the insolvent debtor and the distribution of liquidation proceeds is carried out by a judicial liquidator.

The insolvency procedure is closed when there are no assets left in the patrimony of the insolvent debtor, or there are no requests for registration of claims submitted by the creditors, or all payment obligations assumed under the reorganisation plan have been fulfilled, or all liquidation proceeds have been distributed or placed in bank accounts.

2. Shortcomings and remedies of the Insolvency Law

As what was being pursued through the legislative reform in 2014 in the field of insolvency was mainly the removal of the insolvency Law 85/2006 shortcomings, we considered opportune first of all i) to present these shortcomings - as they were highlighted in the World Bank ROSC report (Report on the Observance of Standards and Codes - Principle C - Legal framework of insolvency proceedings).

After reviewing the mistakes we will present ii) the remedies brought by the new law (Law 85/2014) and at the end we will analyse iii) the functionality of those remedies.

2.1. The commencement of the insolvency procedure

2.1.1. The shortcomings

The first criticisms highlighted in the World Bank report concerned two major issues. On the one hand, the fact that the insolvency procedures take a long time – this generates significant costs and depreciation of assets - especially due to the duration of the observation period - in some cases the period observation was 7-8 years;

On the other hand, due to the existence of an asymmetry between the debtor's rights and those of its creditors' in accessing the proceedings (while the debtor could obtain a ruling on the commencement of the proceedings within 5 days of filing the application, the creditors were given very long court dates for their respective application, sometimes several months, and they had no legal possibility to intervene in the debtor's application, for example, intervening to make proposals regarding the appointment of the judicial administrator of the procedure). Hence - the possibility of manipulating the procedure by the debtor by designating the provisional insolvency administrator.

Other criticism referred to the lack of regulations aimed at preventing the premature dismantling of the debtor's assets between the filing of the insolvency claim and its solving, the lack of legally established rights for current creditors, the possibility of a too easy approval of the reorganization plan, with only one condition for its confirmation by the syndic judge - that at least half plus one of the voting creditors' categories approve the plan, but the percentage (related to the total debt) of the approving creditors was not being taken into consideration in this equation. There were situations when the plan passed with the vote of 2-5% of the total creditor mass, although it fulfilled the condition that at least half of the creditors' categories vote the plan.

All these shortcomings have generated a climate of general mistrust in insolvency procedures, requiring urgent legislative changes.

2.1.2. The remedies

The new insolvency Law no. 85/2014 introduced provisions that reduced the duration of the observation period to a maximum of 12 months from the date of the opening of the procedure. This rule has the desired effect, even if the rule is not an imperative but merely a recommendation, generating an accountability of the courts in using all the legal mechanisms (such as the provisional registration of disputed debts, which require in-depth evidence and lengthy judgments) in order to produce a definitive Table of claims.

It also introduced the possibility for creditors to intervene directly in the debtor's application and it stated clearly the prevalence of the creditor's claim in relation to the nomination of the provisional insolvency practitioner. In case several creditors request the appointment of different provisional insolvency practitioner, the syndic judge will appoint one of the practitioners proposed by the creditors, motivating its choice. This provision did not have the desired impact as the judicial practice is not unitary. Some of the courts have ruled that the creditor's request for the appointment of a temporary insolvency practitioner cannot be analysed in the debtor's non-contentious proceedings and that the creditor's claim cannot be verified at this procedural point.

We would argue that it is virtually impossible for the lawmaker to settle the debtor's request to open the insolvency proceedings within 10 days and to be able in this timetable to administer probation in connection with creditors' claims. However, creditors should have the right to make proposals about the provisional insolvency practitioner, even if their claim cannot be verified by the syndic judge in such a short time.

In order to prevent the premature dismantling of the debtor's assets, it was introduced the following provision; from the moment of the application for the insolvency procedure and before a ruling on the commencement of the insolvency procedure, the syndic judge could order the suspension of the enforcement procedures upon the debtor's request, but also at the request of a creditor, the suspension of all sales / transfers of the important assets by the debtor.

Perhaps the most important change regarding the approval mechanism of a reorganization plan is the introduction of an additional condition; that at least 30% of the total claims should approve the plan. This created a balance between the interests of the debtor and those of his creditors, while ensuring the right of the debtor to recover, as well as the right of creditors to receive fair treatment.

The rights of the current creditors to request the bankruptcy of the debtor for non-payment of current receivables, older than 60 days is certainly beneficial if we take into account that the debtor benefits from a moratorium in respect of past debts, and he should be able to pay its current liabilities. It should also be mentioned that the reorganization procedure cannot be closed if the debtor does not pay his current debts, not just the previous ones.

2.2. The lack of transparency regarding the creditors assembly

2.2.1. The shortcomings

Another problem of the previous legislation was the lack of transparency and efficiency of the insolvency procedure, in the sense that, for example, the creditors' assembly could have been summoned and held in no time, from one day to the next, without the creditors being able to prepare their point of view and get the necessary approvals from their own governing bodies.

Also, the creditors' assembly decisions taken with the vote of creditors who did not represent a real majority and were included in error as major creditors could no longer be changed.The reverse situation was also present; the majority creditors were prevented from voting, being registered by mistake in the provisional Table of claims conditionally, as a non-voting claim. Only subsequent, at the definitive Table of claims they had proven their claim and they were registered with the right to vote.

Last but not least, another flagrant lack of transparency, there was no sanction in the case of a conflict of interest within the creditors' committee.

2.2.2. The remedies

To overcome these shortcomings it was introduced a period of at least 5 working days between the convocation of the creditors' assembly and the actual date of the meeting.

It was introduced the possibility of removing from the creditors' committee those who repeatedly voted, although they were in conflict of interest, and also the express possibility of challenging the decisions of the creditors 'committee before the court - in the previous legislation the decisions were challenged at the creditors' meeting.

But the most important change is the possibility of voiding the decisions of the creditors' assembly in the event that it subsequently turns out that the decision had been adopted with a the vote was vitiated by the introduction or removal of a claim for which the holder requested it to be entered in the debt table and if such a vicious vote could have led to the adoption of another decision.

In order to abolish these decisions, the text of the law imposes several prior conditions: first, that the vote expressed by the unqualified creditor/ the vote not expressed by the creditor who had the right to vote was decisive in adopting the decision of the creditors' assembly. Secondly, there must have been a decision that would alter the creditor's claim either in the sense of admittance or in the sense of rejecting it, and of course, a request must be made to the syndic judge to abolish this decision.

As a general conclusion to all the remedies introduced, we can say that all of them were beneficial, bringing more transparency, efficiency and justice to the insolvency proceedings.

2.3. Regarding the assets

2.3.1. The shortcomings

There are a few aspects related the treatment of assets in insolvency that were problematic in the previous legislation, mainly, that it does not provide for the possibility of selling the assets during the observation period if there is a risk of depreciation of the assets, there is a lack of legal provisions allowing creditors to challenge separately the valuation reports of the assets to be sold, and that the business transfer – as ongoing - does not have adequate regulation, especially in bankruptcy procedures.

2.3.2. The remedies

Specifically, the remedies brought by the new law consisted of introducing the possibility of selling unencumbered assets at any stage of the procedure, if there is not enough liquidity on the debtor's account. Following the appointment of the creditors 'committee, such capitalization may be made only with the approval of the creditors' committee, in accordance with the provisions of Article 39 para. 6. This is a good solution, but it has the disadvantage of conditioning the sale of assets to the lack of liquidity; however, the premise of selling should be the perishable nature of the goods and the risk of depreciation, not the lack of liquidity.

Although the new provisions creates an entirely new world of problems, it has introduced the possibility for any creditor to challenge the content of the evaluation reports within 5 days of the publication of the report extract in the BPI (the bulletin of insolvency procedures) (Article 62.2). The possibility of challenging asset valuation report is a very good measure, since the value is of particular importance in the procedure, it is the amount with which the creditors are entered in the definitive Table of claims and in the reorganization plan as a secured creditor. The rest will be unsecured claim.

We welcome the express introduction of the provision whereby any sale in block as a functional ensemble, regardless of the procedure in which it is carried out - reorganization or

bankruptcy - can be considered a business transfer in accordance with the provisions of the tax code in question and is therefore an exempt transaction. The transfer of assets does not exclude per se, the transfer of staff necessary to maintain the functional character of the business itself.

2.4. Regarding financing

2.4.1. The shortcomings

The problems identified here were the lack of legal regulation that allow the debtor or the administrator to use the sums of money entered into the debtor's property, product of encumbered assets meanwhile guarantying an appropriate protection to the said creditor, the lack of funding sources during the observation and reorganization period and of provisions granting a super priority to the financing given after the opening of the insolvency procedure, and last but not least the lack of provisions which encourage the fluidity of the asset recovery in bankruptcy procedures.

2.4.2. The remedies

Specifically, in relation to these shortcomings, the new provisions stated that, at the request of the judicial administrator, these sums of money may be used in the current activity of the debtor, with the approval of the syndic judge - art. 75, paragraph 9. The use of this of money, with the agreement of the syndic judge, if the guaranteed creditor refuses give its blessing - was not a measure that has reached its end, since many judges are hesitant to approve, considering that it is not a question of legality that may be in the jurisdiction of the court, but rather a matter of opportunity on which the court cannot pronounce or for which it does not have enough concrete data.

Regarding the financing granted in the procedure, a super priority was introduced in favour of the financier, provided that the financing operation is subject to the approval of the creditors' assembly - art. 87 para. 4. Financing the debtor during the procedure has hit a new impediment - the lack of appetite of the creditors for such funding. Even if the law gave top priority distribution in case of bankruptcy, the bank creditors were not too excited to grant such funding, the only situations in which this provisions worked were those in which bankers also had the status of creditors in the procedure.

Regarding the support of the public creditor in the reorganization procedures, which may be considered state aid, the private creditor test was introduced. The public creditor must assess, like any diligent private creditor, given his claim, what he would receive in case of reorganization, compared to the amounts that would receive in the event of bankruptcy of the debtor. The private creditor test is ineffective. The public creditors refuse to perform this test, motivating that they do not have specialists. The text also has a drawback, it lacks a sanction - such as a presumed vote in favour of the reorganization plan.

2.5. Conflict of laws

2.5.1. The fiscal interference

In addition to the matters of the above analysis, we would like to mention two issues that may affect the natural course of insolvency proceedings and that alter the principles governing the procedures insolvency.

These issues are firstly, i) legislative changes parallel to the insolvency procedure brought by other normative acts and secondly, ii) the interference of the criminal process in the insolvency proceedings.

An important disruption in the insolvency procedure is the fiscal procedure. According to Article 351 of the Fiscal Procedural Code- *Settlement of appeals in the case of tax administrative acts on insolvency debtors - As an exemption from the provisions of Art. 75 of the Law no. 85/2014, the tax administrative acts issued before and after the ruling of opening the insolvency procedure are subject to the control of the specialized courts of fiscal administrative contentious.*

Given this legal provision, appeals against claims of the public creditor are excluded from the jurisdiction of the syndic judge. This exemption raises a series of problems; it generates significant delays in solving such challenges; if we take into account that while the insolvency procedure provides for short deadlines for settling claims. By comparison, the procedure for resolving tax litigation lasts 3-5. Also, given the time gap in which the two procedures are solved, it may prove impossible of determining the total of the claims.

Another major drawback lies in the lack of transparency of the fiscal procedure, given the fact that the creditors of the insolvency proceedings cannot intervene in that file, even if they claim and justify the same rights as the creditor fiscal (such as, for example, the situation of a collateral on the same assets).

2.5.2. The criminal interference

An important interference of the Criminal Code and Criminal Procedural Code are the preventive measures that may be ordered under the criminal action against the debtors in insolvency proceedings.

We need provisions that take into consideration the realities of the insolvency procedure. The insolvency proceeding itself should not be blocked.

A concrete example of this disruption is the preventive measure of forbidding the dissolution/liquidation/capitalisation of a company under insolvency proceedings during the observation period, and maybe even during the restructuring or bankruptcy.

Practically, when this measure is instituted by the criminal prosecution bodies or the criminal court, the company is forbidden to enter into bankruptcy, as well as to realise its assets.

But what happens to the proceedings? Who bears the costs related to the security services and the other costs; what about the collective creditors' rights to request the bankruptcy in case of non-payment of claims that are past due for more than 60 days? What can the syndic judge do when the conditions for declaring bankruptcy are met?

And what happens to the security rights of the creditors with mortgages over those assets? On one hand, these assets can no longer be sold, triggering increased costs, and, on the other hand, blocking these asset from being capitalized is not beneficial to the criminal procedure (case) either, because at the end of the criminal processes, the proceeds will be distributed to the secured creditors holding pre-established securities.

Even though said measures may be imposed for no more than 60 days, extensions are granted repeatedly, without the possibility of reasonably determining the time when the insolvency proceedings may be resumed.

3. The need for the INSOL Europe High Level Course on Insolvency Law in Eastern European Jurisdictions

Practicing in insolvency means being on a different plane field; during a reorganization or liquidation process all relationships of a company are in a high state of tension and every aspect of a company is under severe scrutiny. This is what makes it so interesting, but also so challenging. And the challenges are not only at a national level. It has become increasingly difficult to talk about national insolvency laws in the globalization era.

INSOL Europe's answer to this riddle? A course separated into 3 different modules, each with a different -but complementary- component that have conveyed the main elements of international best practice and deepen into the knowledge and interpretation of the local system of a given country. All the training has a theoretical base but fundamentally a practical approach. The classes were seminar-based and fully interactive.

The new insolvency law no 85/2014 had set out to straighten up all the wrongs of the old law, but it too, presents its series of problems unforeseen by the legislator. It was clear we needed an example of best practices that could maybe help us better interpret our provisions and we were lucky enough to be INSOL Europe's pilot country for this course. Romania was representative both in view of the jurisdiction's legal tradition and its recent reforms in the insolvency area.

The professionals participating have not only learned essential comparative aspects of the law, what the law entails, but also why it has come to be this way. And if a different approach in the national law might be possible. This provides a profound understanding of all insolvency institutions.

The first module started on a Thursday, 2nd of February 2017. The course began with Prof. Riz Mokal's (Barrister, South Square Chambers, London Honorary Professor, University College London Visiting Professor, and University of Florence) lecture on *Insolvency law – why have it? What does it do? What does it require of stakeholders?* then, professor Irit Mevorach's (Professor of International Commercial Law University of Nottingham) *Who may go bankrupt and How* – and professor Mihael Veder (Professor of Insolvency Law, Radboud University, Nijmegen, The Netherlands) followed next with the lecture *Effects on the debtor and the "build-up" of the estate* challenging the participants with apparently simple questions such as, what assets will be included in the estate, questions that have very different answers depending on the jurisdiction discussed.

Each professor brought his/hers own energy and emerged participants in this fascinating never ending discussions that rocked the basic questions in insolvency. On Friday, we continued with discussions on *Contracts and secured creditors in insolvency, Informal workouts in the shadow of the law* and *Business Rescue inside formal proceedings.*

The participants were also able to immerse themselves in cross-border insolvency and informal workouts and the respective extensive case studies. We were very fortunate to have had as a lecturer Mme Mihaela Carpus-Carcea from the European Commission, the Directorate-General for Justice and Consumers with the *Proposal on preventive restructuring, second chance and efficiency measures COM(2016)723.* This presents a unique opportunity for the Romanian professional to have a live, informal discussion with the policymaker.

The INSOL Europe High Level Course on Insolvency Law in Eastern European Jurisdictions: Romania 2017, second module, took place in 29 June-1 July, in Bucharest, Romania, at hotel Caro.

This module was devoted to the analysis of a selected number of especially relevant topics of the local insolvency system, such as: how and why the new insolvency law was shaped, the necessary corrections after three years of practice, pre-insolvency and problematic aspects regarding the group of companies, opening the insolvency proceedings and its effects, avoidance actions, directors liability, IOH liability, the restructuring plan, the current claims, bankruptcy, the compliance of the current Romanian System with the Proposal Directive on

Insolvency, Restructuring and Second chance, and so on. The classes have taken the form of a dialogue between the local and the international expert, thus encouraging the audience to actively participate in the presentation. This is the best way to ensure that proper theoretical and practical elements are conveyed at a high level.

The subjects were tackled by Simona Milos, the president of the National Institute for the Training of Insolvency Practitioners, Irina Șarcane, member of the leading board of the National Institute for the Training of Insolvency Practitioners, Flavius Motu - syndic judge, Andreea Deli-Diaconescu, member of the scientific board of the national institute for the training of insolvency practitioners, Vasile Godinca-Herlea president of the National Practitioners' Organization, Cluj branch, CITR CEO, Bogdan Biter, experienced insolvency practitioner and Mihaela Carpus Carcea, legislative officer at the European commission.

Acting as a co-discussant was Professor Janis Sarra, from University of British Columbia, Professor Christoph Paulus, from the Humboldt-University of Berlin and Alberto Nunez-Lagos, partner at Uria Menedez.

The presentations for the second module have been created having in mind the fact that the base for the presentation was the local law and that all the participants were highly skilled professionals, with a rich experience in the insolvency field; IOHs, high court judge's insolvency law doctors and lawyers. A general aspects presentation could potentially be uninteresting for the audience.

And so, the local experts had the difficult job of presenting material that will be attractive for both the local professionals and the international experts. It was a tight line, between the detailed controversial aspects regarding the local law and general aspects/ideas that could be discussed comparatively.

Given the participants background – all highly skilled and experienced professional in the field of insolvency – this module was an incredible experience. The audience (IOH, high court judges, and lawyers) could and have swapped places on numerous occasions. I could only describe it as a group of people coming together and discussing various controversial aspects and possible solutions offered both from the national point of view and from the international experience.

The 3rd Module was designed especially for the participants. They had until December 2017 to write an essay of about 10.000 words on a selected topic, with tutoring available during that period. A committee of experts, composed of both international and national members, reviewed their papers and selected the best for each topic.

Out of the 29 that have submitted an essay, those selected have presented their papers at the final workshop. Even though all the participants are reputable professionals in the insolvency field, the presentation day came with some agitation, nerves and especially excitement. The presentations touched subjects such as the EU Directive Proposal on restructuring and second chance, the systems of liability of directors in insolvency, the possibility of selling the debtor assets seized by criminal authorities, the meaning and extend of supervision of the debtor-in-possession by the judicial administrator in Romania, just to name a few.

With this Module, we have concluded a very successful pilot High Level Course on Insolvency Law in Eastern European Jurisdictions. As INSOL Europe's acting president, I would like to extend my sincere gratitude to the General Director of the High-Level Course, prof. Ignatio Tirado, the Course Director Emmanuelle Inacio, the International experts and the local experts, for making this event a success. It was a pleasure working with you as a Local Director.

The participants' feedback was great, they appreciated the content of the courses, the structure and the organization and especially the interactivity and the overall learning

experience. The international speakers have given us a memorable and refreshing experience in sharing their unique point on view on some of Romanian insolvency laws most controversial aspects. In our profession, constantly dealing with the debtors in their time of need, one can never get comfortable, regardless of our years of experience and this course certainly helps put things into perspective.

THE SECURED CREDITOR'S POSITION IN THE ROMANIAN INSOLVENCY PROCEEDINGS

Judge Flavius MOTU (Tribunalului Specializat Cluj)

1. Introduction

While a secured creditor's right over his debtor's encumbered assets is described by the recast European Insolvency Regulation no. 2015/848 (hereinafter referred to as the Recast EIR) "preferential", thus deserving preferential treatment, the Recast EIR does little to harmonize the various European insolvency laws in that regard. The reason behind this approach is rather simple: as stated in the EIR's preamble no. 22[1], the secured claims' legal regimes in Europe are just too diverse to be harmonized, yet. In the absence of a universal (or at least a European) *lex mercatoria* to regulate secured debts, the Recast EIR simply acts as a European uniform set of rules regulating the conflict of insolvency laws.

As a result, a secured creditor's rights over his insolvent debtor's encumbered assets, remain, in most cases, governed by the law applicable to the creation of the security. In its turn, the law applicable to the creation of the security is, invariably, the law of the state where the encumbered assets are situated at the time the security is created. Therefore, a foreign secured creditor's rights over a Romanian insolvent debtor's encumbered assets will, most probably, be regulated by the Romanian law: the Romanian Insolvency Act no. 85/2014 (hereinafter RIA) and the Romanian Civil Code (hereinafter RCC).

Pursuant to the World Bank's Principles for Effective Insolvency and Creditor/Debtor Regimes, RIA seeks to grant 'adequate protection' to the secured creditors.

The notion of 'adequate protection'[2] is crucial for any analysis of the legal regime applicable to secured creditors in an insolvency governed by the RIA. Like any other national insolvency act, RIA aims at striking a balance between the creditors' interests, protection of the debtor, saving the business and observing the fair trial principle. In this wide, collective proceedings framework, secured creditors enjoy a special position, having rights *in rem* over the insolvent debtor's assets that, according to the Recast EIR Article 8, should not be affected in any way by the opening of the insolvency proceedings. Awarding the secured creditors 'adequate protection' is the solution RIA has adopted in order to balance the individual interest of each secured creditor (who enjoys the standing option of applying for the automatic stay to be lifted and to liquidate the collateral) and the converging interests of the unsecured creditors, while striving to give the debtor a second chance.

Although not among the principles stated in RIA Article 2, the principle that secured claims are to be paid in full before any unsecured claims are paid can be inferred from the wording of RIA Article 159 (1) and (2)[3].

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[1] Regulation (EU) 2015/848, preamble 22: "This Regulation acknowledges the fact that, as a result of widely differing substantive laws, it is not practical to introduce insolvency proceedings with universal scope throughout the Union. The application without exception of the law of the State of the opening of proceedings would, against this background, frequently lead to difficulties. This applies, for example, to the widely differing national laws on security interests to be found in the Member States. Furthermore, the preferential rights enjoyed by some creditors in insolvency proceedings are, in some cases, completely different."

[2] See 3.2., *infra.*

[3] See 4.2., *infra*.

In accordance with the wording of the recast EIR and the terminology of the RCC, RIA Article 5, pt. 15 defines "preferential claims" as "those claims that are secured by a statutory lien and/or by a mortgage and/or by a security similar to a mortgage, according to Article 2.347 of the Civil Code, and/or a pledge over the insolvent debtor's assets, hereinafter called 'causes of preference'. The insolvent debtor may be either a primary obligor or a real surety to the secured creditor. In the event that the insolvent debtor is a real surety, the secured creditor can only exercise his rights over the insolvent debtor's collateral. These 'causes of preference' have the meaning conferred on them by the Civil Code, unless explicitly provided otherwise in the law;"

RCC has abandoned the classic distinction between civil law and commercial law, adopting the concepts of "enterprise"[4] and "professional". A "professional" is any person (natural or legal) running an "enterprise". An "enterprise" is the systematic exercise of an activity consisting in the production / administration / transfer of goods or in the providing of services, by one or more persons, regardless whether such an activity is exercised for a lucrative or for a non-profit purpose. Somewhat ambiguously however, the notion of "professional" covers companies, liberal professionals, NGOs, sole traders, partnerships etc. RIA explicitly excludes liberal professionals, universities, schools and other research institutions from its scope, attempting to restrict the application of its provisions to 'commercial enterprises'.

2. The 'Causes of Preference'. A Crash Course in the Romanian Law of Obligations.

According to Article 2.327 RCC, the 'causes of preference' are: liens, mortgages and pledges.

2.1. Lien

A lien is defined by Article 2.333 RCC as the statutory priority conferred to a creditor by the nature of the debt owed to him by the debtor. Liens are always statutory. Possession of collateral and publicity through registration in the appropriate public registry are not mandatory for the creation of a lien. Subject to statutory publicity, the lien creditor's priority defeats all other causes of preference, regardless of when they were created.

RCC only regulates two 'special' liens over movable property, that take priority over any other liens regulated by other acts: the seller's lien and the lien of a creditor in possession.

Surprisingly enough, the seller's lien over movable property is only applicable if the buyer is an individual (natural person) and the goods were not sold to be used in a commercial enterprise. Therefore, since RIA only regulates commercial insolvencies, the seller's lien regulated by the RCC is inapplicable in Romanian commercial insolvency proceedings.

A creditor in possession is the holder of a retention right over his debtor's movable property. Such a retention right needs to be judicially sanctioned and is an adjunct to a pecuniary obligation. The lien only exists as long as the creditor holds the right of retention.

According to Article 2.342 RCC, in the event that a lien and a mortgage / pledge were created over the same collateral and priority to payment needs to be established, a 'special' lien creditor shall take priority over a mortgagee / pledgee if the lien has been registered in the Electronic Archive for Security Interests in Movable Property (hereinafter AEGRM) / land registry prior to the registration of the mortgage / pledge.

[4] The Romanian term "întreprindere" is traditionally translated as "undertaking". I have chosen to translate it as "enterprise" in order to avoid any confusion with the competition law concept of "undertaking".

2.2. Mortgage

Departing from a one and a half century old tradition of reserving the mortgage to immovable securities, RCC extended the availability of mortgages to both movable and immovable collaterals.

Articles 2.343-2.344 RCC define mortgage as a secondary right *in rem* over an asset encumbered for the purpose of securing the performance of an obligation. A mortgage is, by nature, a right secondary to the creditor's primary right to obtain the performance of the obligation. The mortgage exists as long as the primary right exists, encumbering all the assets concerned, even though the encumbered assets themselves are divisible. Equally, the mortgage is indivisible, even though the secured debt is divisible.

A secured creditor may foreclose[5] on the collateral, even though the collateral has been transferred to a third party. Equally, if the collateral is sold in judicial enforcement proceedings, a mortgagee with a higher ranking priority is to be paid the debt in full (capital, interest and any other additional liabilities, plus the reasonable expenses paid for the preservation of the collateral) before any mortgagee with a lower ranking priority / unsecured creditor is paid.

Mortgages are created by operation of law or by contract. Mortgages encumbering immovable property are only valid if created by a notarised authentic deed, while mortgages encumbering movable property are valid only if they are created by a written instrument. Failure to observe the rules on the *instrumentum* containing the mortgage - notarised deed / written document - results in the absolute nullity of the mortgage.

All legal mortgages encumber immovable assets. They very similar to 'special liens': the seller of an immovable property holds a legal mortgage over the object of the sale to secure the payment of the sale price, the buyer-to-be in a pre-contract of sale holds a legal mortgage over the immovable property registered in the land registry to secure the repayment of advance payments, the lender that has lent a sum of money to allow the borrower to acquire an immovable property holds a legal mortgage over the borrower's immovable property to secure the repayment of that sum of money, the architect / builder holds a legal mortgage over the building to secure the payment of the cost of their services etc.

A mortgage created by way of contract must identify the mortgagor, the mortgagee, the *causa* of the secured obligation and must describe the collateral. Any failure to observe this rule results in the absolute nullity of the mortgage. Equally, the mortgage is not valid if the amount of the secured obligation cannot be determined.

Perfection of a mortgage is subject to its registration in the land registry, if the mortgage encumbers an immovable property, or in the AEGRM, if the collateral is a movable asset. If the collateral is a bank account, the mortgage may be perfected by acquiring control over the account. A mortgage over financial instruments may be perfected by its registration in the registers employed by the market where such instruments are traded.

A mortgage may encumber any property: movable or immovable, corporeal or incorporeal, present or future, individual assets or a universality of assets.

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[5] If the debtor defaults, RCC allows the secured creditor (the mortgagee) to either:

a) enforce the mortgage contract and sell the collateral through judicial enforcement proceedings (the bailiff enforcing the mortgage contract is a judicial private officer);

b) foreclose on the collateral; the creditor becomes the owner of the collateral and the secured debt is extinguished;

c) take possession of the collateral and administer it in order to recover the secured debt out of the collateral administration's proceeds.

If the mortgage encumbers individual assets that are transformed into other assets or used to create new assets, by way of combination with other unencumbered assets, the resulting assets are encumbered by the mortgage. If an encumbered movable asset is joined with an unencumbered immovable asset, the movable asset remains encumbered as long as it retains its initial character. A mortgage encumbering building materials or other similar goods incorporated into a building does not survive their incorporation. A mortgage encumbering a plot of land encumbers, by operation of law, all the buildings erected on that plot of land.

If the collateral consists of a universality of assets, the mortgage encumbers all the assets in the universality. Should an individual asset from the encumbered universality perish, be removed or transferred, the mortgage shall encumber the replacement asset(s), if the debtor replaces them in a reasonable period of time.

All mortgage contracts must contain a description of the collateral, in sufficient detail to allow the identification of the collateral. Such a description may consist of: an encumbered assets list, an indication as to quantity, to a formula or to any other description that allows a reasonable person to identify the collateral. If the collateral consists of a universality of assets, the nature and the composition of the universality must be set out. A contractual provision whereunder the mortgage encumbers all the immovable and the movable assets in the debtor's estate does not constitute a sufficiently detailed description of the collateral. If the mortgage encumbers, *inter alia*, a bank account, that bank account must be specifically referred to in the mortgage contract.

A mortgage over a universality of assets, movable or immovable, present or future, corporeal or incorporeal, may only be created over the assets of a commercial enterprise.

A mortgagor may freely use, lease or even transfer the collateral to a third party, unless such actions should affect in any way the mortgagee's rights over the collateral. A mortgagor may not destroy, damage or diminish the value of the collateral. A mortgagor is not liable for the normal wear and tear or for the collateral being damaged in case of necessity. Otherwise, the secured creditor may claim damages for the diminution of the collateral's value, even if the primary obligation has not reached its maturity. The damages paid by the mortgagor are deducted from the primary debt.

The mortgagee's rights (foreclosure and priority) also encumber the fruits (natural and civil) and the products of the collateral. Equally, they encumber all the goods received by the mortgagor as the price of the collateral's lease or sale, or any other chattel / item that replaces or contains the collateral.

Nonetheless, a third party buying an encumbered item from a commercial entrepreneur, that usually sells such goods during the exercise of his business, acquires that item free of any mortgage, even though the mortgage is perfect and the third party buyer knows about that particular mortgage. In this case, the mortgage is transferred by operation of law to the proceeds of sale the price, or to other goods received by the seller as the price of that sale.

Such a transfer by operation of law is subject to a special formality of perfection. According to RCC, Article 2.412, if the description of the collateral does not cover the proceeds of the sale, the creditor shall modify the initial description by registering a new, comprehensive description, covering the proceeds, with AEGRM, no later than the 15th day after the sale has taken place; any failure to do so results in the security becoming unenforceable against third parties. Modification of the initial description is not required if the proceeds consist of traceable sums of money.

Debts, individually or as a universality, may also be encumbered as collateral. A security over debts may be created either by creating a mortgage over debts, either by an assignment of debts (assimilated by operation of law to a mortgage if done to secure another debt – the primary obligation). In the latter case, the assignment of debts is concluded under a condition: should

the debtor with primary obligation default, the debts owed to the debtor with the primary obligation are assigned to the secured creditor. Repurchase agreements and the retention of title are also assimilated by operation of law to mortgages.

2.3. Pledge

A pledge may only encumber movable corporeal properties or negotiable instruments written on a tangible medium. Valid creation of a pledge requires that the debtor hand over / the creditor retain the possession of the movable asset or, in the case of the negotiable instrument, its transfer (if a bearer instrument) or its transfer and endorsement (if a nominative instrument).

A pledge is perfected by the creditor taking the collateral into possession or by the pledge's registration in the AEGRM. If the collateral consists in a sum of money, possession is the only valid form of perfection.

A pledge is only valid so long as the creditor possesses the collateral / so long as the endorsement is valid.

3. The Effects of Opening of Insolvency Proceedings on Secured Creditors

3.1. The Automatic Stay

According to the Recast EIR, Article 18, the effects of insolvency proceedings on a pending lawsuit or pending arbitral proceedings in relation to an asset or a right which forms part of a debtor's insolvency estate shall be governed solely by the law of the Member State in which that lawsuit is pending or in which the arbitral tribunal has its seat.

Should such lawsuits be pending in Romania, according to RIA, Article 75 (1), the opening of insolvency proceedings entails an automatic stay of all judicial and extrajudicial proceedings initiated by creditors for the purpose of recovering any debts. From this moment onwards, creditors may only exercise their rights against the debtor within the framework of the insolvency proceedings, by lodging their claims.

If duly informed according to the Recast EIR Article 54 and RIA Articles 99 and 42, the creditors (secured creditors included) must lodge their claims for all the pre-insolvency debts within the term provided in the syndic judge's order open the insolvency proceedings. Any failure to do so may result in the creditor being barred from recovering any debt not claimed, during the insolvency proceedings and afterwards.

3.2. The Lift of the Automatic Stay

Notwithstanding the automatic stay rule, any secured creditor may make an application to the syndic judge for a lift of the automatic stay of recovery / enforcement proceedings and for the immediate realisation of the security for the claim (= liquidation of the collateral), according to the rules provided by RIA, Articles 154-158), in the framework of the insolvency proceedings, on condition that the expenses provided by RIA in Article 159 (1) pt. 1[6] are paid by the applicant. The stay may be lifted by the syndic judge in any of the following situations:

A. the collateral's value, estimated by a valuation expert according to the international standards of valuation, is fully covered by the value of the secured claim, if: a) the encumbered asset is not important for the debtor's restructuring; b) the encumbered asset is part of a

[6] See 4.2., *infra*.

functional sub-unit and its detachment and separate sale will not entail any decrease in the value of that sub-unit;

B. when the secured creditor can be offered no adequate protection with respect to the collateral, due to: a) a decrease in the value of the collateral or an actual risk of a significant decrease in the value of the collateral; b) a decrease in the portion of a claim with a lower ranking security that can be paid out of the collateral liquidation proceeds, as a consequence of an increase, due to the accrual of interest and other accessories, of any kind, in the amount of a claim with a higher ranking security over the same collateral; c) the absence of an insurance policy protecting the collateral against damage or destruction.

Should the judicial administrator / the debtor offer the secured creditor adequate protection with respect to the secured claim / the collateral, the syndic judge may reject the secured creditor's application.

Adequate protection could consist of: a) making periodical payments to the secured creditor, in order to cover the decrease in the value of the collateral / the decrease in the portion of a claim with a lower ranking security that would be paid out of the collateral liquidation proceeds; b) making periodical payments to the secured creditor, in order to cover the interest or any other additions accrued and, respectively, to reduce the amount of the unpaid principal in the claim so that it becomes lower in value than the decreased value of the collateral / making periodical payments to the secured creditor who has lodged a claim with a lower ranking security, in order to cover the decrease in the portion of that claim with a lower ranking security which would be paid out of the proceeds of the liquidation of the collateral; c) novation of the security interest by means of creating an additional security (a mortgage over a different collateral, a guarantor or a real surety) or by replacing the encumbered asset with another asset.

The rules of evidence specific to this application provide for a burden of proof shared between the secured creditor and the judicial administrator / the debtor. The secured creditor only needs to produce evidence supporting the fact that whether the encumbered asset is part of a functional sub-unit, its detachment and separate sale do not entail any decrease in the value of that sub-unit; the burden of producing evidence supporting any of the remaining situations regulated by RIA, Article 78, (1), letter A, pt. a and letter B rests with the judicial administrator / the debtor.

3.3. Cash is King (An Exception to the Automatic Stay Rule)

RIA Article 75 (7) provides an important derogation from the automatic stay rule set out in RIA Article 75 (1). Should a claim be secured either with a mortgage encumbering a sum of money, either actually in the insolvent debtor's account at the moment the insolvency proceedings are opened, or with a cash collateral, the said sum of money / the cash collateral shall be paid by the judicial administrator / judicial liquidator to the secured creditor in order to cover any debts due, upon the latter's application, made no later than 5 days after the application was lodged with the judicial administrator / judicial liquidator. If the claim is secured by a mortgage over a sum of money deposited in an escrow account opened in the name of the other party to the contract and the holder of the account objects to the judicial administrator / judicial liquidator transferring that sum of money into the insolvency sole account, the syndic judge, upon deciding that the debtor has duly performed his obligations under the contract, shall order the transfer of the sum of money in the escrow account into the insolvency sole account.

3.4. An Exception to the above Exception

Any money actually in the insolvent debtor's account at the moment the insolvency proceedings are opened / the cash collateral, although encumbered by the mortgage, usually plays a crucial role in the re-launching of the debtor's business. Therefore, if the secured creditor agrees to release those sums of money, RIA Article 75 (9) allows the judicial administrator to use these funds to continue to run the debtor's business as usual. Should the secured creditor deny the judicial administrator access to these funds, the syndic judge may authorise the judicial administrator to use these funds to continue to run the debtor's business as usual, while granting the secured creditor adequate protection.

3.5. When Good Intentions Are Not Enough (Retention of Title)

According to RIA, Article 123 (6), if the retention of title until the contractual price is paid in full is provided for in the contract of sale, the seller shall be deemed to have performed his obligation and the contract of sale shall not be considered to be an on-going contract in the insolvency proceedings. The reservation of title, if duly perfected, shall be enforceable against the judicial administrator / judicial liquidator. The goods sold become part of the debtor's estate and the seller retaining title enjoys the position of a secured creditor, according to RCC Article 2.347.

The purpose of this specific legal provision was, undoubtedly, to clarify the creditor's position and to confer maximum protection on a creditor retaining the title. Yet, the result is, surprisingly enough, the opposite. Instead of keeping the title in the creditor's estate, the title passes to the debtor, and the creditor only remains the holder of a secured debt.

3.6. Before the Point of No Return

RIA provides for a maximum one year period of 'observation' between the moment the insolvency proceedings are opened and the moment the insolvency proceedings must turn either into restructuring, or into liquidation (= the point of no return).

During this maximum one year period, the judicial administrator draws up a list of creditors, values the assets and continues to run the debtor's business as usual / supervises the debtor in possession running his business as usual.

3.6.1. The Creditors' List

According to RIA, Article 103, the assets encumbered are valued (by an independent expert value) and creditors holding secured debts are listed in the class of secured creditors, according to the value of the collateral held. Should the value of the collateral be smaller than the nominal amount of the debt, the creditor is listed in the secured creditors' list with a portion of the debt equal in value to the value of the collateral and is listed in the unsecured creditors' list with the remainder of the debt, not covered by the value of the collateral. Any creditor may challenge the expert value's opinion by way of lodging reasoned objections. The matter is then decided by the syndic judge.

In this context, the insolvency office holders acting as judicial administrators have faced a rather frequent difficulty: the absence of the collateral in the debtor's estate at the moment the insolvency proceedings are opened. This issue is specific to mortgages over movable collateral, which do not allow the creditor to take possession of the collateral. Leaving aside all cases of fraudulent transactions (they have specific remedies, provided for in RIA, Article 117), a debtor, acting in good faith, may sell all his encumbered assets in an attempt to obtain liquid funds and then spend those funds as well, which is just doing business badly.

According to RIA, Article 5, pt. 15, debts are secured only if the security interest bears upon an asset to be found in the debtor's estate at the moment the insolvency proceedings are opened.

If the collateral consists of an immovable property, the creditor may trace the collateral and hold the transferee liable for the debt, if possible, but such a creditor does not enjoy the position of a secured creditor within the framework of the debtor's insolvency. In this situation, the realisation of the security for the claim is effected outside the insolvency proceedings and remains a *res inter alios*.

As mentioned before[7], mortgages encumbering movable assets do not hinder the debtor running a commercial enterprise from selling or transferring the collateral. In such a case, the mortgage is transferred, by operation of law, to the proceeds of the sale or transfer. Tracing such proceeds may be simple if the parties to the sale / transfer have used a negotiable instrument in order to pay the price, but may prove extremely difficult if they have used cash or if the money transferred from the buyer's bank account to the seller's bank account has been later spent by the seller.

In consequence, in practice, if unable to trace the proceeds of the transfers that have left the secured creditors with no collateral in the debtor's estate, the insolvency office holders acting as judicial administrators have listed those creditors in the unsecured creditors class.

3.6.2. Running the business as usual

Section 3.6.1. deals with the collateral being transferred before the insolvency proceedings are opened. The present section 3.6.2. analyses whether the debtor in possession / the judicial administrator may dispose of the collateral during the one year 'observation period'

According to RIA, Articles 84 (1) and 87, all the payments, deeds or operations made or concluded by the debtor after the insolvency proceedings are opened are null, except those provided for in Article 87, those authorised by the syndic judge and those approved by the judicial administrator.

During the observation period, the debtor may continue to run the business as usual and may make payments to the creditors already involved in the business as usual, as follows: a) under the supervision of the judicial administrator, if the debtor has lodged an application for its restructuring according to Article 67 (1) letter g), and the debtor is still in possession; b) under the management of the judicial administrator, if the debtor is no longer in possession.

Any act, deed or payment beyond the situations mentioned above may be authorised by the judicial administrator, if approved before by the creditors' committee[8]. The judicial administrator shall convene the creditors' committee no later than 5 days after a request for the approval of such an act, deed or payment has been lodged by the debtor. If such an act, deed or

[7] See 2.2 *supra.*

[8] When convened in a creditors' meeting, the creditors compose a body regulated by RIA, Articles 48-49: the creditors' assembly. The creditors' assembly is the body that issues the final managerial decisions during the insolvency proceedings, having the prerogative to censor the judicial administrator's / judicial liquidator's managerial decisions. However, convening all the creditors is difficult and time consuming. The syndic judge / the creditors' assembly may appoint a smaller body of creditors to perform specific tasks regulated by RIA: the creditors' committee – 3 to 5 members, that volunteer / are chosen from the higher classes of creditors, holding debts of significant value against the debtor's estate. The syndic judge's jurisdiction only allows the syndic judge to control whether the judicial administrator / judicial liquidator has complied with the mandatory legal provisions in the latter's activity. The syndic judge has no jurisdiction over the judicial administrator's / judicial liquidator's managerial decisions.

payment is recommended by the judicial administrator, and it is approved by the creditors' committee, its execution by the special administrator is mandatory[9].

If the debtor / the judicial administrator proposes the sale / the transfer of an encumbered asset, a secured creditor is entitled to obtain: a) adequate protection, b) payments according to RIA, Articles 159 (1), pt. 3 and 161 pt. 1, if an adequate protection is unavailable.

According to RIA, Article 87 (3), the creditors' committee prior approval appears to be a prerequisite for any sale / transfer of an encumbered asset, since the sale / transfer of an encumbered asset does not normally occur while doing business as usual.

However, if such a sale / transfer is a regular transaction while doing business as usual, the creditors' committee approval is no longer required; Approval by the creditors' committee is not required if the collateral consists in raw materials, their processing or assembling into products. The same goes for the sale of the products thus created or manufactured. In these situations, the security is transferred by operation of law to the resulting products, or, respectively, to the sums of money received as the price of the products sold, as provided for in RCC, Articles 2.392 - 2.393.

The jurisprudence has taken a different view, though, on the debtor spending the money received as the price of the products sold / services rendered for carrying on its business as usual, should such money be encumbered by a mortgage over receivables. The reason behind such a different view is relatively simple: there is no better protection for a secured due debt than its effective payment.

Of course, any rights the debtor and the secured creditor might have over such receivables are provided for by the mortgage contract; if the debtor has encumbered all the receivables resulting from a specific contract, the secured creditor is fully entitled to apply for a lift of the automatic stay as soon as the receivables are paid to the debtor, and, if the application for the lifting of the stay is successful, to be paid.

The debtor might argue that in the absence of any liquid funds, running the business as usual is impossible, but in the above case the debtor will need to offer the secured creditor adequate protection. So far, the only protection considered by the syndic judges to be adequate was the creation of a new mortgage, encumbering other receivables, maturing at a determined moment in the future.

3.6.3. Super Priority

As mentioned above, one of the major challenges an insolvent debtor encounters in its attempt to restart the business is the difficulty to get fresh financing. RIA has addressed this issue in Article 87 (4), creating a super-priority for the creditors who would offer the insolvent debtor fresh financing: „The debts consisting in loans granted to the debtor during the observation period, if approved by the creditors' assembly, shall be repaid in accordance with the priority provided for by Article 159 (1) pt. 2, or, as the case may be, in accordance with the priority provided for by Article 161 pt. 2. These loans shall be secured by encumbering, in the first instance, assets in the debtor's estate free of any other encumbrances; if all the assets in the debtor's estate are already encumbered and the pre-insolvency secured creditors agree, a new security interest, enjoying the highest priority, shall be created over the existing encumbered assets, outranking the priority of the pre-insolvency secured creditors. In the event that the pre-insolvency secured creditors do not agree to the creation of the new security over their collaterals, the loans granted to the debtor during the observation period, enjoying the priority provided for by Article 159 (1) pt. 2, or, as the case may be, the priority provided for

[9] The debtor's shareholders representative during the insolvency proceedings.

by Article 161 pt. 2, will decrease, *pro rata*, the pre-insolvency secured creditors' realisation of their collaterals for their claims. In the event that no assets / insufficient assets are to be found in the debtor's estate, in order to fully secure the repayment of the loans granted to the debtor during the observation period for financing the running of the debtor's business as usual, the portions of those loans that cannot be secured will enjoy the priority provided for by Article 161 pt. 2.

4. Beyond the Point of No Return

4.1. The Bright Side of the Moon (The Implementation of the Restructuring Plan)

Should a restructuring plan be adopted by the creditors' assembly and be confirmed by the syndic judge, the secured creditors will get their secured claims paid according to the plan of payments (a mandatory component of the restructuring plan). Any haircut shall reduce the amount of the secured claim as provided for in the restructuring plan adopted by the creditors' assembly and be confirmed by the syndic judge. Should the debtor fail to comply with the obligations undertaken in the restructuring plan, the debtor shall go into liquidation proceedings and any claim reductions due to the haircut shall be reversed, reinstating the creditors' list, as it has been made definitive by the syndic judge before the haircut.

4.2. The Dark Side of the Moon

If no participant to the insolvency proceedings having legal standing proposes a restructuring plan or if no proposed plan is adopted by the creditors' assembly and confirmed by the syndic judge, the debtor goes into liquidation proceedings. A judicial liquidator is appointed, and the judicial liquidator takes possession of the debtor's estate. An inventory of all the assets is drawn up and the assets are valued anew.

The collateral securities are sold, and the proceeds are distributed pursuant to RIA, Article 159:

(1) "The funds obtained from the sale of the debtor's encumbered assets shall be distributed according to the following order of priority:

1. taxes, fees and other expenses incurred by the sale of such assets, including the expenses necessary for the protection and administration of such assets, as well as the expenses paid in advance by the secured creditors during the enforcement proceedings prior to the opening of the insolvency proceedings, claims of utility suppliers for consumption in relation to the debtor's encumbered assets occurring after the opening of the insolvency proceedings, according to Article 77, the remuneration of judicial administrator / judicial liquidator and the remunerations of other persons hired for the benefit of all creditors, according to Article 57 (2), Articles 61 and 63; they shall be covered pro rata, in relation to the value of all the insolvent debtor's assets;

2. the claims of the secured creditors benefiting by causes of preference created after the opening of the insolvency proceedings. These claims shall consist of the capital, the interest and other associated rights, as the case may be;

3. the claims of the secured creditors benefiting from causes of preference created prior to the opening of the insolvency proceedings. These claims shall consist of the entire capital, the interest and other associated rights and all expenses, including those provided for by Article 105 (3) and Article 123 (11) a).

(2) If the funds obtained from the sale of such assets are insufficient for the payment of the above mentioned claims in full, the secured creditors shall be granted unsecured or budgetary claims for the balance, as the case may be, concurrent with the similar claims of the unsecured creditors and included in the adequate category of claims in the list, according to their type, to be paid according to Article 161, and they shall be subject to the accrual in value provided by Article 80. Should there be any funds left after the payment of the claims mentioned in paragraph (1), they shall be deposited by the judicial administrator / judicial liquidator in the insolvent debtor's estate sole account.

(3) Any secured creditor is entitled to take part in the distribution of the proceeds of a sale prior to the sale of his collateral. The proceeds thus distributed to him shall be deducted from the proceeds of the sale of his collateral, should such a deduction be necessary in order to prevent that creditor from receiving more than he would receive if his collateral had been sold before the distribution.

The Romanian courts (the syndic judges and the appellate courts alike) have been reluctant to apply the rule in RIA, Article 159 (3) literally, since the various collaterals in the debtor's estate are usually liquidated in very different circumstances, thus creating a *de facto* inequality between the secured creditors. Instead, the Romanian courts have preferred to treat secured creditors individually, distributing the proceeds of the sale of each collateral to the respective secured creditor, in accordance with RIA Article 159 (1) and (2).

5. Conclusions

Undoubtedly, RIA is a modern act that has strived to incorporate the World Bank's Principles for Effective Creditor/Debtor Regimes and the World Bank's Creditor Rights and Insolvency Standards. Moreover, RIA is a national legal instrument fully compatible with the Recast EIR.

The secured creditors' rights enjoy a wide protection, to be limited only by the restrictions necessary to allow the debtor to continue running his business as usual, to allow the restructuring of the debtor and to allow the debtor to acquire fresh funding during the insolvency. Yet, the restrictions imposed on secured creditors are fully compensated by the 'adequate protection' granted to these creditors and thus RIA strikes a fair balance between the converging interests of the unsecured creditors and the divergent position of the secured creditors.

27th of April 2018

Flavius-Iancu MOTU
Syndic Judge
The Commercial Court of Cluj

THE CURRENT CLAIMS REGIME IN INSOLVENCY

Bogdan BITER (CONSULTA 99)

This panel was intended to point out some particularities from the Romanian insolvency law regarding the creditors. The main idea is that inside our insolvency procedure there are 2 main categories of creditors:

1) Current creditors
2) Historical creditors – aka creditors who participate in the insolvency procedure

This dichotomy is based on the moment when the claim is born. So, we have the historical claims, born before the opening of the procedure and those claims resulted from the continuation of the commercial activity, claims owned by those companies which are continuing to work with the debtor after the opening of the insolvency procedure.

Being so, the Romanian insolvency law reserves 2 separate treatments for these 2 types of creditors.

In essence the creditors who have an active participation in an insolvency procedure are those ones who possess a historical claim – born before the opening of the procedure. The other ones are presumably working with the debtor even after the procedure starts, so their claim – current debts – are going to be honoured / payed form the continuation of the commercial activity of the debtor.

For this reason, the law is giving each kind of creditor specific rights. As expected the historical creditors have all the rights regarding the decisions to be taken inside and during an insolvency procedure. Per a contrario the current creditors have very few procedural rights, the main being the right to move for bankruptcy.

1. Claims born AFTER the opening of the procedure: "CURRENT CLAIMS". The Romanian law specifies: "*Claims incurred after the date of the opening of the proceedings, during the observation period or in the judicial reorganization procedure will be paid according to the documents resulting from it, and it is not necessary to enroll in the credentials. The provision shall apply accordingly to claims arising after the opening of bankruptcy proceedings*.,, (Art. 102, pct. 6)

2. Claims born BEFORE the opening of the procedure: "HISTORICAL CLAIMS".

2.1 Guaranteed CLAIMS (art. 159): They have a special regime determined by the fact that they are accepted in the Creditors Table in 2 possible ways given by:

2.1.1 Valued amount of the *guarantee*

2.1.2 The full amount claimed and admitted in the creditors table

The money obtained out of the procedure are payed to these creditors in accordance with a very specific algorithm which is presented in Art. 159. So, there is a dedicated regulation for the treatment of these claims in order to respect their legal nature and characteristics.

2.2 All other CLAIMS (art. 161) The algorithm for the distribution of the amounts regulated by art. 161 is the general rule. The order of preference and hierarchy of creditors which are the effect of the provisions article 161 generates also the building structure of the Creditors table. It is important to notice that those current claims that for some reason were not paid by the debtor, transfer to the category of historical claims once the bankruptcy is open

In side of this dichotomic view, rights and status that are conferred to the creditors by the insolvency law according to the moment when the debt was born are different for:

1. **CREDITORS PARTICIPATING IN THE PROCEDURE -** creditors holding debts born before the opening of proceedings (historical claims)

There are two fulfilling conditions in order to be such a creditor. These conditions would be: a) the existence of a certain, liquid and demandable claim and b) the resolution of admission given by the judicial administrator or the liquidator which lead to the registration of the claim in the creditor's table. So, from a formal point of view, once a creditor has his claim in the creditor's table he gains all the right accordingly. In this point is needed to be made the following specification: the resolution of admission can be given also by the Court but only in the situation when the claim is challenged by other.

The fulfilling of these conditions gives the creditor holding a claim prior to the opening of the procedure the status of "creditor participating in the insolvency procedure"

The definition of a "creditor participating at the insolvency procedure" it is defined very clear at Art. 5, pct. 19 from law no. 85/2014: „ The creditor entitled to participate in the procedure is the holder of a claim on the debtor, who has filed an application for the entry of the claim upon the admission of which he acquires the rights and obligations regulated by the present law for each stage of the procedure. The creditor's status shall cease as a result of the non-entry or removal from creditors' successor tables in the proceedings and the closure of the proceedings; Have the capacity of a creditor, without personally submitting the debt claims, the debtor's employees "

The rights of the creditor participating in the procedure (historic creditors) derive from the very title provided by law:

1.1 It issues claims and applications on relevant issues in the procedure

1.2 It formulates appeals (on claims, on measures taken by the judiciary administrator, on the votes recorded in the Creditors' Meeting and the Creditors' Committee)

1.3 VOTES the main measures taken during the procedure

1.4 VOTES THE REORGANIZATION PLAN OF THE DEBTOR

1.5 VOTES and moves for BANKRUPTCY

These creditors receive the payment of their debts according to the above law of algorithm which is a combination of the criteria: the category of creditors which contains priority range and procental quantum from category (Art. 161)

2. **CURRENT CREDITORS** - creditors holding debts born after the opening date (current claims)

These creditors hold the status of a current creditor during the observation period or during the implementation Reorganization plan. They are actually commercial partners of the debtor.

After the opening of the bankruptcy procedure, their claim has the regime provided by the provisions of art. 161 par. 4 which consists in a general priority over the other creditors (it doesn't matter if there are guaranteed claims or not)

The current creditor is the creditor holding a certain, liquid and exigible claim that was born (by cumulating the three criteria) after the opening date of the procedure.

The current creditor obtains this position in two situations: a) by accepting his claim by the debtor in insolvency or by the judicial administrator or b) through admitting by the court a PAYMENT REQUEST formulated by the current creditor (commercial partner of the debtor)

The big highlight is that the current creditor is not a creditor participating in the procedure and consequently has other rights.

It is also natural that the law does not give him a regime similar to that of the "historic" creditor as long as he is considered more of a partner for the debtor, so his invoices are payed

exclusively from the current commercial activity. For the current creditor the fact that his commercial partner is a company in insolvency is not of much relevance.

The conduct of the legal relationship between a current creditor and a debtor in insolvency takes place under the same conditions and with the same terms if this would take place between two normal trading companies / traders - in operation.

Therefore, the current creditor cannot present the same conduct in the proceedings as a historic creditor throughout the first phases of the procedure (t*he observation period and the Reorganisation Plan period).* Consequently, for the current creditor, the debtor's activity in insolvency means that the legal relationship is proceeded or continued in good condition. Therefor such a creditor has not any justification in order to manifest a deeper involvement in the insolvency proceedings.

If the current obligations of the debtor are not covered, at the same time take place the following:

1.1 It appears the necessity to make legal acts within the procedure (in the same time he still retains the position of current creditor and

1.2 it is born the right to submit to the Court 2 type of requests

1.2.1 Submit the Payment Request (mentioned above, in the circumstances in which the status of current creditor was not obtained as a result of the admission of such a claim)

1.2.2 Request for bankruptcy proceedings (move for bankruptcy)

The current creditor, unlike his friend the creditor participating in the procedure, has a much smaller set of rights:

1) The right to immediate indemnity (within the debtor's current activity) in accordance with the documents on which the claim is based

2) The right to ask for the opening of the bankruptcy procedure - if within 30 days from the maturity of its claim (current) does not receive the money

He does not have any of the rights the creditor participating in the insolvency procedure: it lacks the active capacity to stand trial.

Of course, there are very few exceptions resulted from the complexity of some commercial juridical relations. Example: Romanian insolvency law defines the institution of the ”Indispensable creditor” (in this case there are several specific conditions to be fulfilled, such as, among others, a previous identification of that creditor – art. 132 par. 2)

The request for the bankruptcy procedure by a current creditor has a series of elements and conditions: *"The holder of a current, certain, liquid and demandable claim recognized by the legal administrator or by the syndic judge according to par. (3) and whose amount exceeds the threshold value may request during the period of observation the opening of the debtor's bankruptcy procedure if these debts are not paid within 60 days of the taking of the measure by the court administrator or the court's decision of judgment. "* (Art. 75 par. 3 and 4)

Pointing out that the non-payment of the claim incurred during the insolvency proceedings within 60 days from maturity, provided that the insolvency practitioner has been recognized and exigible in the payment claim or by court order pronounced by the syndic judge who resolves the appeal against the refusal, shall give the respective creditor (current one) the right to request the *”transfer”* to the bankruptcy procedure.

The application for the bankruptcy procedure formulated under these conditions follows the rules and criteria imposed by the law in defining the requests for opening the insolvency procedure - exceeding the threshold value of 40,000 lei. (less than 10.000 Euro)

This provision is valid both for the assumption of the bankruptcy petition application during the observation period as in the reorganization period (the hypothesis of the faulty implementation of the reorganization plan)

Note that the legislator uses the phrase "certain, liquid and demandable claim". This phrase, which specifies the hypothesis as clearly as possible, may seem slightly excessive because, according to the definition of the current claim, it has cumulatively the certain, liquid and demandable aspects, but it also eliminates any ambiguity, which can be very helpful in real life.

I feel the need for this comparison due to the fact that there were cases in the two categories were not so obvious. Current claims are born even in the period pending to the proposal of the Reorganisation Plan (the observation period). Some contracts give permission for the payments to be done monthly, or every 2 or 3 months or longer, so during that period those creditors still hold the position of current creditors. Starting from such conjunctures, there are situations when the current creditors assume the role and the rights of the historical ones. This confusion can be found in our practice. The Courts usually reject any claim came from a current creditor, but errors can occur because there are situations when the distinction can be hardly made. The correct / usual solution is to reject any claim from a current creditor (impersonating a historical creditor) as made with the lack of (active) capacity to stand trial.

The closure of the procedure

The closure of the procedure is presented as synthetic as possible with the highlighting of the situation when the closure can occur and the main effects of it.

So, the cases when after the closure of the procedure, the debtor survives and continues to act within the business environment:

1. Success of the reorganization plan
2. Fulfilling of all the claims (usually found in cases of outside funding)
3. No claims are registered (art.177 (1)
4. Withdrawal of all the claims (art. 178) (as a result of a negotiation effort)

And the cases when the closure of the procedure brings the erasure of the debtor from the Trade registry:

1. **Completion of the Bankruptcy Procedure** (all assets are sold, and the money obtained in the procedure are payed to the creditors)
2. **No assets situation** (simplified procedure)

The main effects of the closure of the procedure:

1) **Notification of closure of the procedure:** The closure of the procedure is communicated to the debtor, to all creditors, members or, as the case may be, to associates / shareholders, public institutions (in accordance with the current regulations, the Regional Public Finance Department or, as the case may be, The National Trade Register Office or the register where the debtor is registered and published in the Insolvency Proceedings Bulletin.

2) **Discharge of the participants:** both the syndic judge and the administrator or the liquidator as well as the persons who assisted them are discharged from any duties or responsibilities regarding the procedure, regarding the debtor and his property, as well as about the creditors, the guarantors' obligations of the debtor, shareholders or associates of the debtor.

3) **Discharge of the debtor:** in this case, the hypothesis of the success of a reorganization plan is evoked. Thus, at the date of the confirmation of the plan, the debtor is

discharged by the difference between the amount of the obligations he had before the plan's confirmation and the one stipulated in the plan.

The case of the failure of the reorganization plan is subject of the provisions of art. 140 which specifies the return to the initial extent of the obligations at the moment of bankruptcy

INTERNATIONAL LAW TOPICS

THE E.U. DIRECTIVE PROPOSAL ON RESTRUCTURING AND SECOND CHANCE: AN ANALYSIS OF THE MOST RELEVANT CONCEPTS

Corina Georgiana COSTEA[10]

1. General Overview

1.1. A Brief History of Insolvency and Pre-insolvency Proceedings

Bankruptcy has been an economic and social issue for centuries, approached differently by each nation. It was not always a collective proceeding, as we know it today. For instance, looking back in history at ancient nations (Indians, Egyptians, and Jews), the pursuit of the debtor consisted of enforcements upon the natural persons: debtors were enslaved, forced to work in order to pay their debts, they could have been sold as slaves or even killed by the creditor(s).[11]

The Italian republics were those who reintroduced the Roman principle of enforcements upon assets.[12] In 1244, Venice introduced *Statuta judicum petitionum*, considered the first law that organized bankruptcy proceedings in their modern features.[13] However, debtors were presumed to be fraudsters (*faillitus, ergo fraudator*).[14] The Italian influence had expanded even in France. In Lyon, a Regulation on bankruptcy was adopted in 1624, providing punishments for bankrupt debtors.[15]

Even in the 19th century, the Commercial Code adopted in 1807 in France provided severe punishments for bankrupt merchants. Bankruptcy proceedings applied exclusively to merchants. The French Commercial Code's provisions were adopted by different countries, as their own commercial law (Italy, Belgium, Netherlands, Spain, Egypt etc.).[16] It is considered that the adoption of the French Commercial Code created a new branch of private law – commercial law.[17] It also served as a model for the elaboration of the Italian Commercial Code, adopted in 1882. The Italian Commercial Code inspired the elaboration of the Romanian Commercial Code, adopted in 1887.[18] Both Italian and Romanian Commercial Codes introduced the moratorium, as an alternative to bankruptcy proceedings.

The economic, social and political context determined various legislators to adopt pre-insolvency proceedings, in an attempt to limit the effects of bankruptcies. Due to the war and only for its duration, legislators had adopted different measures aiming at saving good-faith merchants.[19] However, the institution of the moratorium did not achieve its purpose. Mostly due to the legislators' concerns regarding the prevention of debtors' abuses, accessing

[10] Insolvency practitioner (Romania) corinacostea23@gmail.com.
[11] MA Dumitrescu, *Codul de Comerciu Comentat*, vol. 6 (Leon Alcalay 1905) 1.
[12] ibid 3.
[13] ibid.
[14] Yves Guyon, *Droit des affaires. Tome 2: Entreprises en difficultés. Redressement judiciaire – Faillité* (9th edn, Economica 2003) 8.
[15] Dumitrescu (n2) 4.
[16] Stanciu Cărpenaru, *Tratat de drept comercial român* (5th edn, Universul Juridic 2016) 15.
[17] ibid.
[18] ibid 16.
[19] Paul Demetrescu and Marco Barasch, *Legea asupra concordatului preventiv* (Leon Alcalay 1932) 27-28.

preventive proceedings required debtors to pay in full their obligations in a short matter of time[20], which was hardly possible.

Nevertheless, the institution of the moratorium served as a source of inspiration for a new collective proceeding – the preventive composition. Therefore, various legislators had adapted pre-insolvency frameworks by introducing the preventive composition – a new proceeding that allowed debtors, under several conditions, to achieve an agreement with their creditors: UK (1883), Belgium (1887), Norway (1889), Switzerland (1889, entry into force 1892), US (1898), Italy (1903), Austria (1914), France (1919), Germany (1927), Romania (1929) etc.

1.2. Insolvency and Pre-insolvency Proceedings Nowadays

In consideration to the continuous evolution and changes of the social, political and economic European context, legislators have adapted to the current needs. Member States responded to their legislative needs differently, which led to various approaches in regulating civil and commercial matters.

Bankruptcy has had both economic and social effects, affecting not only debtors themselves, but also any other related party: employees, creditors, partners, shareholders etc. In order to limit the negative impact of bankruptcies upon economies, and because many liquidated debtors were worth saving, in time, various legislators around the world have adopted another collective proceeding, as an alternative to bankruptcy – the reorganization proceeding. This is why insolvency – as a collective proceeding – is a new, modern concept, created by the expansion of bankruptcy proceedings in a manner that allows viable debtors to benefit from a last chance of safeguard. Nowadays, insolvency proceedings consist of two types of collective proceedings that, paradoxically, have opposite objectives.

Furthermore, insolvency proceedings themselves are on the verge of expansion, by including yet another form of collective proceedings, aiming at debtors' early restructuring, where there is likelihood of insolvency – pre-insolvency proceedings.

1.3. Insolvency and Pre-insolvency Proceedings at the European Level

According to Eurostat[21], in 2015, 3.9 million jobs were created from 2.6 million newly-born enterprises, while the preliminary results show 3.4 million job losses as a consequence of 2.2 million business deaths. The European Union's key-objectives include creating and preserving jobs, while consolidating an efficient legal framework related to insolvency. Putting in place preventive restructuring proceedings and improving existent insolvency frameworks have been proven to have a positive impact upon the economy as a whole. 'The reality, however, is that legal systems differ in terms of their insolvency laws and the level of their development and effectiveness, which means that some systems are more capable than others to address insolvency cases more effectively.'[22]

However, preventive restructuring proceedings are not available in all Member States, and the ones available have been proven not to be as efficient as needed. In some Member States, entrepreneurs can access restructuring proceedings only as part of insolvency proceedings, which means they cannot benefit from early restructuring and therefore have to wait until they become insolvent in order to have an efficient chance of restructuring. Debtors

[20] The Romanian Commercial Code provided that the duration of moratoriums shall not exceed 6 months.

[21] <http://ec.europa.eu/eurostat/statistics-explained/index.php/Business_demography_statistics> accessed 26 April 2018.

[22] Irit Mevorach, *The Future of Cross-Border Insolvency. Overcoming Biases and Closing Gaps* (OUP 2018) 199.

should be able to access preventive restructuring proceedings, in order to avoid the general effects of insolvency proceedings and the constant pressure of bankruptcy. Nevertheless, putting in place a preventive restructuring framework is necessary, but also challenging due to the fact that it has to be flexible enough to be accessible by a variety of debtors. Another challenge is to improve restructuring and insolvency frameworks, due to the businesses' variety and uniqueness.

2. The E.U. Directive Proposal on Restructuring and Second Chance

On 22nd November 2016, the European Commission presented 'The Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU'[23], 'attempting to harmonize some of the aspects of insolvency law in Europe, focusing mainly on pre-insolvency restructuring'[24]. This legislative initiative approaches the current E.U.-wide insolvency-related issues, and due to the differences among Member States' legislations, it was designed to be flexible by providing key principles and rules as a guidance. Following these principles and rules, Member States will have the liberty to develop them in a way that ensures legal frameworks' transparency, compatibility and efficiency. Flexibility is needed for the Directive to be adaptable to various laws, while limiting its impact. The main focus is enhancing a business rescue culture across the E.U., while addressing the main problems which could be resolved by harmonization.

2.1. The Proposal's Objective

At the European Union's level, barriers that reduce the markets' development have been identified. The official statistical data has revealed a high rate of bankruptcy, which has many side effects on the market even after the companies' death. For instance, creditors who partially recover their claims face the risk of insolvency themselves, as part of the so-called 'domino effect'. The employees who lost their jobs are at risk of no longer being able to pay the loans, which also affects the banks and increases the rate of non-performing loans. It is also true that an insolvent, non-viable enterprise must be liquidated in a short matter of time, to limit the losses and prevent the accumulation of new debts.

The Proposal mentions that its key objective is to remove obstacles to the exercise of fundamental freedoms, such as the free movement of capital and freedom of establishment, which result from differences between national laws and procedures on preventive restructuring, insolvency and second chance.

The aim is not to change insolvency rules across the E.U., but to ensure that Member States have in place key principles on effective preventive restructuring and second chance frameworks, and also measures to make insolvency proceedings more efficient by reducing their length and associated costs and improving their quality.

This is a very ambitious objective, if we take into consideration that the Proposal is limiting its effects. It doesn't aim to harmonize insolvency legislations, but rather to put in place E.U.-wide key principles and rules that would create a transparent, stable and efficient common framework.

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[23] <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0723&from=EN> accessed 26 April 2018 (hereafter referred to as 'The Proposal').

[24] Mevorach (n13) 194.

2.2. The Proposal's Main Concepts

2.2.1. Preventive Restructuring Frameworks

It is a fact that the actual culture in Europe regarding insolvency tends to liquidation rather than early restructuring. Although liquidation is necessary, it is not limited to its scope, and is being applied for financially distressed yet still viable debtors. It is also a fact that this culture is maintained by the lack of a preventive restructuring framework in most of the Member States. As the Proposal mentions, nowadays in the E.U., 200.000 firms go bankrupt each year, resulting in 1.7 million direct job losses every year. However, a significant percentage of firms and related jobs could be saved if preventive procedures existed in all Member states where they have establishments, assets or creditors. Efficient preventive restructuring framework would ease the pressure felt by the financially distressed debtors and would allow them to at least try avoiding insolvency, which would result in a lower rate of non-performing loans, in a higher rate of creditors' claims recovery and in encouraging cross-border investments. For this purpose, 'The Proposal does not harmonize core aspects of insolvency proceedings but gives Member States flexibility to achieve the objectives by applying key principles and targeted rules in a way that is suitable to their national contexts.'[25]

Concept. The Proposal presents a definition of 'restructuring' in Article 2 (2), according to which it means changing the composition, conditions, or structure of a debtor's assets and liabilities or any other part of the debtor's capital structure, including share capital, or a combination of those elements, including sales of assets or parts of the business, with the objective of enabling the enterprise to continue in whole or in part. Therefore, 'preventive restructuring' is understood as a proceeding that aims at avoiding insolvency, accessed by a financially distressed debtor (if eligible) when there is likelihood of insolvency.

