

The Access Conditions of the Natural Person to the Insolvency Procedure in Romania

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Since the beginning of 2020 in Romania, the COVID-19 pandemic has been exhibiting its negative effects. As expected, the hardest hit were the ordinary citizens who, overnight, awakened to reduced wages or downright joblessness. Moreover, the year 2021 has brought price increases in all areas, from basic foodstuffs to electricity, gas, fuels. The over-indebtedness of a large population of individuals has become the norm under the above conditions. The insolvency proceedings law for individuals seemed to be a solution for their over-indebtedness predicament, but we have found that this law is not performing at its true potential. In addition to a complex application form requested of the simple citizen, we contend that the access conditions to the insolvency procedure of the natural persons can be simplified and improved. Given the economic conditions in Romania, along with the reduction in the living standard, the legislator will have to give priority to the possible legislative solutions that will offer the indebted a fresh start.

Keywords: *Insolvency; Natural person; COVID-19*

Introduction

The central element of the insolvency proceedings is the individual debtor.

Since Art. 1 of Law no. 151/2015 outlines the persons covered by law, it is mentionable that this procedure aims to establish a collective procedure for the recovery of the financial solvency of the natural person debtor who is in good faith. The debtor and his/her property rebalancing are the focus, while the creditors' interests are not positioned in the foreground. This prioritisation is a natural one in the context in which the individual debtor, such as a legal entity whose financial situation is irreparably compromised, is not eliminated or ignored. Regardless of the “severity” of the patrimonial damage of the natural person, he/she must be offered the possibility to carry on with life. This “protective care” taken by the legislature for individuals experiencing financial difficulties may seem unfair to other people who struggle to overcome difficult financial situations, but the conditions imposed on the debtor for access to the procedure and its success are intended to select only individuals meriting these benefits.

The Romanian legislature has adopted a separate scheme for consumer insolvency, with major substantive differences as well as with procedural differences, compared to the insolvency applicable to professionals¹, establishing a

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¹Bufam, Deli-Diaconescu & Moțiu (2022) at 1112.

procedure.series of conditions for the individual natural debtor to have access to the

The Debtor, a Natural Person in Good Faith

The natural person debtor covered by law, for any of the three insolvency proceedings, is the modest individual whose obligations do not result from the operation of an enterprise².

The jurisprudence³ has established that the debts of the natural person, coming from the guarantee of some loans for a company where he/she holds the position of statutory administrator, result from the operation by him/her of an enterprise, having not fulfilled the legal condition provided in Art. 4 paragraph (1) of the law for opening the insolvency procedure. Also, in the situation where the debts of the natural person represent obligations originating as a result of attracting personal liability (for the liabilities of an insolvent company according to Law no. 85/2014 or obligations arising from liability for a company's tax claims under the Fiscal Procedure Code), the court⁴ found that the Insolvency Commission's decision to reject the request to initiate the procedure was correct, as these obligations resulted from the exploitation of an enterprise.

The literature⁵ has shown that the notion of the consumer can be used in the sense of a natural person whose undertakings do not stem from professional activities. This notion of consumer includes, *de lege lata*⁶, any natural person or group of natural persons constituted in associations, who act for purposes outside the commercial, industrial or production activity, artisanal or mercantile. Its further illustrations that under European rules, which are binding in national law, the definition of consumer includes only natural persons acting outside the business arena.

The debtor is the only one who may initiate the insolvency procedure, according to Law no. 151/2015⁷. The initiation of the procedure by the creditors or the ex officio notification is excluded. The insolvent debtor may submit to the Insolvency Commission a request to open insolvency proceedings based on a debt repayment plan. If the debtor avows that his/her financial situation is irreparably compromised and that a debt repayment plan cannot be drawn up and implemented, he/she may request opening insolvency proceedings via asset liquidation directly from the competent court. If the debtor meets the conditions

²Art. 3 Cod civil defines the notion of „operation of an enterprise” as the systematic exercise of an organised activity consisting in the production, administration or alienation of goods or in the provision of services, regardless of whether or not is for profit.

³Decision no. 464 of 27.05.2020 pronounced by the Dâmbovița Court, unpublished, www.rolii.ro

⁴Civil sentence no. 2490 of 12.06.2020 pronounced by the Ploiești District Court, unpublished, www.rolii.ro

⁵Dețeșan (2015a) at 25 et seq.

