

THE STATE OF EMERGENCY AND THE ECONOMIC REPERCUSSIONS. A NEW “AVALANCHE” OF INSOLVENCIES

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Abstract

In the context in which websites, debates, publications and online conferences have exploded and merged from multidisciplinary and interdisciplinary point of view, revolving around the “extravagant” Covid-19 virus, we set out not to miss this opportunistic “mixer” of scientific research on the socio-economic impact of the pandemic and to contribute timidly but reasonably to proposals for reviving the economy, drawing our attention to the insolvency procedure, which will appear to us more than ever. Insolvency will become a “real fact” in everyday life, in which legal reform towards the second chance will be a vital necessity of the economic and social renaissance. In the current context of the public health crisis, inevitably followed by a psychological, social and economic crisis, we consider that the reform of insolvency law by outlining a “rescue culture” or at least the temporary modification of specific rules, by measures of “relaxation” and the suspension of certain obligations incumbent on the debtor in a state of financial difficulty, becomes an absolutely essential step in our legal system and not only, in response to the temporary lack of liquidity of companies. In fact, this is the inevitable and optimal direction we must head towards in front of the impact of Coronavirus on the world and the dynamics of insolvency. The biggest challenge now remains economic recovery. After all, it is said that any crisis brings with it an opportunity for change for the better, and we are somewhat obliged to take advantage of it this time as well.

Keywords: *Coronavirus, state of emergency, economy, globalization, Europeanization, insolvency, measures to revive the economy, measures to temporarily amend insolvency legislation.*

The state of emergency – a compromise between health and economy

Until recently, this term “COVID-19” was so foreign to the population and today it resonates with great echo around the globe. Originally from Wuhan, China, this “invisible enemy” is a SARS-like virus that has spread rapidly primarily in Asian countries and during the transit period has advanced massively around the world,

getting to dominate the society, the world press, the politics, the economics, the life itself and to reconfigure in record time the rules “woven” in time of humanity. All governments had to choose between the right to health, life and economy, so they chose life and the heads of State declared a state of emergency, which occurred in a global chain, with few exceptions. As a result, the economy seems to have beaten to the “last breath”, some entrepreneurs have reinvented themselves in the struggle for survival, large companies have restructured, governments have reoriented themselves in funding plans and state aid to support the economy and the population, rights have been temporarily curtailed, legislation has entered an accelerated dynamic of special regulations, our personal and professional routines have changed significantly, schools have closed, events of all kinds they have been annulled, traffic restrictions have been imposed on citizens, social distancing has gradually left its mark on our psyche, and the list goes on. Of course, we cannot deny that all this time the planet itself has regenerated and we are breathing less polluted air. At the same time, however, digitalization reached levels unimaginable a few months ago, computerized procedures being implemented for years have now been forced to materialize in real time and in record time. However, the impact of COVID-19 is not yet a complete one, it continues to unfold and surprise us with new developments.

It almost seems to be just a movie running in cinemas, while we wait for an intense and thrilling viewing and feeling to return to everyday life. The reality is that the “movie” is still running and we don’t even know when and how it will end.

We were saying that the establishment of the state of emergency was a real compromise of the economy, but a necessary compromise. But for how long? This compromise can only be short-lived, as the suspension of activities has affected the entire economy and the stagnation of the economy in turn means famine and, consequently, the compromise of life and health. For example, we are spinning in such a thorny and vicious circle. In this regard, governments in all states have already moved to obvious measures to ease restrictions, people are happy with these relaxations, plan vacations and become somewhat unaware and skeptical of the real danger of Covid_19. Meanwhile, the economy is claiming the right to “wake up” and revival, with branches such as tourism or industry constantly looking for solutions and ways to restart

the business in optimal conditions to stop the spread of the new Coronavirus. We only hope that this rather uncertain context, which seeks to identify a socio-economic balance, will not be followed by a wave even more severe of disease. There is a risk of premature, dangerous and perhaps irresponsible relaxation, which involves a high risk being taken by each state trying to gradually relax the restrictions. In any case, we are on the verge of a new compromise. We are being forced to revive the economy at the risk of now compromising public health. What is certain is that the Coronavirus epidemic (COVID-19) has already brought considerable human suffering and major economic disruption, and governments must prioritize effective public health measures to prevent infection, implement well-targeted policies to support health systems, and protect the incomes of vulnerable employees and businesses. Last but not least, supportive macroeconomic policies can help restore confidence and help restore demand as the virus epidemic decreases in intensity, but they cannot compensate for the immediate disruption resulting from the imposed interruptions. The economic decline is inevitable and is very steep, perhaps counterbalanced by the pharmaceutical industry and other sectors of interest in times of crisis, such as agriculture, the food system, etc. Most certainly, the new economic crisis will generate much deeper and more intense effects of reform both economically, psycho-socially and legislatively, compared to the crisis of 2008.

A new economic crisis. Globalization or Deglobalization? Where to?

