

BANKRUPTCY OF THE PRIVATE INDIVIDUAL

Teaca Mihaela, Ioana

University of Oradea Faculty of Legal Science mihaela.teaca@yahoo.fr

Mihaila Carmen Oana

University of Oradea, Faculty of Management and Technological Engineering omihaila@uoradea.ro

The financial crisis and the economic recession have taken over Romania This situation quickly led to the cash problem, since the bank loans monthly installments turned into an unbearable burden and are more and more aggravated by the extremely high level of interests and rate exchange differences. Based on the lack of liquidity, more and more Romanians practically find it harder and harder to meet their financial obligations falling due while others are about to face personal bankruptcy. Yet, this notion does not actually exist from a legal point of view, which is why various insolvency specialists tend to believe that Romania requires an urgent adoption of a private individual bankruptcy act as a protection measure against forced execution.

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The financial crisis and the economic recession have taken over Romania. There were times when Romania could brag about a low unemployment rate, but the time has come when more and more Romanians lose their jobs or their wage increases are blocked or they face either having their wage reduced or losing their job. This situation quickly led to the cash problem, since the bank loans monthly installments turned into an unbearable burden and are more and more aggravated by the extremely high level of interests and rate exchange differences. Based on the lack of liquidity, more and more Romanians practically find it harder and harder to meet their financial obligations falling due while others are about to face personal bankruptcy. Yet, this notion does not actually exist from a legal point of view, which is why various insolvency specialists tend to believe that Romania requires an urgent adoption of a private individual bankruptcy act as a protection measure against forced execution.

The bank loan for the population was implemented in Romania just a few years ago and yet the culture of indebtedness already became a reality and seems to be accepted as a natural thing. One can no longer refer to purchasing an estate without implying a bank mortgage while the people turn to personal needs loans very easily. The bank loan is destined to equalize the income of a client in time by actually allowing the client to use now the money to be earned in the future. Nevertheless, should this facility be used excessively, a person may turn out buried in debts that will burden him/her for a very long time. Such phenomenon is known as over-indebtedness and is largely familiar in Europe where up to 20% of the population over the age of 18 report problems when reimbursing bank loans. In most countries, 11% to 16% of the population describe themselves as over-indebted. According to Eurostat, the highest percentages are reported in the UK (18%), Denmark (19%), Ireland (21%), Spain (23%) and Greece (49%)

We are most certainly unlikely to escape such phenomenon, if we are to consider “the large number of bank loans that were granted last year and just how easily they were granted, as well as the lack of experience of Romanian consumers when it comes to crediting”.

A Europe Council Report indicates that, besides the financial effects, the loss of control over debts also has psychological consequences mostly resulting in affected individual withdrawing from the social life by affected individuals. These families generally cut back on their consumption incurred expenses, which may some times make it difficult to meet basic needs of the children. Besides, the debt issue is a long-term one and children are usually negatively

affected by a lack of hope in their home. This is why several European countries modified their institutional legal framework in order to provide these families with a minimum life standard.

At the individual level, the overindebtedness is usually revealed when the debtor loses their job or the when work field is disturbed by causes such as unemployment or illness. The age of the persons no longer capable of facing their financial debts ranges between 18-49 and these persons may belong to the low-level income category but also to the middle class. The single-parent families but also those having just one spouse working are mostly affected by this risk. The persons working on variable income rates such as commissions are also highly vulnerable. Studies have recently revealed that optimistic persons borrow twice more than population average, while women tend to assume greater risks than men do, thus exhibiting a higher indebtedness probability.

Most of the EU states currently have a special legal framework created for the overindebted persons. These acts are adopted in order to economically rehabilitate the affected persons and to avoid their ending up in a similar situation. The first country to adopt such a legal framework was Denmark in 1984. Five years later it was followed by France and after 1990 some other countries promoted such acts: Scandinavian countries, Germany, Austria, Belgium, Holland, Italy, Spain and Luxembourg. In 2003 and 2004 respectively, Estonia and Portugal amended their Bankruptcy Act while the Czech Republic undertook such action starting January 1st 2007 in order to include certain adjustment procedures regarding individual entity debts.

Romania has no such similar legal framework. The Ministry of Justice representatives state that, in order to initiate this type of act, it is necessary for the institutions monitoring population indebtedness level and the observance of rights thereof (such as the National Bank of Romania or the National Agency for Consumer's Protection) to first signal the existence of this problem.

It is quite difficult to determine who should actually be in charge with creating this type of bill by simply analyzing and focusing on the experience of the countries already enforcing such legislation. The institution in charge with this issue is the Ministry of Justice in Austria, Denmark, Holland, Sweden and Finland, the Ministry of Labor in Germany, Ireland and Luxembourg, the Ministry of Finance and Economy in France, the Ministry of Industries in Italy while in the UK and Portugal the institution in charge with this project is the consumer's protection agency.

