

## **RELAUNCHING OF THE ECONOMY AND THE PROTECTION OF JOBS BY REFORMING THE NATIONAL RULES ON PREVENTING INSOLVENCY AND INSOLVENCY**

**I. Didea, D.M. Ilie**

### **Ionel Didea**

Faculty of Law and Administration Sciences, University of Pitești, România

Correspondence: Ionel Didea, University of Pitești, Târgu din Vale Str.,

no. 1, Pitești, România

Faculty of Law - Doctoral school

Titu Maiorescu University, Bucharest, Romania

Correspondence: Ionel Didea, Titu Maiorescu University,

22 Dâmbovnicului Str., 4<sup>th</sup> District, Bucharest, Romania

E-mail: [prof.didea@yahoo.com](mailto:prof.didea@yahoo.com)

### **Diana Maria Ilie**

I Doctoral school–Field Law

Titu Maiorescu University, Bucharest, Romania

Correspondence: Diana Maria Ilie, Titu Maiorescu University,

22 Dâmbovnicului Str., 4<sup>th</sup> District, Bucharest, Romania

E-mail: [dianamaria.ilie@yahoo.com](mailto:dianamaria.ilie@yahoo.com)

### **Abstract**

*The reformation of the national rules on preventing insolvency aims at relaunching economy and protecting jobs. The essence of modern normative goals of insolvency is to identify a balance between debtors' and creditors' interests through their constructive harmonization, for which the legislator provides clear and transparent procedures that dynamically reflect basic principles developed at European Union level and also at international level.*

### **Key Words**

insolvency, arrangement with creditors, ad-hoc mandate, Insolvency Code.

### **Introduction**

Insolvency is a phenomenon that has grown in Romania as a result of the financial crisis gradually faced by the country from 2008. Although the economic activity in Romania has seen some improvement in the last few years, the statistical data of the Romanian National Office of the Trade Register show that between 2008 and 2013, the number of insolvencies grew, reaching more than 29,500 companies in 2013, 10% more than the number recorded in 2012. However, the number of companies that became insolvent in 2014 decreased by 30% compared to 2013, and in 2015 it decreased by 50% compared to 2014, and in the 01.01.2016-30.09.2016 period by 20.96% compared to the same period of last year.<sup>1</sup> This decrease is an effect of the regulations, measures and mechanisms established through the legal rules that support granting a chance to debtors that have good faith and are viable, for the efficient and effective business recovery, either through procedures for preventing insolvency, or through a reorganization procedure.

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<sup>1</sup>[www.onrc.ro](http://www.onrc.ro);

### 1. Brief time incursion

Commercial relationships, which are related to the production and circulation of goods and services, are conducted on a contractual basis, and the activity of the professionals – traders is closely interdependent to them. Thus, total or partial failure to fulfil obligations consisting of paying amounts of money can often lead to chain reactions.<sup>2</sup>

Roman law consecrated the first regulations, which, after being improved, subsequently led to the institution of bankruptcy. Without distinguishing between traders and non-traders, Roman law regulated the legal status of debtors, by replacing the enforcement on the debtor with the enforcement on his assets, following the tax enforcement procedure.<sup>3</sup> Bankruptcy represented, for a long time, a personal stigma applied to the entrepreneur either directly (debtors' prison), or by marginalization or exclusion from the commercial profession (commercial revocations, etc). Commercial failure was not attributed, during this period, circumstances or differentiations, as the result of bankruptcy does not allow for any circumvention of the application of the stigma and social isolation.<sup>4</sup> The tradition of Roman law was maintained and developed in the Medieval law, especially in the statutes of the Italian cities Genoa, Florence and Venice. In this period, the procedure had a criminal and corporate character and was only applied to traders, not to non-traders.