According to a report drawn up by OECD in March 2020, "*Coronavirus: The world economy at risk*" [1], China's production declines are being felt around the world, reflecting China's key and growing role in global supply chains, travel and goods. Consequently, it is estimated that the overall annual GDP growth will fall to 2.4% in 2020, as a whole, from an already weak 2.9% in 2019. At the same time, the negative impact on financial markets, tourism sector, aviation industry, followed of course by other sectors, as well as disruption of supply chains, contribute to downward reviews in all 2020 G20 economies, especially those strongly connected to China, such as be Japan, Korea and Australia. The predictions will become even more drastic if the effects of the virus epidemic do not fade soon. Also, according to the OECD, growth in the

Eurozone will remain lower, at around 1% per year on average in the period 2020-2021, and the impact of the virus epidemic will weaken the results in the first half of 2020. The more we sink into uncertainty, the longer the corporate investment is delayed.

The reality is that the global economy is on a downward trajectory even before the pandemic, a concern that the OECD has expressed since March 2019 based on an official report - *Global Growth Weakening as some risks materialize*, [2] which highlighted the risks that prevent global expansion, including the slowdown in external and domestic demand, the US-China trade war, political uncertainty in Europe, including Brexit, with the United Kingdom being an important trading partner for many countries.

Thus, the continuing uncertainty over trade policies, which is now overlapping with the health crisis in tandem with the global social and economic crisis, remains an important source of risk for global investment, jobs and living standards. On a different note, what are the perspectives for 2020-2021 in the new global economic and social context without precedent? Reality casts a dark shadow over the global economy and people's well-being. A new period of financial and economic stress broke out. The forecasts based on IMF statistics are also very bleak, [3] considering that this crisis will "contract" the economy with an unprecedented force since the Great Depression of 1930, a situation in which "*Global GDP will lose another 3 percent in 2020, and if the economic crisis extends into 2021, the level of global GDP will fall by another 8 percent from initial forecasts*". Also, according to IMF, unemployment may rise to 10.4 percent in European countries in the single currency area, as opposed to 7.6%.

The globalization process since World War II driven by multilateral agreements that allow trade opening is challenged. The process of Europeanization is also being challenged in these uncertain times when states are struggling to establish their own or borrowed survival strategies. However, we believe that governments must continue to act in a coordinated and cooperative manner at the level of the European Union but also at the international level, without addressing extremist, totalitarian regimes, to the detriment of the policies that have emerged over so many decades and with so many sacrifices. First of all, it must take into account the interdependence of economies. There is an urgent need for much bolder political action to revive the economy or at least to maintain a balance until the effects of this regime of socio-economic "paralysis"

are overcome. Perhaps this is the path to common solidarity. We have examples in which geopolitical opponents, such as the USA and Russia [4], have applied humanitarian aid measures, by exchanging the mechanical ventilation devices so necessary in the fight to stop the Covid-19 pandemic.

The situation remains inherently fragile and society is sinking even deeper into this economic vulnerability, which it had not even completely “cured” after the 2008 crisis and structural challenges such as digitalisation, trade, climate change, persistent inequalities, lag behind in front of global challenges and risks related to biology, viruses and health, which become dissuasive. In our opinion, deglobalization is by no means a way to overcome the health crisis triggered by the Coronavirus pandemic in January 2020, rather there is a single window of opportunity to avoid social and economic stagnation. The great philosophers consider that a crisis of any kind can be an opportunity through which *„humanity may realize the acute danger posed by global division”*. [5] What does this mean and what are the current challenges of globalization? It may well be said that it involves a global plan, but rather a unitary coordination. For example, in the case of the 2008 financial crisis or the 2014 Ebola epidemic, the United States have taken on the role of global leader in preventing global economic destruction. In the new context, however, we could say that we are also facing a crisis of global leadership, the US reducing support for international organizations such as the World Health Organization.

In this context, the European Union could regain the popular support lost recently, through concrete financial support, by arranging measures for the joint distribution of solutions, research and medical staff. In this regard, the French President of Finance, Bruno le Maire, stated that “if everyone will be for itself, if we let other States collapse, Europe will not recover”. Thus, the collective response of the European Union to the crisis caused by the epidemic has proved to be the fastest and perhaps most impressive in the world to date, by ensuring a budget of 3 trillion Euros, the President of the European Commission, Ursula von der Leyen, saying that “the European budget will be the motor for recovery”. The exchange of experience in such crucial moments must be fully exploited, with global cooperation becoming essential for the economic front. We cannot deny the international, European nature of the economy, of the production,

trade, supply chains, this being a reality that appears to us more than ever, and the signing of a global agreement in this context can save humanity. Perhaps this is the critical point at which we must opt either for division, unilateralism, nationalism, economic and social extremism, or for global solidarity and uniformity, harmonization, universalism and global socio-economic stability, or rather to identify a balance between the two trends.

This vision does not in any way mean the loss of state sovereignty and independence, it does not mean the "dissipation" of the culture of each state. These are historical nostalgia that we must overcome and look to the future, realizing that countries do not have the capacity to relaunch themselves, that we live in an interconnected, interdependent world, in which all Union and international bodies seek viable solutions for socio-economic resuscitation, opportunities that every country should "cling to" in such times. Less developed countries certainly need loans, the support of developed or less affected countries to overcome the crisis, to restore ties and balances once destroyed. Moreover, leaving aside the conspiracies against the "globalists who run the world", what about the "*democratization of knowledge*"? Such contexts on the border between life and death show us that science and research results are a global public good and transcend borders, being absolutely necessary to share experiences and good practices so that research results are optimized for the public good.

