

GROUPS OF COMPANIES IN INSOLVENCY PROCEEDINGS - ROMANIAN AND INTERNATIONAL PERSPECTIVE

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Abstract

Insolvency proceedings in case of groups of companies is no longer a surprise but a reality that concerned in the last period of time the romanian and also the european lawmakers. Although at an intuitive level the understanding of this construction must not raise many questions it is proven that not always what you see is what you get, especially when insolvency proceedings are opened in case of groups of companies. The aim of this article is to offer a global image on the effort made on national and international level to codify and harmonize the insolvency law provisions in the field.

Keywords: *groups of companies, Romanian Insolvency Law, Council Regulation(EC) no.1346/2000, UNCITRAL texts*

Introduction

The economic crisis has generated increasing number of companies that have experienced failure of businesses. As the Communication no. 742/12.12.2012 from the Commission to the European Parliament, The Council and the European Economic and Social Committee “*A new European approach to business failure and insolvency*” revealed, from 2009 - 2011 an average of 200 000 companies went bankrupt per year in the Union and about a quarter of this cases have a cross-border element. In this context it was clear for the European legislator that changes need to be made in domestic insolvency legislation in areas with potential to hamper the establishment of efficient insolvency legal framework and also at the Insolvency Regulation no.1346/2000 level (the latter was presented as key action in October 2012 when the Commission launched Single Market Act II). There are some desirable changes in the national legislation to be made such as developing efficient early warning tools for prevention in the field of insolvency; promotion of a second chance to honest businesses and adoption of the measures that permit a clear distinction between honest and fraudulent bankruptcy; granting of a discharge period for honest entrepreneurs (Member States agreed on the need to harmonize the period to discharge to less than three years as stated in the Competitiveness Council Conclusion, May 2011, following the launch of the Review of the Small Business Act for Europe); harmonization of different deadlines set by national legislation required for the debtor to declare its insolvency; transparency of the claims filing and verification process; proper regulation for groups of companies; promoting restructuring plans, all aimed to increase certainty of cross-border investments by securing the legal framework and in particular by providing opportunities to recover firms in difficulty, especially small businesses.

This paper analyses one of the proposed segments of change, groups of companies, aiming to determine whether the changes regarding this subject offer a coherent answer for the difficulties faced in practice and whether the proposed definition and coordination actions in insolvency proceedings referred to insolvency proceedings of a group of companies, in EU

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provisions and also in national regulation, may conduct to better chances of recovery for the enterprises in difficulty.

1. Group of companies as subject of insolvency proceedings – the present and the future

A subject of the insolvency proceedings can be the group of companies which, in some authors' opinion, in the context of the new view regarding the professional and the enterprise, can have the quality of a professional that is exploiting an enterprise through the controlled companies within the group.¹ As a comment to the expressed position, we mention that the enterprise concept considered by them in the expressed analysis pertains to the Competition Law, as the community jurisprudence confirms that the term enterprise must be understood in the sense of an economic unit, even though legally this unit is made up of several natural or legal entities, a situation which is not particular to Law no. 85/2006, the special applicable law, irrespective of the provisions of art.3 align. 3 of the New Civil Code.

In order to have an overview on this subject, it is required to note the fact that an insolvency procedure is incidental not only to the private law legal entities which are registered with the Trade Register but also for instance to the joint ventures, foundations and agricultural companies; the very item 6 of article 1 align 1 of Law no. 85/2006 referring to any private law legal entity performing economic activities supports this statement. We can presume the fact that the legislator has considered the hypothesis of the private law legal entities which are registered in registers by means of which advertising is provided (the joint venture and foundations register or the agricultural companies register), whose main purpose is not performing economic activities. Pursuing with the analysis of the debtors categories which can be subject to the insolvency proceedings with a leap in time because it is temporally obvious that, at the time Law no. 85/2006 regarding the insolvency procedure appeared, the occurrence of the monist conception of the New Civil Code could not be considered, we secondly highlight the fact that, considering the appearance of the New Civil Code, it is required to reanalyze their scope. Starting from the definition of the enterprise concept, more precisely the exploiting of an enterprise, as it is proposed by article 3 align 3 of the Civil Code, as an organized activity exerted by one or several persons having or not a lucrative purpose, and of the professional in relation to the enterprise, more precisely to its exploitation according to article 3 align 2 Civil Code, as well as from art. 6 and art.8 of Law no. 71/2011 enforcing Law no. 287/2009 regarding the Civil Code, we can state that, at the moment, speaking about professionals, we exceed the scope of the trader and find in this multitude, besides the persons subject to registration in the trade register, also the persons exerting liberal professions, the public institutions exploiting an enterprise, entities without a juridical personality (simple companies or companies without a legal personality, such as pension funds, investment funds) and groups of companies which have been appreciated by some authors as holders of the enterprise².