⁶Art.2 para.(1) of Law no. 193/2000 on abusive clauses in contracts concluded between professionals and traders

⁷Art. 6 Law no.151/2015.

from Art. 65 of the law⁸, he/she may submit a request for the application of the simplified insolvency procedure to the Insolvency Commission.

As only the natural person debtor may make the request to open insolvency proceedings, he/she must have full exercise capacity, i.e. the ability to conclude civil legal acts alone⁹. The doctrine¹⁰ defines the capacity of full exercise of the natural person as the human attitude to acquire and exercise civil rights and to assume and exercise civil obligations by concluding, personally and unaccompanied, all civil legal acts.

If the capacity of the natural person, i.e. the ability to have civil rights and obligations, begins at the person's birth and ceases with his/her death, the full capacity to exercise begins at the age of 18, when the person enjoys the presumption of capacity. This can be contested only if proof of the prohibition of that person is proved or if the lack of discernment is proved.

The Civil Code establishes, by exception to Art. 39, the fact that a minor acquires, through marriage, the full capacity to exercise. If the marriage is annulled, the minor who was in good faith at the conclusion of the marriage retains his/her full capacity to exercise. Thus, only in exceptions, the natural person, male or female, may marry after the age of 16, and the conclusion of the marriage generates effects regarding the anticipated birth of the exercise capacity.

The minor who has reached the age of 14, has limited exercise capacity. Legal acts may be carried out only with the consent of the parents or, as the case may be, of the legal guardian, in the cases provided by law and with the authorisation of the guardianship court. The minor with limited capacity may exercise acts of preservation, acts of administration which do not prejudice him/her, as well as acts of disposition of low value, of current character and which are executed at the date of their conclusion. According to Art. 42 Civil Code, the minor may carry out legal acts regarding work, artistic or sports occupations or those related to his/her profession, with the consent of the parents or guardian, as well as in compliance with the provisions of the special law, if applicable. In this case, the minor exercises the rights unassisted and also executes the obligations arising from these acts and may dispose of the acquired income single-handedly.

All these categories of natural persons who, by reaching the age of 18 naturally or by the legally established exceptions, have the capacity to exercise, may access the insolvency procedure provided by Law no. 151/2015.

Good Faith

Good faith is a fundamental notion in the Romanian legal system occupying a central place in the insolvency procedure of the natural person.

⁸Art. 65 of Law. 151/2015 provides the restrictive and cumulative conditions to be met for accessing the simplified procedure: reaching the standard retirement age or lower age if the debtor has lost half or all of his/her work capacity, has no traceable assets or income, debts do not exceed 10 minimum wages on the economy.

⁹Art. 37 Civil Code.

¹⁰Beleiu (2001) at 349.

Even the Romanian Constitution¹¹ maintains the obligation of Romanian citizens, foreigners and stateless persons to exercise their constitutional rights and freedoms in good faith, without violating the rights and freedoms of others.

The New Civil Code¹² raises good faith to the rank of principle by ruling that any natural or legal person must exercise his/her rights and perform his/her civil obligations in good faith, in accordance with public policy and ethics.

This notion is a complex one, difficult to define and measure in the legal field. The difficulty lies in the fact that good faith, *bona fides*, refers to the truth, justice, and lawfulness perceived by each person. It is seen as a group of elements, namely good intention, diligence, legality and abstinence from harm to others, elements that are a consequence of the transfer of a group of psychological facts that make up honesty (loyalty, prudence, order and temperance) in the sphere of law¹³.

Good faith is a mental state characterised by the sincerity of the person that he/she had a correct representation of stating fact or law of existence at a given time, a vision that allowed him/her to make a decision or to have an attitude in a given circumstance, because man can distinguish between truth and falsehood, justice and injustice, good and evil, fairness and iniquity, lawful and unlawful¹⁴.

The entire procedure of rescuing the debtor in financial difficulty has, as its core, the natural person of good faith. In the context of insolvency, the notion of good faith holds the attitude of the fair and honest debtor who, without being seriously culpable in relation to the state of financial difficulty, will access the procedure provided by Law no. 151/2015, in order to benefit from a "fresh start" after a certain period of time.