In fact, as the President of the European Parliament, David Sassoli, stated: "*Not since the end of the Second World War have we faced such a dramatic crisis. ... This situation is so serious that no European government could think of responding alone*". In this sense, the package of measures proposed by the European Commission, [6] which will complement the national measures, is an essential plan in combating the effects of Coronavirus, already materialized by significant economic consequences such as massive insolvency not only of SMEs but also of numerous airlines, large tourism companies, the decline of bitcoin or the collapse of stock markets. As a consequence, the European Commission has made European budgetary rules more flexible, instituted actions related to state aid, created the *EUR 37 billion Coronavirus Response Investment Initiative*, in order to provide liquidity to SMEs but also to the healthcare

sector and launched the *Support mitigating Unemployment Risks in Emergency - SURE*).[7]

The EU, in its turn, a global player, seems to have taken on some role as a global leader in the crisis, as it has mobilized more than € 400 million to improve global measures to prevent and control the virus, not just in Europe, but also globally, supporting the World Health Organization in substantiating the *2019 Novel Coronavirus (2019-nCoV): Strategic Preparedness and Response Plan*, [8] collaborating at the same time multilaterally and in coordination with global financial institutions such as the G7 and G20. At the same time, in addition to the strategy „*Team Europe*”, The Commission adopted the Macro-Financial Assistance Policy (MFA) by proposing the allocation of EUR 3 billion to ten enlargement and neighborhood policy partners, including Albania, Georgia, Kosovo, the Republic of Moldova, Tunisia and Ukraine, in the form of loans under advantageous conditions, in order to limit the negative economic impact of the Coronavirus pandemic by covering immediate and urgent financing needs. In this regard, Paulo Gentiloni, as Commissioner for the Economy, stated that “European solidarity must not stop at the borders of the Union, because in this global crisis, we win or lose together”. [9] Of course, at the national level, it is up to each state to complete these measures and apply internally the *EU economic recovery plan*. What is certain is that the virus does not take into account borders, whatever they may be and no matter how superficial or rigorous they may be.

Concluding in terms of supporting the idea of Europeanization and globalization, we mention that Romania already benefits from the support provided by the EU, so far the amount of one and a half EUR million has already been mobilized to alleviate the crisis. This short presentation of the international, Union and national economy in an overview, general, also helps us to understand that, although there are distinct national legal systems that define certain rights and obligations, it becomes clear that the reality of global competition affects the national laws and policies.

A new “avalanche” of insolvencies. Chain effects

Despite these efforts to respond to the crisis caused by the new Coronavirus, the resulting “economic pandemic” and its impact on the world of bankruptcy and

restructuring are and will continue to be very real. The impact of COVID-19 will significantly change the business restructuring landscape. Interruption of the flow of goods and services means interruption of production, imports, exports and capital markets. Larger companies, suppliers and their downstream manufacturers are facing material declines in cash flow. Not surprisingly, many companies are heavily indebted, and with the reduction in cash flows, this debt will materially hamper their repositioning and restructuring capacity. It is obvious that capital markets “breathe” uncertainty, and this pandemic raises uncertainty in larger portions.

We will face perhaps the biggest wave of insolvencies that will unfold in a “cascade” in most sectors nationally and internationally. The insolvency issue will affect all parts of business relationships: companies, customers, banks/insured creditors, sellers, owners, insurance companies and employees, not to mention the impact on the capital value of these new struggling companies. As a reflex reaction, we fear that in this context credit will tighten, thus having an additional impact on already fragile cash flows and on the ability to access finance. Sovereign central banks, such as the European Central Bank, will try to respond to both the virus (and its costs) and the economic stress created, as there will be recessions in several countries, and these countries will need credit support.

Why not admit, governments have created many economic support plans, especially for SMEs, which are perhaps the most vulnerable to this crisis, but the reality is that some of these support measures are very restrictive and apply only to “healthy” companies until the onset of the public health crisis, debtors already in financial difficulty not having any chance to benefit from such “safety nets”. In these circumstances, what happens to companies that are already in insolvency proceedings, in the phase of judicial reorganization, or that were on the verge of requesting the opening of this procedure? Let’s take the example of the program *IMM INVEST ROMANIA* which allows Romanian SMEs significantly affected by the COVID-19 crisis to obtain state-guaranteed loans of up to 800,000 Euros for carrying out current activity or for investments, without commissions and interest. [10] The program can be a safety “net” for SMEs, but not for those already insolvent or in financial difficulty and meet the criteria to enter into such a procedure. There are also excluded SMEs which appear

with overdue loans, including for leasing-type financing, in the last 6 months prior to 31 December 2019 or if they are prohibited to issue checks on 31 December 2019 and appear with major incidents with promissory notes in the last 6 months prior to December 31. Under these strict lending conditions, there will not be many companies eligible for financing and in our opinion the effective financing measures would be more beneficial to the detriment of the guarantee ones.

