REORGANIZATION OF COMMERCIAL COMPANIES IN THE CONTEXT OF EUROPEAN INTEGRATION

ELENA DOINA LEPADAT
"TIBISCUS" UNIVERSITY FROM TIMISOARA, 1/A DALIEI STREET, TIMISOARA, ROMANIA, elena.lepadat@yahoo.com

Abstract:
In this paper we presented the different strategic options of legal reorganization and at the same time we dealt with the problem of these options in the context of legal, national and community regulations. Our goal was also to present the mechanisms, both economical and legal , of prevention, detection, and treatment of difficulties, as the reorganization of a company and the continuation of its existence largely depend on the capacity to prematurely detect the problems that might threaten its functioning.

Key words: *insolvency, ad hoc mandate, preventive concordat*

JEL classification: *K, K00*

The needs of carrying out economic activities in the present day conditions, when Romania is a member of the European Union, as well as the necessity to harmonize our legal regulations with the community ones imposed the adoption of new normative acts concerning the reorganization of commercial companies starting with the Law of Insolvency no. 85/2006 and continuing with the Law of Bankruptcy for Insurance Companies (Law no. 503/2004), with the Ordinance referring to the bankruptcy of credit institutions, applicable to the entities regulated by the capital market too, (OG no. 10/2004) with the Law concerning trans-border insolvency(Law no. 637/2002) with the Urgency Ordinance applicable to the profession of insolvency practitioner (OUG no. 86/2006) with O.U.G. no.173/2008 concerning the modification and completion of Law no. 85/2006, with Law no. 381/2009 etc. as well as The Regulations for Insolvency Procedures issued by the European Commission (Regulation no. 1346/2000) with ulterior changes and completions, that are directly applicable in the internal law.

Law no. 85/2006 concerning insolvency specifically provides the proceedings of reorganization as a measure to redress the economical activity of a company in insolvency or in an imminent state of insolvency. This Law was the result of Romanian legal concerns to which were added the demands of the European integration. The process of legislative amendment had its starting point in the community acquis in the field of insolvency. (The Council Regulations 1346/2000 regarding insolvency proceedings, The Directive 2002/74/EC of 22 September 2002 for the modification of the Directive 80/97/EEC regarding the protection of employees in the case of the employer's insolvency, The Directive 2001/17/EC of 19 March 2001 regarding reorganization and bankruptcy of insurance companies, Directive 2001/24/EC regarding reorganization and bankruptcy of credit companies). The adoption of legislation was assumed as a task in the negotiation process

The legal framework of insolvency can be in agreement with the objective requirements of the transition economy only if it is harmoniously integrated within the system of national legislation, within the ensemble of rules for the economic activity. These clear and coherent regulations set the legal limits of market behavior and the sanctions for their breaking, giving the concerned entities the safety and predictability that are necessary for a correct activity, including the confrontation with their own or

their business partners' insolvency, which is a phenomenon inherent to the market economy.

Adequate insolvency legislation cannot and should not attempt to control the economic laws of the market, especially the freedom of competition between prosperous entities and insolvent ones. The main goal of the law of insolvency is to institute correct operating and treatment criteria towards the insolvent debtor. In a more restricted meaning, the insolvency law contains norms of collective proceedings for the forcible sale against some entities. In a larger sense it is extended to the legal dispositions that regulate the ampler effects of the economic phenomenon, regulations belonging to the laws of commercial companies, of banking activity, of consumer credit, of commercial competition, of labor legislation, of taxation, of procedural law etc. that is why the insolvency law should state as precise as possible the relation it has as a special law with the "common law" to which it resorts as to a subsidiary (for example the relation to the Code of Civil Procedure). At the same time complementary legislations should offer adequate solutions for the protection of creditors and for the right balance between the interest of creditors and the legitimate interests of debtors, for the protection of employees through preserving their working places,.; they should offer uniform and mandatory standards for accounting and for financial statements, the penal depression of antisocial deeds in the field, an efficient system of guarantees and the facility of using them.

As a technical legislative modality, the legislator preferred to incorporate the texts that we mentioned into the Romanian law through their adaptation, especially through the synthesizing of the norms within the directives.The goal of legislative harmonization can be thus achieved without the identity of norms regarding commercial companies formulations may differ, solutions should be equivalent.

The regulation methods fall into two categories: *harmonized* and *uniform*.The first categories refers to the harmonization of certain aspects from the national legislations, in which commercial companies are to fulfill certain conditions common to all member states, the harmonization of the law of commercial companies was done by directives- some aspects were left for the states to decide. The obligation of the states was teleological in many of the 12 directives the states did not have a wide range of interpretation, due to the strict characteristic of this domain.

The second category of regulations refers to a uniform European legislation, which in the case of the group of economic interest has a national origin – French, but which in its final form-that of the European society - constitutes itself into an innovating solution from the legal point of view. The regulating of these entities was done through regulations; these were applied directly, without being transposed by the states. Therefore, under the technical aspect the community rules are uniform, still the regulations leave to the states the possibility of interpretation or of instituting supplementary conditions for the entities that we refer to..(GEIE, SEI, SEC) or of applying the national legislation.

James Hanlon underlined that all directives aim at a "harmonization, a "bringing closer" or " coordination", not demanding the states to introduce a uniform law in the matter of companies or only in respect to some juridical forms of commercial company (for example, in the case of incorporated companies). A proposal of standardization of European company law would be rejected because there are different traditions even within the same law system (Roman-Germanic), but also between the two juridical basins (Roman-Germanic and Anglo-Saxon).