We shall not insist on the questions raised in light of the new regulations by the enforcement of item 6 within art. 1 align 1 of Law no. 85/2006 under the conditions of art. 194 and the following, as well as of art.1888 of the New Civil Code for the enumerated categories of professionals, but we shall return, after this parenthesis, to the analysis of the group of companies as a subject of the insolvency procedure. De lege lata, we would however mention from the very beginning that there is no regulation of it as a debtor within the

¹ Gh.Piperea, *Introducere în dreptul contractelor profesionale*, Ed.C.H.Beck, 2011, p. 343.

² Fl.A Baias, E Chelaru, R.Constantinovici ,I Macovei , *Noul Cod civil, Comentariu pe articole*, Ed.C.H.Beck, București, 2012, p. 5.

procedure. The group of companies is regarded by some authors through the companies with a legal personality which make up its structure as being the holder of a complex enterprise, while the exploitation of the enterprise takes place through the companies pertaining to the group, as it is a single economic entity for the creditors and through the single insolvency risk for them³. Although we share the need to norm the group of companies as a complex structure, we do not believe that the inexistence till now of such an analysis is due to the hypocrisy of the formalism characterizing the juridical personality of the companies within the group⁴, but to a remediable regulation deficiency. Economically, the steps taken in order to determine the operation manner of the group, from the perspective of the consolidated financial reporting, is an important starting model, and we consider here the categories proposed by IASB (The International Accounting Standards Board) 2008:5 the controlling entity model (where the group is made up of the mother-company which controls its subordinated branches), the common control model (where the companies making up the group are jointly controlled by an investor) and the risks and rewards model (which means that the activity performed by an entity belonging to the group affects the fortune of the shareholders of another entity belonging to this group). However, legally, we believe that the attention must be drawn on the details related first of all to the defining possibility as a group having in mind both the shareholders structure of each company, and the transparency of the decision-making policy at the level of the entire group, while removing the control or influence presumptions of a group member on the other companies either by capital sharing, or by decisions imposed in a non-transparent manner by shadow directors/investors). In consideration of the fact that, in the proposal of the European Commission to modify EC Regulation no.1346/2000 on Insolvency Proceedings, a new chapter is included, intended for the group of companies, its implementation into the Romanian legislation is exclusively a matter of time. The romanian legislator included in the Insolvency Code adopted by the Government through Emergency Ordinance no.91/2013 a chapter regarding group of companies but unfortunately after the complaint filed by the Ombudsman, the Constitutional Court ruled that the law was unconstitutional. Hope did not die in the matter of a new Insolvency Law in Romania, and also in the matter of daring regulation of group of companies having in mind that in the structure of the new Law project no.90/2014 regarding the insolvency and preinsolvency proceedings⁶, this subject was retained.

Until this modification is made, however we believe that a solution of the courts of law⁷ by means of which a request for joining two files is admitted, where the insolvency procedure has been opened against two different debtors, even though they would belong to a group of companies structure, cannot be received in spite of any legal or opportunity reason, violating art.1, art. 2 and art. 31 of Law no. 85/2006, as the insolvency procedure is collective for the creditors, and its purpose is to cover the liabilities of the insolvent debtor.