The good faith required from the debtor is not limited only to the period of the insolvency procedure. It will also take the attitude of the debtor into account before opening the insolvency procedure as well as subsequent to the completion of the actual procedure.

In the pre-insolvency phase, in order to access the procedure, the debtor must provide a plethora of personal information to convince that his/her insolvency is not a scheme to deny creditor payment; that for reasons beyond his/her control, the state of financial difficulty was externally triggered. The analysis of good faith, with which the debtor acts, is assessed in light of the information provided by him/her in the request to open the procedure.

Art. 13 paragraph 5 of Law no. 151/2015 obligates the debtor to provide the following information:

- a) *the reasons that led to insolvency;*
- b) *the name/denomination of the creditors, their domicile/registered office, the value and type of the claim: certain or conditional, due or not due, showing the amount and, if applicable, the right or cause of preference;*

¹¹Art. 57 from the Romanian Constitution, Exercise of rights and freedom.

¹²Art. 14 Civil Code.

¹³Gherasim (1981) at 34-35.

¹⁴Păun (2016).

- c) *legal actions against the debtor's property, including, where applicable, enforcement proceedings initiated, precautionary measures applied;*
- d) *steps for extrajudicial renegotiation of certain debts undertaken by the debtor, prior to the formulation of the request to open insolvency proceedings;*
- e) *civil status;*
- f) *professional status;*
- g) *the amount of income from work and that assimilated to it, of the amounts of money due as a pension under social insurance or representing another category of social benefits, as well as of any other income, including income due under a property right, intellectual property and dividends received in a period of 3 years prior to the submission of the application, as well as the expected changes in income in the next 3 years;*
- h) *the debtor's assets, including the assets in common ownership in shares or in disinheritance, specifying other real rights other than the property right that the debtor holds over the assets of other persons;*
- i) *the accounts opened with credit institutions or financial investment companies by the debtor, as well as the accounts through which the debtor manages his/her financial or investment funds, as well as cash from these accounts;*
- j) *receivables owned by the debtor, as well as any real rights, other than property right, that the debtor holds over the assets of other persons;*
- k) *documents free of charge, as well as transactions of more than 10 minimum wages per economy completed in the last 3 years prior to the formulation of the application;*
- l) *the names of the persons to whom the debtor is currently performing maintenance services and the title with which they are provided and, where applicable, the names of the persons who contribute, together with the debtor, to the provision of this service;*
- m) *ongoing or completed disputes to which the debtor is or has been a party, which could affect its patrimony in any way;*
- n) *the mention that he/she was not convicted for committing the crime provided in art. 88, of the crime of tax evasion, of the offenses of forgery or of an intentional crime against the patrimony through the disregard of the trust, or that the restoration for such convictions transpired, together with the verifying documents;*
- o) *the statement that he/she has not benefited from a release of residual debts, according to this law, in the last 5 years prior to the submission of the application, respectively, that he/she has not been the subject of an insolvency procedure based on a debt repayment plan or liquidation of assets, which has been closed for reasons attributable to it, in the last 5 years prior to the submission of the application;*
- p) *if applicable, the name of the companies in which the debtor had the position of sole shareholder, administrator or associate/shareholder in the last 2 years prior to the introduction of the application, the number or percentage of shares/shares/interests held;*

- q) *where applicable, the capacity of an authorised natural person, owner of an individual enterprise or member of a family enterprise held in the last 2 years prior to the introduction of the application.*

Throughout the insolvency proceedings, the debtor must maintain an honest and correct attitude, otherwise the debtor will be sanctioned with the closure of the insolvency proceedings and with the impossibility of release from residual debts.

Following the closure of the insolvency proceedings, the debtor, under certain specific conditions, may request the release of the residual debts, i.e. the exemption from part of the unpaid debts. The debtor's good faith is also supervised in the post-insolvency period in order to comply with legal obligations and prohibitions. Moreover, even after the issuance of the decision to release debt, if within three years it is found that the debtor has conducted acts of fraud on creditors, prior to or during the insolvency proceedings, any creditor may apply to the court to revoke the benefit of the release from residual debts.

