The role of the Romanian State based on the new amendments to the insolvency law

Assistant professor **Andreea STOICAN**[1]

Abstract

Law no. 85/2014 on the insolvency prevention and insolvency procedures, envisaged as of its entry into force as a true "Insolvency Code", is the main tool for setting up a collective procedure for covering the debtor's liability, as well as an opportunity to redress the activity of a company in financial distress. The recent amendments brought by the law-maker through the entry onto force, on October 02, 2018, of the Emergency Ordinance no. 88/2018 for amending and supplementing normative acts in the field of insolvency and other normative acts, although brought with the intention of improving the exiting procedure to date as a result of the practices found during the four years since the Insolvency Law has been implemented, succeeded, although probably unintentionally, to create a potential bias towards one of the main creditors encountered in the procedure, namely, the State. This paper therefore, considering the extremely short timespan since the entry into force of the Emergency Ordinance no. 88/2018, proposes by no manner of means to make no criticism on the new regulation, which might even prove effective on the long run as a result of the observation of the practice and concrete implementation of the provisions therein, but only to raise an alarm on some aspects which, at first sight, seem to create certain differences between the creditors by favouring, at least theoretically, a certain creditor.

Keywords: *insolvency, creditors, State, valuation of assets, debt recovery.*

JEL Classification: K22, K23

1. Introduction

Law no. 85/2014 *on the insolvency prevention and insolvency procedures*[2], envisaged as of its entry into force as a true "Insolvency Code", is the main tool for setting up a collective procedure for covering the debtor's liability, as well as an opportunity to redress the activity of a company in financial distress[3].

The recent amendments brought by the law-maker through the entry onto force, on October 02, 2018, of the Emergency Ordinance no. 88/2018 *for amending*

---

[1] Andreea Stoican – Department of Law, Bucharest University of Economic Studies, Romania, andreeastoican@yahoo.co.uk.

[2] Published in the Official Gazette, Part I no. 466 on 25/06/2014, entered into force on 28/06/2014.

[3] See Nasz, Csaba Bela, *Procedurile de prevenire a insolvenței (Insolvency prevention proceedingds)*, Universul Juridic Publishing House, Bucharest, 2015, p. 4; Nasz, Csaba Bela, *Declanșarea procedurii insolvenței (Initiating the insolvency proceedings),* Hamangiu Publishing House, Bucharest, 2014, p. 7; Rosu, Robert Mihaita; Mihailescu, Catalina Maria; Petcu, Dorin George, *Falimentul și lichidarea (Bankruptcy and liquidation)*, Universul Juridic Publishing House, Bucharest, 2015, p. 13; Saracut, Mihaela, *Participanții la procedura insolvenței*, Universul Juridic Publishing House, Bucharest, 2015, p. 10; Turcu, Ion, *Codul insolvenței. Legea nr. 85/2014. Comentariu pe articole, Ediția a-V-a (Insolvency Code. Law no. 85/2014. Comments per articles, 5th Edition)*, C.H. Beck Publishing House, Bucharest, 2015, p. 8.

and supplementing normative acts in the field of insolvency and other normative acts[4], although brought with the intention of improving the exiting procedure to date as a result of the practices found during the four years since the Insolvency Law has been implemented, succeeded, although probably unintentionally, to create a potential bias towards one of the main creditors encountered in the procedure, namely, the State.

The main purpose of a regulation in the field of insolvency, namely, of a clear and firm procedure, was that of giving the creditors the opportunity to maximize the degree of asset valuation and to recover the liabilities held with regard to the debtor that the proceedings were initiated against.

However, the aim of the regulation does not entail benefits only in favour of one of the parties, as the lawmaker set it up, first of all, as a method attempting to save the debtor from the difficult situation it is in concerning its business management, by creating leverages enabling it to effectively and concretely redress, either through the insolvency prevention procedures, or through the restructuring procedure subject to judicial oversight.

Nevertheless, although one of the principles provided for in the Insolvency Law is the provision of an effective procedure, based on appropriate means of communication and procedure performance within a reasonable timeframe, in an objective and impartial manner, by reducing the costs as much as possible to a minimum, the recent amendments brought to the legislation in the matter led to the creation of a potential benefit in favour of a creditor to the detriment of the others.

