A NEW SANCTION IN THE ROMANIAN INSOLVENCY LAW

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Abstract:
At first sight, the intention of the Parliament to initiate a non-patrimony penalty, next to the patrimony one derived from setting out damage to be paid personally by the person that contributed to the debtor's insolvency state, seems praiseworthy. The years when the institution of personal liability determination in the insolvency procedures had no practical application, corroborated with the double civil penalty disciplined in the Insolvency Code, patrimony on one hand, for which the barriers existing in Law no. 85/ 2006 have been removed, and non-patrimony, lead to the conclusion that this time, the Parliament analyzed that institution and wished to transform it into a real payment instrument of receivables to the creditors.

Key words*: business, insolvency, sanctions*

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Introduction

In 1995, the first modern law of insolvency was regulated in the Romanian law. After several important legislative reforms, which followed the trends of the French Parliament, in 2006 Law no. 85 concerning the insolvency procedure was passed. Law no. 85/ 2006 that represented a profound reform of the provisions concerning the insolvency domain and the subsequent normative acts that provided several modifications to the legal text did not reform the core of the mechanism of personal civil liability determination.

Only recently (June 2014) the Insolvency Code entered in force, which indicated the particular interest of the Parliament to transform the civil liability determination in the insolvency domain from a mechanism characterized by inefficiency and practical inapplicability in an efficient and functional one.

Right now, the personal liability determination for members of management bodies is grounded on articles 138 through 142 of Law no. 85/ 2006 concerning the insolvency, as well as on articles 169 through 173 of Law no. 85/ 2014, the Parliament setting out the conditions, framework, and rules applicable to determining the patrimony liability of members of management bodies and / or insolvency monitoring bodies.

Patrimony civil sanction

According to Law no. 85/ 2006, the institution of civil liability determination of members of management bodies that committed illicit deeds and caused the insolvency state was limited as regards the functionality and application due to three reasons:

- impossibility to determine the liability of members of management bodies that would not submit the accounting documents of the debtor to the insolvency practitioner, time when any possibility to analyze the activity developed by the persons considered was practically annulled;

- the express and limitative character of the illicit deeds enumerated in article 138 paragraph 1 of Law no. 85/ 2006 for which the civil liability could be determined;
- the direct causality between the illicit deed and the damage that had to be proven as element of the tort civil liability.

The New Insolvency Code profoundly alters the institution of personal liability determination of the members of management bodies and / or monitoring bodies by the legal text provisioned by article 169 paragraph (1). The new regulation eliminates those three limitations, thus:

- for the first time in the insolvency legislation of Romania, the premises for determining the personal liability of the members of management bodies not collaborating with the insolvency practitioner for delivering the accounting documents is created. The Parliament stipulates in article 169 paragraph 1 letter d) a relative presumption concerning the guilt and the causality relation for the members of the management bodies that do not deliver the accounting documents to the legal administrator / liquidator;
- for the first time in the insolvency legislation of Romania, it is allowed the determination of the personal patrimony liability of the members of management bodies for any deed committed with intent. Although the Parliament takes over in the Insolvency Code the seven deeds set out as limitation (in article 138 paragraph 1 letters a – g of Law no. 85/ 2006 that became article 169 paragraph 1 letters a – g by renumbering of Law no. 85/ 2014) according to which the liability can be determined, within the same article letter h) is introduced, which refers to any other deed committed with intent.
- the causal relation required for determining the liability for the illicit deed and the damage is redefined by replacing the expression "caused the insolvency state" by the expression "contributed to the insolvency state". By using the "contributed" term, the domain of illicit deeds that can lead the legal person to the insolvency state comprises not only those deeds that directly caused the insolvency, but also those that represented a condition such an opportunity for producing the result. The relevancy of that modification appears in the meaning that between the deed and the insolvency state no firm causality relation must exist; the committed deed can represent a favorable condition for the appearance of the insolvency state.

The new regulations set out by the Insolvency Code are meant to revitalize the institution of patrimony civil liability determination in the insolvency area, creating the actual possibility for the persons guilty of the debtor entering the insolvency state to bear personally the damage caused to the creditors. The Parliament did not limit only to activating that mechanism, whose latent state has been called upon by experts for over 10 years, but it brought as a novelty in the insolvency procedure the non-patrimony sanction for those that are proven guilty of the debtor's insolvency state.

Non-patrimony civil sanction

The Insolvency Code introduces in article 169 two new legal provisions: on one hand, in paragraph 9 it is set out the court of law's obligation to send to the National Trade Registry Office the sentence ordering the determination of the patrimony liability of the

statutory director and, on the other hand paragraph 10 stipulates a non-patrimony civil sanction (interdiction to hold the director position for 10 years).