Eligibility. Preventive restructuring frameworks, provided by the Proposal in Title II, address to debtors facing financial difficulties, are they legal or natural persons. However, several categories of debtors are excluded from the Proposal's field of application, as they are subject to other European special legislation: insurance and reinsurance undertakings, credit institutions, investment firms and collective investment undertakings, central counter parties, central securities depositories, other financial institutions and entities listed in the first subparagraph of Article 1(1) of Directive 2014/59/EU and natural persons who are not entrepreneurs.[26]

Judicial and/or administrative involvement. The Proposal acknowledges the need of a limited judicial or administrative authority involvement, to where it is necessary and proportionate. More specifically, in the Proposal's view, there are two cases in which judicial/administrative involvement is necessary: firstly, where the debtor is granted a general stay of individual enforcements actions and, secondly, where the adoption of a restructuring plan implies a cram-down/cross-class cram-down mechanism. The rights of the parties involved in a preventive restructuring proceeding are protected by the supervision of the judicial/administrative authority, improving their trust in the ongoing adopted measures.

Commencement of preventive restructuring proceedings. Preventive restructuring proceedings should be available on the application by debtors, or by creditors with the

[25] Emmanuelle Inacio, 'The European Commission's Directive Proposal for common principles and rules on preventive restructuring frameworks, insolvency and second chance' (Winter 2016/2017) Eurofenix 12.

[26] Even if the provisions don't apply to natural persons (consumers), the Proposal encourages Member States to extend the provisions in Title III to over-indebted natural persons who are not entrepreneurs.

agreement of debtors. Member States who already put in place preventive restructuring frameworks allow access to these proceedings only at the debtor's initiative, because, in general, creditors are the skeptical parties when it comes to restructuring proceedings, while debtors put efforts into facilitating negotiations.

Debtor in possession. Debtors who file for preventive restructuring proceedings should remain totally or at least partially in control of their assets and the day-to-day operation of the business. This is particularly important because it creates balance between the efforts put in the restructuring plan by the involved parties. Not only the rights, but also the obligations of all parties involved in the restructuring process must be balanced. If a debtor wouldn't be allowed to remain in control of the business, it would be just an observant having no rights, but only obligations. Moreover, if the debtor wouldn't remain in control of the business, daily operations of the business should be taken over by another party, which would imply additional costs that could affect the restructuring plan's execution.

Managing the preventive restructuring proceedings. The appointment by a judicial or administrative authority of a practitioner in the field of restructuring should not be mandatory in every case. The "practitioner in the field of restructuring" is defined by Article 2 of the Proposal and means any person or body appointed by a judicial/administrative authority to carry out one or more of the following tasks: to assist the debtor or the creditors in drafting or negotiating a restructuring plan; to supervise the activity of the debtor during the negotiations on a restructuring plan and report to a judicial or administrative authority and to take partial control over the assets or affairs of the debtor during negotiations. The term of "practitioner in the field of restructuring" had never been used before in any European legislative regarding insolvency. A practitioner in the field of restructuring may be appointed in two cases: where the debtor is granted a general stay of individual enforcement actions and where the restructuring plan needs to be confirmed by a judicial/administrative authority by means of a cross-class cram-down.

Benefits of preventive restructuring proceedings. Accessing preventive restructuring proceedings provides debtors with several advantages: firstly, the debtor remains in control of the business and day-to-day operations; secondly, a restructuring plan could be adopted by means of a cross-class cram-down mechanism, and could also grant the debtor a general stay of individual enforcement actions. If a restructuring plan is confirmed by a judicial/administrative authority, it becomes binding to all parties, including dissenting creditors. Furthermore, the general advantage of a preventive restructuring proceeding is its very own purpose – avoiding insolvency. For the creditors, the benefits consist of a higher claims' recovery rates than the ones obtained from a liquidation proceeding.

Stay of individual enforcement actions. A restructuring plan should benefit from a temporary stay of individual enforcement actions, but only if it facilitates negotiations and helps achieving the plan's objectives. The Proposal provides a choice between a general stay of individual enforcement actions that cover all types of creditors, or a limited stay of individual enforcement actions that only extend to one or more individual creditors, including secured and preferential creditors. This provision is particularly important because a guaranteed asset could be vital for the restructuring plan's success.

However, the creditor's rights should be balanced with the debtor's rights, and therefore the stay of individual enforcement actions should be limited in time and only granted to fulfill the restructuring plan's objectives. This is why the Proposal provides such a limitation to a maximum of 4 months, with the possibility of extending the duration of the stay of individual enforcement actions to a maximum of 12 months, upon the request of the debtor or its creditors, under the condition of being confirmed by a judicial or administrative authority. The extension of the stay of individual enforcement actions is allowed, under the conditions mentioned above,

only in two cases: if relevant progress has been made in the negotiations of the restructuring plan and if the continuation of the stay of individual enforcement actions does not unfairly prejudice the rights or interests of any affected parties.

In order to create a functioning preventive restructuring framework, Member States have been given the possibility to ensure the lifting of the stay of individual enforcement actions, in whole or part, at the request of the debtor or of the practitioner in the field of restructuring, or in the situation where it becomes apparent that an insufficient percentage of the creditors support the continuation of the negotiations. In this last case, creditors should also be allowed to request the lifting of the stay of individual enforcement actions, under the condition of proving that the plan is not backed up by the required percentage of creditors' claims. If the plan is negotiated to continue longer than 12 months, it should be able to continue even if the creditor requests the lifting of the stay of individual enforcement action.

Workers' claims. Workers may also be creditors in a preventive restructuring proceeding; therefore the Proposal provides an exception from its provisions regarding the temporary stay of individual enforcement actions, which cannot be extended to workers' claims in the lack of a guaranteed pay at a level of protection at least equivalent to that provided for under the relevant national law transposing Directive 2008/94/EC.[27]

Debtors' ongoing contracts. Considering that the debtor's contracts could also be renegotiated as one of the measures provided by the restructuring plan, the status of ongoing contracts is an important factor for the plan's success. This is why the Proposal provides that Member States shall ensure that, during the period of the stay of individual enforcement actions, creditors to which the stay applies may not withhold performance or terminate, accelerate or in any other way modify executory contracts to the detriment of the debtor for debts that came into existence prior to the stay. However, these provisions are not applied to debts which are not subject to the stay of the individual enforcement actions. Member States are also given the choice to limit the application of this provision to essential contracts which are necessary for the continuation of the day-to-day operation of the business.

The restructuring plan's objectives and content. The main objective of adopting a restructuring plan is to avoid insolvency. A general stay of individual enforcement actions covering all creditors should prevent the opening of insolvency proceedings. The duration of the stay of individual enforcement actions is extended even in cases in which the debtor becomes insolvent; preventive restructuring proceedings should not be automatically terminated, especially if supported by a judicial/administrative authority that delays the opening of insolvency proceedings when a successful restructuring plan appears to be agreed upon. The Proposal sets minimum standards regarding the content of the restructuring plan submitted for confirmation by a judicial or administrative authority. Member States shall ensure that restructuring plans contain at least the information requested by Article 8. One of the most significant provisions of the Proposal provides that Member States shall make available a model of a restructuring plan online[28] and shall contain not only relevant information in accordance to their national law, but also general and practical information on how the model is to be used. Although this idea comes to help financially distressed debtors, especially micro, small and medium enterprises which cannot carry the costs implied by a restructuring plan, the model provided by Member States should be delivered in a way that makes it adaptable to each type and size of business. A model of a restructuring plan could also serve as general information

[27] Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer [2008] OJ L283/36.

[28] According to the Proposal, the restructuring plan model should be made available in other languages, especially in those used in international business.

for the business environment, showing the possibility of accessing early restructuring proceedings in order to avoid costly and lengthy insolvency proceedings.

The plan's adoption. Member States shall ensure voting rights upon the restructuring plan's adoption for affected creditors that will also be divided into separate classes[29] of creditors. The classes in which creditors have been divided shall be examined by a judicial or administrative authority when the restructuring plan is submitted for confirmation. A restructuring plan will be adopted if the majority in the amount of affected parties' claims is obtained in each class of creditors. Member States are given the option of setting the required majority for the adoption of a restructuring plan, under the condition of not overcoming a maximum of 75% in the amount of claims or interests reported to each class of creditors. The confirmation of a restructuring plan by a judicial or administrative authority should be pronounced in a short matter of time, of maximum 30 days.[30] If the restructuring plan is challenged on the grounds of an alleged breach of the best interest of creditors test, the judicial or administrative authority shall determine the liquidation value[31] of the debtor that is subject of the restructuring plan. The effects of a confirmed restructuring plan shall be applied to the participant creditors[32] identified in the plan.

Appeals. The decision upon the confirmation of a restructuring plan may be appealed[33] in the following conditions: if the decision of confirmation is adopted by an administrative authority, it may be appealed before a judicial authority, and if adopted by a judicial authority, the decision may be appealed before a higher judicial authority. If appealed, the decision that confirms the restructuring plan's commencement shall not be suspended, which means that the measures provided by the restructuring plan can be implemented even before resolving the appeal. The Proposal provides what measures Member States may adopt, if an appeal against the decision confirming a restructuring plan is upheld: the restructuring plan may be set aside, or it may still be confirmed, under the condition of granting monetary compensation to the dissenting creditors, payable by the debtor or by the creditors who voted in favor of the plan. Considering that the involvement of judicial and administrative authority is limited, the confirmation of a restructuring plan should strictly target the compliance of the conditions and formalities needed for the plan's adoption. For that matter, an appeal against the decision confirming a restructuring plan should be upheld only if the debtor hasn't complied all the required conditions, or in cases when the debtor assumes new debts during the negotiations or while waiting for a confirming decision, that could reduce the required majority for the plan's adoption.

Financing the debtor. The Proposal brings into attention the importance of new and interim financing, and also the need of their encouragement and protection. This is why it provides that new and interim financing[34] shall not be declared void, voidable or unenforceable

[29] The minimum standards provided by the Proposal regarding the classes of creditors require at least a separation between secured and unsecured claims, leaving the option of Member States of treating the workers in a separate class, although this provision is not mandatory.

[30] The Proposal's provision regarding the maximum delay of the plan's confirmation comes to support an efficient restructuring framework, preventing unnecessary prolongation of negotiations.

[31] The liquidation value will be established by a qualified expert, appointed by the judicial or administrative authority.

[32] The Proposal provides that creditors who are not involved in the adoption of a restructuring plan shall not be affected by the plan

[33] Appeals shall be resolved in an expedited manner, in order to quickly clarify the objections raised by the appellant and also to establish the status of the restructuring plan.

[34] Not only new or interim financing is granted a minimum protection, but also transactions related to the restructuring plan, by preventing them to be declared void, voided or unenforceable in case of a subsequent insolvency proceeding. The Proposal provides a series of examples of such transactions, mentioning the payment of fees related to the restructuring plan's adoption or to seeking professional advice, and the payment of workers'

as an act detrimental to the general body of creditors in the context of subsequent insolvency procedures. The only exception from this provision stands in the case where such transactions have been carried out fraudulently or in bad faith. Member States may afford grantors of new or interim financing the right to receive payment with priority in the context of subsequent liquidation procedures in relation to other creditors that would otherwise have superior or equal claims to money or assets. In this case, Member States shall form a separate class of creditors, which would rank at least prior to the claims of ordinary unsecured creditors.[35]

Directors' duties. Member States are also invited to put in place rules targeting directors[36], if there is likelihood of insolvency. The provided obligations of directors have the purpose of minimizing the losses of creditors, workers, shareholders and stakeholders and also of avoiding any action that is likely to threaten the debtor's viability. However, it is challenging to determine the period approaching insolvency and, implicitly, appropriate measures that need to be adopted. This 'potentially imprecise concept', as named by UNCITRAL Legislative Guide – Part four[37], should 'describe a period in which there is a deterioration of the company's financial stability to the extent that insolvency has become imminent or unavoidable.' It is important to outline that preventive restructuring proceedings' eligibility criteria is based on the debtor's likelihood of insolvency.

Preventive restructuring frameworks in Romania. In Romania, for instance, financially distressed debtors have access to preventive restructuring proceedings, provided by the Law no. 85/2014 regarding insolvency prevention proceedings and insolvency proceedings. As the national law names them, pre-insolvency proceedings are available in the form of ad-hoc mandate and the preventive composition.[38] Both proceedings apply to a debtor 'in financial difficulty', as defined by the law. Although the Romanian law complies with most of the Proposal's provisions, it also provides some particularities: firstly, both proceedings are maintained confidential throughout their duration and secondly, it is not mandatory to form classes of creditors, although the nature and source of their claims must be mentioned. Creditors participate both individually and collectively in the proceedings.

The ad-hoc mandate is adopted when a debtor reaches, within 90 days, an agreement with one or more creditors. Unlike the preventive composition, the ad-hoc mandate doesn't grant the debtor a general stay of individual enforcement actions nor does it block the commencement of insolvency proceedings.

The preventive composition's duration is 24 months, with a possibility of extending it with maximum 12 months; however, the debtor must pay, in the first 12 months, at least 20% of the value of claims provided by the restructuring plan. The preventive composition can be approved by the Court if 75% of the values of all claims vote in favor of the plan. The mechanism that makes the restructuring plan binding on dissenting creditors is a simple cram-down, due to the fact that creditors are not separated into different classes; their voting rights are determined by reporting their claims to the total value of claims. The Court's involvement

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wages for work already carried out. Nevertheless, these transactions are exemplary; therefore any transaction related to the restructuring plan should not be suppressed, especially if they were subject of creditors' vote as a measure provided by the restructuring plan.

[35] The Proposal does not interfere with ranking of all classes of creditors, yet it tries to secure a minimum protection for those who assume a risk of financing a debtor in financial difficulty.

[36] In addition to the Member States' obligation of providing an online model of a restructuring plan, the directors' obligations should also include the consultation of the model, whether it is chosen to be used or not.

[37] United Nations Commission on International Trade Law, *'UNCITRAL Legislative Guide on Insolvency Law – Part four: Directors' obligations in the period approaching insolvency'* (2013) <http://www.uncitral.org/pdf/english/texts/insolven/Leg-Guide-Insol-Part4-ebook-E.pdf> accessed 27 April 2018.

[38] Both proceedings require the Court's confirmation.

is limited to the verification of legal aspects; the preventive restructuring plan is approved under the following conditions: if the debtor is eligible[39] to access preventive proceedings, if 75% of the total value of claims voted in favor of the plan and if the value of challenged and/or unaccepted claims doesn't exceed 25% of the total value of claims.

An important aspect of preventive composition proceedings is that new financing benefits from super-priority at distribution. Also, if the debtor becomes insolvent during negotiations, the directors' obligation of filing for insolvency is suspended; the obligation arises again in 5 days after the negotiations' failure.

2.2.2. Second Chance for Honest Entrepreneurs

As the statistics show[40], in most Member States, if people were to set up a business, they would fear the possibility of going bankrupt (43%) and the risk of losing personal assets (37%) the most. Entrepreneurs often lack the capital they need to initiate a business, so they finance it by applying for a loan. In most of the cases, when starting a business, entrepreneurs guarantee the loan with their personal assets. The Proposal states that in many Member States, it takes more than 3 years for bankrupt but honest entrepreneurs to discharge their debts and benefit from a second chance. The consequences of the lack or inefficiency of second chance frameworks, along with the stigmatization implied by bankruptcy, may result in the entrepreneurs' isolation from the economy.

The Proposal acknowledges the importance of an efficient second chance framework, dedicating Title III to the establishment of the minimum standards regarding the full or partial discharge of the honest entrepreneur, as well as the maximum duration of the discharge period. It is also stated that shorter discharge periods have a positive impact on both consumers and investors, as they are quicker to re-enter the cycles of consumption and investment, which supports and boosts entrepreneurship. Supporting the entrepreneurial spirit may result in a more efficient single market. Certainly, the Proposal's provisions regarding debt discharge only targets over-indebted entrepreneurs who acted in good faith, while providing derogation for entrepreneurs who acted in bad faith. These derogations are provided by Article 22, and give Member States the option of maintaining or introducing provisions restricting access to discharge or laying down longer periods for obtaining a full discharge. It has been shown[41] that in some Member States, entrepreneurs with unlimited liability make up more than half of all businesses, therefore having to pay the debts from their personal income. Member States may provide that, in these situations, debts will be treated in a single procedure, for the purposes of obtaining a discharge. Nevertheless, Member States are allowed to derogate from these provisions, stipulating that professional and personal debts are to be treated in separate procedures that could be coordinated for the purposes of accessing discharge.

A true second chance offered to over-indebted entrepreneurs would have a positive impact on the Member States' economy; therefore, assuring efficient second chance frameworks in the Member States would have a positive impact also on the single market. The Proposal also acknowledges that entrepreneurs re-locate in other jurisdictions to benefit from a fresh start, which implies additional costs for creditors and also for the entrepreneurs

[39] The debtor must be a professional, as defined by the Civil Code and must also fulfill several specific eligibility criteria.

[40] Flash Eurobarometer 354 (2012) 72 <http://ec.europa.eu/commfrontoffice/publicopinion/flash/fl_354_en.pdf> accessed 27 April 2018.

[41] <http://ec.europa.eu/information_society/newsroom/image/document/2016-48/eu_factsheet_40047.pdf> accessed 27 April 2018.

themselves, since some jurisdictions require them to be established for a certain period of time before being allowed to obtain a full discharge.

Some Member States' legislations provide that bankruptcy may be accompanied by other disqualification orders, which blocks the entrepreneurs from making a fresh start. This form of social and economic 'punishment' benefits the economy only when applied to entrepreneurs who acted in bad faith. Entrepreneurs who acted in good faith should be given the chance to benefit from a full discharge of debts, since it has been proven that entrepreneurs who once failed have a higher rate of success and increased abilities of predicting possible risks. Efficient second chance frameworks in Member States would encourage the entrepreneurs to benefit from a second chance, by assuring social an economic protection. This would also boost the entrepreneurial spirit and would support those who once failed.

One of the Proposal's objectives is to ensure second chance frameworks across Member States, which would have a positive impact on their economy. Strong Member States' economies are a determinant factor for a strong single market. The Proposal aims at setting minimum standards that would help Member States to increase their market functioning, through a quick reintegration in the society of over-indebted entrepreneurs, while leaving freedom to Member States to create a proper context that eases the achievement of these objectives.

2.2.3. Measures to Increase the Efficiency of Restructuring, Insolvency and Discharge Procedures

The Proposal provides measures to increase the efficiency of restructuring, insolvency and second chance in Title IV. It offers remedies that could have an impact on the length and costs involved by restructuring, insolvency and discharge procedures. One of the measures offered by the Proposal is the initial and further training of the judicial and administrative authorities that apply restructuring, insolvency and second chance proceedings. It is shown that aspects such as the specialization of judges and their ability to take quick decisions, as well as the professionalism of practitioners in the field of restructuring, insolvency and second chance and also the availability of digital tools may reduce the length of restructuring and insolvency proceedings, the costs they're implying and may also help achieve a higher quality of communication, assistance or supervision.

Generally, the costs of a restructuring plan's implementation are assumed by the debtor, which is the main reason why they need to be reduced as much as possible. Classical communication systems such as postal services not only that imply costs, but they lengthen the proceeding. Digital tools that allow a faster communication at lower costs may be used complementary to classical communication tools.[42]

The Proposal provides that Member States shall encourage the development and the adherence to voluntary codes of conduct by practitioners in the field of restructuring, insolvency and second chance. They are also bodies applying the proceedings; therefore they must additionally receive initial and further training to a level appropriate to their responsibilities. The process for the appointment, removal and resignation of the practitioners in the field of restructuring, insolvency and second chance shall be ensured by the Member States to be clear, predictable and fair. In cases in which practitioners in the field of restructuring, insolvency and

[42] In Article 28, the Proposal provides a series of actions that may be performed electronically, including in cross-border situations. Such actions may consist in filing the claims, filing of restructuring or repayment plans with competent judicial or administrative authorities, notifications to creditors, voting on restructuring plans, lodging of appeals. Although the Proposal does not specifically provide that other actions may be performed electronically, it also doesn't suppress this possibility.

second chance are appointed by the judicial authority, the selection criteria shall be clear and transparent. The judicial authority may appoint a practitioner in the field of restructuring, insolvency and second chance in a certain case, based on the practitioner's experience and expertise.[43] Debtors and creditors may be consulted in the selection of the practitioner. The work of a practitioner in the field of restructuring, insolvency and second chance shall be appropriately supervised by the judicial or administrative authority, by creditors or by both, and should include an effective regime for sanctioning practitioners who have failed in their duties. In this case, bad faith or negligence may constitute grounds for sanctioning practitioners, yet they cannot be held responsible for the failure of negotiations upon a restructuring plan. The Proposal contains provisions regarding the fees charged by practitioners in the field of restructuring, insolvency and second chance, aiming at ensuring proportionality between the requested fees and the complexity of the case.[44]

After the Proposal becomes binding, Member States will be obliged to collect data, sort and report it, in order to create a centralized database that would become reliable for annual statistics.[45] Monitoring the effects of the Proposal's rules and their implementation in Member States could create awareness and could encourage the entrepreneurial spirit, while limiting the effects of bankruptcy.

2.3. Conclusion

The Proposal has proven itself to be flexible enough not to interfere with what currently works in some Member States, while setting minimum standards and general rules for Member States, which are free to create their own context that will assure the achievement of the Proposal's objectives.

For a higher rate of restructuring plans' success, it is recommended that the stay of enforcement actions should especially target assets that are vital for the business to keep operating, only if the business is determined to be viable by an expert. As the measures provided by the Proposal create a favorable context for debtors, their interests must be balanced with the creditors', while preventing eventual abuses. The Proposal indeed sets common rules upon the possibility of ordering a temporary stay of individual enforcement actions, but doesn't provide rules or principles regarding the supervision of the stay. It is stated that such temporary stays may be granted for maximum 12 months, including extensions and renewals. These reasons show the need of judicial supervision, which could also improve creditors' trust in negotiating a restructuring plan. Judicial supervision could be exercised while still maintaining the proceedings' confidentiality, limited to preventing eventual abuses.

New financing being promoted is one of the most important provisions of the Proposal. Although few investors would risk financing a financially distressed debtor, an opportunity of

[43] This is because complex cases require increased efforts and resources, combined with the need of a professional practitioner having the necessary experience to increase the proceeding's efficiency. The ability of communicating and cooperating with foreign insolvency practitioners and judicial or administrative authorities, as well as human and administrative resources shall constitute additional criteria of the practitioner's appointment in in restructuring and insolvency proceedings with cross-border elements.

[44] The fees charged by the practitioner should be negotiated with the creditors since it would represent an additional cost of the proceeding, and should also be submitted to their approval. Furthermore, in cases where judicial or administrative authorities are supervising the proceedings, the practitioner's requested fees should be submitted for confirmation. These measures aim at preventing abuses and creating a balance between the practitioner's requested fees and the complexity of the case.

[45] The obligation regarding data collection is provided by Article 29 of the Proposal. Collected data shall be sorted by the number and type of proceedings, their length, the costs implied and also the recovery rates for secured and unsecured creditors, separately.

new or interim financing should be analyzed on a case-to-case basis, because financial difficulties may not necessarily appear because of bad management; each case presents its particularities. This is why the Proposal encourages financing debtors in financial distress. Hopefully, these provisions will encourage investors to analyze the possibility of investing in financially distressed businesses.

The Proposal, as it states, sets up common rules in order to ensure a reform of the concept of "insolvency". By pursuing this goal, first steps have been taken towards developing a business rescue culture. It is true that changing the actual mindset in order to promote a rescue culture doesn't rely only on legislations, since almost half Member States (13 out of 15) do not a have a preventive restructuring framework put in place. This is why Member States and European Institutions need to work together and put synergic efforts into achieving the common goal.

A new, modern vision upon the concept of "insolvency" is needed. Looking back in history, reorganization was not a form of insolvency. Insolvency itself is a modern concept, as in history we can only find references about bankruptcy, which was often severely punished. Reorganization proceedings as well have been regulated as an alternative to bankruptcy proceedings in a modern context. The actual social, financial and economic context require a new reform supporting and enhancing a rescue culture, by setting preventive restructuring proceedings as an alternative to insolvency proceedings. The Proposal, even at this time, may be used as an instrument which creates awareness in the business environment, and which may have a positive impact at a social and economic level.

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THE RECAST OF THE EU REGULATION ON INSOLVENCY PROCEEDINGS : THE COMI

Livia-Alina PĂLĂCEAN

CHAPTER I. INTRODUCTORY CONSIDERATIONS

1. Cross-border insolvency. Short history

Insolvency, the inability to face outstanding debt, is considered a "disease," a serious accident in the existence of a legal or natural person. The treatment is done by specific methods and each state has its own policies in the field.

The severe economic crisis triggered in 2008-2009 has led to an increase in the number of failed businesses in the context of the trade obligations undertaken and the number of highly indebted individuals in relation to the obligations assumed as consumers. From 2009 to 2011, within the EU, an average of 200,000 companies a year went into insolvency[46] and the debt crisis had a direct effect on people, jobs and businesses. Of the total mentioned by companies in difficulty, about a quarter of insolvency proceedings had cross-border elements.

If the origins of the insolvency situation occur in the territory of two or more states, it is important to know who and how they apply the remedies, which are the competent courts and the applicable law, so that more then the recognition and enforcement of decisions in this area can be done without involving additional cross-border formalities which have the effect of making the process more difficult and slower. For all this, it is imperative to determine the center of the debtor's main interests - COMI, an operation which may encounter difficulties in relation to the different laws of the Member States. Thus, a clear preoccupation of the European Union, as well as of the United Nations Commission on International Trade Law - UNCITRAL, made clear rules for solving insolvency situations with foreign elements.[47]

Improving and accelerating insolvency procedures with cross-border implications require coherent, easy-to-apply and interpreted provisions for determining competent jurisdiction, applicable choices, and recognizing and enforcing judgments in the field.

To this end, in 2011, the European Parliament adopted a resolution on insolvency proceedings[48] containing recommendations to harmonize specific aspects of substantive law of insolvency and company law.

The European Commission acknowledged the significant differences between national insolvency laws and issued in December 2012 a Communication underlining the need for a gradual approach in certain areas where differences in internal insolvency rights could hamper the functioning of an efficient single market . A first step in this approach has

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[46] commission staff working document impact assessment accompanying document to the proposal for a COUNCIL DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON PREVENTIVE RESTRUCTURING FRAMEWORKS AND
AMENDING DIRECTIVE 2012 / 30 / EU at http://ec.europa.eu/transparency/regdoc/rep/10102/2016/en/swd-2016-357-f1-en-main-
part-1.pdf, accessed on 19.11.2017, ora16.00.

[47] http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html

[48] Report with recommendations to the Commission on insolvency proceedings in the context of EU company law 2011/06 (INI), 17.10.2011

been to amend Regulation (EC) No 1346/2000. This change was completed by the adoption on 20.05.2015 of Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings (recast).

Prior to the vote on this regulation, on 12 March 2014 the Commission adopted the Restructuring Recommendation and second chance, which tackled, as was the case, the restructuring and the second chance to be given to entrepreneurs in financial difficulty. With this Recommendation, Member States were advised to introduce effective pre-insolvency procedures to help viable borrowers to restructure and thus to avoid insolvency. States have also been recommended to issue and adopt legal provisions on a second chance for entrepreneurs to enable them to obtain a debt remission within three years of insolvency.

Unfortunately, the subsequent assessments have led to the conclusion that the recommendation did not generate the desired impact on the level of uniform changes in all Member States, facilitating the rescue of firms in financial difficulty and giving a second chance to entrepreneurs. Therefore, a new project was presented in 2016, namely the Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on preventive restructuring, second chance and measures to increase the efficiency of restructuring, insolvency and debt relief procedures, and amending Directive 2012/30 / EU.[49]

This current proposal for a Directive strengthens the 2014 Recommendation and goes beyond its scope by providing for specific rules to increase the efficiency of all types of procedures, including insolvency-liquidation.

In the explanatory memorandum of the proposal, it was considered that the right to insolvency should cover a wide range of measures, starting with early intervention, which applies before a company encounters serious difficulties, through rapid restructuring, which ensures the retention the viable parts of the business, and the liquidation of assets, which is used when companies can not be rescued otherwise, and ending with a second chance for honest entrepreneurs who take the form of debt remittance. A well-functioning legal framework of insolvency that includes all these measures is an essential part of a good business environment as it supports trade and investment, helps create and maintain jobs, and helps economies to more easily mitigate economic shocks which causes high levels of bad credit and unemployment. All these are fundamental priorities of the European Commission.

Insolvency cases are of particular importance at Union level. The existence of a single market with a growing degree of interconnection and a growing digital dimension means that very few companies are purely national if elements such as customer base, supply chain, field of activity, investors and the capital base, to give just a few examples. It should be stressed that these insolvency cases also constitute a deterrent to cross-border expansion operations and cross-border investments. Many investors claim that the main reason why they do not invest or do not enter into business relationships outside their home country is the lack of clarity of the insolvency law applicable in another country, or the risk of insolvency proceedings in another country being very long or complicated. A greater degree of harmonization in insolvency law is therefore essential for the smooth functioning of the single market and for a true union of capital markets. That is why the issue has long attracted considerable interest at EU level.

If there is greater convergence between insolvency procedures and restructuring procedures, greater legal certainty for cross-border investors would be guaranteed and prompt restructuring of viable companies that are facing financial difficulties would be encouraged. If insolvency law provisions are inefficient and divergent, it is more difficult for investors to assess credit risk, especially when thinking about investing across borders. Financial

[49] http://ec.europa.eu/transparency/regdoc/rep/1/2016/RO/COM-2016-723-F1-RO-MAIN-PART-1.PDF

integration would deepen, credit costs would diminish, and EU competitiveness would increase if there was a higher degree of cross-border risk sharing, if capital markets were stronger and more liquid, and if the sources of funding for EU businesses were to be diversified.

The draft directive complements Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings (recast) in that it contains the requirement for Member States to ensure that their national preventive restructuring procedures comply with certain minimum efficacy principles.

2. Introduction of COMI. Importance.

2.1 COMI - Autonomous concept of European Union law

The notion of COMI[505] - the center of the debtor's main interests - is introduced by art. 3 par. (1) of Regulation (EC) No. 1346/2000 and is considered an autonomous concept of EU law and should be interpreted by reference to European Union law. Under the abovementioned Article, the jurisdiction to open insolvency proceedings lies with the courts of the Member State in whose territory the principal interests of a debtor - COMI are located. In the case of a company or legal person, the center of main interests is presumed to be the place where the registered office is located, unless proved otherwise.

2.2 COMI in the old Regulation (EC) no. 1346/2000

2.2.1 Establishing Competent Courts by COMI

According to the provisions of art. 3 par. (1) of Regulation (EC) No. No 1346/2000, the jurisdiction to open insolvency proceedings rests with the courts of the Member State in whose territory the principal interests of a debtor lie. In the case of a company or legal person, the center of main interests is presumed to be the place where the registered office is located, unless proved otherwise. Where the center of main interests of a debtor is situated in the territory of a Member State, the courts of another Member State are competent to open insolvency proceedings against that debtor only if it has a place of business in the territory of that other Member State. The effects of this procedure shall be limited to the debtor's assets situated in the territory of the second Member State. When an insolvency proceeding was opened under the COMI, any insolvency procedure subsequently opened by the courts of another Member State in whose territory the debtor has a registered office is a secondary procedure. The latter must be a winding-up procedure and may be opened before the opening of the main insolvency proceedings only if:

(a) an insolvency procedure can not be opened by the COMI due to the conditions laid down by the law of the Member State in whose territory the center of the debtor's main interests is situated

(b) the opening of the territorial insolvency proceedings shall be required by a creditor who has his domicile, habitual residence or registered office in the Member State in whose territory the said office is situated or whose debt arises from the operation of that establishment.

2.2.2 Establish the law applicable to COMI

[50] Centre of main interests

Unless otherwise provided in the old regulation, the law applicable to insolvency proceedings and the effects thereof shall be the law of the Member State in whose territory the procedure is opened, hereinafter referred to as the "opening country".

The law of the State of the opening determines the conditions for opening, conducting and closing the insolvency procedure. This in particular determines:

(a) debtors liable to insolvency proceedings in relation to their quality;

(b) the assets which form the object of the disqualification and the arrangements applicable to the assets acquired by the debtor following the commencement of the insolvency proceedings;

(c) the duties of the debtor and the liquidator;

(d) the conditions under which compensation is payable;

(e) the effects of insolvency proceedings on the ongoing contracts to which the debtor is a party;

(f) the effects of insolvency proceedings on individual actions brought by creditors, with the exception of pending cases;

(g) claims to be recorded on the debtor's liability and the claims system incurred after the opening of insolvency proceedings;

(h) the rules governing the registration, verification and admission of claims;

(i) the rules governing the distribution of proceeds from the sale of goods, the rank of claims and the rights of creditors who have received partial satisfaction after the opening of insolvency proceedings under a right in rem or as compensation;

(j) the conditions and effects of the closure of insolvency proceedings, in particular by arrangement;

(k) creditors' rights after the closure of insolvency proceedings;

(l) who is responsible for the costs and expenses of insolvency proceedings;

(m) the rules relating to the nullity, annulment or inopportunity of acts prejudicial to the creditors' meeting.

2.2.3 Interpretation of the notion COMI

The notion of COMI must be presented in relation to European Union law.

Therefore, in order to determine the center of interest of a debtor company, art. 3 par. (1), second sentence, of Regulation No. 1346/2000 is to be read as follows:

- The center of the principal interests of a debtor company must be determined by giving priority to the place of the central administration of that company as it can be established by objective and verifiable elements by third parties.
- If the management and control bodies of a company are in the place of the registered office and the management decisions of that company are taken in this place, in a verifiable manner by third parties, the presumption provided for by that provision can not be overturned.
- Where a company's head office is not situated at its head office, the existence of social assets, such as financial services contracts in a Member State other than that in which that company's registered office is situated, can not be regarded as sufficient to rebut that presumption only on condition that an overall assessment of all the relevant factors enables it to be established that the effective center of management and control of that company and the management of the interests of the company are situated in a verifiable manner to third parties in that other Member State.

According to Regulation (EC) no. 1346/2000[51], the moment at which the COMI is determined is the date of the initiation of the request for the opening of the procedure.

The old regulation allows the opening of the main insolvency proceedings in the Member State where the main interests of the debtor COMI are located. These procedures are universal in scope and include all the assets of the debtor. In order to protect different interests, this Regulation allows the opening of secondary insolvency proceedings parallel to the main insolvency proceedings. Secondary insolvency proceedings may be opened in the Member State where the debtor has a registered office. The effects of secondary insolvency proceedings are limited to assets located in that State. Entity within the Union is ensured by imperative rules of coordination with main insolvency procedures.

The old regulation also applies only to procedures concerning a debtor whose center of main interests is COMI located in the Union.

The rules of jurisdiction set out in this Regulation only establish international jurisdiction, ie designate the Member State whose courts may open insolvency proceedings. The territorial jurisdiction of the Member State should be determined by the national law of that Member State.

Before initiating insolvency proceedings, the competent court should examine of its own motion whether the center of main interests of the debtor COMI or its place of establishment is effectively within its jurisdiction.

When determining whether the center of interest of the debtor COMI is verifiable by third parties, special consideration should be given to creditors and their perception of where the debtor manages his interests. For this, it may be necessary, in the case of the relocation of the main COMI center of interest, to inform creditors at the appropriate time of the new venue where the debtor carries out his activities, for example by drawing attention to changing the address of commercial correspondence or by publicly announcing of the new place by other appropriate means.

Also, the recast regulation should contain a series of safeguards designed to prevent fraudulent or abusive use of the most favorable court search practice.

CHAPTER II. REFORMING EU REGULATION ON INSOLVENTION PROCEDURES: COMI

1. Adoption of Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings (recast). Reason.

In the explanatory memorandum to Regulation (EU) 2015/848 of the European Parliament and ofthe Council on insolvency proceedings, it appears that on 12 December 2012 the Commission adopted a report on the application of Regulation (EC) No 1346/2000. The Commission's report concludes that the Regulation generally works well but that it would be desirable to improve the application of some of its provisions in order to improve the effective management of cross-border insolvency proceedings. Since that Regulation has already been amended several times and new amendments are to be made, it should be recast in the interests of clarity.

The smooth functioning of the internal market requires cross-border insolvency procedures to function effectively and effectively. The adoption of this Regulation is

[51] Regulation (EC) No 1346/2000 was published in JOCE no. l160 of 30.06.2000 and entered into force on 31.05.2002

necessary in order to achieve the stated objective of judicial cooperation in civil matters within the meaning of Article 81 of the Treaty. Business activities increasingly have cross-border effects and are therefore increasingly regulated in Union law. The insolvency of such undertakings also undermines the proper functioning of the internal market, requiring a Union act requiring the coordination of measures to be taken in respect of the assets of an insolvent debtor. For the proper functioning of the internal market, it is necessary to avoid the parties being tempted to transfer assets or judicial proceedings from one Member State to another in an attempt to obtain a more favorable legal status to the detriment of the creditor mass (judicial tourism). (6) This Regulation should include provisions governing the jurisdiction to open insolvency proceedings and actions directly arising from insolvency proceedings and are closely related thereto. This Regulation should also contain provisions on the recognition and enforcement of judgments handed down in such proceedings and provisions on the law applicable to insolvency proceedings. In addition, this Regulation should contain rules on the coordination of insolvency proceedings relating to the same obligor or to several companies belonging to the same group.

In order to achieve the objective of improving efficiency and speeding up insolvency procedures with cross-border effects, it is necessary and advisable that the provisions on jurisdiction, recognition and law applicable in this area be encompassed in a binding legal act of the Union which is directly applicable in the Member States States. This Regulation should apply to insolvency proceedings which satisfy the conditions laid down therein, whether the debtor is a natural or legal person, a trader or a private individual. These insolvency procedures appear on an exhaustive list in Annex A. With regard to a national procedure in Annex A, this Regulation should apply without further examination by a court in another Member State as regards the fulfillment of the prescribed conditions in this Regulation. National insolvency procedures not listed in Annex A should not fall within the scope of this Regulation.

This Regulation should apply to insolvency proceedings which satisfy the conditions laid down therein, whether the debtor is a natural or legal person, a trader or a private individual. These insolvency procedures appear on an exhaustive list in Annex A. With regard to a national procedure in Annex A, this Regulation should apply without further examination by a court in another Member State as regards the fulfillment of the prescribed conditions in this Regulation. National insolvency procedures not listed in Annex A should not fall within the scope of this Regulation. The scope of this Regulation should be extended to procedures that promote the rescue of economically viable enterprises but in difficulty, and which gives a second chance to entrepreneurs. It should in particular include procedures for restructuring a debtor at a stage where there is only a likelihood of insolvency and procedures that leave the debtor full or partial control of his assets and business. It should also include debt and debt adjustment procedures with regard to consumers and self-employed persons, for example by reducing the amount the debtor pays or by extending the payment deadline granted. Since such procedures do not necessarily imply the appointment of an insolvency practitioner, they should be subject to this Regulation if they are under the control or supervision of a court. In this context, the term "control" should include situations in which the court intervenes only after an appeal by a creditor or other interested parties[52].

2. COMI in view of Regulation (EU) No. 2015/848

2.1 COMI for individuals

[52] The so-called "judicial shopping" –“ forum shopping“.

In the case of a self-employed person or a professional activity, the center of main interests is supposed to be the principal place of business in the absence of evidence to the contrary. In the case of any other natural person, the center of main interests is supposed to be the place where the natural person has his habitual residence, in the absence of evidence to the contrary. It clarifies the circumstances in which the presumption may be overthrown: in the case of a natural person who does not engage in an independent commercial or professional activity, it should be possible to overturn this presumption, for example, where the bulk of the debtor's assets is outside the Member State where the debtor is habitually resident or where it can be established that the main reason for the move was the opening of insolvency proceedings before the new court and where such an opening could affect significantly to the interests of the creditors whose business with the debtor took place before the move.

2.2 COMI in the case of legal persons

Regarding the legal person, Regulation (EU) no. 2015/848 codifies the case-law of the CJEU in the matter of COMI.

The removal of the issue of international jurisdiction links the courts of the Member States, according to Eurofood IFSC, C-341/04, in which the CJEU has established that, in interpreting Art. 16 (1), the main proceedings opened by a court of a Member State must be recognized by the courts of the other Member States without the latter being entitled to review the jurisdiction of the court of the State of the opening State.

The assumptions that the registered office, principal place of business and habitual residence are at the core of the COMI's main interests should be relative and the relevant court of a Member State should carefully check that the center of main interests of the COMI debtor really is in that Member State. In the case of a company, it should be possible to overturn this presumption if the central administration of the company is located in a Member State other than that where the registered office is situated and if a comprehensive assessment of all relevant factors establishes in a verifiable manner by third parties that the real center of management and supervision of the company and the center for the management of its interests are in that other Member State. In the case of a natural person who does not engage in independent commercial or professional activity, it should be possible to overturn this presumption, for example where the bulk of the debtor's assets are outside the Member State where the debtor has his habitual residence or where it can be established that the main reason for the move was the opening of insolvency proceedings before the new court and if such opening would significantly affect the interests of the creditors whose business with the debtor they have occurred before the move.

With the same objective of preventing the fraudulent or abusive use of the most favorable court search practice, the presumption that the center of main COMI interests is the place where the registered office is situated, the principal place of business or the habitual residence should not apply if , in the case of a company, legal persons or natural persons carrying on an independent economic or professional activity, the debtor has moved its registered office or principal place of business to another Member State within three months prior to the application for the opening of insolvency proceedings or, in the case of a natural person who is not self-employed or professional, if the debtor has moved his habitual residence to another Member State within six months of the request to open the procedure insolvency.

However, if the circumstances of the case give rise to doubts about the court, it should

require the borrower to submit additional evidence to substantiate their claims and, if the law applicable to insolvency proceedings permits, give creditors debtor the opportunity to present his / her views on competence. (33)

If the court seised of the request to open an insolvency proceeding discovers that the core of the COMI's main interests is not within its territory, it should not open a main insolvency proceeding.

Prior to the opening of the main insolvency proceedings, the right to request the opening of insolvency proceedings in the Member State where the debtor has a registered office should be limited to local creditors and public authorities or to cases where the law of the Member State in which the debtor has the center of interests its main COMI does not allow the opening of a main insolvency proceedings. This limitation is justified by the fact that it is intended to confine itself to what is absolutely necessary in cases where territorial insolvency proceedings are requested before the main insolvency proceedings.

Introduction of rules on insolvency of groups of companies should not limit the possibility of a court to open insolvency proceedings in a single jurisdiction for several companies within the same group, if the court finds that the center of main interests COMI of these companies are located in a single Member State. In such cases, the court should also be able to appoint the same insolvent practitioner in all the proceedings concerned, provided that this is not incompatible with the rules applicable to such proceedings.

3. International competence under Regulation (EU) 2015/848

In the new Regulation (EU) No. 2015/848 the main interests of the debtor - COMI to avoid judicial tourism are 3 presumptions about the COMI. Thus, according to the provisions of art. 3 of Regulation (EU) No. 2015/848

1. The jurisdiction to open insolvency proceedings (hereinafter referred to as the 'main insolvency proceedings') shall lie with the courts of the Member State in whose territory the debtor's main interests are located. The center of interest is the place where the debtor usually manages his interests and is verifiable by third parties. In the case of a company or legal person, the center of main interests is presumed to be the place where the registered office is located, unless proved otherwise. This presumption applies onlyif the registered office has not moved to another Member State in the three months preceding the request for the opening of insolvency proceedings. In the case of a self-employed person or a professional activity, the center of main interests is supposed to be the principal place of business in the absence of evidence to the contrary. This presumption applies only if the principal place of business has not moved to another Member State during the three months preceding the request for the opening of insolvency proceedings. In the case of any other natural person, the center of main interests is supposed to be the place where the natural person has his habitual residence, in the absence of evidence to the contrary. This presumption applies only if the habitual residence has not moved to another Member State during the six months preceding the request to open the insolvency proceedings.

2. Where the center of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to initiate insolvency proceedings against that debtor only if he has a place of business in the territory of that other

Member State. The effects of this procedure shall be limited to the debtor's assets situated in the territory of the second Member State.

3. Where an insolvency proceedings have been opened in accordance with paragraph 1, any insolvency proceedings subsequently opened in accordance with paragraph 2 shall be a secondary insolvency procedure.

4. The territorial insolvency proceedings referred to in paragraph 2 may be opened only before the opening of the main insolvency proceedings pursuant to paragraph 1 where:

a) an insolvency proceedings can not be opened pursuant to paragraph 1 because of the conditions laid down by the law of the Member State in whose territory the debtor's main interests are situated; or

b) the opening of the territorial insolvency proceedings is required by:

i. a creditor whose debt arises from the operation of a head office situated in the territory of the Member State in which the opening of the territorial proceedings is requested; or
ii. a public authority which, under the law of the Member State in whose territory the registered office is situated, has the right to request the opening of insolvency proceedings. Where a main insolvency proceeding is opened, the insolvency procedure shall become secondary insolvency proceedings.

3.1 Verification of competence

A court hearing an application for the opening of insolvency proceedings examines ex officio whether it has jurisdiction under Article 3. The decision to open an insolvency proceedings sets out the criteria determining the jurisdiction of the court and, in particular, whether that jurisdiction is based on Article 3 (1) or 2.

Notwithstanding the above, where insolvency proceedings are opened in accordance with national law, in the absence of a judgment given by a court, Member States may entrust the insolvent practitioner designated in those proceedings with the task of examining whether the Member State where the application for the opening of insolvency proceedings is pending is competent pursuant to Article 3. If so, the insolvent practitioner shall specify in the opening decision the criteria determining jurisdiction and, in particular, whether that competence is based on Article 3 (1) or paragraph 2.

3.2 Judicial review of the decision to open the main insolvency proceedings

The debtor or any creditor may appeal to the court for the opening of the main insolvency proceedings for reasons of international jurisdiction.

The decision to initiate the main insolvency proceedings may be challenged by the parties other than those referred to above or for reasons other than lack of international competence, where national law so provides.

3.3 Jurisdiction for an action directly arising from insolvency proceedings and closely related to it

The courts of the Member State in which an insolvency proceeding has been opened in accordance with Article 3 shall be competent for any action directly arising from the insolvency procedure and which is closely linked to such proceedings, such as the revocation proceedings.

Where one of the actions concerned relates to a civil and commercial action against the same defendant, the insolvent practitioner may bring both actions before the courts of the Member State in whose territory the defendant is domiciled or, if the action is brought against more than one defendant, in the courts of the Member State in which each of them has its domicile, provided that those courts have jurisdiction in accordance with Regulation (EU) No. 1215/2012. The first subparagraph shall apply to the debtor in possession, provided that the domestic law allows the debtor in possession of the property to bring actions in the name of the mass of the assets subject to the insolvency.

For the purpose of the above paragraph, those actions that are so closely interrelated are considered to be related, that it is appropriate to investigate and prosecute them at the same time in order to avoid the risk of irreconcilable judgments in their separate judgment.

4. Applicable law under Regulation (EU) 2015/848

In principle, the provisions of Art. 7 of Regulation (EU) No. 2015/848 on the applicable law are a resumption of the provisions of the old art. 4 of Regulation (EC) No. 1346/2000.

Unless otherwise provided in the old regulation, the law applicable to insolvency proceedings and their effects is the law of the Member State in whose territory the procedure is opened, hereinafter referred to as "the State of opening".

The law of the State of the opening determines the conditions for opening, conducting and closing the insolvency procedure. This in particular determines:

(n) debtors who may be insolvent in relation to their quality;

(o) the goods which form the object of the disqualification and the arrangements applicable to the assets acquired by the debtor following the opening of the insolvency proceedings;

(p) the duties of the debtor and the liquidator;

(q) the conditions of countervailing of compensation;

(r) the effects of the insolvency proceedings on the ongoing contracts to which the debtor is a party;

(s) the effects of insolvency proceedings on individual actions brought by creditors, with the exception of pending cases;

(t) receivables to be recorded on the debtor's liability and the claims system incurred after the opening of insolvency proceedings;

(u) the rules governing the registration, verification and admission of claims;

(v) the rules governing the distribution of proceeds from the sale of goods, the rank of claims and the rights of creditors who have received partial satisfaction after the opening of insolvency proceedings under a right in rem or as compensation;

(w) the conditions and effects of the closure of insolvency proceedings, in particular by arrangement;

(x) creditors' rights after the closure of insolvency proceedings;

(y) who is charged with the costs and expenses of insolvency proceedings;

(z) rules on the nullity, annulment or inopportunity of acts prejudicial to the creditors' meeting

5. Relevant case law of the CJEU on COMI

5.1 Interpretation of the notion of COMI. The notion of headquarters

In Case C-396/09

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunale di Bari (Italy), made by decision of 6 July 2009, received at the Court on 13 October 2009, in the proceedings

Interedil Srl, in liquidation

V

Fallimento Interedil Srl, Intesa Gestione Crediti SpA,

Judgment

This reference for a preliminary ruling concerns the interpretation of Article 3 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1) ('the Regulation').

The reference was made in proceedings between Interedil Srl, in liquidation ('Interedil'), on the one hand and Fallimento Interedil Srl and Intesa Gestione Crediti SpA ('Intesa'), of which Italfondario SpA is the successor, on the other, concerning a petition for bankruptcy filed by Intesa against Interedil.

Legal context

European Union law

The Regulation was adopted on the basis, inter alia, of Articles 61(c) EC and 67(1) EC. Article 2 of the Regulation, which deals with definitions, provides as follows:

'For the purposes of this Regulation, the following definitions shall apply:

(a) "insolvency proceedings" shall mean the collective proceedings referred to in Article 1(1).These proceedings are listed in Annex A;

…

(h) "establishment" shall mean any place of operations where the debtor carries out a non- transitory economic activity with human means and goods.'

The list in Annex A to the Regulation refers, inter alia as regards Italy, to 'fallimento' proceedings. Article 3 of the Regulation, which deals with international jurisdiction, provides as follows:

'1. The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

2. Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.

…'

Recital 13 in the preamble to the Regulation states that 'the "centre of main interests" should correspond to the place where the debtor conducts the administration of his interests on a regular basis and [which] is therefore ascertainable by third parties'.

National law

Article 382 of the Italian Codice di Procedura Civile (Code of Civil Procedure), which concerns the resolution by the Corte suprema di cassazione of questions of jurisdiction, provides as follows: *'When adjudicating on a question of jurisdiction, the Court shall give its ruling on that question, determining, where appropriate, the court having jurisdiction …'*

It is apparent from the order for reference that, according to established case-law, any decision delivered by the Corte suprema di cassazione on the basis of that provision is final and binding on the court dealing with the substance of the case.

The dispute in the main proceedings and the questions referred for a preliminary ruling

Interedil was constituted in the legal form of a 'società a responsabilità limitata' under Italian law and had its registered office in Monopoli (Italy). On 18 July 2001, its registered office was transferred to London (United Kingdom). On the same date, it was removed from the register of companies of the Italian State. Following the transfer of its registered office, Interedil was registered with the United Kingdom register of companies and entered in the register as an 'FC' (Foreign Company).

According to the statements made by Interedil as set out in the order for reference, at the same time as the transfer of its registered office, it was engaged in transactions which concluded in Interedil being acquired by the British group Canopus, contracts being negotiated and entered into for the transfer of a business concern. According to Interedil, a few months after the transfer of its registered office, the title to properties which it owned in Taranto (Italy) was transferred to Windowmist Ltd, as part of the assets of the business transferred. Interedil also stated that it was removed from the United Kingdom register of companies on 22 July 2002. On 28 October 2003, Intesa filed a petition with the Tribunale di Bari for the opening of bankruptcy ('fallimento') proceedings against Interedil.

Interedil challenged the jurisdiction of that court on the ground that, as a result of the transfer of its registered office to the United Kingdom, only the courts of that Member State had jurisdiction to open insolvency proceedings. On 13 December 2003, Interedil requested that the Corte suprema di cassazione give a ruling on the preliminary issue of jurisdiction.

On 24 May 2004, without wafting for the decision of the Corte suprema di cassazione and taking the view that the objection alleging that the Italian courts did not have jurisdiction was manifestly unfounded and that it was established that the undertaking in question was insolvent, the Tribunale di Bari ordered that Interedil be wound up.

On 18 June 2004, Interedil lodged an appeal against the winding-up order before the Corte suprema di cassazione.

On 20 May 2005, the Corte suprema di cassazione adjudicated by way of order on the preliminary issue of jurisdiction referred to it and held that the Italian courts had jurisdiction. It took the view that the presumption in the second sentence of Article 3(1) of the Regulation that the centre of main interests corresponded to the place of the registered office could be rebutted as a result of various circumstances, namely the presence of immovable property in Italy owned by Interedil, the existence of a lease agreement in respect of two hotel complexes and a contract concluded with a banking institution, and the fact that the Bari register of companies had not been notified of the transfer of Interedil's registered office.

Doubting the validity of the Corte di suprema di cassazione's finding, in the light of the criteria established by the Court in Case C-341/04 *Eurofood IFSC* [2006] ECR I-3813, the Tribunale di Bari decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is the term "the centre of a debtor's main interests" in Article 3(1) of [the]

Regulation … to be interpreted in accordance with Community law or national law, and, if the former, how is that term to be defined and what are the decisive factors or considerations for the purpose of identifying the "centre of main interests"?

2. Can the presumption laid down in Article 3(1) of [the] Regulation …, according to which "[i]n the case of a company ... the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary", be rebutted if it is established that the company carries on genuine business activity in a State other than that in which it has its registered office, or is it necessary, in order for the presumption to be deemed rebutted, to establish that the company has not carried on any business activity in the State in which it has its registered office?

3. If a company has, in a Member State other than that in which it has its registered office, immovable property, a lease agreement concluded by the debtor company with another company in respect of two hotel complexes, and a contract with a banking institution, are these sufficient factors or considerations to rebut the presumption laid down in Article 3(1) of [the] Regulation … that the place of the company's "registered office" is the centre of its main interests and are such circumstances sufficient for the company to be regarded as having an "establishment" in that Member State within the meaning of Article 3(2) of [the] Regulation …?

4. If the ruling on jurisdiction by the Corte [suprema] di cassazione in the aforementioned Order … is based on an interpretation of Article 3 of [the] Regulation … which is at variance with that of the Court of Justice …, is the application of that provision of Community law, as interpreted by the Court of Justice, precluded by Article 382 of the [Italian] Code of Civil Procedure, according to which rulings on jurisdiction by the Corte [suprema] di cassazione are final and binding?'

On those grounds, the Court (First Chamber) hereby rules:

1. European Union law precludes a national court from being bound by a national procedural rule under which that court is bound by the rulings of a higher national court, where it is apparent that the rulings of the higher court are at variance with European Union law, as interpreted by the Court of Justice.

2. The term 'centre of a debtor's main interests' in Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted by reference to European Union law.

3. For the purposes of determining a debtor company's main centre of interests, the second sentence of Article 3(1) of Regulation No 1346/2000 must be interpreted as follows:

– a debtor company's main centre of interests must be determined by attaching greater importance to the place of the company's central administration, as may be established by objective factors which are ascertainable by third parties. Where the bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions of the company are taken, in a manner that is ascertainable by third parties, in that place, the presumption in that provision cannot be rebutted. Where a company's central administration is not in the same place as its registered office, the presence of company assets and the existence of contracts for the financial exploitation of those assets in a Member State other than that in which the registered office is situated cannot be regarded as sufficient factors to rebut the presumption unless a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is

located in that other Member State;

– where a debtor company's registered office is transferred before a request to open insolvency proceedings is lodged, the company's centre of main activities is presumed to be the place of its new registered office.

4. The term 'establishment' within the meaning of Article 3(2) of Regulation No 1346/2000 must be interpreted as requiring the presence of a structure consisting of a minimum level of organisation and a degree of stability necessary for the purpose of pursuing an economic activity. The presence alone of goods in isolation or bank accounts does not, in principle, meet that definition.

5.2 Transfer of registered office to another Member State. Presumption of place of COMI situation

Case C-353/15 (2015 / C 302/30)

Referring court

Corte di Appello di Bari

Parties to the main proceedings:

Applicants: Leonmobili Srl, Gennaro Leone

Intimate: **Homag Holzbearbeitungssysteme GmbH, Curatela del Fallimento Leonmobili Srl, ICO Srl, Arturo Salice SpA, Graphics Ricciarelli di Ricciarelli Bernardino, Deutsche Bank SpA, Fida Srl, Elica SpA**

Preliminary questions

1. In the absence of headquarters located in another Member State, the presumption referred to in the last sentence of [the last paragraph and paragraph 2] of Article 3 of [Regulation (EC) No] 1346/2000

(1) may be overturned by the party contesting jurisdiction by showing that the center of main interests is situated in a State other than that of the company?

2. If the answer to the foregoing question is in the affirmative, can the evidence be based on another presumption, namely the assessment of some indicia from which it can be deduced logically and deductively that the center of the main interests is situated in another Member State?

Order of the Court (Seventh Chamber) of 24 May 2016 - The device

Article 3 (1) of Regulation (EC) No. No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as meaning that in the event that the statutory seat of a company has been transferred from a Member State to another Member State, the court notified after that transfer with a request for the opening of insolvency proceedings in the Member State of origin can not preclude the presumption that the center of the company's main interests is at the place of its new statutory seat and that, at the time of the referral, the center of those interests was still in that Member State of origin, although that company no longer has a registered office there unless it is apparent from other objective elements and can be verified by third parties that the effective center of management and control of that company as well as the administration of interests he was still in that Member State at that time.

5.3 Applicable law depending on the location of the COMI

Case C 594/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), made by decision of 2 December 2014, received at the Court on 22 December 2014, in the proceedings

Simona Kornhaas

v

Thomas Dithmar, acting as liquidator of the assets of Kornhaas Montage und Dienstleistung Ltd,

Judgment

This request for a preliminary ruling concerns the interpretation of Article 4 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1) and of Articles 49 TFEU and 54 TFEU.

The request has been made in proceedings between Mr Dithmar, acting as liquidator of the assets of Kornhaas Montage und Dienstleistung Ltd ('the debtor company'), and Ms Kornhaas, concerning an action for reimbursement of payments which Ms Kornhaas had made as a managing director of the debtor company after it had become insolvent.

Legal context

EU law

Article 3 of Regulation No 1346/2000, entitled 'International jurisdiction', provides:

'1. The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

2. Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.

...'

Article 4 of that regulation, entitled 'Applicable law', provides:

'1. Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the "State of the opening of proceedings".

2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular:

...

(m) the rules relating to the voidness, nullity, voidability or unenforceability of legal acts detrimental to all the creditors.'

German law

Paragraph 64(1) and (2) of the Law on limited liability companies (Gesetz betreffend

die Gesellschaften mit beschränkter Haftung, RGBl. 1898, p. 846, 'the GmbHG'), in the version applicable to the facts in the main proceedings, provided:

'(1) In the event of the company's insolvency, the managing directors shall be required to apply, forthwith and at the latest three weeks after the company has become unable to pay its debts, for insolvency proceedings to be opened. The same shall apply, in essence, if the company proves to be over-indebted.

(2) The managing directors must reimburse the company with any payments which they made after the company became insolvent or after it was established that the company was over- indebted. …'

The dispute in the main proceedings and the questions referred

Mr Dithmar is the liquidator of the debtor company, in insolvency proceedings opened by the Amtsgericht Erfurt (Local Court, Erfurt). The debtor company, of which Ms Kornhaas was the director, was entered in the Companies Register in Cardiff (United Kingdom) as a private company limited by shares ('limited company'). A branch of the debtor company was established in Germany and, on that basis, was entered in the companies register administered by the Amtsgericht Jena (Local Court, Jena). The object of the debtor company, which was mainly active in that Member State, was the installation of ventilation systems and associated services.

Contending that the debtor company had been insolvent, at the least, since 1 November 2006 and that, between 11 December 2006 and 26 February 2007, Ms Kornhaas had made payments borne by that company totalling EUR 110 151.66, Mr Dithmar sought reimbursement of that sum from Ms Kornhaas on the basis of the first sentence of Paragraph 64(2) of the GmbHG. That action was upheld by the Landgericht Erfurt (Regional Court, Erfurt). Hearing the appeal brought by Ms Kornhaas, the Oberlandesgericht Jena (Higher Regional Court, Jena) confirmed the judgment delivered by the Landgericht Erfurt (Regional Court, Erfurt), whilst giving permission for an appeal on a point of law ('Revision') to the Bundesgerichtshof (Federal Court of Justice).

The referring court takes the view that the action brought by Mr Dithmar is well founded under German law, the purpose of the first sentence of Paragraph 64(2) of the GmbHG being, in essence, to prevent the assets of the insolvent estate being reduced before the opening of the insolvency proceedings and to ensure that those assets are available, so that the claims of all the company's creditors can be satisfied in the insolvency proceedings on equal terms. That provision, although formally integrated in legislation on company law, falls, therefore, within insolvency law and is enforceable against a managing director of a limited company.

The referring court is uncertain, however, whether such a provision is consistent with EU law. In that regard, pursuant to Article 4(1) of Regulation No 1346/2000, the law applicable to insolvency proceedings and their effects is German law, as the law of the Member State within the territory of which such proceedings are opened. There is no agreement in German commentaries on the question whether the first sentence of Paragraph 64(2) of the GmbHG may be enforceable against managing directors of companies established in accordance with the law of other EU Member States, but having the centre of their main interests in Germany.

According to the referring court, the first sentence of Article 64(2) of the GmbHG does not govern the conditions in which a company established in accordance with the law of another EU State may install its administrative office in Germany, but only the legal consequences of such a decision and of wrongful conduct of its managing directors. Freedom of establishment is therefore not affected.

In any event, the possible restriction of the freedom of establishment, entailed by the application of the first sentence of Article 64(2) of the GmbHG, is justified on the grounds that

(i) it is applied without discrimination, (ii) corresponds to an overriding reason in the public interest, namely to protect creditors, (iii) is suitable for preserving the assets of the insolvent estate or restoring them, and

(iv) does not go beyond what is necessary in order to attain that objective.

The referring court observes, however, that the case-law of the Court following from, inter alia, the judgments in *Überseering* (C-208/00, EU:C:2002:632) and *Inspire Art* (C-167/01, EU:C:2003:512) could also be interpreted as meaning that the internal affairs of companies established in one Member State but carrying on their main operations in another Member State are, in the context of freedom of establishment, governed by the company law of the Member State of formation. The application of the first sentence of Paragraph 64(2) GmbHG to managing directors of companies of another Member State could accordingly infringe freedom of establishment within the meaning of Article 49 TFEU and Article 54 TFEU.

In those circumstances, the Bundesgerichtshof decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) If a liquidator brings an action before a German court against a director of a private company limited by shares under the law of England and Wales, in respect of whose assets in Germany insolvency proceedings have been opened pursuant to Article 3(1) of Regulation No 1346/2000, the purpose of the action being to seek reimbursement of payments which the director made before the opening of the insolvency proceedings but after the company had become insolvent, is that action governed by German insolvency law within the meaning of Article 4(1) of Regulation No 1340/2000?

(2) Does an action as referred to above infringe freedom of establishment under Articles 49 and 54 TFEU?'

On those grounds, the Court (Sixth Chamber) hereby rules:

1. Article 4 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as meaning that Article 4 of Regulation No 1346/2000 must be interpreted as meaning that an action directed against the managing director of a company established under the law of England and Wales, forming the subject of insolvency proceedings opened in Germany, brought before a German court by the liquidator of that company and seeking, on the basis of a national provision such as the first sentence of Paragraph 64(2) of the Law on limited liability companies, reimbursement of payments made by that managing director before the opening of the insolvency proceedings but after the date on which the insolvency of that company was established, falls within its scope.

2. Article 49 TFEU and Article 54 TFEU do not preclude the application of a national provision, such as the first sentence of Paragraph 64(2) of the Law on limited liability companies to a managing director of a company established under the law of England and Wales which is the subject of insolvency proceedings opened in Germany.

5.4 Extension of insolvency proceedings opened in respect of a company established in one Member State to a company whose registered office is in another Member State because the property of the two companies has been intermixed

In Case C-191/10

REFERENCE for a preliminary ruling under Article 267 TFEU from the Cour de cassation (France), made by decision of 13 April 2010, received at the Court on 19 April 2010, in the proceedings

Rastelli Davide e C. Snc v

Jean-Charles Hidoux, in his capacity as liquidator appointed by the court for the company Médiasucre international,

Judgment

This reference for a preliminary ruling concerns the interpretation of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1, 'the Regulation').

The reference has been made in the course of proceedings between the company Rastelli Davide e C. Snc ('Rastelli') and Mr Hidoux, in his capacity as liquidator appointed by the court for the company Médiasucre international ('Médiasucre'), concerning the joinder of Rastelli to insolvency proceedings opened in respect of Médiasucre.

Legal context

European Union law

According to recital 6 in its preamble, the Regulation is confined to 'provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings.'

Article 3 of the Regulation, dealing with international jurisdiction, provides:

'1. The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

2. Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State '

Recital 13 in the preamble to the Regulation states that 'the "centre of main interests" should correspond to the place where the debtor conducts the administration of his interests on a regular basis and [which] is therefore ascertainable by third parties'.

Article 4 of the Regulation, relating to the law applicable, provides:

1. Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened …

National law

Judicial liquidation proceedings are governed by Articles L. 640-1 et seq of the French Code de commerce (Commercial Code). With regard to the court having jurisdiction to open such proceedings, Article L. 641-1 of that Code refers to Article L. 621-2 of the same Code which, in the version resulting from Law No 2005-845 of 26 July 2005 on the protection of undertakings provides:

'The competent court will be the Tribunal de commerce (Commercial Court) if the

debtor is a trader or he is registered with the craftsmen's register. The Tribunal de grande instance (High Court) shall be competent in other cases.

One or more other persons may be joined to opened proceedings where their property is intermixed with that of the debtor or where the legal entity is a sham. The court that has opened the initial proceedings shall remain competent for this purpose.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

By judgment of 7 May 2007, the Tribunal de commerce de Marseille (Commercial Court, Marseille) (France) put Médiasucre, which had its registered office in Marseille, into liquidation and appointed Mr Hidoux as liquidator.

Following that judgment, Mr Hidoux brought proceedings before that court against Rastelli, which had its registered office in Robbio (Italy). It requested that Rastelli be joined to the insolvency proceedings that had been opened against Médiasucre on the ground that the property of the two companies was intermixed.

By judgment of 19 May 2008, the Tribunal de commerce de Marseille declined jurisdiction with regard to Article 3 of the Regulation, on the grounds that Rastelli's registered office was in Italy and that it had no establishment in France.

Ruling on the procedural question raised by Mr Hidoux, the Cour d'appel d'Aix-en-Provence (Court of Appeal, Aix-en-Provence), by judgment of 12 February 2009, set aside that judgment and held that the Tribunal de commerce de Marseille had jurisdiction. In that regard, the Cour d'appel held that the liquidator's application was not intended to open insolvency proceedings against Rastelli but to join it to the judicial liquidation already opened against Médiasucre and that, under Article L. 621-2 of the Commercial Code, the court which has jurisdiction to rule on the application for joinder is the court before which the proceedings were initially brought.

Ruling on an appeal brought against that judgment, the Cour de cassation decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

1. Where a court in a Member State opens the main insolvency proceedings in respect of a debtor, on the view that the centre of the debtor's main interests is situated in the territory of that Member State, does [the Regulation] preclude the application, by that court, of a rule of national law conferring upon it jurisdiction to join to those proceedings a company whose registered office is in another Member State solely on the basis of a finding that the property of the debtor and the property of that company have been intermixed?

2. If the action for joinder falls to be categorised as the opening of new insolvency proceedings in respect of which the jurisdiction of the court of the Member State first seised is conditional on proof that the company to be joined has the centre of its main interests in that Member State, can such proof be inferred solely from the finding that the property of the two companies has been intermixed?'

On those grounds, the Court (First Chamber) hereby rules:

1. Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings is to be interpreted as meaning that a court of a Member State that has opened main insolvency proceedings against a company, on the view that the centre of the debtor's main interests is situated in the territory of that Member State, can, under a rule of its national law, join to those proceedings a second company whose registered office is in another Member State only if it is established that the centre of that second company's main interests is situated in the first Member State.

2. Regulation No 1346/2000 is to be interpreted as meaning that, where a company, whose registered office is situated within the territory of a Member State, is subject to an action that seeks to extend to it the effects of insolvency proceedings opened in another Member State against another company established within the territory of that other Member State, the mere finding that the property of those companies has been intermixed is not sufficient to establish that the centre of the main interests of the company concerned by the action is also situated in that other Member State. In order to reverse the presumption that this centre is the place of the registered office, it is necessary that an overall assessment of all the relevant factors allows it to be established, in a manner ascertainable by third parties, that the actual centre of management and supervision of the company concerned by the joinder action is situated in the Member State where the initial insolvency proceedings were opened.

5.5 International competence. Exception of incompetence.

Case C 641/16

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour de cassation (Court of Cassation, France), made by decision of 29 November 2016, received at the Court on 12 December 2016, in the proceedings

Tünkers France,

Tünkers Maschinenbau GmbH v

Expert France,

Judgment

This request for a preliminary ruling concerns the interpretation of Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1).

The request has been made in proceedings between Tünkers France ('TF') and Tünkers Maschinenbau GmbH ('TM') and Expert France concerning an action for unfair competition brought by Expert France against TM and TF.

Legal context

Regulation No 1346/2000

Recitals 4, 6 and 7 of Regulation No 1346/2000 state:

'(4) It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping).

…

(6) In accordance with the principle of proportionality this Regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings. In addition, this Regulation should contain provisions regarding the recognition of those judgments and the applicable law which also satisfy that principle.

(7) Insolvency proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings are excluded from the scope of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Conventions on Accession to this Convention.'

Article 3(1) of that regulation is worded as follows:

‘The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.’

Regulation (EC) No 44/2001

Recitals 7 and 19 of Council Regulation (EC) No 44/2001 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1) state:

‘(7) The scope of this Regulation must cover all the main civil and commercial matters apart from certain well-defined matters.