This paper therefore, considering the extremely short timespan since the entry into force of the Emergency Ordinance no. 88/2018, proposes by no manner of means to make no criticism on the new regulation, which might even prove effective on the long run as a result of the observation of the practice and concrete implementation of the provisions therein, but only to raise an alarm on some aspects which, at first sight, seem to create certain differences between the creditors by favouring, at least theoretically, one of them, namely the State.

2. The new role given to the State through the Government Emergency Ordinance no. 88/2018

Some of the basic principles regarding the implementation of a specific procedure in the matter of insolvency therefore consist of ensuring an efficient and appropriate method, with a reasonable timeframe, minimum costs and an objective analysis enabling the debtors' rescue from the difficult situation they are in concerning their business management, as well as their creditors satisfaction, by ensuring equal treatment of the creditors of the same rank.

It is true that, one of the creditors of the debtors in insolvency is, most of the times, the Romanian State itself, as well, its budgetary situation having primordial importance in a country's economy, however, in spite of that, a careful delimitation

[4] Published in the Official Gazette, Part I no. 840 on 02/10/2018, entered into force on 02/10/2018.

of its position must be made compared to the other potential creditors, in order to avoid any discussions regarding an eventual situation where it might be favoured to the detriment of the other parties involved in the insolvency procedure.

In this respect we cannot help noticing, first of all, the amendment brought by the lawmaker through the Emergency Ordinance no. 88/2018 as of the first aspects therein. Therefore, an obvious difference can be noticed regarding the old regulation[5], which provided that the threshold value for the possibility to submit the application to initiate the insolvency proceedings was the minimum amount of the debt, which was settled at Ron 40,000 both for the creditors, and for the debtor, including for the applications made by the receiver appointed in the liquidation proceedings provided for in the Law no. 31/1990, as regards the liabilities different from the salary ones (whereas for the salaried employees, this value amounted to 6 national average gross salaries/salaried employee).

Therefore, notice can be taken that, through the Insolvency Law, the focus is on redefining the proceeding scope, particularly, the one concerning granting the debtors the opportunity to recover, aiming at saving them and keeping them on the marketplace, since the loss of economic agents affects the entire economy. The recovery opportunity consists precisely of the possibility to implement the proceedings in the Insolvency Law quite early, as the compliance with the requirement mentioned hereinabove thus ensures additional control on the manner the debtor's resources are used, through the activity of the Official Receiver and of the Court-of-Law.

Nevertheless, the amendment brought by the Emergency Ordinance no. 88/2018 provides for certain additional impediments for the Debtor when it comes to resorting to the insolvency proceeding, which may somewhat come against the scope of the Law no. 85/2014 presented in art. 4 point 2 concerning the Debtor's business recovery.

According to the amendments brought by the Emergency Ordinance, the threshold value is redefined by adding an additional requirement compared to the previous provision. Thus, "when the debtor applies for the initiation of the insolvency proceeding, the amount of the tax receivables must be less than 50% of the Debtor's total stated liabilities."

We are yet to realise what the concrete reason might have been behind issuing such provisions and limitations regarding the debtor's right to resort to a procedure, considered favourable to its activity, up to a point, but we can guess what that might be from the perspective of attempting to avoid certain abuses. The new amendment is therefore likely aimed at removing or even completely avoiding the abuses found in the judicial practice when debtors resort to the right the law grants them to request their own insolvency to the detriment of paying their fiscal obligations.

Nevertheless, a vast majority of the good-faith creditors will be affected, since, although they shall comply with all the legal requirements for submitting a

[5] Art. 5 para. 1 point 72 of the Law no. 85/2014 on the insolvency prevention and insolvency procedures.

request for initiating the insolvency proceedings, they shall be unable to do so. A faulty management resulting in the accumulation of fiscal debts should not lead automatically to the limitation of exercise of a right by a participant in the economic and business environment. On the contrary, the management bodies of a company should be encouraged to take the best measures for the company they run, and sometimes, they prove to consist precisely of taking the initiative to submit the request to open the insolvency proceedings.