In conclusion, the debtor's good faith will be analysed from several perspectives: the correctness of the information provided about him/herself, the honesty and diligence with which he/she will use the benefits of the procedure, the real assumption and fulfillment of the obligations established in the procedure and post-procedure. Provided that good faith characterizes the debtor in his/her acts and deeds, he/she will be protected by the insolvency law, while bad faith will be drastically sanctioned by law, with all legal benefits being withdrawn.

Conditions for accessing the Procedure

In accordance with Art. 4 paragraph (2) of Law no. 151/2015, only natural persons who have their domicile, residence or habitual residence in Romania for at least 6 months prior to the submission of the application are eligible. Physical permanent residence in Romania, even if he/she has not fulfilled the legal registration formalities, still allows for eligibility.

The second condition imposed on the natural person to be subject to the law, concerns his/her assets, which must be characterised by the insufficiency of these funds available for the payment of debts. Art. 3 point 12 of the law establishes that insolvency is that state of the debtor's patrimony which is characterised by the insufficiency of such 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/she has not paid his/her debt to one or more creditors. The manifestation of the state of insolvency consists of the effective cessation of payments. Thus, the second condition imposed on the natural person to access the insolvency procedure of the natural person is to be in insolvency.

The third condition is proof of the absence of a reasonable probability of becoming able, within a maximum period of 12 months, to perform obligations as contracted, while maintaining a reasonable standard of living for him/herself and his/her dependents' maintenance¹⁵. The assessment of the reasonable probability

¹⁵Art. 4 para. (1) lit. b) Law no.151/2015.

will take into account the total amount of obligations related to the income realised or forecasted to be realised, compared with the level of professional training and expertise of the debtor, as well as to the traceable assets held by him/her. Thus, the additional condition that the debtor is required to demonstrate involves the presentation of the total amount of debts in comparison with his/her income for the next 12 months, as well as the assets that can be capitalised to cover debts. In this context, it becomes extremely important to compare the asset with the patrimonial liability necessary to the state of insolvency of the natural person.

Also, in the debtor's patrimony, there must be patrimonial assets that can be capitalised to satisfy the creditors' claims. However, the patrimonial assets that can be capitalised are limited from a double perspective: On the one hand, the insolvency law itself establishes that certain assets are not traceable. On the other hand, even if the natural person is in a state of insolvency, preserving a reasonable standard of living for the debtor and his/her family must be considered. As such, while part of the debtor's income is untraceable, it can not be distributed to creditors.

Ope legis, the patrimonial asset, not traceable through the forced execution of common law, is composed of the goods provided in Art. 727 C. proc. and the incomes provided by Art. 729 C. proc. civ.: i.e. the essential goods for the debtor and his/her family, indispensable items for the disabled and those intended for the care of the sick, the food necessary for the debtor and his/her family for 3 months or, under certain conditions, the food necessary until the new harvest, the fuel necessary for 3 winter months, to which is added half of the debtor's net monthly income, regardless of the nature of the receivables, or half of the amount of the minimum net salary per economy¹⁶.

The untraceable assets, which cannot be capitalised from the property of a debtor who is in the procedure of insolvency of the natural person are¹⁷:

- personal or household goods, including furniture, necessary for the debtor and his/her family for a reasonable standard of living, but without the value of each exceeding RON 5000;
- objects of worship, if there are not more than one of the same kind, but without the value of each exceeding RON 2000;
- a vehicle, if it is indispensable for the debtor and his/her family, including for traveling to/from work, and is worth a maximum of €5000, and the cost of its acquisition is not the subject of a claim against the debtor's property;
- the objects reasonably necessary for the debtor or the dependents suffering from a disability and the objects intended for the care of the sick in this situation;
- the food necessary for the debtor and his/her dependents during the procedure;
- goods used for the exercise of the debtor's occupation or profession;

¹⁶Deteşan (2015a) at 83.

¹⁷Art.3 point.2 Law no.151/2015.

- the agricultural inventory, including work animals, fodder for these animals and seeds for cultivation, if the debtor is engaged in agriculture, to the extent necessary to continue work in agriculture, unless there is a real right of guarantee over such goods, or a privilege to secure the claim;
- personal or family letters, photographs and pictures.