Leaving behind companies already in insolvency or on the verge of insolvency, to which the State seems to give them no chance, let us turn our attention a little to those that are, in principle, healthy. If we take into account the forecasts and scenarios of major international organizations such as the World Bank or the IMF, which certainly show a decrease in the volume of international trade, as well as the inevitable repercussions of the state of emergency declared in over 40 countries to stop the spread of the virus, respectively creating a supply shock due to the dependence often on a small number of suppliers, blocking of many activities and sectors, especially tourism, transport, especially air and hospitality, but also the automotive industry, declining sales, layoffs, restricting activities, late payment of suppliers, we undoubtedly find a double shock, demand and supply, which will affect the line of business around the world, especially since all activities are interconnected. Consequently, despite all support efforts, the economy will face the largest increase in insolvencies from 2009 to date, plus 25% in 2020 [11], especially if we consider the risk of a new wave of Coronavirus epidemic, which will block the attempt to restart the economy and translate it. Insolvency means hundreds of people left without jobs, who in turn have bank loans, debts, bills to pay, it means social crisis, in addition to health and economic, obviously followed by the financial crisis.

Therefore, what will be the marketplace? This crisis has two components, both the consumption component, which has decreased due to the state of emergency, and the supply component. Therefore, the current crisis cannot be compared to the crisis of ten years ago, but the experience of ten years ago can help us make much faster and more complex decisions in managing the current crisis, before it is too late.

The urgency of the temporary change of the insolvency legislation - as a measure of “resuscitation” of the economy. Predictions

Certainly, the very state of emergency decreed by the president implies temporary legislative changes of strict necessity, interpretation and application. In this sense, extraordinary norms have been designed, which either involve legislative measures derogating from the general framework, or bring temporary additions to it. We emphasize here that the regulation of such rapid measures of social and economic protection triggers the risk of legal parallels, legislative vacuum and gaps in interpretation.

As we have seen, the illustrative scenarios, which have not yet reached the peak of the economic impact of the coronavirus pandemic, have triggered a number of strategic and economic measures at global and European level. At the level of Romania, the legislative start in this sense was represented by GEO no.29/2020 on some economic and fiscal-budgetary measures [12], as essential measures to mitigate negative repercussions on the economy. In our opinion, among the most important for the economic system were the provisions of art.VII according to which “(1) For the fiscal obligations due starting with the date of entry into force of this emergency ordinance and not paid until the termination, according to par. (4), of the measures provided for in this Article shall not be calculated and no interest and penalties for delay are due in accordance with the Fiscal Procedure Code, approved by Law no.2007/2015, as amended and supplemented”. Also, regarding SMEs, art.X becomes essential, stating that, “(1) During the state of emergency, small and medium-sized enterprises, as defined by Law no.346/2004 on stimulating the establishment and development of small and medium-sized enterprises, as subsequently amended and supplemented, which have ceased in whole or in part on the basis of decisions issued by the competent public authorities, by law, during the state of emergency declared and holding the state of emergency certificate issued by the Ministry of Economy, Energy and Business Environment, benefits from the deferral of payment for utility services - electricity, natural gas, water, telephone and Internet services, as well as the deferral of payment of rent for the building intended for headquarters and secondary offices.(2) By derogation from other legal provisions, in the ongoing contracts, other than those

provided in par. (1), concluded by the small or medium enterprises provided in par. (1), force majeure may be invoked against them only after the attempt, proved by documents communicated between the parties by any means, including electronic means, to renegotiate the contract, to adapt their clauses taking into account the exceptional conditions generated by the state of emergency”.

At the same time, we greatly appreciate the relaxation of the fiscal policy by suspending the enforcements by the tax creditors, par. (3) in Art.VII establishing that “Enforcement measures are suspended or are not commenced by garnishment on the tax receivables, except for the forced executions that are applied for the recovery of the tax receivables established by court decisions pronounced in criminal matters. Measures to suspend enforcement by garnishment on traceable amounts representing income and cash are applied, by the effect of the law, by credit institutions or seized third parties, without other formalities from the tax authorities”. Among other things, we feel the need to discuss, at this point, also the Government Ordinance no.6/2019 [13] on the establishment of tax facilities, which entered into force on 8 August 2019 and which created a special mechanism for payment deferral and debt relief in respect of interest and penalties of outstanding tax obligations at the end of 2018, with the effect of “resuscitation” of enterprises on the border with insolvency. Although, initially, the final deadline for accessing the provisions of the Ordinance was quite short, in the sense of starting the procedure by submitting the application to the tax authority, respectively September 30, amid the state of emergency triggered by the Coronavirus pandemic, changes were made, and in this respect to the advantage of the debtors. Thus, art.22 par.(1) of GEO no.6/2019 was amended based on GEO 29/2020 in the sense that: „(1) *The restructuring request provided in art.5 may be filed until 30 October 2020, under penalty of forfeiture*”.

