INSOLVENCY OF THE GROUP OF COMPANIES

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Abstract: *Insolvency is an economic reality that cannot be ignored especially in the current context, and the regulation of the collective proceedings as efficient as possible is numerous both nationally as well as in the European Union. If several companies which have close economic ties and which form "a group of companies" are in insolvency there is the question of finding the best possible solutions to "treat" them unitary.*

Key words*: group of companies, insolvency, control percentage, interest percentage*

INTRODUCTION

Insolvency is an economic reality that presently cannot be ignored, and the preoccupations to elaborate a collective procedure are more and more numerous both at the European union level as well as at the national level. The problem is to find solutions for a unitary treatment if several companies inside a group of companies are in insolvency.

The group of companies is realised by the interaction between different actors of the business environment in a joint, concentrated and coordinated action in order to realise some joint purposes. According to paragraph 5, point 35 from Law number 85/2014 regarding the insolvency and the insolvency prevention procedures the group of companies refers to ,,two or more companies interconnected by control and/or possessing qualified participations". The present definition is different to the other definitions of the group of companies from the special legislation that is the accounting one, the capital market, insurance because in this one it is expressly stipulated that the group consists out of the mother company and the branches.

As a conclusion the group is an assembly of companies that are independent from a legal point of view, but they are dependent financially and/or from a decisional point of view on another company that has control over them

In compliance with article 5, point 62 from Law number 85/2014 ,,the mother company is a company that has the control or the dominant influence over the rest of the companies in the group". A member of the group can be any of the companies of the group, no matter if it is the mother company or a controlled member of the group. And the controlled member of the group is the company controlled by the mother company.

The control is the capacity to determine or influence in a dominant way, directly or indirectly the financial or the operational policy of a company or the decisions at the level of the company's departments, including the possibility of revoking the majority of the members of the administration, management or surveillance bodies members. An individual or a legal entity has the control in three alternative situations: a) has a qualified participation of at least 40% of the votes and nobody else has more b) holds directly or indirectly the majority of the voting rights in the general assembly c) has the power to appoint or revoke the majority of the members of the administration, management and surveillance bodies.

MATERIALS AND METHODS

Romania is the first country in the European Union that introduced in the insolvency legislation special stipulations regarding the treatment of the group of companies. Between the insolvency procedures of the members of a group can arise conflicts, the value to be recovered on the entire group is reduced, and the solutions were incompatible to the economic logic. Presently the group of companies is submitted to the general stipulations of the Insolvency Code art.183with the modifications introduced in Chapter II – Special stipulations regarding the insolvency of the group of companies.

Generally we do not discuss about the insolvency of the entire group of companies because it has no legal personality, we discuss about the insolvency of the companies that compose the group.

The group of companies is characterized by the following particularities: a) it is a company with no legal personality b) its members are united around some joint interests c) can be qualified as a company. This proves that it is about an imperfect legal situation. In theory the companies in the group have patrimonial autonomy due to its legal personality, but this autonomy cedes in front of the unity of the group company. The mother company can dispose of the goods of any of the companies in the group to fulfil the joint interest and can create debts in the company's patrimony, thus the image of the report between the assets and the liabilities of the companies in the group is distorted. If a company in the group is in insolvency it will be liable with its own patrimony towards its creditors, and the mother company is not liable for the liabilities of the company in insolvency even if it has been done by her because the mother company has no legal personality. The social interest of each company in the group must not be confused with the group's interest. Sometimes the companies' interest is sacrificed for the group's interest, and a company in the group can get rich on behalf of another company getting poorer. The creditors of a company in the group have no right over the other members of the group. As a result the debts of the debtor generated by the group interest are not to be charged to the group but to its debtors and creditors.

The group of companies is governed in insolvency by its general rules, but also by the specific derogations for its insolvency. Thus the following principles have been elaborated to govern the insolvency of the group of companies:

a) The companies in the group have patrimonial independence and the liability of the members of the group does not transfer between the companies that compose the group.

b) To ensure the celerity, the harmony and the cost reduction of the insolvency procedures opened against the members of a group are coordinated.

c) In the insolvency procedure the participants have the obligation to cooperate that is information exchange, the opening at the same time of the insolvency procedures fr the members of the group, correct establishment of the deadlines, coordinating the communication between the insolvency practitioners by the appointed practitioner regarding the mother company or the company with the highest turnover.[1]

d) The material component of solving the joint request of opening an insolvency procedure against the members of the group is the court of justice as a court of the judicial bodies, and in territory is the court where the mother company or the company with the higher turnover has the headquarter, in compliance with the latest published financial situation. This is the court that will solve the joint request and will solve all the pending files of the members of the group indicated in the joint request, no matter their headquarter.

e) For each member of the group there is a separate file, and all the files will be given to the insolvency judge appointed at random, in the first file registered in the informatics system of the courts of justice. Giving all the files to the same judge is a necessary condition to ensure a correlation and coordination of the entire process. The insolvency judge will thus have a global look on the multiple procedures because there were given contradictory solutions or solution that will create problems in the recovering of another member of the group.

f) Appointing the judicial administrator for each member of the group of companies is done complying with the rules of common law of the insolvency procedure. The judicial administration can be appointed differently for each member of the group but it can also be the same person for all the members. If the creditors that have at least 50 % of the statement of assets and liabilities are the same for each member of the group, the judicial administrator or a consortium of judicial administrators will be the same for each member

of the group. If the composition of the statement of assets and liabilities does not allow the appointment of the same judicial administrator, the judicial administrators must cooperate through a protocol to be approved by the insolvency judge.

