THE INSOLVENCY OF THE NATURAL PERSON - FORGOTTEN REALM IN ROMANIA? NEW TRENDS IN APPROACHING CONSUMER OVER-INDEBTEDNESS- COMPARATIVE LAW

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Abstract:
The justification for the choice of this research topic lies in the recurrence of the increasingly dramatic financial situations in which natural persons find themselves in their capacity as simple individuals against the background of the Covid-19 pandemic, situations amplified by the lack of interest of the Romanian legislator that presently provided an almost non-existent answer and a remedy not valued and not accessed by the over-indebted consumer. The period we are going through has generated an economic and social collapse, and the insolvency of professional traders has created chain reactions through restructuring and layoffs, with many people losing their jobs and accumulating debt. In such a fragile context, an opportunity for reset and social revitalization would be to access the insolvency proceedings of the individual under Law no. 151/2015, entered into force in 2018. The reality is that this legal instrument is still in its infancy, so far only 25 people have actually accessed it. And yes, unfortunately, we can say that it is a legal instrument "covered in dust", left in the shadows and almost non-existent, "not stormed" even in terms of doctrine, especially in terms of promotion and social awareness of the benefit resulting in following the access to such mechanisms that allow the so-called fresh start. Why this slow evolution in the application of the treatment of over-indebtedness of simple individuals? Perhaps the enactment of this special law does not meet expectations and is inadequate to the demands of a developed society, perhaps we are not prepared at the cultural level to assimilate it and we are dependent on the stigma of insolvency deeply rooted in our guide of values, perhaps the successive postponement of this normative act triggered a kind of uncertainty, the insolvency procedure becoming a tricky, difficult "realm", difficult to access and especially to navigate, with a much too long time horizon that the debtor must assume in order to improving its economic situation and especially in order to achieve the ultimate goal, namely the discharge of debts and the benefit of a fresh start in society.
Beyond the limits of strictly legal multidisciplinarity and the true analysis of legislation intended strictly for the over-indebted and bona fide consumer, insolvency seen from a psychological, social perspective, from the perspective of people who go through such an experience, whether they are debtors individuals, whether they are administrators of debtors legal entities, whether they are employees, raises many questions. What would be the psychological impact on them and what would be the effects of the financial and economic crisis on human behavior? How do the effects of a gradually unbalanced economy affect society and those who have directly experienced the consequences, those who have lost their jobs? How

is a person who has come into contact with the insolvency procedure seen and what will be their status in society? Is the current law a failure? What would be the foundations of an "ideal" model in regulating the insolvency of simple individuals?
Starting from the premise that the insolvency of the individual is a very delicate subject, with certain nuances and depths of interpretation, we proposed that our research reach an interdisciplinary area, without limiting ourselves to the classic research of analysis-commentary of the legislation of insolvency of the natural person. To achieve this goal, we set ourselves the goal of cutting this research topic in a cascade, starting from the intrinsic and extrinsic springs that can cause an individual to consume irresponsibly, from the idea of changing consumer behavior relative to periods of economic crisis, the need to increase social responsibility and consumer protection, as real social security programs, to identify mechanisms to prevent and treat over-indebtedness, the psychological impact of accessing them, but also to identify solutions for legislative reform, through the creation of a common legislative corpus achieved through the absorption of Law no. 151/2015 by the current Insolvency Code - Law no. 85/2014, an idea already outlined in many countries such as Singapore, Austria, but also India and the United Arab Emirates, which we approached as reference systems in our research.
Keywords: *insolvency, consumer, over-indebtedness, Law no. 151/2015 on Insolvency of Individuals, a Unified Insolvency Code, Comparative Law - Austria, United Arab Emirates, India, Singapore*.

Over-indebtedness - a multidisciplinary perspective. New consumer protection mechanisms under the social responsibility principle

Out of the desire to avoid a classic, disciplinary research, characterized by "scientific rigidity", we set out to paint this topic in a different way, trying to carefully select the key issues and landmarks lost in such a discouraging normative thicket, all the more so we relate to a research topic with reverberations on multiple levels at social, psychological and legal level. In fact, this is the beauty of research, "*the noble purpose of the professor and the scientific researcher being to discover the meaning and reason of the legal rules, to understand them, to expose them, to analyze and explain them, related to ideas springing from the author's personality, to which are added values and principles specific to the time in which they expressed them"* [1].

Any economic crisis has a long-term impact on consumer behavior. For example, the global financial crisis of 2008 has left a huge mark on the economy, on the financial markets, and some would even say on people's behavior. Although the economy seemed to be reborn, unfortunately we faced a new global crisis, this time much more aggressive and with very long-term prospects. The year 2020 was only the beginning of an economic and social decline, with the declaration of the Covid-19 virus pandemic by the World Health Organization. Thus, going through a crisis in a certain market, let's say a real estate market crisis or a stock market crisis, this will affect the willingness of people to take risks in that specific market in the coming decades. People are less willing to invest

due to a negative impact on income, especially in a context where economic security is becoming a hazard across all sectors. At the same time, research shows that there is a predilection of people to be more reluctant to become homeowners, more reluctant to increase the net worth of their homes than we have noticed before. For example, people between the ages of 30 and 40 are less likely to own a home than in previous decades. Also, if we take the stock market as an example, research and statistics suggest that a person who was about 30 years old when the financial crisis hit in 2008 has drastically reduced his or her propensity to be a stockbroker and will last about 30 years until this effect is no longer detectable in the data.

Maybe we should look at this kind of caution as a positive thing, but society needs people willing to take risks for the economy to grow. On the other hand, there may have been too much risk not taken and perhaps a little caution means taking smarter risks. Therefore, let's say that contact with insolvency can make us more cautious in taking risks in the future, but maybe less optimistic as entrepreneurs, as professionals, as consumers, a context in which the effect of decline will be felt on all levels.