…

(19) Continuity between the Brussels Convention and this Regulation should be ensured, and transitional provisions should be laid down to that end. The same need for continuity applies as regards the interpretation of the Brussels Convention by the Court of Justice of the European Communities and the 1971 Protocol should remain applicable also to cases already pending when this Regulation enters into force.’

Article 1(1) and (2) of Regulation No 44/2001 provides as follows:

‘1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

2. This Regulation shall not apply to:

(a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;

(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

(c) social security;

(d) arbitration.’

The dispute in the main proceedings and the question referred for a preliminary ruling

Expert Maschinenbau GmbH, a company incorporated in Germany, carried on business manufacturing components for the automobile industry for which Expert France was granted exclusive distribution rights in France.

On 14 July 2006, the Amstgericht Darmstadt (District Court, Darmstadt, Germany) opened insolvency proceedings against Expert Maschinenbau and appointed an insolvency administrator.

On 13 September 2006, the insolvency administrator concluded a provisional transfer agreement with TM providing for the takeover by the latter of part of Expert Maschinenbau’s business. On 22 September 2006, the insolvency administrator transferred that part of the business to Wetzel Fahrzeugbau GmbH, a company incorporated in Germany and the subsidiary of TM.

By letters of 19 September 2006 and 24 and 27 October 2006, TM invited the clients of Expert France, to which it represented itself as being the asignee of Expert Maschinenbau, to contact it from then on to make their orders.

Taking the view that that act constituted unfair competition, on 25 February 2013, Expert France sued TM and TF before the Tribunal de commerce de Paris (Paris Commercial Court,

France) for acts of unfair competition.

TM and TF challenged the jurisdiction of that court on the basis of Article 3(1) of Regulation No 1346/2000, arguing that the dispute fell within the jurisdiction of the Amstsgericht Darmstadt (District Court, Darmstadt) as the court having opened the insolvency proceedings against Expert Maschinenbau.

The Tribunal de commerce de Paris (Commercial Court, Paris) rejected the plea of lack of jurisdiction by judgment of 8 November 2013, which was confirmed by a judgment of the Cour d'appel de Paris (Court of Appeal, Paris, France) of 19 July 2014. TM and TF brought an appeal in cassation before the referring court against that judgment. They argue that the court with jurisdiction to hear an action for damages for unfair competition, in so far as such an action derives directly from insolvency proceedings, is the court which opened those proceedings.

In that context, the referring court has doubts about the scope of the international jurisdiction of the court which opened the insolvency proceedings as laid down in Article 3(1) of Regulation No 1346/2000, and asks specifically whether an action for unfair competition brought by the subsidiary of an insolvent company may be regarded as being an action which derives directly from the insolvency proceedings and which is closely linked to them.

In those circumstances, the Cour de cassation (Court of Cassation, France) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Must Article 3 of [Regulation No 1346/2000] be interpreted as meaning that the court which opened insolvency proceedings has exclusive jurisdiction over an action seeking to establish liability by which the assignee of part of a business acquired in the course of those insolvency proceedings is accused of misrepresenting itself as the exclusive distributor of the goods manufactured by the debtor?'

Consideration of the question referred

The answer to the question referred for a preliminary ruling requires the determination of the scope of the jurisdiction of the court which opened the insolvency proceedings within the meaning of Article 3(1) of Regulation No 1346/2000, since Article 1(2)(b) of Regulation No 44/2001, which apples in civil and commercial matters, excludes from its scope 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings'.

In this respect, it should be noted that, relying inter alia on the preparatory documents relating to the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 36) ('the Brussels Convention'), which was replaced by Regulation No 44/2001, the Court has held that that regulation and Regulation No 1346/2000 must be interpreted in such a way as to avoid any overlap between the rules of law that those texts lay down and any legal vacuum. Accordingly, actions excluded, under Article 1(2)(b) of Regulation No 44/2001, from the application of that regulation in so far as they come under 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings' fall within the scope of Regulation No 1346/2000. Correspondingly, actions which fall outside the scope of Article 3(1) of Regulation No 1346/2000 fall within the scope of Regulation No 44/2001 (judgment of 4 September 2014, *Nickel & Goeldner Spedition*, C-157/13, EU:C:2014:2145, paragraph 21 and the case-law cited).

The Court also noted, as stated inter alia in recital 7 of Regulation No 44/2001, that the intention on the part of the EU legislature was to provide for a broad definition of the concept of 'civil and commercial matters' referred to in Article 1(1) of that regulation and, consequently, to provide that the article should be broad in its scope. By contrast, the scope of application

of Regulation No 1346/2000, in accordance with recital 6 thereof, should not be broadly interpreted (judgment of 4 September 2014, *Nickel & Goeldner Spedition*, C-157/13, EU:C:2014:2145, paragraph 22).

Applying those principles, the Court has found that only actions which derive directly from insolvency proceedings and are closely connected with them are excluded from the scope of Regulation No 44/2001. Consequently, only those actions fall within the scope of Regulation No 1346/2000 (see judgment of 4 September 2014, *Nickel & Goeldner Spedition*, C-157/13, EU:C:2014:2145, paragraph 23).

It is that criterion that is set out in recital 6 of Regulation No 1346/2000 in order to define the subject matter of the latter. According to that recital, the regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which 'are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings'.

In that context, it must be determined, in the light of the foregoing considerations, whether an action for damages for unfair competition, such as that in the main proceedings, satisfies that twofold test.

As regards the first criterion, it must be recalled that, in order to determine whether an action derives directly from insolvency proceedings, the decisive criterion adopted by the Court to identify the area within which an action falls is not the procedural context of which that action is part, but the legal basis thereof. According to that approach it must be determined whether the right or the obligation which forms the basis of the action has its source in the ordinary rules of civil and commercial law or in derogating rules specific to insolvency proceedings (judgment of 4 September 2014, *Nickel & Goeldner Spedition*, C-157/13, EU:C:2014:2145, paragraph 27).

In the present case, it is clear from the findings of the referring court that the action in the main proceedings aims to establish the liability of TM and TF, the first of those companies being the assignee of a part of a business acquired in the course of insolvency proceedings, for allegedly committing acts of unfair competition detrimental to Expert France. In that action, Expert France does not challenge the validity of the assignment carried out in the course of the insolvency proceedings opened by the Amtsgericht Darmstadt (District Court, Darmstadt), but the fact that TM, which contacted Expert Frances's clients and invited them to contact it directly in order to place their orders, attempted to take over its clientele, to the detriment of its interests.

It is true that, in the judgment of 2 July 2009, *SCT Industri* (C-111/08, EU:C:2009:419, paragraph 33), the Court held that an action challenging a transfer of shares in a company made in the course of insolvency proceedings fell within the scope of Regulation No 1346/2000.

However, unlike the case which gave rise to that judgment, in which the liquidator who transferred the shares was criticised for failing to use a power he derived specifically from the provisions of national law governing collective procedures, the dispute in the main proceedings concerns the conduct of the assignee alone.

Furthermore, Expert France acted exclusively with a view to protecting its own interests and not to protect those of the creditors in the insolvency proceedings. Finally, that action is brought against TM and TF whose conduct is subject to other rules than those applicable in the contest of insolvency proceedings. Therefore, the possible consequences of such an action cannot have any influence on the insolvency proceedings.

Therefore, it must be held that bringing an action for damages for unfair competition, such as that in the main proceedings, is a separate action and it is not based in the rules specific to insolvency proceedings.

As to the second criterion, mentioned in paragraph 20 of the present judgment, the Court has consistently held that it is the closeness of the link between a court action and the insolvency

proceedings that is decisive for the purposes of deciding whether the exclusion in Article 1(2)(b) of Regulation No 44/2001 is applicable (judgment of 2 July 2009, *SCT Industri*, C-111/08, EU:C:2009:419, paragraph 25).

It is true that, in the case in the main proceedings, the action for damages is directed against TM, the assignee of a part of the business in the context of insolvency proceedings. However, the acquired right, once it has become part of the assignee's assets, cannot retain a direct link with the debtor's insolvency in all cases.

In that context, even if the existence of a link between the action in the main proceedings and the insolvency proceedings against Expert Maschinenbau cannot be challenged, that link is neither sufficiently direct or sufficiently close so as to exclude Regulation No 44/2001 and therefore, so as to make Regulation No 1346/2000 applicable.

Having regard to the foregoing considerations, the answer to the question referred for a preliminary ruling is that Article 3(1) of Regulation No 1346/2000 must be interpreted as meaning that an action for damages for unfair competition by which the assignee of part of the business acquired in the course of insolvency proceedings is accused of misrepresenting itself as being the exclusive distributor of articles manufactured by the debtor does not fall within the jurisdiction of the court which opened the insolvency proceedings.

On those grounds, the Court (First Chamber) hereby rules:

Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as meaning that an action for damages for unfair competition by which the assignee of part of the business acquired in the course of insolvency proceedings is accused of misrepresenting itself as being the exclusive distributor of articles manufactured by the debtor does not fall within the jurisdiction of the court which opened the insolvency proceedings.

5.6 International competence. Action brought by the liquidator against the company's administrator for restitution of the payments made.

Case C 295/13

REQUEST for a preliminary ruling under Article 267 TFEU from the Landgericht Darmstadt (Germany), made by decision of 15 May 2013, received at the Court on 28 May 2013, in the proceedings

H, acting as liquidator in the insolvency of G.T. GmbH, V

H.K.,

Judgment

This request for a preliminary ruling concerns the interpretation of Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1) and Article 1(2)(b), Article 5(1)(a) and (b) and Article 3 of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed on 30 October 2007, which was approved on behalf of the Community by Council Decision 2009/430/EC of 27 November 2008 (OJ 2009 L 147, p. 1) ('the Lugano II Convention').

The request has been made in proceedings between, on the one hand, H, acting as liquidator in the insolvency of G.T. GmbH ('G.T.') and, on the other hand, H.K., regarding an action for reimbursement of payments which H.K. allegedly made as the managing director of G.T. after the company became insolvent or after it had been established that its liabilities exceeded its assets.

Legal context

International law

Article 1 of the Lugano II Convention, entitled 'Scope', provides as follows:

'1. This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal …

2. The Convention shall not apply to:

...

(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

…'

Article 5 of that convention, entitled 'Special jurisdiction', provides as follows:

'A person domiciled in a State bound by this Convention may, in another State bound by this Convention, be sued:

1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

– in the case of the sale of goods, the place in a State bound by this Convention where, under the contract, the goods were delivered or should have been delivered;

– in the case of the provision of services, the place in a State bound by this Convention where, under the contract, the services were provided or should have been provided;

…

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

…'

EU law

Article 3 of Regulation No 1346/2000, entitled 'International jurisdiction', provides in paragraph 1: '*The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.'*

According to Article 1(2)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1), that regulation does not apply to 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings'.

German law

The first and second sentences of Paragraph 64 of the Law on limited liability companies (Gesetz betreffend die Gesellschaften mit beschränkter Haftung), in the version applicable to the facts in the main proceedings ('the GmbHG'), provided as follows: '*The managing directors of a company are obliged to reimburse to the company payments made after the company is declared insolvent or after it has been established that its liabilities exceed its assets. That does not apply to payments, even those made after those events, that are compatible with the care to be expected of a prudent businessman.'*

The dispute in the main proceedings and the questions referred for a preliminary ruling

The applicant in the main proceedings is the liquidator in insolvency proceedings opened on 1 November 2009 and concerning the assets of G.T., a German company with its registered office at Offenbach am Main (Germany). The defendant in the main proceedings is the managing director of

G.T. He is domiciled in Switzerland.

On 1 July 2009, G.T. transferred EUR 115 000 to one of its subsidiaries and, on 8 July 2009, to the same subsidiary, EUR 100 000, EUR 50 000 of which it recovered. The applicant in the main proceedings is seeking from the defendant in those proceedings, in his capacity as managing director of G.T., reimbursement of the remaining EUR 165 000. He has based his claim on the first and second sentences of Paragraph 64 of the GmbHG and submits that the transfers made by the defendant in the main proceedings on 1 and 8 July 2009 to the subsidiary in question were made after G.T. became insolvent and after it had been established that the company's liabilities exceeded its assets.

The referring court raises the question whether the proceedings fall within the substantive scope of Article 3(1) of Regulation No 1346/2000. According to the judgments in *Seagon* (C-339/07, EU:C:2009:83) and *F-Tex* (C-213/10, EU:C:2012:215), an action to set a transaction aside falls within the scope of that provision, since that action relates to bankruptcy or winding-up proceedings within the meaning of that regulation, is derived directly from those proceedings and is closely connected with proceedings realising the assets of the debtor or in which the debtor's affairs are administered by the courts. However, that court has doubts as to the legal classification to be given to an action such as that brought in the main proceedings and based on Paragraph 64 of the GmbHG.

According to the referring court, if the action at issue falls within the substantive scope of Article 3(1) of Regulation No 1346/2000, it is necessary to answer the question whether that provision also applies if the insolvency proceedings have been opened in a Member State while the defendant's domicile or registered office is situated in a non-member State as, in the present case, the Swiss Confederation. The Swiss Confederation, while a contracting party to the Lugano II Convention, is not bound by that regulation.

Should the Court conclude that Article 3(1) of Regulation No 1346/2000 is not applicable in a case such as that in the main proceedings, the referring court raises the issue whether the dispute in the main proceedings falls within the substantive scope of Article 1(2)(b) of the Lugano II Convention. Pursuant to that provision, that convention does not apply to 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings'.

In those circumstances, the Landgericht Darmstadt decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Do the courts of the Member State in the territory of which insolvency proceedings regarding the debtor's assets have been opened have jurisdiction to hear and determine an action brought by the liquidator in the insolvency proceedings against the managing director of the debtor for reimbursement of payments which were made after the company became insolvent or after it had been established that the company's liabilities exceeded its assets?

2. Do the courts of the Member State in the territory of which insolvency proceedings regarding the debtor's assets have been opened have jurisdiction to hear and determine an action brought by the liquidator in the insolvency proceedings against the managing director of the debtor for reimbursement of payments which were made after the company became insolvent or after it had been established that the company's liabilities exceeded its assets, if the managing director is not domiciled in another Member State … but in a contracting party to the Lugano

II Convention?

3. Does the action referred to in question 1 above fall under Article 3(1) of Regulation No 1346/2000?

4. If the action referred to in question 1 above does not fall under Article 3(1) of Regulation No 1346/2000 and/or the jurisdiction of the court in that regard does not extend to a managing director who is domiciled in a contracting party to the Lugano II Convention: does the case concern bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions or analogous proceedings within the meaning of Article 1(2)(b) of the Lugano II Convention?

5. If question 4 is to be answered in the affirmative:

(a) Does the court of the Member State in which the debtor has its registered office have jurisdiction, in accordance with Article 5(1)(a) of the Lugano II Convention, in relation to an action of the kind referred to in question 1 above?

1. With regard to that action, is the defendant being sued in a matter relating to a contract within the meaning of Article 5(1)(a) of the Lugano II Convention?

2. With regard to that action, is the defendant being sued in a matter relating to a contract for services within the meaning of Article 5(1)(b) of the Lugano II Convention?

(b) In relation to the action referred to in question 1 above, is the defendant being sued in a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Lugano II Convention?'

On those grounds, the Court (Sixth Chamber) hereby rules:

(1) Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as meaning that the courts of the Member State in the territory of which insolvency proceedings regarding a company's assets have been opened have jurisdiction, on the basis of that provision, to hear and determine an action, such as that at issue in the main proceedings, brought by the liquidator in the insolvency proceedings against the managing director of that company for reimbursement of payments made after the company became insolvent or after it had been established that the company's liabilities exceeded its assets.

(2) Article 3(1) of Regulation No 1346/2000 must be interpreted as meaning that the courts of the Member State in the territory of which insolvency proceedings regarding a company's assets have been opened have jurisdiction to hear and determine an action, such as that at issue in the main proceedings, brought by the liquidator in the insolvency proceedings against the managing director of that company for reimbursement of payments made after the company became insolvent or after it had been established that the company's liabilities exceeded its assets, where the managing director is domiciled not in another Member State but, as is the situation in the main proceedings, in a contracting party to the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed on 30 October 2007, which was approved on behalf of the Community by Council Decision 2009/430/EC of 27 November 2008.

5.7 International competence. Revocative action.

Case C 328/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Germany), made by decision of 21 June 2012, received at the Court on 11 July 2012, in the proceedings

Ralph Schmid, acting as liquidator of the assets of Aletta Zimmermann, v

Lilly Hertel, Judgment

This request for a preliminary ruling concerns the interpretation of Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1; 'the Regulation').

The request has been made in the context of a dispute between Mr Schmid, acting as liquidator of the assets of Ms Zimmermann ('the debtor'), and Ms Hertel, who is resident in Switzerland, concerning an action to set a transaction aside.

Legal context

Recitals 2 to 4, 8, 12 and 14 in the preamble to the Regulation state:

'(2) The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively ...

(1) The activities of undertakings have more and more cross-border effects and are therefore increasingly being regulated by Community law. While the insolvency of such undertakings also affects the proper functioning of the internal market, there is a need for a Community act requiring coordination of the measures to be taken regarding an insolvent debtor's assets.

(2) It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping).

...

(8) In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects, it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in this area should be contained in a Community law measure which is binding and directly applicable in Member States.

...

(12) This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor's assets. ...

...

(14) This Regulation applies only to proceedings where the centre of the debtor's main interests is located in the Community.'

Article 1(1) of the Regulation states:

'*This Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.'*

Article 3 of the Regulation, headed 'International jurisdiction', provides in paragraph 1:

'The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings.

...'

Article 5(1) of the Regulation provides:

'*The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets – both specific assets and collections of indefinite assets as a whole which change from time to time – belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.'*

Article 6(1) of the Regulation states:

'The opening of insolvency proceedings shall not affect the right of creditors to demand the set- off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim.'

Article 14 of the Regulation is worded as follows:

'Where, by an act concluded after the opening of insolvency proceedings, the debtor disposes, for consideration, of:

– an immoveable asset, or

– a ship or an aircraft subject to registration in a public register, or

– securities whose existence presupposes registration in a register laid down by law,

the validity of that act shall be governed by the law of the State within the territory of which the immoveable asset is situated or under the authority of which the register is kept.'

Article 25(1) of the Regulation provides:

'Judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Article 16 and which concern the course and closure of insolvency proceedings, and compositions approved by that court shall also be recognised with no further formalities. Such judgments shall be enforced in accordance with Articles 31 to 51, with the exception of Article 34(2), of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Conventions of Accession to this Convention.

The first subparagraph shall also apply to judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court.

...'

Under Article 44(3)(a), the Regulation is not to apply 'in any Member State, to the extent that it is irreconcilable with the obligations arising in relation to bankruptcy from a convention concluded by that State with one or more third countries before the entry into force of [the] Regulation'.

Annex A to the Regulation contains a list of the insolvency proceedings referred to in Article 1(1).

The dispute in the main proceedings and the question referred for a preliminary ruling

Mr Schmid is the liquidator of the debtor's assets, appointed in the insolvency proceedings opened in her regard in Germany on 4 May 2007. The defendant, Ms Hertel, resides in Switzerland. Mr Schmid brought an action against Ms Hertel before the German courts to have a transaction set aside, seeking to recover EUR 8 015.08 plus interest as part of the debtor's estate. This action was dismissed as inadmissible at first instance and on appeal on the ground that the German courts lacked international jurisdiction. Mr Schmid pursued his action to have the transaction set aside by appealing on a point of law to the Bundesgerichtshof (Federal Court of Justice).

The Bundesgerichtshof observes that the dispute in the main proceedings falls within the scope *ratione materiae* of Article 3(1) of the Regulation. It refers in this regard to Case C- 339/07 *Seagon* [2009] ECR I-767 and recalls that, in that judgment, the Court ruled that the courts of the Member State within the territory of which insolvency proceedings have been opened have jurisdiction to decide an action to set a transaction aside that is brought against a person whose registered office is in another Member State.

The Bundesgerichtshof states that it has, however, not yet been decided whether Article 3(1) of the Regulation is also applicable where insolvency proceedings have been opened in a Member State, but the place of residence or registered office of the person against whom the

action to have a transaction set aside is brought is not in a Member State, but in a third country.

The Bundesgerichtshof considers that, according to the wording of Article 3(1) of the Regulation, it is sufficient for the purpose of application of that provision that the centre of the debtor's main interests be situated in a Member State. However, a cross-border element has to be present in order for the Regulation to apply and it is unclear whether that element must relate to another Member State or to a third country.

In those circumstances, the Bundesgerichtshof decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Do the courts of the Member State within the territory of which insolvency proceedings regarding the debtor's assets have been opened have jurisdiction to decide an action to set a transaction aside by virtue of insolvency that is brought against a person whose place of residence or registered office is not within the territory of a Member State?'

On those grounds, the Court (First Chamber) hereby rules:

Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as meaning that the courts of the Member State within the territory of which insolvency proceedings have been opened have jurisdiction to hear and determine an action to set a transaction aside by virtue of insolvency that is brought against a person whose place of residence is not within the territory of a Member State.

5.8 Recognition and enforcement of judgments by national authorities.

Case C-444/07

REFERENCE for a preliminary ruling under Article 234 EC from the Sąd Rejonowy Gdańsk-Północ w Gdańsku (Poland), made by decision of 27 June 2007, received at the Court on 27 September 2007, in the insolvency proceedings opened against

MG Probud Gdynia sp. z o.o.,

Judgment

This reference for a preliminary ruling concerns the interpretation of certain provisions of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p.1), as amended by Council Regulation (EC) No 603/2005 of 12 April 2005 (OJ 2005 L 100, p. 1) ('the Regulation').

The reference was made in proceedings initiated by the Polish liquidator entrusted with the winding up of MG Probud Gdynia sp. z o.o. ('MG Probud') that were intended to recover, for inclusion in the pool of assets of the insolvent company, company assets in respect of which an attachment orderhad been made in Germany.

Legal context

Community legislation

Article 3 of the Regulation, headed 'International jurisdiction', is worded as follows:

'1. The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

3. Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory

of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.

…'

Article 4 of the Regulation, headed 'Law applicable', states:

'1. Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the 'State of the opening of proceedings'.

2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular:

(a) against which debtors insolvency proceedings may be brought on account of their capacity;

(b) the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings;

(c) the respective powers of the debtor and the liquidator;

…

(f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending;

…'

As provided in Article 5(1) of the Regulation, 'the opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets … belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings'.

Article 10 of the Regulation provides:

'The effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment.'

In Chapter II of the Regulation, which is headed 'Recognition of insolvency proceedings', Article 16(1) states:

'Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings.

…'

Article 17 of the Regulation, headed 'Effects of recognition', provides:

'The judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under [the] law of the State of the opening of proceedings, unless this Regulation provides otherwise and as long as no proceedings referred to in Article 3(2) are opened in that other Member State.

…'

Article 18 of the Regulation, headed 'Powers of the liquidator', states:

'1. The liquidator appointed by a court which has jurisdiction pursuant to Article 3(1) may exercise all the powers conferred on him by the law of the State of the opening of proceedings in another Member State, as long as no other insolvency proceedings have been opened there nor any preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State. He may in particular remove the debtor's assets from the territory of the Member State in which they are situated, subject to Articles 5 and 7.

…'

Article 25 of the Regulation is worded as follows:

1. Judgments handed down by a court whose judgment concerning the opening of

proceedings is recognised in accordance with Article 16 and which concern the course and closure of insolvency proceedings, and compositions approved by that court shall also be recognised with no further formalities. Such judgments shall be enforced in accordance with Articles 31 to 51, with the exception of Article 34(2), of the … Convention [of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36)], as amended by the Conventions of Accession to this Convention ["the Brussels Convention"].

The first subparagraph shall also apply to judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court.

The first subparagraph shall also apply to judgments relating to preservation measures taken after the request for the opening of insolvency proceedings.

2. The recognition and enforcement of judgments other than those referred to in paragraph 1 shall be governed by the Convention referred to in paragraph 1, provided that that Convention is applicable.

3. The Member States shall not be obliged to recognise or enforce a judgment referred to in paragraph 1 which might result in a limitation of personal freedom or postal secrecy.'

As provided in Article 26 of the Regulation, 'any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.'

National legislation

In Poland, insolvency proceedings are governed by the Law on insolvency and restructuring (Prawo upadłościowe i naprawcze) of 28 February 2003 (Dz. U. (Journal of Laws) 2003, No 60, heading 535), as amended.

By virtue of Article 146(1) and (2) of that Law, enforcement proceedings, whether judicial or administrative, opened against the debtor before the declaration of insolvency are to be stayed by operation of law on the date of the declaration of insolvency and sums obtained in stayed enforcement proceedings which have not been paid out are to be transferred to the pool of assets in the insolvency.

Under Article 146(3) of the Law, the same provisions apply where security has been provided in respect of the assets of the debtor within the framework of proceedings to secure claims.

Under Article 146(4), once insolvency proceedings have been opened it is no longer possible to bring against the debtor enforcement proceedings relating to the pool of assets in the insolvency.

The facts in the main action and the questions referred for a preliminary ruling

It is apparent from the order for reference that, by judgment of 9 June 2005, the Sąd Rejonowy Gdańsk-Północ w Gdańsku (North Gdansk District Court, Gdansk) ordered that insolvency proceedings be opened in respect of MG Probud, an undertaking in the building sector whose registered office was in Poland but which engaged in construction work in Germany through the activities of a branch.

Upon application by the Hauptzollamt Saarbrücken (Principal Customs Office, Saarbrücken) (Germany), the Amtsgericht Saarbrücken (Local Court, Saarbrücken), by decision of 11 June 2005, ordered attachment of that undertaking's assets held by banks in the amount of EUR 50 683.08, and of various claims of the undertaking against German parties

with whom it had entered into contracts. Those measures were prompted by procedures initiated by the Hauptzollamt Saarbrücken against the manager of MG Probud's German branch, who was suspected of having infringed the legislation on the posting of workers by reason of failure to pay a number of Polish workers and to make social security contributions in their regard.

The appeal lodged against that decision was dismissed by order of the Landgericht Saarbrücken (Regional Court, Saarbrücken) of 4 August 2005. In the grounds of its order, it stated in particular that, as insolvency proceedings had been opened in Poland, there was reason to fear that those responsible within MG Probud would shortly collect the sums payable and transfer the corresponding amounts to Poland in order to prevent the German authorities from having access to them. The Landgericht Saarbrücken held that the opening of the insolvency proceedings relating to MG Probud's assets did not prevent attachment in Germany. It stated that national insolvency proceedings opened in other Member States must be recognised in Germany when they meet the conditions laid down in Article 1(1) of the Regulation and are referred to in the list in Annex A thereto, but it could not be determined from the copy of the judgment enclosed with the appeal whether insolvency proceedings opened in Poland that had to be recognised in Germany pursuant to Annex A to the Regulation were in fact involved.

In the insolvency proceedings, the Sąd Rejonowy Gdańsk-Północ w Gdańsku questions whether the attachment effected by the German authorities is lawful since Polish law, which is the law applicable to the insolvency proceedings because the Republic of Poland is the State of the opening of those proceedings, would not allow such attachment after the undertaking has been declared insolvent.

In those circumstances, the Sąd Rejonowy Gdańsk-Północ w Gdańsku decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Having regard to Articles 3, 4, 16, 17 and 25 of [the] Regulation …, that is to say, in the light of the rules concerning the jurisdiction of the courts of the State in which insolvency proceedings are opened, the law applicable to those proceedings and the conditions for, and the effects of, recognition of those proceedings, are the administrative authorities of a Member State entitled to attach funds held in the bank account of an economic operator following a declaration of his insolvency made in another Member State (application of the so-called seizure of assets), thereby contravening the national legal rules of the State of the opening of proceedings (Article 4 of the Regulation), where the conditions for the application of the provisions of Articles 5 and 10 of the Regulation are not met?

(2) In the light of Article 25(1) et seq. of [the] Regulation …, may the administrative authorities of a Member State in which secondary insolvency proceedings have not been opened and which must recognise the insolvency proceedings pursuant to Article 16 of the Regulation refuse, on the basis of domestic legal rules, to recognise judgments made by the State of the opening of insolvency proceedings concerning the course and closure of insolvency proceedings pursuant to Articles 31 to 51 of the Brussels Convention …?'

On those grounds, the Court (First Chamber) hereby rules:

Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, in particular Articles 3, 4, 16, 17 and 25, must be interpreted as meaning that, in a case such as that in the main action, after the main insolvency proceedings have been opened in a Member State the competent authorities of another Member State, in which no secondary insolvency proceedings have been opened, are required, subject to the grounds for refusal derived from Articles 25(3) and 26 of that regulation, to recognise and enforce all judgments relating to the main insolvency proceedings and, therefore, are not entitled to order, pursuant to the legislation of that other Member State, enforcement measures

relating to the assets of the debtor declared insolvent that are situated in its territory when the legislation of the State of the opening of proceedings does not so permit and the conditions to which application of Articles 5 and 10 of the regulation is subject are not met.

CHAPTER III. CONCLUSIONS

1. Scope

Regulation (EU) 2015/848 mainly seeks to resolve conflicts of jurisdiction and law applicable to cross-border insolvency proceedings and to ensure the recognition and enforcement of insolvency judgments across the European Union. As a result, normative provisions solve aspects of private international law. The instrument under consideration does not harmonize the material rights of insolvency in the Member States. The provisions of substantive law are exceptional in character and are strictly interpreted and applied. The clear rules are largely due to the use of the CJEU case law.

The new European Insolvency Regulation enters into force on 26 June 2015 and applies from 26 June 2017 with three exceptions, namely:

1. Obligation on Member States to provide the European Judicial Network in Civil and Commercial Matters with a brief description of national insolvency law and procedures (applicable from 26 June 2016)

2. Establishment of insolvency registers by Member States (applicable from 26 June 2018)

3. Interconnection of national insolvency registers at European level (applicable from 26 June 2019)

The Regulation is directly applicable, which means that individuals can directly invoke a European rule before a national or European court without the need for it to have been transposed into national law.

The Regulation applies to collective redundancies, including interim proceedings, based on insolvency law, and for the purposes of rescue, debt relief, reorganization or liquidation:

(a) the assets of a debtor are wholly or partly unavailable and an insolvent practitioner is appointed;

(b) the assets and activity of a debtor are subject to control or supervision by a court; or

(c) temporary suspension of an individual enforcement procedure is granted by a court or by the law, in order to allow negotiations between the debtor and its creditors, provided that the procedure in which the suspension is ordered: to provide for adequate safeguards and if no agreement is reached, precede one of the procedures referred to in (a) or (b).

Where the procedures referred to in this paragraph can be initiated in the event of insolvency being merely presumed, the purpose of the proceedings shall be to avoid the insolvency of the debtor or the cessation of his commercial activity.

1.1 The distinction between collective proceedings and rescue procedures of the debtor

Under the Regulation, "insolvency proceedings" means the procedures listed in Annex A. For Romania, these are: insolvency proceedings, judicial reorganization, bankruptcy proceedings, preventative concordat,

"Collective proceedings" means procedures involving all or a significant part of the

creditor of the debtor, provided that in the latter case the proceedings do not affect the claims of creditors who are not involved in those proceedings; (Article 2, point 1)

Recital no. 14 distinguishes between collective proceedings that should include all creditors and rescue procedures of the debtor, not including all creditors.

It is shown that the procedures leading to the definitive cessation of the debtor's activity or the liquidation of his assets should include all the debtor's creditors.

1.2 The regulation is also applicable when the debtor faces "non-financial difficulties"

Under point 17, the scope of the Regulation should be extended to include procedures triggered by situations in which the debtor faces difficulties other than financial difficulties, provided that such difficulties give rise to a real threat and grave to the current or future ability of the debtor to pay its debts at maturity. The relevant timeframe for such a threat may be extended to several months or even more to take account of cases where the borrower encounters non-financial difficulties which threaten the situation of his business and, in the medium term, its liquidity. An example of this could be the case that the borrower has lost a contract of crucial importance to him.

2. Main procedure: a new wider definition of "core interest center" to avoid judicial tourism

Jurisdiction to open insolvency proceedings ('the main insolvency proceedings') lies with the courts of the Member State in whose territory the debtor's main interests are located. The center of interest is the place where the debtor usually manages his interests and is verifiable by third parties (Article 3, paragraph 1)

It is stated in the recitals that when determining whether the center of interest of the debtor is verifiable by third parties, particular attention should be paid to the creditors and their perception of the place where the debtor manages his interests. For this, it may be necessary, in the case of the relocation of the center of main interests, to inform creditors at the appropriate time of the new venue where the debtor carries out his activities, for example by drawing attention to changing the address of commercial correspondence or by publicly announcing new place by other appropriate means.

3. Presumptions about the core of the main interests

The Regulation states that for the proper functioning of the internal market, it is necessary to avoid the parties being tempted to transfer assets or judicial proceedings from one Member State toanother in an attempt to obtain a more favorable legal situation to the detriment of the creditor (judicial tourism).

Therefore, there are 3 presumptions about the center of the main interests determining the competence of the court in the case of the legal person, the self-employed person or a professional activity as well as any other natural person. In order to avoid judicial tourism, the presumption that the person concerned has not moved his registered office, the principal place of business or the habitual residence during the three months preceding the request for opening the insolvency proceedings,

In the case of a company or legal person, the center of main interests is presumed to be the place where the registered office is located, unless proved otherwise. This presumption

applies only if the registered office has not moved to another Member State in the three months preceding the request for the opening of insolvency proceedings.

In the case of a self-employed person or a professional activity, the center of main interests is supposed to be the principal place of business in the absence of evidence to the contrary. This presumption applies only if the principal place of business has not moved to another Member State during the three months preceding the request for the opening of insolvency proceedings.

In the case of any other natural person, the center of main interests is supposed to be the place where the natural person has his habitual residence, in the absence of evidence to the contrary. This presumption applies only if the habitual residence has not moved to another Member State during the six months preceding the request to open the insolvency proceedings.

The assumptions that the registered office, principal place of business and habitual residence are at the center of the main interests should be relative and the relevant court of a Member State should carefully check that the center of the debtor's main interests is indeed in the State member. In the case of a company, it should be possible to overturn this presumption if the central administration of the company is located in a Member State other than that where the registered office is situated and if a comprehensive assessment of all relevant factors establishes in a verifiable manner by third parties that the real center of management and supervision of the company and the center for the management of its interests are in that other Member State. In the case of a natural person who does not engage in independent commercial or professional activity, it should be possible to overturn this presumption, for example where the bulk of the debtor's assets are outside the Member State where the debtor has his habitual residence or where it can be established that the main reason for the move was the opening of insolvency proceedings before the new court and if such opening would significantly affect the interests of the creditors whose business with the debtor they have occurred before the move. (paragraph 30)

With the same objective of preventing fraudulent or abusive use of forum shopping, the presumption that the center of main interests is the place where the registered office is located, the principal place of business or the habitual residence should not applies if, in the case of a company, legal persons or natural persons carrying out an independent economic or professional activity, the debtor has moved its registered office or principal place of business to another Member State within a period three months before the application for the opening of insolvency proceedings or, in the case of a self- employed person, whether the debtor has moved his habitual residence to another Member State within six months of the request opening the insolvency proceedings. (point 31)

Secondary insolvency proceedings: specific situations in which the court may postpone or refuse to initiate such proceedings

In order to protect the different interests, the Regulation allows the opening of secondary insolvency proceedings parallel to the main insolvency proceedings. Secondary insolvency proceedings may be opened in the Member State where the debtor has a registered office. The effects of secondary insolvency proceedings are limited to assets located in that State. Entity within the Union is ensured by imperative rules of coordination with main insolvency procedures

In accordance with the Regulation, "place of business" means any place of business in which a debtor exercises or exercises, for the past three months prior to the opening of the main insolvency proceedings, an economic activity involving assets and assets.

Secondary insolvency procedures may pursue different goals, in addition to protecting

local interests. Cases may arise where the mass of the goods subject to the debtor's insolvency is too complex to be administered in bulk or the differences between the respective legal systems are so great that difficulties may arise as a result of the extension of the effects deriving from the law of the State of the opening of proceedings the other Member States in which the assets are located. For this reason, the insolvency practitioner in the main insolvency proceedings may request the opening of secondary insolvency proceedings for an efficient administration of the mass of assets subject to insolvency.

Secondary insolvency proceedings may also prevent effective administration of the mass of goods subject to insolvency. This Regulation therefore establishes two specific situations in which thecourt seised of an application for the opening of a secondary insolvency proceeding should be able, at the request of the insolvent insolvency practitioner in the main insolvency proceedings, to postpone or refuse to open such a procedures. These are:

- the possibility of the insolvency practitioner assuming an engagement with local creditors, inwhich case the court does not open the secondary procedure
- the possibility of temporary suspension of an individual enforcement procedure, in which case the court may suspend the opening of the secondary procedure

Firstly, the Regulation confers the insolvency practitioner in the main insolvency proceedings the possibility of making a commitment to local creditors, according to which they will be treated as if a secondary insolvency procedure had been opened. In order to avoid the opening of a secondary insolvency proceedings, the insolvency practitioner in the main proceedings may take a unilateral commitment in respect of the assets in the Member State in which a secondary insolvency procedure may be opened, according to which, at the time of the distribution of the assets concerned or of the revenue accruing from their recovery, will respect the distribution and priority rights under domestic law that would have been available to local creditors if a secondary insolvency procedure had been opened in that Member State. The commitment specifies the factual premises on which it is based, in particular as regards the value of assets in the Member State concerned and the variants available for the capitalization of those assets.

Secondly, it is foreseen that the court may temporarily suspend the opening of the secondary insolvency proceedings when a temporary suspension of the individual enforcement proceedings in the main insolvency proceedings has been granted in order to maintain the effectiveness of the suspension granted in the main proceedings of insolvency. The court may grant temporary suspension if it considers that there are adequate measures to protect the general interest of local creditors. In such a case, all creditors who may be affected by the outcome of the restructuring plan negotiations should be informed of these negotiations and should be allowed to participate in them.

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COMPARATIVE INTERNATIONAL-ROMANIAN LAW TOPICS

A BRIEF HISTORY OF INFORMAL RESTRUCTURING IN ROMANIA

Judge Nicolae PREPELITA

1. Introduction.

On 22 November 2016, in Strasbourg, the European Commission proposed a new approach to business insolvency in Europe, namely promoting early restructuring to support growth and job protection[53].

On this occasion, First Vice-President Frans Timmermans said: *"We want to help businesses restructure themselves in advance, so jobs can be saved, and value can be preserved. We also want to support entrepreneurs who fail to recover faster, overcome the difficult time and try again in a wiser way. "*

On the same occasion, Věra Jourová, the Commissioner for Justice, Consumers and Gender Equality, said: "*Every year, 200,000 firms in the EU are bankrupt, resulting in the loss of 1.7 million jobs. This could often be avoided if we had more efficient procedures for insolvency and restructuring. It is time to give entrepreneurs a* second chance to resume a business by fully discharging debt within three years at most. "

The proposal for a directive focuses on three key elements[54]:

- Common principles on the use of early restructuring frameworks that will help businesses to continue their activity and maintain jobs;
- rules to allow entrepreneurs to benefit from a second chance as they will be fully unpaid after a maximum of 3 years. Currently, half of Europeans say they would not start a business for fear of failure;
- specific measures for Member States to increase the efficiency of insolvency, restructuring and debt relief procedures. This will reduce the length and cost of procedures in many Member States, resulting in legal uncertainty for creditors and investors, and low rates of unpaid debt recovery.

The new rules will establish the following basic principles to ensure the coherence and efficiency across the EU of insolvency and restructuring[55]:

a) Companies experiencing financial difficulties, especially SMEs, will have access to early warning instruments to detect a deterioration in the economic situation and ensure early stage restructuring;

b) Flexible and preventive restructuring frameworks will simplify long, complex and costly judicial procedures. Where necessary, national courts should be involved in protecting interested parties' interests;

c) the debtor will have a limited period of up to four months in which he is protected against forced execution requests, which would facilitate negotiations and allow for successful restructuring;

d) minority creditors and shareholders with dissenting opinions will not be able to block restructuring plans, but their legitimate interests will be protected;

e) specific funding will be specifically protected, which will increase the chances of successful restructuring;

f) through preventive restructuring procedures, workers will benefit from full protection under labor law, in line with existing EU legislation;

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[53] *http://europa.eu/rapid/press-release_IP-16-3802_ro.htm;*
[54] Ibidem.
[55] Ibidem.

g) training, specialization of practitioners and courts and the use of technology (eg the possibility to submit applications and to notify creditors electronically) will improve efficiency and shorten the length of insolvency, restructuring and offering a second chance.

All of this takes place in a context where the Insolvency Proceedings Regulation of 2015 focuses on resolving conflicts of jurisdiction and law in cross-border insolvency procedures and ensuring EU insolvency judgments, without harmonizing the issues of the Member States 'legislation on insolvency, legislation which (according to the „The Five-Presidents' Report: *Completing Europe's Economic and Monetary Union*" of June 2015) is one of the most important bottlenecks preventing the integration of capital markets into the euro area and beyond[56].

In this context, we appreciate that Romania has an old tradition in the regulation of pre-insolvency procedures (hybrids), which today attempt to meet the requirements that require harmonization of the laws and practices of EU members in the field of insolvency.

2. Out-of-court restructuring and hybrid/pre-insolvency procedures in Romania.

2.1 European historical milestones.

In Roman law, the execution of debts on the person of the debtor - prescribed by the law of the twelve tables - was little by little replaced by the execution of his wealth[57]. The creditor requests the magistrate that "missio in the bona" a sort of seizure of the debtor's assets, and after a certain period of time, 30 or 15 days, as the debtor was alive or deceased while publishing to force the debtor to pay or to defend himself in court, if no agreement was reached between the debtor and the creditors, the magistrale ordered the creditors to appoint a curator "magister bonorum". The latter, after drawing up the list of creditors and making the necessary publications, proceeded to a „venditio bonorum! sale; the one who paid the highest price became the owner of the goods (emptor bonorum). In order to avoid abuses and speculation, it was later accepted to replace bulk sales by selling in detail (distractio bonorum).

This form of "venditio bonorum" execution, in addition to the amnesties[58] and expenses generated by such an action, was also infamous. It could not be applied to certain persons with a higher social rank (personae clara).

Execution was even harder when the debtor was gone, but especially when he died. The heirs had to be introduced and if they were using "abstinence benefit", the execution became very difficult.

That is why Roman law allowed the successor of an inheritance to conclude with the creditors a debt reduction convention, the so-called „pactum ut minus solvatur" convention. The convention that gave creditors a debtor, and the heir the opportunity to save the memory of the deceased, avoiding the infamy of the „veneditio bonorum" procedure. It had to be concluded with the majority of the creditors[59]. This convention was also mandatory for the minority of creditors[60]. In the event of equality, the opinion of the most important creditor of both groups was taken into consideration, and if that criterion were missing, the pretor was following the „humanior sentita" to decide on the reduction of claims (Papinian).

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[56] Ibidem

[57] Joseph Kandel – *Concordatul preventiv – Textul proiectului de lege, introducere şi comentarii*, Institutul de arte grafice „Tiparul românesc", p. 5.

[58] Ibidem – p. 6.

[59] Ibidem – p. 6.

[60] The author, J. Kandel, claims that this is the origin of the modern concordat.

Under Justinian, however, introducing the institution of inventory benefit, the "*ut minus solvatur*" pact was not applied.

But the principle underlying the concordate - the reduction of the claim by the will of the majority imposed on the minority of creditors - was reintroduced in the Middle Ages after the execution of the debtor's person was replaced in the 13th century by collective execution of the debtor's assets. Thus, at the end of the fourteenth century, the concordat is governed by the statutes of the various Italian cities (Venice in 1244, Cremona in 1188, Milan in 1396, Florence in 1411)[61].

In general, the majority of the creditors in the amount and in number (Bologna 1309) needed the creditors to give the debtor either debt repayments or wages, or both together, regulating subsequent relations as they thought fit (Venice 1393, Florence 1415) .

The Concordat, approved by the judiciary, was obligatory for all creditors, absent, opposing, known or unknown (Florence 1415).

From what has been shown so far, it appears that the arrangement was nothing more than a convention concluded after the borrower became insolvent, bankrupt, making the convention a post-bankruptcy convention, and not as it is today.

Historical research clearly shows that the concordat arrangement still existed in the Romans (friendly understanding before the *venditio bonorum*) and in the "*pactum ut minus solvatur*" and that it was thoroughly regulated in the statues of the Middle Ages. the Italian cities met not only the post-bankruptcy arrangement but also the preventative concordat[62].

This is not only mentioned but widely organized in the statutes of traders in Lucca (XV century) under the title "About Those Who Want to Avoid Bankruptcy".

Under these statutes, the debtor could before bankruptcy present himself to the judge and ask him to summon the creditors to propose an arrangement, having to file the registers and the balance sheet. If the application was admitted, a one-month term was given for the summoning of the creditors, who, with a majority of 3/4, representing 1/2 of the receivables, agreed on the acceptance or rejection of the concordat.

In Italy, the concordat passed to Germany (Luebeck, 13th century), to Switzerland (Zurich, 14th century) and to Spain, and only later in France (17th century) the Order of 1673 provided that he could imposed by the will of 3/4 of the creditors.

In 1808 France was the first to codify the trade laws, but this codification was felt by the revolutionary period in which traders were badly seen[63], which made the provisions of the trade code relating to bankruptcy very harsh for them.

The crises and wars that affected Europe and the United States in the nineteenth century have produced, apart from the movement of opinions, a legislative movement in different countries, where for the bona fide, fallen victims of these phenomena have sought to find fair legal remedies. Thus, in Belgium, the need to improve the bankruptcy regime and the appearance after long debates of a law on the concordate, which served as a model for other legislation, was felt. The principles of the Belgian law, aimed at saving unhappy merchants and in good faith, have been adopted in other countries under the pressure of economic crises[64].

Thus, France adopted them in 1898, but modified the conditions for their application, introducing, in addition to bankruptcy, a special regime for honest traders who declare their insolvency in the short term, a regime that leaves them at the head of their business, of impunity "and allows them to save their commercial honor by reaching an agreement with creditors.

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[61] J. Kandel, op. cit. p. 6.
[62] Ibidem, p. 7.
[63] Ibidem, p. 8.
[64] Ibidem, p. 9.

Italy had in the code of 1883 the institution of the moratorium, which was also taken over by the Romanian commercial code. Practice, however, has shown that the moratorium does not give the expected results, because most of the times the debtors need not only a prolongation of receivables, but also a remittance, and in order to obtain this, the condition imposed by the law, that of obtaining the vote of the unanimity of the creditors was practically unrealistic.

In Italy, the moratorium was suppressed, and the law of May 24, 1903, on the preventive concordat whose application had good results in the first part of the 20th century was voted in place. In Romania art. 834-844 of the Commercial Code concerning the moratorium were repealed by art. 59 of the 1929 Prevention Concordat Law.

The Concordat was defined at the beginning of the last century[65] as a convention that the creditors conclude with the debtor in order to defend their interest and to avoid a greater loss that would be sustained if the liquidation was done in a competitive way.

It was then classified according to the time it ends in the previous or the post-bankruptcy, depending on the effects it produces, can be remission, reducing part of the receivables, or only a dilation, postponing a term the full payment of debts, the number of creditors adhering to it can be unanimous (amicable post-bankruptcy Article 845 Commercial Code) or majority (Article 848 Commercial Code).

2.2 A history of conventions for rescuing the debtor's business in Romania.

„We have yet decided to add necessity and some laws to some of the things that were not in use to the old because they were not known to them, and some others that in our times have become somewhat different, such as: the disposition of conventions between authors and typographers; the disposition of tickets generally called asignants and the provision of the creditors concurrence, added at the end, as one that does not concern the civil code, a matter that is very poor in the Basilica and in our other books of law; and so on." - wrote[66] in 1817, Scarlat Calimach, in the promulgation letter of the Moldavian[67] Civil Code. According to §1974[68], "The order of the creditors' concurrence is the rule of law, which is followed by bankruptcy".

Therefore, it can be argued that the concurrence of the creditors of the Calimach Code is the first bankruptcy regulation in the Romanian countries, the previous regulations being "very poorly understood" this institution, being superior to the Caragea Code in the Muntenia (Wallachia) County.

Because the Calimach Code does not contain any provision regarding the conventions that may be undersign between the creditors and debtor which is the object of our research our reference to this code will stop here.

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[65] Ibidem, p. 13.

[66] The text was taken from the work *Codul Calimach – ediţie critică*, coordonată de Academician Andrei Rădulescu, apărută la Editura Academiei RPR, 1958, in the collection *Adunarea izvoarelor vechiului drept românesc scris*, vol. III, p. 51. The book is a bilingual, Greek and Romanian version, the Calimach Code with indexes and explanations of the Romanian archaic language.

[67] Romania has four major regions: Moldova, Muntenia (Wallachia), Transylvania and Dobrogea. In 1859 Moldavia and Wallachia united and formed the Romanian Principalities, after the independence war of 1877, the Romanian Principalities united with Dobrogea, and in 1918, after the First World War, the Romanian Principalities united with Transylvania forming the Kingdom of Romania .

[68] The regulation (the *Calimach Code*) has four parts, each divided into chapters, and two annexes. The first appendix refers to the Creditors' Concurrence and the second to the auction. The numbering of the texts is based on the paragraphs, the Creditors' Concurrence, which are of interest to us, having assigned Paragraphs §1974-§2032.

2.2.1 Commercial Code from 1840.

As has been shown[69], the Commercial Code introduced in Muntenia in 1840 during the reign of Alexandru Dimitrie Ghica[70], enforce also in Moldova since 1864 (Commercial Code of the Principatele-Unite-Romane), is an adaptation of the French law of 28 May 1838. The Commercial Code was in force until 1887, when the Commercial Code was introduced in the old kingdom, which proved to be perennial in time, its provisions remaining - with some exceptions - in force until the adoption of Law no. 64/1995 on the procedure of judicial reorganization and liquidation.

Subsequently, on November 2, 1850, the Commercial Code was supplemented with the Supplementary Law on the cessation of bankruptcy operations in the event of the failure of the assets, and in 1864 with annexes on the establishment of the commercial courts and the commercial procedure.

Commercial code is divided into three books. The first book, divided in eight titles, regulates the trade, the merchants accounting, the associations, the wealth of the merchant's wife, the stock exchanges, the commissioners, the purchases and the sales, the securities. The second book, with three titles, is dedicated to bankruptcy, bankruptcy felony, and rehabilitation of bankruptcies, and the third book regulate maritime trade through fourteen titles.

Although today the concordat is known exclusively as a procedure for the prevention of insolvency, the concordat regulated by the Commercial Code, in Article 248 - Article 270, is an agreement concluded between creditors and the common debtor to cover its liability after the opening of bankruptcy proceedings. Therefore, in order to present the concordat procedure in the Commercial Code we must briefly present the bankruptcy procedure governed by this normative act.

2.2.1.1 Bankruptcy in Commercial code[71] from 1840.

The bankruptcy procedure started at the request of the debtor or one or more creditors, addressed to the court where the debtor was domiciled[72]. From Article 188 it is clear that the proceedings could also be opened by the court of its own motion[73].

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[69] As Radu Bufan says in the *Tratat practic de insolvenţă*, Editura Hamangiu, 2014 (hereinafter referred to as the *Tratat*), p. 29.

[70] Although Mihail Pascanu in the *Adevărul* newspaper, March 1927, as well as in the *Concordatul preventiv - Textul proiectului de lege, introducere şi comentarii*, Institutul de arte grafice „Tiparul românesc", p. 59, said that Commercial Code appeared during reign Ştirbey, our research shows that he was the governer of Wallachia in the period of June 1849 - October 29, 1853 and October 5, 1854 - June 25, 1856. Consequently, Commercial Code appeared during the reign of Alexandru Dimitrie Ghica, who was the first governor of Wallachia, between April 1834 and October 7, 1842.

[71] In romanian archaic language *Condica de comerciu*.

[72] *Commercial Code* generally refers to debtors merchants, traders, as individuals, and not as legal entities. When referring to societies, and here we are referring to "companies in a comprehensive name", it makes it explicit, as is the case in art. 186, third sentence: "In case of bankruptcy by a company in a comprehensive name, the statement shall include the name and the sign of the domicile of each of the jointly responsible companions, and shall be made at the court of the place where the establishment of the company" . Consequently, the references we make to debtors will be made as individuals. The fact that things must be looked at also results from art. 185 which states that bankruptcy could be opened after the death of merchant, one year after its death, or art. 201 where the bankruptcy is reported to be arrested, at the police station or at his home.

[73] "*Art. 188 - Bankruptcy is brought to light by the judgment of the court, once, or after the merchant's appearance, or by the petition of one or more creditors, or by the court itself.* "

Request for bankruptcy procedure by the debtor[74] should also be accompanied by the balance sheet, and if the balance sheet could not be submitted, the reasons why it could not be submitted should be shown. The balance sheet had to be dated and certified for compliance by the merchant.

Naturally, given the era in which it appeared, the Commercial Code operates with terms that are no longer in use today, and the meaning of terms used today in the bankruptcy procedure can have a different meaning.

Thus, the decision to open the bankruptcy procedure is "the judgment on face to face bankruptcy". The decision to initiate the procedure also established the day of the cessation of payments. If it was not possible to establish with certainty the day of the cessation of payments, "then it will be counted from the day of the judgment of the tribunal on the appearance of bankruptcy" (Article 189, last sentence).

The judgment is published in a Bulletin[75] and was posted to the court of domicile, but also to the courts where the debtor had commercial establishments (Article 190).

From the date of the decision to open the bankruptcy proceedings, the right to conduct business was lifted, the forced pursuit of the merchant's movable and immovable property was suspended (Article 191) and the interest was no longer flowing (Article 193).

The supervisor of the bankruptcy procedure is not the syndic judge, but the judge-commissar who is in charge of hurrying and supervising the work and management of bankruptcy, drawing up reports in this respect, being able to be replaced by the court at any time of the proceedings[76].

In order not to acquire goods, the decision to open the bankruptcy proceeding took the measure of sealing the goods as well as the measure of arresting the merchant at the police headquarters or at his home under the supervision of a police officer (Article 201). He could be released if he filed a bail (Article 216). The merchant could acquire, he and his family, food aiders that were decided by the court on the basis of the proposals of the syndics (Article 217). When looking at registers, the merchant's participation, either personally or through the quartermaster, it was mandatory, the impossibility of personal presentation to be well motivated (Article 219). The merchant, if released from custody, could, within the limits set by the judge-commissar, work alongside the syndics, giving them the necessary explanations (Article 231).

If the bankruptcy proceedings or the merchant arrest expenses were insufficient, then the court made a loan that was considered a privileged debt, which is paid primarily from the goods subsequently sold (Article 205).

By decision to initiate bankruptcy proceedings, one or maximum three temporary syndics[77] were appointed. Subsequently, not later than 15 days after the date of the bankruptcy judgment, in a hearing with all the creditors, the judge-commissar, after hearing the opinion of the creditors and exhibit up his own report, the court definitively appointed one or more syndics (maximum three), who could have been previously appointed as temporary. The syndics could be replaced in accordance with a certain procedure and were chosen from among the creditors, but could also be designated non-creditors, but not from the relatives of the merchant to the fourth degree[78]. They were remunerated by the tribunal at the end of the proceedings, after giving an account, based on a report drawn up by the judge-commissar (Article 206).

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[74] The request had to be made within three days of the cessation of payments (Art. 186).

[75] We did not find any references in *Commercial Code* or at the time papers to understand what the notion of "*Bulletin*" refers to, but we think it is an official bulletin today's equivalent of the *Monitorul Oficial*.

[76] "*Art. 200 - The Tribunal may at any time, instead of the bankruptcy judge, order another of its members.* "

[77] As Adrian Ștefan Clopotari notes in "*Sindicul la cerere sau din oficiu?*" article published on *www.juridice.ro* on December 1, 2016, the syndics from 1840 are insolvency practitioners today, having the managerial task of liquidating the asset and passive, working under the supervision of the judge-commissar.

[78] *"Art. 207. No relative of the merchant, up to the fourth degree, will be able to designate syndic."*

The syndicates had to work together but, by decision of the judge-commissioner, a union could fulfill certain responsibilities. They sealed the merchant's goods, made their inventory [79], they sold them immediately (Article 213 and Article 214), with the judge-commissar consent, the defective goods, the price drop, or exaggerated expenses, through a direct bargaining, or auctioning. Judge-commissar handed over to the syndics the accounting registers in which they made the records (Article 215), which led the entire business of the merchant.

If the movable or non-movable goods of the merchant were pursued, the syndicates could conclude deals with the pursuing creditors. If the good was not valued or worth more than three hundred lei, the agreement was made with the permission of the court. The merchant could oppose this agreement, and in the case of the immobile goods, his opposition was sufficient for the cessation of the agreement.

The money earned on sales and rents, after the deduction of expenses, was deposited by the syndicates at the tribunal, for each day of delay they were forced to interest. Distributions were made on the basis of the request of the syndicates with the approval of the judge-commissar, only after the opposition had been resolved, if they existed. The tribunal could also order distributions on the basis of a plan made by the syndics, confirmed by the judge-commissar (Article 233).

After the decision to open bankruptcy, the creditors were required to submit to the court the original documents for the sums to be received, together with copies under their signature, documents handed over to the tribunal's registry (Article 235). Also, the creditors who were not aware of the opening of the bankruptcy procedure were aware of this fact by publishing an announcement in the Bulletin, telling them what to do, within twenty days of publication in the Bulletin, themselves or their quartermaster, to recover their amount (Article 236, first sentence).

Creditors enrolled at the creditor's table, but also the debtor, could lodge complaints against the amounts requested by the creditors.

Jurnalul de adeverire (The testimonial) was identified as the creditors' table used today, where the creditor's or his quartermaster's domicile are indicated, also the source of the claim, and whether the amount was accepted or removed from the credentials (Article 239). On the original of each document that was proof of the claim, the syndics wrote a formula[80], signifies acceptance of the claim at the credentials they signed with the judge-commissar. The creditor had to confirm, in the eight days since the investigation of his claim, to the syndics and the judge-commissar that debt is his.

Article 242 provides that if the debt is removed from the creditor table, the judge-commissar may, without calling the creditor, judge the case in court within a short time. The tribunal may order that a case be investigated, with the judge-commissar, and call on the persons who may be able to clarify the certainty of the forfeited claim.

If the tribunal can not judge definitively the overturned claim, it will either order or postpone the creditors' meeting for the concordat, the agreement between the creditors and the merchant (Article 243). If the tribunal orders the meeting, the canceled claim will attend the meeting in the amount determined by the decision to convene the meeting, and then its amount will be finalized (Article 243, last sentence).

The search for a debited claim from the creditors' table could also be given in the jurisdiction of other courts - police, criminal or correctional. However, if the investigation was done by the police tribunal, the defaulted creditor could participate in the meeting of the concordat, if the investigation was done by the criminal or correctional tribunal, the creditor could not participate in this meeting until the case had been resolved (article 244).

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[79] When seals were placed, the inventory, then called catagraphy, and the valuation of the goods the syndics could be helped by people chosen by them. The inventory and the accounting also had access to the prosecutor.

[80] „ *It was received between the debts of bankruptcy, as the amount of ..... at ....*”.

If the creditor guarantee of a mortgage-backed claim was removed, then he could participate in the proceedings as a non-mortgage creditor (Article 245).

2.2.1.2. The concordat in Commercial code from 1840.

Chapter VI of Title I of Book II is "For concord and union." Article 251 -270 is allocated to the concordat, and Article 271 - 284 uniting creditors.

As previously seen, in Article 243 of the Commercial Code from 1840 we meet the first legal definition of the concordat, namely the agreement between the creditors and the merchant.

Within three days of finalizing the creditors' table, through a notice in the Bulletin and addresses addressed to creditors, the tribunal will gather all creditors "to decide on the concordat" (Article 248). At the assembly chaired by the judge-commissar, all creditors could take part, personally or quartermaster, as well as the merchant, if not arrested. The merchant had to be present personally, "and he will not be able to order his quartermaster except for well-spoken words and received by the judge-commissar" (Article 249).

In this meeting, the syndics presented a report, signed by them and the judge-commissar, in which they presented the procedure, the things that had happened up to that moment.

The concordat could not be concluded until after the above stages, between the creditors representing at least 3/4 of the total creditors.

Mortgage, privileged or pledged creditors, could only take part in the concordat meeting if they gave up their mortgage, and if these creditors voted for the arrangement, they were deemed to have been denied any insurance they had, being regarded as ordinary creditors (Article 252).

If the merchant was convicted of fraudulent bankruptcy (cunning), the concordat could not be concluded, the creditors being able to defer, only with the majority of the creditors in number and amount, taking a decision on the arrangement until the merchant was finally tried for bankruptcy.

Instead, if the merchant was convicted for bankruptcy (simple), the concordat could be concluded, with creditors being able to postpone, as in a fraudulent bankruptcy, a decision.

All creditors could oppose the concordat, which had to be brought to the syndics and the merchant's knowledge, within eight days of the concordat, otherwise it would not be taken into account. The opposition had to be "grounded on serious words." If only one syndic had been appointed in the proceedings, and he opposed the concordat, another syndic should be appointed to carry out the formalities related to the trial of the opposition against the concordat.

Only after the passing of the eight days required to formulate the opposition, the Commercial Court could proceed to the confirmation ("endorsement") of the concordat. The Judge-commissar filed a report explaining the type of bankruptcy to which the merchant was subjected and giving his point of view on the admissibility of the concordat. By the same judgment, the tribunal had to resolve the opposition and rule on the concordat. In the case of the admission of an opposition, the concordat was abolished (Article 257).

The concordat was not approved if the rules governing it were violated, or "when motives concerning the interest of the public or creditors would seem important to stop the concordat" (Article 259).

After its approval, the Concordat had a binding character for all creditors, registered or not on the balance sheet, with "confirmed or unconfirmed acts", even for those outside the country.

Once the decision to settle remained final, the work of the syndicates ceased. They gave, in the presence of the judge-commissar, reporting to the merchant, handing him his wealth, registers, things, "under a receipt." And the judge-commissar job ceased after he wrote a journal

of all the activity (Article 263). The court also ruled in cases arising from the handing over of goods and documents to the merchant.

Once approved, it could be abolished "only for the sake of guile discovered by homologation, and born either by reducing the amounts to be taken by the merchant, or by increasing his debts" (Article 262).

The abolition of the concordat for the cunning or the conviction of the merchant to fraudulent bankruptcy removes any liability to which the merchant's guarantors could be hired.

If the merchant could not carry out his obligations in concordance, the court proceeded to terminate it, calling on the person who guaranteed it personally. The cancellation of the concordat does not release the merchant's personal guarantors, which have been obliged, in whole or in part, to join him in the fulfillment of the obligations to concordat.

The conviction of the merchant for fraudulent bankruptcy or the abolition of the concordat resulted in the court's appointment of a judge-commissar and one or more temporary syndics through the decision to abolish the concordat. The syndics made the seals, with the help of the police, proceeded to an additional inventory of the merchant's goods and carried out an extra balance sheet. The new creditors were called, through the Bulletin, to submit the evidence of their claims within 20 days (Article 266).

Claims before the opening of bankruptcy proceedings were no longer investigated, but only those born after the opening of this procedure. Claims paid up to the disbandment of the concordat, in whole or in part, were removed from the credentials, totally or partially (Article 267).

After the new creditors table was finalized, another arrangement could be concluded and the creditors decided whether or not to replace the syndics appointed temporarily by the decision to abolish the concordat.

The acts concluded by the merchant between the confirmation date of the concordat and the date of its dissolution were maintained, with the exception of those concluded with "cunning against the rights of the creditors".

2.2.1.3 Unification of creditors.

If the concordat could not be concluded, then the creditors concluded another type of act, called the *unification* act, by which they took all the necessary steps to compensate as much as possible from the merchant's wealth (Article 271) and which established, the sale of goods and the recovery of the debtor's claims to cover his debts. It is noticed that unlike the concordat, the act called unification act was concluded only between the creditors of the merchant.

The creditors could agree that some of the merchant's wealth was to be given to him and his family, the syndics suggesting how much to give, the court deciding to do so.

If the bankruptcy was an association of merchants, the concordat could concluded with one or more members of the association. The unification of the creditors had in view the wealth of the association and not the wealth of each merchant, which was part of the association, but the merchant, member of a association, who concluded, in his own name, an concordat with the creditors of the association, responded with personal property and no longer responded jointly to the other merchants of the association.

The syndics had to pursue the payment of the debts of the creditors, but they could at the same time be empowered to pursue the trader's enterprises. The creditors' meeting, which was attended by 3/4 of the creditors and the judge-commissar, which gave this power of attorney, determined the extent, the period for which the empowerment was given and the amounts that could be spent. The Merchant and the creditors could oppose to the decision of that meeting, but the opposition was not a suspension of execution (Article 275).

The creditors had to meet at least once a year, at which time the syndic presented the report, and they could be maintained or replaced (Article 279). The procedure was completed by a creditors' meeting when, in the presence of the merchant, the syndic gave the report and the creditors expressed their point of view of the merchant forgiveness. Then a minutes were concluded, which marked the legal abolition of the unification of creditors (Article 280).

Judge-commissar presented to the tribunal the minutes of the last creditors' meeting, as well as his own report on bankruptcy and its circumstances, the court ruling whether or not the merchant was worthy of forgiveness. If the merchant was not forgiven, each creditor had the right to initiate a personal prosecution against the person or personal property of the merchant, and if the merchant was forgiven, he was "defended by the creditors' arrest,", and only his wealth could be pursued.

Wrongful falsities, fraudulent bankers, those condemned for theft, deception, and those charged with public money were not worthy of forgiveness (Article 283).

The courts rejected demands by which the debtors intended to donate their wealth to creditors to cover their debts (Article 284).

The Commercial Code also contains other rules on bankruptcy, but we will no longer analyze them as it goes beyond what we have been proposing to work on.

2.2.2 Commercial Code from 1887.

Inspired by the Italian Commercial Code, issued in 1882, the 1887 Commercial Code regulates bankruptcy proceedings in Book III. The book comprises eight titles, Chapters 2 and 3 of the sixth title cover two types of conventions that may be concluded between the debtor and his creditors, one before bankruptcy and two during the bankruptcy. In the category of pre - bankruptcy conventions, there is the moratorium (Article 840 - Article 842), and in the category of conventions during bankruptcy the moratorium takes place during bankruptcy (Article 832 - Article 839) and the concordat (Article 843 – Article 858).

Since the rules on post-bankruptcy arrangements are the same as in the Commercial Code of 1840, we will briefly outline the bankruptcy procedure established by the 1887 Commercial Code.

2.2.2.1. Bankruptcy[81] in Commercial Code from 1887.

The bankruptcy of a trader could be opened as a result of the request made by one or more creditors, the debtor[82], or even ex officio.

An extract of the bankruptcy order was displayed within 24 hours at the tribunal's door and published in several places established by Article 934 of the Commercial Code.

The bankruptcy sentence was called the judge-commissar[83], order the sealing, was called the syndic[84] provisionally, the deadline (not longer than 15 days) for the recording of the

[81] In our presentation we will briefly analyze the institution of bankruptcy governed by the *Commercial Code* of 1887, but only those elements related to the pre- and post-bankruptcy agreements concluded between the creditors and their debtor in order to cover its liabilities.

[82] The request to open bankruptcy proceedings should have been made within 3 days of the cessation of payments to the competent court and should be accompanied by the trader's balance sheet and the trade registers as they are.

[83] It was only through the Law of 20 June 1895 that the syndic judge's institution was introduced into the *Commercial Code*.

[84] Bankruptcy management will be exercised by a syndic appointed by the court, supervised by a delegation of creditors, under the direction of the judge-commissar. It aims at preserving and liquidating the merchant's assets and their distribution among creditors. As in the *Commercial Code* from 1840, the syndic chooses a court between

receivables, the date and time of checking the receivables, it was envisaged that the merchant should submit the balance sheet and the registers if he did not do so by opening the application (Article 708). By the same sentence, interest is suspended, the right to administer the merchant's goods is raised and his arrest may be ordered under certain circumstances. Merchant was denied access to the stock exchange premises and could not leave his home without the judge's commissar's permission.

From the day of declaring bankruptcy, the actions belonging to the merchant could only be exercised by the judge-commissar, except for those who regard his exclusively personal rights or who are foreign to bankruptcy and all actions against the merchant regarding his movable or immovable property and no an act of enforcement against the same goods was directed against the judge-commissar.

2.2.2.2 The moratorium post bankruptcy.

A post bankruptcy moratorium was only admissible if bankruptcy proceedings were opened at the creditors' request or ex officio, not at the debtor's request.

The moratorium[85] was a legal institution that gave the merchant a postponement of payment in order to be able to cope with the obligations he had taken, - suspending during his term any act of execution and enforcement of any action against the merchant (Article 839). In most cases, he assumed a momentous critical situation in which the merchant was, a situation that could arise either from an asset's mismanagement of the passive or from a failure due to heavy events through which he traded.

In order to obtain the moratorium, the merchant had to prove that the cessation of payments was the consequence of extraordinary and unexpected events, while showing that the asset exceeds the liability. After obtaining the moratorium, within a six-month period that could be extended in some cases to one year, the merchant had to execute his obligations under the sanction of bankruptcy.

Thus, in the three days following the publication of the bankruptcy decree pronounced as a result of the creditors' request or ex officio, the merchant could only ask the court if he submitted the registers, the balance sheet and a nominative list with all the creditors, showing the domicile and the amount debts, suspending the execution of this sentence or, in other words, requesting a moratorium. So the law demanded the debtor full honesty and forced him to act swiftly in order not to worsen the state of discontinuation of payments. It is accepted in the case-law that Article 834 Commercial Code makes the irregularity of the trade registers, a fine of non-receipt of the application for a moratorium, a fine of non-receipt which applies in all cases and not only when the registers are not sincere and real[86].