We could say that one of the chances of debtors in financial hardship was GEO no. 29/2020 on some economic and fiscal-budgetary measures, which practically stopped for the moment the abusive behaviour at times, in our opinion, of the tax creditor, suspending during the state of emergency but also for a period of 30 days after its cessation all forced executions and conferring certain advantages such as the extension of payment terms, the granting of fiscal facilities and the possibility of

restructuring meant to revive the economy, etc. For example, no more summons were issued, garnishments on cash and traceable incomes were made and no seizures were made on the assets, except for the amounts from the court decisions pronounced in criminal matters. These measures can really accelerate economic recovery and obstruct bankruptcies by giving respite to debtors in financial difficulty.

Of course, in addition to GEO no.29/2020, came many other emergency ordinances, as the social crisis and the economic crisis deepened, requiring new support measures. We mention here GEO no.30 of 18 March 2020 for amending and supplementing normative acts, as well as for establishing measures in the field of social protection in the context of the epidemiological situation caused by the spread of SARS-CoV-2 Coronavirus, which came with new measures to support the economy, by establishing state insurance of technical unemployment benefits. Thus, according to Art.XI, „during the state of emergency established by Decree no.195/2020 regarding the establishment of the state of emergency on the Romanian territory, for the period of temporary suspension of the individual employment contract, at the initiative of the employer, according to art.52 par.(1) letter c) of the Labour Code, as a result of the effects produced by the SARS-CoV-2 Coronavirus, the benefits payable to employees are set at 75% of the basic salary corresponding to the job occupied and are supported from the insurance budget for unemployment”. The measures were to be completed and developed by GEO no.32/2020, GEO 33/2020, respectively GEO no.53/2020 and many more such ordinances will probably follow, which will come in support of socio-economic support at national level.

We believe that the measures necessary for the economic recovery will take shape even better over time. We still have to reflect on the statement of the President of the European Commission: „*I am convinced that the European Union can withstand this shock. But each Member State needs to live up to its full responsibility. And the EU as a whole needs to be determined, coordinated and united*”. [14]

Latosensu, we could say that the social, economic and legislative efforts and measures undertaken at national level are in an ascending rhythm and in line with European and global trends, which will be in continuous transformation and adaptation to the concrete situation resulting from the evolution of the health, social and economic

crisis. First of all, economic support needs to be improved through much stronger and more intense public investment, through the granting of direct grants and state guarantees targeting investment loans and working capital financing, the provision of more flexible state aid or specific support in the form of salary subsidies for employees. Monetary policy must be supported, in its turn, and it becomes very likely the emergence of other tax cuts as in other economies, by changing the structure of taxes and duties due to the consolidated state budget, perhaps by fewer constraints, enough to maintain a budgetary balance. For example, in Austria, taxes on multinational corporations have been raised and taxes on the middle class have been reduced. Of course, on the agenda of several European countries and not only there is the proposal to ensure a guaranteed minimum income to support people affected by the crisis, especially if we look at the whole and see that the number of employment contracts suspended only in Romania exceeded one million, while over two hundred thousand contracts were terminated. Let us not forget the banking system and the need to provide guarantee mechanisms and liquidity lines for banks, in order to ensure working capital for SMEs, guarantees and venture capital, as well as other economic policy instruments.

Stricto sensu, focusing on insolvency, it becomes imperative that this phenomenon be anchored in the socio-economic reality through urgent and temporary administrative and legislative measures. It is in this idea that we avoided an abrupt analysis and tried to start from the general context in order to narrow the scope of the analysis to identify useful measures to reform the field of insolvency.

In this context, we aim for companies in difficulty to be able to continue their activity or even to “freeze” it temporarily without permanently losing their perspectives. In these unprecedented times, company managers will need to be well prepared, with a solid understanding of the duties and insolvency framework of the jurisdictions in which they operate. Some jurisdictions have already taken steps to adapt insolvency law in the light of COVID-19, for example by suspending the obligation to file insolvency proceedings by the end of this year and introducing new laws to allow company-specific rescue. We have tried to monitor these types of legislative developments at European and global level, as well as the ability of existing insolvency legislation to provide

adequate responses to the extremely difficult situation in which many companies may find themselves in the Covid-19 crisis, in order to identify the most opportune solutions. We will analyze and propose measures in this regard from the perspective of the two concrete hypotheses identified.

On the one hand, we are talking about the companies that in the shortest time will have to declare their insolvency, as they will meet the conditions that attract the obligation to request the insolvency provided by Law no.85/2014 on insolvency prevention and insolvency proceedings, and on the other hand, we have in mind the companies that are already in insolvency proceedings, especially in the phase of judicial reorganization.

Regarding the first hypothesis, we consider that it is time to promote a lot and to implement in advance, before it is too late, the *Directive (EU) 2019/1023 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency)*[15], although Romania, like the other Member States of the European Union, has the obligation to implement this normative act until 17 July 2021, with certain exceptions. Especially in the current context, the Directive represents an opportunity to seize the chance for harmonization in the sense of a rescue culture through a legislative reform of the insolvency institution, with a focus on preventive restructuring frameworks. One of the elements that seem to be emphasized at the level of the European Union is the encouragement of extrajudicial agreements, those *out-of-court* transactions, thus going on the attempt to restructure out of court and before the fatidic word “insolvency” is pronounced. These transactions represent attempts to stabilize the receivables and restructure the activity by massively inviting to negotiation the creditors who hold the majority of receivables, the control ones, in our legislation being regulated but too little promoted and developed in this sense the ad-hoc mandate and the preventive arrangement.