Worryingly, we still face the stigma of bankruptcy, which is ubiquitous in modern societies, from China to Europe and the United States, and the stigma-recovery ratio must "balance" in equilibrium to work the second chance philosophy given to the natural person as a simple individual. [2]

We must admit that the new vision is somewhat detached from the purely economic dimension of insolvency, as it has been configured in the past, by integrating the social dimension into its structure and gradually eliminating that personal stigma attributed to honest or not bankrupt. At both Union and international level, priority is given to measures and procedures for rescuing the financially distressed debtors and reintegrating them into the economic circuit, when it can contribute to "healing" the economy through honesty and innovation, since, in addition to being an instrument for saving the indebted debtor, it also becomes the realm where the law intersects very strongly with the economic phenomenon. In fact, we enjoy a legislative "effervescence" in the area of giving the debtor a second chance, this becoming a won principle, an integral part of the genetic code of insolvency proceedings, which is reflected in the judicial reorganization regulated by Law no. 85/2014 on insolvency prevention and

insolvency proceedings, financial recovery under the rules of Government Emergency Ordinance no. 46/2013 on the financial crisis and the insolvency of administrative-territorial units, approved by Law no. 35/2016, as well as the well-deserved fresh-start granted to individuals as regulated by Law no. 151/2015 on the insolvency of individuals.

Over-indebtedness is characterized by excessive debt, which results in the fact that: the debtor's assets, even higher than the liabilities, are not immediately liquidable, while the debts are already due; the debtor's assets suffer a significant erosion of the liquidity value, which has become insufficient for the payment of the due debts; the debtor';s income decreases or acquires fluctuating values, insufficient to pay the debts; even if the value of the assets and the level of income are maintained, the debts accumulate, in a rate that is impossible to follow and in an amount that is impossible to cover [3].

In our domestic law, simple individuals struggle with an unlimited liability towards any creditor, with all their assets, whether present or future. Regardless of the financial situation and even if the assets of the individual debtor are insufficient to cover all his debts, he remains obliged *ad infinitum*.

We must point out that in the doctrine we find a difference between *active over-indebtedness*, generated by irrational, reckless consumer behavior through excessive borrowing, beyond the limits of its sources of income and its collateralised payment assets, and *passive over-indebtedness*, which characterizes the honest consumer, in good faith, who, faced with unforeseen circumstances, such as unemployment, the onset of an illness, the sharp decline in the value of the mortgage, etc., is unable to pay his debts. Access to insolvency proceedings but also to other social protection mechanisms is conditioned by the consumer's lack of fault, his good faith and honesty.

However, we note a constant concern of the legislator in regulating instruments, important mechanisms for the protection of over-indebted consumers, which complement the law on insolvency of natural persons, namely: Government Ordinance no. 38/2015 on alternative dispute resolution between consumers and traders, which aims to establish an alternative dispute resolution procedure for individual disputes brought voluntarily by consumers against traders in order to ensure a high level of consumer protection and the proper functioning of the market, and Law No. 77/2016 on the giving in payment of some

real estate in order to settle the obligations assumed through loans, offering the consumer the right to pay off the debts arising from credit agreements by paying the mortgaged property in favor of the creditor. These legal mechanisms offer individual debtors the opportunity to discharge their debts by cooperating in good faith, mechanisms that of course contribute to shaping a system of consumer protection.

Interestingly, we are in the presence of a regulatory competition in the field of consumer protection, with the recent regulations on the Law on giving in payment and the Law on the insolvency procedure of natural persons becoming, why not, extended remedies of unforeseen circumstances, in a context deeply marked by the field of social responsibility. The shaping of these legal rules that intersect for the benefit of the consumer becomes the result of interdisciplinary analyzes between law, economics, ethics and sociology. Moreover, in a deeply ethical spirit, the evolution of common law has focused on the development of consumer protection, by setting up modern legal institutions such as unpredictability. The new concept is based on principles that visualize the contract in the sense of a more flexible connection between the contracting parties, principles designed to govern the new theory of contract law: *the principle of contractual equality, the principle of contractual equilibrium, the principle of contractual fraternity, the principle of social utility, as well as the principles deduced: the principle of legal certainty, the principle of freedom and responsibility and the demonstrative principle of contractual solidarity* [4]. This concept of breach of principle *pacta sunt servanda* we also find it in the modern insolvency laws of the individual, which have a double purpose, in addition to the protection of creditors, that of saving the debtor in good faith, giving him a second chance, respectively that well-deserved fresh start. Thus, we find few countries that still maintain the concept of *pacta sunt servanda* and gives absolute priority to the fulfillment of consumer contractual obligations. This option is reflected in the way they implement in their systems the idea of *moral hazard* to allow the cancellation of part or all of your personal debts without payment. Therefore, like legal persons debtors, natural person debtors may face problems that are beyond their control, which may bring the debtor beyond the limits of affordability, which entitles him to resort to insolvency as a safeguard [5].

The relationship of interdependence of the legal mechanisms mentioned above with the insolvency law of the individuals is obvious and extremely close, given that the institution of payment may be a means of partial exemption of debts of the natural person debtor, a means of avoiding special insolvency proceedings. Thus, the foundations of the Law on the insolvency of individuals were laid even during the height of the financial difficulties triggered by the constant and remarkable depreciation of the Swiss franc against the national currency, respectively 2015, in the public space being discussed the disastrous effect on the balance between parts of the bank loan agreement granted in foreign currency, especially in CHF. Indeed, the existence of delays in the payment of credit rates of individuals in Romania is a reality that emerges from the official statistics, but the over-indebtedness of debtors was a trigger of this phenomenon and not a lack of discipline in lending. Although the Law on giving in payment was challenged by the banking entities in about 2000 cases, this being the most contested normative act in the history of the Romanian Constitutional Court, by CCR Decision no. 431 of 17 June 2021, recently published in the Official Gazette, respectively 27 October 2021, the new law on giving in payment was validated, thus establishing a clear definition of impredictibility in the application of this law. The Constitutional Court pointed out that rebalancing contracts is paramount, virtually removing all defenses of credit institutions that led to the loss of lawsuits through misinterpretation of imoredictibility. Here is a protection tool that is becoming more and more contoured and becomes a shield for those who will suffer from the current economic crisis, as they have the right to notify the bank in order to rebalance the contract in case the rate increased by more than 50% compared to the time of signing the contract or the exchange rate increased by more than 52.6%.