In order to resolve the request for a moratorium, the president of the court summoned, through the merchant, the judge-commissioner and the creditors, before the deadline set for checking the receivables[87]. Following this meeting, a protocol was concluded which included several elements: the names of the creditors, the amount of their receivables, the claims of each creditor and the judge-commissar regarding the certainty of each receivable, the moratorium and its duration, the conservation measures and the ways of capitalizing by negotiating the price

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foreigners to the mass of the creditors, and who are not relatives or affiliates to the merchant up to the fourth degree inclusive.

[85] Paul I. Demetrescu şi Marco I. Barasch - *Legea asupra concordatului preventiv din 10 iulie 1929, comentată şi adnotată*, Ediţia I, Edit. Libr. „Universala", Alcaly & Co, p. 5.

[86] Gheorghe Piperea, *Procedura concordatului*, Wolters Kluwer România, 2010, p. 115.

[87] It is the time limit set by the bankruptcy order for the verification of debts and which can not be more than 10 days from the deadline set for the filing of the claim statement (Article 708, point 4).

of goods, to persons entrusted with the administration and supervision of the trader's patrimony during the moratorium.

After this first meeting, the application for suspension of the bankruptcy proceedings was debated, in contradiction with the merchant, the judge-commissar and the creditors, taking into account the desire expressed by the majority of the creditors. If the request for suspension was admitted, the court took several steps regarding the term of execution, the manner of payment of debts, and the appointment of a supervisory committee, the current creditors' committee, with which it proceeds to liquidate the liability in the manner established by the court, "Under the direction of the judge-commissar".

As regards privileged creditors and state receivables, the moratorium had no effect (Article 839, para. 2).

If, after the moratorium was granted, unsecured debts to the merchant or receivables declared fictitious were discovered during his execution or if he did not meet the obligations imposed on him to administer and liquidate his patrimony or if he was guilty of deeds of bad faith, or if his asset no longer offered hope for the full payment of his debts, the court could revoke, even ex officio, the moratorium and prescribe the necessary measures for the continuation of the bankruptcy proceedings (Article 841, para 2).

If the request for a moratorium was not admitted, a time limit for the verification of the claims was set in the bankruptcy procedure.

2.2.2.3 The moratorium before bankruptcy.

If the merchant fulfilled the conditions laid down in Article 834, he could request a moratorium before the bankruptcy proceedings were opened. If the tribunal found the grounded request, the creditors summoned, only 15 days later, and determined the measures that were required. If they were not incompatible, the provisions of the moratorium post-bankruptcy were still applicable.

If the tribunal judged that the moratorium was not well founded, it would "go" without delay to declare bankruptcy.

If during the six months of a moratorium the merchant paid a considerable portion of the receivables and if more than half of the remaining creditors expressed a favorable vote, a moratorium could be given for another six months.

2.2.2.4 The concordat post bankruptcy.

According to Article 845 of the Commercial Code, a post-bankruptcy arrangement was possible, as the inter-war doctrine remarked, "the legislator, through the grant of the concordat, wanted to help the merchant, worthy of protection, and who is the victim of some strain, transient[88] circumstances". By the approval of the concordat by the tribunal, the state of bankruptcy ceased, with all its effects.

The Concordat of the Commercial Code from 1887 is very similar to that of the Commercial Code from 1840.

The concordat could be concluded at any time, the judge-commissar had to insist on the conclusion of the deal. If the consent of all creditors was not obtained, at the request of the syndic, the merchant, or a quarter of the creditors, was summoned by the judge-commissar. In this meeting, the merchant presented all bankruptcy-related relationships and proposed

[88] *Codul comercial adnotat*, p. 586, apud, Gheorghe Piperea, Procedura concordatului, Wolters Kluwer România, 2010, p.116.

remedial measures. The concordat ended when 3/4 of the creditors joined him. The privileged creditors, if adhering to the arrangement, had to give up their privileges. Any interested party could ask for its approval, and creditors who did not join him could object before approval. The tribunal pronounced itself by the same judgment on the opposition (if any) and on the approval of the concordat. If the opposition was admitted, the concordat was canceled. If the opposition was done in bad faith, the opponent was fined.

Approval of the concordat made it opposed to all creditors, including those outside the country. After the endorsement sentence remained final, the bankruptcy ceased and the powers of the syndic and the creditors delegation (today's creditors committee) ceased. The syndic gave the merchant the account and handed him the books of account. For this, a minutes were concluded. The tribunal is judging the objections formulated.

The concordat, although approved, may be quashed by the court at the request of the syndic or any creditor, after hearing the syndic and the merchant, if discovered after approval, that it has fraudulently exaggerated its passive or that it has dissimulated an important part of the asset.

If the merchant does not comply with the agreement, the syndic will, in the name of the creditors who have not been compensated by the sums due by arrangement, request termination. Termination of the concordat does not release the guarantors of their obligations.

The acts made by the merchant following the approval of the concordat and before its cancellation or termination can not be declared void unless it has been done in breach of the rights of the creditors.

The creditors before the concordat regained all their rights to the merchant and could take part in the bankruptcy table only in the proportions established by Article 865 of the Commercial Code.

The same criticism[89] regarding the effectiveness of the moratorium measure can be made with regard to the effectiveness of the concordat. Not designed as a bankruptcy prevention measure to intervene before the court has declared the cessation of payments, the post-bankruptcy arrangement did not give the expected results, which is why it was abandoned.

The unsatisfactory results of these procedures for avoiding the effects of bankruptcy - which in fact led to their abolition - are explained by the excessive involvement of the judge-commissioner and the tribunal, through complicated court proceedings, lack of concrete sanctions for delay, and the fact that both the moratorium and the concordat presupposed that the debtor is already in the cessation of payments, therefore in an irremediably compromised situation.

2.2.3 The law of the concordat forced outside of bankruptcy, from Transylvania.

Until the Great Union of 1918, and even thereafter, until 1929, in Transylvania and Bucovina, the normative acts adopted in the Austro-Hungarian Empire were applied. Thus, the double monarchy established by Ausgleich in 1867 makes in Bukovina the Law for the preventive concordat, adopted on December 10, 1914 in Vienna, and in Transylvania was applied the Presidential Ordinance No. 4070/915 on the procedure of forced concordat outside bankruptcy, normative act adopted in Budapest.

Since we did not find the law that was applied in Bukovina in the libraries and archives we visited, we will only refer to the law applied in Transylvania.

[89] Gheorghe Piperea, *op. cit.*, p.116.

2.2.3.1. Ordinance Pres. No. 4070/915 of the concordat forced outside of bankruptcy.

A first aspect, related to this law, is that it applies not only to traders but also to individuals or their heirs in the case of the deceased.

The first measure to be taken is the appointment of a wealth inspector overseeing the patrimony and the asset management of the debtor, and if the delegation of the wealth inspector does not provide a sufficient guarantee, the judge may take any of the insurance measures provided for in the implementing law, may even order the closure of the debtor's store. The wealth inspector performed the duties[90] of the judicial administrator today, which means that the concordat procedure in Transylvanian was very close to an insolvency procedure.

In order to know the true financial situation of the debtor, the activity of the debtor being extended, and the wealth inspector failing to act, a commissioner or a controlling[91] board of creditors could be appointed, together with the wealth inspector and the experts examining the debtor's wealth situation both from the point of view commercially and in terms of trade registers. The Commissioner and the council worked free of charge and deducted their expenses.

As soon as the wealth inspector's report[92] shows the creditors a faithful icon of the debtor's situation, they will no longer be ignorant of accepting or declining the bid and the judge for the approval of the arrangement.

With the call for the opening of the procedure, which had to be accompanied by several acts[93], the offer of agreement was also submitted. If the debtor revokes or modifies the offer without the consent of all creditors interested in the proceedings, the judge will continue the proceedings without considering the revocation or modification and if the debtor fails to comply with the provisions taken, the judge will quit the procedure that will result in the debtor and most of the time bankruptcy[94].

Article 6 (with the marginal name - Minimum quota) of the Ordinance establishes that the Minister of Justice, in agreement with the Minister of Commerce, may lay down, by means of a general ordinance, the minimum rate to be paid for the payment of debts and the longest term which may be stipulated for their payment, so that the concordat procedure can be accepted. The procedure can not be opened if the concordat offer does not meet the conditions established by the ordinance[95].

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[90] He informed about the wealth situation and was obliged to take care of the debtor's trade, economy or profession to be continued and to ensure that nothing was lost in the debtor's assets, examined the creditors' picture and the provisional balance sheet presented by the debtor, (Article 21, paragraph 1) was obliged to report to the judge, if the debtor works against the orders given by the judge, he could claim, besides the reimbursement of expenses and a fee for his activity (Article 24, paragraph 1).

[91] Format from a maximum of five creditors.

[92] Anca I. Leontin, *Procedura de concordat forțat în afară de faliment (Transilvania)*, Editura Arte Grafice Alexandru Anca - Cluj, p. 6.

[93] The creditors' list, provisional balance sheet, guarantee statement provided with the authenticated statement of the person who guarantees for the fulfillment of the obligations taken by the debtor by arrangement, extracted from the land books, extracted from the company register.

[94] Anca I. Leontin, op. cit., p. 10.

[95] In a note to this norm, the author (Anca I. Leontin) stated that "*This ordinance has not been issued so far and thus the defense of the interests of the minority of creditors is guaranteed by the judge's obligation to refuse to approve the concordat if he observes a manifest disproportion in defaul of creditors* ". And in relation to that rule, the case-law has held that the offer of an arrangement must be made for a fixed rate payable within a fixed period. No bid can be made for a liquidation arrangement without any quota or fixed payment term (Anca I. Leontin, op. cit., p. 11).

The judge could forbid the debtor from concluding acts, and if he breached that obligation, the proceedings ceased. Moreover, between the filing date of the application and the opening date of the procedure, the debtor could not alienate or dispose of goods, and after the opening of the proceedings, he could only conclude the acts with the consent of the wealth inspector, otherwise the act was null and the proceedings closed.

The procedure was considered open at the time the publication was posted informing the public that the procedure had been opened on the "court billboard".

To prevent[96] some of the creditors from acquiring the debtor in difficulty acquiring separate or privileged rights to remove in whole or in part the debtor's assets before the creditor's mass and thus to preserve the patrimony for all creditors Article 17 provides for the nullity of the acts of sale and guarantee of the debtor.

In the event that the arrangement procedure is opened, the pending bankruptcy proceedings must be suspended (Article 20, paragraph 3).

The debtor was obliged to appear in person at the hearing of the concordat, and if he did not appear in person and did not justify his absence, the judge could quit the procedure (Article 37, paragraphs 1 and 2). In debating, the debtor[97] presented the business registers, the wealth inventory and the final balance sheet drawn up under the control of the wealth inspector, an inspector who also presented a report, and the debtor pledged the reality of those entered in the register. The creditors present also tell their point of view. It was also possible to vote by correspondence. The concordat should have adopted 2/3 of the total receivables, and if in the voting session this majority was not obtained, the judge could grant a maximum of 15 days.

For reasons of "coercive" (legality) the concordat was not approved by a judge (Article 53), but also for optional cases enters in Article 54: if creditors promised apart from the arrangement separate favors, if the debtor granted, after he has become insolvent or after he has ceased payments, to a creditor, the payment of favors or guarantees, which then did not correspond to his situation of wealth, if he can not acquire a full orientation on the debtor's wealth situation if there is a disproportion exorbitant between the measure of the favors granted to the debtor by arrangement and his wealth situation in the defaul of the creditors.

After the decision to approve the concordat was published and remained final, the procedure had to be declared finished. In addition to the reasons set out above, the procedure could also be closed for the reasons set out in Article 56.

Upon completion of the procedure the debtor regains[98] the full freedom of the right to dispose of the property and all the assets administered by the asset inspector or the deposited amounts must be returned to the debtor unless otherwise stipulated.

If the procedure can not reach its purpose or because it lacks legal conditions, or if the creditors did not receive a bid or the judge did not approve the concordat, there can be no question of *termination*, but only of *quitting*[99].

By approving the concordat[100] and completing the procedure, the aim was achieved, ie the clearing of the insolvent or difficult situation of the debtor, preventing bankruptcy. The debtor remains liable to the creditors only with a concordatable interest rate payable according to the agreed term and manner.

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[96] Anca I. Leontin, op. cit., p. 19.

[97] The jurisprudence of the time stated that if the debtor did not keep commercial records is not a cause for which the forced conciliation procedure apart from bankruptcy should be unconditionally extinguished but if the oversight of the debtor's real estate can not be found, refuses to approve the concordat (Anca I. Leontin, op. cit., p. 59).

[98] Anca I. Leontin, op. cit., p. 56.

[99] Anca I. Leontin, op. cit., p. 56.

[100] Anca I. Leontin, op. cit., p. 63.

If the concordat has been obtained by granting separate favors to creditors, the creditor may, by means of an action against the debtor, request, within two years of the final day of the approval decision, that the concordat is declared[101] null and void, if the rendered service has matured, the debtor must be obliged to fulfill it (Article 64).

Regarding the application of this ordinance, we note the writings written by the only author we identified, Anca I. Leontin, and who, speaking of appeals against the judgments handed down in the proceedings, showed that if the procedure of conciliation in some cases did not was deliberately successful by those who promoted it, but contributed more or less to the compromise of internal credit, and the blossoming of the debt is explained by the fact that instead of ending the procedure in 1-2 months, especially following the a useful and unnecessary attack lasted for 8 to 10 months and even more, thus contributing to discouraging honest manufacturers and wholesalers and, on the other hand, to encouraging traders to speculate lightly or even shamefully good faith of the first.

In a personal opinion we do not believe that the procedure has had a particular impact, being very complicated and very close to a reorganization procedure that we know today.

2.2.4 The Preventive Concordat Law from 1929.

However, the institution of the moratorium did not achieve the desired aim of the legislature[102], because the term in which the trader had to execute the bonds was too low, so when he had real estate they could not be sold and the goods did not always find buyers; because the point of departure of his admission was wrong, an asset that exceeded the liability, which is why most of the times the data displayed by the trader did not correspond to the reality. Also, payments made by the trader within the given term often favored some of the creditors at the expense of others. For these reasons, it also explains why the moratorium ends in bankruptcy.

The consequence of the ineffectiveness of the institution of the moratorium has led many countries to abolish it because the belief that the payment of all the debts of a merchant in a critical financial state may be possible is a pure illusion[103]. The moratorium suspends bankruptcy proceedings only to provide the trader with the possibility of a deal with the creditors, but this arrangement can not provide the bankruptcy guarantees.

From the analysis of the relevant legal provisions, it can be said that pre-bankruptcy moratorium was a procedure that was available to solvable traders, but which, owing to unforeseen events, were temporarily in difficult economic situations and could recover from financial point of view[104].

As Romanian trade and industry no longer had the necessary protection under the provisions of the trade code, it was necessary to take speedy steps to introduce the preventive concordat into our legislation[105].

The regulation of the preventive concordat in Romania was insistently demanded, especially after the First World War, both for its superiority to the moratorium and for the disastrous consequences of the war, because many good faith traders had to, and filed the

[101] The practice has held that the fact that the creditor was not aware of the opening of the arrangement procedure and that the debtor did not notify the creditor's claim can not serve as a legal reason for canceling the concordat (Anca I. Leontin, op. cit., p. 66).
[102] Paul I. Demetrescu şi Marco I. Barasch, op. cit., p. 6.
[103] Ibidem, p. 9.
[104] Csaba Bela Nasz – *Procedurile de prevenire a insolvenţei*, Universul Juridic, Bucureşti, 2015, p. 34.
[105] George Petrovici – „*O măsură legislativă urgentă: concordatul preventiv*" in „*Argus*", 3 martie 1927.

balance sheet without the legislator making any difference between them and those who, after speculating on credit, were trying to speculate on bankruptcy[106].

After the First World War, trading courts across the country solved weekly 30-50 bankruptcy claims, and bankruptcy judges, in small numbers, were unable to fulfill their statutory[107] duties and goods depreciated in deposits . The creditors were losing their capital, and the country's credit and the national economy suffered enormously. The institution of the moratorium has proven to be ineffective even in normal times. A relaxation, by moratorium or a moratorium extension, is an illusory measure; the prolongation of agony, caused by unknown and unforeseeable social circumstances during the time when these measures of protection of the honest trader were enacted. The situation was damaging, not just for the real traders, but also for the big needs of the tax. The bankruptcy of a merchant meant the extinguishment of a safe tax revenue source.

On this background, The Preventiv Concordat Law of 10 July 1929, the first distinct regulation of the commercial code of a pre-insolvency procedure, appears in the Kingdom of Romania. The law was inspired by the Italian draft drawn up by a commission with the first president of the Court of Cassation as president. The Romanian law project also envisaged the doctrine and the jurisprudence that emerged after 1903, when the Italian law was promulgated, without ignoring the necessities of the Romanian trade, introducing the best provisions that could lead to an effective defense of the national economy[108].

The preventive concordat was defined at the time of the law as an agreement between a good faith but insolvent trader and its creditors concluded for the purpose of avoiding bankruptcy[109].

Although at the time when the 1929 law came into being, two types of concordat were known, one amicable, when its effects were limited to those who joined, and judicial one, when its effects extended to the other creditors, and for his approval the vote of a legal majority of the non-preferential creditors and the approval of the tribunal was necessary, the Romanian legislature of 1929 chose to regulate the judicial concordat. The ultimate goal of the preventative concordat is that by sacrificing the creditors, following the reduction of their claims and the postponement of their payment, the trader may be able to continue trading, thereby rendering his state of insolvency disappear.

The preventive arrangement regulated by the 1929 law was only for the benefit of traders who prove that they have actually been trading for three years, have the registered firm irrespective of the date of this registration or an industry patent and offer a payment quota that can not be less than 50% of the chirographic claims and within a term not exceeding three years.

The request was addressed to the competent court to declare bankruptcy, along with the mandatory registers kept for at least 3 years, a detailed list of the entire asset with its valuation, a list of all creditors showing their domicile and the amount of the claims of each and with the indication of the degree of kinship in the case of relatives of the debtors, a summary of his commercial activity.

If the trader does not meet the legal requirements, ie if he has been convicted of fraudulent bankruptcy, if he has not fulfilled his obligations in a previous arrangement, if five years have elapsed since the fulfillment of the obligations taken by a previous preventative arrangement, does not present himself or herself in support of his application, the court will reject the application, because the benefit of the concordat can be granted only to a trader who

[106] Paul I. Demetrescu şi Marco I. Barasch, op. cit., p. 3.
[107] Ibidem.
[108] Ibidem, p. 12.
[109] Ibidem, p. 13.

has not been arrested with criminal justice and who has all the guarantees that he will be able to execute his obligations under the arrangement[110].

If the application is rejected, the court will have to declare the trader bankrupt (Article 6).

If the application was accepted by an admission in principle, the judge was appointed, the date of the meeting of the creditors was set, in order to discuss the application, set the amount necessary to cover the costs of the concordat and the deadline within which the amount must be deposited, after depositing it. The closing of the admission shall be published in the Official Monitor and the Chamber of Commerce's Bulletin.

Throughout the course of the preventive conciliation procedure, the trader retained the management of his assets, but since the admission of the application in principle, trade continued under the supervision of the delegate judge, who could oppose the trader's management acts. Also, with the consent of the delegated judge, the alienations and the lodging of guarantees were also concluded.

For the admission or rejection of the request made by the trader, the creditors with uncontested claims shall decide[111] on the date fixed by the conclusion of the admission in principle, after the debts of each of them have been checked in advance by the delegated judge. Only the creditors may take part in the vote, with the exclusion of those who have real or personal guarantees. Creditors who have preference over the debtor's assets may take part in the vote if they renounce a mortgage, pledge or privilege (Article 21).

A meeting where the debtor's request was debated began by reading the report drawn up by the delegate judge, and any creditor could challenge the claims and show the reasons why he believed that the debtor did not deserve the benefit of the arrangement, or the proposals could not be accepted. The Delegated Judge shall pronounce a report on all appeals. If the debates could not be completed in one day, their continuation would be right on the next working day, and thereafter until a decision has been taken (Article 18). The creditor who opposed the admitted concordat could have objected within 40 days of the date of conclusion of the minutes.

The challenged creditors, the contestants and the trader could appeal against the decision of the delegate judge to resolve the appeals, which was settled within 10 days. A term of 20 was granted by the tribunal for the settlement of the oppositions to the admitted concordat and for the approval of the concordat.

The challenged creditor whose claim was removed from the vote of the concordat, was entitled, if the arrangement was finally approved, to make use of his claim against the debtor by way of principal action (Article 32).

On the day fixed for the trial of the opposition and the approval of the concordat, the tribunal, after hearing the opponents, the trader and the delegate judge, pronounced in the council chamber by a single decision.

Once the formalities for giving the guarantees were met, the decision to approve the concordat became enforceable, and the judgment was published.

If the application for approval were rejected, it was questionable "if the place is to declare bankruptcy" (Article 36).

Within one year from the approval of the concordat, any creditor may request the court to cancel the concordat and order the debtor to go bankrupt if it proves that the trader through the dol has exaggerated its liability or has hidden part of the asset (Article 46).

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[110] Ibidem, p. 19.

[111] Decisions on the concordat shall be taken by the creditors' vote, representing three quarters of the total unsecured claims and unsecured mortgage or pledge. When the offered quota is at least 80%, it is sufficient that the vote represents 2/3 of the total receivables (Article 19).

In the event of failure by the trader to comply with the terms of the arrangement, the guarantors or the guarantors included in the arrangement agreement, any creditor may ask the court to revoke the concordat and to declare the bankrupt merchant (Article 47).

By Decree-Law no. 1,701 of 5 May 1938 published in the Official Gazette no. 102/5 May 1938 the The Preventiv Concordat Law of July 10, 1929, with the amendments brought to it by the laws of 4 July 1930 and 20 October 1932, was repealed.

Also by the same decree-law, the provisions of Articles 834-844 of the Commercial Code concerning the moratorium, which were repealed by the The Preventiv Concordat Law, were enforced, and the application of these provisions as well as those of Articles 845-865, the same code, referring to to the post-bankruptcy concordat, expanded throughout the country.

Therefore, between 5 May 1938 and 29 June 1995, when Law no. 64/1995 on the procedure of judicial reorganization and bankruptcy, when explicitly abrogated, the provisions of Article 834 - Article 865 of the Commercial Code were in force, but after the Communists came to power and until 1990 they certainly did not applied, but after 1990 and up to 1995, when the free market economy was transferred, we have no knowledge of having applied to any debtor.

Between 1995 and 2009, until the entry into force of The Preventiv Concordat and the Ad-hoc Mandate Law nr. 381/2009, the conventions between the debtor and its creditors were not regulated in Romania.

2.2.5 Judicial Restructuring of Claims in Romania.

The economic crisis that started in 2008, as well as other previous crises, has demonstrated, for the time being, that a systemic financial crisis can generate solvency problems that go beyond the capacity of the formal legal mechanisms to which they are used to overcome them. Therefore, often solving the problem of debts by extrajudicial (informal) means proved more efficient than established judicial procedures.

This has led to the emergence of out-of-court debt restructuring which has been defined[112] as changing the composition and / or structure of the assets and liabilities of borrowers in financial difficulty without resorting to full judicial intervention and in order to promote efficiency, to restore growth and minimize the costs associated with the borrower's financial difficulties.

Restructuring activities may include measures to restructure the borrower's activity (operational restructuring) and measures to restructure the borrower's finances (financial restructuring).

Out-of-court (informal) restructuring is done through contractual arrangements between the debtor and his creditors who restructure the debtor's debts and possibly his commercial activities. Consolidated (informal) restructuring is done through contractual arrangements that are reinforced by the existence of norms or other types of contractual or legal arrangements.

Restructuring of extrajudicial debt can also take place through the involvement of public authorities or even the courts, the so-called "hybrid procedures", but the involvement of the judiciary or other authorities is less intense than in the case of formal insolvency proceedings. "Beyond" hybrid procedures are the reorganization and insolvency procedures, which are formal procedures to deal with financial difficulties.

[112] World Bank, *Extrajudicial Restructuring of Debts*, 2012, p.1. (the study can be found at: *https://openknowledge.worldbank.org/bitstream/handle/10986/2230/662320PUB0EPI00turing09780821389836.pdf?sequence=1&isAllowed=y*).

In many situations, informal restructuring is an alternative to official insolvency proceedings. However, the relationships between informal restructuring and formal insolvency proceedings may be complex. In some cases, informal restructuring can work as a complement to formal insolvency procedures; in others, restructuring may be analyzed and dealt with in a separate insolvency procedure following the failure of the restructuring plan. However, in many legal systems, there is no clear distinction between formal insolvency procedures and informal restructuring processes, which makes the procedures more or less combined.

Also, there is no direct correlation between the degree of financial difficulties the borrower encounters and the best procedural route to be chosen to overcome them. Minor financial difficulties can occasionally lead to formal insolvency procedures, and serious financial difficulties may be dealt with in informal restructuring.

In Romania, the "Extrajudicial Restructuring Guidelines[113] for Commercial Companies" was identified as an out-of-court procedure for informal restructuring, and as "hybrid" procedures, the ad-hoc mandate and the preventive concordat procedure, both currently regulated by Law no. 85/2014 on insolvency and insolvency prevention procedures.

Referring to the current insolvency law in Romania, we would like to note that art. 4 of Law no. 85/2014, lists thirteen principles governing it, taken from the most important international acts: The World Bank - 2011 Principles for Effective Insolvency and Creditor / Debtor Regimes[114], Principles of European Insolvency Law[115], UNCITRAL Legislative Guide on Insolvency Law[116].

2.2.6 "Guidelines for the out-of-court restructuring of the obligations of commercial companies".

This guide has been developed by the World Bank in consultation with the Minister of Justice, the Ministry of Public Finance, the Romanian Banking Association and the National Union of Insolvency Practitioners in Romania.

The guide does not have the power of law, being purely indicative, a guideline for debtors and creditors who do not want to appeal to a court, not even a neutral person, as is the case with the ad hoc mandate, in disputes over their claims . Naturally, nothing prevents them from using a qualified person to support their approach.

Unlike the ad-hoc mandate and the preventative arrangement applicable to borrowers[117] in financial difficulty, the user has only commercial companies as recipients.

In order for the guide to be applicable, at the request of the World Bank a number of norms were first[118] introduced in Law no. 85/2006 on the insolvency procedure, rules which were later taken over by Law no. 85/2014 which repealed the law of 2006.

Thus, in Article 66, paragraph (2) of the Law no. 85/2014 states that the obligation to file the application for opening the insolvency proceedings shall run within 5 days of the failure

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[113] We have found this guide at: *http://www.alb-romania.ro/Documents/ghiduri/CDRG_ro_fin.pdf*.

[114] Available here: *http: //siteresources.wori dbank.org/lNTGILD/Resources/ICRPrinciplesJan201 l.pdf*.

[115] Available here: *http://www.iiiglobal.org/component/jdownloads/finish/39/ 405.html*.

[116] Available here: *http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/ 2004Guide.html*.

[117] Thus, art. 6 of the Law no. 85/2014 on Insolvency Prevention and Insolvency Proceedings establishes that insolvency prevention procedures are applicable to borrowers in financial difficulty, and in art. 5, item 27 of the same law defines this debtor: "is the debtor who, although executing or is capable of executing the required obligations, has a short-term liquidity degree and / or a high degree of long-term indebtedness, which may affect the performance of the contractual obligations in relation to the resources generated by the operational activity or the resources attracted by the financial activity; "

[118] We have in mind art. 27, par. (11), art. 80 par. (11) and Art. 138, par. (11) of the Law no. 85/2006 on insolvency proceedings.

of the negotiations and not within 30 days of the appearance of the state of insolvency, (1) of that Article. Article 117, paragraph (3) excludes from the application of subparagraph d)-f) of paragraph (2) of the same Article in respect of acts concluded in good faith in the execution of an agreement with creditors concluded following extrajudicial negotiations for the debtor's debt restructuring, provided that the agreement was capable of leading to the financial recovery of the debtor and not to have the purpose of prejudicing and / or discriminating against creditors. Article 169, par. (6) provides that the patrimonial liability of directors can not be incurred if, in the month preceding the cessation of payments, payments have been made in good faith to an arrangement with creditors concluded following extrajudicial debt restructuring negotiations to the debtor, provided that the agreement has been such as to lead to the debtor's financial recovery and has not been aimed at prejudicing and / or discriminating against creditors.

The Guide contains a preamble listing the benefits of out-of-court redress and three chapters, one setting the scope and domain application, the second that speaks of voluntary judicial restructuring negotiations, and the latter that first sets out the 12 principles to govern the conduct of negotiations explains them extensively.

Thus, Chapter I shows that the guide provides guidance to debtor companies, their creditors and competent public institutions to conduct negotiations to restructure their obligations beyond the judicial framework, and that the principles of the proposed out-of-court negotiations can be used, to the extent of their compatibility, and in negotiations between the debtor and the creditors in the ad hoc mandate and the concordat arrangement,

Article 1 of Chapter II shows that the main actors in the restructuring are the relevant debtor and creditors who need to develop a restructuring plan to resume business. If the plan does not materialize, the possible alternatives are triggering a pre-insolvency proceeding (ad hoc or concordat) or insolvency. In both situations, the use of information gathered during the voluntary negotiation period may lead to more speedy deployment of judicial procedures.

Together with other authors[119], we do not believe in any way that after the negotiations fail, there will be room for further negotiations within the ad hoc mandate or preventive concordat. A reorganization plan, however, in the insolvency procedure could yield results, although the chances will be quite low. We believe that if the restructuring negotiations fail, the debtor will be obliged to file the application for insolvency proceedings (Article 66, paragraph (2), Law 85/2014).

In the same chapter there are also the types of out-of-court negotiation, which can be bilateral, multilateral and collective, the difference between the latter two being the fact that the multilateral ones involve debt rescheduling, debt remittance, while the collective ones also imply the granting of financial support , risk-bearing between creditors and their commitment not to continue debt recovery.

Here are also presented the differences between voluntary negotiations on extrajudicial restructuring and formal insolvency and pre-insolvency proceedings.

Concerning the applicability of the principles promoted in this guide, it should be noted[120] that there is a possibility of combining the concordat procedure with the guiding moratorium set out in the Guide to Principle 5.

In practice, it is proposed to sign a convention between creditors and debtors, granting a moratorium to the debtor, and this agreement will cease on the date of submission of the concordat.

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[119] Arin Octav Stănescu, Simona Maria Miloș, Ștefan Dumitru, Otilia Doina Milu, *Procedurile de prevenire a insolvenței: concordatul preventiv, mandatul ad-hoc. Reorganizarea judiciară*, Editura Universul juridic, 2010, p. 79.

[120] Ibidem, p. 83.

Given the confidential character of the negotiations, we do not know whether Romanian traders have appealed to this guide.

2.2.7 The ad-hoc mandate procedure.

2.2.7.1 Short history.

This procedure first appeared[121] in France, as a pretorian law creation, being incorporated into French law quite recently[122].

The team that worked on the draft normative act considered it useful to add this procedure, although initially it was only envisaged to regulate the preventive concordat. A "out of court" procedure was also considered to be extremely fast and confidential.

In Romania, the ad hoc mandate procedure was first regulated by Article 7 - Article 12 of Law no. 381/2009 of the preventive concordat and the ad hoc mandate[123], provisions taken *ad literam* in Article 10 - Article 15 of the Law no. 85/2014 on insolvency and insolvency prevention procedures[124], also called the Insolvency Code, currently in force.

2.2.7.2 Definition and general provisions.

The ad hoc mandate is defined (Article 5, point 36 of Law 85/2014) as a confidential procedure initiated at the request of the debtor in financial difficulty[125] by which an ad hoc mandatory, designated by the court, negotiates with creditors for the purpose of reaching an agreement between one or more of them and the debtor in order to overcome the difficulty of the debtor.

It is noted that the ad-hoc mandatory[126] needs to have more qualifications, to be able to analyze the economic and financial situation of the company, to have managerial skills and knowledge but especially to be a very good negotiator. The technique of negotiating with the debtor, and especially with the creditors, will be decisive in the success or failure of the trustee.

It is clear from the analysis of the legal provisions that there is no limitation[127] on the measures that the mandatory may propose, but it is absolutely necessary for them to be accepted by the debtor and its creditors, otherwise the agreement referred to in the text law.

Since no protection is given to the debtor, and judicial proceedings against him have not been stopped, they have concluded[128] that the procedure can not be used with too much success to hinder the eventual opening of the insolvency procedure, being for viable businesses. However, viability involves lasting, lasting trade relationships that have created trust between the parties that must remain.

2.2.7.3 Field of application. Procedure

[121] Arin Octav Stănescu in *Tratat*, p. 106.
[122] It is the Law no. 94-475 / 1994 on the prevention and treatment of enterprises in difficulty.
[123] Published in the Official Monitor, Part I, no. 870 of 14 December 2009.
[124] We appreciate, along with other authors (Csaba Bela Nasz – *Procedurile de prevenire a insolvenţei*, Universul Juridic, Bucureşti, 2015, nota 1 de la p. 42) that the name of the *Insolvency Code* is not appropriate.
[125] For definition of debtor in financial difficulty see art. 5, point 27 of the Law no. 85/2014.
[126] A. O. Stănescu in *Tratat*, p. 106.
[127] Ibidem.
[128] Ibidem.

In its initial[129] form, the ad hoc mandate was applicable only to enterprises organized by legal persons, but the current regulation (Law 85/2014) extends the scope to all debtors, including the individuals who organize an enterprise. We consider[130] that the extension of the scope of preventive treatment is justified not only because, as long as a professional individual can be a passive subject of the collective enforcement procedure, it is fair that he can also use the mechanisms for preventing insolvency, thereby ensuring equal treatment of legal professionals with other categories of professionals, but also because, by law, such a debtor who has become incapacitated for payment is excluded from the benefit of the judicial reorganization procedure, being automatically subject to the simplified insolvency procedure as it is considered to be bankrupt.

On the other hand, it was shown[131] that the expression in Article 1 of Law no. 381/2009, according to which "*this law applies to legal entities that organize a company in financial difficulty*", concludes that, in the view of those who have changed the original draft of the bill, the enterprise is born with a handicap of financial difficulty. an enterprise is in difficulty because the business is not good or not good, and therefore causes the owner to lose or goes bankrupt.

The ad-hoc mandate is an independent debtor as well as creditor. He is not a trustee of the debtor, nor is he a trustee of all the creditors, but a mandatory of the president of the court. Hence, the potential for negotiation and credibility of the ad hoc mandatory vis-à-vis those of the debtor[132].

In the literature[133], the natural question was asked: why would such negotiations not take place directly and individually with the debtor under normal circumstances? Why would a third party need to negotiate what the debtor could also negotiate? A plausible response is that the ad-hoc mandate is a person independent of the debtor, who can impartially analyze the debtor's state and the causes of his or her arrival. Being a crisis manager and a good negotiator, the ad hoc mandate could identify these realities and propose viable solutions to creditors. In addition, he is an agent of the president of the tribunal, a bearer of his authority, as well as of the authority of justice. Therefore, creditors could accept as a serious negotiating partner the ad-hoc mandate, even if the borrower did not give him too much credit in any previous attempts to negotiate the latter. The debtor is obviously subjective in assessing his restructuring opportunities relative to the depth of his financial difficulties, while an independent crisis management specialist may be objective in this regard. In any case, negotiations between the debtor and the creditors must be guided by the ad-hoc mandate in good faith and honesty, as they are meant to bring mutual benefits to the parties involved. In the absence of honesty and good faith, negotiations are likely to fail in the debtor's bankruptcy.

The duration of the agreement that ends after the negotiations does not have a maximum execution time, as is the case with the reorganization plan, which can not be longer than three years.

The borrower should be required to implement a restructuring plan for his own business that will not have a reorganization plan to allow business to continue and lead to debt settlement under the terms of the agreement negotiated by the ad hoc mandatory with creditors. The plan must demonstrate that the business can operate in a profitable way and determine the conditions under which the debtor will repay its debts. Among other things, the plan will show the cash

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[129] *The Preventive Concordate and the Ad-hoc Mandate Law no.* 381/2009 published in M. Of. no. 870/14 December 2009.

[130] Csaba Bela Nasz – *Procedurile de prevenire a insolvenței,* Universul Juridic, București, 2015, p. 187.

[131] Gheorghe Piperea, *Procedura concordatului*, Wolters Kluwer România, 2010, p. 24.

[132] Ibidem, p. 33.

[133] Ibidem, p. 36.

flow forecast, indicating payments to creditors for the next 2-3 years (or a longer period if investment credits, leasing contracts or other long-term financing arrangements are in progress), sources the financing of working capital and the operational and financial improvements of the business, and the extent to which the rights of the relevant creditors are expected to undergo changes (transformations, rescheduling, changes or debt remittances).

By accepting ad-hoc mandatory proposals, however, the relevant creditors will have to give the debtor[134]: (i) a moratorium on outstanding or short-maturity claims (postponement of enforced, judicial or extrajudicial actions or claims triggering insolvency proceedings against the debtor); (ii) a write-off, reduction or freezing at the nominal value of the amount receivable; (iii) a staggered payment of outstanding debts; (iv) the continuation of ongoing contracts (eg, the use of existing credit lines and facilities) or, conversely, the cessation or discontinuance of other ongoing contracts if they are detrimental to the chances of the restructuring debtor; (v) an abstention from attempting to improve their individual position vis-à-vis other creditors by obtaining guarantees or executing them or by applying for preferential treatment.

The agreement will have to take into account the privileges and guarantees accompanying the debts against the debtor. However, in order to facilitate the safeguarding of the debtor's business, the ad-hoc agent will be able to propose the removal, in whole or in part, definitively or for a limited period of time of the accessions of these guarantees (such as the right to pursue, preference, interest and penalties) in favor of essential lenders for restructuring, such as utility providers, creditors who agree to finance the debtor's activity or the payment of recalcitrant creditors, to avoid forced execution or insolvency, payment of employees, etc.

As an agreement concluded during the suspicious period, before any formal insolvency proceedings, it should be mentioned the possibility of an action for the reintegration of the patrimony based on Article 117, (2), lit. d, e and f, of Law no. 85/2014, but such an action could be rejected if the provisions of Article 117, paragraph (3) of the same law.

As a strictly confidential procedure, the name of the debtor not listed in the court's computer system, does not know the number of ad-hoc mandate cases registered at country level.

2.2.8 Preventive Concordat

2.2.8.1 The renaissance, without success, of an old procedure in Romanian law

In 2009, the economic crisis at the global level erupted, generating, at Romania's level, the registration of a large number of requests for opening of the insolvency proceedings before the specialized courts, most of them failed in bankruptcy, with negative consequences for the business environment. On this background, at the end of 2009, it appears in the Official Monitor, Part I, no. 870 of December 14, 2009, The Preventive Concordate and the Ad-hoc Mandate Law no. 381/2009 deemed necessary and to provide a buffer against the wave of insolvencies, which are not necessarily justified by a real cessation of payments. Then, immediately after the law came into being, for some[135] it was foreseeable that at least for a period of 6 months after the law came into force, insolvency claims would be drastically reduced in favor of requests for conciliation and if the practical effectiveness of the concordat will be reduced or if this procedure will massively fail, it is likely that the actors of this scene will return to insolvency.

[134] Ibidem, p. 37.
[135] Ibidem, p. 11.

The normative act contained several provisions[136], which made it unapproved by the financial institutions, and determined the existence of a reduced number of concordat cases (files). Thus, according to the data obtained by us from the National Trade Register Office, during the period 2010-2017 there were recorded 194 files in the whole country, 115 files during the Law no. 381/2009 and 79 file during the period of Law no. 85/2014[137].

The causes that led to the failure of this procedure were identified[138] as:

a) First of all, it was difficult to approve an arrangement (to make it opposed to non-signatory creditors, including the unknown or contested creditors, and to obtain from the syndic judge the suspension of all forced execution procedures), since para. (2) of Article 28 of the Law required, inter alia, that the offer of a concordat arrangement had been approved by creditors representing at least 80% of the total amount receivable, a difficult rate to achieve;

b) secondly, the amount of the disputed and / or disputed claims was not to exceed 20% of the creditor's;

c) thirdly, if the debtor had debts to the consolidated state budget that exceeded 80% of the total debt, the budget creditor's agreement was not obtained because this favorable vote could be considered state aid;

(d) fourthly, the expected rate of satisfaction of the claims could not be less than 50% as a result of the implementation of the proposed recovery measures [Article 21 (2) lit. c)], a fairly high threshold and difficult to reach;

(e) fifthly, since Article 27 (2) provided that, from the date of communication of the decision finding the preventive concordat, the interest, penalties and any other charges relating to the debts were legally suspended, vis-à-vis the signatory creditors, and the guaranteed creditors were not interested in voting in favor of an offer arranged, being more advantaged by the opening of the insolvency procedure, whereby the guaranteed receivables were included in the final table up to the amount of the guarantee established by the assessment, ordered by the judicial administrator or the liquidator;

f) last but not least, the deadline for settling the receivables settled in concordat, according to Article 21 para. (2) lit. d), can not exceed 18 months from the date of conclusion of the preventive arrangement, with the possibility of extending the duration of the concordat with a maximum of 6 months compared to the original duration.

Law no. 381/2009 did not achieve the purpose stated in Article 2 not only because at the time of the adoption of the creditor they were not fully aware of the advantages of approving a preventive concordat, but also because, most of the time, debtors wanted to had access to this prevention procedure, were already in insolvency, that is, they were calling too late for the preventive concordat procedure.

2.2.8.2 The second rebirth.

We tend to agree, in part[139], with other authors[140], that the current regulation of the concordat, Law no. 85/2014, seems to have removed these shortcomings. Thus, in order to approve the preventive concordat, it is required that the draft agreement be approved by

[136] Firstly, we consider the provision in Article 27, para. (2) which states that from the date of the approval of the concordat, the interest, penalties and any other expenses related to the receivables are automatically suspended from the signing creditors.

[137] The year breakdown is as follows: 39 - 2010, 41 - 2011, 13 - 2012, 14 - 2013, 8 - 2014, 34 - 2015, 27 - 2016, 17 - 2017 (until October).

[138] Csaba Bela Nasz – op. cit., p. 39.

[139] See final of this section, along with the practical example.

[140] Csaba Bela Nasz – op. cit., p. 41, or A. O. Stănescu in *Tratat*, p. 104.

creditors representing at least 75% of the value of the accepted and uncontested claims, and the value of the contested and / or disputed claims not to exceed 25% of the creditor mass. For the budget lender, the private creditor test was introduced, if, through the draft agreement, reductions in claims on the state were proposed. The debtor is no longer required to pay a certain minimum percentage of the total amount of debts following the implementation of the redressive measures proposed in the draft agreement, the deadline for settling the receivables settled in the arrangement is currently 24 months from the date of its approval by enforceable judgment, with a possible extension of 12 months. Moreover, Article 24 (3) of the new law provided that, in the case of contracts the maturity of which exceeds the period of 24 months required to complete the arrangement or those for which payment arrangements are proposed outside that period, after the closure of the arrangement procedure, such payments will continue according to the resulting contracts. Finally, through par. (2) of Article 29 of the new law, the rule on accessories was reversed: "The interest, penalties and any other charges relating to claims shall not be suspended in respect of the creditors who are signatories, unless they expressly express in writing, the agreement to the contrary, an agreement to be mentioned in the draft agreement ".

2.2.8.3 Participants and beneficiaries.

Beneficiaries of this informal hybrid agreement are companies[141], cooperative societies[142], individuals - seen as self-employed professionals[143], family businesses[144], agricultural companies with legal personality[145], economic interest groups[146], autonomous governments, any other private legal entities that also carry out economic activities.

But for economic and even psychological[147] reasons, small businesses and micro-enterprises could be excluded from law enforcement, as these debtors have a small, atomized exposure to relevant lenders (banks, utility providers, state). At most, employees of such enterprises may consider that their "exposure" to these debtors is high, since the disappearance of such a debtor would mean the disappearance of their jobs. On the other hand, the holders of such undertakings benefit from a (too large) mobility with regard to the organization of the enterprise, being able at any time to transfer its business to another legal person, modify the scope of business, close and reopen any such enterprise without

In relation to those excluded[148] from the benefit[149] of the concordate, it is found that it is absurd to restrict the rights of the legal person on the criminal grounds of the shareholders / associates, that we are in the presence of sanctions imposed on the debtor, and in this case the

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[141] Regulated by Law no. 31-1990, republished, as amended.
[142] Cooperative societies are governed by Law no. 1/2005
[143] Professionals regulated by O.U.G. no. 44/2008 on the carrying out of economic activities by authorized persons, individual enterprises and family enterprises.
[144] Ibidem.
[145] Regulated by Title II of Law no. 36/1991.
[146] Entities governed by Title V of Law no. 161/2003 on certain measures for ensuring transparency in the exercise of public dignities, public functions and business environment, preventing and sanctioning corruption (Monitorul Oficial, Part I, No. 279 of 21 April 2003).
[147] Gheorghe Piperea, op. cit., p. 50.
[148] Excluded from the beneficiaries of the law are:
a) those who have already benefited 3 years prior to an arrangement procedure;
b) if the debtor and / or the shareholders / associates / associate associations or its directors / directors have been finally convicted for several criminal acts listed in art. 16 lit. b) of Law no. 85/2014;
c) if a debtor's liability was borne by the members of the debtor's management and / or supervisory bodies, according to the provisions of art. 169 et seq. or the provisions of special laws, in order to bring it into insolvency.
[149] Gheorghe Piperea, op. cit., p. 52.

question is whether it is fair for the employees , the state, local communities, banks or even the corrupt creditors of the debtor as a personal sanction imposed on the debtor's managers to negatively affect the company's chances of safeguarding.

Employees or unions may participate in the concordat procedure only if they are also creditors. Considering in particular that the concordat procedure also aims at saving jobs as much as possible, strikes, more or less spontaneous, as well as wage claims, should be suspended during the concordat. Otherwise, the chances of safeguarding the enterprise would be greatly diminished, and the deal would fail. A "union enthusiasm" on the grounds that, with an arrangement, regular creditors are kept away, while employees should be paid better and faster or, in any case, treated separately, is contra-indicated.

2.2.8.4 The procedure.

The concordat procedure is open only at the request of the debtor. The creditors can not initiate the procedure, but it was argued[150] that theoretically, creditors could make requests for action in this procedure to oppose the opening of proceedings, but the very short time that the syndic judge and the quasi- confidential request settlement (in a council room without a citation) in such a request makes it almost impossible to intervene.

As the opening of the concordat procedure can also have a contagion and panic effect, which results from the listing of the file in the electronic system of the court portal and the quasi-negative publicity of the debtor's business, the moment of filing the claim by the debtor must be chosen great caution, in order to avoid that the request for a concordat turns into its opposite, ie in a travel ticket to insolvency[151].

The request for the opening of proceedings will briefly explain the reason for it, namely the financial difficulty of the debtor's business. If there is an expertise, an audit report, a censor report, or a decision of the general meeting of shareholders to ascertain and explain the financial difficulty, they should be submitted with the request in order to facilitate the task of the syndic judge to appreciate the appearance of financial difficulty[152].

Lack of documents, inaccuracy or irregularity of the information to be submitted under Article 24 (1) of the Law no. 85/2014, may lead to the rejection of the offer by the creditors but, on the other hand, may lead to the dismissal of the concordat by the syndic judge, regardless of whether the concordat offer was approved with 75% of the value of the claims, par. (2) second sentence of Law no. 85/2014, the syndic judge may reject the approval of an arrangement, even voted by the creditors, for reasons of legality. Shortages or discrepancies in accounting result in an incorrect analytical situation of the debtor's asset and liability and may be considered as grounds for nullity of the arrangement, as they may hide fraud to the detriment of creditors.

Regarding the appointment of the conciliator in the literature, it was argued[153] that if the debtor does not propose a conciliator by requesting the concordate, the syndic judge can not appoint one of the practitioners submitting tenders, since the concordant debtor-administrator relationship is dominated by the intuit-personae element.

In the previous drafting[154] of the preventive concordance the debtor who had facts registered[155] in the fiscal record, according to the Government Ordinance no. 75/2001 on the

[150] Idem, p. 49.
[151] Idem, p. 74
[152] Idem, p. 69
[153] Csaba Bela Nasz – op. cit., p. 230.
[154] Law 381/2009.
[155] For details see Gheorghe Piperea, op. cit., p. 70.

organization and functioning of the fiscal record, republished, was exempted from this hybrid procedure by the safeguarding of its business, its only being the voluntary insolvency. However, in the current wording, the budget claim may be challenged, the only condition that must be fulfilled is that it does not exceed 25%, alone or with other disputed claims, so that the concordat can be approved

A law enforcement problem may arise in relation to unknown creditors, not highlighted in the debtor's documents and accounts, especially those domiciled abroad, and not notified in connection with the opening of proceedings.

The fact that a creditor does not appear in the debtor's bookkeeping may also be the result of abuse of the debtor, and a claim may be generated by legal, licit or unlawful acts. Any unknown creditor, including someone domiciled abroad, who can provide evidence of a certain claim (a court order) may file an application for membership of an arrangement or an action for nullity on the grounds of fraud of the creditor.

We agree with the point of view expressed[156] in the literature that in Law no. 85/2014 does not derive this right either expressly or implicitly, it is obvious that the debtor and the creditors have the right to challenge the receivables table. Another solution would lead to an indirect violation of the principle of guaranteeing the right to property and the principle of free access to justice. First of all, creditors have the right to collect their debts, the arrangement being a way of covering them rather than making them anaiscientific; the creditors, as well as the debtor, have a legitimate expectation to obtain a beneficial result from the concordat procedure. Secondly, since creditors are not able to engage in debt claims and in creditors' claims by the conciliator administrator, they may refuse the right to appeal would be to denounce their right of access to justice.

In the current regulation of the concordat, Article 24, paragraph (5), if the draft agreement proposes reductions of the budgetary receivables, it is obligatory to present the results of the private creditor test[157].

In the case of concordat, two ways are possible (at least at the theoretical level) to reduce the tax claim[158]:

- contrary to the will of the budget lender; the creditor votes against the concordate, but it is approved by the vote of the other categories of creditors; in this situation there can be no question of the granting of state aid, the will of the state (fiscal) being contrary to the majority will of the creditors, which is contrary to the granting of the state aid;

- with the vote of the budgetary creditor; the creditor agrees to reschedule / reduce his claim; this agreement can not be considered as state aid, since we are in a semi-judicial procedure, the rescheduling / reduction being implemented through a contract that is authorized by a court order (the approval decision).

The budget lender may vote favorably to the concordate if, following a credible assessment of the debtor's assets by which the liquidation value of the company's assets was established, it becomes unlikely that the bankruptcy procedure would be less than in the arrangement.

On the other hand, State aid is under suspicion in European Community law as it has a high potential for distorting the normal competitive environment. However, the amendment of the tax claim by concordat and the state's voting can not be considered acts of distortion of the competitive environment, because we are in a special procedure, which is partly juridical and

[156] Gheorghe Piperea, op. cit., p. 73.

[157] The private creditor test is defined in art. 5, point 71, of Law no. 85/2014 on insolvency and insolvency prevention procedures.

[158] Gheorghe Piperea, op. cit., p. 89.

essentially collective, having a concurrent character, a procedure that is carried out transparently, under judicial control.

Competition may be distorted by subsidies granted by the state to economic agents following the fulfillment by the beneficiary of predetermined conditions and the agreement of the European Commission. These aids are potentially harmful to the competitive environment because they are granted by the executive power of the state. However, the concordat is the cumulative result of the approval sentence and the vote of the creditors. In addition, the granting of such State aid measures requires public authorities to draw up State aid schemes or individual State aid schemes through a government decision which must include at least the following elements: the objective, the way in which the aid is granted as well as the amount of funds allocated for this purpose from the budget of the central or local public authority, according to the legislation in the field. If the theory that the change of the tax claim in the concordat proceedings is invariably state aid is acceptable, we would be faced with an extrajudicial procedure parallel to the judicial and very complex procedure, which may take months or even years. The state aid is subject to the obligation of notification according to Government Emergency Ordinance no. 117/2007 and can only be granted after authorization by the European Commission. Such an out-of-court procedure would lead to the real impossibility of recovering debtors and, implicitly, to the disappearance of all companies in a situation of financial difficulty. Moreover, the risks and losses of the state resulting from the bankruptcy of the debtor would be high as, given the current market situation and given that the state generally is not in a position of equality with the guarantors, the state's recovered debt is in bankruptcy or almost zero.

On the basis of the bid to the concordat, the debtor may request the syndic judge to suspend all individual forced execution irrespective of the subject matter of execution or the quality of the pursuing creditor. By way of derogation from the provisions of the Code of Civil Procedure, the debtor in financial difficulty is not required to file any bail. The provisional suspension of individual enforced pursuits persists in rendering an enforceable decision to approve the concordat or to reject the offer to be matched by the creditors whose uncontested claims constitute the creditor's mass, according to the law.

The Preliminary Concordat Project must be negotiated within a timeframe that can not exceed 60 calendar days (previously, the negotiation period was 30 days) being in line with the World Bank Recommendation - B3-ICR-R0SC Principle: "(iii) some participants the market complains that, in complex cases and especially when foreign banks are involved, the period of formulation of the arrangement plan has proved to be unrealistically short. "

The most important effect of the approval of the concordat is that the insolvency procedure against the debtor can not be opened during the concordat period.

Any creditor who obtains a writ of execution on the debtor during the proceedings may file an application for membership in an arrangement or may recover his claim by any other means prescribed by law.

From the interpretation of the provisions of Article 28, (1), it is clear from the game of figures, namely, that an arrangement can be approved in the extreme situation of at least 56.25% of the claims[159] on the credentials. Which is a great advantage for the success of the procedure,

[159] The figure is based on the following calculation: if 25% of the creditors are disputed or in dispute, it means 75% unresolved creditors participate in the vote, of which 25% reject the concordat. However, 75% who vote in favor of the concordat of 75% unresolved creditors means, in fact, 56.25% of the creditors who approve the concordat, of the total credentials. Of course, the percentage is ideal, very difficult to achieve, since the percentage of creditors contested or in dispute and that of creditors who reject the arrangement must be exactly 25%, the first of the total creditor mass, and the next of the total undisputed creditors.

unlike the old regulation[160], where the concordate had to be approved by 80% of the total credentials.

If the preventive arrangement is affected by any nullity, relative or absolute, the law puts two actions in the hands of the creditors, one in the absolute nullity, one in annulment, and if the debtor fails to observe the obligations assumed by an arrangement, action in the resolution of the preventive concordat.

As regards the action for finding the absolute nullity of the preventive concordate, there is a deviation from the general[161] rule, in the sense that it is prescribed within six months from the date of the approval of the preventive concordat. The action for annulment may be exercised only by the creditors who voted against the preliminary concordat, within 15 days from the date of its approval.

Regarding the action in the resolution of the concordat, an action regulated by Article 35 of the Law no. 85/2014, and only at the hands of the meeting of the crediting conciliators, it was claimed[162] in the literature that the legislator's option was criticized. The lack of a valid judgment of the creditors' meeting should not prevent an individual action in resolving the creditors as they are part of a contract that may be suffering by the fact that the debtor fails to fulfill his obligations. The author considers that since such action is not expressly prohibited and, in addition to a commercial law, civil law always applies (as is apparent from the provisions of Article 1 para. (2) C. com.), The action for rescission / termination by a creditor individually or by several creditors in the consortium litis is admissible. In this case, the preventive concordat procedure shall not be suspended, but the syndic judge may order the suspension, for solid reasons and provided that the petitioner has lodged a deposit of at least 10% of the total amount of the receivables to be distributed to the creditors, following the execution of the preventive concordat.

Where the creditors' meeting decides to promote the action for a ruling, even if Article 21 (1) fit. c) of Law no. 85/2014 states that this meeting is the holder of the said request, it is necessary to designate a representative of the creditors who will have to sign the petition for legal action in the name of the creditors' meeting without legal personality and to stand before the syndic judge action.

The action in the resolution will have the effect of abolishing the provisions of the concordat agreement regarding the modification of creditors' claims, who have the right to initiate the debtor's forced prosecution and even to promote applications for the opening of insolvency proceedings. By the decision to admit the action for resolution, creditors may be awarded damages, according to the law.

We show, above all, that we are partly in agreement with the fact that the current regulation of the concordat removes the shortcomings of the old law. We say this because a certain confusing legal provision has also been taken up in the current regulation.

Thus, the provisions of Article 27, (1) of the old law[163] was almost identical in the new law to Article 29, para. (1), the only change being the replacement of the phrase "the finding decision" with the "approval decision", the stage of establishing the preventive concordance

[160] Article 28, par. (1), lit. c, of Law no. 381/2009 provides that the concordat arrangement must be approved by creditors representing at least 80% of the total amount of receivables.

[161] Entry in the Civil Code at Art. 1.249, par. (1): Unless otherwise provided by law, absolute nullity may be invoked at any time, either by way of action or by way of exception.

[162] Gheorghe Piperea, op. cit., p. 111.

[163] "From the date of the communication of the decision for finding the preventive concordat, the individual prosecution of the creditor signatories on the debtor and the curtailment of the limitation of the right to demand the forced execution of their debts against the debtor shall be lawfully suspended."

being deleted in the new law[164], provisions contradicting the provision of Article 28, para. (3) of the old law[165], absolutely identical to Article 30, (1) of the new law.

In order to prove the shortcomings of the quoted norm we will give the following **example**:

By the conclusion of March 28, 2016, the procedure for the preventive concordat with the company P is opened and the conciliator is appointed as the insolvency practitioner CII CGA. On 13 June 2016, by another decision, the application is accepted the administrator of the CII CGA concordant ordering the approval of the preventive concordat on the debtor P and the suspension of all the forced execution proceedings started with respect to him, this latter provision of the syndic judge being the practical assumption of the provision in Article 30, (1) of the Law no. 85/2014.

Subsequently, a non-signatory creditor of the preventive concordate, Bank X, filed a petition to the syndic judge requesting the clarification of the decision of 13 June 2016. On December 23, 2016, the syndic judge admits the creditor's request to Bank X and clarifies the meaning of the decision of the June 16, 2016 ruling that "by ordering the suspension of all enforcement proceedings commenced in respect of the debtor P" refers to the forced execution procedures initiated by the creditors signing the preventive concordat.

The reasoning behind this final judgment states: "*A careful analysis of these two rules could induce the idea of a contradiction in the sense that Article 29 (1) provides for the legal suspension of individual prosecutions from the date of communication of the approval decision to the signatory creditors, and Article 30 (1) provides for - more extensive - suspension of all enforcement proceedings from the time of issue of the approval. The question arises: to which creditors are the concordat, to the signatories, to the uncontested ones, regardless of whether or not they have signed the agreement, or to all the creditors?*

The syndic judge considers that the suspension of forced execution provided for by Article 30 (1) is distinct from the suspension provided for in Article 29 (1). The latter is applicable only if an application for provisional suspension had not been lodged or admitted previously under Article 25 (1). The suspension provided for in Article 29 (1) shall apply from the date of the communication of the approval decision (ope legis), and its effect shall be on the signatory creditors. In contrast, the suspension provided for in Article 30 (1) is judicial, with effect from the date of delivery. The duration of this suspension and its scope are closely related to paragraph (2) of the same Article, namely for a maximum of 18 months, against the non-signatory creditors against whom the claim for the maturity of receivables is also admissible.

As Bank X is not the creditor of the offer of a preventive condordat offer, it means that the enforcement proceedings are not suspended for this creditor."

By a decision of the Bucharest Court of Appeal, the solution reached by the conclusion of 16 June 2016 in the sense that "it orders the suspension of all the forced execution proceedings initiated with regard to the debtor P has been changed, refers to the forced execution procedures initiated both signatory creditors and non-signatory creditors of the preventive concordat agreement ".

In the grounds of the judgment delivered by the Court of Appeal it is stated that "by the closing of the meeting that is the subject of the request for clarification, the court has reproduced exactly the provisions of Law no. 85/2014, of art. 30 par. 1, which expressly states that "by granting approval, the syndic judge shall suspend all enforcement proceedings". Although "all" has the meaning of "full", "complete", "of which there is no one or nothing", regarding the

[164] "From the date of the communication of the decision on the approval of the preliminary concordate, the individual prosecution of the creditor signatories on the debtor and the curtailment of the limitation of the right to demand the forced execution of their debts against the debtor shall be lawfully suspended."

[165] "With the approval, the syndic judge suspends all enforcement proceedings."

forced execution procedures initiated by the creditors without any distinction or any exception by the legislator, by clarifying the conclusion of the approval of the preventive concordate, in the sense of a restriction of the all-encompassing effect initially, the limits allowed by art. 443[166] of Code of Civil Procedure. In so doing, the judge changed the effects of the judgment so that the result was not that of clarifying but of changing the device. "

3 Conclusions.

As in the European countries with an old tradition in this field, we note that two centuries ago, in Romania, in its historical regions, norms were in place that aligned with the progressive tendencies of the time, regarding the conventions concluded between the debtor incapacity for payment and its creditors.

After these rules were applied more or less successfully[167] after a break of more than 60 years in which they were either in force but not applied due to the communist regime at power between 1945-1989, or have been explicitly abolished (between 1995-2009), it has been attempted in the last ten years, it is true with small steps, the revival of insolvency prevention practices so successfully used in countries like Britain or France[168].

Of course, the success of these practices in Romania depends on many factors such as the economic environment in which it operates, entrepreneurs' mentality, national culture, the improvement of the legislative framework, but we believe that in time, as entrepreneurs will gain confidence in them and will know them the advantages will be used more intensively, and why, why not, the weight of formal insolvency proceedings will fall significantly.

Nicolae Prepeliţă

Bucharest Tribunal

Romania

[166] Art. 443. - (1) Where clarification is required concerning the meaning, scope or application of the provision of the judgment, or if it contains contradictory provisions, the parties may require the court which has delivered the judgment to clarify the provision or to remove the opposing provisions.

[167] In our researches in the national archives we discovered an concordat concluded in 1848.

[168] We are referring here to the "scheme of arrangements" in the United Kingdom and the "procédures d'alert" in the French system.

INFORMAL INSOLVENCY RESTRUCTURING: An analysis of international trends

Judge Nicoleta Mirela NASTASIE

1. Introduction

Facing the challenges generated by the proposed European Directive[169] and the efforts for harmonising the European insolvency law, one main issue is how these trends would determine changes in Romanian legislation and practices in the restructuring domain.

In search for some answers, the author of this paper looks for reference in the international doctrine. It is considered important to analyse and define the terms of out-of-court and pre-insolvency restructuring, the relationship between formal and informal insolvency, general conditions and different forms of preventive restructuring. Some relevant European practices have also been referred to.

The analysis of different legislative traditions and practices in the field of preventive restructuring, the evolution of national legislations and approaches have been described with the purpose of understanding current realities and needs for changes.

The overview of some relevant restructuring frameworks reveals a real interest for finding solutions to rescue viable businesses, but practice has demonstrated the inefficiency of pre-insolvency proceedings and also the absence of a coherent out-of-court restructuring.

2. Relations between formal and informal insolvency procedures

In the world of rescue procedures, there are three main forms: out-of-court workouts, pre-insolvency, sometimes named hybrid proceedings, and formal insolvency.

In different jurisdictions, formal insolvency may be an alternative or complement to informal restructuring mechanisms.

One proposal to solve the dilemma of the relationship between these procedures[170] is that legal systems should regulate the possibility to transform informal workouts into formal insolvency proceedings.

3. General conditions for debt restructuring

The *World Bank Principles for Effective Insolvency and Creditor Rights Systems* study[171] demonstrates the importance of informal restructuring. Not all businesses should and could be

[169] Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU, Strasbourg, 22.11.2016, COM(2016) 723 final, 2016/0359 (COD), http://ec.europa.eu/information_society/newsroom/image/document/2016-48/proposal_40046.pdf;

[170] Jose M. Garrido, *Out-of-Court Debt Restructuring*, World Bank Study, 2012, ISBN (electronic): 978-0-8213-8956-0, p.2 – 6;

[171] Leroy Anne Marie, Grandolini Gloria M, *The World Bank Report* number 106399, 2016, *Principles for effective insolvency and creditor and debtor regimes*, http://documents.worldbank.org/curated/en/518861467086038847/pdf/106399-WP-REVISED-PUBLIC-ICR-Principle-Final-Hyperlinks-revised-Latest.pdf;

object of restructuring: only viable businesses have chances to avoid formal insolvency, in their search for solutions against financial distress.

The World Bank's research paper reveals the general preconditions[172] for debt restructuring: a plurality of creditors and the financial difficulty of the business. First, when different creditors, such as financial, trade creditors, public creditors, are involved, the possibilities for obtaining an agreement are very few. Therefore, the suggestion is *"to leave non-financial creditors out of the restructuring negotiations and unaffected by the binding effects*"[173], as a condition for „*consensual agreement outside a formal insolvency process*"[174].

The second condition concerns "*the debtor's inability to service the debt*"[175].

Besides general conditions, several supplementary conditions are described. One condition refers to the viability of business. For an unviable one, the liquidation without delay is a preferable solution. When there are questions in this respect, the reorganisation formal insolvency may offer better protection. The challenge is how to establish the viability in early stages and who is in charge of the evaluation process?

The good faith and positive attitude are also very important. The debtor and creditors should admit they would have greater benefits in a restructuring agreement than in formal insolvency or individual enforcement actions.

The study also reveals the importance of *"an enabling legislative and regulatory framework*"[176], an *"a well-designed insolvency law….an effective implementation of laws*"[177]. When there is legal uncertainty, parties usually avoid negotiations and approval of restructuring agreements.

4. Different classifications

One classification, depending on the degree of judicial involvement, is talking about ***out-of-court restructuring, hybrid procedures and formal insolvency mechanisms***.

In 2012 World Bank Study[178], the terms "*out-of-court restructuring*" and "*workout"* are used as synonyms for purely contractual agreements. We can also find the term "*enhanced restructurings*" and "*hybrid procedures*", as alternatives to formal insolvency proceedings.

A recent research[179] analyses the *pre-insolvency proceedings*, with different classifications. There are three types noted: **"***workout-supporting*" ,"*hybrid proceedings", "proceedings to address hold-out in workout negotiations***"**.

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[172] Jose M. Garrido, ibid, p.6-9;

[173] Jose M. Garrido, ibid, p.6-9;

[174] *„Statement of Principles for a Global Approach to Multi-Creditor Workouts*", INSOL INTERNATIONAL 2000, p.6, https://www.insol.org/pdf/Lenders.pdf, with an updated edition, launched at the recent Quadrennial Congress in March 2017, http://www.insol.org/_files/Publications/StatementOfPrinciples/Statement%20of%20Principles%20II%2018%20April%202017%20BML.pdf

[175] Jose M. Garrido, ibid, p.6-9;

[176] Jose M. Garrido, ibid, p.6-9;

[177] *Statement of Principles for a Global Approach to Multi-Creditor Workouts*", INSOL INTERNATIONAL 2000, ibid, p.4-5,

[178] Jose M. Garrido, ibid, p.16;

[179] Bob Wessels, S. Madaus, *Rescue of Business in Insolvency Law*, European Law Institute,2017, ISBN: 978-3-9503458-9-6, p. 174 – 176; https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Instrument_INSOLVENCY.pdf;

Another recent classification[180] describes hybrid proceedings, "*out-of-court settlements*" and "*confidential procedures*".

It is also points out the distinction between the workout and turnaround management, as '*'business transformation project''*[181], with the explanation that the workout is rather a creditor-led process of crisis management and financial restructuring, while in a *turnaround process,* the debtor-led mechanism priority becomes the business improvement.

5. Advantages and disadvantages of different informal restructuring proceedings

How to establish whether **contractual workout** is the real answer for a debtor in financial difficulty? What are the main features of these mechanisms?

„*Expeditious rescue or workout*" is considered by the financial institutions to give better results; consequently, financial institutions should be encouraged to develop methods „*for consensual agreement outside a formal insolvency process",* by supporting initiatives of national or international authorities.[182]

Some relevant benefits should be noted: no judicial involvement and adaptability. "*Workouts"*[183] allow a **larger flexibility for negotiation**. Other positive elements[184] are: the inapplicability of absolute priority rules, the **possibility for different treatment to creditors**; no mandatory conversion of credits to local currency; creditors can put into effect their security and sett-off rights; no changes on contractual provisions and the execution of contracts, unless all parties agree to modify them.

Procedural rules, specific for contractual negotiations, give greater leeway, which can create a proper atmosphere for discussions.

The time is an essential element. In informal proceedings, **discussions and negotiations between creditors and debtor are faster**. The challenge is to convince creditors that **no judiciary intervention and procedural requirements**, conjointly with a quick identification of the proper agreement, may increase the possibility for recovering their loans.

We should not forget **less publicity, less of stigma**, and no formal control of the debtor business. The company may operate the business freely, without any changes in the management.

Minimum cost is also very important, even if some experts and/or advisors participate and support the process.

In the World Bank Report[185], disadvantages are analysed: the rigidity of the approval procedure, with the requirement of unanimity; fewer possibilities to promote actions for liability; difficult negotiations when a large number of creditors is involved, or problems generated by the recognition process in foreign courts.

There is no single answer to the question "*what type of procedure to choose?*", but a case-by-case analyse. The question is not whether informal proceedings are superior to

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[180] **St.** Bariatti, I. Viarengo, F. C. Villata, F.Vecchi**,** *The Implementation of the New Insolvency Regulation, Recommendations and Guidelines,* p.1-13, MPI Luxembourg, the Universities of Milan and Vienna, 2016, JUST/2013/JCIV/AG/4679, http://insreg.mpi.lu/Guidelines.pdf;

[181] Stuart Slatter, David Lovett, *Corporate turnaround, Managing Companies in Distress, Revises edition*, Penguin Books, 1999, p.5-9;

[182] Statement of Principles for a Global Approach to Multi-Creditor Workouts", INSOL INTERNATIONAL 2000, ibid p.4-5;

[183] In the definition and interpretation of Jose M. Garrido, ibid, p.16;

[184] Jose M. Garrido, ibid, p.8-14;

[185] Jose M. Garrido, ibid, p.8-16;

traditional insolvency, but to establish if they may obtain better results with less cost. Consequently, the difficult issue is to establish the real financial and economic condition of the business, its viability and real chances of recovery.