Unlike the legislation of other states, the Romanian legislation only regulates the procedure of legal reorganization, a fact that does not rule out the possibility of a conventional reorganization. However, the law of insolvency is still far from perfect, leaving space for a long list of future amendments; the rules are slippery and full of…

exceptions, and the reality of insolvency proceedings in Romania is on many occasions far both from the law and from the rules or, in any case different from these.

In this situation a new and radical solution of treating the company difficulties is imperatively necessary in Romania. The debtor whose company is going through a remediable crisis should ask from his creditors a chance of redress through a a mechanism and a procedure outside the insolvency proceedings, even outside the court of law. Legal reorganization could be superseded by equivalent measures such as **preventive concordat**; this does not involve the decision of a court to declare insolvency, but a contract between debtor and the majority of his creditors concluded and carried out under the mediation of an insolvency expert; the failure of the contract should lead to bankruptcy.

In answer to these necessities, on the 13 January 2010, Law no. 381/2009 came into force. The law regulates two optional procedures for saving companies in financial difficulties. The new regulations offer the debtors the opportunity of saving their activity by resorting to amiable mechanisms and proceedings outside the legal insolvency and thus of avoiding the initiation of insolvency proceedings, such as they are regulated by the Law no. 85/2006.We notice that the new proceedings, the **ad hoc mandate** and the **preventive concordat** are available for companies that are faced with financial difficulties, without being in a state of insolvency.

Both procedures have the same goal, that of saving the company in difficulty so that it could continue its activity, preserve the working places and pay the company debts. However, the approach is different in the two procedures.

If we refer to the initiation of proceedings, we see that any of these two **pre-insolvency** procedures may be initiated by the company itself, through a request filed at the district court where the company headquarters is situated; the request should ask for the naming of an ad hoc authorized agent in the case of an ad hoc mandate or of a conciliator in the case of a preventive concordat. Both the authorized agent and the conciliator should be insolvency practitioners.

We should mention that the ad mandate is available to all companies with financial difficulties, while for initiating the preventive concordat the company in question is to fulfill certain conditions concerning its general reliability; some of these conditions are similar to those applied in the case of debtors for the Insolvency Law no. 85/2006, which gives the possibility of proposing a reorganization plan (for example it should not have a final sentence for fraudulent management, breach of trust, fraudulence, embezzlement, false testimony etc.)

The ad hoc mandate is a confidential short - term procedure (it does not last longer than 90 days), during which the ad hoc authorized agent has the task of determining the debtor and one or several of his creditors to reach an agreement for the overcoming of difficulties the debtor faces. Confidentiality plays an important role if we take into consideration the fact that any information the business partners of the company may be given about the initiation of a legal insolvency procedure against the company may seriously affect the credibility of the company.

On the other hand, the **preventive concordat** is to a certain extent similar to reorganization within the **insolvency proceedings**. The conciliator acts similarly to the legal administrator in the legal reorganization proceedings and collaborates with the debtor company to make a concordat offer that includes the concordat project and the recovery plan.

Once the concordat is approved by creditors and ascertained by the syndic judge, any individual action of creditors who signed the concordat against the debtor is suspended by the nomination of an ad hoc authorized agent; the time limit for the prescription of the right to demand the forcible sale for debts against the debtor is also suspended. At the same time the flow of interests, penalties and expenses concerning

debts to the creditors who signed the contract are also suspended by right. Both the ad hoc authorized agent who demands the forcible sale of debts and the conciliator are insolvency practitioners.

In order to make the concordat opposable to creditors who have not signed the concordat, including the unknown or contested creditors, the conciliator may recourse to the ratification of the concordat, which will be ordered by the syndic judge. As of the date of the order all forcible sale proceedings will be suspended.

Among the advantages brought about by the ratification of the concordat we can mention the facts that:

(i) during the duration of the ratified concordat the insolvency proceedings against the debtor cannot be initiated

(ii) following the request of the conciliator and under the condition of the debtor's granting guarantees to the creditors, the syndic judge may impose to the creditors who do not sign the concordat an up to 18 months extension of the date of payment for their claims, a period during which no due interests, penalties and expenses will flow.

As for the period for covering the debts set by the concordat, it may not be longer than 18 months from the date of the contract conclusion. Should the obligations stipulated in the contract not be fulfilled at the date when the initial duration of the concordat expires, the initial duration may be extended 6 months at the most, with the creditors' vote , at the conciliator's proposal.

Conclusions: Preventive concordat may be seen as a contractual negotiation with the creditors of the company in difficulty, in which the conciliator's experience and specific know-how will be used in order to create a restructuring plan of both the debtor's activity and of the agreeing creditor's claims so as to establish an adequate action- plan which will lead to the overcoming of the potential insolvency state of the respective company. The ad hoc mandates as well as the preventive concordat are deemed to be new pre-insolvency procedures aimed at saving the companies in difficulty.

BIBLIOGRAPHY

1. St. Cărpenaru, Drept comercial român, Universul Juridic, Bucureşti, 2008, p.628
2. P.M. Le Corre, Droit et pratique des procédures collectives, 3° édition, Dalloy, Paris, 2006/2007, p.181.
3. James Hanlon, *European Community Law*, Second edition, Sweet&Maxwell, London, 2000, p. 279.
4. Gh. Piperea, Drept comercial, Editura C.H.Beck, Bucuresti, 2009, p.177.
5. Gh. Piperea, Insolvenţa, legea, regulile, realitatea,Wolters Kluwer,Bucureşti, 2008, p.15.
6. Ion Turcu, Mădălina Stan, Compatibilitatea normelor Codului de procedură civilă cu specificul procedurii insolvenţei, R.D.C. nr. 12/2005, p. 9.
7. Ion Turcu, Legea procedurii insolventei- comentariu pearticole, Editura C.H.Beck, Bucureşti, 2007, p.18-19.