g) According to article 187 from Law number 85/2014 the general assembly of the associates and shareholders will appoint the same special administrator for each member of the group. If at the group level the decision is concentrated at different persons than a special administrator of the members of the group will be appointed the one of the mother company or the company with the highest turnover.

h) The creditor committee of each member of the group of companies will be appointed complying with the common laws of insolvency. It is preferred that in each committee to be at least some mutual members. The creditors committee must meet each term to form recommendations regarding the activity of the debtor and the progress of the reorganisation plan.

i) Opening the insolvency procedure is done according to the general rules, both the debtors and the creditors can elaborate such a request. A member of a group of companies that is not in insolvency can subscribe to a joint request done by other members of the group. In this case the joint request of opening the insolvency will have to be approved also by the general assembly of the associates and shareholders members of the group that has adhered to this request. One reason will be the increase of the recovering chances and saving the group from bankruptcy due to its good economic and financial situations.

j) Each member of the group that subscribes to a request to open the procedure must comply with the request of the limit of RON 40,000. The rule is also valid for the creditor. The creditor that has a sure debt, liquid and exigible for more than 60 days and whose threshold value is of RON 40,000, against two or several members of the group of companies can file a joint request of opening the insolvency procedure, a request that must have proving documents.

k) If the request to open the procedure is well founded the insolvency judge will pronounce a conclusion of the request and will open the general or the simplified procedure.

l) The debts of the creditors will be registered in the debt tables no matter if they are common debtors or they hold debts against some solitary debtors. The later have a voting right and can participate at the procedure opened against the main debtor as well as against the solitary debtors. The debts of the members of the group against other members of the group are registered in the preference order regarding the subordinated debts.

m) The common debtors must not be submitted to the same risk of the creditors members of the group, because according to the specific of the operations inside the group they have benefit of their results and therefore theirs debts can be assimilated to some financings [2].

n) The reorganisation plans of the members of the group are submitted to the general rules with two new elements of the group of companies in compliance with article 199 and 200 from Law 84/ 2014. The registration deadline of the reorganisation plan is of60 days from presenting the final debts tables unlike the common deadline of 30 days. The judicial administrators of the members of the group must make available information that is necessary to elaborate some reorganisation compatible and coordinated plans.

o) In the activity previous to the opening of the insolvency procedure a member of the group can support the current activity or the reorganisation plan of another member of the group by granting some loans with the approval of the creditors committee. The judicial administrator of one member of the group that intends to file against another member of the group an action to annul a transaction between them that he considers fraudulent must communicate his intention to the other judicial administrators as well as to the coordinating practitioner. The ones that have been communicated the intention must analyse the effects

of such an action in order to be able to take a decision to introduce or not such an action and will consult with their creditors committee. Taking a decision regarding the introduction of an annulling action will take into consideration the opportunity reasons and not the legal ones. The law does not clearly stipulate if the approval of the creditor committee of the loaner member is or the one of the loaned member is needed. Because the one that loans assumes a supplementary risk of diminishing its patrimony in case of the impossibility to refund the credit we may say that only the loaner's approval is sufficient. But a risk may appear for the one the loans and its creditors due to the difficulties in the current activity that will prevent its refunding and as a result the increase ofthe debt, that is a reduced recovering of the debts. In these conditions the creditors' approval of the loaned member is needed. [3]

p) After opening the procedure during the observation period or the reorganisation one, the members of the group in insolvency can conclude loaning agreements with the debtor in order to sustain its activity, and therefore they need the approval of the creditors committee.

q) The member of the group that has given the loan to the debtor members will have a debt against the fortune of the loaned ones that comes from the continued activity of the debtor and that has a priority order for such a debt. The member of the group of companies in insolvency can conclude loan agreements with third parties as loaners. Such an agreement can be guaranteed with the approval of the creditors by a different member of the group.

To conclude the insolvency procedure of the group of companies no derogation from the general stipulations is mentioned, thus any of the articles regarding the conclution oif the procedure is to be applied to each of the members of the group. The situation of each debtor will be analysed without the obligation of coordination between the procedures. Only during the observation period and the reorganization one there is a coordination and cooperation and during the bankruptcy procedure there is a liquidation of the assets.

CONCLUSIONS

The group of companies is an assembly of companies that have tight relations characterised by the control the mother company has over its branches. When several companies in this group are in insolvency, the lack of some measures referring to all individual procedures opened can take to significant obstacles to recover each company in the group or the entire group..

The norms regarding the insolvency of the group of companies have as a main purpose the stimulations of saving viable companies by a pragmatic approach, to create some communication mechanisms between those that apply the procedures and to coordinate the insolvency procedures of different members of the group of companies.

REFERENCES

1. **GAINA, V.**, 2016, Procedura insolvenţei grupului de societăţi, Universul Juridic,www.juridice.ro , 6 January 2016
2. **POPA, M. C.,** ,Definiţia grupului de societăţi in procedura insolvenţei. Grupul de societăţi si societatea-mamă., Universul Juridic,www.uridice.ro,3 September 2015
3. **The National Institute for preparing the insolvency practitioners**, 2014, Tratat practic de insolvenţă, Bucharest, page 847
4. **MOŢIU, F.**, 2013, Contractele speciale in noul Cod Civil, ed a 4-a, Universul Juridic, Bucharest
5. **TURCU, I.,** 2000, Insolvenţa comercială,reorganizarea comercială şi falimentul, Lumina Lex Publishing house, București
6. **U.N.P.I.R.,** 2011, Procedura insolvenței, Culegere de practică judiciară, vol III, C.Beck Publishing House, Bucharest