Consequently, as one can notice, the amendment brought by the Emergency Ordinance no. 88/2018 created an imbalance and a contradiction between the first sentence and the newly introduced second sentence in art. 5 para. 1 item 72 of the Law no. 85/2014 on the insolvency prevention and insolvency procedures. On the one hand, we deal with a sense of responsibility on behalf of the creditors and the support provided by the lawmaker at the appropriate time when the debtor still has real chances of recovery by not accumulating tremendous debts; on the other hand, we deal with an obvious limitation of the exercise of this right, but only to the benefit of a certain creditor: the State.

Furthermore, we cannot help but notice that the limitation concerns strictly the obligation of a debtor who is responsible for submitting the request to initiate the insolvency proceedings against themselves. Nothing prevents any of their creditors to take the necessary steps for opening the proceedings against a debtor in distress precisely as a result of major tax receivables to the State budget. Or, so long as an attempt is made to eliminate ill-faith debtors in order to protect the State budget, why could we not consider that, given the current regulation, we might find ourselves in the situation to deal with ill-faith creditors?

On the other hand, according to the provisions of the new regulation, the fiscal liabilities found through a challenged fiscal administrative deed whose forced execution was not suspended through a final Court Order shall be accepted on the statement of affairs and entered under a cancellation condition until the challenge settlement by the Contentious-Administrative Court.[6]

Concurrently, amendments regarding the fiscal liabilities also occurred as regards the reorganisation plan of the company subject to the performance of the insolvency proceedings.

Thus, the reorganisation plan consists of a series of documents indicating and aiming at proving the chances of redress of the Company activity, in relation to the Debtors' possibilities and activity specificity. It is prepared while taking into account the Debtor's financial possibilities, the market demand and what the company still in insolvency has to offer, including a series of means and measures able to offer an eventual replacement of the company management bodies, if applicable, as well as a debt payment programme. The execution of the reorganisation plan shall not exceed 3 years, calculated as of the plan confirmation date.

[6] Art. 102 para. (8^1) of the Law no. 85/2014 on the insolvency prevention and insolvency procedures.

Or, according to the new amendments brought to the Insolvency Law, a series of clarifications made to the accounts tax receivables can be noticed.

Consequently, the fiscal creditor shall be able to approve the reorganisation plan which includes the proposition to reduce the non-guaranteed tax receivables, the grounds of this reduction being laid down in the plan provided that a series of criteria is complied with; these criteria concern the fact that the reduction is the optimal way to recover the non-guaranteed tax receivables compared to the situation when the debtor enters the bankruptcy proceedings; the debtor holds a goodwill allowing it to continue doing business and, not least of all, the reduction measure shall lead to rendering the debtor company viable.[7]

Nevertheless, on the supposition that, through the reorganisation plan, a measure to reduce the non-guaranteed tax receivables by up to 50% is proposed, the fiscal creditor shall approve the plan if, besides the three cumulative conditions mentioned hereinabove, an additional one is also complied with. The latter may consist either of a minimum level of 50% of the current tax liabilities owed throughout the reorganisation plan implementation period compared to their average annual level prior to initiating the insolvency proceedings, or the performance by the debtor company of a public interest activity, or the performance by the debtor company of a strategic activity in a certain economic field.

However, the provisions stipulated in art. 5 Para. 1 point 71 of the Law no. 85/2014 on the insolvency prevention and insolvency procedures, concerning taking the private creditor test, shall continue to be incidental in any of the presented situations and conditions. This is a "comparative analysis of the level of satisfaction of the tax receivables compared to a private diligent creditor, in a proceeding designed to prevent insolvency or reorganization, compared to a bankruptcy proceeding." The analysis shall be based on the preparation of an assessment report prepared by an evaluator or by another specialist and reference shall be also made to the duration of bankruptcy proceeding compared to the programme proposed for making the payments. It shall however not be interpreted as a State aid, and in this case the private creditor test certifies the fact that the allocations that the fiscal creditor would be to receive in an insolvency or reorganisation prevention proceeding exceed those the fiscal creditor would be to receive in a bankruptcy proceeding.[8]

In spite of that, by giving the fiscal creditor the possibility to contract the services of an evaluator or specialist to vote on the reorganisation plan including the proposition to convert the tax receivables in shares by preparing the assessment report finding whether the legal requirements are complied with, the lawmaker made no provisions regarding the one who is to bear the costs of such a measure. Thus, it would only be fair and equitable that, since they concern strictly the fiscal creditor, they be borne by the latter, and not but her debtor.