Regarding the group of companies, it is undeniable its need of regulation. The coordination of the procedures opened against the companies belonging to the group in order to maximize the fortune of the group, without imposing successful solutions for a part of the companies to the detriment of other viable companies which shall prove to be 'collateral damages' of these solutions, the permanent cooperation between courts and practitioners involved in the open procedures, adopting an European Safeguarding Plan (the proposal

³ Gh Piperea, *Introducere în Dreptul contractelor*, op.cit., p 343.

⁴ Gh.Piperea, *Drept Comercial.Întreprinderea*, Ed C.H.Beck, București, 2012, p 367.

⁵ P.Ștefea, L.I.Viașu, D.R. Gabriș, *Considerații privind grupurile de societăți și situațiile financiare consolidate*, Studia Universitatis Vasile Goldiș Arad, Seria Științe Economice Anul 21/2011 Partea I, p 464, www.uvvg.ro

⁶ PL – x no.90-2014, <http://www.cdep.ro>

⁷ Dismissal of 03.09.2012 returned by the Court of Galați, Civil Section II, file no. 5739/121/2011*, BPI no. 15832/07/11/2012; by decision 796R of 12.11.2012, the Galați Court of Appeal has rejected the joinder request as not grounded.

belongs to INSOL Europe) are only a few of the desiderates expressed in practice and in the specialized literature in the field of companies groups. Also, we shall not exclude the possibility of changing COMI (center of main interests) in the situation of group companies, as this could prove to be an advantage for the effective capitalization of the assets, under the reserve of conciliating the provisions of grounds 4 and 20 of the EC Regulation no.1346/2000. The approach of the center of main interests of the group of companies is of interest considering the discussions launched in the specialized literature regarding its determination, as the theories debating the differences between the place where companies directly perform their activity and the one where the administrative and decisional control is constantly and transparently exerted on them⁸, the place where the central management being designated ECOMI for the group⁹, as well as the possibility of implementing an alternative which would offer a choice between the submission of a request for opening the procedure in the state where the center of the group is located (determined depending on certain criteria, such as identifying the location with the highest level of coordination of the activity performed by the companies of the group, the research of the law applicable on the territory of the state where that location is identified regarding the norms incidental to the reorganization or liquidation procedures, considered convenient at the group level) or the benefit of coordinating the procedures opened in several jurisdictions¹⁰.

2.The Report of the European Commission regarding the enforcement of the EC Regulation no. 1346/2000

Suggestions regarding the need to modify the provisions of the EC Regulation on Insolvency Proceedings have been made as far back as the first years of its enforcement, although it was admitted the extremely beneficial impact of a ruling with a mandatory juridical force among the EU Member States.

Further to the analysis of the comments provided by the specialized literature¹¹, the main criticism aims at the lack of a clear definition of the debtor's COMI, not treating the groups of companies within the EC Regulation, the missing part of the Regulation including the detailed procedural norms related to mechanisms of the national law of the member states, the weakness¹² of art.3 align 3 which provides the fact that the secondary procedure must be a liquidation procedure¹³, the need to establish a manner of cooperation and information among the courts of law and all the bodies qualified to participate in the opened proceedings, the urgency of including regulations which would be incidental in situations exceeding the Union (EU) borders, and last but not least the fact that according to art.45, it is possible to only amend its annexes. The changing proposals, object of the Report of the Committee on Legal Affairs, the opinions of the Committee on Economic and Monetary Affairs and the

⁸ Georg Friederich Schlaefter, Forum Shopping under the Regime of the European Insolvency Regulation, The International Insolvency Institute, International Insolvency Studies, Germany, 2010, <http://www.iiiglobal.org/component/jdownloads/finish/39/5922.html>

⁹ Hon.Samuel I.Bufford, Revision of the European Union Regulation on Insolvency Proceedings-Recommendations, International Insolvency Law Review, IILR 3/2012, Germany, http://www.arage-insolvenzrecht.de/Speech_Samuel_BUFFORD.pdf

¹⁰ International Insolvency Institute, Guidelines for Coordination of Multinational Enterprise Group Insolvencies, Paris, France, Twelfth Annual International Insolvency Conference, Supreme Court of France, 21-22 June 2012.