In the absence of a special legal framework, the banks can, by means of a court order, force employers to operate salary withholds until the entire debt is fully reimbursed. Consequently, the salary seizure may be maintained even up to debtor's retiring date. The only protection is provided by the Employment Code regulating that the cumulated withholds cannot exceed half of the net salary.

At the European Union level there is no unitary approach regarding overindebtedness. Still, there are three regional patterns.

The first group includes the Scandinavian countries, which were inspired by the Dutch rules. They give special attention to good faith as a main condition for a client to be granted legal protection. The courts of law have the power to deny access to the debt adjustment procedure should the person in question be exposed to have acted irresponsibly, to have not done sufficient efforts in order to pay the debt or to have applied for bank credits just before applying for the debt adjustment.

The second regional pattern is represented by the German and Austrian formula, which was also implemented in the Czech Republic and Estonia. This pattern focuses on reimbursing a minimum part of the debt so as the debtor earn their right to get rid of the accumulated loans. Indebted persons are bound to observe creditors' rights by their own behavior, namely they must be employed or be looking for a job. The debt adjustment procedure is regulated by the bankruptcy law, which addresses a private individual's inability to pay creditors exactly as it does corporate bankruptcy.

The third pattern is the one used in France, Belgium, Holland and Luxembourg, where the legislative framework is rather focused on debt-related issue prevention. This is the reason why the law encourages voluntary agreements between parties. In return, the judiciary option used to escape debt imposes certain harsh conditions and the procedure takes a long time, thus being quite disadvantageous for both parties. It is important to specify that a client may enter the debt adjustment program only if the bank has no collateral to capitalize. For example, in the case of a mortgage-based personal needs loan or a property loan, the bank cannot be prevented from selling the estate the loan was guaranteed with, in order to retrieve the debts/back payments. Besides, very few countries have particular regulations regarding property guaranteed loans. In most cases the basic idea is that, even if the person owns a house, such person could not be able to keep it within the debt reduction procedure.

New reimbursement schedule

The debtor is, in all countries, bound to reimburse part of the accumulated debt according to a very specific reimbursement schedule. The person in question must make his/her entire income available to the creditor and is strictly entitled to withhold from such income only the amounts necessary to cover family needs and expenses. The calculation of these expenses and costs vary from one country to another but the general attitude is that overindebted persons must get used to an extremely modest standard of life, most similarly to the social welfare.

The debt adjustment schedule is usually spread over five years but there are certain countries such as Denmark or Holland where payment can be made in 3 years. On the other hand, in France the debtor may be bound to stand these restrictions even for 10 years while in Austria, Luxembourg and the UK, it can go up to 7 years. The overindebted client may pay either fixed or variable installments. Even the fixed installments may be modified should the debtor's income be significantly changed. In Austria, Germany and Estonia, the installment rates are variable and are permanently adjusted to the earned income. Also, they have a descending tendency namely the persons are allowed to withhold a higher percentage of the salary in the final years of payment.

Special attention is given to the persons that have no minimum income necessary to provide for the survival expenses. In these situations, there are certain countries that allow insolvent clients to be entirely released of their debts without paying anything. Yet, the person in question is closely monitored. In France, for example, the debtor is released of debts after a two-year monitoring period. On the other hand, Austria, the client must reimburse at least 10% of the debt, irrespective of his/her financial situation, while in Luxembourg a special fund was created that reimburses the minimum debt that must be paid by the persons having major difficulties.

Romania should also implement the European standards regarding private individual bankruptcy. Although the corporate reorganizing or liquidation is regulated, the same cannot be said about individuals.

The Ministry of Labor, Family and Social Protection proposed a Decree Draft for the procedure regarding the insolvency status of debtors, be them individuals or companies, in compliance with the provisions stipulated under article 176 in the Government Decree no. 92/2003 concerning Fiscal Procedure Code.

According to paragraph 1 of article 176 in the Fiscal Procedure Code, "the insolvable debtor is the debtor whose income or traceable assets' value is lower than the fiscal payment obligations or the debtor that owns no traceable assets or has no income"

Thus, the Procedure included in the Decree draft is applicable to individuals or companies that meet the legal conditions in the matter. According to the procedure, the fiscal debts, which are to be analyzed from the perspective of declaring the insolvency state shall be deemed as complying with the legal conditions in the matter, the debtor in question shall be declared insolvable based on the minutes drafted by the forced execution department of the territorial labor inspectorate and signed and approved by the legal department thereof and the chief inspector. The insolvency

minutes shall be drafted in 3 copies, of which one for the forced execution file, one for the financial-accounting department and one for the debtor to be declared insolvent.

