Bulletin of the *Transilvania* University of Braşov – Special Issue
Series VII: Social Sciences • Law • Vol. 11 (60) No. 2 - 2018

THE LEGAL EFFECTS CAUSED BY GOVERNMENT'S EMERGENCY ORDINANCE NO 88/2018 REGARDING THE CHANGES IN INSOLVENCY PROCEDURES AND THEIR IMPACT ON CURRENT AND FUTURE INSOLVENCY PROCEDURES

Cristina DINU[1]

Abstract: *Insolvency procedures are rather frequent in Romanian courts and this type of procedure was subject to debate over time; it was also the subject of recent legal amendments, in the year 2014 and later, in 2018. Most insolvency procedures contain budgetary debts, which usually benefit from a preferential treatment as opposed to the other categories of debt. By studying the latest legislative changes, we must observe the fact that the lawmaker was preoccupied with protecting this category of debts and ensuring a high degree of payment of these debts. However, we will analyse the extent to which this legislative amendments will affect the payment of budgetary debts and the legal effects in regard to the other categories of debts.*

Key words: *insolvency, budgetary debts, legislative amendments, legal effects*

1. Introduction

The insolvency procedure was designed as a foreclosure procedure, meant to forcibly recuperate a debt from the debtor, much like the foreclosure procedure regulated by the Civil Procedure Code. However, the insolvency procedure is not as ruthless as the common law foreclosure procedure. Quite the opposite, this procedure discovers its vocation of nursing the insolvent debtor by searching for therapy means meant to avoid the inherent disturbances of bankruptcy (Turcu, I., 2015, p. 8).

According to the doctrine, when there are clashes between the interests of the participants, private law will always give in in favour of the interest of salvaging a certain business or in favour of the creditors (Turcu, I., 2015, p. 8). At this time, insolvency law is a functioning piece of the legislative mechanism, as it is a complex phenomenon, frequently seen in the practice of Romanian courts, especially given its economical

[1] *Transylvania* University of Brasov, cristina.dinu@unitbv.ro

factor, which is in close connection to modern commerce, the practice of granting loans, tenor, debts and failing to pay debts in due term.

According to the above quoted doctrine, creditors are mostly affected by the insolvency of their debtors, as they must claim the main role in this insolvency procedure and Justice must limit itself to the control of the procedure without being forced to arbitrate by ruling in favour of budgetary debts (Turcu, I., 2015, p.19).

However, across time, budgetary debts were present in all insolvency procedures in Romania, as they became an uncontested reality, a reason of concern for the Romanian state in regard to the degree of payment of these debts. Thus, the legislative policy of the last few years was that of ensuring the necessary mechanisms and tools in order to create a proper climate for payment of budgetary debts. Doctrine also noticed the legislative support provided to the debtor in order to recover his business with the final purpose of covering his debts by encouraging the prevention of insolvency procedures on a national level (Milos, S. M., Deli – Diaconescu, A., 2014, p.28).

Presently, the last legislative changes of Law no 85/2004 regarding insolvency procedures helps the lawmaker perfect the legal mechanism which is meant to increase the degree of payment of budgetary debts. Subsequently, we will analyse to what extent these legislative changes affect the legitimate rights of the other creditors of the debtor.

2. The main changes of Law no 85/2014 by the coming into force of Government's Emergency Ordinance no 88/2018

2.1. Changes regarding the special administrator and judicial administrator

By Government's Emergency Ordinance no 88/2018 the lawmaker inserts a new second alignment in article 52 which states that **a person or a company which has the quality of creditor can't be named as special administrator.** Our opinion is that this change or completion of article 52 attempts to avoid a conflict of interest between the activity of administering an insolvent debtor and that of a creditor which aims to achieve payment of his debt in this procedure. Although apparently these two qualities would not be in a conflict of interest, as a good activity of the debtor results in the natural payment of all his debts, most times, by the activity of legal reorganisation, not all debts are paid, as there is a known hierarchy of debts divided into categories (guaranteed debts, budgetary debts, salaries and so on).

A successful reorganisation is that particular procedure of reorganisation in which the debtor, based on a reorganization plan as voted by most debtors and definitively confirmed by the judge, performs payments only in regard to certain debts (according to the order established by the lawmaker in article 161 of Law no 85/2014).

As a result, the creditor which is at the end of the list mentioned in article 161 could have contrary interest with those of the debtors, considering that, in most cases of judicial reorganisation, most of the unsecured debts are not paid.