Here, too, it is necessary to mention Regulation (EU) no. 575/2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) no. 648/2012, which establishes a series of uniform rules on the general prudential requirements that credit institutions must implement for good credit risk management, assessing at the time of granting the loan the real capacity of the debtor to repay the debt. Moreover, Directive 36/2013/EU of the European Parliament and of the Council on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms seeks accountability and “interweaving” so necessary between the

protection of consumers of banking products and services and the social responsibility of banks. Therefore, banks, and not only economic operators in general, should insist on the integration and adoption of social responsibility policies, firstly because they have the means to respect human rights, and secondly because in this way participates in social progress, as a moral responsibility regarding the interaction of the activity of an economic operator with its customers, its consumers, its own employees but also the community as a whole. This social responsibility of economic operators, including banks, reflects a complex attitude that combines legal responsibility, economic responsibility, ethical responsibility and philanthropic responsibility.

Therefore, the solution lies in a transparency of society in general, in a responsible assumption of all the factors involved and a common effort of fair "sharing" of risks. On the one hand, we invoke, in this sense, the Consumption Code, according to which consumers have the right to be informed, fully, correctly and precisely, of the essential characteristics of products and services, including financial services provided by operators, so as to be able to make a rational choice between the products and services offered, in accordance with their economic and other interests and to be able to use them, according to their destination, in full safety and security", as it complements the regulation of banking products and services offered by GEO no. 50/2010 on consumer credit agreements, and on the other hand, the Regulation of the National Bank of Romania no. 5/2013 on prudential requirements for credit institutions, as subsequently amended and supplemented, according to which credit institutions must have a risk management framework in place.

Although the giving in payment procedure may seem more accessible and faster, it should only be used *in extremis*, in our view, however, the insolvency of natural persons procedure being a more advantageous choice, in the context of a "debt discharge system based on good practice at European level and on the timing of forced execution which offers increased benefits to consumers, dealing with the complex issue of over-indebtedness competitively and failry" [6].

In any case, the pandemic has accelerated changes and changed consumer priorities, activating the risk of over-indebtedness, which implies a final cost of lending that exceeds the financial possibilities of the debtor consumer. The pandemic, of course,

is due to a decrease in consumer purchasing power due to inflation, with the risk of default being a direct result of events such as job losses, declining incomes and more. [7]. Here is a whole “chain of weaknesses” that can lead to over-indebtedness and insolvency of the consumer.

The natural person - between the quality of consumer and that of entrepreneur (professional). Reflections on the recovery of the financial situation of the natural person debtor under Law no. 151/2015 on the insolvency of natural persons

Until recently, only traders were those who enjoyed the protection of the court by virtue of insolvency - Law no. 85/2014, depriving creditors of the possibility to initiate forced executions by “freezing” the receivables, thus benefiting from a series of important favorable effects, including the discharge of debts - *discharge*, as a result of the excusable bankruptcy. On the other hand, simple individuals “benefited” instead from an unlimited liability to any creditor, developing a real “anxiety” about debts and carrying “on their shoulders” the social stigma. Against the background of real social protection needs, the insolvency law of the natural person was outlined, which would offer to the bona fide natural persons in financial difficulty, a possibility of safeguarding, by voluntarily submitting the opening of the insolvency procedure.

Initially, Law no. 151/2015 on the insolvency procedure of natural persons, published in the Official Gazette of Romania, Part I, no. 464 of 26 June 2015, should have entered into force on 26 December 2015. The first postponement was made through the Government Emergency Ordinance no. 61/2015 for 31 December 2016, followed by Government Emergency Ordinance no. 98/2016, which extended the deadline for entry into force until 1 August 2017, meanwhile being approved the Methodological Norms for the application of Law no. 151/2015. However, the application of the Insolvency Law on natural persons faced a new and final extension of the deadline for entry into force, respectively 1 January 2018, according to Government Ordinance no. 6/2017, published in the Official Gazette of Romania no. 614 of 28 July 2017, invoking the complexity of the field regulated by this law, as well as the point of view of the Superior Council of Magistrates which signaled the need for rigorous preparation of the administrative capacity of courts called to apply insolvency proceedings of natural persons.

"Giving a second chance" has become a basic principle of insolvency, pursuing the idea of reintegration into the economic and social circuit, both of professionals and individuals not only as entrepreneurs, but also as of consumers. The beginning of this "rescue culture" was triggered by *Recommendation no. 135/2014 of the European Commission on a new approach to business failure*, Recommendation aimed only at honest professionals. Later, this culture took shape in the spirit of the *Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 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*) [8], an European legal instrument of the type *hard-law* which covers two important levels, namely: harmonization/standardization of legislation at EU level in the field of insolvency and the development of a rescue culture that can be achieved, on the one hand, through sound insolvency prevention procedures, and on the other hand, by promoting and accessing the judicial reorganization procedure in the insolvency phase [9]. And because the countdown has begun in order to transpose Directive (EU) 2019/1023 at national level, we are already enjoying a draft law to amend and supplement Law no. 85/2014 on insolvency prevention and insolvency proceedings, which is on the "table" of the Parliament.

Although our research concerns the insolvency of the natural person, we cannot look separately at the normative acts that regulate insolvency, on the one hand, Law no. 85/2014 intended for professionals, and on the other hand, Law no. 151/2015 intended for simple individuals, and we cannot disregard their common points, at least in terms of the purpose for which they were adopted and the legal effects which these legislative acts produce, an analogy that allows the improvement of the last normative act that is still in the period of "pioneering" at national level and that tends to follow the same genetic code of the principles and insolvency procedures intended for entrepreneurs.

In fact, we must point out that through the draft law amending the current Insolvency Code - Law no. 85/2014 and the transposition of EU Directive 1023/2019, the legislator tends towards a compatibility of insolvency proceedings specific to professionals, with that of natural persons, given that most often the delimitation of civil

obligations from those assumed in the operation of an enterprise it turns out to be difficult or even impossible to achieve. In this regard, we enjoy a new approach to professional traders-natural persons, but also to the liberal professions, which currently have only the simplified insolvency procedure involving only bankruptcy, being excluded from any insolvency prevention procedure or of judicial reorganization, but also from the application of Law no. 151/2015. [10] The new draft law gives a second chance to these categories as well, together with the proposal to repeal art. 38 paragraph 2 of Law no. 85/2014 also absorbing the category of liberal professions, a category that the doctrine has tried over time to include in the content of Law 151/2015.