---

[7] Art. 133 para. (5^1) of the Law no. 85/2014 on the insolvency prevention and insolvency procedures.

[8] Art. 5 para. 1 point 71, the final sentence of the Law no. 85/2014 on the insolvency prevention and insolvency procedures.

Therefore, the Emergency Ordinance amending some provisions in the Insolvency Law clarifies the outcome of tax receivables found through a challenged fiscal administrative deed whose forced execution through a final Court Order was not suspended. Consequently, these tax receivables are to be accepted on the statement of affairs and thus entered in the table with the body of creditors under a cancellation condition until a final Court Order is given by the Administrative and Fiscal Contentious Court.

Moreover, the provisions in the amendments clearly lead to the conclusion that the reorganisation plan cannot provide for a conversion of the tax receivables into bonds. However, the exception consists of the possibility granted by the fiscal creditor's expressed vote to convert the State's tax receivables into shares, if a series of previously mentioned conditions are complied with.

3. Conclusions

Consequently, although the new amendments brought to the Insolvency Law through the Emergency Ordinance no. 88/2018 aimed at leading to an accelerated completion of the proceedings themselves, which were oftentimes affected by the noncompliance with the reorganisation plan or by the non-payment of current debts to the creditors, it also led to a potentially unwanted effect of favouring one of the essential creditors, namely the fiscal creditor. Or, an imbalance between creditors could not lead to any long-term benefits; quite on the contrary, it would lead to tensions and bias. One of the basic principles of the performance of the insolvency procedure is that of equality amongst creditors, without placing any of them on a preferential position to the detriment of the others, by creating a privileged status.

Nevertheless, at first sight, the latest amendments to the Insolvency Law seem to lead precisely to such an outcome, placing the State on a favourable position compared to the other creditors participating in the insolvency proceedings. It is however premature to speak, only one month into the implementation of the amendments, of such obvious consequences, as, in time, the practice has proven that the effects envisaged by the lawmaker have been much less significant that the possible hypotheses issued in the legal reality. Thus, the effects of the new regulation shall be subject to scrutiny in the upcoming legal practice, in the hope that the theorists' fears after simply glancing at the new provisions prove to be unfounded.

Bibliography

1. Nasz, Csaba Bela, *Procedurile de prevenire a insolvenței (Insolvency prevention proceedingds)*, Universul Juridic Publishing House, Bucharest, 2015.
2. Nasz, Csaba Bela, *Declanșarea procedurii insolvenței (Initiating the insolvency proceedings)*, Hamangiu Publishing House, Bucharest, 2014.
3. Rosu, Robert Mihaita; Mihailescu, Catalina Maria; Petcu, Dorin George, *Falimentul și lichidarea (Bankruptcy and liquidation)*, Universul Juridic Publishing House, Bucharest, 2015.

4. Saracut, Mihaela, *Participanții la procedura insolvenței*, Universul Juridic Publishing House, Bucharest, 2015.
5. Turcu, Ion, *Codul insolvenței. Legea nr. 85/2014. Comentariu pe articole, (Insolvency Code. Law no. 85/2014. Comments per articles)*, 5th edition, C.H. Beck Publishing House, Bucharest, 2015.
6. Emergency Ordinance no. 88/2018 for amending and supplementing normative acts in the field of insolvency and other normative acts, published in the Official Gazette, Part I, no. 840 on 02/10/2018, entered into force on 02/10/2018.
7. Law no. 85/2014 on the insolvency prevention and insolvency procedures, published in the Official Gazette, Part I, no. 466 on 25/06/2014, entered into force on 28/06/2014.