The untraceable incomes of the debtor, which are not intended to satisfy the creditors' claims, but will be intended to maintain a reasonable standard of the debtor's daily life, are¹⁸:

- the amounts necessary to cover the housing, food, transport, health and other current needs of the debtor and the persons to whom he/she provides routine maintenance;
- the amounts necessary for the debtor and the persons to whom he/she provides routine maintenance in order to take compulsory education courses, as well as the amounts necessary for the beginning or continuation of post-secondary, university or post-university studies;
- the amounts required for the payment of compulsory insurance premiums.

Moreover, in the insolvency procedure of the natural person through a repayment plan, the administrator of the procedure expressly analyses the housing situation of the debtor and must propose measures to be taken regarding the family home. The costs incurred by the debtor remaining on the property, the amount of rent or mortgage installments, the amount of tax insurance premiums or maintenance costs of the property will be taken into account.

The costs of an alternative rental solution will also be considered. Even if the repayment plan states that the debtor's home is to be capitalised to cover the liability, he/she may remain on the property until capitalisation, but not more than 6 months from the date provided in the capitalisation plan. After the capitalisation of the property, the debtor has a preferential right to terminate lease of the property or part of it, at an amount of rent established under market conditions. It should be noted that all these provisions are innovative in comparison with the procedure of execution of the common law for residential buildings, where the only respite that can be granted by the bailiff is the one provided by art. 896 para. (1) C. proc. civ., which is one of maximum 3 months and only if the forced execution is done in winter¹⁹.

The comparison between common law enforcement and insolvency proceedings reveals the increased protection enjoyed by the individual debtor in insolvency proceedings, by establishing a diverse range of non-trackable assets

¹⁸Art. 3 point 25 Law no.151/2015.

¹⁹Art. 896 para. (1) Code of Civil Procedure „no eviction from residential buildings may be made from 1 December to 1 March of the following year, unless the creditor proves that, within the meaning of the provisions of housing law, he/she and his/her family does not have a suitable home or that the debtor and his/her family gave another suitable home in which he/she could move immediately”.

and income for expenses considered necessary for a reasonable standard of living of the debtor and his/her family.

In conclusion, within a maximum period of 12 months, the debtor must prove a reasonable improbability of resuming solvency as well as the inability to perform his/her obligations as contracted, while maintaining a reasonable standard of living for him/herself and the persons of concern. In practice, the process must bear in mind the traceable assets allowed by insolvency law, as well as the expenses necessary to maintain an acceptable standard of living.

As evident, all the conditions imposed by law have the maintenance of a reasonable standard of living for the debtor as a central element. This infers that the debtor must make efforts to overcome the difficult financial situation he/she is in. However, these efforts must not lead the debtor to lowering the level of lifestyle below the reasonable limit. The notion of "reasonable standard of living" is extremely complex and dynamic and can be perceived differently by each individual. Precisely for this reason, a legislator of the Insolvency Commission, set up at the central level, is appointed in charge, in order to determine criteria for establishing a reasonable standard of living and for assessing the living needs of debtors and their families.

According to Decision no. 7/2018²⁰, the Insolvency Commission approved general criteria for establishing a reasonable standard of living. Hence, they used the value of the minimum monthly consumption basket, which represents the minimum threshold below which the expenses for ensuring a reasonable standard of living may not be established. This amount represents the amount of money from the debtor's income that cannot be impeded for the purposes of debt payment because it is necessary to cover the expenses indispensable to ensure the daily livelihood for himself and his/her family. The value of the minimum monthly consumption basket was differentiated from the insolvency procedure based on the debt repayment plan, the simplified insolvency procedure and the judicial insolvency procedure through asset liquidation. The amount of expenses to ensure a reasonable standard of living may be equivalent to the value of the minimum monthly consumption basket, but may also exceed this value, depending on the particular needs of each debtor and his/her family members while taking into account respect for rights, fundamental freedoms and human dignity.