The reality is that corporate insolvency can lead to personal insolvency once a business fails, even when the business is a separate legal entity, which is why the design of personal insolvency regimes is also very important. For example, an effective personal insolvency regime should take into account debtors' prospects and incentives for future revenue generation to allow entrepreneurs a second chance after insolvency.

Moreover, the new Directive 1023/2019 provides that entrepreneurs would not actually benefit from a second chance if they had to go through separate procedures with different access conditions in order to remit the professional debt and any personal debt incurred outside the exercise of their profession. Therefore, Member States must ensure that, in cases where the professional debts of entrepreneurs cannot be reasonably separated from personal debts, both categories of debt will be remitted in the same procedure. Where these categories of debt can be separated, Member States may provide that they are remitted in the same or separate but coordinated procedures. Following the line of this vision, the draft law on amending the Insolvency Code proposes to complete art. 3 with new paragraphs, thus - „*If a professional natural person in insolvency has both personal debts and professional debts, which either cannot be separated in a reasonable way, or are in divisions of the patrimony constituted according to art. 2324 (3) of the Civil Code, they are dealt with, in the present insolvency proceedings, in order to obtain the final discharge of obligations*". We consider that these provisions do nothing but strengthen the idea of unifying the legislation on insolvency in a common corpus, which would represent a real Insolvency Code.

It remains to be seen to what extent the overlap of a commercial insolvency proceeding with a personal insolvency proceeding will be effectively applied, being a rather delicate matter, which should be more precisely regulated, especially as regards the classification of professional debt as compared to personal debt. From the brief analysis, it is obvious that the draft law on amending the Insolvency Code for professionals also brings implicit amendments to Law no. 151/2015 on the insolvency of natural persons. At the border of the two categories of debts, which should be "treated" in a single procedure based on the Insolvency Law, certain uncertainties remain "in order to obtain the discharge of obligations". On the one hand, it is not clear to what extent Law no. 151/2015, which provides for other procedures but also different functional competencies, the insolvency commission and the court having other competencies than the syndic judge, and on the other hand, to what extent is suspended or terminated a personal insolvency procedure, pending at the date of initiation of the restructuring mechanisms based on the Commercial Insolvency Law. [11].

Returning *stricto sensu* to the core of our research, we must point out that the insolvency of simple individuals is indeed a progressive approach, but an insufficient approach. In order to unravel the secrets of an ideal legislative model, we consider it important not to fall into the trap of the misconception in the sphere of society at the beginning of the 21st century, namely that the simple individual is a consumer rather than a citizen. The victim of society is this vulnerable consumer before the "monsters" of unfair competition, the "collectors" of claims, where the focus is on debt and not on the rights and freedoms of the citizen to allow the right to subsistence, keeping the family home and freeing the honest, bona fide debtor from debt for the chance of a fresh start. And from this we deduce, in fact, the *key elements* of this special law, namely: good faith, over-indebtedness and discharge of debts. In fact, there are two internationally recognized models of insolvency of the natural person: on the one hand, the Anglo-American model, called "*fresh start*" and the European model, known as "*deserved fresh start*". The European model requires access to such a debt relief procedure only to the honest, bona fide debtor natural person who, independently of his will, is in a situation of over-indebtedness, unlike the Anglo-American model, which allows access to the procedure of insolvency of any debtor, regardless of the condition of the manifestation of good faith.

This “tradition” of conditioning the restructuring and giving it a second chance is also found in nuances regarding the professional debtor, Recommendation no. 135/2014 of the European Commission on a new approach to business failure outlining the idea of adopting different liquidation measures for honest entrepreneurs compared to dishonest entrepreneurs, as well as the need for expedited procedures for companies that have honestly gone bankrupt. Consequently, the tendency of some consumers to access the procedure only to be forgiven for certain debts is reversed by the need to meet mandatory requirements for the release of residual debts. Also the Roman legislator grants this opportunity only to bona fide natural person debtors, although proof to the contrary can be made quite difficult, which is why in the case of professional traders the legislator opted for the use of the simple term debtor, and not honest debtor.

And because we do not want an exhaustive analysis of the normative act itself, we continue to point out the essential elements of the insolvency of the natural person, and we will also make comparative law digressions, without overestimating foreign jurisprudence and legislation, reaching only extensive research possibilities and regulatory vision.

If until the moment of the appearance of this normative act we were talking only about a possible insolvency of the natural person not subject to the procedure regulated by Law no. 85/2014, Law no. 151/2015 introduces the concept of insolvency for this category as well, defining it at point 12 of art. 3 as representing *„that status of the debtor's patrimony which is characterized by the insufficiency of the funds available for the payment of debts, as they become due. The insolvency of the debtor is presumed when, after a period of 90 days from the due date, he has not paid his debt to one or more creditors. The presumption is relative*”.

The normative act begins by regulating the purpose of the insolvency procedure of the natural person, the legislator emphasizing that ,,*it is a collective procedure for the recovery of the financial situation of the natural person debtor, in good faith, the coverage as much as possible of his liabilities and the discharge of debts“.* First of all, we find that we are facing a regulation similar to the insolvency procedure provided by Law no. 85/2014, in the sense of a collective procedure that will involve all creditors of a debtor and which will have three objectives: recovery of the financial situation of the natural

person, coverage of liabilities in a higher percentage and release of debts remaining as a result of the procedure. However, we note that the primary purpose pursued by the legislator in the content of Law no. 151/2015 is the financial recovery of the debtor in economic difficulty, over-indebted, unlike Law no. 85/2014 on insolvency prevention and insolvency proceedings, the main purpose of which is to cover the debtor' liabilities by maximizing his assets, giving the debtor a chance to recover, when possible, being provided here as a subsidiary purpose. We consider that such a difference is justified by the fact that a professional debtor can be dissolved, deregistered in the situation where economic reintegration becomes impossible, while the individual debtor continues to exist regardless of the outcome of such procedures to regulate the financial situation. Precisely by virtue of this last aspect, the procedure regulated by Law no. 151/2015 supports consumers in the sense of creating a legal context that allows them to enjoy a decent living by capitalizing on goods in an organized setting, as opposed to individual forced executions, which in addition to depriving the individual of the goods necessary can have negative consequences for the whole family. Consequently, the purpose of this procedure is not only economic but also social.