The first complete and systematic regulation of bankruptcy was made through the French Commercial Code of 1807. Under the influence exercised by Napoleon, who was dissatisfied with the behaviour of some army suppliers, the regime of bankruptcy consecrated by the Commercial Code was very intransigent. The influence of the French Commercial Code of 1807 on the legislation of the European laws is no longer disputed by anybody, as each country sought to develop rules and adopt regulations meant to adjust to the requirements of that age.<sup>5</sup>

In a subsequent stage, the interest of the regulation was focused on supporting creditors in maximizing their chances to recover their claims, in establishing certain collective procedures of satisfying the body of creditors by immediate means or by reorganizations meant to allow for the upturn of the debtor's assets. From the second half of the last century, the concept related to the treatment applicable to traders in distress underwent important changes. Thus, the foundations were laid for a new concept, which abandoned the idea of bankruptcy. Starting from the contemporary realities of the commercial activity, it was admitted that the existence of certain financial difficulties in the trader's business, which are not always attributable to him, should not necessarily lead to the trader's disappearance.<sup>6</sup> On the contrary, in such case, it is useful to try to save the respective trader. From this regulatory stage, the notion of bankruptcy was separated from that of inexcusable fault of the entrepreneur, thus accepting the fact that failure is part of the commercial game.

Over time, in Romania there were several legal regulations concerning the treatment applied to traders in difficulty. Each of these regulations was the expression of the concept of the age in which it was adopted.

The first regulations of the old Romanian law, which included certain provisions related to bankruptcy, were: The Caragea Code of 1817, which regulated bankruptcy in Part

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<sup>2</sup>Sorana Popa, *Drept comercial - Obligații, Contracte, Titluri de valoare, Insolvența*, Universul Juridic, Bucharest, 2014, page 223.

<sup>3</sup>M.N. Costin, Angela Miff, *Instituția juridică a falimentului, Evoluție și actualitate*, Revista de Drept Comercial no. 3/1996, page 43 and the following.

<sup>4</sup>Csaba Bela Nasz, *Deschiderea procedurii insolvenței*, C.H. BECK, Bucharest, 2009, page 6.

<sup>5</sup>R. Bufan, Andreea Deli-Diaconescu, F. Moțiu, *Tratat practic de insolvență*, Hamangiu, Bucharest, 2014, p. 23.

<sup>6</sup>Stanciu D. Cârpenaru, *Tratat de drept comercial român*, Universul Juridic, Bucharest, 2012, p. 667.

## RELAUNCHING OF THE ECONOMY AND THE PROTECTION OF JOBS BY REFORMING THE NATIONAL RULES ON PREVENTING INSOLVENCY AND INSOLVENCY

III, Chapter VIII, “For Lending and Debt”, and the Calimach Code of 1817 respectively, which regulated bankruptcy in Annex I “In Relation to the Organization of Creditors”.

The regulation included in the Commercial Book (“*Condica pentru comertiu*”), adopted in 1840, is viewed as the first complete Romanian law on bankruptcy. It was a translation of the provisions concerning bankruptcy from the French Commercial Code, in the form amended by the Law of 28 May, 1838.<sup>7</sup>

Using the 1882 Italian Commercial Code as model, the Romanian Commercial code of 1887 maintained the tradition of the French Commercial Code. After the shift to the market economy, after 1989, due to the fact that the provisions of the Commercial Code concerning bankruptcy were no longer appropriate for the requirements of the modern age, a new legal regulation was adopted, which was meant to be applicable to traders in difficulty. This regulation was substantiated in Law no. 64/1995 on the procedure of reorganization and judicial liquidation.<sup>8</sup>

The regulatory policy of the approach of economic difficulty in Romania has evolved gradually, first of all due to the experience of the years of financial crisis in which insolvency proceedings left behind, along with a few successful reorganization plans, a few “collateral damages”, and secondly due to the strong influence of the European Union law, and more particularly Council Regulation (EC) no. 1346/2000, whose provisions are part of the internal legal order of our country, from the date of Romania’s adhesion to the European Union, according to the Union treaties.

Consequently, a special concern of the Romanian administration was related to the systemic crises and the insolvency of state-owned enterprises, and to the role and implications of the bankruptcy of these enterprises within the privatization process.