The value of the minimum monthly consumption basket was established differently for the debtor living in urban areas as compared to the debtor living in rural areas. The value of the minimum monthly consumption basket for the debtor and his/her family members living in urban areas in the insolvency procedure based on the debt repayment plan or the simplified insolvency procedure is set at 797 RON²¹ for each adult, 587 RON for each child over 14 years, 419 RON for each child up to 14 years old. The value of the minimum monthly consumption basket for the debtor and his/her family members living in rural areas in the insolvency procedure based on the debt repayment plan or the simplified

²⁰Decision no. 7 of December 17, 2018 of the Central Insolvency Commission published in the Official Gazette no. 41 of January 16, 2019.

²¹We specify that 500 RON is the equivalent of 100 euros 1 euro = 5 ron

insolvency procedure is set at 644 RON for each adult, 473 RON for each child over 14 years old, 339 RON for each child up to age 14.

It should be noted that the analysis carried out by representatives of the Ministry of Labor and Social Justice, the National Institute for Economic Research of the Romanian Academy, the National Forecast Commission, the National Institute for Scientific Research in Labor and Social Protection, the Research Institute for Quality of Life of the Romanian Academy, The National Institute of Statistics and the National Authority for Consumer Protection regarding the values of the exposed consumer basket was performed at the level of 2018, with these values being included in Decision no. 7/2018. Although the minimum amounts necessary for a reasonable livelihood are constantly changing, four years after the adoption of these values, we find that they have not been updated. In our opinion, an annual update is imperative to achieve the proposed goal of quantifying the amounts needed for a reasonably sustainable livelihood. Moreover, the years 2020-2021, characterised by the COVID pandemic, which produced disastrous economic and social effects, should have persuaded the central Insolvency Commission to review the value of the consumer basket applicable to 2022.

The Insolvency Commission at the central level, by Decision no. 7/2018, concretises the general provisions of Law no. 151/2015, expressly establishing the amounts allocated to each member of the debtor's family in order to maintain a reasonable standard of living. It also takes into account a number of particular situations that lead to increased values, such as children's education, medical treatment, transportation of debtor family members, and so on. The territorial Insolvency Commissions, together with the administrators and liquidators for the insolvency procedure of natural persons, aims at establishing, in concrete terms, the expenses for ensuring a reasonable standard of living for the debtor²².

The non-traceable assets established in the insolvency proceedings are considerably higher than those established in the common law enforcement procedure. The protection afforded by the legatee to the debtor and his/her family is obvious and clear, the central idea being to overcome the difficult financial situation with some effort. This effort, however, should not put pressure on the debtor and his/her family to lower the standard of living below the level of decency and human dignity.

The fourth condition imposed on the individual to enter under the insolvency law is a minimum level of debt corresponding to 15 minimum wages per economy. The legislator defines the notion of "threshold value" in Art. 3 point 24 as the minimum amount of due debts of the debtor necessary to be able to introduce the request for opening the insolvency procedure, based on the debt repayment plan or the judicial insolvency procedure through asset liquidation. The fulfillment of this criterion will take into account the date of the request made by the debtor to access the insolvency procedure, considering that the minimum wage in the economy undergoes periodic changes. In order to access the simplified insolvency procedure, a maximum debt threshold corresponding to 10 minimum wages per economy is required.

²²Art. 2 para.(3) The methodological norms for the application of Law no.151/2015.

Starting from the central idea of this law, namely overcoming a difficult situation from a financial point of view, for the debtor who is a natural person in good faith, the legislator imposed a series of bans on the access of certain categories of debtors to insolvency proceedings. For various reasons, expressly regulated by law, certain debtors are denied access to insolvency proceedings and implicitly to the benefits they offer when the debtor can no longer be characterised as one in good faith.

The doctrine²³ mentioned that Art. 4 para. (3) and para. (4) of the law sets real fines for non-compliance of the debtor with the character of a sanction against possible misconduct, excluding these debtors, *de plano*, from the applicability of the law.

The procedures provided by this law are not applicable to the debtor against whom the insolvency procedure was terminated, for reasons that are attributable to him/her less than 5 years prior to the formulation of a new request to open the procedure²⁴.

The notion of 'imputable reasons' is linked to misconduct found during the previous insolvency proceedings, this prohibition being a sanction for the acted in Fraud toward the creditor. The imputable reasons are assessed at the moment of pronouncing the decision, or the decision being irrelevant to the behaviour bad faith debtor who has not complied with his/her legal obligations or has of the debtor after the closing of the procedure.