6. Comparative analysis of three categories of informal restructuring

The author of this paper will describe different forms of informal restructuring, having as starting point the World Bank research[186], which analyses ***contractual workouts, enhanced restructurings and hybrid procedures.***

6.1. Contractual workouts or out-of-court debt restructuring

6.1.1. Definition and characteristics

The out-of-court restructuring involves changes in contractual liabilities of a debtor without any judicial intervention. As a contract between the debtor and its creditors, the out-of-court agreement determines changes in the creditors' rights and in their relationships.[187]

They are **defined** as multilateral contracts dealing with *"the conduct of the debtor and the modification of the creditors' rights"*[188].

The World Bank Report[189] describes some **features** related to their flexibility, with no requirements for evidence of financial distress, no procedural rules for negotiation, and total liberty to agree on any issue.

6.1.2. Conditions:

The informal procedure may be promoted by the debtor and creditors. The position of the debtor is not a strong one; he must convince the relevant creditors that his business is a viable one, and it offers better prospects than in insolvency.

Human factor is essential. If creditors have the possibility, information and time to evaluate the debtor proposal in relation to their interests, they may see it as a feasible alternative.

What **factors** may prevent the completion of such negotiations and what can be done to improve the conditions for an efficient workout? What reasons could a creditor have for its resistance in work-out-negotiations?

One issue is **the creditors' refusal to accept the debtor's offer.**

Stakeholders have different priorities. It is very important for a company to have a clear picture of various classes of stakeholders. One very successful approach[190] allows lenders and banks to lend more to fund trading and receiving substantial *"influence and ultimate control".* The increasing common interest of creditors in restructuring may lead them to pre-coordination[191].

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[186] As main sources of inspiration it is considered the paper of Jose M. Garrido "*Out-of-Court Debt Restructuring*, WORLD BANK Study", ibid

[187] An analysis in Jose M. Garrido, ibid, p.16;

[188] Jose M. Garrido, ibid, p.28-39;

[189] Jose M. Garrido, ibid, p.28-39;

[190] Stuart Slatter, David Lovett, *Corporate turnaround, Managing Companies in Distress, Revises edition*, Penguin Books, 1999, p.308, 14, *Financial Restructuring;*

[191] Stuart Slatter, David Lovett, ibid, p.308, 14, Financial Restructuring

A recent study makes the difference between rational „*rational hold-outs*" and „*strategic hold-outs"*[192] of the relevant creditors. In the first category creditors who do not trust in the proposal may be included, because they do not understand why the haircut of their claims is necessary, or because of lack of trust in the debtor's management. We should see the provision of complete and relevant information about the debtor's business and financial situation, and the use of soft law mechanisms or international standards as solutions to overcome the impasse generated by the lack of confidence [193]

In this respect, a set of general principles was developed in the 1970s by the Bank of England, explaining the voluntary, collective approach, adopted by banks in the United Kingdom, when facing with a company in financial difficulty.[194]

The eight principles of *INSOL International Statement of Principles for a Global Approach to Multi-Creditor Workouts*, set out „*to be regarded as statements of best practice for all multi-creditor workouts*"[195]should also be mentioned.

Creditors may be represented by a leading creditor or creditors' committee, whose role is to coordinate discussions. In this sense, the Fourth Principle INSOL International represents a veritable example of „*soft law*" best practice for „*multi-creditor workouts*"[196]. Creditors should coordinate in relation to the debtor, to act *"as a whole"*[197], and may appoint specialists to assist them. Coordinators should be *"facilitators of the negotiation process*", ensuring the proper information and advice for all creditors, instructing other professionals, such as accountants or lawyers. The coordinator may be a representative of the financial creditor which has "*the greatest or one of the greatest exposures to the debtor*", because the attitude of the coordinator to debtor's proposals is usually similar to the reaction of relevant creditors.[198]

Some „*trust-building instruments*"[199] are, for example, standstill-agreements.

What other reasons may a creditor have for its **resistance in work-out-negotiations**? In the attempt for a substantial profit or the recovery of the claim at the nominal value, the refusal of the second category of creditors may be determined by their desire to sell the claim under better conditions.

It is observed that "*relative size or nature of exposure or a desire on its part to terminate the relationship with that debtor"* should not be considered as *"legitimate justification"*[200] for this refusal.

In the *Seven INSOL International Principle*[201], the debt trading is described as a feasible possibility for those creditors and financial institutions to exit the rescue process and, consequently, enlarge the power of the remaining ones in the process.

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[192] Bob Wessels, Stephan Madaus, Gert-Jan Boon, ibid, p.176-182;
[193] Bob Wessels, S. Madaus, ibid, p. 175-183;
[194] J.H. Armour and S. Deakin, *Norms in Private Insolvency: the London Approach to the Resolution of Financial Distress*, in: 1 Journal of Corporate Law Studies 2001, 21, https://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/working-papers/wp173.pdf;
[195] INSOL International *Statement of Principles for a Global Approach to Multi-Creditor Workouts*, ibid;
[196] „The Fourth Principle: „*The interests of relevant creditors are best served by coordinating their response to a debtor in financial difficulty. Such co-ordination will be facilitated by the selection of one or more representative coordination committees and by the appointment of professional advisers to advise and assist such committees and, where appropriate, the relevant creditors participating in the process as a whole*"; INSOL International Statement of Principles for a Global Approach to Multi-Creditor Workouts, ibid;
[197] INSOL International *Statement of Principles for a Global Approach to Multi-Creditor Workouts*, ibid. p.6-11;
[198] INSOL International *Statement of Principles for a Global Approach to Multi-Creditor Workouts*, ibid., p.22-23
[199] Bob Wessels, Stephan Madaus, Gert-Jan Boon, ibid, p.175;
[200] *Statement of Principles for a Global Approach to Multi-Creditor Workouts* II, INSOL International 2017, ibid;
[201] *Statement of Principles for a Global Approach to Multi-Creditor Workouts* II, INSOL International 2017, ibid, p.6-11;

One solution described is to *"ban on debt trading which would deny strategic investors to acquire claim against debtor*"[202], but denying the right to trade the claims may affect all creditors and determine action to enforce their rights against debtor. It is observed[203] that a more practical solution may be the involvement of the court to bind dissenting creditors, in formal insolvency or some types of pre-insolvencies.

A particular interest should be given to the idea of legislative intervention to force creditors to "*cooperate positively*". In this respect the World Bank Principles B3 and B5.2 militate for an enabling environment, with *"norms that facilitate effective internal procedures and practices"*.[204] For "*holdout creditors*" the World Bank proposes statutory regulation of a majority, the exclusion of certain creditors as employees from the negotiations and effects.[205]

What other **problems** may appear in out-of-court proceedings? What are the **challenges**?

In the case of fraudulent behaviour of a debtor, when an investigation of antecedent transactions is necessary, if formal proceedings fit properly, or the debtor's directors do not accept to take the risk of possible liability for using workout instead of formal insolvency, or some problems with foreign recognition are anticipated, insolvency proceedings may become the *right way* for that debtor.

Some **procedural aspects** should be analysed: the access of experts to confidential documents, when the debtor doesn't cooperate; the role of the independent professional; what an efficient period when the creditors' enforcement actions should be suspended is.

What **problems** should be solved in the negotiation period? The debtor should take some measures to maintain the value of the business, to find enough financial support for payment of small creditors. Some discussions around the term "*super-priority for ongoing funding*" are current. They may be under the form of repayment in advance or a new security interest.[206]

Some provisions in the law should be introduced[207]for allowing the directors to negotiate, without the duty to file for formal insolvency. Some measures to avoid abuse should also be considered. In the process of negotiation, the law should admit *"the relative position of creditors"*: the leading position of a creditor with bigger claim, the recognition of a secured creditor's status.

We may conclude that factors to support ***out-of-court restructuring***[208] are: reciprocal presentation of relevant information; providing enough time for an efficient negotiation; early warning mechanisms; the participation of an independent advisor or expert***;*** legal framework for "fresh money"***;*** favourable tax treatment of losses resulted from these proceedings; soft law instruments such as **"***codes of conduct*"[209].

6.2. Enhanced restructuring

Consolidated restructuring is done by contractual arrangements which are reinforced by the existence of norms or other types of contractual or legal arrangements.

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[202] Bob Wessel, ibid p.179;
[203] Bob Wessel, ibid p.179;
[204] Principle B3 and B5.2 of the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes (2015), ibid, par 20-44;
[205] Jose M. Garrido, ibid, p.56;
[206] Jose M. Garrido, ibid, p.28-39;
[207] Jose M. Garrido, ibid, p.28-39;
[208] Bob Wessels, Stephan Madaus, Gert-Jan Boon, ibid, p.176-182;
[209] Bob Wessels, Stephan Madaus, Gert-Jan Boon, ibid, p.176-182;

In the World Bank opinion[210], there are some important factors to consider when defining enhanced restructuring procedures, such as the adoption of "*best practices*"[211], as those described by international institutions or associations.

As for financial institutions, characterised by a higher degree of formality, the need for their stronger commitment in the process should be taken into account. Could these institutions be obliged to participate to the development of such mechanisms? The World Bank guidance[212], mentions this possibility, even with penalties for refusing to respect specific deadlines, because the participation of financial institutions to the restructuring is necessary for the predictability of the entire financial system.

The doctrine[213] revealed different instruments for enhanced procedures, such as social norms, alternative dispute resolution methods, contractual agreements.

6.3. Hybrid procedures

6.3.1. Definition and characteristics

The procedures are named „*hybrid"* because they include some elements specific to formal insolvency, to avoid the shortcomings of contractual workouts. The essence of these changes refers to the court participation. Also called *"pre-insolvency compulsory arrangements*"[214], they have both characteristics of informal agreements and formal insolvency.

As it is observed in the World Bank Study[215], it is impossible to identify and classify *"all hybrid procedures, existing in numerous jurisdictions".*

Some key **features** should be noted: the binding effects for the minority of creditors, "*the change from unanimity to majority*", from individual to *"collective consent*"[216]; the involvement of an independent authority, court or administrative body.

Characteristic to hybrid procedure is that the debtor and a majority of creditors have already reached o settlement, but no voting before filing; the real purpose is to enforce the agreement to the minority of dissenting creditors. A minimum intervention of the court and a fast procedure are specific to hybrid mechanisms.

6.3.2. Conditions and forms.

There is a large variety of hybrid proceedings. Sometimes, they have features of "*debtor in possession*", when the debtor continues to administer the business and assets. In other jurisdictions, they are part of the insolvency system.[217]

The appointment of a mediator, insolvency practitioner or another independent expert to initiate the dialog between the debtor and creditors, assist and improve the negotiation process is also a possibility.[218]

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[210] Jose M. Garrido, ibid, p.28-39;
[211] Jose M. Garrido, ibid, p. 39-47;
[212] Jose M. Garrido, ibid, p. 59;
[213] Jose M. Garrido, ibid, 39-47;
[214] see Garcimartìn, *The review of the EU Insolvency Regulation: some general considerations and two selected issues (hybrid procedures and netting arrangements*), NVRII Preadviezen/Reports 2011, pp. 27-36, http://www.naciil.org/uploads/files/preadvies-2011.pdf;
[215] Jose M. Garrido, ibid, p.47-51;
[216] Jose M. Garrido, ibid, p.47-51;
[217] Jose M. Garrido, ibid, p.47-51;
[218] Some requirements, related to the need to call a proper specialist, trained for the negotiation an efficient dialog between parties, an independent person, with no conflict of interests, should be fulfilled for the participation in the

Procedures with a stay on enforcement actions and no debtor's obligation to file for insolvency are other alternatives.

Proceedings where the court confirms or checks and approves a basic agreement between creditors and debtor, named *"pre-packaged bankruptcy*"[219], or *"informal, pre-negotiated agreement"* in principle B4.2 of World Bank Principles[220], are present in some systems.

The "*pre-negotiated plan*", where the debtor, before filing, asks the creditors for votes on the plan is also used. The debtor files for formal procedure to obtain the court approval. Pre-packaged sale is a sale of the business as a "*going concern*", in a very early stage.

Examples of hybrid procedures are the "*schemes of arrangement*" in England, or the "*sauvegarde financiére*" in France.

Looking for **factors to improve** hybrid procedures, the World Bank study emphasises the need for **"***regulatory guidelines for pre-packaged plans***"[221],** preconditions related to issues such as: the creditors' authorization to participate to the negotiation; rules dealing with the confidentiality of information; minimum requirements for filing the court; the plan validation before resolving the disputes between creditors; the possibility for creditors to adhere to the plan; the possibility to convert the hybrid procedure to formal reorganisation.

Related to **hybrid procedures,** there is legal uncertainty when cross-border elements intervene, issues such as the applicable law, enforcement and recognition. Two practical solutions were emphasised in the UE doctrine: to enlarge the scope of the European Regulation[222], or to develop parallel framework for hybrid procedures, as an "*autonomous instrument*"[223]. The first approach impugns an analysis in relation to the EIR-Recast and changes in terms of its scope. There is no clear definition in the Regulation related to the concept "*pre-insolvency "and "hybrid*" procedures. From the Recital 10 and Article 2(3) we can conclude that the concept "*debtor in possession*" is similar to "*hybrid procedure*" and their elements should be found in the Article 1(1) EIR.

It was observed[224] that most European hybrid procedures, which are not in the Annex A, are considered outside the scope of the Recast. This doesn't mean that, without exception, these procedures fall in the scope of Brussel I Regulation[225], because of their different nature, on one hand, and on the other hand, because the rules of the Brussel I Regulation are not considered to be suitable for these procedures.[226] Two possible situations are described. First, for the proceedings not listed in Annex A, but meeting the conditions of Article 1(1) EIR, the national rules of the insolvency law or the private international law should be applicable. The

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hybrid procedure. His nomination should be made by a court, a government office, or other authority. For more details, see Garcimartìn, ibid, p. 27-36;

[219] Jose M. Garrido, ibid, p.47-51;

[220] World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes (2015), ibid;

[221] Jose M. Garrido, ibid, pp.47-51, par.100;

[222] For the text of the Recast, see *Regulation (EU) 2015/848 of the European Parliament and the Council of 20 May 2015 on insolvency proceedings (*Recast), published in the Official Journal O.J. L 141/19 of 5 June 2015 (http://eur-lex.europa.eu/legal-content/EN/TXT/PDF).

[223] see *Garcimartìn*, ibid, p. 27-36;

[224] St. Bariatti; I. Viarengo; F. C. Villata; F.Vecchi**,** *The Implementation of the New Insolvency Regulation, Recommendations and Guidelines*, JUST/2013/JCIV/AG/4679, MPI Luxembourg, the Universities of Milan and Vienna, 2016, pp.35; http://insreg.mpi.lu/Guidelines.pdf;

[225] The original *Brussels Regulation (44/2001*), the recast version of the Regulation applies from 1 January 2015. *Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF;

[226] For ample analyses of the issue, see St. Bariatti; I. Viarengo; F. C. Villata; F.Vecchi, ibid, p.36-37;

second situation is when proceedings are not listed in Annex A, are based on the company's law, meet the conditions of Article 1(1), but they are not used just for solving insolvency problems. The most relevant example is, of course, the situation of the UK scheme of arrangement.

7. International context

Large insolvency proceedings with international implications may lead to the *„risk of inconsistent judgments on a truly monumental scale*".[227] In the attempt to generate some debates on this issue[228], professor Mason[229] describes some possible solutions.

A key for cross-border insolvency is how local legal systems and their specific features produce different consequences in parallel litigations, and how this situation affects the rights and obligations of the interested parties. In informal restructuring as well in formal insolvency, legislative and practical differences explain the attempt to select from various jurisdictions the most efficient one, or the most appropriate to the aims of the applicant. Consequently, domestic insolvency laws should be adapted to the actual *"complex business structures engaged in integrated business and financial operations"*[230].

National insolvency laws, created for individuals and single corporate debtors, are not always adapted for multinational business and cross-border litigations. In practice, the cross-border use of the "*insolvency agreements*"[231] may be the response for the multitude of problems generated by international insolvencies.

Subsequent, the need for guidance has conducted to the development of general principles and guidelines, soft law mechanisms[232] for cooperation. In this respect, the cross-border insolvency agreement is a possible solution, conjointly with harmonized insolvency framework.[233]

8. Specific subjects related to informal debt restructuring

8.1. Pre-insolvency proceedings in France and the UK

A brief comparative analysis of the informal pre-insolvency proceedings regulated in the UK and France should be interesting for the Romanian system, as sources of inspiration and

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[227] Rosalind Mason and John Martin, *Introduction in Conflict and Consistency in Cross border Insolvency Judgments*, http://www.uncitral.org/pdf/english/congress/Papers_for_Programme/46MASON_and_MARTIN-Conflict_and_Consistency_in_Cross_border_Insolvency_Judgments.pdf;

[228] Congress *Modernizing International Trade Law to Support Innovation and Sustainable Development to celebrate the 50th annual session* of UNCITRAL 4-6 July 2017, Vienna;

[229] Professor of Insolvency and Restructuring Law and member of the Commercial and Property Law Research Centre, Queensland University of Technology, Brisbane, Australia;

[230] Rosalind Mason and John Martin, ibid;

[231] Rosalind Mason and John Martin, ibid;

[232] In this respect see: *Communication in Cross-Border Cases* published by the American Law Institute (ALI) and International Insolvency Institute, http://www.ali.org/doc/Guidelines.pdf; the *European Communication & Cooperation Guidelines for Cross-border Insolvency* adopted by INSOL Europe in 2008, http://www.abiworld.org/committees/newsletters/international/vol4num4/European.html; UNCITRAL *Practice Guide on Cross-Border Insolvency Cooperation* of 2009, http://www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_english.pdf.; *EU Cross-Border Insolvency Court-to-Court Cooperation Principles Final Public,* 2014, http://www.tri-leiden.eu/uploads/files/Final_Public_Draft_-_EU_JudgeCo_Principles.pdf;

[233] Rosalind Mason and John Martin, ibid, p.18;

lessons for future development. France and the UK alike have advanced informal insolvency procedures and a flexible legal framework.

The French law[234] provides three pre-insolvency institutions: the mandate ad hoc procedure, the conciliation and a new debtor in possession procedure, called "*safeguard" (sauvegarde*).[235]

The UK insolvency law[236] regulates the *company voluntary arrangement*, a debtor in possession procedure, and the *scheme of arrangement*, as alternative corporate rescue. [237]

The intervention in early stages is crucial in both systems, but different approaches may be observed. The UK system is traditionally characterized by a "*pro creditors*" orientation, but important legislative changes have been introduced in the insolvency framework. In France, the preservation of the business and jobs of the employees is the main objective of the pre-insolvency proceedings.[238]

The French mandate ad-hoc[239] begins with a request addressed to the President of the Commercial Court to appoint a "*mandat**é**e"*. The procedure is short, characterised by fewer formalities, flexibility, confidentiality.

The conciliation is based on confidential negotiations on contractual rules. By opening the procedure, the Court shall name a conciliator *(conciliateur),* to assist the company in the process of negotiations within a period of 4 months. The Court or the President can ratify the conciliation agreement under certain conditions.

The safeguard procedure, inspired by the American Chapter 11, is meant to facilitate the reorganisation of a distressed company. The court, at the request of the debtor, will appoint an administrator to assist and supervise the debtor, but this is not mandatory. The directors are not removed from the company's management, unless the public prosecutor makes a request.

8.2. A short analysis of the English "scheme of arrangements"

8.2.1. Importance

The "*Scheme of arrangements***"** represents significant mechanisms, used commonly to make changes in the control of businesses, or restructure debts. It is a reality that these procedure is used in different other situations, as *"extremely valuable corporate mechanism for restructuring both debt and equity"*[240]

[234] Loi n.2005-845 du 26 juillet 2005 de sauvegarde des enterprises amending Book VI of the French Commercial Code, available in https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000632645&dateTexte=&categorieLien=id, Ordinance no.2014-326 of 12 March 2014;

[235] For details see Alexandra Kastrinou, *Comparative Analysis of the Informal Pre-Insolvency Procedures of the UK and France*, http://onlinelibrary.wiley.com/doi/10.1002/iir.1247/abstract;

[236] The Insolvency Act 1986, http://www.legislation.gov.uk/ukpga/1986/45/contents;
The Insolvency Act 2000; https://www.legislation.gov.uk/ukpga/2000/39/contents ;

[237] After the enactment of the Insolvency Act 1986, the Enterprise Act 2002 introduced significant improvement to the restructuring regime.

[238] Rebecca Parry, in K. Gromek Brok and Rebecca Parry, *Corporate Rescue in Europe, an Overview of Recent Developments from Selected Countries in Europe* (Kluwer Law International, 2004),pp.13;

[239] Paul Omar, Anker Sorensen, „ *The French Experience of Corporate Voluntary Arrangements*" 1996, 7(3), ICCLR 97-103;

[240] Jennifer Payne, *Scheme of arrangement*, University of Oxford, Cambridge University Press, online publication: July 2014, online ISBN:9781139061049 Book DOI: https://doi.org/10.1017/CBO9781139061049; p.389;

In the schemes the company's proposal for debt restructuring is approved by 75 % of the creditors in each class. They address the Court to sanction the agreement. The scheme becomes binding to all creditors.

8.2.2. The"*Scheme of arrangements*" and the forum shopping

One frequent concern is the case of foreign entities, especially for the restructuring of companies with COMI in different EU member States, even without moving their COMI to England.[241]

A response to this concern is that the scheme represents the idea of a "*good forum shopping*", giving the example of *Re Rodenstock GmbH*[242], an English scheme for rescuing a foreign company, when the national legislation didn't permit such a procedure. One explanation is that forum shopping is in the creditors' favour, anticipating and using the English law for their agreement to restructure the debts of the company, and permitting its rehabilitation.[243]

The schemes are not in the Annex A of the Regulation (*EU) 848/2015 on insolvency proceedings*, and because of Recital 16, it is not possible to be included in Annex A in the future.

It has recently been observed[244] that it is not unusual for creditors with COMI/ domiciled outside the UK to be part of the schemes brought to the UK Courts under Article 8 or Article 25 of the Regulation EU no. 1215/2012[245], founded on the idea that the claim is *closely connected*[246], or based on the idea of *English jurisdiction clause* agreed by creditors[247]. The effect is the automatic recognition of the English scheme of arrangements in other EU jurisdictions. It is also observed that it is not clear how Article 8 is considered applicable for those proceedings by the English courts, from decisions establishing that a single scheme creditor with domicile in the UK is sufficient for the English jurisdiction, to decisions expressing the idea that the number of creditors with domicile in the UK and value of their claims should be taken into consideration. Another issue brought to the English Courts is the interpretation of the *"asymmetric jurisdiction clause"* in the application of the Article 25 for the scheme of arrangements. The case of contractual clause providing exclusive jurisdiction on

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[241] See e.g. *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch); [2012] BCC 459, *Re Primacom Holdings GmbH* [2012] EWHC 164 (Ch); [2013] BCC 201, discussed in Chapter 7, Jennifer Payne, *Scheme of arrangement*, University of Oxford, Cambridge University Press, online publication: July 2014, online ISBN:9781139061049 Book DOI: https://doi.org/10.1017/CBO9781139061049;

[242] *459 Re Rodenstock GmbH*; In the case of a solvent German company with center of main interests in Germany, with no "establishment" in the UK and majority of senior lenders in UK, senior lenders used the schemes of arrangement to obtain an agreement subject to English law and subject to jurisdiction of English court, the scheme was approved by creditors. Some important questions are in discussions: if the English court had jurisdiction to sanction scheme in relation to solvent company; whether is a sufficient connection with the jurisdiction; [2011] EWHC 1104 (Ch), https://www.insol.org/_files/Fellowship%202015/Session%206/Rodenstock.pdf;

[243] Jennifer Payne, *Scheme of arrangement*, ibid;

[244] Ryan Perkins, *Schemes of Arrangement and the Judgments Regulation: The New Authorities*, South Square Digest, September 2017, p. 50-56, http://www.southsquare.com/files/Digest%20Sep%202017.pdf;

[245] REGULATION (EU) No 1215/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF;

[246] Article 8 of the Regulation EU no. 1215/2012provides: "*A person domiciled in a Member State may … be sued … (1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings …";*

[247] Article 25 of the Regulation EU no. 1215/2012;

the English courts only for financing parties (creditors), has been discussed in some recent English cases. The most common solution of English Courts is that financial creditors are able to sue the debtor in other jurisdictions, but not to contest the jurisdiction of the English courts, when they are seised.[248]

Ample analyses of the nature, effects and the recognition of the schemes of arrangements with cross-border elements are made by scholars and professionals, trying to answer questions such as: is putting the scheme of arrangements in a corporate statute the answer? How to solve the problem of uncertainty of recognition in the case of foreign companies? Does the Brussel I biss apply to the scheme considered as having civil and commercial nature? Is the applicability of each state's domestic international private law the answer for issues such as jurisdiction and recognition of the schemes after (if) the UK leaving the European Union?

8.3. The lessons from the French "procédures d'alerte"

The experience of the French ***„procédures d'alerte***" is also an important lesson for Romanian legislator and practitioners. According to the French law, procedures are applicable for all companies, groups of companies and individuals, for informing directors and decision-makers of significant facts that may compromise the business, and allowing urgent action to be taken.[249]

Information is essential to detect existing or emerging difficulties.

These mechanisms of prevention are characterised by the plurality of procedures, variable rules, available to different entities or businesses. The alert may be given by the action of an approved warning group *(le groupement de prévention agrée*), the auditors (*commissaire aux comptes*), the employees' associations or the president of the commercial court *(le president du tribunal du commerce ou de grande instance),* but the alert can be also given by shareholders, or associates.[250]

The alert may be promoted by the ***"group de prévention".*** When the directors of small companies don't have the capacity, time or education to analyse and discover financial and economic problems threatening the continuation of their activity, the French law provides assistance through the group "*de prevention*". The group is usually in the form of a private company or association, offering to its members a confidential analysis of the accounting and financial situation.[251] The membership of the group is opened to all entities and individuals registered for the conduct of an economic activity.[252] It is an optional procedure, which doesn't create any obligation for action, according to the proposal made by the group.

The prevention may be exercised by **the "*commissaire aux comptes***", having investigative duties and control, through his financial, accounting and judicial competences. He

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[248] For an analyze of the recent cases ,as *Re Vietnam Shipbuilding Industry Group[2014] BCC 433 at [15]-[16]; Re Van Gansewinkel Groep BV[2015] Bus LR 1046 (Ch); Re Hibu Group Ltd [2016] EWHC 1921 (Ch); Re Global Garden Products Italy SpA[2016] EWHC 1884 (Ch),* see Ryan Perkins , *Schemes of Arrangement and the Judgments Regulation: The New Authorities* , South Square Digest, September 2017, p. 50-56, http://www.southsquare.com/files/Digest%20Sep%202017.pdf;

[249] For details, see Pierre-Michel le Corre, Chapter 122 « *Procédures d'alerte* », in « *Droit et Pratique des procédures collectives »*, Dalloz, Neuvième Edition, 2016.

[250] Alain Lienhard, „*Procédures d'alerte" in „Procédures Collectives*", 7e édition, Delmas, 2016,

[251] M.Jeantin, „*La loi du 1er mars relative à la prévention et au règlement amiable des* difficultés *des entreprises",* 1984, p.41;

[252] *France la prévention des difficultés des entreprises*, 18 janvier 2017 - Direction de l'information légale et administrative (Premier ministre), Ministère chargé de la justice, https://www.service-public.fr/professionnels-entreprises/vosdroits/F22321

transmits one request for explanations ("*une demande d'explication*") to the company's directors and also informs the commercial tribunal about his actions and results.

The alert is also **made by the president of the tribunal.**

The French law promoted after the 2015 recognises the possibility for the President of the Commercial Tribunal where the company has its headquarters to take action, when the documents or procedures lead to the conclusion the business is under financial distress.

The President may invite the management to consider with him some measures, and, if necessary, he may obtain from the auditors, administrations, social agencies and the Banque de France, members and representatives of the employees, the associations of the company, public administrations, as well as departments responsible for the centralization of banking risks and payment incidents, auditors, information on the economic and financial situation of the company.[253] Directors may ask the Commercial Tribunal for an **interview**. They are assessed to make their own diagnosis of financial difficulties with a **self-diagnostic chart**.[254]

It is observed that the French judicial supervision is indeed very active not only in the alert mechanisms, but in most of judicial prevention proceedings, where *"judicial omnipresence is the rule and contractual freedom the exception*".[255] What is special is the availability of a variety of canals for information about the situation of the society in difficulty.

The procedure usually commences with the President organizing a "*cellule de prévention*", with judges in exercise, following three important purposes: assuring the information and communication, early detection of difficulties; finding the proper solution, as ad-hoc mandate or "*conciliation*" (*"La prévention – anticipation la préventions détection ; la prévention – traitement"*).[256]

The debtor is summoned for a confidential interview, to inform on different available legal mechanisms. After the meeting, the magistrate may establish another meeting, continue analysing the situation, appoint a *"dirigeant*" to promote a collective procedure in 45 days. After the meeting, a minute is signed.[257]

It was observed that the success of the mechanism depends on the judge abilities and competences, his capacity of understanding the information provided, his pragmatism and psychology of communication, so to become a *"véritable partenaire pour l'entreprise en difficulté".*[258]

The early detection of the cessation of payments with the mechanisms of the **"***procédures d'alerte***"** is in the center of a real judicial policy[259] organized by the commercial courts, an

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[253] France, la prévention des difficultés des entreprises, 18 janvier 2017 - Direction de l'information légale et administrative (Premier ministre), Ministère chargé de la justice, https://www.service-public.fr/professionnels-entreprises/vosdroits/F22321;

[254] An application form is available to the public to the following address: prevention@tribunauxdecommerce.fr.; The GIE Infogreffe provides a self-diagnostic chart; a prevention information brochure (produced by the NMC) and appointment Request Form are available online; for more information see "*Prévention des difficultés des entreprises*", at http://greffe-tc-roanne.fr/index.php?pg=pc_prevention or https://www.infogreffe.fr/informations-et-dossiers-entreprises/prevention.html;

[255] Aymar Toh, *„La prévention des difficultés des entreprises, étude compare de droit français et droit OHADA*", étude doctoral, Université de Bordeau, 2015, Par 825, ISBN13 : 978-2-275-05674-6, https://tel.archives-ouvertes.fr/tel-01282659/document;

[256] Alain Lienhard, „Procédures d'alerte" in „Procédures Collectives", 7e édition, Delmas, 2016, par 14.22-14.33 ;

[257] Alain Lienhard, „*Procédures d'alerte*" in „*Procédures Collectives*", 7e édition, Delmas, 2016, par 14.22-14.33 ;

[258] E. Borcard, "*Le juge consulaire : un partenaire pour les chefs d'entreprise* », LPA, 2008, p.85, described in Alain Lienhard, „Procédures d'alerte" in „Procédures Collectives", 7e édition, Delmas , 2016, par 14.22-14.33, par 186 ;

[259] I Raibaut, "*Une politique juridictionnelle : la prévention des difficultés des entreprises,* 2009, in Alain Lienhard, „*Procédures d'alerte" in „Procédures Collectives*", 7e édition, Delmas , 2016, par 14.22-14.33, par 186 ;

extraordinary example of the judicial active involvement on the prevention and rescue of viable businesses.

10. Instead of conclusions

The main goal of this study is to find some explanations and provide some themes for debates and for future research. Instead of conclusions it opens the door for new questions.

From the public data it is not clear if in the Romanian financial system there are some practices to help the out-of-court restructuring. It would be interesting to establish if the most important financial institutions have developed some guidelines enabling restructuring informal procedures between banks and debtors in financial difficulties, and if they may become publicly available.

It is certain that some questions need urgent answers. Are some provisions for assistance in out-of-court procedures necessary for Romanian law system? Do we need a rapid and inexpensive out-of-court procedure for small and medium enterprises? Would the creation of a "*soft law*" practical guidance to support out-of-court restructuring and pre-insolvency proceedings be feasible in Romania? What should be the main elements of such mechanism? In the case of banks or other financial institutions it may be useful a code of conduct on voluntary consensual procedure? Has the Romanian National Bank the central role for developing a set of rules with binding effects for banks or other financial institutions, in the absence of another competent financial association? What is the role of the judiciary in the process?

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SYSTEMS OF LIABILITY OF DIRECTORS: A COMPARISON BETWEEN ROMANIA AND 2 OTHER EU LEGISLATIONS, WITH SPECIAL REGARD TO THE CAUSAL LINK IN DIRECTORS' LIABILITY FOR THE INSOLVENCY COMPANY'S DEBTS

Mihai LANŢOŞ

1. Introduction

Insolvency is based on a default situation of a company in upholding its obligations, usually from a financial perspective. Because the premises are default situations, automatically questions regarding liability arise. „Who is to blame for the losses creditors face?" More importantly: „Who can be held liable for these losses?" Because directors or *de facto* managers are the persons whose actions are those of the company, these are the usual targets of liability claims. The present analysis aims to determine the general outline of directors' liability for the default of a company in Romania and compare it to the systems of Germany and the United Kingdome.

Affectio societatis, recognized by all three analyzed jurisdictions, gave rise to judicial persons as intermediaries of people's desire to conduct trade and their unwillingness to risk all of their wealth. In order to form separate patrimonies, companies are set up and liability of the members is limited to their investment.

But this must not allow members to abuse this limitation. Protection provided by the limited liability of the company must only be allowed for good-faith traders who uphold the rules of the market. Although damages could be caused to third persons (mainly creditors of the company), good-faith trading should only allow for the companies' wealth to be distributed amongst creditors. In this situation, a company member will only loose his or her investment. So, the same *affectio societatis* implies that creditors assume an equal and opposite risk that a company will fail to meets its obligations. Liability systems are aimed at triggering personal liability where the limits of good-faith trading are breached and creditors face losses because of this.

2. Comparative analysis of directors' liability systems

In what follows, the key elements of the liability system for each of the covered jurisdictions are presented. Reasons for choosing these jurisdictions include, among others, the fact that major influences in European legal approach can be covered, the analysis allows for a comparison between the statutory- and common-law systems, high performance rate of Germany and UK, geographical positioning of the three countries provides an analysis across Europe, namely wester, central and eastern European approach to this issue etc.

Our analysis will be structured on the key aspects in regard to directors' liability in case of insolvency, namely: 1. General conditions of liability in the specific jurisdiction, 2. Directors' liability in an insolvency situation and 3. Causal link between actions and outcome in respect to liability.

2.1. Romania

The Romanian legal system is rooted in statutory-law. Based on the development of Roman legal institutions, Romanian law has allowed itself to be influenced by a great many solutions from legislation such as the French, Italian and German jurisdictions, and lately uses common-law systems as inspiration for legislative background. Liability is no exemption. Using the existing approaches of other jurisdictions and applying them to its own historical legal background, Romania has tailored and adapted its legal provisions to meet the challenges faced in an Easter European business environment.

2.1.1 General conditions for directors' liability

There are two main types of liability in the Romanian legal system, namely contractual and aquilian (*ex delicti*). Civil law, in general, refrains from providing specific situations in which persons are liable. It rather tends to state merely that any actions which causes damages will determine an obligations of the person held responsible, to cover such damages.

For this to happen, legal doctrine has concurred that four conditions must be met:

a. Action (or lack thereof) must be in conflict with legal or contractual provisions;

When action or passivity is in contradiction with legal provisions or contractually assumed obligations, it can be usually argued that there is misconduct (*delicti*) which could lead to liability.

b. Damages must exist;

Existence of damages is best described by the expression *"no harm, no foul"*. Even if there is misconduct in the actions of a person, in civil law the courts cannot condemn that person if there is nothing to be held liable for.

c. A causal link between action (or inaction) and damages must be determined;

This refers to a "cause and effect" relationship between misconduct and existing damages. Courts analyze if existing damages are the direct result of the actions of a person. Moreover, the question is asked: *In case these actions would not have been present, would the same damages still be present?* in order to determine how much responsibility for damages can be placed on the debtor. This will reflect the extent of liability.

d. Persons must be deemed guilty, i.e. a court must establish that action or inaction is due to intention or lack of diligence of that person.

Intention to do harm or gross negligence are usually penalized with the obligation to cover any and all damages, including future and foreseeable losses, reduction of the ability to obtaining benefits (such as the ability to work), even unrealizable benefits derived from uncertain rights to the extent of the probability these benefits were likely to happen.

At the other end of the spectrum is the mildest degree of guilt. Although damages should be covered to the full extent incurred by the creditor, the level of guilt revealed by the person might reduce the level of liability and might even exclude certain responsibilities for compensation. Also, if a person acts without any personal interest, driven solely by the intent to gratify the creditor, liability may be excluded entirely.

In regard to a directors' liability, the Romanian Civil Code states that a director (administrator) is liable towards the company for damages caused by disregarding legal provisions, contractual obligations deriving from the mandate or by faulty administration of the company[260].

This kind of liability will demand that all four general conditions described above are put into the commercial context in which the director was acting in. Also, a claim of liability

[260] Art. 1915 par. (1) of the Romanian Civil Code

will have the company as the claimant. Creditors of the company may only act directly against the director in the event of insolvency[261], in which case special conditions need to be met.

Directors acting in Romania have a legal obligation to act in accordance with the *business judgement rule*, a term adopted from the common-law systems. This rule is prescribed in art. 144^1 of the commercial companies Law No. 31/1990. It states that a director must act prudently and diligently, as a good administrator would. Directors must act based on relevant information, which has been duly analyzed and scrutinized so that decision and subsequent actions would have an outcome that is foreseeable at the time the decision is made.

Directors' actions will not trigger liability towards the company if, at the time a decision is made, directors are reasonably entitled to believe that they are acting in accordance with the companies' interest, based on adequate information. This is a liability clause which holds directors liable to the company and not towards creditors. However, if the company goes insolvent due to lack of diligence, a director could be made responsible by the official receiver in the name of the company, thus generating revenue to cover outstanding debts.

Sometimes decisions are made in a democratic manner (within administrative committees, board of directors etc.). In these cases, directors' liability will not be triggered if they vote against the damaging action or, if they were absent from the vote, upon returning, they registered their opposition to the voted action.

The current legal environment in Romania considers that the actions of the directors are the actions of the company itself. Therefore, the company is liable towards third parties for the actions of its representatives. However, the company is entitled to regressive action against directors, even for the actions of employees of the company, whenever it is determined that if directors would have provided due oversight, the actions of the employees would not have caused damages.

Cases in which general liability of directors can be triggered are countless under Romanian law. A director is usually legally bound to uphold the law, the mandate set out by the shareholders and the general duty to run the company in good-faith as a prudent and diligent administrator would (*business judgement rule*).

Romanian law tends to hold a director liable for everything from correct book-keeping to managing environmental issues for the company. For example, directors personally can be fined if security personnel is not employed or a security plan is not put into place. They can be liable up to a criminal offence if environmental issues are not resolved in due course. Health and safety regulations hold the director personally responsible for providing a safe workspace for employees. Emergency situations, when regulated by law, require the director to ensure their implementation. Issues regarding keeping of records and documents are also the responsibility of the director, who will have to ensure proper storage and maintenance for records.

Although it is natural that decision makers are responsible for upholding the law, Romanian practice in applying these liability provisions is, in many cases, abusive. Authorities tend to overlook conditions for liability (especially causal link and the degree of guilt) and sanction directors merely for results (or lack thereof). There are numerous situations in which directors were held liable by authorities even when it was proven that actions were carried out only after due diligence information gathering and analysis. Also, even when it would be impossible for directors to act (for example, for lack of resources), they might still be held liable for lack of results.

Examples of such liability include environmental authorities holding directors personally liable even if the company did not have the necessary means to resolve

[261] Art. 73 par. (2) of Law No. 31/1990

environmental issues. Shareholders were asked for money and even environmental and local authorities were asked to intervene and give information on funds which might be accessible. Neither action dismissed liability of the director.

In cases regarding security for the companies' assets, police found the director liable for not employing security personnel or a specialized firm[262], even if the company could not afford to do so. Again, shareholders were asked to provide resources. Security measures such as locks and barricades were placed. The police found that such measures are not sufficient and it is the duty of directors to employ security personnel or hire a firm to provide such personnel.

Moreover, fiscal law provides a situation in which directors can be held personally liable for failure of the company to pay its debt to the state[263]. Fiscal authorities may pass a decision which provides that directors will have to pay the companies debts with their own personal assets. Situations for personal liability are limited and similar to those set out in the insolvency law. Also, fiscal law expressly mentions bad-faith to be a part of the conditions in which a directors acts.

But there have been instances in which personal liability of directors was triggered without any motivation of the decision. It even failed to mention the specific actions (or lack of action), let alone proving bad-faith in the conduct of the director. Such instances are particularly damaging because decisions of the fiscal authority are directly enforceable against a director. Legal action against such decisions will not suspend enforceability. The director must ask the court for such a suspension of enforceability and provide a security (bail money). Because of the tedious civil procedure in Romania, it can take months to obtain suspension and the decision might be enforced before the court states on the request of the director.

2.1.2 Directors' liability in an insolvency situation

In case of insolvency, the Romanian law no. 85/2014 provides specific situations in which a person can be held liable for unrecoverable debts of creditors. To this end, paragraph (1) of art. 169 sanctions directors if:

a. They have used assets or credit of the company in their own interest or that of another person;

b. They have undertaken activities of production, commerce or provided services in their own interest, under the cover of the legal person;

c. They have ordered, in their own interest, continuation of an activity which, obviously, would lead the legal person in the impossibility to pay;

d. They kept fictional accounting, have arranged for accounting documents to disappear or have not kept accounting in accordance with the law. In case accounting documents are not presented to the official receiver, the guilt, as well as the causal link between actions and damage are assumed. The assumption is relative;

e. They have embezzled or hidden some of the assets of the legal person or have fictionally inflated the debts of this person;

f. They have used ruining methods in order to attract funds to the legal person, in the interest of postponing the impossibility of payment;

g. In the month prior to the impossibility of payment, they have paid or have ordered for debts to be paid to a creditor, to the detriment of others;

h. Any other action undertaken with intent, which has contributed to the insolvency state of the debtor, established according to the present title.

[262] Under Law 333/2003 regarding security of objective, assets, values and safety of persons
[263] Art. 25 of the Romanian Fiscal Procedure Code

Also in regard to insolvency, a director must file a request for the company to enter into the procedure within 30 days of the moment insolvency sets in. Failure to do so might incur personal liability and, if the request is not filed within 6 months, sanctions are of a criminal nature.

Although in Romania directors are considered to act based on the contractual principle of a mandate, liability in insolvency situations is widely considered an aquilian one because contractual liability on the mandate principle can be used only by the company. In an insolvency situation directors are asked to cover the losses directly to creditors, which are third parties to the mandate contract between the company and the director. This entails that liability will be judged using the general conditions for liability set forth by civil law.

Actions which will be deemed as **misconduct** must fall into one of the provisions stated in art. 169. So the directors are liable for damages linked to insolvency only when actions exist such as those provided by the law. Actions described by art. 169 have a tendency to describe bad-faith conduct, aimed at directors own benefits rather than that of the interests of the company.

Damages are represented by the debt which cannot be covered using the debtors' estate. These are legally limited to the debts of the insolvent company, as provided in the first part of par. (1) of art. 169, so extended liability is not applicable. Quite often, courts will postpone judgement of requests based on art. 169 until such time that it is certain which claims will be left uncovered after the insolvency estate is liquidated. This approached is aimed at definitively establishing the extent of the damages before condemning the director to cover such damages.

The **causal link** between actions and damages is a specific one, namely the actions must lead to impossibility of payment (insolvency).

Although **guilt** is not expressly defined in art. 169, the situations in which directors are liable determine a need for intent to be present. Directors must act with the intent to gratify their own interest, or that of others, in detriment to the companies estate, and finally in disregard to the rights of the creditors. Intent does not need to be aimed at generating insolvency. This outcome is more of a side-effect of the finality of directors' actions.

The law also provides two situations in which directors will not be held liable: (i) opposing decisions for harmful actions and (ii) execution, in good-faith, of a payment plan agreed with creditors or a safeguarding procedure.

If a director is found liable, there is another legal sanction prescribed in paragraph (10) of art. 169: directors will not be able to be hold management positions for a period of 10 years from the moment the judgement is definitive. If the person holds such a position at the time the judgement is passed, the conviction will determine a loss of such positions.

2.1.3 Causal link between actions and outcome in respect to liability

Damages must be directly linked to actions of the directors in order for them to be held liable. As mentioned in paragraph 2.1.1. above, directors must act prudently and diligently at the moment a decision is made (*business judgement rule*). But, in order to make a commercial decision, information is needed, but it comes down to a case-by-case scenario if enough information has been collected for the decision to be made or it would have been more diligent to gather more information. There is also the matter of cost-effective action to be discussed: if more information would call for too many resources to be consumed, is it still necessary (or cost-effective) for that information to be gathered? If an analysis of these situations determines that directors are not to be blamed, a logical conclusion would be that there is no causal link between the actions of the directors and the damages incurred by the company.

Liability in insolvency situations is of a special nature in the Romanian legal system. Art. 169 of Law No 85/2014 provides liability for directors who caused the company to go into insolvency. So, actions must cause insolvency in order for liability to be triggered. *Business judgement rule* should be used to assess directors' actions and if they can be linked to insolvency.

2.2 Germany

Civil liability in Germany has a tendency to be more generally defined. Strict and detailed legal provisions can be observed in criminal liability situations. These also allow for creditor claims, in addition to criminal charges for directors. But in general, directors are personally liable when they are in breach of their obligation to uphold company interest as a whole.

2.2.1 General conditions for directors' liability

As in any statutory-law system, German legislation provides a general liability which applies in any circumstance in which damages are linked to a persons' actions. Title 27 of the BGB[264] (Articles 823 to 853) institutes the generally applicable *"Schadenersatzpflicht"* – the obligation to reimburse a person who has been damaged, under the marginal appellation of *Prohibited Actions (Unerlaubte Handlungen)*. The main article regarding liability is article 823 which sets the premises for a liability claim in case damages or losses are incurred by any person. These provisions are a baseline for any civil liability under German law.

Additionally, some provisions narrow down and prescribe detailed liability situation. Article 31a of the BGB determines that organic members of an association are personally liable for damage caused by intentional or gross negligent action. Article 179 of the same code provides that a representative is personally liable if he or she acts without or outside his/her mandate. 280 of the BGB provides for *Schadenersatzpflicht* in case obligations (provided by the law or entered into by way of contract) are not upheld, similar to Romanian liability.

Regarding directors' liability, BGB remains applicable for outlining general liability and effects for breach of duties. BGB provisions are completed by texts from GmbHG[265], AktG[266] and InsO[267].

German directors have an obligation to act in good-faith as a diligent businessman. Legally, this obligation is prescribed in article 43 paragraph (1) of the GmbHG for the limited liability companies and, with greater detail, in article 93 of the AktG. Directors have the obligation to act in accordance with the law, the articles of association and the decisions of the shareholders.

German legislation provides that breach of this duty can trigger personal liability towards the company and its shareholders (mandate rule). More important, directors will be held jointly liable with the company towards creditors for any damages arising from such a breach. These texts represent the *business judgement rule* codification under German law, which is usually called for in liability cases against directors, or by the directors themselves in order to obtain relief.

[264] Bürgerliches Gesetzbuch (German Civil Code)
[265] Gesetz für Gesellschaften mit Beschränkter Haftung (Law regarding limited liability companies)
[266] Aktiengesetz (Law regarding shares companies)
[267] Insolvenzordnung (Law regarding insolvency)

The *Bundesgerichtshof*[268] (BGH) outlined the limits of directors' liability using business judgement rule in its "ARAG-Entscheidung"[269], stating that a director will not be held liable if, by his actions, the interests of the company as a whole were being targeted, decisions were based on diligent approach to information and, in more complex cases, the intervention of counsel has been called for. Another more recent High Court decision[270] has concluded that directors are personally liable towards third persons when they are in breach of their due diligence duty, i.e. if they willingly or by gross negligence fail to be informed in regard to the commercial situation of the company or fail to properly analyze the obtainable information in order to have an informed decision making process.

Because *business judgement rule* includes the obligation to uphold the law, in case legal provisions regarding environmental law, employment law, revenue law etc. are disregarded, directors' will usually be held liable jointly with the company. In these cases, they will not be held solely liable as the law tends to protect creditors who will be able to file a liability claim against the directors and another separate claim against the company, thus maximizing his chances for full reimbursement.

Therefore creditors or the state are entitled to act against directors if *business judgement rule* is not upheld. Good-faith holds an important role in this scheme, as the *business judgement rule* does not have (and cannot have) a clean-cut definition; it must be of a somewhat floating nature as it must be applicable in all commercial situation (which are of infinite complexity).

There are also provisions which prohibit convicted directors from occupying leading positions of a company for a period of 5 years (Art. 73 Par. (3) of AktG and Art. 6 Par. (2) of GmbHG). This restriction applies after a criminal conviction, usually for situations linked to insolvency which are described below.

2.2.2 Directors' liability in an insolvency situation

As in all jurisdictions, once insolvency sets in, there is a predictable loss in creditor rights, be it postponement of payment or reduction of receivables. Such loss means damage and for this damage directors could be held liable under German law.

Business judgement rule breach is limited to the outline mentioned above, namely the intentional of gross negligent lack of directors' informational deficit. But aside the general liability in commercial instances, directors have civil liability in case of insolvency if they postpone filing for insolvency or for payments after insolvency has set in.

Term for filing an insolvency request with the courts is 3 weeks under German law[271]. If directors opt to continue trading after this point, they do so risking their own wealth.

Making payments after insolvency has set in can trigger personal liability of directors to the extent of those payments. This liability clause is provided by article 64 of GmbHG and is applicable under business judgement rule for shares companies.

This type of liability aims to prohibit preferential payments to creditors which would not have benefited from payment in an insolvency procedure. Directors can obtain relief of this liability if they prove that payments have benefited the company or had foreseeable benefits for the company[272]. This limitation is of judiciary nature and was argued in the High Court ruling BGH, 05.11.2017 – II ZR 262/06. The court gave relief to the director because, even though payments to commercial creditors were made after insolvency had set in, it was considered that

[268] German High Court
[269] BGH, 21.04.1997 – II ZR 175/95
[270] BGH, 18.06.2014 – I ZR 242/12
[271] Article 15a of InsO
[272] Business judgment rule

at the time of payment a diligent director would have reasonably considered that such action could rejuvenate the company.

A director is at a much more serious risk of liability in Germany due to criminal law provisions. Article 159 of the StGB[273] states that directors can be charged with up to two years imprisonment or a fine, to which the *Schadenersatzpflicht* is added.

This sanction is incurred if directors act in such a way that their actions cause insolvency, i.e. a companies' inability to pay off debt is caused intentionally or by gross negligence by its director.

Paragraph (5) of article 159 describes the actions which constitute such an offence, namely those actions contrary to appropriate economic principles consisting in:

a. Destruction, damaging, rendering useless, wasting or donating an important part of one's wealth;

b. Payment of considerable high amounts in an unreasonably chancy undertaking that is not part of normal economic activity of that person, in situations of games or bets;

c. Overconfident assumption of obligations in regard to his or her debt-to-asset ratio or ability to deliver on commercial obligations, in a manner that is obviously contrary to good judgment;

d. Failure to keep books and records of financial status, or these are kept in such a manner that makes them difficult or time consuming to be analyzed in order to determine the actual state of the estate, finances or productivity, or other necessary controlling measures which would provide a such overview;

e. Failure to maintain yearly records, for which a legal obligation exists, or these records are kept in such a manner or with such tardiness that it makes it difficult to have a timely overview of the estate, finances or productivity.

Comparing these situations with the Romanian legislations, it can be observed that the main duties of directors in Germany are similar to Romanian directors. Liability, although with different levels of punishment, is triggered in similar circumstances, thus underlining a comparable liability system.

2.2.3 Causal link between actions and outcome in respect to liability

German legislation and jurisprudence conclude that *Schadenersatzpflicht* exists when directors act intentionally or by gross negligence in a damaging manner. First entitled to liability claims is the company itself. Shareholders, stakeholders and creditors are entitled to reimbursement from directors only under certain circumstances. Causal link between directors' actions and liability is nuanced by *business judgement rule*.

Damages have to be directly linked to actions of the directors. Indirect actions tend to exclude liability as in a commercial situation there is always risk involved, meaning that players on a commercial market assume the risk of their endeavor not to perform as predicted (*affectio societatis*).

Furthermore, actions considered criminal under German law will have to have a direct effect of insolvency or inability to pay off debt. This is a legally prescribed effect which must exist in order for liability to be triggered.

Much like in the Romanian, the German legislation tends to link liability to a cause of actions carried out with the intent to cause harm and obtain personal gain, or by gross negligence.

[273] Strafgesetzbuch (German Criminal Code)

2.3 *United Kingdom*

While the UK is a common-law system, in matters of directors' liability there are a few statutory provisions which provide the basis of holding directors responsible for damages incurred by the company or third parties. Case-law has outlined legal principles which apply to duties of directors and the breach of such duties.

2.3.1 General conditions for directors' liability

Under UK law, directors can be held liable using general statutory-law provisions of the Companies Act of 2006. These provisions outline the basic duties of directors and their power to exercise their authority and are presented under Chapter 2 of the act: *General duties of directors*. In this respect, section 171 of the Companies Act of 2006 provides that directors must act within companies' constitution, i.e. the articles of association, any bylaws in place and shareholders resolutions. Any action of the director must be undertaken in good-faith, with the porpoise of executing company interests (directors must withhold from abusing their power).

Following this line of judgement, section 172 provides that directors have the duty to promote success of the company for the benefit of its members as a whole. Directors will have to act in good-faith, taking into account a series of aspects to predict possible outcome. Case-law has determined that among these aspects directors should regard the interests of stakeholders as well as shareholders, likelihood of action to deliver success of the company, long-term consequences of actions and decisions etc.

Section 173 provides for directors to exercise independent judgement and section 174 holds directors to reasonable care, skill and diligence in their decision making process and implementation of these decisions.

Corroborating these provisions, the limits of the *business judgement rule* can be observed. Directors, who bear responsibility for their action in exercising their mandate (section 173), must base their decisions on sufficient information and diligent analysis (section 174) in promoting the interests of the company (section 172).

UK Supreme Court stated that even when directors receive discretionary powers, they will have to act in such a manner as to promote companies interests for all its members[274] and stakeholders and avoid personal interests or the interests of others. In respect to diligence, the Companies Act 2006 has codified principles derived from case-law which were used prior to this codification. For example, *Bartlett v Barclays Bank Trust Co Ltd (No 1) (1980)* set out the general obligation for directors to act *"with the same care as an ordinary prudent man of business would extend to his own affairs"*. This outline was widely considered too subjective and general. Therefore, a codification such as that of section 174 paragraph (2) of the Companies Act of 2006 was welcomed by stakeholders and directors alike.

Also, stating the extent of the diligence of a director, in *Contex Drouzhba Ltd v Wiseman and another* the court held that foolish optimism is equal to dishonesty. The court argued that a director is obliged to act based on relevant information and due analysis, with regard to objective belief that actions could lead to success. In the cited case, the director disregarded this duty and acted in the blind hope that the situation will take a turn for the best, even though there was no evidence that the economical context would change in a positive manner.

On the other hand, a director represents the company and acts on its behalf. Personal liability is only incurred when duties towards the company are breached. This was the

[274] Eclaris Group Limited v JKX Oil & Gas plc [2015] UKSC 71, accessible at http://www.bailii.org/uk/cases/UKSC/2015/71.html

conclusion of the court in the case of *Williams and another v Natural Life Health Foods Ltd.* The principle is that a director will only be personally liable towards creditors if he/she assumes this responsibility. Otherwise, a limited liability company will exonerate a director in case of good-faith failure of the company.

Sections 175 to 185 of the Companies Act of 2006 provide situations and duties in regard to personal interest of the director. Section 175 prohibit directors to exercise their mandate in case of a conflict of interests. Section 176 prohibits directors to accept benefits from third parties, so as not to disregard their duties to promote the interests of the company[275]. If there are transactions which can benefit the company but a conflict of interests exists or could appear, directors are bound to disclose any aspect which could, directly or indirectly, influence their decision to act. Failure to declare interests in future transactions is viewed as a civil offence, where as in the case of ongoing transactions, failure to declare could result in criminal charges. Obligation of disclosure holds directors to indicate the extent and nature of their personal interest in the transaction in a complete and accurate manner.

Any breach of these obligations provided by the Companies Act of 2006 can lead to liability charges filed by the company, as these duties are owed to the company under section 170 paragraph (1). Shareholders, official receivers or even stakeholders can promote such actions. Duties under the act are viewed as fiduciary duties, meaning that directors must act in the companies' best interests with regard to their specific duties (section 178 paragraph (2) of the Companies Act of 2006).

Comparing the duties of UK directors to those of Romanian directors, certain similarities must be noted. First of all, both law systems provide that directors must act in the interests of the company. *Business judgement rule* is present in both legislations. Breach of duties will be analyzed from the companies' perspective first.

Directors may obtain relief from liability, indemnity and insurance, provided that during court proceedings it is established that the directors' actions were honest and reasonable and, in regard to the circumstances of the case (including aspects regarding the appointment of the director), it would not be fair treatment to hold the director personally liable.

2.3.2 Directors' liability in an insolvency situation

Sections 212, 213, 214, 238 and 239 of the Insolvency Act of 1986 set out special situations in which directors could be faced with personal liability charges for unrecovered claims in insolvency.

Section 212 refers to misfeasance. The text aims to trigger liability if the general duties towards the company are disregarded. In such situations, the official receiver, liquidator, shareholders or stakeholders (even creditors) can request compensation from officers of the company. Breach of fiduciary duties, misrepresentations, breach of reasonable care, skill and diligence, acting outside their power and other situations can be reason for a misfeasance claim. Under this section a director could be obliged to reimburse creditors for an unaccountable cash withdrawal prior to insolvency proceedings, as was the case in *Purnell v Chorlton and another*.

Under section 213, any person acting knowingly and willingly towards defrauding creditors or for any fraudulent porpoises may be personally liable towards the company or its stakeholders (including future creditors). Fraudulent behavior can be considered when credit is obtained although there is no reasonable evidence money will be available to pay the debt. Activation 213 in this case will be subject to providing evidence of dishonesty, otherwise there is no fraud and therefore no liability.

[275] Similar provisions are to present in the Bribery Act of 2010

More aggressively, section 214 can be used in liability claims for wrongful trading. Combined with principles derived from section 174 of the Companies Act of 2006 (reasonable care, skill and diligence), wrongful trading can infer personal liability if directors knew, or ought to have known, that their actions had no reasonable prospects for the company to avoid insolvent liquidation. To this, case-law added the condition that directors fail to take necessary steps to minimize losses after it becomes clear that insolvent liquidation is imminent. Most famously, this section was the basis of directors' liability in the case of *Earp v Stevenson, Re Kudos Business Solutions Ltd (in liquidation) [2011]*. The court held the director, Mr. Stevenson, liable because he continued trading even though he only had *"a speculative hope"* that contracts will be fulfilled. Because the company was already in financial distress, the court argued that a diligent director should have had the rational expectation that the company will enter into insolvent liquidation. For this judgement, the case of *Ward v Perks, Re Hawks Hills Publishing Company Ltd (in liquidation) [2007]* was cited, retaining that directors conduct should be based on *"rational expectations of what the future might hold"*. It also played a role that Mr. Stevenson failed to keep himself informed in regard to the financial status of the company, thus breaching due diligence duty of a director.

Although primary case-law provided that directors must take *"every step"* necessary to minimize creditor losses, in the recent case of *Ralls Builders Limited (in liquidation) [2016]* the court argued that this would be *"a high hurdle for directors to surmount"*. The court decision argued that in order for directors to present an *"every step"* defense, they will have to prove they took professional advice and updated that advice once situations changed. The case also outlined two tests, one objective and one subjective. Director's functions test (objective) provides that it should be established what minimal requirements are necessary for a person to exercise directorial attributes. The subjective General knowledge, skill and experience test infers higher standards for directors with higher knowledge, skill and experience.

The Insolvency Act of 1986 can also hold directors liable for transactions at an undervalue (section 238) or preferences (section 239). These provisions allow liquidators to set aside certain transactions by which the company disposed of its assets at a significant less value of their worth or transactions were made to the benefit of certain creditors while defrauding the interests of other creditors. In these cases, directors' liability may be triggered if setting aside the transactions will not recover the full value lost by the company.

These provisions tend to be similar in nature with Romanian legislation. For example, wrongful trading is present in article 169 paragraph (1) letter c) of Romanian Law No 85/2014: *"They (*directors*) have order, in their own interest, continuation of an activity which, evidently, would lead the legal person in the impossibility to pay"*. The same principles of wrongful trading are applicable in letter f): *"They have used ruining methods in order to attract funds to the legal person, in the interest of postponing the impossibility of payment"*. Fraudulent trading is also relatable to art. 169 par. (1) letter a): *"They have used assets or credit of the legal person in their own interest or that of another person"*.

UK directors can also be disqualified, meaning they will no longer be able to hold directorial positions, if they fail to uphold various duties to submit documents to the Registrar of Companies (max. 5 years) or if they are considered unfit to be concerned in the management of a company (2 to 15 years)[276]. A director could be deemed unfit, among other situations, if he or she is found guilty of misfeasance, wrongful or fraudulent trading, failure to uphold fiduciary duties to the company or duties regarding book-keeping are disregarded.

2.3.3 Causal link between actions and outcome in respect to liability

[276] Section 6 of the Company Directors Disqualification Act of 1986

Under UK law, causal link between action and damages must always be clear and direct. Cases of relief from liability seek those situations in which directors decisions or actions would be considered correct at the time they were implemented, although they ended up in damaging the company or third parties.

Case-law provides that directors will be held liable when their actions determined false hope to creditors to continue trading under assumption that debt will be paid, an assumption determined by the directors[277].

Two conditions can determine causal link: (1) there must be a factual link between action and damages and (2) it was reasonably foreseeable at the time of action that the outcome of such action would cause damages.

Courts use the "inextricable link test", drawn from criminal jurisprudence[278], in order to establish whether or not directors' action caused damages, or the same damages would have been incurred even in absence of directors' actions.

3. Conclusion

Our analysis concludes that even though these three jurisdictions have notable different backgrounds, which determined different approaches to many aspects of civil life, commercial legislation provides for the same basic principles.

Business judgment rule has been adopted in all three jurisdictions as a standard for director's duties and, of course, liability.

All three jurisdictions assess the situation at the time a decision is made and implemented. Therefore, in all three instances hindsight does not allow for liability claims.

Company interests, books and records keeping, filing for insolvency in a reasonable time span, prohibiting creditor favoritism, all are in some way included in all three legislations. This shows that the main reasons for liability are similar in any of the analyzed jurisdictions.

In the common-law system of the United Kingdome, one of the most heavily codified sectors is the commercial one, while other sectors, such as family or food-safety regulations, rely mainly on legal precedent.

In statutory law systems this situation can be observed when analyzing the fast pace at which commercial legislation changes. Traders are constantly looking for bigger and better ways to conduct business and find innovative approaches to deliver goods and services. As such, legislators have difficulties keeping up with these changes in the marketplace.

The fact that the same general principles can be observed for different liability systems is encouraging. Such principles are a clear indicator that trade, at its core, follows the same rules everywhere. For the creditors, this means a greater level of trust. For the companies and their directors, this means intuitive obligations. For both sides, similar principles allow for a much better risk evaluation. Together with the rapid globalization effect which brings traders constantly closer, such findings can only strengthen the belief that in regard to commerce, rules are developed by the marketplace and legislators follow preset equity standards.

[277] Morphites v Bernasconi [2001]
[278] Cross v Kirkly [2000]

ROMANIAN LAW TOPICS

METHODS WHICH CAN BE SELL THE ASSETS OF THE DEBTOR IN SUPPORT OF INSOLVENCY PROCEEDINGS WHEN THEY ARE INSTITUTED INSURANCE MEASURES ADOPTED IN THE CRIMINAL PROCESS

Judge Cristian Dezideriu DEBRENI

I have to write an essay about the roles and responsibilities of the main characters in the insolvency procedure (syndic judge, insolvency practitioner, special administrator) when the insolvent company's assets have been frozen as a consequence of a criminal care.

A Persian proverb says: „when you speak, you plant; when you shut up, you pick". So, I'm curious to know what I'm going to pick up.

Insolvency in Romanian law involves the passage of 3 specific and successive stages, in the order shown below, but not each or more of them together are mandatory.

A first stage of the insolvency procedure **is the observation period**, in which current activities are carried out for the debtor :

- by the special administrator, under the supervision of the judicial administrator, if the debtor has requested the reorganization and thus has the right to administer (Article 67, paragraph 1, letter g, corroborated with Article 5, point 4, referring to Article 87, paragraph 1 from Law nr. 85/2014).

Art. 67 (1) The debtor's application must be accompanied by the following documents:

g) a statement by which the debtor shows his intention to enter into a simplified or reorganized procedure, according to a plan, by restructuring the activity or by liquidation, in whole or in part, of the wealth in order to settle his debts;

Article 5 (1) For the purposes of this Law, terms and expressions have the following meanings:

4. Special administrator is the natural or legal person appointed by the general meeting of the shareholders / members / members of the debtor, empowered to represent their interests in the proceedings and, when the debtor is allowed to manage his / her activity, carry out on behalf of and on behalf of the debtor , the necessary administrative acts;

Article 87 (1) During the observation period, the debtor may continue to carry out the current activities and may make payments to the known creditors, who are in the normal conditions of exercising the current activity, as follows:

a) under the supervision of the judicial administrator, if the debtor has applied for reorganization, within the meaning of art. 67 paragraph (1) lit. g), and was not given the right to administer it;

b) under the management of the judicial administrator, if the debtor has been given the right of administration.

or

- by the special administrator, in the case of the right of administration, either due to the failure to submit documents related to the reorganization request or by sanction (Article 87, paragraph 1, referred to in Article 58, letter f), art. 56, paragraph 2, Article 82, paragraph 1, Article 85, paragraphs 1 and 3 from the same Law nr. 85/2014).

Art. 58 (1) The main attributions of the judicial administrator under this title are: f) the full or partial management of the debtor's activity, in the latter case, in compliance with the express provisions of the syndic judge regarding his / her duties and the conditions for making payments on the debtor's assets;

Art. 56 (2) After the right to administer is lifted, the debtor is represented by the judicial administrator / liquidator, who also manages his business activity, and the special administrator's mandate will be reduced to represent the interests of the shareholders / members / members.

Article 82 (1) The debtor has the obligation to make available to the judicial administrator / liquidator and to the creditor at least 20% of the total value of the receivables included in the final table of claims all the information and documents deemed necessary for the activity and his wealth, as well as the list of payments made during the last 6 months preceding the opening of the procedure and the patrimonial transfers made during the two years prior to the opening of the procedure, subject to the imposition of the right of administration.

Article 85 (1) The opening of the procedure raises the right of administration to the debtor, consisting in the right to manage his activity, to administer his assets and to dispose of them if he has not declared his intention of reorganization, under the conditions art. 67 paragraph (1) lit. g). The raising of the right of administration shall also be ordered if the debtor has not declared his intention to reorganize within the term stipulated in art. 74.

Article 85 (3) The syndic judge may order the total or partial removal of the debtor's right of administration with the appointment of a judicial administrator, indicating also the conditions for the exercise of the debtor's management.

In the reorganization phase, which obligatorily follows the observation period, finding us after the processual moment of the confirmation of the plan, the current activities are carried out for the debtor:

- by the special administrator, under the supervision of the judicial administrator, if the debtor retains the right to administer (Article 56, paragraph 2 in relation to Article 58, letter e and Article 141, paragraph 2 from Law nr. 85/2014)

Art. 141 (2) During the reorganization, the debtor shall be led by the special administrator, under the supervision of the judicial administrator, subject to the provisions of art. 85 par. (5). Shareholders, associates and members with limited liability shall not have the right to intervene in the management of the activity or in the administration of the debtor's assets, except and in the limited and limited cases provided by the law and in the reorganization plan

or

- by the judicial administrator if the debtor has been given the right to administer (Article 56, paragraph 2, referring to Article 58, f and Article 141, paragraph 2, with the application of Article 85, paragraph 5 from Law nr. 85/2014).

In bankruptcy, which may be:

- either the only step to which the party in the proceedings applied
- either a successive and final stage in the proceedings, in the sense that :
  - it follows a period of observation without going through the reorganization phase

or

- following a period of observation followed by a failed reorganization

the current activities are carried out by the liquidator following the right of administration (Article 85, paragraph 4 from Law nr. 85/2014).

Article 85 (4) The debtor's right of administration shall terminate by law at the date when bankruptcy is commenced.

During each of these stages, it is possible to discuss the opportunity of selling the debtor's assets either for the fulfillment of a reorganization plan voted by the creditors and confirmed by the syndic judge or in the bankruptcy procedure, and there is a real disputes in doctrine and jurisprudence about the possibility of selling the assets and the concrete way during the observation period (largely: juridice.ro: "Unique case law CITR (22): sale of goods during the observation period", December 22, 2017 Adrian Ştefan Clopotari).

In some cases, one or more assets of the debtor, or all of them, are subject to precautionary measures in criminal proceedings that run in parallel either with insolvency proceedings or sometimes with tax procedures.