But what happens to the companies that during this period meet the conditions for requesting insolvency, reaching the threshold of a certain, liquid and due debt of more than 60 days, in a minimum amount of Lei 40,000? We mention that, according to

the Insolvency Code, the debtor has the obligation and not the right to request the opening of the insolvency procedure within maximum 30 days from the occurrence of this state, and exceeding by more than 6 months the term provided by art.66 of Law no.85/2014 may attract the criminal liability of the administrator for committing the offence of simple bankruptcy, in accordance with art.240 of the Criminal Code. Of course, the literature has already sounded the alarm regarding the postponement of the initiation of these insolvency proceedings but also regarding this term, oscillating between considering it either a limitation period [16], suspended by law based on art.62 par.(1) of the Decree no.240/2020 issued by the President of Romania regarding the establishment of the state of emergency, either a maximum term specific to the insolvency legislation, [17] according to which the criminal liability or tort civil liability of the statutory administrators is attracted. Given that in this case we are talking about an obligation and not a right of the insolvent debtor, we are of the opinion that the suspension of the deadline for requesting the opening of the procedure would not have been justified during the state of emergency, prescription and revocation being specific means of paralyzing rights and not obligations. Although the general rule resulted and interpreted at national level, [18] in the sense that during the state of emergency the debtors' requests to open insolvency proceedings are not judged, there were cases [19] in which such requests were judged on the grounds of the exceptional nature of the state of insolvency, as well as the need for urgent protection of the debtor in financial difficulty by suspending the forced executions based on art.75 of the Insolvency Code.

Of course, the pressure of doctrinal and jurisprudential criticism was quite accentuated during this period regarding the uncertainty that gravitated around the field of insolvency, which is why in the meantime *Law no. 55 of 15 May 2020 on certain measures to prevent and combat the effects of the COVID-19 pandemic*, in which the legislator has allocated a number of articles, we could even say generously, dedicating Section 8 – „Measures in the field of insolvency ”exclusively in the matter of insolvency. Thus, in addition to areas such as transport, health, education and research, or the field of labour and social protection, the field of insolvency is making its presence felt more than ever, as a corollary of the economy, necessary to be upgraded and reformed. However, we consider that the measures are somewhat late, entering into force only

after the declaration of the state of alert at national level, at the same time, there are minimum measures, which relate mainly to a limited period of time, respectively the state of alert, and are addressed especially to debtors who have ceased their activity totally or partially as strict effect of the measures adopted during the state of emergency, established by Decree no. 195/2020. These measures are aimed at, among others, a suspension of art. 66 of Insolvency Code which we were talking about above, in the sense that, according to art. 46 par.1) the debtor no longer has the obligation to file a request to open insolvency proceedings during the state of alert, but this option is not restricted, the legislator leaving it to the insolvent debtor to choose between requesting the opening of proceedings either during the state alert, or after its expiration, period in which the threshold value also increases from Lei 40,000 to Lei 50,000, both for debtors and creditors, as it results from art.47 par.2). However, we point out, as an addition to the measures taken, the timid promotion of the arrangement with creditors by ensuring longer deadlines for drafting the offer of arrangement with creditors, but also by conditioning the creditors of prior negotiation with the debtor, proven by documents, before requesting the opening insolvency proceedings.

Going over these current procedural aspects, strictly related to the period of the state of emergency or the state of alert, we consider that we need an overall view, which would place us beyond the cessation of the state of emergency, then or later companies being in the same imperative situation to request the initiation of insolvency proceedings. Essentially, the Romanian legislator did not intervene with major and systematic amendments on Law no.85/2014 on insolvency prevention and insolvency procedures, at a time when the economic situation is going through the hardest tests and obviously requires legislative changes at all levels, not just at macroeconomic level. Why do we invoke the lack of action in this current strategic area of the economy? Because the debtors who have reached the insolvency threshold, even if they did not request during the state of emergency or alert to enter the insolvency procedure, considering that this obligation has been suspended, will be obliged to request it tomorrow, because there are no concrete measures for these debtors nor for those who are already in insolvency proceedings and trying to complete a reorganization plan, while insolvency practitioners struggle to supervise and manage in crisis conditions acts

and operations imposed by legal norms, by digitizing all specific procedures. Indeed, we appreciate the measures proposed by the legislator, even if they are minimal, drawn up at the last moment and on the verge of the collapse of the national economy, respectively the possibility of modifying the reorganization plan already being implemented, within 3 months from the occurrence of law, in cases where the perspectives of the debtor's recovery have changed due to the situation created by the Covid-19 pandemic, as well as the possibility of prolonging the duration of the execution of the plan, up to a maximum of 5 years for cases in which the activity was totally or partially interrupted. At the same time, a temporary solution is the possibility for debtors to request the insolvency judge, within 30 days from the entry into force of the law, to suspend the execution of the reorganization plan for a period not exceeding two months, specifying that it is a measure that is strictly addressed to debtors in judicial reorganization at the time of the law, which have ceased their activity totally, not partially, as a result of the measures adopted by the public authorities.