As in the case of Law no. 85/2014, the debtor enjoys the effects of insolvency regarding the exemption from penalties, interest on arrears, the suspension of individual forced executions against him and, as we mentioned, the release of certain debts under the law. The advantage also manifests itself over the creditors who will be able to recover the receivables, or at least a part of the receivables, in an organized framework, with lower procedural expenses than those involved in an individual enforcement procedure.

We also identify similarities with the insolvency of the professionals regarding the principles regulated by art. 2 of Law 151/2015, respectively: giving bona fide debtors a chance to recover their financial situation through a debt repayment plan, supporting the exit from insolvency, including by discharging the debtor in a systematic and rational manner, so that the debtor is motivated to make efforts to carry out income-generating activities, facilitating his reintegration into the social environment and his contribution to the economic life of the community, according to the level of professional training and experience gained. We note that the legislator wanted to give priority to the insolvency procedure based on a debt repayment plan by placing this principle at point 1 of art. 2,

the procedure by liquidation of assets occupying a subsidiary place. We note that the law seeks to support the natural person debtor to get out of insolvency by appropriate means such as negotiating claims with creditors, leading to the development of a viable debt repayment plan, a procedure in which creditors enjoy fair, transparent and predictable treatment. [12]

It should be noted, however, that since 2018, the time of entry into force of the law, and until now, the National Authority for Consumer Protection (ANPC) has admitted about 47% of requests for protection through insolvency proceedings of natural persons, noting that fewest requests have been submitted in the last year, which is due to the aid measures granted by the Government but also to the moratoriums granted by the financial-banking institutions during the pandemic. According to the same source, the number of people who have so far filed for insolvency of natural persons is in the order of hundreds, but the number of cases that actually go into insolvency is very small. [13] And here's the question mark. Is this law a failure? What should be changed? What reforms are needed? Aren't the access conditions too restrictive? Definitely the statistics demonstrates that this legal mechanism does not help the over-indebted.

With regard to this scope of application of the insolvency of natural persons, the legislator has stipulated a number of exceptions, which is why, in our opinion, the conditions for a natural person debtor to access the provisions of Law no. 151/2015 become particularly restrictive. Thus, parapraphs (3) and (4) of art. 4 regulates the interdictions of access to the procedure on reasons imputable to the debtor, aiming mainly at his good faith, the doctrine mentioning that by these are established "a number of eight genuine exceptions of inadmissibility of a punitive nature in respect of possible misconduct prior to filing" [14], respectively: (3) The insolvency proceedings on the basis of a debt repayment plan, a judicial insolvency procedure by liquidation of assets or a simplified insolvency procedure may not benefit the debtor who was the subject of such a procedure, completed with the release of residual debts, less than 5 years before the submission of a new request to open insolvency proceedings. (4) The procedures provided by this law are not applicable to the debtor: a) in case an insolvency procedure based on a debt repayment plan has been closed, for reasons attributable to him, a judicial insolvency procedure by liquidation of assets or a simplified insolvency procedure

less than 5 years before a new request for the opening of insolvency proceedings is submitted; b) who has been definitively convicted for a tax evasion, a forgery or an intentional offense against property by disregarding trust; c) who has been dismissed in the last 2 years for reasons attributable to him; d) who, although fit for work and without a job or other source of income, has not made the reasonable diligence necessary to find a job or who has unjustifiably refused a proposed job or another income-generating activity; e) who has accumulated new debts, through unnecessary expenses while he knew or should have known that he is in a state of insolvency; f) which determined or facilitated the arrival in a status of insolvency, intentionally or through serious fault. It is presumed to have had this effect: 1. contracting, in the last 6 months prior to the submission of the request for opening the insolvency procedure, debts that represent at least 25% of the total value of the obligations, except for the excluded obligations; 2. assuming, in the last 3 years prior to the submission of the request, excessive obligations in relation to his patrimonial status, to the advantages he obtains from the contract or to all the circumstances that significantly contributed to the debtor';s inability to pay his debts, other than those owed by him to the persons with whom he has so contracted; 3. making, in the last 3 years prior to the application, preferential payments, which have significantly contributed to the reduction of the amount available for payment of other debts; 4. the transfer, in the last 3 years prior to the submission of the request, of goods or values from his patrimony into the patrimony of another natural or legal person while he knew or should have known that through these transfers he will reach a state of insolvency; 5. termination of an employment contract by agreement of the parties or by resignation in the last 6 months prior to the submission of the request to open the procedure; g) which, at the date of the request for the opening of an insolvency procedure, according to the present law, has already opened another insolvency procedure".

Pursuant to art. 3 of the law, a consumer can access the insolvency procedure in Romania if he has his domicile, residence or habitual residence for at least 6 months, prior to submitting the request, in the country. At the same time, the debtor must be in a state of insolvency and there must be no reasonable probability of becoming able to perform his obligations again. From this perspective, the notion of ,,*reasonable probability*" will be assessed by comparing the total amount of obligations to the income

realized or forecast to be realized, depending on the level of professional training, the traceable assets held by the debtor, the possibility of a salary increase in the future, etc. The last requirement for entering insolvency concerns the total amount of due debts which must be at least equal to the threshold value, respectively 15 minimum wages per economy, amount that fluctuates according to the minimum gross salary in the country established by Government decision and analyzed at opening procedure by the insolvency commission.

An important aspect that we remember in this procedure is the fact that it can be triggered exclusively by the debtor, as opposed to the insolvency procedure regulated by Law no. 85/2014.

The law regulates three forms of personal insolvency proceedings, respectively *administrative insolvency proceedings on the basis of a debt repayment plan, insolvency proceedings by liquidation of the debtor's assets, and simplified insolvency proceedings*. We mention that the first two forms, real insolvency proceedings, are addressed to all debtors who, of course, meet the legal conditions, while the third procedure is a form of social protection for a limited category of debtors.

According to ANPC, the requests regarding the opening of the procedure based on the repayment plan are the ones that predominate, in a percentage of 90%, unlike the requests for opening the insolvency by liquidating assets, where we are talking about approximately 4 files at the level of courts. This becomes an additional reason to focus strictly on the outline of the administrative insolvency procedure based on a debt repayment plan.

Defined by art. 3 point 17, the insolvency proceedings on the basis of a repayment plan benefit from the allocation of the entire Chapter III entitled "*Administrative procedure based on debt repayment plan*", which also includes the largest number of articles. Unfortunately, in addition to restrictive procedural deadlines and conditions, this procedure also involves many stages that make it difficult to access, even more so, the discharge of debts, which can at any time turn into an insolvency procedure by liquidation of assets.

