

Strategic insolvency in Romania

Nicoleta Munteanu sets out how a ‘strategic insolvency’ is defined in Romania, and its consequences for insolvency proceedings



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INSOLVENCY HAS THE EFFECT OF CLEARING AND REMOVING FROM THE ECONOMIC CIRCUIT THOSE UNDERTAKINGS THAT DO NOT COMPLY WITH THE RULES OF THE GAME



Through early restructuring and second chance, the European Union has been concerned with a reality less understood in the economic environment.

As a state of things, insolvency is an element of the economic circuit, an imperative marker for the efficiency, dynamics and purpose of the economic mechanisms. As an effect, the insolvency of failing companies is determined, alongside subjective causes, by objective causes as well, by an economic and financial context that places the debtor undertaking in an undesirable situation beyond its control. From this point of view, we must understand the EU’s efforts that insist on preventive mechanisms and on

the possibility for the undertaking to return to the economic circuit.

Understanding insolvency as a “necessary evil”, as an imbalance that must prepare a new balance, as a “critical point” meant not only to draw a serious warning signal but also to constitute a “new beginning”, is the closest to the relevant EU philosophy. Moreover, insolvency also has the effect of clearing and removing from the economic circuit, where appropriate, those undertakings that do not comply with the rules of the game and are trying to take advantage of them. But what if there are undertakings that simply cannot be removed from the economic circuit?

Practical experience in managing the insolvency of several insolvent companies allows for drawing a number of

conclusions about the whole process:

- Many companies enter into insolvency proceedings because of an economic and financial context they cannot control, often generated by economic, social, political crises, etc.
- Many companies enter into insolvency proceedings due to faulty, customised, group-interest-focused management. Often this management is politicised, so that the managers selected do not have the professional skills and managerial capabilities recommending them for such a position.
- Many companies enter into insolvency proceedings because, as creditors to other insolvent companies, they

suffer from the so-called “domino effect”.

- The managerial dimension in the insolvency proceedings is suffocated by the legal dimension, as the insolvency practitioner cannot put into practice a management policy of his own, but strictly follows the proceedings, most of the time just supervising the management’s operational activity, without being directly involved.
- Finally, often among the debtor companies there are very important companies for the national economy and for the State’s safety and security, whose insolvencies can generate windows of vulnerability and risks in the national security field. In that case, such undertakings should not be removed from the economic circuit.

This conclusion comes directly from discussions among practitioners, and indirectly, from a bibliographic study and long scientific research¹: there are certain companies in any national economy, whose bankruptcy could generate threats both to the economic security and to the national security.

An analysis of such insolvencies is thus necessary, by supplementing the legal dimension with the dimensions of security studies and of management and it leads to the concept of “strategic insolvency”, which is nothing more than the “classical” insolvency process applied to undertakings of “strategic” value, which cannot be removed from the economic circuit because this would generate threats to the State’s security interests.

Furthermore, the insolvency analysis in terms of management leads to understanding how important the managerial skills are in the insolvency practitioner’s profile, especially when managing undertakings of interest to the State’s national security.

According to the relevant Romanian law, the definition of insolvency refers to the debtor’s

shortage of funds available for the payment of debts which are certain, due and of a fixed amount.

“Strategic insolvency” refers to a debtor which belongs to the national security system, but whose situation is also characterised by the shortage of funds available for the payment of the debts.

As it can be seen, the distinction between an ordinary insolvency and a strategic insolvency consists only in the debtor’s standing within the national security system.

The following questions stand at the basis of the analysis.

1. **How should be identified and analysed the debtor’s standing so as to consider it important enough for the national security system?**
2. **How can the managerial dimension of the “strategic insolvency” be structured?**

Regarding the first question, the notion of “national security system” is very broad and, following a general analysis, it includes any organised entity, directly or indirectly tied to the national security.

Practical and easily trackable indicators have to be found in order to see how an economic entity is included in the national security system, as well as a set of instruments which can lead to a decision as to whether or not an economic entity (state-owned company, company) is part of the national security system. The instruments to be used are:

- the critical infrastructure of the state;
- the strategic areas of interest for national security; and
- the risk/vulnerability for national security brought about by the company’s insolvency.

Nowadays in Romania, the critical infrastructure consists in a list of the ICN² sectors and the public authorities in charge, which could allow to easily identify the

debtor entities that are part of the ICN. This list includes, *inter alia*, the sectors of energy, information and communication technology, water supply, food, health, national security, administration, transportation, chemical and nuclear industry, etc.

Concerning the strategic areas of interest for national security, the State has the possibility, through Government Decision, to establish which economic entities may belong to this category. The research conducted also took into account private companies which have a great importance for the national security system, because any discrimination between private and public companies is detrimental to the State.

The final tool, accounting for the risk/vulnerability brought about by a ‘strategic’ company to national security, makes it possible to analyse and decide at the strategic level³ which can be the effects of the bankruptcy of such entities in terms of national security.

Through this strategic analysis, the State may include in the national security system those organisational entities that, by liquidation, generate major risks and vulnerabilities to national security. The strategic analysis will also include the means by which the State assumes such an insolvency. But rescuing of undertakings through judicial restructuring should not be taken, under any circumstances, for a State aid. The success of restructuring can be ensured through the implementation of efficient management and through market economy instruments provided for by the national and the European Community legislation.

As to the second question, namely *how can the managerial dimension of the ‘strategic insolvency’ be structured*, the building of a *management model* is necessary, able to provide a coherent vision on the implementation of the measures required for the recovery of the debtor and to develop a style of



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management which is direct, proactive, visionary, assumed and involved at all levels of society.

Thus, *the strategic insolvency management* should deal with the crisis and risk situations by developing managerial instruments specific to this branch, which would allow the insolvency practitioner to directly implement the measures he or she deems necessary.

From this point of view, *the concepts of risk and risk analysis* become very important in the effort to build such a management model, because they are the basis not only of the management, but also of the proposals concerning the stages of the process and the structure of the risk management documentation plan proposed by the doctoral thesis mentioned (see footnote 1).

Conclusion

In conclusion, the *strategic insolvency* management may lead both to the development of the

insolvency practitioner’s skills and competences, and, of course, to the debtor undertaking’s recovery through reorganisation, and to its reintegration into the economic circuit, as part of the national security system.

The concept of “strategic insolvency” will certainly lead to future debates and position-taking by specialists in the field.⁴ Even if, at this moment, the insolvency practitioners find it difficult to understand insolvency management as a security issue, the new geo-economic realities, doubled by the States’ wishes to ensure economic security, will surely lead to the acceptance of this concept as a viable solution for those economic sectors with direct impact upon the national security.

As an example, the success of *Hidroelectrică’s*⁵ reorganisation was primarily due to the direct management exercised by the receiver at all company levels, and by the change of the business

attitude and mentality, not only of the top managers in the company, but also of those at intermediate levels.

In conclusion, “the rescuing of the undertakings of strategic interest” from bankruptcy should not be understood or associated with the phrase “State aid”, because the State only recognises the importance of the undertaking in terms of national security and shows flexibility assumed in the implementation of the economic measures necessary for the return of the debtor undertaking to the economic circuit. ■

Footnotes

- 1 See “Strategic Insolvency Management and National Security”, doctoral thesis publicly presented on September 27, 2017 by the author of the article
- 2 National Critical Infrastructure
- 3 In Romania, by CSAT –The Supreme Council of National Defence
- 4 Contact the author for further discussion
- 5 The largest hydropower producer in Romania

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