At first sight, the Parliament's intention to introduce a non-patrimony sanction next to the patrimony one derived from setting out the damage to be paid personally by the person that contributed to the debtor's insolvency state seems commendable. The years when the determination of personal liability for insolvency had no practical applicability corroborated with the double civil sanction stipulated in the Insolvency Code, patrimony on one hand, for which the barriers existing in Law no. 85/ 2006 have been eliminated and non-patrimony, leads to the idea that this time the Parliament actually analyzed that institution in a real payment instrument of the receivables to the creditors. Text of article 169 paragraph 10 provisions that the person to whom a final decision of determining the liability was given can no longer be designated director or, if he is a director of other companies, he will lose that right for 10 years since the date when that decision remained final. Thus, the conclusion is without a doubt that creating a

mandatory and not facultative non-patrimony sanction was desired and that it operates de jure (*ope legis)* and was not left to the discretion of the syndic judge. The nonpatrimony sanction stipulated by article 169 paragraph 10 must not be ordered by the syndic judge by the request of liability determination. It will acquire legal strength by the simple giving of a final decision of liability determination, its applicability being ensured by article 169 paragraph 9 that binds one to communicate that sentence to the Trade Registry Office.

Critiques and proposals

Nevertheless, when carefully analyzing article 169 paragraph 10, several critiques can be submitted. On one hand, although the liability determination is possible for the members of the management bodies and / or monitoring bodies within the company, as well as for any other persons that contributed to the insolvency state, the patrimony sanction is limited to the director position. That means the person against whom a final decision was given of liability determination cannot be designated director or, if he is a director of other companies, he will lose that right for 10 years since the date when that decision remained final.

Persons holding positions such as manager or shareholder can lead the companies, which positions are not considered by the legal text or those persons can even hold no position in the company they run. Practically, the legal text as it is now formulated allows, from my point of view, a series of manners of escaping the non-patrimony sanction. Being a sanction, the analyzed provisions are determined by interpretation and they cannot be construed by analogy. From my point of view, the patrimony civil sanction created by the Insolvency Code in article 169 paragraph 10 strictly refers to holding the director position, not being any restriction in connection to exercising the specific attributions of other decision-making positions[1]. Also in that context one can naturally ask which would be the situation of documents concluded (employment contracts, bank contracts, commercial contracts, etc.) by a person affected by a nonpatrimony sanction and acting while breaching the provisions of article 169 paragraph 10 of Law no. 85/ 2014.

In my view, for reaching its maximum efficacy, the interdiction should refer to any decision-making position within a company and not just to the director one; the actions forbidden to him matter and not the position in which they have been committed. My proposal that I believe would render the legal text efficient would envisage applying the

[1] For the contrary, please refer to R.Bufan, (2014) Tratat practic de insolvență (Practical insolvency treatise), Ed. Hamangiu, p. 834

non-patrimony civil sanction by the interdiction to run, manage, administer, directly or indirectly control a business, no matter the position held by that person.

Another criticism that could be brought to the new law text refers to the rigidity of the sanction that forbids the director position for a fixed 10-year period without considering the committed deed, the total amount of the caused damage or the paying of the damage set out by the decision of liability determination to the creditors. Although I acknowledge the preventive role of that sanction, I believe it is radical by the simple fact that it cannot be differentiated among various cases and more important, it cannot be lifted if the damage is paid to the creditors.

From my point of view, I believe that applying the non-patrimony sanction by the syndic judge is particularly useful, upon the request of the persons that can lodge also the petition of determining the personal liability, for a period between 3 and 10 years, and with the possibility that the syndic judge lifts that sanction when receiving the proof of paying the damage set out by the decision of liability determination. As well, I

believe that the possibility of lifting the non-patrimony civil sanction by paying the damage will lead to recovering the creditors' receivables in a shorter period of time, as against the perspective of being punished for a 10-year period no matter if the damage is paid or not.

Conclusions

Even if the regulation chosen by the Parliament as the non-patrimony civil sanction is questionable, as least a first step for that was made; its practical application follows to prove the efficiency of the legal text. The same cannot be said of correlating the provisions in the area of fraudulent bank transfers to the provisions in the personal liability determination, an aspect called upon by the doctrine[2] as being necessary, but which did not catch the Parliament's eye.

As a conclusion, one can state that the institution of personal liability determination of members of management bodies in insolvency faced an unprecedented evolution by the entry into force of the Insolvency Code. The real perspective of the members of management bodies of a debtor of being held personally accountable for the deeds committed prior to beginning the insolvency procedure but also during its development will certainly contribute to rendering more responsible the business environment participants and to recreating a natural climate in the development of an insolvency procedure in which the accounting documents can be analyzed and pertinent conclusions can be drawn in connection to those that contributed to the debtor's insolvency state.

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3. Law nr. 85/2014 published in Official Monitor no. 466 from 25.06.2014

[2] A.Buta, (2012), Raportul cu acțiunea pentru atragerea răspunderii fostelor organe de conducere a debitoarei, Anularea actelor frauduloase în procedura insolvenței, Ed. C.H.Beck, București, p. 438 și urm.