¹¹ Bob Wessels, Twenty suggestions for a makeover of the EU Insolvency Regulation, 2006, www.bobwessels.nl

¹² Gabriel Moss, Christoph G.Paulus, The European Insolvency Regulation - The case for urgent reform, 2005, <http://www.eir-reform.eu/uploads/papers/Reforms%20EC.pdf>

¹³ It is interesting to note that, according to annex B of the Regulation, as modified after the accession of the new wave of states to the EU, Romania brings in a liquidation procedure, the bankruptcy procedure, although according to art. 3, item 20 of Law no. 85/2006 regarding the insolvency procedure, the liquidation of the debtor's goods can also take place within the juridical reorganization, and this contravenes the Regulation.

Committee on Employment and Social Affairs have grouped the problems identified within the analysis period into 4 directions regarding: the possibilities of harmonizing the provisions included in the national legislations, proposals whose object is to modify the Regulation, the themes of the groups of companies, as well as bringing in, at the European level, a register allowing a fast dissemination of the information on opening an insolvency procedure in a Member State, as well as the deadlines for submitting the debt statements. On 15 November 2011, further to these steps, the European Parliament adopted a resolution containing recommendations for the Commission regarding the insolvency procedures¹⁴, while the document preserved the 4 directions contained by the Report of the Committee for Legal Affairs.

In the point of view issued on 08.02.2012 on the Resolution of the Parliament¹⁵, the Commission positively noted the existence of the consensus on the need to make modifications, but also the possibility of harmonizing certain aspects from the national legislations regarding the submission of the debt statements, qualification of the liquidators or that of bringing in the provisions on the groups of companies or an insolvency register, but also drew the attention on the need to deepen other elements included in the resolution, such as defining COMI, harmonizing the content of the reorganization or competition plans of two procedures – main and secondary – in the context of the single market.

In the matter of the group of companies the coordination of the insolvency procedures regarding companies of the same group there is a new approach in the Insolvency Regulation Proposal, unlike the current Regulation which deals with each company differently, ignoring the whole structure. The role of the liquidator is increased, acquiring the capacity to pursue proceedings regarding the other companies of the group, having the right to request the suspension of the open procedure against them or to propose the reorganization plan considered to be the most appropriate for the entire group. Although the proposal is beneficial, one must also highlight the fact that it was not intended to renounce the practice of opening a procedure within one single jurisdiction in the situation of the groups of companies with an increased level of integration, as in the case of the procedure instituted for the telecommunication group NORTEL, in which case the administration procedure was opened in England for all the companies of the group. Moreover, the Proposal establishes at art. 42 b the obligation to cooperate among courts which can directly communicate requesting their mutual assistance, and can also appoint a person or body to act according to their instructions. In the context of the manner of defining the group of companies in article 2 letters i and j of the Proposal, the court must appreciate the existence of the group starting from an extremely wide framework of elements and for this reason we believe that the solution for appointing the same liquidator for all the companies in the group would mean a less difficult starting point.

It is to be noticed in fact that, from the enforcement of the EC Insolvency Regulation, i.e. 2002, the legislations of the Member States are in a constant change, either because in some cases the attempts to stabilize the insolvency norms are in the search period, or because conception modifications are required considering the European trends to implement a culture of safeguarding the enterprise and grant new chances to the honest debtor. Under these circumstances, it can be noted that any proposal aiming at the modification of the Regulation is deeply rooted into the practices of the national legislations which have been faced with cross-border insolvency causes and in the policies established by each state in approaching this phenomenon. The permissivity of the Model Laws and the compromise they offer

¹⁴ Resolution of the European Parliament of 15 November 2011 containing recommendations towards the Commission regarding the insolvency procedures in the context of the EU law regarding the commercial companies, www.europarl.europa.eu

¹⁵ Follow up to the European Parliament resolution with recommendations to the Commission on insolvency proceedings in the context of EU Company Law, adopted by the Commission on 8 February 2012, www.europarl.europa.eu

precisely lies in the fact that they do not have the force of mandatory provisions and for this reason the freedom offered when sometimes adapting or adopting their provisions into the national legislation decreases the pressure of aligning the national concepts to the dispositions contained by such rules, and turns them into such appreciated harmonization means.