Concerning the concurrence between criminal and tax proceedings, we may find arguments in the case-law of C.E.DO. ,respecting the principle of legal certainty so that it can reveal the need for a unitary approach. Thus, in its judgment of 21 October 2014 in the case of Lungu and Others v. Romania (Application No 25129/06), C.E.D.O. showed the following:

"37. The Court has concluded several times in the sense of the violation of Art. 6 as a result of the extraordinary appeal, without substantive and imperative reasons, of final judgments (see, among others, Brumărescu v. Romania (MC), no. 28342/95, point 61, ECHR 1999-VII and Riabyk v. Russia, no. 52854/99, paragraphs 52 and 56, ECHR 2003-IX, cited above). Also, in several cases, it has been held that, even in the absence of a quashing of a judgment, the reinstatement of the solution adopted in a dispute by a final court judgment in another judicial proceeding may prejudice art. (6) in so far as it may illusively have the right of access to a court and breach the principle of legal certainty (Kehaya and Others, paragraphs 67-70, Gök and Others v. Turkey, No 71867/01, 71869 / 01, 73319/01 and 74858/01, point 57 62, 27 July 2006, and Esertas v. Lithuania, no 50208/06, points 23-32, 31 May 2012).

38. According to its settled case-law, it is not for the Court to substitute itself for the domestic courts. In particular, it is not for the national court to rule on errors of fact or of law allegedly committed by an internal court or to substitute its own assessment for the domestic courts only if and to the extent that they could have brought about infringement of rights and freedoms guaranteed by the Convention (García Ruiz v. Spain (MC), no. 30544/96, points 28-29, ECHR 1999-I].

39. The Court also notes that, in all legal systems, the authority of a final court decision implies limitations ad personam and ad rem (Esertas, cited above, paragraph 22).

40. In the present case, even admitting that there was neither the identity of the parties nor the identity of the two internal proceedings, the Court notes that the fiscal and criminal proceedings concerned the same decisive issue for their settlement, namely the legal classification of the same transactions transformation and resale of tires (mutatis mutandis, Siegle v. Romania, No 23456/04, point 36, 16 April 2013).

41. In that regard, it observes that, in the context of the tax contentious proceedings initiated by the applicants, by the final judgment of 3 July 2003, the commercial department of the Suceava Court of Appeal, after examining the evidence adduced and debated by the parties, concluded that the transactions transformation and resale of the tires have been lawful and

they entitle them to tax incentives. It therefore upheld the action brought by the applicants against the minutes imputing taxes and penalties for those transactions (see paragraph 13 above).

42. However, in the criminal proceedings brought in response to the complaint made by the Directorate-General for Public Finances against the first applicant, the criminal section of the same court of appeal, on the basis of a new expert opinion, reverted to that conclusion, by the final judgment of 5 December 2005, that those transactions were unlawful and that, on that basis, the applicants had unduly benefited from tax advantages (see paragraph 25 above).

43. In that regard, the Court found that the views of the experts were divergent (see paragraph 15 above). The Court recalls that, in any event, the fact that there may be more opinions on a subject is not sufficient reason to prejudice the principle of legal certainty. This principle can only be derogated from if substantial and compelling reasons so require (SC Maşinexportimport Industrial Group SA v. Romania, no 22687/03, point 32, 1 December 2005).

44. However, in the present case, no such element can justify such a recall.

45. While admitting that, in the second case, the criminal section of the Court of Appeal focused more on the applicants' situation and that it sought to correct the alleged errors committed by the commercial section, the Court considers that they should not it is the responsibility of the claimants to bear the possible deficiencies of the judicial authorities (mutatis mutandis, Amurăriţa v. Romania, No 4351/02, point 36, 23 September 2008).

46. It is certainly not the case that an irrevocable court decision was set aside and that it has acquired the force of res judicata (compare Brumarescu, cited above, paragraph 62). ***However, the simultaneous and parallel conduct of two independent proceedings concerning the same facts, which led the criminal section of the court of appeal to reach a new appreciation of those facts, radically opposed to the earlier decision of the commercial court of the same court of appeal, the principle of legal certainty*** *(mutatis mutandis, Siegle, paragraph 38).*

47. Consequently, on the basis of a matter which had already been settled and which had been the subject of a final judgment, and in the absence of any valid reason, the Court of Appeal breached the principle of legal certainty. For this reason, the applicants' right to a fair trial within the meaning of Art. 6 § 1 of the Convention.

48. This provision of the Convention was therefore infringed. "

As regards the implications of taking precautionary measures in the criminal proceeding against insolvent borrower assets regarding the possibility of selling these goods, we could identify some normative and case-law elements capable of outlining the manner and conditions for the sale of such goods of goods.

In this regard, we need to keep in mind :

- on the one hand, the nature and type of criminal seizure adopted,

respective

- the existence or not of pre-established warranties over the assets seized by the criminal investigation bodies and the fulfillment of the related forms of advertising.

With regard to the types of precautionary measures that can be adopted in the criminal proceeding and their relevance for the recovery of assets in insolvency proceedings, we will notice, given the disputes. art. 249 C. PR. PEN, the need to differentiate between :

- ordinary or common law seizure, established for :
  - guaranteeing the execution of the criminal fine or legal costs or
  - guaranteeing the repair of the damage caused by the offense

and

- seizure of assets subject to special confiscation or extensive confiscation.

ART. 249 C.pr.pen. :

(1) In the course of the criminal prosecution, the prosecutor, the judge of the preliminary chamber or the court, ex officio or at the request of the prosecutor, in the preliminary procedure or during the trial, may take precautionary measures by ordinance or, as the case may be, in order to avoid the concealment, destruction, alienation or evasion of property which may be the subject of special confiscation or extensive confiscation, or which may serve to ensure the execution of the punishment of the fine or the legal costs or the repair of the damage caused by the offense.

(2) The precautionary measures consist in the unavailability of movable or immovable property, by the seizure thereof.

(3) The precautionary measures to guarantee the execution of the fine may only be imposed on the suspect or defendant's goods.

(4) The precautionary measures for special confiscation or for extended confiscation may be taken over the property of the suspect or defendant or other persons in the possession or possession of the goods to be confiscated.

(5) The insuring measures for the repair of the damage caused by the offense and for the guarantee of the execution of the judicial expenses may be taken over the goods of the suspect or the defendant and the person responsible in civilian terms, up to the value of their probable value.

(6) The precautionary measures provided in paragraph (5) may be taken during the criminal prosecution of the preliminary proceedings and of the trial, and at the request of the civil party. The precautionary measures taken ex officio by the judicial bodies referred to in para. (1) may also use the civil party.

(7) The insuring measures taken under para. (1) are mandatory if the injured person is a person with little or no exercise capacity. (8) Goods belonging to a public authority or institution or to another person of public law can not be seized, nor the assets excepted by law.

Art. 112 C.Pen : Special Confiscation :

(1) Subject to special confiscation:

a) the goods produced by committing the deed provided by the criminal law;

b) goods that have been used, in any way, or intended to be used for the commission of an act provided for by the criminal law, if they are the offender, or if the person has the purpose of using them;

c) the goods used, immediately after the act was committed, to ensure the escape of the perpetrator or the preservation of the benefit or the obtained product, if the perpetrator is, or if, to another person, it has the purpose of using them;

d) goods which have been given to cause the commission of a criminal act or to reward the perpetrator;

e) the goods acquired by committing the offense provided by the criminal law, if they are not returned to the injured party and insofar as they do not serve to compensate it;

f) goods the possession of which is prohibited by the criminal law.

(2) In the case provided for in paragraph (1) lit. b) and lit. c) if the value of the goods subject to confiscation is manifestly disproportionate to the nature and gravity of the act, the confiscation is ordered in part, by monetary equivalent, taking into account the consequence of, or which could have resulted from, the contribution of the asset to it. If the goods were manufactured, altered or adapted for the purpose of committing the offense provided for by the criminal law, their confiscation shall be ordered in their entirety.

(3) In the cases provided for in paragraph (1) lit. b) and lit. c) if the goods can not be confiscated because they do not belong to the offender and the person to whom they belong did not know the purpose of their use, the equivalent of their money will be confiscated, applying the provisions of para. (2).

(4) The provisions of paragraph (1) lit. b) does not apply to acts committed by the press.

(5) If the goods subject to confiscation according to par. (1) lit. b) - e) are not found, money and goods are confiscated instead of their value.

(6) The goods and money obtained from the exploitation of the goods subject to confiscation, as well as the goods produced by them, shall be confiscated, except for the goods referred to in paragraph (1) lit. b) and lit. c).

ART. IV din Legea nr. 63/2012

Whenever by special laws, the Penal Code or the Code of Criminal Procedure refers to art. 112 of Law no. 286/2009 on the Criminal Code, the reference shall be considered at art. 112 and 112 ^ 1 and whenever by special laws, the Penal Code or the Code of Criminal Procedure refers to confiscation as a security measure, the reference shall also be made to the extended confiscation. "

ART. 112^1 Enhanced confiscation

(1) Goods other than those referred to in Art. 112, if the person is convicted of committing one of the following offenses, if the deed is likely to procure material benefit, and the penalty provided by law is a four-year or more imprisonment:

a) offenses related to drug and precursor trafficking;

b) offenses related to the trafficking and exploitation of vulnerable persons;

c) offenses related to the state border of Romania;

d) money laundering offense;

e) offenses against the legislation on preventing and combating pornography;

f) offenses from the legislation on combating terrorism;

g) establishing an organized criminal group;

h) offenses against the patrimony;

i) non-observance of the regime of arms, munitions, nuclear materials and explosives;

j) forgery of coins, stamps or other values;

k) disclosure of economic secrecy, unfair competition, non-compliance with provisions on import or export operations, misappropriation of funds, offenses concerning the import and export regime and the introduction and removal from the country of waste and residues;

l) gambling offenses;

m) offenses of corruption, offenses assimilated to them, as well as offenses against the financial interests of the European Union;

n) tax evasion offenses;

o) customs regime offenses;

p) frauds committed through computer systems and electronic payment instruments;

q) trafficking in organs, tissues or cells of human origin.

(2) Extended confiscation shall be ordered if the following conditions are cumulatively met:

a) the value of the assets acquired by the convicted person within a period of 5 years before and, if appropriate, after the offense has been committed, up to the date of the referral of the court, clearly exceeds the income obtained by him licit mode;

The Constitutional Court, by Decision no. 11/2015 found that the provisions of Art. 112 ^ 1 paragraph (2) lit. a) of the Criminal Code are constitutional insofar as the extended confiscation does not apply to assets acquired before the entry into force of Law no. 63/2012

b) the court is convinced that the respective goods come from criminal activities of the nature provided in par. (1).

(3) For the application of para. (2) account shall also be taken of the value of the goods transferred by the sentenced person or by a third party to a family member or to a legal person over whom the convicted person has control. (4) By goods, according to the present article, is meant also the money amounts. (5) In determining the difference between the legal income and the value of the acquired goods, the value of the goods at the date of their acquisition and the expenses incurred by the convicted person, the members of his / her family, shall be taken into account. (6) If the goods subject to confiscation are not found, money and goods shall be confiscated instead of their value. (7) The goods and money obtained from the exploitation or use of the goods subject to confiscation, as well as the goods produced by them, shall also be confiscated. (8) The seizure may not exceed the value of the goods acquired during the period stipulated in par. (2), which exceeds the legal income of the convicted person.

This delimitation must be considered, starting from disp. art. 91 of Law no. 85/2014, according to which *the assets alienated by the judicial administrator or the liquidator in the exercise of his duties provided by the present law are acquired freely of any duties, such as privileges, mortgages, pledges or retention rights, seizures of any kind. The precautionary measures ordered in the criminal proceedings for special confiscation and / or extensive confiscation are exempt from this regime.*

Going forward with the analysis, we must bear in mind that the debtor's assets that are covered by the precautionary measures adopted in the criminal trial may be free-of-charge or burdened by other safeguards prior to the moment when the possibility of criminal sequestration.

So , according to art. 2328 C.civ., "the preference granted to the state and to the administrative-territorial units for their claims is regulated by special laws. Such preference can not affect the rights previously acquired by third parties ", and according to Art. 153 of Law no. 71/2011 "the preference granted to the state and to the territorial-administrative units for their claims shall not be opposed to third parties before the moment when it was made public by the registration in the advertising registers. Such a preference will gain priority from the moment the preference has been made public. "

In relation to the ones shown, we can have more situations:

1.

- a criminal seizure instituted to ensure the execution of the criminal fine or legal costs or the repair of the damage caused by a criminal offense to a property of the debtor involved in the insolvency proceedings and on which no guarantees have been provided in favor of the creditors;

2.

- a criminal seizure instituted to ensure the execution of the fine or legal costs or the repair of the damage caused by a criminal offense to a property of the debtor involved in the insolvency proceedings and on which other creditors' guarantees have been previously established and related advertising;

3.

- a criminal seizure imposed on goods subject to special confiscation or extended confiscation and in respect of which no other guarantees have been previously lodged in favor of creditors;

4.

- a criminal seizure imposed on goods subject to special confiscation or extensive confiscation in respect of which guarantees have been pre-established for creditors;

5 .

- a criminal seizure imposed on goods subject to special confiscation or extensive confiscation and which are acquired by the insolvent debtor from the suspect.

We will note that the procedure for challenging criminal insurances does not take place in front of the syndic judge, but it is regulated by the criminal procedural rule, it is being conducted before the criminal court, before which may be invoked arguments that are more related to compliance criminal rules rather than establishing an insolvency procedure.

In particular, the appeal procedure is governed:

- both precautionary measures

- as well as the way this is done,

through art. 250 and art. 250 ind. 1 C.P.P., distinct from the stage of the trial in which the measure was adopted.

Art. 250 ***Appealing the precautionary measures***

(1) The suspect or defendant or any other interested person may lodge an appeal against the precautionary measure taken by the prosecutor or the manner of carrying it out within 3 days from the date of communication of the order for taking the measure or from the date of bringing fulfillment of it, to the judge of rights and freedoms from the court to which he or she has jurisdiction to hear the case.

(2) The contestation is not a suspension of execution.

(3) The prosecutor shall submit to the judge of rights and freedoms the file of the case, within 24 hours from the request of the file by the prosecutor.

(4) The appeal shall be settled in the council chamber, with the summoning of the contestant and of the interested persons, by reasoned conclusion, which is final. Attorney's participation is mandatory.

(5) The file of the case shall be returned to the prosecutor within 48 hours after the appeal has been resolved.

(5 ^ 1) If, until the settlement of the objection formulated according to par. (1) has been brought before the court by indictment, the appeal shall be submitted to the competent judge for a preliminary ruling. The provisions of paragraph (4) shall apply accordingly.

(6) Against the manner in which the precautionary measure taken by the court of first instance or by the court, the prosecutor, the suspect or the defendant or any other interested person can appeal to that judge or to that court, within the 3 days from the date of implementation of the measure.

(7) The contestation shall not suspend the execution and shall be settled, in public session, by reasoned conclusion, with the parties quoting, within 5 days from its registration. Attorney's participation is mandatory.

(8) After the final decision has ceased to exist, a civil appeal may be filed only in respect of the manner in which the precautionary measure is carried out.

(9) The minute is mandatory.

ART. 250^1 Appealing against the precautionary measures ordered during the trial. (1) The defendant, the prosecutor or any other interested person may appeal against the conclusion requiring the taking of an interim measure by the judge, the court or the court of appeal, within 48 hours from pronouncement or, where appropriate, communication. The contestation shall be filed, as the case may be, with the preliminary judge, the court or the appeals court which issued the contested conviction and shall submit, together with the case file, as the case may be, to the preliminary chamber judge from the hierarchical superior or the hierarchical court superior, within 48 hours of recording. (2) The appeal against the conclusion by which the Preliminary Chamber Judge of the Criminal Division of the High Court of Cassation and Justice has taken a precautionary measure shall be solved by a panel consisting of 2 preliminary chamber judges and the appeal against the conclusion by which the Criminal Division The High Court of Cassation and Justice, at first instance or on appeal, has taken a precautionary measure to be resolved by the 5-judge panel. (3) The complaint formulated according to par. (1) is not a suspension of execution. The appeal will be resolved within 5 days of registration, in public, with the participation of the prosecutor and with the summons of the defendant and the interested parties who have formulated it. The provisions of art. 425 ^ 1 and the following shall apply accordingly.

In hypothetical case no. 1:

- a criminal seizure instituted to ensure the execution of the criminal fine or legal costs or the repair of the damage caused by a criminal offense to a property of the debtor involved in the insolvency proceedings and on which no guarantees have been provided in favor of the creditors,

It is clear that, in the absence of privileged claims, the chirographic claims admitted in the insolvency proceedings will only be covered after the satisfaction of the budgetary claim corresponding to the damage invoked in the criminal proceedings. In such a situation, given the disputes. art. 252, ind. 1; art. 252, ind. 2 and 253 of the Criminal Code, before a final judgment is delivered, may be ordered by the prosecutor or the court :

- the recovery of seized movable property, at the request of the owner of the goods or when there is agreement

- exclusive use of seized movable property, where the owner does not agree, under certain conditions governed by law,

with the indication that the amounts thus obtained reach into an account provided by art. 252 par. (8) C.P.Pen., according to the constitution according to the special law, namely Law no. 318/2015 *(According to art. 27 par. (1) of the Law no. 318/2015 The National Agency for Managing the Unavailable Utility manages and keeps records of the sums of money subject to seizure according to art. 252 par. (2) of the Law no. 135/2010 and the sums of money resulted from the capitalization of perishable goods under the conditions of art. 252 par. (3) of the Law no. 135/2010. According to art. 28 of the same law, at the request of the prosecutor or the court, the National Agency for Managing the Indispensable Goods temporarily deposits and manages the indispensable movable assets whose individual value exceeds the equivalent in lei of the sum of EUR 15,000 at the time of the arrangement of the insurer; For this purpose, the Agency is called custodian, within the meaning of Art. 252 par. (9) of the Law no. 135/2010, as amended and supplemented").*

According to al. 7 and 8 of art. 27 of the Law no. 318/2015:

(7) Within no more than 3 working days from the notification of the enforceable title, if the insurance measure was ordered for the purpose of repairing the damage caused by the offense, according to art. 249 par. (1) of the Law no. 135/2010, as subsequently amended and

supplemented, and the amount of money has been transferred to the account provided in par. (3), the Agency shall inform the civil party, in order to enforce the enforcement title, in accordance with the law, as well as all public institutions and professional entities with attributions in the field of forced execution. Payment of the amount of money in the accounts provided in paragraph (3) shall be performed by the Agency, under the law, on the basis of the provision issued by the competent enforcement body.

(8) Within 30 days of the communication of the final decision of the judge of the preliminary chamber or of the final decision of the court that ordered the confiscation of the amounts of money in the account provided in par. (3), the Agency shall pay the amount as income to the state budget.

If seizure is instituted at the request of a civil party (other than the state), it will cover the damage established by the criminal judgment, avoiding the competition of the insurer insolvent creditors.

ART. 252^1 ***Special cases of exploitation of seized movable goods :***

(1) In the course of the criminal proceedings, before a final judgment is given, the prosecutor or the court that instituted the seizure may immediately dispose of the seized movable property at the request of the owner of the property or, where there is agreement.

(2) In the course of the criminal proceedings, before the final decision is pronounced, in the absence of the consent of the owner, the movable assets upon which the seizure has been established may exceptionally be capitalized in the following situations:

a) when, within one year from the date when the seizure was instituted, the value of the seized assets diminished significantly or by at least 40% compared to the time when the precautionary measure was ordered. The provisions of art. 252 par. (1) shall also apply accordingly;

b) when there is a risk of expiry of the warranty period or when the insurance seizure has been applied to live animals or birds;

c) when the seizure has been applied to flammable or petroleum products;

d) when the insurance seizure has been applied to goods whose storage or maintenance requires disproportionate expenses in relation to the value of the good.

(3) During the criminal proceedings, before a final judgment is given, when the following conditions are met cumulatively: the owner could not be identified and the capitalization can not be made in accordance with paragraph (2), the motor vehicles on which the seizure has been established may be capitalized in the following situations:

a) when they have been used, in any way, to commit an offense;

(b) if, from the date of the imposition of the measure, the insurer has over a period of one year or more.

(4) The amounts of money resulting from the capitalization of movable goods made according to paragraph (1), (2) and (3) shall be deposited in the account provided by art. 252 par. (8).

According to art. 27 par. (1) of the Law no. 318/2015), the National Agency for the Managing of Unavailable Utility manages and keeps track of the sums of money resulted from the special cases of exploitation of seized movable goods, provided by art. 252 ^ 1 of the Law no. 135/2010.

ART. 252^2 ***Use of mobile assets seized during criminal prosecution:***

(1) In the course of the criminal prosecution, where there is no consent of the owner, if the prosecutor who instituted the seizure considers that the seizure of the seized movable

property is necessary, he shall refer him with a motivated proposal for the capitalization of the assets seized by the judge of rights and freedoms. (2) The judge of rights and freedoms notified in accordance with para. (1) sets a deadline, which may not be less than 10 days, to which the parties are called, as well as the custodians of the goods, when one has been designated. Attorney's participation is mandatory. (3) At the appointed time in a council room, the parties and the custodian shall be informed that the seized movable property is intended to be used and they are reminded that they have the right to make observations or requests related to the goods to be redeemed . After examining the objections and requests made by the parties or the custodian, the judge of rights and freedoms has a reasoned conclusion on the capitalization of the movable goods provided in art. 252 ^ 1 par. (2). The lack of legally cited parties does not prevent the proceedings from proceeding. (4) Against the conclusion of the judge of the rights and freedoms provided in para. (2) the parties, the custodian, the prosecutor and any other interested person may appeal to the judge of rights and freedoms from the superior hierarchical court within 10 days. (5) The term stipulated in paragraph (4) shall flow from the communication to the prosecutor, the parties or the custodian, or from the date when they have taken notice of the conclusion in the case of other interested persons. (6) The parties or custodians may appeal only against the conclusion by which the judge of rights and freedoms ordered the sale of seized movable goods. The prosecutor can appeal only against the conclusion by which the judge of rights and freedoms rejected the proposal for the use of seized movable goods. (7) The contestation provided in paragraph (4) is a suspension of execution. Judgment of the case is done urgently and above all, and the decision by which the appeal is resolved is final.

ART. 252^3 ***Exploitation of mobile assets seized in court****:*

(1) During the trial, the court, ex officio or at the request of the prosecutor, one of the parties or the custodian, may order the recovery of the seized movable property. To this end, the court shall fix a time limit, which may not be less than 10 days, to which the parties are quoted in the council chamber, as well as the custodians of the property, when one has been designated. Attorney's participation is mandatory.

(2) At the fixed term, the Parties shall discuss the use of seized movable property in the council chamber and shall be reminded that they have the right to make observations or requests related to them. The lack of legally cited parties does not prevent the proceedings from proceeding.

(3) On the capitalization of the seized movable assets, as well as on the applications provided in par. (2), the court has a reasoned decision. Ending the court is final.

ART. 252^4 ***Appealing how to seize mobiles seized :***

(1) Against the way of accomplishing the conclusion provided by art. 252 ^ 2 par. (3) or the court decision on the capitalization of seized movable property, provided by art. 252 ^ 2 par. (7) or art. 252 ^ 3 par. (3), the suspect or defendant, the civilly liable party, the custodian, any other interested person, as well as the prosecutor may lodge a complaint in the criminal proceedings with the court competent to settle the case at first instance.

(2) The contestation provided in par. (1) shall be made within 15 days of the performance of the contested act.

(3) The court resolves the emergency appeal and, in particular, in a public hearing, by summoning the parties, by a final decision.

(4) After the final settlement of the criminal proceedings, if no appeal has been made against the manner in which the conclusion of the court order for the capitalization of the seized movable assets referred to in para. (1), an appeal may be made under civil law.

ART. 253 ***Minutes of seizure and mortgage registration or registration*** *:*

(1) The body that applies the seizure shall conclude a report on all the acts performed according to art. 252, describing in detail the seized goods, indicating their value. The report also shows the goods exempt from the law from the pursuit, according to the provisions of art. 249 par. (8) found in the person to whom the seizure was applied. The objections of the suspect or defendant or the civilian party as well as those of other interested persons are also recorded. (2) In the minutes referred to in paragraph (1) also mentions that the parties have been notified that: a) may request the capitalization of the seized property or assets, pursuant to art. 252 ^ 1 par. (1); b) during the criminal proceedings, before the final decision can be pronounced, the movable assets upon which the seizure has been established may be redeemed by the judicial body, even without the consent of the owner, if the conditions provided by art. 252 ^ 1 par. (2). (3) A copy of the minutes referred to in paragraph (1) shall be left to the person against the property to which the seizure has been applied, and in the absence thereof, to the person with whom he resides, the administrator, the goalkeeper or the person who usually replaces it, or to a neighbor. If a part of the goods or all of them have been handed over to a custodian, leave a copy of the record. One copy shall also be submitted to the judicial body that ordered the taking of the precautionary measure, within 24 hours after the minutes have been concluded. (4) For immovable property seized, the Prosecutor, the Preliminary Chamber Judge or the court having ordered the seizure shall request from the competent body the mortgage notation of the seized property, enclosing a copy of the ordinance or the order by which the seizure was ordered and a copy of the trial- verbal seizure. (5) The provisions of paragraph (4) shall also apply accordingly to the disposal of mortgage registration on movable property.

In the doctrine (N. Ţăndăreanu - The Code of Insolvency commented, ed. 2017, pp. 563 et seq.), starting from a certain judicial practice of the I.C.C.J. (meaning in which the author referred to the case file dated 29.06.2016, filed in file No. 2600/1/2015, final by d.p. no 145 / 20.06.2016, delivered by the 5 judges panel in the file No 2523/1/2016) shows that, although there is no legal text providing for the possibility of revoking the precautionary measure, it should be accepted both theoretically and in practice that the judge in charge of dealing with the criminal case may appreciate a possible applications for the revocation of criminal sequestration, in relation to disputes. art. 53 of the Constitution, which regulates the way in which the exercise of some rights may be restricted and art. 2, al. 2 C.pr.civ., according to which the provisions of the Code of Civil Procedure also apply in other matters, insofar as the laws governing them do not contain any contrary provisions, with reference to the prev. art. 957 C.pr.civ. which regulates the procedure for lifting civilian seizure.

Art .957

(1) If the debtor will, in all cases, provide a sufficient guarantee, the court may, at the request of the debtor, raise the seizure insurer. The request shall be settled in the council chamber as a matter of urgency and with the short-term summons of the parties, by way of termination only subject to appeal, within 5 days of pronouncement, to the hierarchically superior court. The appeal is being dealt with urgently and above all. The provisions of art. 954 par. (4) shall apply accordingly.

(2) Also, if the principal claim under which the precautionary measure was granted was annulled, rejected or obliterated by a final judgment or if the person who made it waived its judgment, the debtor may request the lifting of the measure by the court which has given its consent. On the request, the court pronounces itself by a final decision, without the parties being summoned. The provisions of art. 955 shall apply accordingly.

It is to be noted here that by d. no. no. 145 / 20.06.2016, pronounced by the Panel of 5 judges in file no. 2523/1/2016 the seizure measure was revoked after a bail was recorded corresponding to the value of the seized assets, while the cited author invokes the possibility of obtaining the judicial liquidator the revocation of the unconditional bail penalty (cf., p. 563), an opinion we do not share with the contents prev. art. 957 C.pr.civ. (*the debtor will, in all cases, provide a sufficient guarantee*). Of course, such an obligation may be an obstacle to the possible lifting of the seizure imposed on the assets of a debtor involved in insolvency.

We could allow the possibility of revoking a seizure, subject to the replacement of the appropriate collateral, by providing another guarantee so that the seized original asset can be capitalized in insolvency proceedings, especially when this measure is included in a reorganization plan, and the sale of the good would create the premises for a debtor's business to be unblocked.

If we were in bankruptcy proceedings, we might discuss a possible interest in making a request for the revocation of criminal sequestration when, for example, there was a firm offer of purchase that would correspond to the value of the good and which is not less than the amount for which the seizure has been established, with the indication that from the sale of the asset under these conditions, the amount correlated to the seizure would take special purpose prev. by art. 27 of the Law no. 318/2015, and the eventual excess spread would serve the satisfaction of insolvency creditors.

Of course, there would be an impediment to determining who would make the sale: the Special Agency, or the insolvency practitioner.

We assume that the sale should be done through the Agency regulated by Law no. 318/2015 and only the surplus that would exceed the value of the seizure would go to the insolvency account administered by the practitioner, the decision of the High Court of Cassation and Justice - The competent body that judges the appeal in the interest of the law, published in: Official Gazette no. 411 of June 20, 2012, which stated that, in interpreting and applying the provisions of art. 142 para. (1) of the Law no. 85/2006, referring to art. 136 par. (6) of the Fiscal Procedure Code, the enforcement of court decisions to attract the responsibility of the members of the management or supervisory bodies under the conditions of art. 138 of the Law no. 85/2006 will be made, in the case of the competition between the tax creditors and the other creditors of the debtor, according to the Code of fiscal procedure.

With regard to the provision of the guarantee, it could even consist in recording the amount corresponding to the price of the alleged bidder, in a special purpose account, at the disposal of the court, until the application for revocation of the seizure has been granted and then available to the Agency .

Such a legal construction could be based on both the rule of principle that a legal provision must be interpreted in the sense of producing legal effects and the need to assess the dynamic nature of the concepts which are the subject of the normative regulation . In this sense, there should be a wider openness in the future to the pragmatic interpretation and application of the criminal procedural provisions enforced on civil forced execution executed either individually or collectively, the purpose of the insurer procedural measures being precisely the increase of the chances of the material damage by committing offenses, which can be regarded as similar to that contemplated by the insolvency law, and which consists in the satisfaction of the creditors participating in the collective proceedings.

The eventual contest between the different categories of creditors should not annihilate the opportunities to maximize the rate of recovery of claims that may occur at some point in terms of the capitalization of assets, this restriction adversely affecting all the creditors of the debtor involved in a insolvency.

In hypothetical case no. 2:

- a criminal seizure instituted to ensure the execution of the fine or legal costs or the repair of the damage caused by a criminal offense to a property of the debtor involved in the insolvency proceedings and on which other creditors' guarantees have been previously established and related advertising;

We will consider decision no. 8 of April 27, 2015 issued by the High Court of Cassation and Justice - The Law Enforcement Unit, published in the Official Gazette no. 431 of June 17, 2015, dismissing as inadmissible the petition filed by Sibiu Tribunal - Civil Division I, by the Conclusion delivered on 23 December 2014 in File no. 18.699 / 306/2013, pending before that court, on the issue of a preliminary ruling for the lack of interpretation of the provisions of art. 711 et seq. Of the Code of Civil Procedure.

In the following, the following is shown:

"The text of art. 519 of the Code of Civil Procedure imposes the requirement that the High Court of Cassation and Justice should not have ruled (on appeal in the interest of the law or in the cassation appeal) on the matter of law which is the subject of the request for a preliminary ruling and that legal issue are not the subject of an appeal in the interest of the law currently in the process.

In the exceptional situation where the High Court of Cassation and Justice has already ruled on the issue in question in any way, and the interpretation given is wrong, there is the possibility of a change of case law, but the way of the preliminary ruling is no longer open.

In this case, the High Court - the Criminal Division has pronounced on the matter of law the resolution of which is requested, by Decision no. 1.392 of 23 April 2013, in File no. 423/64/2012 / a1, stating the following:

"In this logical-juridical succession, the High Court finds that at the date when the criminal insurer was seized, the real estate was affected by a mortgage following a loan agreement with a real estate collateral. was sold, then auctioned by the mortgage lender.

Under this circumstance, the real estate situation has changed, becoming the property of B.D.'s petitioner, which was unrelated to the facts that are the subject of the legal relationship inferred from the judgment. On the other hand, it is obvious that the bailiff was found in the face of a contest between a mortgage claim and an alleged debt of presumptive chirographic creditors. As such, mortgage receivable has a high priority and priority even if the injured parties have a claim against the owner of the property, but in the case of chirographic creditors, they will satisfy their claims to the extent that there will still be some of that good. The guaranteed loan was worth 300 thousand euros, the property being awarded at 60 thousand euro.

According to art. 163 of the Criminal Procedure Code, the precautionary measures are taken during the criminal prosecutor's trial or the court and consist in the unavailability, by imposing a seizure, of the movable and immovable property, with a view to the special confiscation, repair of the damages caused by the offense, and to guarantee the execution of the fine. Provisional damages may be taken against the property of the accused or defendant and the person in charge of the civilian business, up to the amount of the probable damage.

As a result, seizure is set up to ensure compensation for civil parties. In the present case, even if the injured parties who have filed applications for civil party formation are granted and ordered to settle, they are in competition with the petitioner in the present case, BD, a mortgagee who in this case circumstance is a priority, and will be satisfied first, since the mortgage is a real right of access to the holder's right to pursue the property in the hands of anyone who finds a right of preference in respecting its claim to the other creditors.

Even in relation to other mortgage lenders, the petitioner would have had the right to be the first to be compensated, since among the two creditors with a different rank ranked the priority one, so the one who registered it first, in this case BD, having the right to full compensation from the mortgage and only afterwards and from what remains to be called first to the subsequent mortgage creditor and only then to the creditors.

According to art. 518 par. 3 of the Civil Procedure Code, from the date of registration of the property transmitted by the adjudication act, the building remains free of any mortgages or other duties in guaranteeing the rights of the claim; the creditors - without the case of the beneficiaries of the insurer's seizure - can achieve these rights only of the price obtained.

In this respect, it is the practice and jurisprudence of the High Court of Cassation and Justice - the Criminal Section, in the sense that if an immovable property upon which the insurer was seized was capitalized through the sale at a public auction and part of the price was distributed the insurer's seizure will be maintained only on the amount undistributed to the creditors and other assets of the defendant, up to the amount of the damage caused (Criminal Decision No. 3.507 of 1 June 2006)".

It is also remembered that the role of Î.C.C.J.- R.I.L. is registered under file no. 2739/1/2017, with judgment on 18.02.2018, notification of C.A. Bacau on the following issue of law:

"- if in the interpretation of art. 712 C.pr.civ., The existence of precautionary measures established in criminal proceedings against the assets of a natural or legal person:

a). suspend the forced execution initiated by a secured creditor whose mortgage right on the same assets became enforceable against third parties prior to the establishment of the insurer in the criminal proceedings?

b). does the nullity of the enforcement acts subsequent to the establishment of the precautionary measure in the criminal proceedings on the same goods, thereby preventing the forced execution of a guaranteed creditor? "

In these circumstances, given both disputes. art. 91, paragraph 1 of Law no. 85/2014, and the case-law of the ICCJC. (Criminal Section, No. 1.392 of April 23, 2013, File No. 423/64/2012 / a1 and Criminal Decision No. 3.507 of June 1, 2006, and the Law Enforcement Unit, dp 8 from 27 April 2015), until the decision of RIL has been pronounced related to file no. 2739/1/2017, with a trial date of 18.02.2018, it must be acknowledged that the possible criminal sequestration imposed on the debtor's assets in insolvency does not prevent the sale of those goods in respect of which, in the advertising registers, preference prior to the introduction of criminal sequestration, with the legal and jurisprudential argument that the privileged claim has priority over both the budgetary claim and the chirographic claim in relation to the distribution order established, including by the law of insolvency.

In hypothetical case no. 3 :

- a criminal seizure imposed on goods subject to special confiscation or extended confiscation and in respect of which no other guarantees have been previously lodged in favor of creditors.

In the doctrine (idem. page nr. 570) two opinions were advanced:

- one, according to which these goods can not be sold,

- another, according to which these goods may be sold but not free of duties but affected by the measure of special confiscation or extended confiscation.

The first opinion is not economically productive, and the second is of no interest to potential buyers.

Starting from prev. art. 252, ind. 1 and the following form Criminal Procedure Code, it might be possible to discuss, at the theoretical level, about any arguments regarding the pragmatism of the solution in order to assess the admissibility of an application for the revocation of the seizure measure where, at some point in time, the existence of a firm offer of purchase is of a nature to provide the necessary amounts both to cover the damage and to satisfy partially the chirographic creditors who would never have any chance in the concurrent proceedings before the budget lender.

In hypothetical case no. 4:

- a criminal seizure imposed on goods subject to special confiscation or extensive confiscation in respect of which guarantees have been pre-established for creditors;

Referring to the same two opinions, we will see that in this situation, the situation of the creditor who has pre-established guarantees on the good before the institution of the criminal seizure has to be further analyzed.

In this regard, we are considering disputes. art. 909-910 C.civ., Corroborated with art. 909, al. 1 C.civ., according to which:

Art. 909

Correction of temporary entry or entry :

(1). Any interested person may request the rectification of provisional entry or entry if:

1. the entry or the termination is not valid or the act under which the registration was made was abolished, under the law, for causes or reasons preceding or concurrent with the conclusion or, as the case may be, with its issuance;

2. the enrolled right was wrongly qualified;

3. the conditions for the existence of the enrolled right are no longer fulfilled or the effect of the legal act under which the registration was made is no longer fulfilled;

4. the registration in the land register is not, for any other reason, consistent with the real legal situation of the building.

(2) The correction of the entries in the land book may be made either amiably, by the authentic notary statement of the holder of the right to be canceled or modified, or, in the case of a dispute, by a final court decision.

(3) When the right entered in the land book is to be rectified, the holder is obliged to surrender to the entitled person, with the consent in the authentic notary form for the correction, the necessary documents, otherwise the interested person may ask the court to have registration in the land register. In the latter case, the decision of the court will supplement the consent of the party who has the obligation to hand over the documents necessary for the rectification.

(4) The rectification action may be brought simultaneously or separately after the substantive action has been admissible, as the case may be. It may be formulated against both the acquirer and third parties, for consideration or free of charge, under the conditions provided for in Art. 909, with the exception of the action based on the provisions of paragraph (1) (3) and (4), which can not be initiated against third parties who have entered a real right acquired in good faith and by a legal act for pecuniary interest or, where applicable, under a mortgage agreement , building on the land book.

ART. 909

Time limits for exercising the right of rectification :

(1) Subject to the limitation of the right of action, the rectification action is imprecise to the acquirer as well as to the third party who has acquired in bad faith the right enforced for

his benefit. If the substantive action brought by way of a separate action has been upheld, the rectification action is also impracticable against both those who have been summoned in court and third parties who have acquired a real right after the substantive action has been registered Land Registry.

(2) With respect to third persons who have acquired in good faith a real right through donation or privately related, the action for rectification, subject to the right to the substantive action, may be introduced only within 5 years, count from registration of their application.

(3) Also, subject to the limitation of the right of action, the rectification action, based exclusively on the provisions of Art. 908 par. (1) (1) and (2), it may also be directed against third parties who have entered into any real right acquired in good faith and by a legal act for pecuniary interest or, where applicable, under a contract mortgage, based on the land book. In such cases, the time limit shall be three years from the date on which the application for registration was filed by the immediate acquirer of the right whose rectification is required, except where the termination ordering the registration which is the subject of the action for rectification, has been communicated to the entitled party, in which case the term will be one year after its communication.

(4) The terms provided in paragraph (2) and (3) are deferral terms.

ART. 910

Effects of admitting the rectification action :

(1) The decision authorizing the rectification of an entry shall not prejudice rights in favor of those who were not parties.

(2) If, however, the rectification action has been recorded in the land book, the court decision of admission shall also be entered ex officio against those who have acquired a tabular after the scoring, which will be erased with the right of their author.

ART. 901

Acquiring a tabular right in good faith :

(1) Subject to any legal provisions to the contrary, anyone who has acquired in good faith any real right entered in the land book by virtue of a legal act for pecuniary interest shall be deemed to be the proprietor of the right in his favor even if, at the request of the beneficial owner , the author's right is removed from the land book.

(2) The acquiring third party shall be considered in good faith only if the following conditions are fulfilled at the date of registration of the application for registration of the right for its benefit: a) no action was filed against the content of the land book; b) there are no grounds for the rectification of the book in favor of another person; and c) did not otherwise know the inaccuracy of the land book.

(3) The provisions of this article also apply to a third party who has acquired in good faith a mortgage on the basis of a legal act concluded with the landlord or his successor in title, as the case may be.

(4). The provisions of this Article may not, however, be opposed by a Contracting Party to the other, or by their universal successors or by universal suffrage, as the case may be.

We assume that the third party to the criminal trial, a privileged creditor based on a mortgage or other collateral assimilated under art. 2347 C.civ., Has the right to be protected, on the basis of his good faith which the law has understood to protect it, as an element capable of contributing to the dynamic security of the civilian circuit and thus to benefit in a concrete manner and its guarantee, *as long as it is not proved to him in a contradictory judicial*

procedure, the fulfillment of the conditions of admissibility of the action for rectification of a land book concerning the entry relating to the guarantee he has established.

ART. 2347
Assimilated operations

(1). Contracts which have as their object the preservation or establishment of a right over a property to ensure the performance of an obligation, whatever their number, nature or denomination, shall not be invoked against third parties who have acquired rights in respect of that property unless they are registered in the advertising registers, according to the rules established for mortgages.

(2) Restitution clauses, repurchase agreements or collaterals concluded for the purpose of collateral are thus assimilated to mortgages.

(3) The provisions of this chapter on the order of preference and execution of mortgages shall apply accordingly to the contracts provided for in paragraph (1).

Such a procedural guarantee could even constitute an appeal before the criminal court to challenge, on the basis of Art. 250 C.pr. pen, the institution of criminal sequestration of the good already offered as a guarantee in his favor.

In this respect, disputes should be considered. art. 8 of Directive 2014/42 governing the guarantees offered to third parties under covert and special confiscation measures:

Article 8
Safeguards

1. Member States shall take the necessary measures to ensure that the persons affected by the measures provided for under this Directive have the right to an effective remedy and a fair trial in order to uphold their rights.

2. Member States shall take the necessary measures to ensure that the freezing order is communicated to the affected person as soon as possible after its execution. Such communication shall indicate, at least briefly, the reason or reasons for the order concerned. When it is necessary to avoid jeopardising a criminal investigation, the competent authorities may postpone communicating the freezing order to the affected person.

3. The freezing order shall remain in force only for as long as it is necessary to preserve the property with a view to possible subsequent confiscation.

4. Member States shall provide for the effective possibility for the person whose property is affected to challenge the freezing order before a court, in accordance with procedures provided for in national law. Such procedures may provide that when the initial freezing order has been taken by a competent authority other than a judicial authority, such order shall first be submitted for validation or review to a judicial authority before it can be challenged before a court.

5. Frozen property which is not subsequently confiscated shall be returned immediately. The conditions or procedural rules under which such property is returned shall be determined by national law.

6. Member States shall take the necessary measures to ensure that reasons are given for any confiscation order and that the order is communicated to the person affected. Member States shall provide for the effective possibility for a person in respect of whom confiscation is ordered to challenge the order before a court.

7. Without prejudice to Directive 2012/13/EU and Directive 2013/48/EU, persons whose property is affected by a confiscation order shall have the right of access to a lawyer throughout the confiscation proceedings relating to the determination of the proceeds and

instrumentalities in order to uphold their rights. The persons concerned shall be informed of that right.

8. In proceedings referred to in Article 5, the affected person shall have an effective possibility to challenge the circumstances of the case, including specific facts and available evidence on the basis of which the property concerned is considered to be property that is derived from criminal conduct.

9. Third parties shall be entitled to claim title of ownership or other property rights, including in the cases referred to in Article 6.

10. Where, as a result of a criminal offence, victims have claims against the person who is subject to a confiscation measure provided for under this Directive, Member States shall take the necessary measures to ensure that the confiscation measure does not prevent those victims from seeking compensation for their claims.

In hypothetical case no. 5:

- a criminal seizure imposed on goods subject to special confiscation or extensive confiscation and which are acquired by the insolvent debtor from the suspect;

According to art. 249, al. (4) from Code of Criminal Procedure, provisional measures for special confiscation or extended confiscation may be taken against the suspect or defendant's property *or other persons in the possession or possession of the goods to be confiscated.*

Similar to the approach adopted for hypothetical case no. 4, we should accept the thesis of the protection of the acquirer for pecuniary and good faith reasons, otherwise the debtor involved in insolvency has only the action in regression against the one from which he has acquired.

This is all the more so as Art. 6 of the Directive no. 2014/42 regulates the protection of third parties in good faith.

Article 6

Confiscation from a third party

1. Member States shall take the necessary measures to enable the confiscation of proceeds, or other property the value of which corresponds to proceeds, which, directly or indirectly, were transferred by a suspected or accused person to third parties, or which were acquired by third parties from a suspected or accused person, at least if those third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer or acquisition was carried out free of charge or in exchange for an amount significantly lower than the market value.

2. Paragraph 1 shall not prejudice the rights of bona fide third parties.

Debreni Cristian,
a syndic judge at Arad Tribunal

INSOLVENCY OF THE CORPORATE GROUP IN ACCORDANCE WITH ROMANIAN LEGISLATION: PROCEDURAL AND SUBSTANTIVE ISSUES

Carmen PĂLĂCEAN

The Romanian insolvency legislation regulated for the first time the insolvency of the group of companies through Law no. 85/2014[279].

In order to reach the new regulation, the following were taken into account:

- The proposal to amend Council Regulation (EC) 1346/2000, as regards the cross-border insolvency of the group of companies;
- The UNCITRAL Legislative Guide on Insolvency, Part III - Treatment of group of companies in insolvency – where international cases are highlighted to demonstrate the need to promote a cross-border insolvency of the group of companies. It has thus been shown that when the business is controlled and led by a group of members located in different jurisdictions in an integrated and orderly manner, it is expected that the economic failure of one of the members will shift into a series of insolvencies that will affect other members from different jurisdictions.

Law no. 85/2014 regulates the insolvency of the group of companies in Title II *Insolvency Procedure*, Chapter II *Special Provisions on Insolvency of the Enterprise Groups*, Articles 183 to 203. There are other provisions that are contained in the first part of the law, namely in art. . 5 par. (1), points 35, 37, 38 and 39.

According to the provisions of art. 5 par. (1) point 35, the group of companies is two or more companies interconnected by controlling and / or holding qualifying holdings.

As a result, according to the Romanian law regulating the insolvency of legal entities, we are in the presence of a group of companies when two or more companies are interconnected: either by control, by holding a qualifying holding, or by both.

The methods of delimitation of the group of companies are the control and qualifying holdings taken separately or together, as the case may be.

In the content of art. 5 there are several definitions for the group of companies: group of companies, control, group member, controlled group member and parent company.

The group of companies under insolvency regime. Definition

According to art. 5 point 35 of the Law, a group of companies means two or more companies interconnected by controlling and / or holding qualified holdings.

Our law uses both criteria generally used in corporate groups, controlling and holding a stake. This definition, at least at first glance, differs from all the other definitions of the group of companies in the special legislation (capital market, insurance, accounting).

First of all, in all these matters, the definition of the group of companies expressly states that the group is made up of the parent company and its subsidiaries, which is missing in the definition of the Law.

Secondly, the use of the phrase 'and / or' in the group definition is singular, and it does not correspond to another definition of the group of companies, whether national or international. This drafting option may reflect the intention of the legislator to include the widest range of possibilities. As will be seen below, this approach is totally inappropriate.

In the conception of the Law, we will therefore be in the presence of a group of

[279] Law no. 85/2014 on Insolvency and Insolvency Prevention Procedures, published in Official Gazette of Romania Part I, no. 466 of June 25, 2014.

companies when two or more companies are interconnected (i) either though control, (ii) either by holding a qualifying holding, (iii) either through both. In other words, there is a group of companies when two or more companies are interconnected by control or holding a share. Such a conclusion will be all the more so when both criteria are met, namely the holding of both control and a qualified holding.

The member of the group under insolvency. Definition

A group member can be any of the group's companies, whether it is the parent company or a controlled member of the group.

The controlled member of the group under insolvency. Definition

A controlled member of the group is that company controlled by the parent company.

The parent company under insolvency. Definition

According to art. 5 point 62 of the Law, the parent company is the company which exercises control or dominant influence over the other companies in the group.

As you can see, this definition is not the happiest one, using the terms control and dominant influence, as the latter is included in the definition of the former.

Going beyond this, we note that, while the definition of control is based on passive control, characterized by the mere existence of the ability to control, the definition of the parent-company refers to active control, that is to say, the exercise of control. Therefore, a company which has control over another company, namely the ability to determine its policies or decisions, is not considered to be the parent company of that company. On the other hand, if it makes use of this capacity, it exercises control over the controlled company, it is considered a parent company.

But what does this different approach to the two definitions mean, given that any major shareholder or shareholder naturally holds control over society and naturally exercises the right to vote, determining the important decisions of that company, that is, exercise control.

An explanation may be that we are again in the presence of a simple error or negligence. The fact that all the definitions examined have a lower or greater degree of imprecision makes such a possibility plausible. Instead of this imprecise and confusing definition, there were some very simple and clear regulatory options. One was to define the parent company as the controlling company over the other companies in the group. Another option was simply to write that if the person holding the control is a company, it is called a parent company. Finally, in the presumption of holding control, instead of talking about the person who will be considered to have control in those hypotheses, it is possible to say that the company in one of those hypotheses is considered to be a parent company.

This approach is also supported by the fact that, in the concept of the law, the definition of the parent company is practically irrelevant in the determination of the group of companies: on the one hand, because the group is defined without any reference to the parent company, automatically, even in the absence of any definition, the company that controls the other companies in the group; on the other hand, because in the economy of regulation the parent company has a modest role, and only if it is part of the procedure. More specifically, the competent court will be the tribunal in whose jurisdiction the parent company has its headquarters and if the same insolvency practitioner has not been appointed for each member of the group, the coordination of the communication between the insolvency practitioners is done by the practitioner designated in the parent company file.

We will, however, still analyze the assumption that the definition of the parent company has been deliberately formulated, with a purpose well established by the legislator.

It seems logical that if the lawmaker had considered the common situation of all the majority shareholders or shareholders, it would not have had to resort to the active control criterion to define the parent company but would have used one of the previously proposed variants. If, however, this was done for a particular purpose, the only thing that can help us is the specificity of group relations, so we can assume that the law takes into account the situations that are specific to the groups of societies, and not the ordinary ones, specific to any associate or majority shareholder.

We have shown on other occasions that what differentiates groups of societies from societies with simple associations is the interdependent way of deploying the activities of the component companies according to the strategy and policies of the parent company.

The exercise of control by the parent company could mean, in this context, the exercise of its corporate rights in the light of a global policy and strategy developed at the group level.

For an associate or for a majority shareholder of a common law, including a parent company of a decentralized group, control can not be viewed in a dual way, since the mere exercise of the right to vote under the law includes both passive and active dimensions of control.

Indeed, naturally, any associate or majority shareholder determines the decisions of the society in which he holds the majority, but not any associate or majority shareholder leads the company according to a unitary concept thought at a global level, even for the mere fact that this implies, necessarily, but not enough, the existence of a group of companies.

From this perspective, the interpretation of the law could be that the parent company is the company that can instill a unitary direction, a unitary leadership of group of companies in the sense of imposing its financial and operational strategy, whether this is done formally or informally.

In practice, such an interpretation would mean that the law is only concerned with groups of economically integrated companies, managed in a unitary manner by the parent company as a single undertaking. However, this would mean a narrowing of the scope of the legal definition of the group of companies, meaning that, of the groups considered as such by law, we should only be concerned in the insolvency procedure with those which also satisfy the unitary management criterion by the parent company.

Such an interpretation would lead to new complications. Thus, we should analyze the complex notion of "group interest" because only by reference to the interest of the group and of the controlled companies, it is possible to determine whether or not the control of the parent company over the group companies and the consequences thereof.

Lastly, such an interpretation can not be accepted simply because, if the law had intended to define the groups of societies on the basis of unitary management, it ought to have done so expressly.

With this in mind, for the sake of clarity of regulation, the definition of a parent should be changed in one of the ways indicated above.

Control in the insolvency regime. Definition

According to art. 5 par. (1) point 9 of the Law no. 85/2014, control is *the ability to directly or indirectly determine, the financial and operating policy of a company or decisions at the level of the corporate bodies*

According to art. 5 par. (1) point 9 of the Law no. 85/2017, a person may be considered to have control when:

a) they hold, directly or indirectly, a qualifying holding of at least 40% of the voting rights of that company and no other shareholder or shareholder holds directly or indirectly a higher percentage of the voting rights;

b) they directly or indirectly hold the majority of the voting rights in the general meeting of that company;

c) as an associate or shareholder of that company, they have the power to appoint or revoke the majority of the members of the administrative, management or supervisory bodies.

The operational policy of the company considers the way in which the company is organized and deployed, starting with the production of the goods / services and ending with the way of selling and commercializing them on the market.

Decisions regarding the activity of group companies are taken in relation to the business model on which the group operates. For example, the group may decide: to close a production unit in a certain area or country, to limit or increase production, or to open new production units.

The operational policy determines the financial policy of the company, the latter taking into account the financial resources needed to achieve the operational objectives within a certain timeframe and the ways to obtain financing, either by means of equity or by means of loans.

Financial policy decisions are based on the financial structure adopted by the enterprise according to its profitability, growth and risk objectives. The main tasks of the financial policy are to choose a pace of growth of economic capital and the ways of financing this growth, as such a choice results in an increase in the financial capital and the degree of autonomy of the enterprise.

One of the essential elements of a group of companies is the *financial policy* of the group, which is set by the parent company. The parent company uses the resources according to the objectives it sets at the level of the group, allocating resources to the companies in which they decide to invest or those who have a higher need for financing, including to get out of the financial deficit.

In most cases, the parent company or other group companies grant credits, loans or guarantees to other companies in the group. Credits within the group predate postponement of either the performance of contractual obligations, such as the payment of invoices or statutory obligations, such as the payment of due dividends. Also, the financial resources of the group companies are used only according to the criteria set by the parent company regarding the investment ceiling, their object, the way of using the internal and external resources, the degree of indebtedness, etc.

As a result, intragroup financing is done under the conditions set by the parent company through its financial policy adopted at the level of the group. The extreme but not rare case is where the parent company elaborates entirely the financial policy of society, from the perspective of the group's policy, and impose it within the competent societal bodies.

Group companies were found to have resisted easier in times of economic and financial difficulty due to the centralized management of group resources and the allocation of resources to troubled companies resulting from the implementation of the global financial policy by the parent company.

Some parent company decisions may be imposed only on the basis of written or verbal instructions or in the form of recommendations in more or less formal discussions. In the case of centralized and economically integrated groups, many of the decisions of the bodies of the controlled companies are nothing more than the natural pursuit of the decisions, policies or strategies adopted by the parent company at the level of the whole group.

1. The presumption of control

Article 5, (9) of the Law does not only cover the definition of control but also establishes a simple presumption of holding control. Thus, *a person will be considered to have control when:*

a) they hold, directly or indirectly, a qualifying holding of at least 40% of the voting rights of that company and no other shareholder or shareholder holds directly or indirectly a higher percentage of the voting rights;

b) they directly or indirectly hold the majority of the voting rights in the general meeting of that company;

c) as associates or shareholders of that company, they have the power to appoint or revoke the majority of the members of the administrative, management or supervisory bodies.

As a general observation, in all assumptions, the person presumed to have control must hold a share, that is, be an associate or a shareholder.

As far as the first hypothesis is concerned, it would be a comment on the form and the one on the merits.

From a formal point of view, the expression of the law is again unfortunate, even contradictory, using the *qualified participation ratio of at least 40%*, given that qualified participation is a notion defined by law, which will be analyzed below.

Moreover, qualifying participation here involves voting rights, while the definition of qualifying participation means holding a percentage of the share capital. This method of regulation is totally inappropriate, since it only creates confusion. Was it complicated to write simply *holding directly or indirectly at least 40% of (...)?*

From the point of view of the substance, the hypothesis does not take into account the fact that within a company there are two associates or shareholders who each hold 40% of the voting rights. The text is probably taken from the French law, being identical to art. L233-3 of *Code de commerce*. This leniency of the French legislator was corrected by the Czech legislator when regulating the groups of companies, in the Czech Republic the presumption of holding control in the case of holding at least 40% of the voting rights is operative only if there is no other associate or shareholder which holds a similar or higher percentage.

Therefore, although the law does not expressly state it, we consider that the presumption of control holds only the associate / shareholder holding at least 40% of the voting rights of that company, provided that no other associate holds directly or indirectly, a percentage equal to or greater than the voting rights.

The presumption established by the law is a simple one, which means that it can be overturned by evidence contrary to the interested party to prove the group's non-existence. The interest in probing such a situation would be of the company that is alleged to have control over another company or a company that is claimed to be controlled by another. The reversal of the presumption presupposes proving that although a person is in at least one of the three hypotheses, that person does not have control, since it has no ability to determine or influence predominantly financial and operational policy, in particular , nor the decisions of the corporate bodies in general.

For example, in the first hypothesis of the presumption analyzed above, the person holding 40% of the voting rights may show that there is an associate or shareholder who also holds 40% of the voting rights of that company. In such a case, it may be either a joint control or even a sole control of the other associate or shareholder, if there are other elements that lead to that conclusion, by reference to the criteria provided by the law.

It is also possible to imagine situations where, although a person has the majority of the voting rights, it does not have control within the meaning of the law. These situations can be generated, for example, by clauses in the articles of association on the basis of which another associate or shareholder has the right to veto important decisions within the general assembly,

such as the appointment and removal of members of the organs of society.

On the other hand, there is nothing to exclude the proof that a person who does not assume the presumption still has control. Just as a person holding 40% of the voting rights does not necessarily have control, similarly a person holding 39% of the voting rights, for example, can not be excluded from such a possibility. Situations of this kind can be found in the case of large atomized companies, where there is only one significant shareholder and many minority shareholders holding very small percentages. These situations are frequent, especially for listed companies, with the special law in this matter presuming the control of the company by the significant shareholder holding at least 33% of the voting rights.

Therefore, the presumption establishes some indicative, and not absolute, indications, indications that need to be supplemented by other evidence to demonstrate the existence or absence of the group, as the case may be.

One thing is certain: namely, that the holding of control necessarily implies the quality of associate or shareholder, ie holding a share.

2. Qualified participation

According to art. 5 point 41 of the Law, *qualifying holding means the fraction of capital between 20% and 50% held by a person in another company.*

The use of the definition of qualified control and participation in the definition of the group of companies would mean that the group is composed of interconnected companies either:

(i) through control, ie through the ability to determine the decisions of the company,
(ii) (ii) through holding a fraction of 20% to 50% of the share capital, or
(iii) (iii) through both.

It is obvious that the second hypothesis, which defines the group of companies only on the basis of the holding of one company in another society of a fraction of 20% to 50% of the share capital, would be absurd, making no sense in the absence of an additional criterion.

Under these circumstances, the reference to holding a qualifying share in the definition of a group of companies is odd. If it wanted to limit the group to companies with controlling links, it appears to be totally useless. The same conclusion is reached if it was intended that only the companies in which the parent had a minimum percentage should be included in the group, in which case it could simply be said so. Whatever the legislator intended, holding between 20% and 50% of the share capital can by no means constitute the sole criterion of the definition of the group of companies.

Therefore, the definition of qualified participation is not only useless, but also confusing, especially since it serves only to define the group of companies. In the absence of it, everything would be much simpler, the group of companies meaning two or more companies interconnected by control. Even though the definition of qualified participation, in our view, is more confusing, as long as it appears in the law, we must try to find a meaning, and the only legal sense that we can find, which also corresponds to the purpose of the law, and the nature of the groups of companies would be to establish the minimum shares which, combined with the control, defines the group of companies. In other words, what we think the law wants to express or should do is that the ability to gain control only belongs to people who hold, directly or indirectly, a stake of at least 20% of the share capital.

3 Principles governing the insolvency regime of the group of companies

The group of companies is governed in insolvency by the general rules of insolvency,

but also by the specific exemptions imposed for its insolvency.

Group companies have patrimonial independence and the liability of the group members is not transferred between them.

Insolvency proceedings against members of a group of companies are coordinated with a view to ensuring their speed and harmonization and minimizing costs.

Participants in the procedure have the obligation to cooperate in the procedure. The modalities of cooperation consist in the exchange of information, the simultaneous opening of insolvency proceedings for group members, the correlation of deadlines, the coordination of communication between insolvency practitioners by the practitioner who has been designated in the parent company file or in the company with the largest fiscal value.

4 Competency of the settlement of the application for opening the insolvency procedure of the group of companies

The material jurisdiction of solving the joint application to open the insolvency proceedings against the members of the group is the tribunal as a court in the system of judicial bodies, and the territorial jurisdiction is the court in whose jurisdiction the parent company resides or, as the case may be, the company with the highest fiscal value, according to the latest published financial statement.

A separate file will be created for each member of the group. All filed files will be assigned to the syndic judge appointed under the random assignment system, in the first case registered in the computerized system of the courts.

5. Bodies applying the group of companies' procedure

5.1 The syndic judge

The syndic judge appointed in the first file randomly assigned to the opening of the insolvency proceedings of a member of a group of companies will be assigned the other files for the other members of the group.

The distribution of all insolvency files of the members of the group of companies to the same syndic judge is a necessary condition for ensuring the correlation and coordination of the proceedings as a whole.

The syndic judge will in such a situation always have the image of the procedure in its entirety and avoid parallelism and contradictory solutions in matters that have common elements among the members of the group.

The recovery of some group members will be done in the overall context of the procedure and its pace will be better adapted to the concrete situations of the procedure.

Supervision of the procedure by a single syndic judge is beneficial and ensures unity and efficiency in its development.

5.2 The Judicial Administrator

The judicial administrators may be appointed differently for each member of the group, but in some cases it may be the same for all members of the group. The appointment of the legal administrator for each member of the group of companies is made according to the general law rules of the insolvency procedure, which also apply to the insolvency of the group of companies.

Where creditors holding at least 50% of the creditor mass are the same for each member

of the group, the legal administrator or a consortium of judicial administrators will be the same for each member of the group.

If the composition of the creditor does not allow the appointment of the same court administrator, the appointed administrators will be held liable for the obligation to cooperate.

The obligation to cooperate will be set out in a protocol that will summarize the way in which the economic, legal and operational activities at the group level will be integrated.

The cooperation protocol will be filed within 10 days of the opening of the insolvency proceedings in which the coordinating practitioner was appointed, and the protocol will be approved by the syndic judge.

Any of the appointed judges may participate in the meeting of creditors and at the meeting of the creditors' committee of any of the members of the group. The judicial administrator of any of the members of the group has the procedural capacity to submit a reorganization plan in the proceedings of the other members.

The appointment of judicial administrators or judicial liquidators, as the case may be, should be done with the verification of the absence of a conflict of interest.

5.3. The special administrator

General meetings of associates or shareholders of group members will designate the same special administrator.

Within the group of companies where the same person concentrates the decision for all members, the appointment of the same special administrator does not cause any difficulty.

A problem arises when, at the level of the group members, the decision is concentrated on different people.

It was considered that in such a situation it is necessary to proceed as to the appointment of the coordinating practitioner, namely to be appointed as the special administrator of the members of the group of the parent company or of the company with the highest turnover.

If the general meetings of associates or shareholders of the members of the group of companies do not designate the same special administrator for each member, the sanction would be to not recognize the status of special administrator of the persons designated differently from the special administrator of the parent company or the company with the highest turnover

5.4 The Creditor Committee

The creditors' committee of each member of the group of companies hall be appointed according to the rules of ordinary law on insolvency.

In order to ensure the coordination of procedures in the light of the specific situations in which debts are held, it is preferred that there is at least a few common members in each committee.

The creditors' committee of the members of the group must meet at least every trimester. The purpose of these trimestrial meetings is to formulate recommendations on the activity of the debtor and to ensure the optimal implementation of the proposed reorganization plans.

6. Opening of procedures

6.1The joint request of the debtor members of the group

Members of a group of companies in insolvency may file a joint application to the

tribunal for the opening of insolvency proceedings.

The joint request of the group members must meet all the conditions for the opening of the procedure and have the supporting documents attached.

The following documents must be attached to the supporting documents necessary for any claim made by the debtor: a list of the members of the group; a description of how the group works; a list of the ongoing contracts concluded between the members of the group

The documents required in addition are necessary for the overall knowledge of the group's situation in order to manage the procedure properly.

A member of a group of companies not currently in insolvency may subscribe to a joint request made by other members of the group.

In such a case, the joint application to initiate the insolvency proceedings must also be approved by the general meeting of the associates or of the shareholder members of the group who have joined this application.

One reason a group member adheres to a joint request might be to protect him from possible financial difficulties that may affect his situation as a result of interconnection between group members.

Another reason for such a member to join the joint request would be to participate in increasing recovery chances and rescuing the group from bankruptcy through the support it could bring because of its good economic and financial situation.

6.2 The creditor application

A creditor who has a certain, tangible and exigible claim of more than 60 days and whose threshold value is 40,000 RON against two or more members of a group of companies may file a joint application for the opening of insolvency proceedings of the group of companies.

The application must be accompanied by supporting evidence, as provided by art. 70 par. (2) of the Law no. 85/2014.

6.3 Opening the procedure

If the claim of the debtors or the creditors, as the case may be, is well founded, the syndic judge will pronounce an opening of the insolvency proceedings.

By that conclusion, as the case may be, the judge shall open the general procedure or the simplified procedure.

7. Specific procedural measures

7.1Registering the claims

Creditors' claims are entered in the debt tables according to the general rules, regardless of whether creditors are ordinary or have claims against joint creditors.

Creditors with claims against solidary debtors have the right to vote and to participate in open proceedings both against the principal debtor and in the open proceedings against jointly liable debtors.

The claims of group members against other members of said group are recorded in the order of preference for subordinated claims.

Ordinary lenders should not be subject to the same risk of creditors as members of the

group, as the latter, according to the specific nature of the intragroup transactions, benefited from their results and as such their claims could be assimilated to certain financing.

7.2 The reorganization plan

Reorganization plans for group members are subject to general rules in the matter. The elements of differentiation of the reorganization plans of the members of the group of companies consist of the submission deadline and their elaboration in a compatible and coordinated way.

The deadline for submission of the reorganization plan within the insolvency of the group of companies is 60 days from the date of the display of the final receivables tables, as opposed to the 30-day joint term.

The judicial administrators of the members of the group must provide the information they need to develop compatible and coordinated reorganization plans.

7.3 Actions for annulment

In the course of the activity prior to the opening of the procedure, the members of the group could have concluded between themselves acts of constitution or transfer of patrimonial rights.

Such acts are subject to a specific treatment within the insolvency of the group of companies.

The judicial administrator of a member of the group who intends to file an action against another member of the group to cancel a transaction between them that they consider fraudulent must communicate this intention to the other judges as well as to the coordinating practitioner.

Those who have communicated their intention will analyze the potential effects of such action in order to make a decision to introduce or not to do so and will consult the committees of their creditors for that purpose.

Making a decision to bring an action for annulment will be based on purely opportunity considerations, and not legality.

For the members of the group, what matters greatly is the stability of legal acts between them and the prevention of worse situations that might arise following the cancellation of acts between them.

7.4 Loan contracts

After the opening of the procedure during the observation or reorganization period, the members of the insolvent group may conclude loan agreements with the debtor to support its activity.

For the conclusion of the loan contract the permission of the Creditors' committee is required.

A member of the group who has granted a loan to the debtor members will hold against the estate of the borrowers a claim arising from the continued activity of the debtor, which has the order of priority provided for this type of debt.

A member of the insolvent company group may conclude borrowing contracts with third parties as borrowers.

The contract so concluded may be guaranteed, with the agreement of the creditors' committee, by another member of the group.

8 Closing the procedure

The closure of the insolvency procedure of the group of companies is subject to general rules in this field.

The syndic judge will analyze the situation of each member of the group and will, as appropriate, arrange for the conclusion of the procedure.

There is no need for the closure of the procedure to be concurrent for all members of the group in insolvency.

9 Particularities of the group of companies

The particularities of the group of companies are as follows: a) it is a legal entity lacking legal personality; b) its members are united around common interests; c) it is likely to be qualified as an enterprise.

9.1Legal entity lacking legal personality

In corporate law, *stricto sensu*, the group is not a legal reality because of the lack of legal personality. The group of companies is not a subject of law within the meaning of the Civil Code, but the members of the group are companies with legal personality, which gives them legal autonomy. Autonomy is associated with independence, freedom of action, sovereignty in the perimeter of the legal personality. However, within the group, societies are neither independent nor sovereign, their behavior being determined and influenced by the company that controls them. Therefore, the group may be qualified as a legal paradox, being an entity lacking legal personality but made up of several legal entities.

In the absence of personification, the group can not be the debtor in the collective proceedings. This solution is confirmed by art. 5 point 26 of the Law no. 85/2014, which provides that „*the debtor is the natural or legal person who may be subject to a procedure provided by the present law".* From this perspective, the phrase *"insolvency of the group of companies"* used by the legislator is liable to be criticized. The group can not be the subject of insolvency proceedings. This error must be corrected in the future.

In the absence of legal personality, the group can not have any patrimony. However, control within the group becomes a form of economic ownership. The control confers on the parent company the power to use the assets and liabilities of the controlled companies, to modify their assets. In this context there is the interference of the parent company in the activities and patrimony of the controlled companies. This interference may be the manifestation of normal or ordinary relationships within the group. Otherwise, it may be abnormal or abusive, affecting the joint pledge of the creditors of the companies controlled by the group. Also, in group companies, the patrimony of some companies may be confused, or societies may be fictitious.

From the perspective of accounting regulations, the consolidated financial statements of members of a group disclose the existence of that entity.

9.2Community of Interests

Groups of companies are genuine company assemblies. They are formed on the basis of a group of contracts governed by common interests of all members. The community of interest

differs from the social interest of each group company. The interest of the group is immediate, while the interest of the component companies is a future one. Thus, each operation within the group loses its individuality and must be appreciated in light of the group policy. In certain situations, the community of interests sacrifices the distinct social interest of each company that is a member of the group.