In other words, although the debtor was given the chance to financially recover, his/her reckless or fraudulent behaviour led to the closure of the procedure. The debtor may receive a new chance to access the procedure only after a period of 5 years. This prohibition also persists if the debtor, against whom the proceedings have been closed due to the imputable element, has paid all the claims, including interest and penalties which will be taken into account due to his/her unfaithful conduct.

The procedures provided are not applicable to the debtor who has been definitively convicted of an offense of tax evasion, forgery or an intentional offense against property by disregarding trust. Since in this case the central element is good faith, the final conviction for these crimes denotes a bad faith behaviour of the debtor. It should be noted that not every conviction of the debtor will lead to the impossibility of accessing the insolvency proceedings. The legislator expressly mentions the offenses concerned: the crime of tax evasion, the crime of forgery or intentional offenses against property by disregarding trust, etc. Intentional crimes against property by disregarding trust include abuse of trust, abuse of trust by fraud to creditors, simple bankruptcy, fraudulent bankruptcy, fraudulent management, misappropriation of property found or erroneously brought to the perpetrator, deception, public fraud, the patrimonial exploitation of a vulnerable person.

Also, the procedure will not be applied to the debtor who has been dismissed in the last 2 years for reasons attributable to him/her²⁵.

²³Deteşan (2015b) at 26.

²⁴Art. 4 para. (4) lett. a) Law no.151/2015.

²⁵Art. 4 para. (4) lett. c) Law no.151/2015.

Dismissal for imputable reasons involves reckless, chaotic, irresponsible behaviour that causes the employer to dismiss him/her, aspects that are incompatible with good faith, a central element that must govern the debtor's behaviour prior to the opening of insolvency proceedings.

As the law does not provide for any exceptions, we consider that the mere existence of a dismissal, attributable to the last two years, prohibits the debtor's access to insolvency proceedings, regardless of whether the debtor is employed or not employed at the time of the application. The employment of the debtor after the imputable dismissal is not a factor to be taken into account, as the sanction is imposed on any debtor who has been dismissed in the last two years for imputable reasons. The fact that the debtor succeeds in committing him/herself after the imputable dismissal is not a guarantee that he/she has changed his/her behaviour and that he/she will further act in good faith.

The debtor who is unjustifiably unemployed will not have access to the procedure, i.e. the debtor who, although fit for work, is without a job or other source of income, who has not made the reasonable diligence necessary to find employment or has unjustifiably refused a proposed position or any income-generating activity²⁶.

The obtaining of income by the debtor is a necessary condition for the insolvency procedure, because he/she must ensure, on a monthly basis, a reasonable standard of living for him/her and his/her family. In the absence of any income, this goal is particularly difficult to achieve.

The good faith of the debtor implies the development of an income-generating activity. The legislator also considers the situation in which the debtor does not have a job at the time of the application, but this situation is not attributable to him/her when the debtor can prove that he/she is interested and that he/she has made efforts to obtain employment.

When formulating the request to open the procedure, it will be assessed whether there is a good faith reason regarding the lack of employment, or if this reason tends towards a bad faith behaviour. A clear proof of bad faith, expressly mentioned by the legatee, is the situation in which the debtor refuses to engage in actively procuring employment. This phenomenon is observable only in the situation when, being registered in the records of the employment agency to which he/she is assigned, he/she refuses a job offer.

The procedures provided by this law are not applicable to the debtor who has accumulated new debts, through luxuriant expenses, while he/she knows or should know that he/she is in a state of insolvency.

The notion of "luxuriant expenditure" is not defined by insolvency law. In the regulation of the artificial real estate accession, at Art. 578 paragraph (3) letter c of the Civil Code, luxuriant works are defined as those performed for the simple pleasure of the one who performed them, without increasing the economic value of the building.

Through a broad interpretation, we can appreciate that the luxuriant, epicurean expenses from the perspective of the debtor who requests access to the insolvency procedure, are those made strictly for the pleasure of the debtor,

²⁶Art. 4 para. (4) lett. d) Law no.151/2015.

without leading to the increase of the patrimonial asset. Certainly, not all the expenses allowed to be made by the debtor, which are established by the decision of the Insolvency Commission at national level to ensure a reasonable living, can be considered as epicurean.