From the comparison of the proposals for the modification of the EC Insolvency Regulation with the objectives assumed by the Working Groups at UNCITRAL level, we can easily note that the identified problems are mainly joint (the treatment of cross-border insolvency – definition, categories of debtors, problems raised by the cross-border insolvency in the case of the groups of companies, the stringent need to cooperate and coordinate within the procedures), being anchored in the same concrete realities but, unlike the European legislator that has the duty to conciliate the transposition of these objectives in a unanimously accepted manner, so that the results are visible for a longer time, UNCITRAL can issue model norms without this pre-established mission, the Model Law regarding the cross-border insolvency 1997, the Practical Guide regarding the cooperation in the cross-border insolvency cases 2009, the Practical Guide regarding the Insolvency Law 2010, the Model Law regarding the Cross-Border Insolvency – The Judicial Perspective 2011, being the most eloquent in this respect.

Regarding the group of companies as a subject of the insolvency procedure, we shall not reiterate its importance because it has already been debated in the content of the work, but we shall focus on other aspects of the construction. It should be emphasized from the very beginning that the jurisprudence has had different approaches of the group of companies from one cause to another, starting from considering through the COMI interpretation that it is required that all the group companies be subject to the law of the state where the center of main interests for the mother-company (*Juzgado de lo Mercantil num.4.4.2009 -Hard Metal Engineering, S.L.U. : The Spanish Court of the First Instance has decided that it is competent to open the insolvency procedure against the three companies forming a group of companies - two of them are headquartered in Spain, and one is registered in Hungary, based on the following reasons in order to overturn the presumption included in article 3 of the Regulation – the entire production process taking place within the Hungarian company is managed according to the guidelines imposed by the Spanish company Metasint which owns 100% of the capital; the managers of the Metasint company reside in Spain and all the commercial transactions are also performed and executed on the Spanish territory*¹⁶.) is located, which controls the decisions of the entire group, going through the interpretation according to which the appointment of the same practitioner in all the open insolvency procedures for the companies of the group would offer greater advantages in their coordination (*Nortel Networks Romania LTD part of Nortel Group - the notification announcing the opening of the foreign procedure of administration according to the English Law, was published in Romanian Insolvency Proceedings Bulletin no. 945 on 26 February, 2009; The High Court of Justice of England and Wales, Chancery Division, Companies Court rules that COMI of the group is in England and the administration procedure must be opened by the same Court against all 19 companies belonging to this group, no matter where the registered office is located*) or, in other cases, getting to the interpretation that each entity of the group should be treated separately (*C-341/04 Eurofood in paragraph 36 of the Judgment of the Court about the presumption laid down by EC Insolvency Regulation in article 3(1)* :

“By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the Regulation”).¹⁷

¹⁶ <http://www.insolvencycases.eu>

¹⁷ <http://curia.europa.eu>

The definition of the group of companies brought in by the Proposal of modification of the Regulation is laudably built, but only contains verifiable and formal elements which lead to assessments of an entity as a group: either through the participation of a company (qualified as a mother-company) in building other companies or the control of a company exerted on other companies by means of the owned votes, the right to appoint or dismiss the management bodies, or through the contracts signed by the mother-company with its subunit.

We also consider that the treatment applicable to the group of companies would have required a deeper approach because the forms under which they can appear exceed by far the proposed structures in complexity, and the way the cross-border insolvency procedures take place, involving such structures cannot only come down to bringing in articles providing the cooperation and communication obligations (articles 42 a, 42 b, 42 c, 42 d of the Proposal for the modification of the Regulation) and in supporting these statements a few practical comments will be made.