Analyzing schematically, we find that at a preliminary stage the debtor has the obligation to notify his intention to access the insolvency proceedings of all known

creditors, having the right according to art. 13 (4) to notify the insolvency commission after a minimum period of 30 days from the notification, during which the creditors may initiate individual proceedings against the debtor. Here is a first impediment in the concretization of the procedure. There is, of course, a legislative “loophole” for the escape and cessation of these forced executions, and the debtor may appeal to the temporary suspension by way of the presidential ordinance to advance to the next step. The next step is the administrative procedure that takes place before the insolvency commission, by filing a request for debt repayment based on the plan. If the commission accepts the debtor’s request for repayment in principle, forced execution shall be temporarily and provisionally suspended for a maximum period of 3 months, during which time the debtor’s proposed plan shall be confirmed or not. The conditions of admissibility are the good faith of the debtor and his situation of over-indebtedness. In the event that the debtor is in an irreparably compromised situation, the commission will ask the court to order the opening of the proceedings by liquidation of assets. As a critique of the text of the law, we point out that the debtor himself cannot request liquidation in case of rejection of his insolvency request based on repayment plan, only having the possibility to request another repayment based on plan, but after passing a period of 6 months. Step two involves opening the insolvency proceedings by a decision which will also contain the order appointing the administrator of the proceedings, a stage which is quite difficult given the complexity of the procedure but also the “labyrinth” of remedies (insolvency commission decisions can be challenged in court and subsequently appealed to the court) in order to outline and demonstrate good faith and the situation of over-indebtedness at the fine border with the situation irreparably compromised.

As in the case of the reorganization procedure within the insolvency of the professionals, the administrator of the procedure has an essential role in its development, monitoring, support and supervision, but which in turn is controlled by the insolvency commission, as the judicial administrator is controlled by the syndic judge according to Law no. 85/2014. The repayment plan can be designed for a maximum period of 5 years, even with the possibility of extension for another year, depending on the amount of debts, the expected income or the value of the goods to be capitalized. [15]

The debt repayment plan is also a complex one, as well as the judicial reorganization plan related to the professional debtor based on the Insolvency Code - Law no. 85/2014, art. 16 (2) of Law no. 151/2015 establishing its content. For the approval of the plan by the creditors, the vote of the creditor is required, which represents 55% of the value of the receivables and at least 30% of the value of the preferential claims, in accordance with art. 28 of the law.

The last step of the procedure, materialized as a result of the successful implementation of a repayment plan, is that of debt relief, as in the case of judicial reorganization of professionals. Unfortunately, the discharge is not an automatic one, but must be ordered separately by the court. It is bizarre that despite the decision of the commission to establish the termination of the procedure without incidents regarding the payment schedule, the discharge can be refused by the court pursuant to art. 75 of the law, for reasons such as intentional or negligent violation by the debtor of any obligations under the law, including after the closure of the proceedings, but also the commission of fraud to the detriment of creditors committed within three years of the closure of the proceedings. And the circle of uncertainties does not end here. All the effort made by the debtor can be deleted once the request for discharge of debts is rejected, in the sense that it returns to the principle of unlimited liability regulated by art. 2324 (1) of the Civil Code, the debtor being bound by all historical or current obligations, being calculated including interest and penalties on them. However, does not the completion of a repayment plan and implicitly the finding of this by decision by the insolvency commission not automatically imply the fulfillment of the obligations by the debtor? It seems like a contradiction of the legislator the possibility of the court to refuse the discharge of debts, lacking in effect one of the essential purposes of the insolvency law, an effect that remains a simple desideratum. Here's how these promoted legislative ideal and *fresh start* become a system that is far too slow but also cautious towards the debtor, which in reality requires an immediate response from society.

That is why the Law on Insolvency of natural persons has received much criticism, including non-compliance with the standard set out in the guidelines of the European Commission Recommendation on a new approach to business failure and insolvency, which we mentioned above, namely the standardization of the period set for discharge of

debts up to a maximum of 3 years, the law violating this standard as deadlines of 1, 3 and even 5 years are prescribed, also the time from which these deadlines are counted, deadlines that are calculated from the date of closing the procedure and not from the date of the opening of the procedure, as calculated in other Member States' legislation, as well as in the mode of operation, in the sense that the discharge of debts is not an automatic effect but is carried out only at the request of the debtor. For example, in the French legal system, natural persons debtors in an irreparably compromised situation can obtain full and immediate debt discharge from the evaluation commissions, with the liquidation of assets and without going through a revaluation program, the debtors without assets, benefiting even from the faster forgiveness of debts [16]. For all these reasons, we could say that the law makes it difficult to revitalize the debtor's situation, through the excess of regulations and conditions, contributing to shaping the image of bankruptcy, the stigma still used in our society.

The reality is that, although four years have passed since the entry into force of this law, which was intended to be a starting point in helping over-indebted Romanians, very few people have resorted to its procedures. Worryingly, the law is far from having the impact that the legislator would have expected.

The perspective of a unified insolvency code. Comparative look: Singapore, India, Austria and The United Arab Emirates

The doctrine speaks more and more about the need to rethink consumer protection legislation, by drafting a genuine *Consumer protection code* to absorb Law no. 151/2015 on the insolvency of the natural person, such as GO no. 38/2015 on the alternative settlement of disputes between consumers and traders or Law no. 77/2016 on the giving in payment of real estate in order to settle the obligations assumed through loans but also the competition law, a code that will also apply the consumerist *vortex*, especially over-indebtedness but also the prevention of over-indebtedness. Such a legislative attempt existed a few years ago with regard to the drawing of an *Economic Code of Romania*, which absorbs the insolvency of professional traders.