Usually, the community of interests of the members of the group allows the parent to use the assets of the controlled members. Often the controlling company has access to the assets of the members of the group as if it were its own assets. In this context, the resources of group members are not always used in the interest of the company, but in the interest of the group. Clearly, the use of the assets of the group of companies by the parent company affects their patrimony. This makes it possible for a group company to be impregnated with all the debts of the group.

9.3It is susceptible of being qualified as an enterprise

The group of companies is a way of organizing the exercise of an economic activity, structured on smaller component companies, with a single direction, imposing its decisions at the level of the group, functioning according to a common strategy, pursuing a common interest distinct from the social interest of each of its component companies. These characteristics allow the group to have autonomous market behavior even if it lacks legal personality.

The thesis that the group of companies is an enterprise is not new. This thesis was originally launched and then developed by the Court of Justice in Luxembourg in the field of competition law, especially in the context of the analysis of the liability of the parent company for the debts of the subsidiary.

In the *Höfner and Elser* decision,of 23 April 1991, the Court notes that the concept of an enterprise means any entity exercising an economic activity independent of the legal status of that entity and its mode of financing[280]. In the *Aalborg Portland v. The Commission* decision, the Court recognizes the group of companies as economic unit even if the parent and the subsidiary are distinct legal persons and therefore qualifies it as an enterprise[281].

In the context of this qualification, the Court of Justice has consistently held that when a subsidiary has legal personality but has no decisional autonomy, acting in accordance with the instructions of the parent company, it does not have a real autonomy, forming an economic unit with the parent company and therefore its conduct must be attributed to the parent company[282]. In a relatively recent decision, the Court confirms this case-law by arguing that, in order to determine whether a subsidiary independently determines its conduct on the market, account must be taken not only of the holding of the parent company in the capital of the other companies, „*but what also needs to be taken into consideration is all the relevant elements of the economic, organizational and legal links that link this subsidiary to the parent company, links which may vary according to each individual case and therefore can not be addressed to an exhaustive list of settled case-law, which shows that the conduct of a subsidiary may be attributed to the parent company, in particular where, although it has distinct legal personality, that subsidiary does not autonomously decide on its conduct on the market but applies essentially the instructions given to him by the parent company*"[283]. In the same case, the Court

[280] ECJ, 23.04.1991, c-41/1990.
[281] ECJ, 07.01.2004, c- 204/00P, c- 205/00 P, c-211/00P, c-213/00 P, c-217/00 P, c-219/00 P.
[282] ECJ, 14.07.1972, I*mperial Chemical Industries LTD v/ The Commission*, C-48/69; ECJ, 21.02.1973, *Europemballage corporation and Continental Can Inc v/ The Commission*, c-6/72; ECJ, 11.04.1989, *Ahmed Saeed Flugheisen and the Silver Line Gmbh v/ Zentrall*, c- 66/86.
[283] ECJ, 09.12.2009, c-97/08, *Akzo Nobel*, par. 74.

states that „*Community competition law is based on the principle of the personal liability of the economic entity which committed the infringement. If the parent company is part of that economic unit (...) which may consist of several legal persons, it is considered that that parent company is jointly and severally liable with the other legal entities that constitute this unit for infringements of competition law. Thus, even if the parent company does not participate directly in the infringement, in such a case it exercises decisive influence over the subsidiaries which participated in the infringement. It follows that, in that context, the liability of the parent company can not be regarded as an independent liability for fault"*[284].

In another judgment, the Court held that the presumption of the parent company's decisive influence over the subsidiaries is not contrary to the principle of limited liability of the companies which constitute the group and which have legal personality[285].

These legal issues concerning the group of companies, which the Court of Justice has unleashed on competition law, should not be echoed in the matter of corporate law and the insolvency law.

Concluding, we can say that the group of companies is a legal paradox: although it is not endowed with legal personality it is made up of several legal persons; although they have legal personality, the constituent companies do not have real legal autonomy, being controlled by the parent company; although not personified, the group, through the parent company, imposes its own rules on the constituent companies.

Having no legal personality, the group is not personified and is therefore not visible as an actor in legal life. That is why he himself can not be the subject of a collective procedure.

10. The usefulness of the formation of the group of companies

Today, business practice demonstrates that the utility of the group of companies is indispensable. Thus, the group of companies is used to create holdings, to acquire corporations, to split business risks, in order to dilute liability by multiplying their legal entities, in order to "exclude" from the group a sick company impregnated with the group's debts, to create loss areas and profit areas in a business to avoid the spread of economic and financial difficulties or the contamination of other members of the group by screening their legal personality, and so on.

Although lacking legal personality, the group is an instrument of economic control masked by the apparent legal independence of the companies that make up it and an instrument to support the companies that constitute it through the unity of the decision[286].

From this perspective, the group of societies is an economic reality that can no longer be ignored by the Law. In this context, the initiative to lay down a set of legal rules for the group of companies under the Insolvency Code is meritorious.

10 The group of companies – an imperfect legal situation

The peculiarities of the group of companies demonstrate that it is an imperfect legal situation.

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[284] The jurisprudence was later reiterated in other cases. See in this regard, by way of example, the ECJ, 13.06.2013, c-511/11P, *Versalis Spa v/ The Commission and* ECJ, 18.07.2013, c-501/11 P, *Schindler Holding Ltd*.

[285] ECJ, 08.05.2013, c- 508/11, *Eni Spa.*

[286] ANNE -FRANÇOISE ZATTARA-GROS, *Les groupes de sociétés confrontés à une crise financière globalisée, în Crise du crédit et entreprises. Les réponses du droit,* colecție coordonată de JEAN – LUC VALLENS, Ed. Lamy, Wolters Kluwer, France, 2010, p. 22.

10.1 Patrimonial / Legal Autonomy of Members vs. unit of the group enterprise

The group enterprise unit explains the use of the assets of its members in the interest of the group. Theoretically, group societies enjoy patrimonial autonomy, conferred by their legal personality. But practically this autonomy gives way to the unity of the group enterprise. The unity of this group enterprise allows it to behave autonomously. The company controlling the group may dispose of the assets of any group company in order to achieve the common interest. Also, the company controlling the group can create debts in the patrimony of a group company through the patrimonial operations undertaken in pursuing group policy. Thus, the enterprise unit may distort the image of the ratio between the assets and liabilities of the group companies.

However, if a group company enters into insolvency, its legal and patrimonial autonomy requires that it responds with its own assets to its creditors. Also, the legal and patrimonial autonomy of the other companies in the group, especially the company that controls them, requires them not to answer for the liability of the company in insolvency. At the same time, in the absence of legal personality, the group can not answer for the insolvency liability of the company, even if it was generated by it.

Therefore, although the patrimony of a member is at the discretion of the group, seen as a distinct entity, responsibility for its liability does not lie with the group because it hits an obstacle that seems insurmountable: lack of legal personality.

10.2 Social interest vs. the interest of the group

The social interest of each group company is not confused with the interest of the group. Sometimes the social interest of the group companies is sacrificed to the benefit of the group's interest. Thus, a society in the group can be enriched by bridging one another.

The legal recognition of the prevalence of the interest of the group on the social interest results from the rules on: coordination of procedures of group members, unity of the act of justice, unity / cooperation of participants in the group members' procedures, especially regarding actions for cancellation of intra-group patrimonial transfers, the impossibility of initiating proceedings against the group.

10.3 The interest of creditors vs. the interest of the group

The creditors of a group company have no right over the other members of the group or their assets. Thus, the interests of the creditors are sacrificed by the debtor's patrimonial autonomy. Under this scheme, the risks of insolvency proceedings of a group company are suffered by the creditors, and the benefits of impregnating a company with the group's debts are suffered by the group or other members of the group. Therefore, debtors' debt generated by group interest is not imputed to the group but suffered by the debtor and its creditors.

As far as the creditors of the group companies are concerned, it can be seen that the patrimonial autonomy of a group company in insolvency protects the creditors of the other members of the group. This solution seems to be unfair, especially when the group in which the group's debts are deposited is "selected". By doing so, the company that controls the group makes a selection of creditors whose interests are to be protected or sacrificed, as the case may be. Therefore, the debtor's membership of a group of companies must be disclosed to the creditor.

11. How does the group of companies influence collective action?

The group of companies may affect the patrimony of the component companies, representing the lien of their creditors. Therefore, any change in the patrimony of a component company will affect the interests of its creditors.

In this context, a conflict may indeed arise unnaturally between the creditors of the group companies: the creditors of the insolvency group are interested in extending the procedure to the other members of the group and the creditors of the companies in the bonis oppose the extension of the procedure. The former are affected by the principle of legal autonomy applicable to the company in the insolvent group and the latter are protected by the same principle applicable to the other members of the group. the first ones seek the reconstruction of the patrimony of the debtor company in insolvency, and the latter oppose because the reconstruction can affect their pledge.

From the point of view of legal treatment, an imperfect legal situation such as that of the group of companies should receive one of the following solutions: either ignoring the interest community on which the group of companies is based, and therefore any influence of the of the group on liability for the social liability will be rejected, or the reality of the group will be taken into account and the legal liability of the company, be it parent, sister or daughter, for the social liability in the subsidiary may be undertaken.

Whatever the legal treatment may be, a court will lead the procedure. In the context of a plurality of companies, their location of their premises and their nationality can influence the procedure.

Thus, we appreciate that both theoreticians and practitioners are called upon to solve the following problems: 1) involving a group member for the company's debts in insolvency; 2) identification of the competent court when the application is filed by a creditor; 3) conflict of laws and conflict of jurisdiction in the case of multinational groups; 4) identification of the legal value of the cooperation protocol between the judicial administrators, the sanction of non-execution.

11.1 Legal liability for the liability of a company in the group entered into insolvency

We have noticed that one of the peculiarities of the group of societies is that the patrimony of a society can be used by the society that controls the group in the interest of the group, thus defeating the principle of the legal autonomy of the members of the group. The use of the assets of a company by another group company poses problems only when it is done abusively. It is possible for one of the companies in the group to enrich themselves to the detriment of another, which is causing insolvency. In this context, the following question arises: who will answer for the liability of the company of the group in insolvency?

The legal device in the matter of the group of companies existing in Law no. 85/2014 (the so-called Insolvency Code) does not contain any special rules in this respect. Therefore, we must turn our attention to art. 169 of the Code - general provision on liability for the payment of the liability of the insolvent company - in order to verify its application in the particular case of the group of companies.

At first glance, the rule does not seem to be adapted to the group of companies because the debts are generated by the group, but without its own liability being recognized, unless it is personified. The lack of the legal personality of the group prevents the group from incurring

liability for the created liability, as evidenced in the patrimony of the company in insolvency. However, by carefully following the content of the rule contained in art. 169 para. (1), it can be seen that the members of the management and / or supervisory bodies of the company as well as any other persons who have contributed to the debtor's insolvency can be the subject of liability. Thus, if within the group it can be identified which is the company that behaved as a *de jure* or *de facto* administrator of the assets of the debtor company or which contributed to the state of insolvency of the company, its liability could be traced to the debtor's liability. In this context, however, criteria should be set according to which a group company can be qualified as an administrator.

However, it is not sufficient to identify this person, but it is necessary to fulfill one condition: committing one of the express and limitative facts referred to in points a) - h) of art. 169 paragraph 1) of the law. This condition may be an obstacle to liability for the liability of a group company. Thus, in order for the liability of another group company to be liable for the liabilities of the company in insolvency, one of the facts listed in Art. 169 para. (1) lit. a) - h) attributable to this company must be proved to have taken place. In the absence of evidence in this respect, the involvement of a group company in the social responsibility of another group company will fail.

It is therefore noticed that there are no rules to impute, under certain conditions, the debts of society in insolvency to mother, sister or daughter society. It is true that this problem has not been attracted to the attention of the authors in our specialty literature. The delicate aspect is the basis of this responsibility: objective, faultless, for the deed of another? a responsibility that should be based on the idea of control and risk? a liability which should be based on the culpability of the company that controls its failure to perform its prudent and diligent obligations? This area of parental responsibility for the debts of subsidiaries is a space that must be explored by law theorists, especially in the context of regulating the group in the new insolvency law.

In addressing this issue, the legislator could have drawn inspiration from the competition-based solutions that take into account the unity of the enterprise created by several legal entities. Decisional autonomy prevails over legal personality when more than one company is a single enterprise.

11.2 Identification of the court competent to hear the request for opening the insolvency proceedings against a group company

Art. 185 par. (1) of the Law stipulates that in the event of insolvency proceedings against members of the group of companies following the submission of a joint application for insolvency proceedings, the competent court is the court in whose territorial jurisdiction the parent company is established or, after case, the company with the highest turnover according to the latest published financial statement, for all member companies of the group.

It can be seen that the law sets out two alternative criteria for identifying the court having jurisdiction to adjudicate the insolvency proceedings against a group company: the localization criterion of the parent company and the highest turnover criterion according to the latest published financial statement. The law does not determine who exercises the option between the two criteria: the formulator - the debtor or the creditor - or the judge? As far as we are concerned, we consider that the court is required to verify its own competency by applying the two criteria in an alternative way.

Thus, basically, a number of problems arise. The identification of the parent company or company with the highest turnover will be difficult to achieve by a creditor of a group member in the absence of inside information. Therefore, there is a risk that, after the creditor's

application has been registered, settlement will be delayed due to this obstacle. There is also the risk that, after disclosure by the member of the debtor group, the court finds that it is not competent to apply either criterion. Obviously, application settlement will be delayed.

11.3 Conflict of laws and conflict of jurisdiction in case of multinational groups

If in the case of the group of national-sized societies, the issue of territorial competence is easier to solve; in the case of the multinational group, its interpretation is more difficult.

Assuming the identification of a multinational group, there may be conflicts of laws and / or jurisdictions. In the latter case, the provisions of Regulation (EC) no. 1346/2000 of 29 May 2000 on insolvency proceedings ecome applicable. Article 3 of the Regulation sets out the criteria according to which jurisdiction is established in the case of insolvency proceedings.

The notion "center of main interests" used in art. (3) of the Regulation has been the subject of several interpretations by the Luxembourg Court of Justice [12]. However, the last judgment of the Court confirms the insufficiency of the Regulation in the matter of groups of companies. Thus, the Court held that „*Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as meaning that a court of a Member State which has opened a main insolvency proceeding against a company, holding that the center of its main interests is in the territory of that State, can not, by virtue of a rule of national law, extend that procedure to a second company whose registered office is in another Member State, only on condition that it demonstrates that its core of main interests is in the first Member State". The Court also states that „Regulation no. Of Regulation No 1346/2000 is to be interpreted as meaning that, where a company whose registered office is situated in the territory of a Member State is concerned by an action seeking to extend the effects of an open insolvency proceedings in another Member State, against another company established in the territory of the latter State, the mere finding of confusion between the assets of those companies is not sufficient to show that the core of the main interests of the company concerned by that action is also in that the aforementioned state. In order to overturn the presumption that that center is at the registered office, it is necessary for a global assessment of all the relevant elements to make it possible to establish that, in a verifiable way by third parties, the effective center of management and control of the company concerned by the proceedings seeking extension of the proceedings is situated in the Member State in which the original insolvency proceedings were opened".*

11.4 The legal value of the cooperation protocol between the judicial administrators of the group members

Article 189 of the Act provides that if the composition of the creditor mass does not allow the application of Art. 188, the judicial administrators appointed according to the provisions of art. 57 will be bound by the obligation to cooperate. This obligation to cooperate will also be materialized by signing a cooperation protocol, containing a synthesis of the way in which the economic, legal and operational activities at the group level will be carried out in an integrated manner.

As an agreement on the program of economic, legal and operational activities at group level, the cooperation protocol has the legal nature of a convention or contract. The signing of this convention confirms the recognition of the interest of the group of companies and, therefore, the unity of the group enterprise. This makes it possible to restructure the group of companies or to protect the patrimony of a group company against judicial proceedings aimed at

reconstructing the patrimony of the company in insolvency.

According to the law, in order to be effective, the protocol must be approved by the syndic judge. The law does not set the criteria according to which the syndic judge will approve the protocol. It would seem that the judge has discretionary power in this case: he can approve or reject the protocol as he wishes. However, we do not believe that this was the intention of the legislator. Therefore, we appreciate that the syndic judge will have the task of performing a brief check of the substantive and formal validity conditions of the protocol: verification of the identity of the participants in the protocol, their capacity, consent to the signing of the protocol, the object of the protocol, the case, when stated, of the written form of the content. Being approved by the syndic judge, the protocol acquires, besides the conventional nature it also acquires a judicial one.

Non-implementation of the cooperation protocol may raise the following issues: what will be the effects of non-execution? what will be the applicable sanction? will the sanction affect the protocol or the person of the legal administrator who violates it?

12. Conclusions

The absence of legal personality confers a complete immunity of the group of companies on the insolvency of one or more group companies. Thus the lack of personification is an advantage of the group enterprise.

The principle of the legal autonomy of the group companies on which the legal separation of the assets of the component companies is based protects the group companies from legal liability for the liability of the company in insolvency. There is a real imbalance between control / power and responsibility. Although the parent company is the one to provoke the liability of a controlled company in the interest of the group enterprise, the principle of legal autonomy is an obstacle to its accountability. From this perspective, the group appears as a technique of organizing limited liability around the principle of legal autonomy.

Excessive application and recognition of the legal autonomy of group companies that protect corporate creditors *in bonis,* but affect the interests of the creditors of the company in insolvency in the absence of the debts of the parent company.

Therefore, the lack of its legal personality and the legal personality of its members are the avatars of the group of companies in the collective proceedings. Propagation or extension of the procedure to the other companies in the group is not possible. Nor is it possible to extend liability for the social liability of a company in insolvency.

The group of companies tends to become a legal reality by shy regulation in the new insolvency law. However, the regulation addresses more technical issues than the background ones, the latter looking for answers from theoreticians and practitioners of law.

Groups of companies from the perspective of judicial practice

Law no. 85/2014 now provides for special rules applicable to group companies in insolvency proceedings. Thus, the special rules in the field of insolvency of groups of companies apply also to personal groups, not only financial ones, a confirmed opinion in practice, by accepting a joint claim for the declaration of insolvency of companies belonging to a personal group. In an action[2879], the court decided that „(…) at the date of (…) the creditor filed applications for the opening of proceedings against all companies (…) in the group, separate applications which received a first deadline (…) which differed, (…), so these cases are not judged at present either. Meanwhile, the companies in the group of companies filed a

[287] C. Ap. Oradea, decizia nr. 54 din 25 februarie 2015.

joint application for the opening of proceedings, which was admitted by the court. Given that no connection was made within the time frame set for the examination of this petition, as well as the existence of other requests to initiate proceedings against the group of companies, the appellant's criticism of the obligation of the court of first instance of ordering the connection of the causes is not well founded. It was found that the creditor complainant did not understand that she was to make a joint application, with the aim of simultaneously opening the insolvency proceedings against two or more members of the group of companies, as provided by the provisions of Art. 5 par. (8) of the Law no. 85/2014, but separate applications against each of the companies, which could not be joined for the above reasons. "

In another recent case[28810], shortly after the parent's entry into the simplified procedure, the syndic judge accepted the claim of a creditor to initiate the insolvency procedure of the subsidiary, in which the parent held 90% of the share capital. Without challenging the state of insolvency, the subsidiary attacked the solution by requesting the application of the special rules provided by law for companies in the same group. The court rightly rejected the appeal, considering that: "If there is no collective request for the purposes of the legislature but successive claims in time for opening the insolvency proceedings of members of the group of companies, the provisions of Article . 183 et seq. of the law do not apply, as they are derogatory and apply only in cases and situations expressly provided by law... ".

[288] Court of Appeal Oradea, decision no. 67/C/2015-A of March 10, 2015.

THE MEANING AND EXTENT OF SUPERVISION OF THE DEBTOR-IN-POSSESSION BY THE JUDICIAL ADMINISTRATOR IN ROMANIA

Alexandra ZODIANU-FRINCULESCU

1. Evolution of the *supervising the activity of the debtor* notion

1.1 Law no. 64/1995 on the reorganization and judicial liquidation procedure

This law, an enactment of American inspiration, was the **first major** reform of the insolvency proceedings of traders in Romania and was characterized by:

i) Unlike the 1887 Commercial Code of Italian inspiration, which regulated a single procedure - bankruptcy, Law no. 64/1995 regulated two forms: I - the financial recovery, with the same assets or with the sale of some of the assets and II - the bankruptcy, in this order of priority (Article 2 of Law No. 64/1995).

ii) As in the bankruptcy procedure governed by the Commercial Code, the tribunal (specifically, a judge of the court in whose jurisdiction the debtor's main office is located, other than the syndic judge designated in that file, but who can be appointed as a syndic judge in other file) has full jurisdiction over the course of the procedure, while the syndic judge has minor jurisdictional powers and full management prerogatives.

iii) Apparently, the situation of the syndic judge is improved compared to the Commercial Code, by the alternative offered to the tribunal to designate an administrator or a liquidator (Article 6 letter b) of Law no. 64/1995, published in the Official Gazette no. 130 of 29 June 1995). The profession of judicial administrator was regarded only as a secondary profession to justice. As a representative of the syndic judge, for the activities carried out outside the tribunal, the judicial administrator prepared activity reports describing the evolution of the debtor's activity and assessing the patrimonial effects, by reference to the procedural provisions. The debtor's economic and financial activity was based on results and not ex-ante.

iv) The intervention in the debtor's business decision was minimal, since it was considered, on the one hand, that the bodies implementing the procedure could not know the business better than the debtor himself – by reference to the diversity of the activities carried out by the addressees of this procedure and, on the other hand, that if the debtor wanted to save his business, then he would cooperate voluntarily and provide all the information required for counseling and ultimately for his business financial recovery, otherwise the penalty would consist in being declared bankrupt.

v) In this context, supervision of the debtor's activity was perceived as mere monitoring, and was not assimilated to a component part of the managing the debtor's business or taking part in the managerial or risk-taking decisions specific to any entrepreneurial activity.

The second reform is represented by Law no. 99/1999 on some measures for accelerating the economic reform, published in the Official Gazette no. 236 of May 27, 1999, and contributed to the improvement of the Law no. 64/1995 (which became *Law No. 64/1995 on the procedure of judicial reorganization and bankruptcy*) in several aspects, the most relevant being:

i) replacing the notion of "judicial liquidation" with "bankruptcy", rewording the scope of the law: payment of the debtor's liabilities in the cessation of payments, either by reorganizing the enterprise and its activity, or by bankruptcy;

ii) regaining the role of magistrate by the syndic judge;

iii) improving the provisions on the appointment and attributions of the judicial administrator/liquidator.

GO no. 38/2002, published in the Official Gazette no. 95 of 2 February 2002, and approved by Law no. 82/2003, published in the Official Gazette no. 194 of 26 March 2003, brings about a series of amendments in the field, representing a **new legislative reform**.

Among the introduced amendments, relevance has the improvement of the regulation on the designation, attributions and liabilities of the judicial administrator/liquidator, challenging its measures and his replacement.

Although it has undergone major changes, Law no. 64/1995 does not provide for a criterion for the appointment of the judicial administrator/liquidator or for the determination of his/her remuneration.

Another reform was achieved by Law no. 149/2004, published in the Official Gazette no. 424 of May 12, 2004, which brought about 122 amendments to 130 articles and amendments of other related enactments, in order to reduce the shortcomings of the procedure and to remedy some of the wording mistakes.

Following these major reforms, the content of Law no. 64/1995 on the procedure for judicial reorganization and bankruptcy is still incomplete, as an example to this effect, to the supervision of the debtor's activity being brought no clarifications or supplementations - art. 24 letter d) stipulating only that among the main duties of the administrator is also mentioned *the supervision of the management operations of the debtor's patrimony,* but there are no defined notions and expressions of obvious importance for the efficient development of the procedure (as is the supervision of the management operations of the debtor's patrimony).

1.2 Law no. 86/2006 on insolvency proceedings

Following the conclusion of the European Commission's Report on the progress made by Romania in 2004 in the process of joining the European Union, within the meaning that "the Romanian legislative system does not provide adequate and efficient mechanisms for the economic operators to exit a market", the Romanian Government has initiated the elaboration of a new enactment regarding the insolvency proceedings, starting with the acquis communautaire in the field: Council Regulation no. 1346/200 on insolvency proceedings, Directive no. 2002/74 of 22.09.2002 amending the Directive no. 80/97 / EEC on the protection of employees in the event of the employer's insolvency, Directive no. 2001/17 / EEC of 19.03.2001 on the reorganization and bankruptcy of insurance companies, Directive no. 2001/24 / EC on the reorganization and bankruptcy of credit institutions.

Although Law no. 85/2006 stipulates, at art. 20 par. 1 letter e and f, that among the main tasks of the judicial administrator are the *supervision of the operations of managing the debtor's patrimony and the full or partial management of the debtor's activity, in the latter case, in compliance with the explicit provisions of the syndic judge regarding its duties and the conditions for the making of payments from the debtor's patrimony,* the enactment did not define the notion of "supervision" nor "partial management" of the debtor's activity.

In the absence of an explicit regulation, supervision has shaped itself in practice as being represented by the totality of the activities or measures adopted by the judicial administrator in order to achieve two essential objectives of the procedure:

- maximizing the debtor's wealth,
- avoiding the increase of the patrimonial liability.

The way in which these goals were pursued and achieved was a matter of adaptation to each practical case. At the level of judicial practice, the interpretation of the notion of supervision in the former regulation is different, and, by way of example, I herein below indicate a series of national courts' contradictory solutions:

- *Pitesti Court of Appeal Pitesti, 9 March 2011* - The debtor carries out its activity in the ordinary course of the current activity, so that no express consent is required from the judicial administrator for each operation.

- *Piteşti Court of Appeal, 20 October 2010* - During the general insolvency proceedings, the entire managerial, financial and economic activity of the debtor is carried out under the supervision of the judicial administrator responsible for its real property and personal property assets. Any good exits the patrimony only with the signature of the judicial administrator.

- *Brasov Court of Appeal, 5 February 2010* - From the provisions of art. 49 of Law no.85/ 2006 derives that during the observation period the debtor will not be able to make payments, during this period, in the absence of the judicial administrator's supervision.

- *Braşov Tribunal, 18 December 2009* - The syndic judge considers that the supervision exercised by the judicial administrator entails also the approval of the debtor's payments, which are carried out only through the special account.

1.3 Current regulation – Law no. 85/2014

The draft law amending the insolvency law was part of the program financed by the World Bank and the International Monetary Fund, entitled "Strengthening the Insolvency Mechanism in Romania".

Appreciating globally the new enactment - Law no. 85/2014 on insolvency proceedings and insolvency prevention proceedings, its essence is to identify a balance between the interests of the debtor and those of the creditors, trying to constructively harmonize them, tempering both the too easy access of the debtor to the confirmation of a reorganization plan, and the tendency to manipulate these procedures to the detriment of creditors. Account was also taken of the European Commission's communications requesting Member States to encourage a second chance for the borrower by supporting business restructuring from an early stage and to facilitate the adoption of a reorganization plan towards honest, viable borrowers.[289]

The meaning of the term "supervision of the debtor's activity" was defined at art. 5 point 66 of the Law no. 85/2014, being applicable only if the right of administration is kept by the debtor.

The notion of supervision consists in the permanent analysis of the debtor's activity and in the prior targeting of the measures involving the debtor's patrimony and those that would lead to its restructuring / reorganization.

Thus, the lack of a regulation of the notion of supervision has led to an extensive regulation that impels the judicial administrator to state *ex-ante* his opinion on the majority of commercial, financial, accounting and legal operations. The opinion of the judicial administrator is a certificate of compliance, and not an advisory opinion, and this results from the provisions of art. 84 of this enactment, according to which all operations performed without the advisory opinion of the judicial administrator, the approval of the creditors' committee or by the syndic judge, as the case may be, are lawfully null and void.

[289] *Practical Treaty on insolvency*, Radu Bufan, PhD Associate Prof., Hamangiu Publishing House, 2014

The question arises as to what happens in the event of a conflict between the opinion of the special administrator, who considers that the proposed commercial operation is necessary and beneficial, and the opinion of the judicial administrator, who appreciates the contrary, refusing to give its approval.

The new law kept the separation between the lawfulness review which is within the scope of the syndic judge and the opportunity review, which remains within the scope of the creditors' committee (art. 45 paragraph 2 of Law No. 85/2014).

This means that in the event of a conflict of opinion on the desirability of an operation, the decision is to be taken by the creditors' committee, and that decision can not be challenged but for reasons of unlawfulness.

2 Field and relevant texts

One of the major changes introduced by the Law on insolvency proceedings and insolvency prevention proceedings concerns the supervision activity of the debtor exercised both during the observation period and after the reorganization plan is confirmed, respectively when the debtor's right of administration is not withdrawn.

As we have already mentioned, the former regulation - Law no. 85/2006 did not detail the notion of supervision of the debtor's activity, merely by stating that one of the principal duties of the administrator was to supervise the debtor's management operations. Specifically, under the governance of the former law, each judicial administrator had the possibility to give his own interpretation to the supervisory duty, in the absence of additional guidance elements.

During the reorganization period, the judicial administrator was supervising the fulfillment of the obligations under the reorganization plan, but the supervisory activity required by the insolvency practitioner appointed to coordinate the procedure during the observation period raised a series of problems in practice. However, in relation to the definition of the notion of supervision, brought by the current regulation - Law no. 85/2014 on insolvency proceedings and insolvency prevention proceedings, many insolvency practitioners have expressed their disagreement with the extension of the liability of the judicial administrator.

Currently, with the clarification of the notion of supervision and its content, the judicial administrator should permanently analyze the activity of the debtor and approve in advance both of the patrimonial measures and the measures for restructuring the activity.

Specifically, **art. 5 point 66 of Law no. 85/2014** defines the notion of supervision exercised by the judicial administrator as being: ``*supervision exercised by the judicial administrator, while the debtor's right of administration has not been withdrawn, consists in the permanent analysis of its activity and the prior approval both of the measures involving the debtor's patrimony, and of those meant to lead to the restructuring/reorganization thereof; the endorsement shall be carried out based on a report drawn up by the special administrator, that also mentions that they have been verified and that the conditions concerning the reality and opportunity of the legal transactions subject to approval are met. The supervision of the management operations of the debtor's patrimony shall be carried out by the prior advisory opinion given at least on the following operations:*

a) the payments, both by the bank account and by the payment desk; this can be achieved either by endorsing each payment, or by the general instructions with regard to making payments;

b) the conclusion of contracts in the observation period and in the period of reorganization;

c) the legal operations in the litigations in which the debtor is involved, the endorsement of the proposed measures concerning the recovery of claims;

d) the operations involving the diminishing of the patrimony, such as removal from inventory, revaluations etc.;

e) the transactions proposed by the debtor;

f) the financial statements and the activity report attached thereto;

g) the measures of restructuring or the changes in the collective labour contract;

h) the mandates for the meetings and committees of creditors of insolvent companies in which the debtor company has the status of creditor, as well as the general assemblies of shareholders in the companies in which the debtor holds participations;

i) the alienation of fixed assets from the patrimony of the company where the debtor holds interests or their encumbrance with burdens, is required, in addition to the advisory opinion of the judicial administrator, and going through the procedure provided in Article 87 (2) and (3).

Other relevant texts of the Law on insolvency proceedings and insolvency prevention proceedings which improve the analysis of the notion under consideration:

- Article 84

(1) Except for the cases provided in Article 87, for the cases authorised by the syndic-judge or endorsed by the judicial administrator, all acts, operations and payments made by the debtor following the opening of the procedure shall be null de jure.

(2) The special administrator appointed in an insolvency procedure shall be liable for the infringement of Article 87, the syndic-judge, at the request of the judicial administrator, of the assembly of creditors, formulated by the president of the committee of creditors or by another creditor appointed by the committee, or at the request of the creditor that holds 50% of the value of the claims included in the amount of claims, the syndic-judge may order that a part of the liabilities thus resulted be borne by the special administrator, without exceeding the prejudice that has a causal connection with the acts or operations thus performed.

(3) The debtor and/or, as the case may be, the judicial administrator shall be obliged to draw up and keep a list that includes all receipts, payments and nettings carried out after the opening of the procedure, stating their nature and their value, as well as the data for the identification of the co-contracting parties.

- Article 85

(1) The opening of the procedure shall withdraw the debtor's right of administration, which consists in the right to manage its activity, to administer its assets and to dispose of them unless he has declared its intention of reorganisation, under the terms of Article 67 (1) g). The withdrawal of the right of administration shall also be ordered in case the debtor has not declared his intention of reorganisation within the time limit provided in Article 74.

(2) Except for the cases expressly provided by law, the provisions of paragraph (1) shall be applicable also in relation to the assets the debtor would acquire after the opening of the procedure.

(3) The syndic-judge may order the full or partial withdrawal of the debtor's right of administration at the same time with the appointment of a judicial administrator, also indicating the condition for exercising the management of the debtor's activity.

(4) The debtor's right of administration shall be terminated de jure on the date when the opening of bankruptcy is ordered.

(5) The creditors, the committee of creditors or the judicial administrator may address a request for the withdrawal of the debtor's right of administration to the syndic-judge at any time, provided the continuous losses in the debtor's property or the lack of probability in achieving a rational plan for the activity can be proven.

(6) The syndic-judge shall examine, within 15 days, the application provided in paragraph (5), holding a sitting where the judicial administrator, the committee of creditors and the special administrator shall be summoned.

(7) As of the date of going into bankruptcy, the debtor may only pursue the activities necessary for the performance of the liquidation operations.

- **Article 87** of the same enactment states that:

(1) During the observation period, the debtor may continue to pursue his current activities and can make payments to the known creditors, which fall within the normal conditions of exercising the current activities, as follows:

a) under the supervision of the judicial administrator, if the debtor has made an application for reorganisation, for the purpose of Article 67 (1) g), and his right of administration has not been withdrawn;

b) under the management of the judicial administrator, if the debtor's right of administration has been withdrawn.

(2) The acts, operations and payments transgressing the conditions mentioned in paragraph (1) may be authorised for the exercise of the supervision powers by the judicial administrator; he shall convene a meeting of the assembly of creditors in view of submitting for approval the application of the special administrator, within maximum 5 days from the receipt of this application. In case a certain operation that exceeds the current activity is recommended by the judicial administrator, and the proposal is approved by the committee of creditors, it shall be mandatorily fulfilled by the special administrator. In case the activity is managed by the judicial administrator, the operation shall be carried out by him with the approval of the committee of creditors, without being necessary an application from the special administrator.

(3) In case of proposals for the alienation of the assets pertaining to the debtor's property which are burdened by causes of preference, the holder creditor shall have the following rights:

a) the right to benefit by an adequate protection of his claim, according to the provisions of Article 78;

b) the right to benefit by distributions of amounts under the terms of Article 159 (1) point 3 and Article 161 point 1, given that he can not benefit by adequate protection of the claim, enjoying a cause of preference, according to Article 78.

(4) The financings granted to the debtor during the observation period in view of carrying out the current activities, with the approval of the assembly of creditors, shall enjoy priority upon refund, according to the provisions of Article 159 (1) point 2 or, where appropriate, according to the provisions of Article 161 point 2. These financings shall be granted, mainly, by allocating some assets or rights that are not the object of some causes of preference, and in addition, if there are no such assets or rights available, with the consent of the creditors that are beneficiaries of such causes of preference. Assuming that the consent of these creditors can not be obtained, the priority upon repayment of those claims, provided by Article 159 (1) point 2, shall diminish the regime of satisfaction of the creditors that are beneficiaries of the causes of preference, proportionately, by reference to the full value of the assets or rights that are subject to these causes of preference. In case of non-existence or insufficiency of assets to be burdened by causes of preference in favour of the creditors who grant financing during the observation period in view of pursuit of current activities, for the unsecured part of the claim, they shall benefit by priority according to Article 161 point 2.

- Article 141

1) Following the confirmation of a reorganisation plan, the debtor shall manage his activity under the supervision of the judicial administrator and in accordance with the confirmed plan, until the syndic-judge gives a reasoned decision either to close the insolvency

procedure and to take all steps for the debtor's reinsertion in the business activity, or to terminate the reorganisation and to go into bankruptcy, according to the provisions of Article 145.

(2) Throughout the reorganisation, the debtor shall be managed by the special administrator, under the supervision of the judicial administrator, subject to the provisions of Article 85 (5). The shareholders, associates and members with limited liability shall not have the right to interfere in the management of the activity or in the administration of the debtor's property, except for and within the limits of the cases expressly and restrictively provided in the law and in the reorganisation plan.

(3) The debtor shall be bound to apply, without delay, the structural changes provided in the plan.

3 Meaning of the notion *to supervise the debtor's activity*

In relation to the notion of *supervising the debtor's activity*, the periods in which he has the right to administer are relevant, respectively i) the observation period - the time interval between the opening of the procedure and the date of the plan's endorsement or, as the case may be, of the bankruptcy, according to art. 87 of the Law on insolvency proceedings and insolvency prevention proceedings - and ii) the reorganization period of the debtor's activity, according to art. 141 of the same enactment.

The only procedure that justifies and legally supports the incandescence of the relationship between the right of administration and its holder is the general procedure (obviously, until the date of debtor's entry into the bankruptcy procedure). It is also the reason why the lawmaker provided for the natural compatibility between the debtor's right of administration and the specific periods of the general procedure currently in progress, respectively either only during the observation period or during the observation period followed by the judicial reorganization procedure[290].

Judicial administrator's supervision of the debtor's patrimony administration operations shall be carried out under the prior approval of the operations expressly listed by art. 5 pt. 66 letter a) -i), but also of other operations involving the debtor's patrimony.

3.1Relevant elements regarding the withdrawal of the right of administration

Considering the provisions of art. 85 par. 1 of the Law on insolvency proceedings and insolvency prevention proceedings, we note that the debtor's right of administration includes his right to manage his business, to administer his patrimonial assets, and, of course, the right to dispose of them. These are all debtor's goods and patrimonial rights, including those acquired during insolvency proceedings, which may be enforced under the Civil Procedure Code, respectively it is about the debtor's wealth upon the time when the insolvency proceedings were opened and throughout the entire course of the proceedings as well, save for the exceptional cases stipulated by law.

The debtor's right of administration, consisting of the right to manage, administer and dispose of the assets, is exercised through the special administrator under the direct supervision of the judicial administrator during the observation period or reorganization period. The opening of the bankruptcy procedure has the direct effect of withdrawing the debtor's right of administration. The syndic judge may decide, even by the decision to open the insolvency

[290] *Current regulation of the debtor's right of administration within the insolvency proceedings,* Daniela MOȚIU, PhD Lecturer, West University of Timişoara, Faculty of Law

proceedings, to remove, in whole or in part, the debtor's right of administration. As a penalty, removal of the right of administration may intervene at the request of the creditors, the creditors' committee or the judicial administrator, and may even be ordered by the syndic judge *ex officio*.

Breach of the prohibition on the activity performed by the debtor who had the right to administer withdrawn leads to the application of the absolute nullity penalty of the documents, transactions or payments concluded under such conditions, the legal liability reverting to the special administrator or the judicial administrator.

The retention of the right to administer the activity by the debtor at the date of the opening of the general insolvency procedure implies that:

- the debtor belongs to the category of professionals, as defined by art. 3 par. (2) of the Civil Code, with the exception of those exercising liberal professions, as well as those subject to special provisions regarding their insolvency regime, including self-regulatory authorities;

- that the debtor declares his intention to reorganize, under the conditions of art. 67 paragraph (1) letter g) of the Law on insolvency proceedings and insolvency prevention proceedings or within the time limit provided by art. 74 of the same enactment. It is a statement by which the debtor shows his intention to enter into a reorganization procedure, according to a plan, by restructuring the activity or by liquidation, in whole or in part, of the wealth, in order to settle his debts. Or, if the procedure is opened at the request of the creditors, the debtor is impeled to submit to the case file, within 10 days from the opening of the procedure, the documents and the information stipulated in art. 67 paragraph (1) of the Law;

- that the syndic judge should not order the total or partial removal of the debtor's right of administration along with the appointment of a judicial administrator, indicating the conditions for the exercise of the debtor's management activity, in accordance with art. 85 par. (3) of the law. In practice, the removal of the right to administer along with the appointment of a judicial administrator occurs in exceptional cases, respectively, whether the documents filed in the case file reveal serious irregularities in the management of the debtor's activity.

However, even though the decision to open the proceedings has maintained the debtor's right of administration, it is not excluded that at the request of the entitled persons - the creditors, the creditors' committee or the judicial administrator - and the fulfillment of the condition to prove the continuous loss of the debtor's assets or the lack of the probability of carrying out a rational plan of activity, the syndic judge may order that the right of administration be removed subsequent to this point, but without the debtor finding himself in the situation in which the removal of the right to administer occurs under the law, as per art. 85 par. (4) of the law[291].

Even if the holder of the right of administration remains the debtor, through the special administrator, it shall be exercised under the direct supervision of the judicial administrator, as defined by art. 5 point 66 of the Law on insolvency proceedings and insolvency prevention proceedings.

To this effect, art. 45 para. 2 of the Law on insolvency proceedings and insolvency prevention proceedings, states that: ``*the managerial powers pertain to the judicial administrator or judicial liquidator or, exceptionally, to the debtor, unless his right to manage his own property has been withdrawn. The managerial decisions of the judicial administration, judicial liquidator or of the debtor which has retained the right of administration may be controlled in respect of opportunity by the creditors, through their bodies".*

On the other hand, in the context of the general insolvency procedure, insofar as the debtor manifests its intention to reorganize the business, the debtor's right to administer is used

[291] *Current regulation of the debtor's right of administration within the insolvency proceedings,* Daniela MOȚIU, PhD Lecturer, West University of Timişoara, Faculty of Law

in the insolvency law and as a punishment against a dishonest debtor who does not understand to comply with the provisions of the law or those established by the syndic judge in its charge.

The out-of-line attitude of the indisciplinary debtor is punished by the lawmaker by removing the right of administration:

- in the event that the meeting of the shareholders/stockholders/members, as convened by the judicial administrator or by the provisional judicial liquidator does not appoint a special administrator within maximum 10 days from the notification of the opening of the procedure, the debtor will have the right of administration withdrawn, if this right has not been already withdrawn, and the debtor, respectively the shareholders/stockholders/members lose the rights recognized by the procedure and which are exercised by a special administrator, according to art. 53 par. (2) of the Law on insolvency proceedings and insolvency prevention proceedings;
- in the event that the debtor fails to fulfill the obligation to make available to the judicial administrator and the creditor holding at least 20% of the total amount of the receivables included in the final table of receivables, all the information and documents deemed necessary for his activity and wealth, as well as the list of payments made in the last 6 months preceding the opening of the procedure and the patrimonial transfers made during the 2 years preceding the opening of the procedure, as per art. 82 par. (1) of the Law on insolvency proceedings and insolvency prevention proceedings;
- in the event that, on the opening date of the procedure, the debtor has not declared his intention to reorganize under the conditions of art. 67 paragraph (1) letter g) or has not declared its intent to reorganize within the term stipulated at art. 74, according to art. 85 par. (1) and (3) of the same enactment.

According to art. 56 para. (2) of the Law no. 85/2014, after the removal of the right of administration, the debtor is represented by the judicial administrator/liquidator, who also manages his business activity, the special administrator's mandate being reduced to representing the interests of the shareholders/stockholders/members.

3.2Supervision during the observation period

During the observation period, the insolvent company may carry out its current activities, namely those trading and standard financial operations in the normal course of business, such as: continuing the commissioned activities according to its scope of activity, performing the receipts and payments related thereto and ensuring the financing of the working capital within current limits.

During this period of observation, in the course of which, at least, theoretically, nothing irreversible happens to the fate or property of the debtor, the causes of the insolvency, the chances of reorganization and the persons potentially responsible for the debtor’s state of insolvency are established, the inventory of debtor’s goods is made and the receivables table is drawn up.

Also during the observation period, the judicial administrator will analyze the accounting documents of the debtor company and draws up a report showing the causes that led to insolvency and who is responsible for it, if the debtor company can be saved by reorganization and the size of the active component of the company's patrimony, compared to the total receivables towards the debtor, which will entitle the receivables’ holders to participate in the proceedings.

The debtor, by its special administrator, may perform during the observation period payments which fall within the scope of the ordinary conditions of the current activity’s exercise, only under the supervision of the judicial administrator.

Even if, in fact, the judicial administrator has not fulfilled his legal duty to supervise the debtor's current operations, one can not order from the point of view of Law no. 85/2014, that the debtor continues his activity during the observation period without his supervision.

The notion of supervision implies the agreement or the opinion of the judicial administrator for making the current payments, because, *per a contrario*, they would be emptied of the content of Law no. 85/2014 on insolvency proceedings and insolvency prevention proceedings.

In the course of the special insolvency proceedings, no matter the urgency of making a payment or taking action in relation to the debtor's current administration, it must be ordered in accordance with the provisions of the Law on insolvency proceedings and insolvency prevention proceedings, under the supervision of the judicial administrator.

This is all the more so as the insolvency law sets forth penalties for the judicial administrator's failure to perform or inappropriately perform his duties - within the meaning of affecting the interests of the creditors – in which case, one may request its very replacement.

If the debtor makes the current payments without the judicial administrator's supervision during the observation period, it would be ineffective to appoint this participant to the insolvency procedure, which would mean that the debtor would carry out his current business as it had done before the opening of the procedure.

At the same time, during the observation period, for the actions that exceed the exercise of the current activity, the special administrator must request the administrator to authorize their execution, a prior authorization.

The judicial administrator will be able to authorize those deeds only after they have been approved by the creditors' committee. The committee must approve the performance of these deeds and not only to approve of them, consulting the committee being therefore insufficient. Only after their approval by the creditors' committee can the judicial administrator give the authorization, which must be express.

If the debtor does not have the right to administer, the current activity of the debtor belongs to the judicial administrator, who can do any act or operation which falls within the scope of the current activity. For those deeds which exceed the exercise of the current activity, the judicial administrator also needs the approval of the creditors' committee, given by the simple majority of the total number of its members, according to art. 51 par. (4) of the Law on insolvency proceedings and insolvency prevention proceedings.

At the same time, the Law on insolvency proceedings and insolvency prevention proceedings stipulates that "if a certain operation that exceeds the current activity is recommended by the judicial administrator and the proposal is approved by the creditors' committee, this will be fulfilled by the special administrator "(Article 87 (2).

The law also expressly states that "if the activity is managed by the judicial administrator, the operation will be carried out by him with the approval of the creditors' committee without the need for the special administrator's request."

Specifically, during the observation period, the debtor may continue its current activities, respectively, according to art. 5 point 2 of the Law on insolvency proceedings and insolvency prevention proceedings.

``*those activities of production, trading activities or provision of services and financial operations, proposed to be carried out by the debtor during the observation period and during the reorganisation period, in the normal course of its activity, such as:*

a) continuance of the contracted activities and the conclusion of new contracts, according to the object of activity;

b) performance of receipts and payment operations related thereto;

c) ensuring the financing of the working capital within the current limits``.

It follows that, during the observation period, the debtor can only carry out its usual business activities, and may also carry out new operations and conclude new agreements if they are circumscribed to his/her own scope of activity.

In the event that during the observation period the need to conclude certain deeds or to carry out operations that exceed the current activities, in order for these to be carried out, such must be authorized by the judicial administrator. The judicial administrator will submit these operations to the creditors' committee for approval. From the economy of the text it results that, if the creditors' committee does not approve the request to carry out operations that go beyond current activities, they can not be authorized by the judicial administrator and, implicitly, will not be performed.

In this respect, the specialized literature stipulates that the deeds that are not repetitive, such as the sale of a goodwill, the signing of a tenancy agreement or a shares' assignment agreement, staff redundancy, closure of a workplace, etc., do not fall within the scope of the company's current activities.

Since the wording of paragraph (2) makes it clear that the deeds, operations and payments which exceed the conditions of the debtor's current activities will be proposed by the special administrator and subsequently approved by the creditors' committee, the specialty literature stipulates that the special administrator does not need the prior approval of the shareholders/ associates to dispose of the debtor's estate, even if it proposes the conclusion of certain disposal deeds. Indeed, the legal rule of interest to us does not impose such a requirement for the deeds and operations proposed by the special administrator under the above conditions, but, when it proposes amendments to the articles of incorporation of the debtor company (increase of the share capital; change of the scope of activity by waiving certain activities; dissolution of some branches, working units or other secondary offices, etc.), the decision of the general assembly of the shareholders to approve such operations is necessary. The measures and operations will be put into practice by the special administrator or by the judicial administrator, as the syndic judge has kept or has removed the debtor's right to administer[292].

4 Supervision during the reorganization period

Judicial reorganization is the procedure that applies to the debtor in insolvency, a legal entity, in order to pay his debts, according to the payment schedule of the receivables. The reorganization procedure involves drawing up, approving, endorsing, implementing and complying with a plan, known as a reorganization plan, which may provide, on a non-limiting basis, jointly or separately:

- the debtor's operational and/or financial restructuring;
- corporate restructuring by modifying the share capital structure;
- reducing the activity by partial or total liquidation of the asset from the debtor's assets.

Following the endorsement of a reorganization plan, the debtor will conduct his activity under the supervision of the judicial administrator and according to the endorsed plan, until the syndic judge orders, by reasoned opinion, either to complete the insolvency proceedings and take all measures for the debtor's reintegration into the business, either the termination of the reorganization and bankruptcy entry, according to the provisions of art. 145

[292] *CARPENARU D.Stanciu, HOTCA Mihai-Adrian, NEMES Vasile, Annotated Insolvency Code 01-oct-2014, Universul Juridic Publishing House*

According to art. 141 of the Law no. 85/2014, the endorsement of the reorganization plan marks the transition from the observation period to the reorganization period. Given that the transposition of the reorganization plan endorsed by the syndic judge involves the timely and accurate fulfillment of certain activities, the law establishes that the debtor legal entity (as individuals are excluded from the judicial reorganization procedure) will carry out its activity under the supervision of the judicial administrator and exclusively in accordance with the provisions of the endorsed plan, until the syndic judge orders, by reasoned opinion, either the termination of the insolvency proceedings and the taking of all measures for the debtor's reintegration in the commercial activity, or the ending of the judicial reorganization and entry into bankruptcy.

The judicial administrator has the duty of supervising the manner in which the debtor fulfills the requirements of the reorganization plan, having the obligation to notify the syndic judge of any debtor's infringement of the plan and any other matter that requires court settlement. The syndic judge may decide to enter bankruptcy in cases where the debtor has losses or does not comply with the plan.

5 Extent of the notion *to supervise the debtor's activity*

Art. 5 pt. 66 of Law no. 85/2014 states that the supervision exercised by the judicial administrator provided that the debtor's right of administration has not been withdrawn:

- continuous analysis of its activity, and
- the prior endorsement of both the measures involving the debtor's patrimony and the measures meant to lead to its restructuring/reorganization.

With regard to the approval of the debtor's measure by the judicial administrator, the Law on insolvency proceedings and insolvency prevention proceedings does not contain a definition of such procedure, indicating only that this operation is carried out on the basis of a report drawn up by the special administrator, which mentions also that the conditions for the reality and timeliness of the legal transactions subject to the approval are being complied with.

From the reading of the relevant legal text, it results that, in the case of the supervisory duty, the judicial administrator is liable only for the lawfulness of the approved deeds, while the special administrator is responsible for the reality and the appropriateness of the proposed measures.

The deeds subject to the notice are listed, for exemplification purposes, at pt. 66 of art. 5, respectively:

- *the payments, both by the bank account and by the payment desk; this can be achieved either by endorsing each payment, or by the general instructions with regard to making payments;*
- conclusion of agreements during the observation period and during the reorganization period;
- *the legal operations in the litigations in which the debtor is involved, the endorsement of the proposed measures concerning the recovery of claims;*
- *the operations involving the diminishing of the patrimony, such as removal from inventory, revaluations etc.;*
- transactions proposed by the debtor;
- financial statements and the activity report attached thereto;
- *the measures of restructuring or the changes in the collective labour contract;*
- *the mandates for the meetings and committees of creditors of insolvent companies in which the debtor company has the status of creditor, as well as the general assemblies of shareholders in the companies in which the debtor holds participations;*

- the alienation of fixed assets from the patrimony of the company where the debtor holds interests or their encumbrance with burdens, is required, in addition to the advisory opinion of the judicial administrator, and going through the procedure provided in Article 87 (2) and (3).

However, in relation to the provisions of art. 84 of the the Law on insolvency proceedings and insolvency prevention proceedings, the approval concerns, in fact, almost all of the debtor's operations, deeds and payments - under the penalty of absolute nullity and the possibility of engagin the liability of the special administrator.

To this effect, art. 84 of Law no. 85/2014 sets out the following:

(1) Except for the cases provided in Article 87, for the cases authorised by the syndic-judge or endorsed by the judicial administrator, all acts, operations and payments made by the debtor following the opening of the procedure shall be null de jure.

(2) The special administrator appointed in an insolvency procedure shall be liable for the infringement of Article 87, the syndic-judge, at the request of the judicial administrator, of the assembly of creditors, formulated by the president of the committee of creditors or by another creditor appointed by the committee, or at the request of the creditor that holds 50% of the value of the claims included in the amount of claims, the syndic-judge may order that a part of the liabilities thus resulted be borne by the special administrator, without exceeding the prejudice that has a causal connection with the acts or operations thus performed.

(3) The debtor and/or, as the case may be, the judicial administrator shall be obliged to draw up and keep a list that includes all receipts, payments and nettings carried out after the opening of the procedure, stating their nature and their value, as well as the data for the identification of the co-contracting parties.

In the event of the debtor's right of administration, the above operations shall be carried out by the special administrator under the supervision of the judicial administrator. Breach of the obligation to make payments during the observation period engages the special administrator's liability with his own assets. From the wording of the law, it is clear that the personal liability of the special administrator will be engaged, which means that the debt shall be covered from its own patrimony and not from the debtor's wealth. The law refers to debts, and not to damages.

Also, the special administrator's liability is a tort liability, just like the one of the other persons who caused the debtor's state of insolvency. This means that, in order to engage the special administrator's liability, it is necessary to establish the causal link between his conduct and the debt created to the insolvent debtor.

Thus, it was expressly regulated the personal liability of the special administrator who fails to observe the obligation to perform during the observation period only those deeds and operations that fall within the limits of the current operations and are not subject to the supervision of the judicial administrator or carries out operations related to the debtor's wealth , although his right of administration was withdrawn. Although the text stipulates that the syndic judge may order that part of the debt thus produced be borne by the special administrator without exceeding the causal damage with the deeds or operations thus performed, we believe that this does not exclude that the special administrator be held liable for the entire damage caused to the debtor's wealth and, implicitly, to the creditors. The holders of the claim for liability are the judicial administrator, the creditors' meeting and the creditor holding at least

50% of the value of the receivables registered with the creditor's table. The request is within the jurisdiction of the syndic judge[293].

In order to prevent the infringement of the obligation stipulated at par. (1) and in order for the syndic judge to control the debtor's wealth, the debtor and/or its representatives, as the case may be, must draw up and keep a list of all the operations made, specifying their nature and value and identifying data of the co-contractors. It follows that the nullity may be ordered *ex officio* by the syndic judge or may be requested by any interested person following the consultation of the lists or of becoming aware, in any way, about the performance of the operations, deeds and prices in breach of the conditions laid down in this Article [294].

Concluding, referring to the notion of supervision, as defined by Law no. 85/2014, the scope of the deeds that might be valid without a prior approval of the judicial administrator is very limited, and it is possible to assimilate potential deeds of preservation exercised under the ordinary conditions of the current activity performed by the debtor.

Comparative Law Issues

In the American law of insolvency, to which the Romanian lawmaker regarded as a model for the elaboration of Law no. 64/1995, of Law no. 85/2006, and of Law no. 85/2014, there is no double management of the activity. When the right of administration is not revoked and the debtor is allowed to continue the business, the judicial administrator only monitors the activity. Thus, the debtor-in-posession should not seek agreement or endorsement for the conduct of current business. The Bankrupty Code does not have the institution of pre-approval of operations.

At the same time, it is true that managers can resort to imprudent economic policies by making desperate decisions, with the consequence of damaging the interests of creditors, but for this reason in countries such as the UK, Germany or the Czech Republic, the former management is removed to protect creditors from possible damages. The removal of the former management can be seen as the key to a successful reorganization, as this management is usually responsible for the financial situation of the insolvent company.

6 Penalties applicable to the special administrator in connection with the supervision obligation

According to art. 60 para. 2 and 3 of Law no. 85/2014,``*the syndic-judge shall sanction the judicial administrator with a judicial fine from RON 1.000 to RON 5.000 in case that he, by his fault or by ill-intention, does not fulfil or fulfils the powers provided by law or established by the syndic-judge. If, by the deed provided in paragraph (2), the judicial administrator caused damage, the syndic-judge may, at the request of any party concerned, oblige the judicial administrator to cover the damage caused*``.

Thus, the possibility can not be ruled out that the interested party may address a request to the syndic judge to engage the liability of the judicial administrator on the grounds that a certain measure or lack of a measure has resulted in a particular damage.

To this effect, according to art. 182 of Law no. 85/2014,

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[293] *TANDAREANU Nicoleta, Annotated Insolvency Code of 01-sept-2014, Universul Juridic Publishing House*

[294] *CARPENARU D.Stanciu;HOTCA Mihai-Adrian;NEMES Vasile, Insolvency Code with Comments, 2nd Edition, as revised and supplemented, of 01-sept-2014, Universul Juridic Publishing House*

(1) The judicial administrator/judicial liquidator may be held accountable for exercising his attributions in bad faith or in gross negligence. Acting in bad faith is ascertained when the judicial administrator/judicial liquidator violates the rules of substantive law or of procedural law, having in view or accepting to bring prejudice to a legitimate interest. The existence of gross negligence is ascertained when the judicial administrator/judicial liquidator does not meet or does inefficiently fulfil a legal obligation and thereby causes prejudice to a legitimate interest.

(2) Besides the provisions of the preceding paragraph, the judicial administrator/judicial liquidator may be held accountable from a civil, criminal, administrative or disciplinary viewpoint for acts carried out during the procedure, in accordance with the rules of the common law.

(3) The judicial administrator/judicial liquidator acting in good faith, within the powers provided by the law and of the available information, can not be held liable for the procedural acts performed or for the contents of the documents drawn up within the procedure.

The text, as a novelty, regulates the liability of insolvency practitioners according to the magistrates' accountability model only for the exercise of their duties in bad faith or serious negligence.

Bad faith is defined as knowingly infringing the substantive or procedural rules set out by this law by pursuing or accepting the damage caused to a person's legitimate interest - the debtor, the creditors, the associates/members of the debtor or a third-party person.

Serious negligence is defined as the deed of not complying with, or inappropriately complying with a legal obligation, thus causing a damage to one's legitimate interest.

According to the text, the insolvency practitioner is not responsible for the defective administration of the procedure, if bad faith or serious negligence can not be upheld.

We believe that the insolvency practitioner's liability can be exercised by the injured party - the debtor - by the special administrator, any creditor, any associate/shareholder/member of the debtor, any injured third party and, as an action specific to the case, falls within the jurisdiction of the syndic judge. In the absence of a special provision, the limitation period of the right to file a claim for liability is of 3 years, which runs from the date of the injury[295].

7 Liability of the special administrator in the insolvency proceedings

According to **art. 84 para. 2 of Law no. 85/2014**, ``*the special administrator appointed in an insolvency procedure shall be liable for the infringement of Article 87, the syndic-judge, at the request of the judicial administrator, of the assembly of creditors, formulated by the president of the committee of creditors or by another creditor appointed by the committee, or at the request of the creditor that holds 50% of the value of the claims included in the amount of claims, the syndic-judge may order that a part of the liabilities thus resulted be borne by the special administrator, without exceeding the prejudice that has a causal connection with the acts or operations thus performed*``.

Thus, a second type of special tort liability is regulated under a special law. The need to regulate the liability of the special administrator for infringement of his obligations to collaborate with the other participants in the procedure within the meaning of omitting to submit

[295] *TANDAREANU Nicoleta, Annotated Insolvency Code of 01-sept-2014, Universul Juridic Publishing House*

for authorization or approval the operations he undertakes, arose as a consequence of the fact that the nullity penalty does not always lead to the reparation of the damage suffered by creditors. A lawful deed is annulled in vain if the value of the transferred asset or the funds can no longer be returned to the debtor's wealth.

Specifically, with regard to the conclusive enactments, Law 85/2014 aggravates the liability of the special administrators in relation to the actitivity carried out after the opening of the insolvency proceedings, imposing a more drastic control of its activity by the judicial administrator and the creditors. The special administrator is appointed by the assembly of shareholders or stockholders after the opening of the insolvency proceedings, mainly to represent the interests of the shareholders or stockholders during the procedure and to lead the economic activity of the debtor if the debtor's right of administration has not been revoked. Practically, after the opening of insolvency proceedings, the special administrator will represent the insolvent debtor in commercial relationships (operating under the supervision of the judicial administrator) until entry into bankruptcy or removal of the administration right. The special administrator is the one who, by his signature, will bind the insolvent debtor in commercial relations developing during the insolvency proceedings, unless the debtor's right of administration has been removed.

From the perspective of the representation of the debtor company, the activity of the special administrator is generally the same as that of a director of a company before the opening of the insolvency proceedings, the special administrator being bound to carry out his activity in the interest of the debtor and of the shareholders/sotckholders; however, in the case of insolvency proceedings, in the activity he carries out on behalf of the debtor, he must also prioritize the interests of the creditors, within the meaning of maximizing the debtor's wealth so as to recover the debts registered with the creditor’s table.

Given the nature of the special administrator's obligations and the fact that he is the debtor’s representative in the normal course of the business, the insolvency law imposes certain restrictions and levels of supervision of the activity of the special administrator in order to ensure that the insolvency procedure is observed and that the interests of the creditors in the procedure are protected. Thus, during the observation period, the special administrator will handle the current activities of the insolvent debtor and the payments to the known creditors, which are part of the ordinary conditions governing the exercise of the current activity, operations that will be carried out under the supervision of the judicial administrator, according to art. 87 of the law.

Any operations exceeding these limits must be authorized by the judicial administrator and approved by the creditors' committee or authorized by the syndic judge. The insolvency law imposes a particular conduct on the manager during the observation period, considering that this period is quite sensitive to the activity of the company. Thus, the special administrator will require the judicial administrator to authorize any operation that exceeds the debtor's current activities, this request being also approved by the creditors' committee.

Interesting is that the law also allows the judicial administrator to seek the approval of certain operations that go beyond the debtor's current activities, when the special administrator does not do so. Moreover, the law requires the special administrator to perform any operation that exceeds the debtor's current activity, which was recommended by the judicial administrator and approved by the creditors' committee. Thus, the special administrator may find himself in a situation where he has to enforce a decision recommended by the judicial administrator and approved by the committee, despite the fact that he does not find this operation necessary for the activity of the insolvent debtor. Given that the new insolvency law also tightened the conditions engaging the liability of the special administrator, if the special administrator disagrees with the recommendation of the judicial administrator (as approved by the

committee), he will have to give up the mandate, in order to avoid being held liable for a decision of which he disapproves.

By these provisions, the new law clarifies the situation in which the special administrator did not want to make a certain decision or to perform a certain operation necessary for the debtor's activity during the observation period, but which, in the opinion of the judicial administrator and the creditors represented by the creditors' committee was recommandable. Because the special administrator is the one who represents the company in the relationship with third parties during the observation period (the judicial administrator does not have this quality in the commercial relationship of the insolvent debtor), in practice could occur situations where the special administrator remained passive, although the interest of the debtor and of the creditors required that a certain action be taken/operation be performed. At present, in this situation, the judicial administrator may have the initiative to recommend a specific operation that exceeds the current activity, which becomes mandatory for the special administrator if approved by the committee.

Considering the specific nature of the debtor's activity during the observation period, a period during which the debtor must focus on the financial recovery attempt, the activity of the special administrator is essential. This is a sensitive period for the debtor, and the one who will run his business must pursue maximizing the chances of recovering creditors' recievables and debtor’s financial recovery. A novelty brought by Law no. 85/2014 is the special administrator being held liable for its activity during the observation period.

Thus, the special administrator will be liable for infringing the limits described above in relation to his activity. The judicial administrator, the creditors' meeting or the creditor who holds 50% of the value of the receivables registered with the creditor's table may engage the special administrator's liability for his actions by requiring the syndic judge to order that part of the debt arising from the activity carried out by the special administrator be borne by him.

The purpose of the provision is to determine the special administrator to be more careful with the activity he carries out, his accountability in order to observe the procedure. Thus, they will be more careful with the operations they will carry out, knowing that they can be held accountable for the debt they cause to the insolvent company. Theoretically, special administrators would have had to answer for their activity until now as well, as they had acted as mandators of the debtor and of the shareholders/stockholders; but in practice it was very difficult to engage the special administrator's liability, since the special administrator was bound by a duty of care (and not of result) towards the company, the shareholders and the creditors.

Although the current provision of the law is not very detailed, the lawmaker preferring only to expressly mention the possibility of engaging the special administrator’s liability, the simple insertion of such provisions in the law should determine the judicial administrators and creditors to use this instrument in order to engage the special administrator’s liability and his determination to comply with the law and principles of the insolvency proceedings. The courts must determine on a case-by-case basis the special administrator's fault and, in particular, the causality link between its activity and the increase of the debtor's debts. Thus, a judge addressed with a request for engaging the special administrator’s liability, pursuant to art. 84, will have to analyze the activity/operations performed by the special administrator, determine the deed that damaged the debtor, determine what the damage is (the law speaks of the "debt thus produced", but the judge should also check whether by the defective administration by the special administrator did not reduce the chances of maximizing the asset, not only if the liability was aggravated) and to establish the causality link between the deed and the damage (the liability of the special administrator being within the limits of the damage caused by his deed).

As instruments available to a judge in determining the detrimental deed of the special sdministrator, I believe that the law permits the analysis of the activity of the special

administrator from all perspectives, taking into account not only the observance of the letter of the law, but also the insolvency proceedings' principles, the debtor's interests and the interests of the creditors. Until now, abuses by the special administrators who, in bad faith, benefited from their position in the proceedings to pursue their personal interests and to defraud the interests of creditors could easily be made.

The recommendations of the UNCITRAL Legislative Guide - Part IV, which entered into force in 2013 and named "Director's obligations in the period approaching insolvency", which underlied the insertion of these rules in Law 85/2014, could be a very useful tool for syndic judges in identifying the criteria for engaging the liability of special administrators, based on art. 84 of the Law. The Guide righteously recommends a careful analysis of the pre-insolvency activity of the administrators (activity similar to the one carried out during the observation period, both periods being sensitive to the debtor in difficulty), an analysis which goes beyond the strictly reasonable approach by a person with average know-how. The analysis should take into account the knowledge, skills, experience of a professional who generally performs activities similar to those of the special administrator (as a matter of reference, the activity of an administrator acting in a similar company, not insolvent, may be a starting point), taking into account a much higher standard in the case of sophisticated companies or with sophisticated internal structure where the expectations of an administrator are much more demanding. In addition, the specific situation of the special administrator - the educational level, studies, skills and experience in a specialized field such as that of the debtor, should be analyzed, details which should increase its accountability. The lack of such knowledge, of experience and skills is not an excuse for the special administrator's bad administration. In general, the syndic judge should take into account the knowledge, skills and experience required for such a position in such a company, analyzing from case to case the activity of the special administrator.

Given the explicit regulation of the special administrator's liability, we expect the person to be appointed on such a position to be aware of the fact that that he/she must have the qualities required for such a position and accept the mandate in full awareness thereof, undertaking to be subject to penalties if he/she performs his/her activity in a defective manner. We hope that the cases where the special administrator is just an instrument in the hands of shareholders/stockholders, doing nothing but obeying their instructions without pursuing the debtor's interests or the interests of the creditors involved in the proceedings, will disappear in practice (or, at least, minimized). We hope that by this regulation, special administrators will be more responsible in respect of their work, and judicial administrators and especially creditors - more careful to its work. In practice, the extent to which syndic judges will resort to this tool for punishing the special administrators' defective activity and engaging their liability will also be significant. At the moment, the legal instrument is governed by law. It is at the discretion of the creditors or the syndic judges to use it in order to be able engage the liability of this category, which is so important, for the participants in the insolvency proceedings[296].

Comparative Law Issues

Because there are similarities between the Romanian law and the French law, as regards the substance of the tort law, I found useful to give some examples from the judicial practice of the Courts of Appeal and the French Court of Cassation.

Arguments in cases where liability was engaged:

[296] The new insolvency law aggravates the special administrators' liability, Vlad Peligrad

- "Mandators appointed by the tribunal **to carry out, under their control,** the procedure shall be held liable for any mistakes committed in the course of their duties and are held liable for repairing any damages caused not only to creditors and debtors, but third parties as well" (Court of Cassation, decision 3 -7-2007).
- The liability of the legal representative may be engaged since **he/she has disregarded not only his/her duty of care and diligence**, but also the obligation to assist the debtor in all management deeds or as a result of misleading suppliers by assurances given in an imprudent manner" (Court of Cassation, decision 8-12-1998).
- In case of assets' assignments, he is bound to inform the future owner about the exploitation situation from the perspective of the relevant legal provisions "(Court of Cassation 30-11-2010).

Any other mistake that causes damage to creditors shall be also punished, especially: the *insufficient supervision of the undertaking's management manner by the debtor (Cass 11-5-1992); negligence of allowing the debtor to continue, for a long period of time, its activity without renewing the authorizations given for a definite duration (Court of Appeal Versailles 14-3-1998); the preferential payment of certain creditors (Court of Cassation 20-2-1996).*

Court's considerations on release of liability:

- "Judges can not take into consideration the fault of the judicial administrator in respect of current management deeds that normally fall outside his jurisdiction" (Cass 14-3-1995).
- "The judicial administrator who gives an order at a time when the debtor's situation was not irrevocably compromised does not commit a mistake" (Court of Cassation, decision 20-10-1992)[297].