First of all, the constructions of the group of companies, besides the vertical ones, specific for instance to the oil industry in which the mother-company has control over the distribution and service provision companies, the horizontal ones such as those specific to the media trusts in which the mother-company develops companies providing segments of products to be found among the ones provided by it or "kereitsu"¹⁸ type, specific to Japan (vertically or horizontally organized, whose feature is the reciprocal ownership of capital among the members of the group, organized around a bank which provides the financial resources of the group companies), can also appear under the form of entities such as those meant to limit the effects of bankruptcy (Special Purpose Vehicle or SPV also known as SPE, Special Purpose Entity) constituted by a company (sponsor) through the transfer of goods within the SPV, goods which cannot be followed by the creditors of the sponsor firm (although sometimes the courts can characterize the transfer of goods as a guaranteed financing fact, and consequently instruct on reintegrating them in the balance of the sponsor)¹⁹ or under the form of income trusts (many of these companies can be found in jurisdictions such as Bermuda, Bahamas, Jersey which can refuse the repatriation of the goods²⁰) meant for isolating the income-producing goods which could be followed within an opening of the bankruptcy procedure, belonging to another company (mechanisms similar to the fiducia contract, recently included into the Romanian legislation by means of the New Civil Code), while such offshore trusts offer, besides the rapidness of constitution, the complete confidentiality, as well as the protection of goods.²¹ The connections between the companies which are part of such constructions are often difficult to prove, as the formal criteria enumerated by the Regulations Proposal are not applied.

Second of all, we consider it extremely important to clarify the manner in which the request for opening the insolvency procedure shall be dealt with; from this point of view, in practice, new questions can occur which have different solutions in the legislation of the member states. Part of these questions could regard the following:

- the possibility of submitting a request which would include all the companies in the group (in which case certain courts could state that they cannot give a verdict in this manner for the need to have one single main procedure with several secondary procedures, and in the absence of a group COMI regulation we shall return to the same place of interpreting the national courts aiming at localizing the center of main interests for all the group companies);

¹⁸ A. Istocescu, *Management comparat internațional*, Ed.ASE, București, 2005, pag.171.

¹⁹ Gary B.Gorton, Nicholas S.Souleles, *Special Purpose Vehicles and Securitisation*, January 2007, <http://www.nber.org/chapters/c9619>

²⁰ Michael Sjuggerud, *Defeating the self-settled spendthrift trust in Bankruptcy*, Florida State University Law Review, Volume 28, Number 4, 2001, <http://www.law.fsu.edu/journals/lawreview>

²¹ Magdalena-Daniela Iordache, *Gruparea de tip trust*, Revista română de Drept al afacerilor, ed.Wolters Kluwer, nr.6/2011, pag.83.

- the issue of extending the procedure also over the companies which are not insolvent or in a period of financial difficulties (such an extension could be beneficial in a reorganization procedure but has several disadvantages such as an inequitable instrumentality of the creditors, application of periods of suspending the executions which could damage the creditors of the company which is not insolvent, the possibility for the mother-company to continue its activity during the period of financial difficulty to the detriment of a solvable company, clearly affected by this action);

- the treatment of the transactions concluded inside the group from the perspective of the actions in annulment of the patrimonial transfers;

- the existence of several creditors committees or the establishment of their single committee, for all the companies of the group against which an insolvency procedure has been opened; the application of the real consolidation within the group, which implies the consolidation of the goods and debts as belonging to one single entity in the situations in which the separation of the goods is not possible because of the group construction (a fact which would imply a rearrangement of the national and European concepts regarding the identity of the legal entity);

- the appointment of a single insolvent practitioner, an apparently beneficial thing but which also has the disadvantage of the conflict of interests (the Regulation Proposal identifies the possibility of the occurrence of such a conflict within article 42 a, but the reference is made to distinct procedures, applicable to the companies of the group).

In our opinion, the definition inserted within the Proposal should be modified in the sense of defining the group of companies not only as a formal relation, but also as a structure within which the constitutive companies are contractually, financially or economically interdependent, which should be proved at the same time as the request to deal with these companies as a group because several times, this interdependence is not known by the third parties that have the certainty of contracting with separate juridical entities, and in a request for opening the insolvency procedure expressed in such situations, we consider it opportune to solve the mystery of this interdependence to the benefit of the creditors.