Law no. 85/2006 on the insolvency procedure<sup>9</sup> was the result of these concerns, to which the requirements related to the integration into the European Union were added. Taking into account the conclusions of the European Commission Report on Romania’s progress in 2004 towards accession, according to which the Romanian legal system does not provide for “effective mechanisms for economic operators’ exit from the market”, thus identifying as main causes of the lack of efficiency “the complexity of the procedure, the uneven application of the in the matter, the law protection of creditors”, the Romanian Government set as a priority objective in the Legislative Programme and the strategy for the reform of the judicial system, the development of a normative act for the reform of the judicial reorganization and bankruptcy proceedings<sup>10</sup>. The starting point of the law amendment was the community acquis in the bankruptcy field, more specifically Council Regulation (EC) no. 1346/2000 of 29 May 2000 on insolvency proceedings<sup>11</sup>, Directive 2002/74/EC of 22 September, 2002 amending Directive 80/97/EEC on the protection of employees in the event of the insolvency of their employer<sup>12</sup>, Directive 2001/17/EC of 19 March 2001 on the reorganization and winding-up of insurance undertakings<sup>13</sup>, Directive 2001/24/EC on the reorganization and winding up of credit institutions<sup>14</sup>, laws whose processing was undertaken within the negotiation process. Besides, the Explanatory memoranda of the Bankruptcy Law states that “the best practices in this field of the European

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<sup>7</sup>This regulation was applied in Wallachia, and from 1864 in Moldavia too.

<sup>8</sup>Official Journal no. 1130 of 29 June, 1995.

<sup>9</sup>Published in the Official Journal no. 359 of 21 April 2006. The law came into force 90 days after its publication in the Official Journal. Law no. 85/2006 was amended by Law no. 86/2006 on the reorganization of insolvent practitioners and by G.E.O. no. 173/2008, approved as amended and supplemented by Law no. 277/2009, Law no. 25/2010, and Law no. 169/2010.

<sup>10</sup>The Explanatory Memoranda of Law no. 85/2006 on the insolvency proceedings.

<sup>11</sup>Published in JOCE L 160 of 30 June 2000.

<sup>12</sup>Published in JOCE L 270 din 8 October 2002.

<sup>13</sup>Published in JOCE L 110 din 20 April 2001.

<sup>14</sup>Published in JOCE L 125 din 5 May 2001.

Union member countries and of countries with long-standing tradition in this field, such as the United States of America, was taken into account”.

The main purpose of Law no.85/2006, as well as of Law no. 64/1995 was to cover the insolvent debtor’s liabilities. However, these regulations were criticized for the fact that they do not include, unlike many of the regulations the European Union countries, preventive proceedings meant to avoid debtor’s insolvency, and consequently, the application of the judicial reorganization or bankruptcy proceedings.

This gap was eliminated through the adoption of Law no. 381/2009 on introducing the composition agreement and the ad-hoc mandate, with the purpose of safeguarding the debtor in difficulty by amicable procedures for the renegotiation of creditors’ claims or of the conditions of such claims. Law no. 381/2009 reintroduced in our law the interest for supporting enterprises in difficulty before the emergence of their insolvency, by introducing the composition agreement and the ad-hoc mandate. Thus, a pre-insolvency period is regulated, with the explicit purpose of preventing insolvency. Consequently, the purpose of this law is to avoid financial collapse by opening the insolvency proceedings. Nevertheless, we can notice that this law has also a social nature, because it is concerned with saving the jobs of the debtor’s employees.<sup>15</sup>

Through Emergency Ordinance no. 91/2013 on the insolvency prevention and insolvency proceedings – the Insolvency Code, which came into force on 25.10.2013, efforts were made for the unification and consistent regulation of both the period preceding the insolvency and of the proceedings themselves. Thus, this regulation, referred to as the Insolvency Code aimed to establish a unitary concept that was better compared to the previous regulations, as well as to correct certain dysfunctions noticed in the application of the insolvency proceedings. Nevertheless, the Decision of the Constitutional Court of 29.10.2013 ascertained that Government Emergency Ordinance no. 91/2013 is unconstitutional, thus being suspended de jure from being published in the Official Journal.

Following the declaration of the unconstitutionality of Government Emergency Ordinance no. 91/2013, its content was taken over, except the unconstitutionality aspects, and became, with amendments, adaptations and completions, Law no. 85/2014 on insolvency prevention and insolvency proceedings.<sup>16</sup>

## **2. Insolvency—a new approach in the Romanian economic and social space**

Due to the adoption of the Insolvency Code need emerged, both in the doctrine, as well as in the jurisprudence, for balancing the positions held by the main actors involved in the insolvency proceedings, to modernize the laws, in order to align them to the current trends of the European laws, as well as to streamline procedural mechanisms.