On the other hand, why not look at another form of regulation. There is the possibility of integrating this special law of insolvency of simple individuals in the

Insolvency Code - Law no. 85/2014, all the more so as we observed during our research that the insolvency procedure of natural persons actually complies with the genetic code of insolvency proceedings aimed at professionals, a code modeled on common Union and international principles and which can only be interpreted unitary, in a logic of legislative harmonization. *Consequently, wouldn't it be much more useful to create a unified Insolvency Code?* We consider that, in terms of insolvency law, we are already talking about a solid legal construction, which tends towards an independent law, the insolvency law, which is required to preserve its identity and the evolution outlined *in globo*. [17]

If we take a panoramic look, we will find that the states oscillate between the regulation of a unitary law, common in the matter of the institution of insolvency, reuniting in a *common corpus* both the insolvency of natural persons, in their capacity as simple individuals, but also the insolvency of professionals, and, separate legislation, an option adopted by the Romanian legislator.

For example, *Singapore* benefits from a unified law for both consumers and companies. In addition to the USA, which remain a pioneer in reorganisation and the development of a "debtor rescue culture" in financial distress, and which enjoys a unified insolvency code, we look at the legal regime developed by Singapore, which stands out as having become, in a relatively short time, the leading Asian centre for debt restructuring and one of the leading centres worldwide, alongside London and New York. As such, 2019 marks the field of restructuring and insolvency in Singapore, given the long-awaited Insolvency, Restructuring and Dissolution Act - IRDA, passed in Parliament in October 2018 and which came into force in 2019, an act that consolidates personal and corporate insolvency laws, linking both personal and corporate debt restructuring into a single legislative corpus. [18].

Here we also mention *India*, which recently enjoyed major changes to the Insolvency and Bankruptcy Code 2016 (IBC), bringing all insolvency proceedings in India under one "umbrella", namely the insolvency framework applicable to limited liability companies (Insolvency and Bankruptcy Council Rules of India - IBC Rules) and that applicable to inatural persons (Insolvency resolution for natural persons 2016). [19]

In Austria [20], the idea of dividing insolvency regulations has been abandoned since 2010, with the introduction of the Austrian Law on Insolvency (Insolvenzordnung, hereinafter IO) creating a unified insolvency procedure for both natural persons, regardless of their status as entrepreneurs or consumers, as well as legal persons. For consumers, Austrian law regulates two additional debt cancellation instruments: the payment plan (Zahlungsplan) and the revenue collection procedure (Abschöpfungsverfahren). These tools are open to all natural persons, whether or not they run a business. However, distinctions are made between entrepreneurs and non-entrepreneurs in terms of the structure of the procedure.

Moreover, the recent legislative initiative becomes very interesting, in that the Austrian legislator has simplified the transition between individual forced execution, governed by the Law on forced execution (Exekutionsordnung, hereinafter EO) and collective forced execution under insolvency law. According to the EO, forced execution proceedings should be suspended if the so-called “obvious insolvency” (offenkundige Zahlungsunfähigkeit) is detected and in such cases, creditors should request the opening of insolvency proceedings in order to recover claims.

We also find in Austrian insolvency law the key element of good faith, the main reasons behind this change being the social issues, namely the fact that people who are in a hopeless economic situation must be discharged from debt in a relatively short time. Therefore, the purpose of this “consumer insolvency” (Privatkonkurs) is, *inter alia*, to enable the debtor to have a fresh start. Individual debt discharge has been the focus of attention because it is assumed that every bona fide debtor is exempt from debt after a certain period of time, even if the creditors do not receive any payment during this time. The most recent amendment to the provisions on insolvency proceedings entered into force in July 2021, precisely to align the IO with the European Directiveon restructuring and insolvency (EU 2019/1023). Obviously, the effects of the Directive will be much more uniform, without “short circuits” of interpretation, given that Austria has a unified Insolvency Code, unlike Romania, which has so far created a draft law transposing the EU Directive intended for professionals and not correlated with related laws such as Law no.151/2015 on the insolvency of the natural person, as we analyzed in the second section.

Under Austrian insolvency law, natural persons as consumers have three different options for debt discharge, as in our legal system, namely: (a) on the basis of a reorganization plan (Sanierungsplan, art.140 et seq. of IO); (b) on the basis of a payment plan (Zahlungsplan, art. 193 et seq. IO); and (c) the absorption procedure (Abschöpfungsverfahren, Art.199 et seq. IO).

We must mention that in Austrian law, the opening of insolvency proceedings is not an option for the consumer as in Romanian law, where the legislator stipulated this obligation only for professionals under certain conditions expressly regulated by law. Thus, in Austria the insolvency proceedings can be initiated only on the basis of a request, which can be lodged by a creditor or the debtor, the latter being obliged to apply for insolvency under art. 69 (2) of the IO. The initiation of insolvency proceedings requires the insolvency of the debtor (Zahlungsunfähigkeit), as well as assets to cover the costs (kostendeckendes Vermögen), a kind of over-indebtedness stipulated in our law, over-indebtedness which is not assimilated to an irreparably compromised institution the procedure can be accessed on the basis of a repayment plan but only on the basis of liquidation of assets as we analyzed in the second section).

Even more interesting is the next point made by the Austrian legislator, namely that if the undertaking was completely closed at the time of the request, the debtor is considered a consumer. The origin of debts becomes irrelevant, they can come even from entrepreneurial activity. The procedures are cascading, in reality achieving continuity, simplification and access of debtors to insolvency mechanisms, which can be transformed in the same process, depending on the specifics of the debt and the activity of the company, which is facilitated by legislative unification.

As a final important aspect of Austrian insolvency law, we note that in 2020, 54,688 people received support from one of the 10 recognized debt counseling agencies in Austria. Of the 7,296 insolvency proceedings opened, 67% of all debtors were accompanied by a recognized debt counseling agency. Practice shows that debtors with no income or below average income are mainly represented by a debt counseling agency. At the same time, the number of people seeking advice from a debt counseling agency is growing. This is how counseling plays a key role in promoting and accessing this procedure, which is still viewed reluctantly by our consumers. Free counseling is

essential, as recourse to the services of a lawyer involves high costs and hence the waiver of insolvency proceedings. At the same time, in addition to the direct support given to debtors in insolvency proceedings, emphasis is also placed on the long-term stabilization of the debtor's financial situation. Debt counseling agencies are also active in the field of financial education through special provisions for children, young people and adults. The goal is to provide timely financial education and prevent over-indebtedness later. Debt counseling agencies therefore perform not only legal but also economic and social activities.