Although we can observe the intention of the legislator not to allow the debtor unjustified financial excesses in relation to his/her financial situation, we appreciate that the notion of “luxuriant expenses” must be legally defined from the perspective of the insolvency law.

The procedures provided are not applicable to the debtor who determined or facilitated the state of insolvency, intentionally or through gross negligence. It is presumed to have had this effect:

1. Contracting, in the last 6 months prior to the formulation of the request to open insolvency proceedings, debts that represent at least 25% of the total value of the obligations, except for the excluded obligations;
2. The assumption, in the last 3 years prior to the formulation of the request, of excessive obligations in relation to his/her patrimonial state, to the advantages he/she obtains from the contract or to all the circumstances that contributed significantly to the debtor's inability to pay his/her debts, other than those due by him/her to the persons with whom he/she contracted thus;
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 application, of goods or values from his/her patrimony to the patrimony of another natural or legal person while he/she knew or should have known that through these transfers he/she 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 formulation of the request to open the procedure.

The five presumptions established by the legatee are relative, i.e. they allow the debtor to prove otherwise²⁷. All bad faith behaviours referred to in Art. 4 paragraph (4) letter f of the law have as a finality either the decrease of the patrimonial assets, or the increase of the debtor's liabilities, both situations being prejudicial for creditors who view their chances of recovering the receivables diminished. Precisely because the insolvency proceedings are intended to give the debtor a chance in good faith, such conduct is not permitted toward the debtor prior to the opening of the proceedings.

The procedures provided by this law are not applicable to the debtor who, at the date of formulating the request to open an insolvency procedure, according to the law, has already opened another insolvency procedure²⁸.

²⁷Art. 327 Code of Civil Procedure defines presumptions as „the consequences that the law or the judge draws from a known fact in order to establish an unknown fact”.

²⁸Art. 4 para. (4) lett. g) Law no.151/2015.

Naturally, the debtor against whom the insolvency proceedings have been opened, in any of the three forms provided by law, will not be able to submit a new application to open the proceedings, regardless of the reasons of good faith he/she invokes. The prohibition refers strictly to the possibility for the debtor to access the second insolvency procedure, the first already opened not being affected by the submission and rejection of the second application.

The debtor against whom the insolvency procedure of the natural person was opened, which ended with the cancellation of the unpaid debts after the closing of the proceedings, cannot benefit from a new procedure if at least 5 years have not passed since the cancellation of the unpaid debts from the previous procedure.

Art. 4 paragraph (3) of Law no. 151/2015 states: "The debtor who has been the subject of such a procedure may not benefit from an insolvency procedure based on a debt repayment plan, a judicial insolvency procedure by liquidation of assets or a simplified insolvency procedure, completed with the release of residual debts, less than five years before a new application for insolvency proceedings was made."

Although, in order to benefit from the cancellation of the residual debts, the debtor must show good faith, the formulation in less than 5 years of a new request to open the insolvency procedure that can lead to a new elimination of residual debts, goes out of the scope of good faith. The purpose of the law is to give the bona fide debtor a chance to benefit from a fresh start, with the cancellation of unpaid debts. But the possibility to repeatedly request the protection of the law is temporarily conditioned at 5 years, considering a behaviour lacking diligence, honesty and good faith, if in a shorter time the debtor requests the re-opening of insolvency proceedings.

Conclusions

Insolvency law gives over-indebted individuals a second chance. There is an increased legal protection of debtors who, in good faith, try to overcome their state of financial difficulty. However, in order for them to act under the protection of the law, the conditions for accessing the procedure are numerous and restrictive.

As we have shown, a long series of documents must accompany the request of the debtor to open insolvency proceedings. Also, some debtors are not allowed to access the insolvency proceedings, but these prohibitions are not clearly defined by the legislator and leave room for interpretation.

Excessive forms and possible interpretations of the law have led to a distrust by citizens in accessing it, although the COVID-19 pandemic has led to the over-indebtedness of many individuals.

The legislator must also focus his/her attention on this matter so that the insolvency procedure of the natural person becomes a real help and support for the citizens who are in a situation of over-indebtedness, wishing in good faith to overcome it.

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