Another change which aims to avoid the conflict of interest is that of article 61 of Law no 85/2014; thus, Government's Emergency Ordinance no. 18/2018 adds a new alignment which forbids the judicial administrator to conclude a collaboration contract

with lawyers, experts, evaluators or specialists in case they are found in a situation which is likely to create a **conflict of interest** with people, in the meaning of the Fiscal Code affiliated to the judicial administrator, liquidator, debtor or one of the creditors. This beneficial change aims to obtain impartial, transparent and correct services in order to ensure an equidistant insolvency procedure.

In regard to the naming of the judicial administrator, the lawmaker modified article 57 of the law, which stated, in the old regulation" "**In case the debtor and the creditors did not file any propositions and there are no offers on file,** the judge will temporarily name, until the first creditor's meeting, an insolvency practitioner, which is randomly chosen from the Board of the National Union of Insolvency Practitioners of Romania".

According to this regulation, in case neither the creditor nor the debtor expressly requested the naming of a certain judicial administrator and no offers were filed, the judge would appoint a random judicial administrator form the Board. The question is, how does the judge proceed in case either the creditors or the debtor or both, requested, by filed procedure documents, the naming of a certain insolvency practitioner as judicial administrator, provided he did not file an offer. Could such a judicial administrator be named, although he did not file an offer as stated in article 57 first alignment of the Law?

In order to eliminate these inconsistencies, the content of article 57 first alignment regarding the naming of the temporary judicial administrator, was modified as follows: "in case the debtor or the creditor din not phrase any suggestions" by maintaining the situation of no offers on the file from any practitioners, thus the naming of the judicial administrator will be performed randomly from the Board.

We believe this change to be beneficial, considering that, in case both the debtors and the creditors request a certain temporary judicial administrator; this situation is expressly regulated by article 45 of Law no 85/2014.

In regard to the **activity of the judicial administrator**, the ordinance completes article 59 regarding the report the judicial administrator must file on a monthly basis; this report must describe the way in which the judicial administrator has fulfilled his duties. In addition, the current lawmaker states the obligation of the judicial administrator to file in his report "information regarding the respect of budgetary obligations, regarding the necessity of updating all authorisations required for the activity it performs, all control documents …". Thus, this is the first change which expressly refers to fiscal obligations of the debtor and which aims, in the opinion of the author, to constantly inform the judge in regard to the value of fiscal/budgetary debts, the way in which they are paid, as those are considered to be current expenses; thus the judge can have a correct background in regard to the current activity of the debtor.

However, what we notice is that the judicial administrator has no obligation to report on the situation of other current debts of the debtor, as there is a difference in which the fiscal/budgetary debts and the other categories of debts are regulated. As a *de lege ferenda* suggestion, we believe it is necessary to complete this text of law, by including the administrator's obligation to make a monthly mention of the situation of all current debts of the debtor, not only the fiscal ones, in order to ensure all parties are equally treated, especially all creditor which are entitled to be part of the procedure.

2.2 Legislative changes regarding the progress of the insolvency procedure

The lawmaker states that, in case of article 67, in addition to the previous regulation, that failing to prove that, before the insolvency was filed by the debtor, the fiscal authority was notified, would cause the file for insolvency to be rejected. Not filing this document before the legislative change of 2018, although not necessary, was regulated by the debtor, under the sanction of rejecting the claim. Thus, **the previous notification of the fiscal authority before the insolvency is filed by the debtor becomes mandatory;** otherwise the claim is rejected.

In regard to the legal ground for the rightful suspension of all judiciary and extra judiciary actions and foreclosure measures in order to obtain payment from the debtor, the new legislative changes insert new provisions in regard to the debtor's current expenses. Mainly, this text aims to bring all litigation regarding the fortune of the debtor to the same judge (Turcu, I., 2015, p.231). Thus, in its present form, Law no 85/2014, as modified by Government's Emergency Ordinance no 88//2018, article 75 third and fourth alignment state that the judge must analyse demands regarding all current debts within 10 days since they were filed. Thus, the judicial administrator must solve all demands regarding the debtor's current expenses within 10 days, namely to acknowledge the debt and take all necessary measures for it to be paid.

The fourth alignment states that "the holder of a current debt, which is certain, determined, and due and acknowledged by the judicial administrator or he failed to acknowledge it within the 10 day term since the claim for payment was filed, according to the third alignment, in case the debt is above the established amount, the creditor can demand the debtor files for bankruptcy, if these debts are not paid within 60 days since the judicial administrator acknowledged or rejected the claim for payment or from the date of the court decision".