The European Parliament adopted a legislative Resolution on 5 February 2014 on the December Proposal of the European Commission suggesting around 60 amendments having regard to the opinion of the European Economic and Social Committee and to the report of the Committee on Legal Affairs(the Committee had 69 amendments).As for groups of companies the EP legislative resolution extended the approach beyond the need for cooperation and coordination of the proceedings related to such a structure . Some of the most interesting proposed changes are²²:

- a new definition of a group of companies and of the parent company (the controlling criteria of the parent company from the Article 2 point j was eliminated so that the parent company in the proposed amendment means the company which controls one or more subsidiary companies; also the parent company role is in accordance with the Directive 2013/34/EU of the European Parliament and of the Council);

- introducing a new 20aa Recital underlining that a group coordination proceedings are ment to strenght the restructuring through the coordinated conduct of the proceedings and should not have a binding role for individual proceedings ;

- an important clarification was also made in case of Article 42 a, paragraph 2, subparagraph 1, point b, so that the exercise of the cooperation referred to in the paragraph 1 of the Article 42 a shall explore, according to the new content of point b, the possibilities for restructuring the group members subject to insolvency proceedings;

²² European Parliament legislative resolution on 5 February 2014 on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation(EC) No 1346/2000 on insolvency proceedings , www.europarl.europa.eu

- new provisions regulating opening of group coordination proceedings(Article 42da), tasks and rights of the coordinator(Article 42db), court approval of group coordination plan(Article 42dc).

3. The group of companies in national provisions

A new indisputable subject of the insolvency procedure is the group of companies, for which reason we consider it important to assign it some comments which would dedicate it a defined role.

According to article 127 alignment (8) of Law no. 571/2003, the single fiscal group is made up of juridically imposable independent persons, established in Romania, that are in close relations from the organizational, financial and economic point of view; the economic aspect is clarified by item 4 of the methodological norms (GD no. 44/2004) for applying article 127, by owning the capital of these companies directly or indirectly to a proportion of over 50% by the same shareholders. Starting from the structure laid down by the fiscal norms, we suggest that the group of companies be defined as two or several interdependent companies by owning most of the shares by a company in other companies exerting control or dominant influence on them. The interdependence is manifested by one company, called mother-company, owning at least 50% of the capital of another company; the control shall be manifested also by the right to appoint or dismiss the components of the executive or control bodies of the controlled company, while the dominant influence regards the decision-making contribution in the financial and operational policy of another company. It would also be very important to bring in certain dispositions regarding the coordination and cooperation within the procedure as far as the group companies are concerned, for which reason we suggest the regulation of the possibility to submit a joint request for opening a procedure, while all procedures would be opened within the same court, by derogation from the rules provided by article 6 of Law no. 85/2006, on condition that the procedure opening conditions are complied with, while the same proposal is also applicable to an introductory request expressed by the creditor against several companies of the group. Of course, there are situations in which not all the group companies are insolvent, which leads to a new proposal for derogation from the current dispositions of the insolvency law, namely granting the possibility to acquiesce to the joint request of opening the procedure. Moreover, we suggest the coordination of the procedures opened by the court for each company of the group by establishing the same deadlines for continuing the procedure to the extent to which this is possible or at least by avoiding the substantial differences between the deadlines granted in each file. For the cases in which they shall not appoint the same insolvent practitioner for all the companies of the group, we consider it opportune to regulate the manner of cooperation between the appointed practitioners, under the form of regular reports, containing the measures proposed or performed by each of them within the administrated procedure, the points of view expressed in the assemblies of the creditors, the proposals of the creditors' committees; the reports would be submitted at regular intervals within each of the ongoing procedures.

Conclusions

It is never too late to give the insolvency of enterprise groups the deserved appreciation especially when this construction is quite common and the new tendencies in national and European regulations as presented are the certain proof. What is interesting to observe is that in the case of group of companies, the economic reality was some steps ahead of the legal architecture putting some pressure on the latter so that the debate between entity law on the one hand and the recognition of a structure based on economic facts (enterprise law) on the other hand, is a subject to be followed.

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