As a comparative law perspective, we also dwell for a moment on the insolvency of the natural person regulated in the United Arab Emirates (UAE),[21] an analysis that we found interesting primarily because of the diametrically opposed culture of our culture. In contrast to Austria, Singapore or India, the Emirates, as well as Romania, have separately regulated the insolvency of the natural person. EAU Insolvency Law no. 9 of 2019 is still in the process of "groping in the dark", creating a basis for practice that will give consumers the courage to access these rules.

Unlike our law, which gives the possibility to approach one of the three procedures, the EUA law provides only two procedures, similar to the insolvency law dedicated to traders, respectively the implementation of a settlement plan or bankruptcy. What is essentially different from our law is that the procedure followed will be different depending on the number of working days in which the debtor has not paid the debts and not depending on the possibility of recovery, as in our system. We thus discover a completely different vision. In this sense, in case of non-payment of debts within maximum 50 working days from the due date, a settlement plan will be applied, and exceeding this threshold of 50 working days will automatically involve the liquidation procedure. Basically, the regime is much more severe.

Settlement plans are under the supervision of the courts of the United Arab Emirates and only the debtor can apply for a settlement plan. Thus, a solvent debtor may request recovery on the basis of this financial liability settlement plan, provided that he has not suspended the payment of debts for a period of more than 50 consecutive working days. Upon submission of the request, the debtor must provide the court with details of his financial situation, information on income from the United Arab Emirates or offshore,

cash flow forecast and sources of cash flow for the next 12 months, details of all assets inside or outside United Arab Emirates and the approximate value of each asset, as well as details of all money transfers during the 12 months prior to the request. If the request is accepted by the Court, an expert will be appointed, as in our case an administrator of the proceedings, who will publish a summary of the Court's decision and invite all creditors to present their debts and claims against it. In the same way as our regulation, if the Court accepts the debtor's request, all legal proceedings against him and all enforcement proceedings against his assets are suspended until the completion or expiration of the settlement plan, while secured creditors can secure their guarantee only with the consent the court.

It is important to point out that in the case of bankruptcy proceedings, it can be initiated either at the request of the insolvent debtor or at the request of a creditor or group of creditors to whom the debtor owes more than AED 200,000, unlike our law which stipulates that only the debtor may apply for insolvency proceedings. The debtor will be rehabilitated immediately if he pays all his debts. At the level of the United Arab Emirates, the Insolvency Law is considered to be an evolution that has been anticipated for many years and will be a welcome development for many people living there.

However, in relation to the insolvency of natural persons regulated at EU or US level, we notice that the law is much stricter and more severe in the UAE, insolvency is no longer a consumer option given that UAE law also gives creditors the opportunity to apply directly for bankruptcy. Under these conditions, the insolvency law will certainly make its presence felt in the UAE and perhaps an organized execution of the individual debtor is much more advantageous as opposed to a chaotic forced execution that could result in our case from the application of the provisions of Civil Code and Civil Procedure Code without regard to the debtor's state of difficulty.

Conclusions

Invoking the idea of the title of our research, an idea from which we started and which resides in the urgent need to reform the insolvency law of the natural person, a law "covered in dust", artificial, intangible, we will try to summarize some conclusions that can reset the law in certain key issues. First of all, we consider it appropriate to establish

concrete measures to rehabilitate bona fide debtors, who face problems beyond their control, in order to ensure the effective revitalization of their situation, through access to finance, credit, reintegration into the labor market, professional reconversions, specialized counseling in areas of interest, etc.

It is also necessary to discuss as soon as possible the regulation of the prevention of insolvency of natural persons, with an emphasis on counseling, prevention being a key element of EU Directive 1023/2019 to be transposed at national level and which should not be strictly limit yourself to professionals. Moreover, the prevention of over-indebtedness should not be treated as a utopia, the duties of information, counseling and warning being even obligations derived from the requirement of good faith of the professional, that is why we speak of a consumer-professional interdependence in regulating over-indebtedness and maintaining good faith, as key elements in accessing a reorganization, restructuring and second chance procedure.

It is interesting to consider the legislative model adopted by Belgium, where any resident natural person can apply for an *arrangement* if they are unable to pay their debts and have not indicated their intention to apply for insolvency proceedings. Moreover, with regard to debt discharge deadlines and the facilitation of these mechanisms and regulations, one could follow the model outlined by England and Wales, which are currently enjoying the fastest debt discharge processes at European level in favor of over-indebted debtors, offering a complex system that tries to quickly reintegrate into the economic circuit, in some cases even in one year. This system prioritizes efforts to prevent indebtedness through regulation, counseling and education, with alternative, non-judicial procedures for the automatic discharge of debts in certain situations and conditions through insolvency agreements under the coordination and monitoring of an insolvency service specially constituted. Such measures are also heavily promoted in the United States, allowing the debtor a fresh start in economic relations.

These aspects of comparative law once again reinforce the idea of the need to shape social responsibility in regulating economic processes at the national level, supervised rehabilitation, financial education and social assistance becoming pillars of balance in the current socio-economic context.

We must accept the effort to provide support to the National Authority for Consumer Protection, which provides advice and guidance to people with unpaid debts for at least 90 days when they want to open an insolvency procedure, both regarding the preparation of the insolvency file and and the procedure itself which should contribute to their financial recovery. At the same time, the Authority offers free advice to consumers who have debts higher than the value of all goods they own (at least 15 gross minimum wages per economy) or who have an irreparably compromised financial situation, and to facilitate access to information, ANPC has also created a *Guide of natural person insolvency* [22]. In addition, we can "cling" to a new hope of legislative reform of the insolvency of the natural person, given that ANPC recently announced the preparation of a new project in the field of insolvency of natural persons, for which it will apply for a grant from the European Union, so as to provide real support to the indebted consumer and to manage in the most efficient and responsible way the economic crisis generated by the medical one, which has occurred in the last two years. [23]

Finally, since we did not intend to make a complete analysis of this normative act, we cannot fail to note that the Law on insolvency of natural persons, although not a perfect one, is intended to be quite complex and comprehensive, but all changes necessary will appear together with the sedimentation of the matter in practice, followed by the necessary corrections made by the legislator.

Last but not least, we believe that educating consumers, investors, business participants about the benefits of insolvency proceedings, second chance policies and restructuring laws, which today target both individuals and professionals, as well as the administrative-territorial units, represent an essential and imperative aspect necessary in our society.

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