The reality is that measures to temporarily amend insolvency law could be left without real major effects of economic support, as they do not seem to be viable long-term solutions, but rather a superficially ticked chapter of the government agenda. *De lege ferenda*, it would be appropriate to make real, concrete, not only temporary, to the insolvency law, measures to protect debtors in financial difficulty and to relax the conditions for entering insolvency, given the rapid economic decline from one day to another, which will do nothing but trigger an unprecedented wave of insolvencies. In this regard, accessing the website of INSOL Europe Association [20], in its turn a member of the INSOL International Federation [21], with a strategic role in substantiating the guiding principles in drawing up codes and laws, European and international directions on insolvency, we note some proposals for reform, urgent adaptation of legal rules, addressed to national legislators. Moreover, within The Conference on European Restructuring and Insolvency Law (CERIL) [22], there was discussed the capacity of existing insolvency law to provide appropriate responses to the extremely difficult situation in which many companies may find themselves in the COVID-19 crisis, and in a statement CERIL management called on European and EU national legislators to "take immediate action and adapt insolvency legislation in the light of the current

extraordinary economic situation and prevent unnecessary bankruptcies of entrepreneurs”.

Consequently, the recommended primary strategic steps were:

1. suspension of the obligation to file insolvency proceedings based on over-indebtedness and

2. to respond quickly to the lack of liquidity of companies.

In this context, we could take the example of a temporary legislative reform of the field of insolvency carried out in more developed countries. For example, the Australian Federal Government has recently approved temporary amendments to insolvency and corporate laws, given the challenges that COVID-19 presents to many profitable and viable companies. Thus, the *Omnibus bill 2020* [23] provides for measures to prevent unnecessary insolvencies and bankruptcies by providing a “safety net” for administrators and companies so as to help them operate in a temporary period of illiquidity, rather than entering into a judicial reorganization or voluntary liquidation. The measures involve a kind of “hibernation”, especially of companies severely affected by the measures taken during the state of emergency, as well as the appointment of specialized people, multidisciplinary, operational advisory groups, to assist them in debt management and to avoid bankruptcy. As part of the important changes, the administrators will be temporarily exempted from the obligation to request the opening of insolvency proceedings, and the temporary exemption will work for a period of six months. In addition, in addition to other measures to relax the insolvency legislation, the minimum threshold of the threshold value according to which the creditors can request the opening of the procedure is also modified, also for a period of 6 months. In fact, countries such as Austria and the Czech Republic have also decided to suspend the obligation to request the opening of insolvency proceedings for a period of 6 months after the end of the state of emergency. A very effective example in this sense would be Luxembourg, [24] which has suspended *sine die* this obligation, a measure which, in our opinion, becomes necessary in such an uncertain and unpredictable general context.

Germany also regulated a *Law on mitigating the consequences of the COVID-19 pandemic on insolvency field*. The amendments to the existing regime aim primarily at suspending the obligation to submit the insolvency file, appropriately limiting the liability

of the company's management and incentives for the continued activity of the affected companies. This is achieved by a complete suspension of the insolvency obligation until 30 September 2020 and through a series of additional measures to ensure that management can continue to conduct business on a regular basis, eliminate the risks associated with the provision of new financing in crisis and reduce the risks of fiscal recovery for contractual counterparties in general. A very interesting aspect that the German legislature has in view is that the suspension does not apply if the insolvency is not caused by the effects of the spread of the SARS-CoV-2 virus (COVID - 19 pandemic). Thus, it distinguishes between insolvency caused strictly by the pandemic and insolvency inevitable and independent of the global health crisis, in the sense that if the debtor was not in a state of financial difficulty on 31 December 2019, insolvency is presumed to be caused by the effects of the COVID- 19 and that there are perspectives for remediation, otherwise no. In our opinion, this perspective is somewhat exaggerated, being really necessary a differentiation between debtors, for example the one in good faith and the one in bad faith, or the business in the branches most affected by the pandemic, in the sense of benefiting from more tax facilities, etc., but in no case the total exclusion from such legislative opportunities of those who were already vulnerable and in financial difficulty at the time of the general crisis state.

Finally, if we refer to the category of debtors already in a state of insolvency, and we are especially interested in debtors in the process of judicial reorganization as a procedure that contributes, in our opinion, to the recovery and revival of the economy, we find that, in essence, the thorny issue it concerns not only the triggering moment of the insolvency procedure, but also the assurance of the continuity and development of the judicial reorganization plans in course of implementation. Indeed, the insolvency proceedings followed their course, only the actual activity of the court being suspended during the state of emergency. But what about overlapping this economic crisis with these already vulnerable companies? Will they still be able to complete a reorganization plan or pay their current debts so that they do not inevitably "step" in bankruptcy proceedings or be enforced by creditors?

For example, the execution of the judicial reorganization plan, approved and confirmed in advance, continued its course, the debtor being required to comply with the

plan, to pay the amounts provided under the payment program, the legislator not stipulating provisional measures to suspend, postpone these obligations during the state of emergency. As a consequence, debtors had to identify the means of rescue, often opting for tax and budgetary benefits granted by the authorities, the most convenient measure being the application for technical unemployment, as other measures, such as, for example, the measure of granting loans guaranteed by the state presented above, excluded from the beginning the companies already in insolvency, regardless of whether they were in the phase of judicial reorganization.