Thus, we can conclude that, in case the judicial administrator fails to acknowledge or reject a certain demand for payment or on a payment regarding a current debt within the newly regulated term, the holder of the current debt still has the possibility of requesting the debtor files for bankruptcy, under the conditions stated by law, **as the lack of solution to the current debt request within the 10 day legal term, operates as a tacit acknowledgement and provides the creditor with the right to ask the court to declare the bankruptcy of the debtor.**

The purpose of this legislative change is the accountability of the judicial administrator and his obligation to answer swiftly to any demand in regard to the debts of the current creditor. On the other hand, it provides increased protection to the current creditor, without distinguishing between the budgetary creditor and the rest of the creditors, thus creating a constraint mechanism of the debtor in order to obtain the payment of his debt.

In the long term, we will perhaps be able to notice certain deficiencies of this change, as the judicial administrators will not have the real possibility to correctly and swiftly analyse all demands regarding current debts, thus creating a setback. It is very possible that, being unable to handle the large number of current debts payment, they will not be solved within the legal term, thus entitling the current creditors to move forward

with the procedure and demand the debtor files for bankruptcy.

These changes of law do not end here, as the lawmaker inserts in article 143 of the law changes that state the fact that **the procedure for solving the demands regarding the debtor's claim for bankruptcy will be solved within 30 days from when the claim was filed,** thus such demands will be rejected in any of the three conditions: the debt is not owed (as acknowledged by the judge), the debt was paid and the debtor concludes a payment convention with the demanding creditor.

In regard to the conversion of reorganisation in bankruptcy, jurisprudence stated that failing to pay current debts which arise during the reorganisation period can't cause the rejection of the trimestral report and the conversion of reorganisation in bankruptcy, as long as the debtor pays all his due debts and respects the reorganisation plan (Court decision no 271 of February 24th, 2009, Gorj Tribunal, Commercial Section published in the Judicial Practice Collection 2006-2009, second volume, page 461).

Another novelty element regarding all categories of debts is found in the same article 143 which states that for all current debts which are older than 60 days, foreclosure is **possible.** Article 143 first alignment provisions that if the debtor doesn't respect the plan or accumulates new debts in regard to the creditors who are already a part of the insolvency procedure, any of the creditors of the judicial administrator may request the judge to declare the bankruptcy of the debtor. The demand is ruled upon with emergency within 30 days since it was filed. The demand will be rejected by the judge in case the debt is not owed, is already paid or the payment convention is concluded with the creditor. **For debts accumulated during the insolvency procedure which are over 60 days old, foreclosure may begin.**

In our opinion, this change aims to perform a clear and effective distinction between the companies which have a real chance of reorganisation and those whose insolvency is purely formal, as the only solution is bankruptcy.

The second category contains those companies which benefit from a long observation period, given all the challenges of the debts and the long term needed to finalize evaluation, a time which allows for a huge volume of current debts which are impossible to be paid by the debtor, thus benefiting from the old protection mechanisms regulated by the old insolvency law; all these finally result in bankruptcy and the debt is twice as much as when the debtor filed for insolvency. However, we must understand the Romanian lawmaker's preoccupation with creating a correct and simple mechanism in order to grant equal chances of salvation to all companies which are able to reorganize.

2.3. Legislative changes regarding budgetary debts

Although in past subchapters we have referenced the changes regarding budgetary debts, in this section we will analyse some legislative changes which are specific to these particular debts. In regard to article 102, the first alignment was modified and the novelty element mentions that "**a budgetary debt established as such by decision which is prior to the insolvency procedure, but is subject to the previous activity of the debtor is considered to be a previous debt.** Within 60 days from the time the insolvency notice was published in the Insolvency Procedure Bulletin, the fiscal authorities perform the fiscal inspection based on the risk analysis, according to Law no 207/2015 regarding

the Fiscal Procedure Code with subsequent changes and modifications". We believe that this statement of the lawmaker was needed as judicial practice showed inconsistencies regarding the qualification of these debts whether as previous debts of current debts. The present legislative solution is in accordance with most of the unified practice until now, as it is legal and correct, in the opinion of the author.

Furthermore, the same article 102 introduces alignment 8 first point which states that: **"***Fiscal debts acknowledged by administrative fiscal act which is challenged and whose foreclosure was not suspended by court decisions, will be considered acknowledged debts until the court rules on the challenge***"**.

The novelty element comes in article 133 and 135 first point, in which, in regard to the reorganisation plan, as it regulates the possibility of the budgetary creditor to express consent for the **conversion of budgetary debts into stock, if the conditions of article 133 fifth alignment letter k of the insolvency law are met**.