8 Conclusions

In Romania, over time, in connection with the duties of the judicial administrator to supervise the debtor's activity, it has been passed from the absence of a regulation on the notion (to supervise) to an extensive regulation, which bounds the judicial administrator to state *ex-ante* his opinion on the majority of commercial, financial, accounting and legal operations. The opinion of the judicial administrator is a certificate of compliance, and not an advisory opinion, and this results from the provisions of art. 84 of this enactment, according to which all operations performed without the advisory opinion of the judicial administrator, the approval of the creditors' committee or by the syndic judge, as the case may be, are lawfully deemed null and void.

The American law of insolvency - Bankrupty Code - which was regarded by the Romanian lawmaker as a source of inspiration for the elaboration of Law no. 64/1995, of Law no. 85/2006, and of Law no. 85/2014, does not regulated the possibility of debtor's double management of the activity. When the right of administration is not revoked and the debtor is allowed to continue the business, the judicial administrator only monitors the activity. Thus, the debtor-in-posession should not seek approval or endorsement for the conduct of current business. The Bankrupty Code does not have the institution of pre-approval of operations.

As a conclusion, we could say that in the light of the new regulation, namely of Law no. 85/2014 on insolvency proceedings and insolvency prevention proceedings, the supervisory duty exercised by the judicial administrator on the activity of the debtor, in the case where he has the right of administration, has been largely regulated so that, at present, the issues related to the meaning and extension of this notion have been largely clarified.

[297] Excerpts from *MEMENTO PRATIQUE, FRANCIS LEFEVRE, Droit commercial,* 2012

Currently, along with the clarification of the notion of supervision and its content, the judicial administrator should permanently analyze the activity carried out by the debtor and approve in advance both of the patrimonial measures and the measures for restructuring the activity.

In the course of the special insolvency proceedings, no matter the urgency of making a payment or taking action in relation to the debtor's current administration, it must be ordered in accordance with the provisions of the Law on insolvency proceedings and insolvency prevention proceedings, under the supervision of the judicial administrator.

Referring to the notion of supervision, as defined by Law no. 85/2014 on insolvency proceedigns and insolvency prevention proceedings, the scope of the deeds that might be valid without a prior advisory opinion of the judicial administrator is very limited, the preservation deeds exercised by the debtor while in the ordinary course of its business activity being eventually assimilated.

THE RANK OF CLAIMS IN BANKRUPTCY: THE POSSIBILITY OF SELLING THE DEBTOR'S ASSETS SEIZED BY CRIMINAL AUTHORITIES

Bianca Mihaela CIMPOI

1. Introduction

The sole objective of bankruptcy is the liquidation of the debtor's assets in order to compensate the claims registered against the debtor, partially or totally. Taking into consideration this objective, we can consider the bankruptcy phase of the insolvency procedure as having an important role in the forced execution of the debtor's obligation.

Funds distribution equally has a significant role in any executional procedure. It constitutes one of the final procedural actions that has to be performed within the procedure, and it implies dividing the funds obtained from the sale of the debtor's assets among the creditors.

In practice, as a rule, the debtor's assets are not enough to pay the expenses and the claims of all creditors registered in that procedure. In the majority of cases, there will be creditors that will not receive anything, or that will receive a small amount of their claims. The hypothesis where the debtor's assets are sufficient to pay everything is almost inexistent in practice. This is the reason why the lawmaker looked for regulating rules for the distributions of the funds, as this should not be done chaotically, but according to certain preestablished rules. Therefore, any distribution of the funds obtained from the sale of the debtor's assets is regulated by imperative rules that are mandatory.

The distribution of the funds in the common executional procedure is regulated by the Civil Procedure Code (in the partition dedicated to the executional procedure – articles 865 to 887 [1]). Law no. 85/2015 on pre-insolvency and insolvency procedure includes its own rules for distribution, specific for the bankruptcy of the debtor procedure (articles 159 to 168 [2]).

Even if the distribution is regulated by mandatory rules, the carrying out of this procedural act is rather difficult to fulfil, especially in the current economic context where we are frequently confronted with the situation where the debtor's assets are totally or partially seized by the criminal authorities as a result of the penal files opened against the debtor prior/after the opening of the procedure. As this situation is not expressly regulated by Law no. 85/2014, and the courts will not clearly and consistently decide on this issue, a blocked procedure will eventually occur, that is not in the benefit of the creditors as the procedural expenses will continue to grow up to their disadvantages.

Hoping that the courts will manifest their wisdom and clear up this issue, in this paper an attempt is made to define these aspects, viz. *distribution* and *criminal seizure*, and to identify whether there are any connections between them, more precisely whether a distribution in a bankruptcy procedure is or could be influenced by the criminal seizure.

2. Current theoretical perspectives - defining the terms

It is important to clarify:

(i) **Wha**t *ranking* is,
(ii) **Who** sets the ranking in a procedure and **how**,
(iii) **What** the *debtor's estate* includes,
(iv) **Who** are the *creditors* and, finally,
(v) **What** *seizure* means.

2.1. Thus, the ***ranking (priority order)*** is not expressly defined by Law no. 85/2014. The law sets only the order for the distribution of the result of the liquidation depending on the types of claims registered against the debtor. As we will find out below, there are two provisions that regulate this matter, article 159 and article 161 of Law no. 85/2015, respectively. Taking into consideration its content, we consider we could define *ranking* as the imperative order for the distribution of the funds resulted from liquidation of the debtor's assets.

The ranking is set by the law by means of imperative norms, and according to the types of claims that were registered against the debtor in the ***definitive consolidated table of creditors***. This table is defined by article 5 point 68 of Law no. 85/2014 as the one including the whole set of claims that appears as admitted in the *final table* of claims, as well as the undisputed claims included in the *additional table* of claims, and the claims resulting from the settlement of oppositions against the additional table of claims. In the event that the opening of bankruptcy was ordered after the confirmation of a reorganization plan, the final consolidated table of claims will include the whole set of claims that appear as admitted in the final table of claims, the undisputed claims in the additional table of claims, the ones resulting from the settlement of oppositions against the additional table of claims, minus the amounts paid during the implementation of the reorganization plan [2].

2.2. The ***creditors*** who will participate in the distribution are those that are registered in the definitive consolidated table of creditors, namely those creditors entitled to participate in the proceeding.

Even if the lawmaker omitted to impose it, similar to the preliminary and definitive table of creditors, the *definitive consolidated table* of creditors reflects the amount claimed, the amount admitted and the claim category as per articles 159 and 161 [2]. Due to the sequence in which the tables are drawn up in the procedure by the insolvency practitioners (judicial administrator and judicial liquidator – after the bankruptcy procedure has been opened against the debtor), at the moment of any distribution, the claims, their amounts and priority order shall be definitively set by the insolvency practitioner or, in case of contestation, by the syndic judge.

According to article 5 point 19 of Law no. 85/2014, a *creditor entitled to participate in the proceeding* means the holder of a title of claim against the debtor's estate, who has filed a petition for their claim to be admitted; pursuant to the admission of it they have acquired the rights and obligations set out by this law for each stage of the proceedings. One shall no longer be a creditor if they were not registered as such, or if they were removed from the table of claims successively prepared in the proceedings, as well as pursuant to the closing of the proceedings; the debtor's employees are registered as creditors without having personally filed their statements of claims [2].

2.3. The ***debtor's estate*** is defined by article 5 point 5 of Law no. 85/2014 as the whole set of assets and corporate rights – including those acquired during the insolvency proceedings – which may be the subject of forced execution, according to the provisions of the Civil Procedure Code [2].

Prior to any liquidation of the debtor's assets, its estate will be assessed by an evaluator appointed by the judicial liquidator based on the decision of the committee creditors. This assessment will be the starting point for any sale within the bankruptcy procedure.

2.4. The ***seizure*** is included in the category of the *interim measures* that are ordered in a criminal trial with a view to freezing those movable and/or immovable asset/(-s) that belongs/(belong) to the accused/indicted.

The seizure and the procedure of seizing are regulated by articles 249 – 253 of the Criminal Procedure Code. According to article 249 of the Criminal Procedure Code, **the seizure is put into force**:

(i) in order to guarantee the payment of a criminal fine;

(ii) in view of the special and/or extended confiscation;

(iii) in order to compensate the damage that was caused by a criminal act and to guarantee the payment/execution of the judicial expenses paid by the State in a criminal lawsuit [3].

As we will see below, the second category of seizure is relevant to the insolvency procedure.

According to the above mentioned provisions, the seizure is a temporary measure – until the criminal lawsuit is decided - and it will prevent the accused/indicted from hiding, destroying and selling their movable and/or immovable property that is the object of the seizure.

In this context, we should highlight that, according to article 163 par. (3) of Law no. 85/2014, the insolvency account opened as referred to in article 39, par (2), shall in no way be blocked by any criminal, civil or administrative action, ordered by the criminal prosecution bodies, administrative bodies or courts of law [2].

3. Ranking – a practical approach

, the approach to ranking is discussed based on the legal framework: Section 7 of Law no. 85/2014 - *Bankruptcy and Liquidation of the Bankrupt Debtor*, Subsection 3 - *Distribution of Funds resulting from Liquidation*.

There are two articles that have to be observed when setting the ranking for distribution, article 159, and article 161, respectively, of Law no. 85/2014.

3.1. Ways of carrying out ranking in function of the different categories of claims registered against the debtor

The ranking in view of the distribution of the funds from the liquidation of the assets and rights of the debtor's estate which are **affected by causes of privilege** in favour of the creditors is regulated by article 159 of Law no. 85/2014.

Article 161 regulates the ranking for distribution within the bankruptcy procedure of the funds obtained from the sale of **any other assets and rights** of the debtor's estate, except those ones that are affected by causes of privilege.

Even if the approach of the lawmaker was to firstly regulate the manner of distribution of the funds obtained from the sale of the assets and rights of the debtor's estate that are the object of causes of privilege (preference), still we will consider the provision of article 161 of Law no. 85/2014 as being **the rule** in the matter of distribution. Therefore, article 159 of the same law will be applicable only referring to the distribution of the funds obtained from the sale in the bankruptcy procedure of those assets subject to causes of privilege of one of the debtor's creditors.

3.1.1 Distribution of the funds from the liquidation of the assets and rights of the debtor's estate which are affected by causes of privileges

The *privileged claims* are defined by article 5 point 15 of Law no. 85/2015 as being those claims that are accompanied by a privilege and/or a mortgage right and/or rights

assimilated to the mortgage, and/or a pledge right in the assets that form the debtor's estate, irrespective whether it is a main debtor or a third-party guarantor for the beneficiaries of the causes of privilege. If the debtor is a third-party guarantor, the creditor who benefits from such a privilege cause will exert the correlative rights only as to the respective asset or right [2].

The rights assimilated to the mortgage are, according to article 2347 of the Civil Code:

(i) ownership reserve provisions,

(ii) option of repurchase, and

(iii) assignments concluded in view of a guarantee [4].

Unless indicated otherwise by a special law, these causes of privilege shall have the meaning ascribed to them in the Civil Code [2].

According to article 103 of Law no. 85/2014, the claims that benefit from a cause of privilege are recorded in the final table of claims, up to the market value of the security, as established by the evaluation ordered by the judicial administrator or by the judicial liquidator, and conducted by an evaluator [2].

A privileged creditor is entitled to participate in any distribution of amounts made before the sale of the asset affected by a privilege in its favour. In order to prevent such a creditor from receiving more than what it would have received if the asset affected by a cause of privilege in its favour had been sold prior the distribution, and only if this measure is necessary, the amounts received from any distribution made before the sale of the asset affected by a privilege in its favour shall be deducted from the ones that the creditor would be entitled to receive later on from the funds obtained from the sale of the asset affected by a privilege [2].

The **first** rank in priority for the distribution of the funds obtained from the sale of the bankrupt debtor's assets that are affected by causes of preference - Article 159, point 1 of Law no. 85/2014 - comprises:

(i) fees, stamps and any other expenses in connection with the sale of these assets;

(ii) expenses necessary for the conservation and administration of these assets;

(iii) expenses advanced by the creditors in the forced execution procedure;

(iv) claims of utilities suppliers; remunerations due to professionals retained for the joint interests of all creditors [2].

However, two categories of creditors require further clarifications:

I. The utilities suppliers' claims are those arising after the opening of the proceedings and are related to the assets object to causes of preference in case the debtor has the position of a captive consumer. The captive consumer is defined by article 5 point 10 of Law no. 85/2014 as the consumer who, for technical, economic or regulatory reasons, is unable to select its supplier [2]. According to article 77 of Law no. 85/2014, no supplier of services – electricity, gas, water, telephone, or the like – is entitled, for the entire observation period and during the reorganization period, to change, refuse or temporarily suspend the supply of such services to the debtor or to its estate [2].

II. The remuneration due to professionals retained for the joint interests of all creditors shall be borne pro rata, depending on the value of all assets in the debtor's estate. In this category are included the fee of the insolvency practitioner and the fee of specialists, such as: lawyers, experts, evaluators etc., who were nominated by the insolvency practitioner according to a decision of the creditors' committee.

The **second** rank in priority for distribution of the funds obtained from the sale of the bankrupt debtor's assets that are affected by causes of preference - Article 159 point 2 of Law no. 85/2014 - is the claims of privileged creditors arising during the insolvency proceedings [2].

In this category are included the claims of the privileged creditors, arising in any phase of the insolvency (observation period or reorganization, after the reorganization plan has been confirmed by the syndic judge). These claims include the capital, interests, as well as other accessories - as the case may be.

The **third** rank in priority for distribution of the funds obtained from the sale of the bankrupt debtor's assets that are affected by causes of preference - Article 159 point 3 of Law no. 85/2014 - is represented by the claims of privileged creditors, covering the entire capital, interests, increases and penalties of whatever nature, including expenses [2].

In a supplementary manner, the claims of the following creditors are included in this category:

a) claims arisen according to article 105 indent (3) of Law no. 85/2014, namely those claims resulting from leasing contracts rescinded before the opening of the insolvency proceedings, in cases where the ownership in the assets under the leasing contract is transferred to the debtor. In these cases, the funds provider shall acquire a statutory mortgage in those assets, ranking the same as the initial leasing operation;

b) claims arisen according to article 123 indent (11) lit. a) of Law no. 85/2014, following the rescinding of leasing contracts by the funds provider (financing party) and its option for transferring the ownership in the assets that form the subject matter of the leasing contract to the debtor. Similar to the first hypothesis above, in this case the financing party is entitled to acquire a statutory mortgage in those assets with the same ranking as the leasing operation, for the amount of outstanding instalments and accessories, invoiced and not paid up on the date of the opening of the proceedings, plus the remaining of the outstanding amounts under the leasing contract, but without exceeding the market value of the assets, to be determined by an independent evaluator, nominated by the insolvency practitioner as approved by the creditors' committee.

Within the distribution of the funds, three hypotheses could be identified, viz.:

(i) The asset affected by a cause of privilege is sold at a higher price than the amount the privileged creditor is registered with – as a secured creditor - in the final consolidated table of claims;

(ii) The amounts obtained from the sale of the assets are insufficient to fully cover the claims the privileged creditor is registered in the final consolidated table of claims with;

(iii) The amounts obtained from the sale of the assets are higher than the amount the privileged creditor is registered in the final consolidated table of claims with.

The first hypothesis is the event that the assets affected by a cause of privilege are sold at a higher price than the amount the privileged creditor is registered in the final consolidated table of claims with. This case is regulated by article 103 of Law no. 85/2014, being stated that the *positive balance* shall be given to the secured creditor as well, even if part of its claim had been registered as an unsecured claim, up to the full amount of the main claim and of the accessories, to be calculated according to the documents backing the claim, until the asset is sold. This positive balance should result after the observance of the article 159 par. (1) of Law no. 85/2014, i.e. the observance of the ranking as regulated by this provision [2].

The second hypothesis is the case when the amounts obtained from the sale of these assets are insufficient to fully cover the privileged creditors' claims. In this case, the creditors shall, in respect of the difference, hold unsecured or budgetary claims, as appropriate, which shall compete with the ones included in the corresponding category according to their nature, referred to in article 161 [2].

The case when a positive difference results after the payment of the amounts according to the priority regulated by article 159 indent (1) of Law no. 85/2014 represents the third hypothesis. In this last case, such difference shall be deposited on account of the debtor's estate, and it shall be added to the amount, in order to be distributed to unsecured creditors, according to article 161, as the case will be [6] [2].

3.2.2 Distribution of the funds from the liquidation of any other assets and rights. The rule in the matter of distribution

As we noted above, the funds obtained from the sale of any other assets and rights of the debtor's estate, save those one that are affected by causes of privilege, will be distributed according to article 161 of Law no. 85/2014.

Therefore, this provision should be observed under two hypotheses:

(i) no secured creditors are registered with the consolidated table of creditors, and

(ii) there are secured creditors that are registered with the consolidated table of creditors, but the debtor's estate includes both assets that are affected by causes of preference, and assets that are free of any such causes, and which constitute the general pledge of all registered creditors.

In this second hypothesis, the provision of article 161 of Law no. 85/2014 will be observed only for the distribution of the funds provided by the liquidation of the assets that represent the general pledge of all registered creditors.

Therefore, one can clearly see that article 159 will be applicable under the same hypothesis for the distribution of funds provided by the liquidation of the assets that are affected by causes of preference. Such a hypothesis implies a delimitation of the incomes and expenses in relation with every asset that is the object of a cause of preference, in order to mark a difference with the incomes and expenses in relation with any other asset that is free of such causes of preference and that constitutes the object of general pledge of all creditors [6].

In what follows, a discussion of the general ranking is proposed, taking into consideration the interpretation and the observance of the order in which it is regulated by article 161 of Law no. 85/2014.

Thus, the **first** rank in priority with a view to the distribution of the funds obtained from the sales of the bankrupt debtor's assets that are not affected by causes of preference - Article 161 pct. 1 of Law no. 85/2014:

(i) fees, stamps and any other expenses in connection with the bankruptcy procedure;

(ii) expenses necessary for the conservation and administration of the debtor's assets;

(iii) expenses related to the debtor's activity pursued after the opening of the proceedings, as well as remunerations due to professionals, which are retained for the joint interests of all creditors [2].

This provision is similar with to the provision of article 159 point 1 of Law no. 85/2014. Some points should be underlined here:

I. The claims of the utilities suppliers, arising after the opening of the proceedings and related to the debtor's assets, in case the debtor has the position of a captive consumer, are not expressly included in this position of the rank. Nevertheless, I consider that these claims are assimilated to (i) those the expenses necessary for the administration of the debtor's assets, or (ii) of the expenses in connection with the debtor's activity pursued after the opening of the proceeding.

II. The remuneration due to professionals, retained for the joint interests of all creditors, are the following:

a) fee of the insolvency practitioner, and

b) fee of the specialists, such as: lawyers, experts, evaluators etc., who were nominated by the insolvency practitioner according to a decision of the creditors' committee.

Even if this provision does not expressly state, it is obvious that these expenses shall be borne *pro rata*, depending on the value of every asset in the debtor's estate. Furthermore, the expenses paid according to the reorganization plan, or during this phase of the procedure, shall be deducted.

III. In the category of expenses in connection with the debtor's activity pursued after the opening of the proceedings are included those expenses emerged after the opening moment, including the bankruptcy procedure, as it is accepted that in some circumstances the debtor's activity could continue after the opening of the bankruptcy.

For example, article 85 par. (4) of Law no. 85/2014 provides that the debtor's right of administration lawfully ceases as of the date when the opening of the bankruptcy is ordered [2]. In the same line, par. (7) of the same article states that as of the opening of the bankruptcy, the debtor may only carry out the activities which are necessary for the liquidation operations [2]. Nevertheless, to simply and automatically apply these provisions would not be in the spirit of the law and according to its objective, namely the maximization of the debtor's assets - maybe the most important objective within the bankruptcy procedure. Furthermore, to simply stop any activity of the debtor as soon as the bankruptcy procedure is ordered can cause important losses to the creditors. This is the reason why in practice it is accepted that the debtor's activity should continue after the bankruptcy procedure is pronounced against the debtor. Such circumstances could include: finalisation of products/works, diminishing losses, preventing events having negative consequences over people's health, environment etc. [6].

The **second** rank in priority with a view to the distribution of the funds obtained from the sales of the bankrupt debtor's assets that are not affected by causes of preference - Article 161 point 2 of the Law no. 85/2014: claims resulting from financing granted according to article 87 par. (4), viz. those financings offered to the debtor during the observation period in order to conduct its daily activities [2].

In order to profit from this rank, the granting of those funds by the creditor has to be approved by the creditors' assembly.

The creditor will have priority upon repayment according to article 159 par. (1) point 2 – in case such financings were secured with the debtor's assets or rights, or, as applicable, according to article 161 point 2, in case there were no assets, or if the existing assets were insufficient to be encumbered with causes of privilege in favor of the creditors offering financing during the observation period, in order to allow the debtor to conduct their current activities (in other words, for that part of the claim which is unsecured).

The **third** rank in priority with a view to the distribution of the funds obtained from the sales of the bankrupt debtor's assets that are not affected by causes of preference - Article 161 point 3 of Law no. 85/2014: claims resulting from labour relations (salary claims), viz. those claims defined by article 5 point 18 of Law no. 85/2014 that result from labour relations between the debtor and their employees [2].

I underline that these claims are anyway automatically registered with the debtor's table of claims by the judicial administrator/judicial liquidator.

The **fourth** rank in priority for distribution of the funds obtained from the sale of the bankrupt debtor's assets that are not affected by causes of preference - Article 161 point 4 of Law no. 85/2014 - comprises:

(i) claims resulting from the debtor's activity pursued after the opening of the proceedings;

(ii) claims of the counterparts arisen following the termination of the contract due to its denunciation by the insolvency practitioner, as these compensations were decided by a final decision;

(iii) claims payable to third party acquirers acting in good faith, or to subsequent acquirers that are obliged to restitute to the debtor the assets or the value thereof [2].

Referring to the last two categories of claims in this rank, the following should be noted:

I. Ongoing contracts are considered maintained in full force and effect on the date of the opening of the proceeding. In order to leverage the debtor's estate to the largest extent possible, within a limitation period of three (3) months from the opening of the proceeding, the judicial administrator/judicial liquidator may terminate any contract, unexpired leases and other long-term contracts, as long as they were not fully or substantially performed by all parties involved. The judicial administrator/judicial liquidator must, within thirty (30) days from receipt, provide an answer to the notification sent by the contracting party within the first three (3) months from the opening of the proceedings, requesting termination of the contract; in the absence of such an answer, the judicial administrator/judicial liquidator shall be precluded from requesting performance of contract, and the contract shall be deemed terminated. A contract is deemed terminated:

a) At the lapse of a thirty (30)-day term from the receipt of the counterparty's request for termination of the contract, if the judicial administrator/judicial liquidator fails to answer;

b) On the date of the judicial administrator's/judicial liquidator's notice of termination [2].

In case of termination of the contract, a motion for indemnification may be filed by the counterparty against the debtor, and it shall be settled by the syndic judge. These rights, that are determined in favour of the counterparty pursuant to the motion for indemnification, shall be paid to it according to article 161 point 4, based on the final decision in this respect.

II. The judicial administrator/judicial liquidator/creditors' committee/the creditor holding more than 50% of the value of claims registered in the table of claims may lodge with the syndic judge petitions for cancelation of fraudulent acts or operations made by the debtor over the last two (2) years before the opening of the proceeding to the detriment of its creditors' rights. These kinds of fraudulent acts or operations are expressly and limitedly regulated by article 117 par. (2) and par. (4) of Law no. 85/2014. Such petitions for cancelation of fraudulent acts or operations should be registered against the third party acquirers.

In case such patrimonial transfer is cancelled, the third party acquirer shall have to restitute the transferred asset in the debtor's estate or, if the asset no longer exists, or there are hindrances of any nature whatsoever for the debtor to take it back, then the third party shall repay the value thereof as of the time of the transfer made by the debtor, determined by an expert's report prepared under the law.

In case of restitution, the parties should be reinstated in the previous positions so that the encumbrances existing at the time of transfer shall be re-registered.

The third party acquirer who restituted to the debtor the asset or the consideration of the asset that had been transferred by the debtor shall have against them a claim equal to the price paid plus the value added of that asset at the very most as generated by investments, provided

that the third party should have accepted the transfer in good faith, with no intention to prevent, delay or mislead the creditors of the debtor.

A petition for cancelation of fraudulent acts or operations may be lodged against the subsequent acquirers only if the subsequent acquirer failed to pay the corresponding value of the asset, and they were aware or had to be aware that the initial transfer was likely to be cancelled. Where the subsequent acquirer is a spouse, a relative or kindred up to the 4th degree inclusively of the debtor's, they are relatively presumed to have known the event that the initial transfer was likely to be cancelled.

In case such patrimonial transfer is cancelled, the subsequent acquirer may claim from the debtor only the amount of the added value generated by the investments made [2].

The **fifth** rank in priority with a view to the distribution of the funds obtained from the sale of the bankrupt debtor's assets that are not affected by causes of preferences - Article 161 point 5 of Law no. 85/2014: budgetary claims [2] defined in article 5 point 14 as those claims consisting in taxes, fees, contributions, fines and other budgetary income, as well as their accessories [2].

The budgetary claims that are not fully covered by the value of privileges, mortgages or pledges created, shall, for that portion which is not covered, be deemed to have the same nature.

The **sixth** and **seventh** ranks in priority with a view to the distribution of the funds obtained from the sales of the bankrupt debtor's assets that are not affected by causes of preference - Article 161 point 6 and 7 of Law no. 85/2014 – comprise:

(i) claims consisting in amounts payable by the debtor to third parties based on some obligations to provide financial support, minor children's allowances or payment of periodic amounts meant to ensure the living;

(ii) claims consisting in the amounts determined by the syndic judge for support of the debtor and their family [2].

A short note should be underlined referring to the last category of claims in this rank, as it will be applicable only where the debtor is an individual. According to article 3 par. (1) of Law no. 85/2014, the proceedings regulated by this law are applicable to all professionals as they are defined by the Civil Code, specifically – companies and any other legal or physical person or individual that are entitled to carry out economic activities, save those who practice liberal professions.

The **eighth** rank in priority in the view of the distribution of the funds obtained from the sales of the bankrupt debtor's assets that are not affected by causes of preference - Article 161 point 8 of Law no. 85/2014 – comprises:

(i) claims representing bank loans and the related expenses and interests;

(ii) claims resulting from delivery of products, providing of services or other works, and from rents;

(iii) claims arisen following the rescinding of leasing contracts by the funds provider (financing party) [2].

This rank will be attributed to the claim of the financing party only in case were, after the rescinding of leasing contracts, the funds provider (financing party) does not opt for transferring the ownership in assets that form the subject matter of the leasing contract toward the debtor. Therefore, if the financing party opts to recover the assets that form the subject matter of the leasing contract, and if there are no other assets that would turn the holder into a creditor who benefits from a cause of privilege, then the financing party shall be registered as a creditor having the eighth rank of priority for the amount of outstanding instalments and

accessories, invoiced and not paid up on the date of the opening of the proceedings, plus the remaining amounts due under the leasing contract minus the market value of the recovered assets - to be determined by an independent evaluator, appointed by the insolvency practitioner according to a creditors' committee decision.

The **ninth** rank in priority in the view of the distribution of the funds obtained from the sale of the bankrupt debtor's assets that are not affected by causes of preference - Article 161 point 9 of the Law no. 85/2014: any other unsecured claims, as defined by article 5 point 22 of Law no. 85/2014 as those that are held by the debtor's creditors that are registered in the table of claims and that do not benefit from a privilege cause [2].

The creditors that do benefit from causes of privilege, but whose claims are not fully covered by the amount of privileges, mortgages or pledges held, are also unsecured creditors for that portion of their receivable which is not covered.

The **tenth** rank in priority in the view of distribution of the funds obtained from the sale of the bankrupt debtor's assets that are not affected by causes of preference - Article 161 point 10 of Law no. 85/2014: subordinated claims in the following order of preference:

(i) claims payable to third party acquirers acting in bad faith, that are obliged to restitute the debtor the assets or the value thereof, following a definitive decision on the claim for annulment of the fraudulent acts of the insolvent debtor,

(ii) claims payable to subsequent bad faith acquirers;

(iii) loans granted to the debtor – legal entity – by an associate or shareholder holding at least 10% of the share capital and of the voting rights in the general meeting of the shareholders, or by a member of the group of economic interests, respectively.

Some considerations relating to these claims should be discussed:

I. According to article 120 par. (2) of Law no. 85/2014, the third party acquirer acting in bad faith shall be entitled to receive only the price paid. Bad faith of the third party acquirer must be proved [2].

II. The Group of Economic Interests (GEI) is defined by article 118 Title V of Law no. 161/2003 regarding some measures of ensuring transparency in performing public functions as an association of two or more physical or legal persons, constituted over a determined period with a view to fostering or developing its members' economic activity, as well as to improving the results of that activity. The GEI is a legal person with its heritage purpose, that can hold the capacity of a trader or non-trader.

(iv) claims resulting from deeds without consideration [2].

3.2. General rules for distribution in the bankruptcy procedure. Manner in which the distribution is actually carried out. The report concerning the funds and the plan for distribution [2]

Every three months, calculated from the date of commencement of the liquidation, the judicial liquidator shall provide the creditors' committee with a report on the funds obtained from liquidation and collection of the debts, as well as a plan for distribution between creditors, if applicable. For solid grounds, the syndic judge may extend by maximum one (1) month, or they may reduce it, the term allowed for presentation of the report and of the distribution plan.

The *report concerning the funds obtained from the liquidation and from the collection of debts* and the *plan* shall be registered with the tribunal's Registry, and it shall be published in the Insolvency Procedure Bulletin.

The report shall provide at least the following information:

a) balance existing in the liquidation account after the last distribution;

b) collections made by the judicial liquidator from the sale of each asset and from the claims recovery;

c) amount of interests or other income that the debtor's estate benefits of, pursuant to preserving the amounts not distributed in bank accounts, or pursuant to the administration of the assets existing in the debtor's estate;

d) total amounts in the liquidation account.

The *distribution plan* shall be registered with the tribunal's Registry, and the judicial liquidator shall notify each creditor thereon. A copy of the report and a copy of the distribution plan shall be posted on the tribunal door.

The plan for the distribution to the creditors must necessarily include the following information concerning each creditor to whom distribution is made:

a) updates to the consolidated table of claims;

b) amounts already distributed;

c) amounts remaining after the adjustment of the consolidated table of claim and the distributions already made;

d) amounts that form the object of distribution;

e) amounts remaining to be paid after the distribution is made.

Within fifteen (15) days from the publication of the report and of the plan in the Insolvency Procedure Bulletin, the creditors' committee or any creditor may file opposition against them.

We note that the law does not impose the judicial liquidator's obligation to publish the distribution plan in the Insolvency Procedure Bulletin, but the legal term for opposition starts from the publication of the report and of the plan in the Insolvency Procedure Bulletin. Therefore, this provision should be interpreted as providing a legal term for opposition – fifteen (15) days – and this term starts from the publication of the plan in the Insolvency Procedure Bulletin, in case the plan is published. In case the plan is not published, the legal term for opposition does not start before the date the creditor receives the notification of the judicial liquidator related to the registration of the distribution plan with the tribunal's Registry, but starting from the notification date.

Furthermore, we should note that the opposition may be filed by the creditors' committee, this provision being circumscribed to the general attribution of the creditors' committee, as stated by article 51 par. (1) let. c) of Law no. 85/2014: "to take note of the reports prepared by the judicial administrator or by the judicial liquidator, to analyze them and, if applicable, to file oppositions". Having in mind these attributions of the creditors' committee, I appreciate that an opposition should be registered only in the case that the distribution plan and the report break the rights of all creditors, or if imperative provisions are not observed by the judicial liquidator on the date of carrying out the report or plan.

A copy of the opposition shall be sent to the judicial liquidator, as well. Within five (5) business days from the expiration of the term allowed for filing oppositions, unless any opposition is filed, the judicial liquidator shall proceed to the actual payment of the distributed amounts. If oppositions were indeed filed, then the judicial liquidator shall refrain from distributing the amounts that form the object of opposition accordingly, and payment of the not disputed amounts can commence.

Within twenty (20) days from the publication of the report and of the plan in the Insolvency Procedure Bulletin, the syndic judge shall organize a meeting for which they shall summon the judicial liquidator, the debtor and the creditors and shall issue a sentence settling all oppositions at once.

Within five (5) business days from the date when the decision settling the oppositions becomes a writ of execution, the judicial liquidator shall proceed to the actual payment of the amounts distributed, as determined by the courts. I note herein, that according to article 46 par. (1) of Law no. 85/2014, the decisions of the syndic judge are enforceable and may be challenged separately only by appeal, and according to article 43 par. (5) let. d) of Law no. 85/2014, the sentence settling the opposition against the intended distribution of funds obtained from liquidation and from collection of debts may be suspended by the court of appeal. Therefore, in case this suspension was not decided, the judicial liquidator shall proceed to the actual payment of the amounts distributed.

Amounts may be distributed to the holders of claims in a specific category only if the holders of claims in a higher category have been fully satisfied.

The amounts to be distributed between creditors with the same priority ranking shall be granted pro rata to the amount allotted for each claim in the final consolidated table of claims. In other words, where the amounts necessary to cover the full amount of claims with the same priority ranking are insufficient, the holders thereof shall receive a *bankruptcy quota*, which means a pro rata amount equal to the percentage that their claim account for in the category of the respective claims.

When partial distributions are made, the following amounts shall be provisioned:

a) pro rata amounts due to the creditors whose claims are subject to conditions precedent that have not been fulfilled yet;

b) pro rata amounts due to the holders of promissory notes or bearer bonds, and who hold the originals but have not presented them yet;

c) pro rata amounts due to the temporarily admitted claims;

d) reserves meant to cover the future expenses of the debtor's estate, including those generated by ongoing litigations.

For the creditors holding claims registered in the final consolidated table of claims, to whom amounts were allotted only partially or claims under condition precedent and who took part in the distribution, the due amounts shall be kept in the bank in a special deposit account, until their situation is clarified.

3.3. Final measures: the final report and the final financial statements. Closing the bankruptcy procedure [2]

After the assets in the debtor's estate were liquidated, the judicial liquidator shall provide the syndic judge with a *final report* accompanied by the *final financial statements*.

Copies of these documents shall be forwarded to all creditors and to the debtor, by publication in the Insolvency Procedure Bulletin.

The syndic judge shall order the creditors' meeting to be called within maximum thirty (30) days from the publication of the final report. The creditors may file objections against the final report at least five (5) days before the convening date.

At the meeting date, the syndic judge shall, by resolution, settle all objections at once, shall approve the final report, or shall order the corresponding amendment thereof - as applicable.

Once the syndic judge approves the final report of the judicial liquidator, the latter shall have to operate the final distribution of all funds from the debtor's estate. Similar to the decision of the syndic judge on any opposition against the distribution plan, in case the final report includes such distribution, this decision is enforceable and it and may be challenged separately only by appeal, and, according to article 43 par. (5) let. d) of Law no. 85/2014, the sentence settling the opposition against the intended distribution of funds obtained from liquidation and

from collection of debts may be suspended by the court of appeal. Therefore, in case this suspension was not decided, the judicial liquidator shall proceed to the actual payment of the amounts distributed.

The funds should be claimed within thirty (30) days by the entitled persons, this legal term being qualified as an imperative extinctive prescription term. If the entitled persons fail to claim the funds within the legal term, the unclaimed funds shall be transferred to the liquidation fund.

The claims which, on the date of registration of the final report, shall continue to be under condition precedent, shall not participate in the final distribution. According to article 166 of Law no. 85/2014, for the creditors holding claims registered in the final consolidated table of claims to whom amounts were allotted only partially, or claims under condition precedent and that took part in the distribution, the due amounts shall be kept in the bank in a special deposit account, until their situation is clarified [2].

According to article 175 par. (2) of Law no. 85/2014, a bankruptcy proceeding shall be closed when the syndic judge shall have approved the final report, all funds or assets in the debtor's estate shall have been distributed, and the unclaimed funds shall have been deposited with a bank. On the date of the closing of the bankruptcy procedure, the debtor should be erased from the register where it is recorded. The residual amounts, if any, after the last distribution, shall be deposited in a bank account available for the shareholders or for the individual, as the case may be [2].

The sentence ordering the closing of the proceedings shall be notified by the syndic judge to the territorial division of the public finance or to the county administration of public finance, as appropriate, and to the trade register office or to the register of agricultural companies or to other registers where the debtor may be registered, respectively, in order to be recorded therein. It shall be further notified to all creditors, by publication in the Insolvency Procedure Bulletin.

Pursuant to closing of the proceedings, the syndic judge, the judicial administrator/the judicial liquidator and all persons having assisted them are discharged from any duties or liabilities in connection with the proceedings, the debtor and its estate, the creditors, the holders of privileged rights, the shareholders and the associates.

Pursuant to the closing of the bankruptcy proceedings, the debtor who is an individual shall be discharged of his/her obligations dating from before the opening of the bankruptcy, but only provided that he/she is not found guilty for bankruptcy fraud or fraudulent payments or transfers; in such cases, he/she shall be discharged from liabilities only to the extent that they were paid within the proceedings.

According to article 164 of Law no. 85/2014 in the event that the assets that form the estate of an economic interest group or of a general partnership type of company or limited partnership are not sufficient to cover the claims included in the final consolidated table of claims, then related to that group or company the syndic judge shall authorize the forced execution according to the law, against unlimited liability associates or, as applicable, against the members, and shall issue an enforceable sentence to be enforced by the judicial liquidator, through a court officer [2].

As the legal provision cited above states, this enforceable decision could be pronounced only against the members of the economic interest or unlimited liabilities associates. So, this provision constitutes an application of the general rules that regulate the unlimited liability of the members of these entities, i.e.:

I. Article 119 Title V of Law 161/2003: members of the GEI have unlimited responsibility for both the group's obligations and the individual ones, unless differently stipulated with third parties co-contractors.

II. Article 3 par. (2) and (3) of the Law no. 31/1990 relating to companies:

- The associates in a general partnership, as well as the active partners in a limited partnership or in a limited partnership by shares, shall have an unlimited and joint liability for the company's obligations.
- The shareholders, the sleeping partners, as well as the associates in a limited liability company, may be kept liable only up to the value of their subscribed registered capital.

4. Enforcing a seizure over the debtor's assets

4.1. Discussion

As pointed out in the preliminary part of this material, the hypothesis according to which some assets - or even all of the assets of the debtor - constitute the subject of a criminal seizure, has been more and more frequently met in practice, lately.

Thus, it is necessary to analyse and find the answer to two questions that have arisen under such a hypothesis, viz.:

(i) whether, following the general rule set by criminal laws – *the criminal keeps in place the civil* – the bankruptcy procedure could unroll, or a definitive decision should be expected to be pronounced in the criminal trial, and

(ii) whether there is any connection between the putting into force of a criminal seizure and the ranking as regulated by articles 159 and 161 of Law no. 85/2014, more exactly whether a super-priority results following the enforcing a criminal seizure.

In order to identify an answer to the above questions, which should meet both the requirements of Law no. 85/2014 and those required in criminal matters, we should start in our approach from the definition of this term – ***criminal seizure*** – as it was presented under point 2.4. above. According to that definition, the preservation following the putting into force of a criminal seizure is *a measure* set in view of protecting the asset(s), by preventing the owner (accused/indicted) to destroy or sell them in order to minimalize their patrimony in the event they should execute an obligation or they should be held responsible for compensations following a damage caused [8].

From this definition, we can identify some of the **essential features** of this measure – the **criminal seizure** – that are useful in identifying an answer to the questions under discussion, namely:

I. The criminal seizure is included in the category of **interim measures**, more exactly measures put into force until the criminal trial is decided – a moment when a definitive decision is pronounced in a criminal file;

II. The criminal seizure prevents the accused/indicted to hide, destroy or sell their movable and/or immovable property that is the object of this measure. Therefore, the effect of this measure consists in the **preservation/temporary suspension of the disposition right that is owned by the owner of the assets seized**. Thus, the measure is put into force in order to prevent the passive subject of the measure, i.e. the debtor (the owner of the seized asset) in order to diminish the estate by their own deed, in the event of a subsequent forced execution [8];

III. The criminal seizure has a certain final aim regulated by article 249 of the Criminal Procedure Code. Thus, we should reiterate in this context the **four purposes entitling that such a measure be put into force**, viz.:

a. to guarantee the payment of a criminal fine;
b. in view of the special and/or extended confiscation;
c. to compensate the damage that was caused by a criminal act, and

d. to guarantee the payment/execution of the judicial expenses paid by the State in a criminal lawsuit [3].

Therefore, we should discern between the putting into force of the seizure in view of the following:

- ensuring the payments related to/in connection with the civil action in a criminal trial (compensation of the damage that was caused by a criminal act);
- guaranteeing of the criminal fine and of the judicial expenses paid by the State in a criminal trial;
- the special/extended forfeiture (confiscation).

As already noted in this study, and confirmed in what follows, the putting into force of this measure in view of special and/or extended forfeiture could constitute the most important issue in the insolvency procedure.

Not least important, we will discern between the **moments when the seizure was put into force**, viz.

- previous to the moment when the decision of opening the insolvency procedure is pronounced, or
- subsequent to that moment [7].

4.2. Unrolling of the sale proceedings of the debtor's assets in the hypothesis in which some of their assets or the whole estate are affected by a criminal seizure put into force by the criminal investigation body/the Court within a criminal lawsuit

Even if any connection with the criminal domain would result in a "solution" by applying the rule according to which *the criminal keeps in place the civil*, the domain that is the main interest for us here – insolvency – even though mainly a civil one, does not exactly observe the evoked rule.

Firstly, we should have in mind that the collective insolvency proceeding is ensured/regulated by a special law – Law no. 85/2014 – therefore, the principle according to which the *special derogates from the general (speciallia generalibus derogant)* is fully applicable [7].

Secondly, we should take into consideration that, according to article 2 of Law no. 85/2014, this law is intended to implement a collective proceeding for the recovery of the debtor's liabilities while offering the debtor, whenever possible, a chance for business recovery [2]. In order to fulfil this objective, the insolvency proceedings should unfold by observing certain principles, among which a few are mentioned only as being in close relationship with the subject under discussion:

- ensuring a fair treatment for all creditors of the same rank;
- ensuring a higher degree of transparency and predictability;
- recognizing the creditors' existing rights and observing the priority rank of the claims, based on a clearly determined, and uniformly applicable, set of rules;
- assets leveraging in due time and as efficiently as possible;
- allowing insolvency practitioners to manage the pre-insolvency and insolvency proceedings and their implementation thereof, under the control of the courts of law [2].

From all the above, and also taking into consideration the uniform jurisprudence of the European Court of Human Rights related to a fair trial, a fundamental principle will arise, and this should govern the whole insolvency procedure, viz. the **celerity principle**. Thus, within Law no. 85/2014, imperative and mandatory terms are regulated for the procedure acts that are drawn during the insolvency proceedings viz. (i) the terms for summoning of the creditors'

committee and creditors' assembly, (ii) the terms for voting of the reorganization plan, (iii) the terms within which contestations, oppositions and any other claims should be registered with the insolvency file etc. Moreover, the connection with the common laws – Civil Code, Civil Procedure Code – is ensured by article 342 par. (1) of Law no. 85/2014, by the manner in which the provisions in the common laws will complement/complete the provisions of Law no. 85/2014 only in case these are not contrary to Law no. 85/2014.

Not least important, in this context it is necessary to remind the provisions of Law no. 85/2014, article 91, precisely those that have generated numerous discussions and controversies in practice and in the jurisprudence of the last years. These provisions stipulate the following:

"(1) The assets sold by the judicial administrator or the judicial liquidator while fulfilling its duties according to this law are acquired free of any encumbrances such as privileges, mortgages, pledges or liens, sequestrations, of whatever nature. By way of exception, interim measures ordered in a criminal trial with a view to special and/or extended confiscation are not subject to this regime.

(2) By way of exception from article 885, par (2) of the Civil Code, de-registration from the land book of any encumbrances and interdictions referred to in par (1) shall be made based on the act of disposal signed by the judicial administrator or the judicial liquidator [2]".

Thus, taking into consideration all the above and, especially, the above evoked provisions of article 91 of Law no. 85/2014, we will note that the answer to the first question representing the object of our interest – namely, whether the selling procedure of the debtor's estate could take place after the seizure is put into force, or if the final decision in the criminal file should be expected – is offered by the manner of interpretation of this provision, i.e. article 91 of Law no. 85/2014. As par. (1) of article 91 of Law no. 85/2014 refers to the assets sold by the insolvency practitioners that are affected by encumbrances, and the sequestrations (criminal seizures) are expressly included in this category of hindrances, the answer to the question is **YES, the assets affected by a criminal seizure can be sold within the insolvency procedures, and a final decision in the criminal file SHOULD NOT be expected**.

The assets that are sold within the insolvency procedure will be acquired by a third party free of any encumbrances, such as privileges, mortgages, pledges or liens, sequestrations of whatever nature, this being the **rule** in the matter of the bankrupt debtor's assets liquidation.

The de-registration from the Land book of any encumbrances and interdictions will be carried out according to par. (2) of article 91 of Law no. 85/2014, based on the act of disposal signed by the judicial administrator or the judicial liquidator.

There are two points to be underlined in this respect, viz.:

(i) In the category of **encumbrances** there are expressly and exhaustive provided: privileges, mortgages, pledges or liens, sequestrations (seizures) of whatever nature.

(ii) Referring to the last encumbrances – **seizures** – the second thesis of the first paragraph of article 91 expressly excludes the interim measures ordered in a criminal trial with a view to the special and/or extended confiscation, by providing that these are not the subject to this regime.

Hence, the question will arise: *whether the lawmaker's intention was to exclude these assets – that are affected by an interim measure ordered in a criminal trial with a view to special and/or extended confiscation – from the possibility of selling within the insolvency procedure?*

The answer is not quite simple, as the interpretation of the norm under discussion – the second thesis of the first paragraph of article 91 of Law no. 85/2014 – has been generating numerous problems in practice, due to the manner in which it was inserted in the content of the provision upon the moment when the law was drawn up.

Nevertheless, we fully agree with the majoritarian doctrine in this matter, and I back the opinion according to which the **exception**, as regulated by the second thesis of the first paragraph of article 91 of Law no. 85/2014, constitutes only an exclusion from the selling-free-of-encumbrances rule, and not an exception from the possibility of selling the seized asset/assets within the insolvency procedure. We are fully convinced that the lawmaker thought in the same way and, maybe for this reason, this provision should rather have been inserted in paragraph (2) of article 91 of the law, as the last provision regulates the de-registration of the encumbrances over the debtor's assets that are sold within the insolvency procedure.

Thus, the answer to the above-mentioned question derives from the interpretation of this provision of the law – the second thesis of the first paragraph of article 91 of the Law no. 85/2014 – and it should be a **negative** one, more exactly, that the above mentioned provision of the law does not provide an interdiction for the selling of the seized assets in view of special/extended confiscation, but it provides that the interim measures ordered in a criminal trial with a view to special and/or extended confiscation shall remain registered with the land registry as to the asset/assets sold within the insolvency procedure. So, the seizures ordered in a criminal trial in order to ensure the payment of any sums related to/in connection with the civil action registered within the criminal trial (compensation of the damage that was caused by a criminal act), as well as those ordered to guarantee the payment of the criminal fine, of the judicial expenses paid by the State in a criminal file, will be de-registrated, but those seizures that are ordered in view of the special/extended confiscation will not be de-registrated.

Thus, other questions will arise, namely whether *in such circumstances there could be anyone interested in buying an asset/debtor's assets within the insolvency procedure which are affected by a seizure ordered with a view to special/extended confiscation? Could such an encumbrance be ever de-registrated, at whose request, and what procedure should be followed then?*

We take into consideration the fact that, in practice, the cadastral and real estate publicity offices deny the de-registration of such seizures – ordered in view of special/extended confiscation – with the Land Registry, being reluctant about the de-registration of any seizure. The difficulty has its roots in the provision of article 167 par. (1) of the Regulation annex to ANCPI Order no. 700/2014, according to which the registration drawn up according to article 195 par. (5) of the same regulation – more exactly the seizure ordered according to article 249 of Criminal Procedure Code, shall be de-registrated only based on the agreement of the institution that has ordered the interim measure [7]. I agree with the opinion expressed in the doctrine, according to which such a provision is illegal, more exactly it contravenes to the law, viz. to the provisions of article 857 of the Civil Procedure Code and to those of article 91 of Law no. 85/2014 [7].

At the current moment, despite of the numerous doctrinal attempts to offer an answer to all these controversies, practice has not offered a clear consistent jurisprudence related to the issues under discussion. For this reason, and in wait for clear jurisprudential and, why not, legislative solutions, related to the possibility of the de-registration of the criminal seizure on the asset acquired within the insolvency procedure, the proceedings in which such problems have arisen are stagnating at the stage of liquidation of the bankrupt debtor's assets, despite the numerous attempts of selling required by the creditors and initiated by the insolvency practitioners.

Not least important, I should underline that such discussions arise in the hypothesis that the interim measures in a criminal trial, more exactly the seizure with a view to special/extended confiscation, have been ordered **prior to** the opening of the insolvency procedure. Thus, in the hypothesis in which those encumbrances would be ordered **consequent** to the moment of the insolvency procedure opening, the lawmaker offered a clear legal solution by providing the

following in article 88 of Law no. 85/2014: *"Where a right, a legal writ or fact did not become opposable to third parties on the date of opening of the proceeding, all records, transcriptions, registrations and any other specific formalities necessary in this respect,* ***including those ordered in a criminal trial in order to implement special and/or extended confiscation****, performed after the date of opening of the proceeding, are not binding on the creditors, except when a duly filed motion or notification was received by the qualified court of law, authority or institution, the latest on the day before the date of the decision ordering the opening of the proceeding.* ***The registrations made in breach of this article are lawfully de-registered****"* [2]. Nevertheless, taking into consideration that the de-registration could not operate *lawfully* [7] and that the cadastral and real estate publicity offices refuse to operate such de-registrations *ex officio,* the de-registration has proved to be an extremely laborious one in practice.

4.3. Does the seizure ordered in a criminal trial ensure a superpriority in terms of distribution? The seizure from the perspective of the provisions of articles 159 and 161 of Law no. 85/2014

In order to answer to the question whether and to what extent criminal seizures – even those ordered in view of special/extended confiscation – ensure a superpriority in distribution, we should firstly take into consideration the essential feature of this measure, namely that it represents an *interim measure*. Thus, the seizure is not a guarantee or an *in rem right* ordered in view of guaranteeing the fulfilment of an obligation.

Only if we take into consideration this feature of the seizure, we could answer to this question quite simply, underlining the fact that this ordered measure **does NOT ensure/grant any priority in distribution**. Therefore, the general rules in the matter of distribution, as provided by articles 159 and 161 of Law no. 85/2014, will be observed [7], the superpriority being only apparent and having its roots in the interpretation – maybe erroneous – of the provision of article 91 of the law, and that might have occurred as a consequence of the effects that follow after this measure is ordered (*criminal seizure in view of special/extended confiscation*), namely the blocking of the whole procedure - as the practice of the last years has demonstrated.

Therefore, the creditor for whose interest the seizure was ordered (the *aggrieved party*/State) should ask that their claim be registered within the procedure by filing a petition of admittance their claim. By so doing, their claim will be observed in competition with those of the other creditors of the bankrupt debtor and according to the imperative rank, as regulated by the two provisions evoked above – namely articles 159 and 161 of Law no. 85/2014. Thus, the claim of this creditor will get – in the hierarchy regulated by articles 159 and 161 of Law no. 85/2014 – its rank according to the nature of the claim against the debtor, such as non-secured claim (in most cases), budgetary (i.e. the seizure ordered in view of the payment of the criminal fine, or guaranteeing the payment of the judicial expenses paid by the state in a criminal trial) and so on.

The above conclusion arises from the interpretation of the following, which can be found in Law no. 85/2014:

I. Principle provided by article 4 point 4 of Law no. 85/2014 of ensuring an efficient proceeding, inclusively by using adequate communication mechanisms, unfolding the proceeding in due and reasonable time, in an objective, unbiased and cost effective manner [2];

II. Principle provided by article 4 point 6 of Law no. 85/2014 of recognizing the creditors' existing rights and observing the rank priority of claims, based on a clearly determined and uniformly applicable set of rules [2];

III. Principle regulated by article 102 par. (8) of Law no. 85/2014, that provides that the claim of an aggrieved party in a criminal suit shall be registered **under condition precedent** until a final decision is issued in the civil action under the criminal suit in favour of that aggrieved party, **by filing a proof of debt**. Where the civil action in a criminal trial is not completed until the closing of the insolvency proceeding, either pursuant to the successful implementation of the reorganization plan, or as a result of liquidation, the claims, if any, arising from the criminal trial shall be covered from the estate of the reorganized legal entity or, if necessary, from the amounts obtained from the action for vicarious liability of the persons who had facilitated the insolvency of that legal entity, according to the provisions of article 169 et seq [2]. Thus, this claim will be registered with the creditors' table only whether it was asked to be registered so, by filing a petition within the imperative term regulated by the law. Until the criminal trial is decided – by the pronunciation of a definitive decision – such a claim shall be registered under precedent condition, this meaning that prior to the date the condition is fulfilled (namely the definitive decision is pronounced), the creditor will not be entitled to participate in any distribution. In the same way, this regime of a condition precedent is regulated by article 102 par. (5) of Law no. 85/2014, that provides that the voting right and the distribution right of the holders of claims under condition precedent on the date of the opening of the proceeding, including those of the holders of claims the sale of which is conditioned by the prior execution of the main debtor, shall arise only after that condition is fulfilled [2].

IV. Provisions of article 75 par. (2) let. a) of Law no. 85/2014, that exclude civil actions in criminal trials from the automatic stay measure [2].

Additionally, the conclusion above is fully backed by the fact that the claims admitted to be registered with the creditors' table are incontestable, and thus they represent *goods* in the sense of the European Court of Human Rights' jurisprudence. Hence, these should be observed, protected and implemented according to the principle regulated by article 4 point 6 of Law no. 85/2015, namely *based on a clearly determined and uniformly applicable set of rules*.

5. Proposals and recommendations

5.1. Unwanted effects following the putting into force of a seizure, especially those enforced in view of special/extended confiscation

As noted above, the interpretation of article 91 of Law no. 85/2014 has generated numerous difficulties in practice, as the putting into force of the seizures in view of special/extended confiscation was conducive only to a blocking of the insolvency procedures.

Thus, even if both the majoritarian practice and juridical doctrine have clarified the issue of the selling within the insolvency procedure of the seized assets owned by the bankrupt debtor (including those ones that are affected by a seizure put into force in view of special/extended confiscation) [7], the interests of the potential buyers in the acquisition of such assets is almost inexistent.

Consequently, as it is accepted (but not unanimously, as pointed out below) that the assets seized are not inalienable, nor imperceptible [8][9], and therefore only the volitional sale (the disposition right of the debtor) is restricted, and not the sale within the insolvency procedure [10][7], the issue under discussion at this moment is not whether such assets can be sold within the insolvency procedure, but actually *who is interested and would assume the risk to buy such assets, especially those ones affected by a seizure put into force in view of special/extended confiscation?*

The difficulties connected with the acquisition of such assets – affected by a seizure in view of special/extended confiscation – are undoubtfully related with the impossibility of any

de-registration of such encumbrances. So, again: *who is interested in buying such assets that are the object of a registration that will remain noted with the Land registry in such circumstances when the law does not even regulate the procedure to follow in order to de-registrate such encumbrances?*

5.2. The jurisprudence of the Romanian Courts

As shown above, the issue of selling the debtor's assets affected by the interim measure of seizure has for long represented an object of analysis by the judicial forums.

Although most solutions have been pronounced in the matter of the forced execution regulated by the Civil Procedure Code, due to the similarities between the two domains – the forced execution regulated by the Civil Procedure Code and the competitional one, ensured by Law no. 85/2014, the issues raised in practice are actually the same, so that I consider that it might be useful in our study to present some of the solutions pronounced in this respect.

Even if practice has built up into some precedent in this matter, we can note that this has not been, even up the present time, standardized. There is both a majoritarian practice, and also a range of contrary solutions, that are not really few, a fact that creates a minority practice.

- The High Court of Cassation and Justice, by its Criminal Division - Decision no. 3.507 on 1 June 2006 - stipulates that if an asset over which a seizure has been enforced was sold by public action, and a part of the price that was obtained was distributed to the creditors, then, the maintenance of the seizure over the asset is no longer justified. Therefore, the seizure will be maintained only over the amount that was not distributed to the creditors, and also over the other assets of the indicted (debtor) up to the level of the damage caused [13].
- The High Court of Cassation and Justice, Criminal Division, by Decision no. 1392 on 23 April 2013, under the hypothesis in which, upon the date of enforcing the criminal seizure, the asset that is the object of the forced execution was bound by a mortgage, stipulates the following:
  - The executor was faced with a competition between a secured claim and a potential claim of the presumptive unsecured creditors;
  - The secured creditor was given priority, and it has priority, even under the hypothesis that the aggrieved parts have a liability against the owner of the immovable asset;
  - As they are unsecured creditors, they will see their demands met to the extent that something remains after the initial distribution of the funds from that asset;
  - The seizure is enforced in order to ensure the compensation of the civil (aggrieved) parties;
  - Even in the case when compensations of the aggrieved parties that have formulated requests of becoming civil parties are approved and ordered, they come against, and in competition with, the applicant in the case as hand – a secured creditor – that, under these circumstances, has priority, and it should be firstly satisfied [14]. Thus, the third party creditor that has a mortgage right, previously noted before the seizure, will get preference, and they cannot be forbidden to exercise their rights in executing the mortgaged assets in their favour [9].
- The High Court of Cassation and Justice, by its Panel competent to resolve law issues, by Decision no. 8 on 27 April 2015, rejected the application as not being admissible, referring to the two above mentioned decisions, noting that the High Court had already ruled on that matter of law. Also, the High Court ruled that not even the condition of the novelty of the matter of law whose clarification is required – this condition being asked by article 519 of the Civil Procedure Code – is not fulfilled. However, it was ruled that in the doctrine the matter of law was solved as follows: in the case the seizure has not become final, even if that liability

has a superior degree of preference, if there are no other assets to be executed, then the forced execution initiated by a unsecured creditor or by one having an inferior degree of preference but having an execution writ, could not been prevented. By carrying out an analysis of the jurisprudence in the matter, the High Court has concluded that the majoritarian practice is in the sense of rejecting the contestations to executions, formulated by the Prosecution, ruling that the seizure enforced in a criminal case cannot represent an impediment upon initiating or continuing the forced execution, irrespective of the matter the seizure had been put into force in, and the mortgage liability has priority even under the hypothesis that the aggrieved party might have a liability against the owner of the building subject to the forced execution [15].

- Taking into account the further existence of not standardized practice in this matter of law, the Management College of the Bacau Court of Appeal decided - based on article 514 of Civil Procedure Code - to bring a case before the High Court of Cassation and Justice - the Panel competent to judge the appeals in the interest of the law, in order to pronounce a decision as regards the interpretation of article 712 and seq. of the Civil Procedure Code (the Decision no. 51 din 28.09.2017 of the Management College of the Bacau Court of Appeal [10]). The case has a deadline for ruling in February 2018.
- By Decision no. 762, pronounced by the Tribunal on 15 October 2015, it was ruled that the existence of seizures established within a criminal case do not cause suspension or annulment of the creditors' acts, whose mortgage right over the same assets has become opposable to the third parties prior to the setting up of seizures in the criminal case. It was ruled that the ensuring of criminal seizure usually lasts up to the definitive solutions of the case, but it cannot block the execution of a right to liability whose firm character has been established by a decision pronounced by a Court. The prevention does not assume that the asset(s) cannot be forcefully executed, because, as an effect of applying the seizure undoubtfully this was not declared as inalienable or not distrainable [8].
- A solution pronounced in the matter of insolvency, governed by Law no. 85/2006, is that included in Decision no. 44, pronounced by the Craiova Court of Appeal on 19 February 2015, in which, in a discussion on the selling of an asset being under the incidence of a seizure, with the view to ensuring the compensation of the damage caused to the civil part that originates in an illegal VAT reimbursement, the following were ruled:

- Both the establishment and enforcing of the liability payment against the debtor cannot be carried out in any other way but under the special procedure by means of a liquidator;
- The establishment of the budgetary claims had already taken place, the budgetary creditor being mentioned with in the definitive table of creditors;
- The selling of the seized assets is not prevented by the provisions of article 53 of Law no. 85/2006, as it was altered by article 81 point 2 of Law no. 135/20110 for the enforcement of Law no. 135/20110 as regards the Criminal Procedure Code and for the modification and completion of a legal provision that includes criminal procedural provisions [11];
- The seizures are taken with a view to meeting the demands of the creditor in favour of who these had been enforced, after the definitive decision is pronounced in the criminal case, and not at all in order to impede their satisfaction;
- The sale of the seized assets should be carried out by the liquidator, and the distribution of the funds thus obtained will be carried out according to the provision of Law no. 85/2006, the assets being sold free of any encumbrances [12].

- In contradiction with the above, the solutions of admitting of contestations against the forced execution and annulment of execution acts, that are not few, are based on the following considerations as these were synthesized within Decision no. 51/28.09.2017, issued by the Management College of the Bacau Court of Appeal [10]:

- The forced execution was initiated by the judicial executor without taking into account the existence of the criminal seizure that has not been released in the manner provided by the law. Up to the moment the seizure is not released by the competent criminal judicial forum, no other judicial procedure can be initiated with regard to that respective asset, because this would have been taken out of the prevention effect in a manner that is not provided by the law.
- By the launching of the executional procedure and by the drawing up of the executional acts, the judicial executor had disregarded the existence, in the juridical order of the criminal trial, of the documents by means of which this measure – the seizure – had been instituted and maintained.
- Criminal seizures represent legal measures with a real character, as throughout their validity they have as an effect the preservation of the assets over which they have been instituted, and they prevent the conclusion of any civil act that have their sale as an object, including the forced execution. The effect of the prevention is reflected over the entire juridical condition of the asset, including the one over any encumbrance of third parties as regards this asset.
- The interest protected by the criminal seizure is a general one - of the entire society -, in comparison with the mortgage and pledge that are conventionally instituted in view of protecting only one creditor as regards the debtor's acts that can damage their interest.
- The seized asset is subject to the provisions of article 813 para. (4) of the Civil Procedure Code, according to which the assets that have been declared as not being susceptible to be forcefully executed in the cases provided by the law are not the subject to any forced execution [16].

6. Conclusions

In this study, I have tried to find an answer to a few current questions arisen in those insolvency procedures where the debtor is the subject of a criminal case and, consequently, be brought in front of a criminal body/Court, that decides to enforce a seizure over an (the) asset(s) own by the bankrupt debtor.

The conclusions I have reached are based on a thorough interpretation of the legal provisions that refer to the matter of liquidation of the bankrupt debtor's estate, and that are formulated only after the examination of the jurisprudence in the domain, both the majoritarian and minority ones. Nevertheless, I am aware of the fact that certain counter-arguments could be brought against my conclusions.

The discussion is still open and ongoing one. Even if a lot of doctrinal works related to this issue can be identified, I maintain that the questions emerged in connection with the enforcement of a criminal seizure over the bankrupt debtor's assets can be efficiently solved only by:

(i) standardizing the jurisprudence in this matter and

(ii) altering the legislation.

As we pointed out, the problem of the enforcement of a seizure over the debtor's asset/estate should be resolved differently depending on:

(a) the date the seizure was enforced – prior to the opening of the insolvency, or subsequent to that moment and

(b) the purpose of this measure.

In my opinion, the cases where the jurisprudence standardization is required are as follows:

- *if the bankruptcy procedure can be unfolded or a definitive solution in the criminal trial should be expected;*
- *if the asset(s) seized could be sold within the bankruptcy procedure by the judicial liquidator*?

We are truly confident that, by a firmly mechanism of jurisprudence standardization, i.e. the recourse in the interest of law, both questions above could be effectively solved. Thus, we are waiting with great interest the decision that will be pronounced by the High Court for the Cassation and Justice following the request of the Management College of the Bacau Court of Appeal. Even if this decision is related to the interpretation of article 712 et seq. of the Civil Procedure Code, the findings will be applicable in the same manner within the insolvency proceedings, as, according to article 342 of Law no. 85/2014, the provisions of this law shall come in addition to the provisions of the Civil Procedure Code and to those of the Civil Code, to the extent that these do not contravene to the insolvency law. As pointed out, this decision is due for February 2018 [17].

Nevertheless, we are perfectly aware of the fact that the standardization of the jurisprudence will not solve all the issues related to the enforcement of a seizure over the bankrupt debtor's asset(s). There will be further questions that cannot be solved without the alteration of the legislation. Among them, the most important ones are as follows:

- *Why did the lawmaker treat the seizures in view of the special/extended confiscation differently in article 91 of Law no. 85/2014?*
- *How can the seizure enforced in the view of special/extended confiscation be de-registrated?*

From my point of view, nothing can justify a different legal treatment of the criminal seizure - and no distinction should be done in function of the purpose of the seizure. Therefore, an alteration of article 91 is necessary, in the sense of excluding the exception regulated by the second thesis of the first para., so that the assets sold within the insolvency procedure can be acquired by a third party free of any encumbrances of whatever nature. Therefore, the interim measure of the seizure, of whatever nature, should be transferred on the funds collected, and it should be distributed according to articles 159 and 161 of Law no. 85/2014 [7].

Furthermore, two more provisions require alteration, viz.:

(i) Article 88 of Law no. 85/2014, related to the lawfully de-registering of those records, transcriptions, registrations and of any other specific formalities performed after the date of opening of the proceeding. As pointed out above, the de-registration could not operate *lawfully*, so that is why it is necessary to replace this notion by the concept of *ex officio* de-registering.

(ii) Article 167 par. (1) of the regulation annex to ANCPI Order no. 700/2014, according to which the registration drawn up according to article 195 par. (5) of the same regulation – more exactly the seizure ordered according to article 249 of the Criminal Procedure Code, should be de-registrated only based on the agreement of the institution that has ordered the interim measure. This should be done because, as pointed out above, this provision contravenes to the provisions of article 857 of the Civil Procedure Code and to those of article 91 of Law no. 85/2014 [7].

References

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2. Law no. 85/2014 on pre-insolvency and insolvency proceedings, the Official Gazette, Part I, no. 466/25 June 2014;

3. Law no. 135/2010 – *The Criminal Procedure Code*, the Official Gazette, Part I, no. 486/15 June 2010;
4. Law no. 287/2009 – *The Civil Code*, the Official Gazette, Part I, no. 505/15 July 2011;
5. Nicoleta Țăndăreanu – *The Insolvency Code, Annotated. News; comparative exams and explicative notes*, Universul Juridic, Bucharest 2014;
6. National Institute for the Training of the Insolvency Practitioners - *Practical Treatise of Insolvency* (Coordinator Prof. Radu Bufan, PHD; Eds. Andreea Deli Diaconescu - Lawyer, Assoc. Prof. Florin Moțiu, PHD – Judge), Hamangiu, Bucharest 2014.
7. Alexandra Mihaela Șinc and Andra Roxana Trandafir - *Unbearable Softness between Insolvency and Criminal Law*, www.juridice.ro;
8. Decision no. 762, pronounced by the Sibiu Tribunal on 15.10.2015.
9. Octavian Popescu and Călin Dobre - *The Competition between the Forced Execution of a Mortgage Registered with the Land Registry and the Seizure*, www.juridice.ro;
10. Decision no. 51/28 September 2017, issued by the Management College of the Bacau Court of Appeal (according to which it has been decided to notify the High Court of Cassation and Justice to pronounce a decision related to the interpretation of article 712 et seq. of the Civil Procedure Code).
11. According to article 53 of Law no. 85/2006 (as this provision has been altered by article 81 point 2 of Law no. 255/2013: *The assets sold by the judicial administrator or liquidator, while fulfilling its duties according to this law are acquired free of any encumbrances such as mortgages, pledges or liens, of whatever nature, or interim measures, save the interim measures or specific prevention measures, put into force within the criminal trial*. Thus, one can clearly note that, in comparison with the provision of article 91 of Law no. 85/2014, the evoked provision of Law no. 85/2006 does not distinguish between different types of interim measures, all these measurers having the same regime).
12. Decision no. 44, pronounced by the Craiova Court of Appeal on 19 February 2015 (the following rulings are similar to the above mentioned decision: The closing pronounced by Suceava Tribunal, Criminal Section, on 17 June 2015; the Decision no. 31/R, pronounced by Oradea Court of Appeal, Criminal section, on 17 January 2012; the Decision no. 1051, pronounced by Bucharest Court of Appeal, Civil Section, on 29 April 2014; the Sentence no. 545, pronounced by Constanța Tribunal on 18 February 2013; the Sentence no 221/A, pronounced by Ilfov Tribunal on 22 October 2013; the Decision no. 2068, pronounced by Bucharest Court of Appeal, Criminal Section, on 17 November 2006).
13. High Court of Cassation and Justice, Criminal Chamber, Decision no. 3507/1 June 2006.
14. High Court of Cassation and Justice, Criminal Chamber, Decision no. 1392/23 April 2013.
15. High Court of Cassation and Justice, the Panel competent to resolve law issues, Decision no. 8/27 April 2015.
16. Decision no. 85, pronounced by the Sibiu Tribunal on 06 February 2017; Decision no. 379A, pronounced by Cluj Tribunal on 14 March 2016; Civil Sentence no. 3544, pronounced by Călărași Law Court on 17 November 2015; Closure pronounced by Giurgiu Law Court on 09 October 2015.
17. The existence of the file no. 2379/1/2017, registered with the High Court of the Cassation and Justice is mentioned by Nicoleta Țăndăreanu in *The Insolvency Code. Commented, Vol. I, Articles 1-182*, Universul Juridic, Bucharest 2017.