The insolvency procedure shall be applied for each of the situations specified under article 176, paragraph (1) in the Government Decree no.92/2003 concerning the Fiscal Procedure Code, as republished and with subsequent amendments, for both the debtors whose income or traceable assets' value is lower than the payment fiscal obligations and the debtors having no income or traceable assets.

The forced execution measure shall not be interrupted throughout the period a debtor, whose income or traceable assets having a lower value than the payment fiscal obligations, is declared insolvent. Moreover, for the main fiscal obligations of insolvent debtors whose income or traceable assets are lower in value than the payment fiscal obligations, accessory fiscal obligations shall fall due until the full payment date thereof.

In exchange, the fiscal debts of the debtors having been declared insolvent or who own no traceable assets and have no income, shall be erased from the current records and shall be recorded separately, while the enforcement of forced execution measures shall be interrupted.

For the main fiscal obligations registered on the name of the insolvent debtors having no income and no traceable assets, accessory fiscal obligations shall be deemed due until the date such obligations are recorded separately on, in compliance with the provisions of article 120, paragraph 4, letter b) in the Government Decree no.92/2003 concerning the Fiscal Procedure Code, as republished and with subsequent amendments.

The fiscal debts, from the current records, of the debtors having been declared insolvent and for which the forced execution procedure is continued as well as the fiscal debts, from the separate records, of the debtors having been declared insolvent but for which the forced execution procedure is interrupted, shall be erased from these records on the expiry date of the limitation term of the right to request a forced execution procedure.

The fiscal debts of the corporate debtors shall be erased from the current records or from the separate records, as the case may be, after the date on which the legal entity was erased from the Registry of Trade and Companies based on the erasure decree issued by the delegate judge from within the Office of the Registry of Trade.

The fiscal debts of the private individual debtors, who were declared insolvent, shall be erased from the separate records also during the limitation term, after the date on which the person in question was declared missing or deceased by a court order and such person has no legal heirs to accept the inheritance.

The erasure procedure of the fiscal debts of the debtors from the current records or the separate records, as the case may be, shall be carried out under the law and based on the erasure minutes and the enclosed entry-erasure slip. The records erasure minutes shall be drafted by the forced execution department within the territorial labor inspectorate and shall be signed and approved by the legal department and the chief inspector.

After the date a private individual was declared insolvent on, and should the execution body find that the legal conditions regarding joint and several responsibility are met, it shall undertake legal steps as per the provisions of article 27 and article 28 in the Government Decree no.92/2003 regarding the Fiscal Procedure Code, as republished and with subsequent amendments.

Several opinions were expressed on the matter of adoption of such law. Those in favor of adopting such law as a means to protect the insolvent private individuals refer to economic and moral arguments. Unlike the legal entity, the private individual has to defend themselves before several creditors in individual court trials with each and every one. Normally there should be only one trial that may gather all creditors. It is not normal for a person to pay debts and penalties their whole life even after the crisis has passed, it is not normal not to be given the right to a new start simply because he/she was the victim of an historical circumstance". Take for instance the cell phone subscription contracts stipulating the fact that the payment delay penalties can exceed the

actual debit, which is not at all normal. Nevertheless, given the Romanian specificity, a legislation must be elaborated that prevents abuse, i.e. the combination between the bad faith and the complicity of the bank officers.

Those against the adoption of such a bill sustain the idea that we already have the forced execution act and the bank loan contracts that act as enforceable instruments/writs of execution. If there is a collateral/guarantee, the bank simply executes it. Yet, it is impossible for a private individual to find itself in insolvency or bankruptcy. A company is erased and dissolved and it no longer exists. Yet, a private individual cannot be erased. We cannot go back to the Middle Ages when there used to be prisons for the indebted. If a private individual cannot pay the debts, a minutes may be drafted stating the lack of assets or the unemployment status and thus there is nothing left for the bank to execute or seize, and so nothing can be done. In order to keep the enforceable instrument valid, the creditor must check up with the debtor in order to see if assets were acquired meanwhile. The law is very specific and no artificial means are necessary for something that already exists” declared Dumitru Falota, Esq.

There are certain moderate voices stating that an insolvency bill is not necessary, the only thing that may prove necessary would be some special regulations that may grant a grace period with no penalties and no interests for the insolvent ones, until such individuals get a new job and their situation is improved, declared Ioana Moiescu, president of the National Union of the Insolvency Practitioners (UNPIR), Iasi branch.

Even if the opinions of both practitioners and specialists differ, the lawmaker it self is the actual entity to take action in order to protect, on the one hand, the private individual in a temporary payment incapacity and, on the other hand, to allow creditors to capitalize their receivables without affecting the stability of the civil circuit.

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