In analysing this perspective, which was not possible until this moment, it is needed that the manifestation of will is expressed in the form of a vote by the budgetary creditor, a vote which must be expressed at the time the reorganisation plan is approved by the creditor's gathering. As a result, the conversion of the budgetary debt into stock is not left at the will of the debtor, nor at that of the judicial administrator, as it must come from the budgetary creditor and, in order to make this decision, the budgetary creditor can contract an evaluation report based on which he can exercise his vote.

We believe it is important to mention that these regulations refer to the debtors organized as commercial companies with stock and not any other type of companies.

In the enforcement of these changes, article 135 first point of the law was introduced, stating that the date of payment of the debt which is subject to conversion is, according to article 133 fifth alignment letter k, the date the conversion is performed. The central public institution which holds the stock at the time the conversion is performed, exercises the rights and obligation of the Romanian state as holder of the stock as well as for stock issued in favour of the Romanian state by the companies as a result of conversion and register these operations in their accountancy.

In case the state does not hold, previous to the conversion, stock of the debtor, for all the stock issued as a result of the conversion, the exercise of the rights and obligations of the state, as well as the registration of the newly achieved stock is performed by the Authority for Administration of the Actives of State.

We believe that the budgetary creditor benefits from these legislative changes as the operation of converting a budgetary debt into stock of the debtor society ensures a better degree of payment of budgetary debts. As a result, the legislative change is welcome, but gives rise to the question: why does the law allows for the operation only in favour of the state and not in favour of other people and companies which are in the same situation?

Is such a measure constitutional given that the Romanian Constitution guarantees that all its citizens are equal before the law? A possible answer might come from the fundamental principles of public law which entail general interest, in this case the states' interest of achieving payment of budgetary debts which is primordial as opposed to

private interest. However, insolvency law is a law which belongs to the private field and, whenever it is necessary for it to be modified, this action will be performed with laws which belong to the same private field.

We believe that debate in regard to this subject will give rise to different opinions and only judicial practice will be able to answer the above-mentioned questions and will create a better founded majority opinion.

3. Conclusions

The present article aims to identify the main changes brought upon by Government's Emergency Ordinance to insolvency law no 85/2014 as well as to analyse the main effects these legislative changes will produce. As these are legislative changes which come into force October 2nd 2018 and there is a certain amount of time from when the law comes into force and the time this material was drafted, it is easily understood that the aspects described in this article are purely theoretical.

As we have structured the present material, the main changes entail some of the main actors of the insolvency procedure: the special administrator and the judicial one, some procedural aspects regarding all creditors without creating discrepancies between the budgetary creditor and the other creditors, but also the possibility of the budgetary creditor to access a certain mechanism regarding the conversion of the budgetary debt into stock of the debtor company in order to ensure payment of states' debt.

All three categories of changes and completions of the law are equally important and, we believe, have been demanded by judicial practice until this moment. We refer to the legal terms established for the judicial administrator to solve the demands regarding current debts, the 30 day procedure in which we must solve the request for bankruptcy of a current creditor meant to ensure a speedy procedure.

We believe that most of these changes are beneficial for the good performance of an insolvency procedure and specifically a successful judicial reorganization procedure.

We support this point of view by considering the provisions of article 9 of Government's Emergency Ordinance no 88/2018 which states that legal terms regulated by the present ordinance in regard to the change of articles 75 and 143 of law no 85/2014 **will be applied to demands filed during trials which had begun before it came into force, including the demands which had not been solved until the ordinance came into force.**

As a result, all the changes of the insolvency law are meant to ensure the speedy performance of certain operations of the insolvency procedure and it will also apply to trials which are under way based on law no 85/2014. It is important to mention and to point out that these changes will not apply to insolvency procedures which began under the old insolvency law no 85/2006, considering that ordinance no 88/20178 modifies only the law which is in force and does not refer to the law which is not in force at this time.

Also, similar provisions in regard to the **enforcement of provisions regarding trials which are under way are found in article X of Ordinance 88/2018 which states that the provisions of article 133 fifth alignment letter k, article 133 fifth alignment points 1-5**

and article 134 first point will be applied to trials that had started before it came into force, provided the reorganisation plan is not approved by the creditor's gathering until the ordinance comes into force.

References

Milos, S. M., Deli–Diaconescu, A. (2014). The main novelty elements brought by Law no 85/2014 regarding the procedures meant to prevent insolvency. In *Romanian Law Magazine* no. 7/2014, page 28.

Turcu, I., (2015). *Codul insolventei. Comentarii pe articole* [Insolvency Code. Comment by articles], fifth edition. Bucharest: C.H. Beck Publishing House.

*** Court decision no 271 of February 24th, 2009, Gorj Tribunal, Commercial Section published in the Judicial Practice Collection 2006-2009, second volume