In this context, the chances of recovery have decreased in a very steep way for the companies in judicial reorganization, the conversion to bankruptcy becoming almost inevitable, especially if we consider the new regulations of GEO no.88/2018 which amended Law no.85/2014, in the sense that *“for the debts accumulated during the insolvency procedure that are more than 60 days old, the forced execution can be started”*.

Of course, in the macroeconomic regulations during the state of emergency, economic operators have identified and accessed certain levers of suspension of payment obligations, deferral of payment for utility services, settlement by the state of technical unemployment benefits, exemption from penalties for delay in the execution of contracts concluded with public authorities, as well as other facilities and support measures in trade relations, all based on obtaining an Emergency Situation Certificate according to the procedure regulated by Order no.791 of 25 March 2020 issued by the Ministry of Economy, Energy and Business Environment. However, the support measures are necessary even after the completion of the state of emergency, respectively of the state of alert, triggered on the Romanian territory, when the mass enforcements are restarted. That is why, in our opinion, *stricto sensu* measures are required also regarding the insolvency legislation, which should contribute to the support of economic operators, either in the sense of timely recovery by intensifying the application of preventive insolvency procedures, especially the preventive arrangement, or by adapting the insolvency procedure and the legal regime of reorganization of debtors to the new socio-economic context.

De lege ferenda, we propose a relaxation of the insolvency regulations, in the sense of the possibility of suspending for a period of at least 6 months the payment obligations resulting from the reorganization plan or rescheduling the payments by modifying the reorganization plan based on a decision of the insolvency judge and without being necessary the consent of all creditors, prioritizing measures such as: payment of current receivables, granting special support to insolvent debtors through appropriate financing programs, providing free guidance and counseling supported by the state, increase of the threshold value of Lei 40,000 for a longer period of time, at least for 6 months, not only during the state of alert, but also the suspension of the creditors' right to request the transition to bankruptcy or forced execution or modification of the condition regarding the debt payability, currently 60 days, by increasing it to at least 120 days. Now more than ever, policymakers can consider including a simplified insolvency regime, in particular by providing SMEs with simplified reorganization procedures and other options for their timely rescue, which would aim to simplify formalities for the notification, submission and proof of claims and the approval of reorganization plans, the provision of standard templates, programs and forms, the use of electronic means, as well as reduced costs, public aid and shorter deadlines but also limited reasons for their extension, measures recently proposed by UNCITRAL, too, which is progressing more and more with *The draft model law on a simplified insolvency regime for micro-enterprises* (MSE insolvency) [25]. The latter project was discussed at the 56th meeting of Working Group V, held in Vienna on 2-5 December 2019 and was on the proposed agenda for the May 2020 session in New York, to support any final amendments following the review of the 56th meeting of Working Group V.

Finally, if we were to relate to some predictions and risks in the immediate future, we could consider issues such as: the decline of financial markets, the emergence of legislative overlaps and misinterpretations that will give free rein to the so-called "vulture investors", opportunistic buyers of assets/companies without adverse credits and interests, tightening of credit as a reflex reaction, with additional impact on already fragile cash flows, the explosion of the invocation of force majeure in most trade relations and the reflection on general contractual obligations for emergency situation based on emergency ordinances regulated during the state of emergency, certificate

that continues to produce effects, there existing also the possibility of obtaining a force majeure notice [26]. At the same time, we will face the emergence of the force majeure phenomenon versus insolvency, companies being tempted to argue that they are not really insolvent, invoking force majeure as a priority, actions that will end with direct bankruptcy and loss of opportunities for judicial reorganization, but also the emergence of the indulgence phenomenon of the courts post pandemic regarding the installation of insolvencies and granting the possibility of reorganization even in the case of those “zombie” companies with the “domino” effect of economic decline on trading partners, and the list goes on.

Conclusions

Our research began with the affirmation that any crisis brings with it an opportunity for change. Perhaps this is the opportunity that will positively restart society, the economy and, why not, the legislative system. Perhaps it is time for a well-deserved new beginning, in a well-deserved “fresh start”, in which the pandemic will trigger a “phoenix” phenomenon - the rebirth of the economy from “the ashes”. The experience of the Coronavirus pandemic followed by the materialization of the economic crisis has somewhat confirmed our need to emphasize this indisputable link between the social dimension and the economic dimension of insolvency, which is a reality we must not be afraid of, the “rescue culture of salvation” through insolvency proceedings being currently claimed by the company itself, through the need for revival and reset. We believe that this perspective of giving a second chance to the debtor in financial difficulty is no longer just at the stage of giving satisfaction to some Union and international bodies that have long strived to shape it, and which the States have embraced gradually and implemented it timidly. This perspective becomes a reality, which appears to us more than ever and is a second chance for Romania, a country where social and economic challenges are becoming increasingly complex, an effective approach to legal institutions, such as insolvency, becoming essential for reactivating the levers of economic and social progress.

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