The project for the amendment of the insolvency laws was part of the programme funded by the World Bank and the International Monetary Fund, entitled “Strengthening the Insolvency Mechanism in Romania”. Thus, a team of experts of the World Bank analysed, studied and identified the main deficiencies related to the insolvency prevention and insolvency proceedings in Romania, and subsequently drafted recommendations in the report entitled “Report on the Observance of Standards and Codes. Insolvency and Creditor/Debtor Regimes.”

Thus, taking into account the economic context that required taking quick measures meant to create the legislative and administrative prerequisites leading to the increase in the efficiency of economic operators, to the increase in the safety of the circular flow and in the investment attractiveness of the Romanian market, the result, following the elimination of certain exceptions of unconstitutionality, was Law no. 85/2014 on the insolvency prevention and insolvency proceedings.

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<sup>15</sup>Vasile Nemeş, *Drept comercial*, Hamangiu, Bucharest, 2012, p. 485.

<sup>16</sup>S. D. Cărpenaru, *Tratat de Drept Comercial Român, 5<sup>th</sup> Edition, updated*, Universul Juridic, Bucharest, 2016, p. 712.

## RELAUNCHING OF THE ECONOMY AND THE PROTECTION OF JOBS BY REFORMING THE NATIONAL RULES ON PREVENTING INSOLVENCY AND INSOLVENCY

The current normative purposes of insolvency include supporting the continued activity of debtors, keeping jobs and covering claims on the debtor, focusing mainly amicable procedures for the renegotiation of debts or the conditions of such debts, more specifically the ad-hoc mandate or the composition agreement. Consequently, the rules that regulate the insolvency prevention and insolvency proceedings have also acquired an obvious social nature, because they aim at saving the jobs of the debtor's employees.<sup>17</sup> Moreover, according to the current regulation, the scope of the insolvency prevention proceedings is expanded. Thus, the insolvency prevention procedures are applicable to debtors in difficulty, but the law does not provide other specifications, which means that these procedures are currently dedicated both to corporate debtors, as well as to debtors who are natural persons, the important thing being that they have the legal status of debtor within the meaning of the special law.<sup>18</sup> Moreover, according to the doctrine, the Insolvency Code seems to have eliminated shortcomings, causes that had prevented the debtor from resorting to amicable procedures for the renegotiation of debts, the most important including: the difficulty of homologating the composition agreement, as the current requirement is that the composition agreement project should be approved by creditors representing at least 75% of the value of the debts accepted and undisputed, and the value of the disputed and/or litigated debts should not exceed 25% of the body of creditors, the introduction of the private creditor test, if, through the composition agreement project, reductions of the debts to the government budget are proposed, the elimination of the requirement that the debtor, following the implementation of the recovery measures proposed through the composition agreement project, should pay a certain minimum percentage of the total value of the debts, etc.<sup>19</sup>

We can say that the insolvency laws, and especially the laws on the insolvency prevention proceedings, suffered the inconvenience of being insufficiently known by the business environment, which generally rejected such procedures. This was also due to the fact that the Romanian laws on insolvency were disseminated in too many normative acts, the new Insolvency Code unifying in a single draft law the entire Romanian legislation on insolvency through Law no. 85/2014 on the insolvency prevention and insolvency proceedings.

The Romanian administration repeatedly tried to streamline the insolvency proceedings, which is why it has aimed at assessing the legal framework in relation to the protection of creditors' rights, the recovery of debts, insolvency prevention mechanisms, as well as to assess the extent to which they are among the most efficient international practice. They tried to identify creditors' expectations, in such a way as to determine, in a better manner, their advantages and disadvantages within the insolvency proceedings, following the guidelines drafted by the World Bank in *World Bank's Principles and Guidelines in insolvency procedures* related to the liability of the corporate debtor's management bodies, opening the proceedings, the effects of opening the proceedings, etc.<sup>20</sup>

Moreover, currently, Law no. 85/2014 lists thirteen principles governing the new regulation, which are taken over from the Principles of the World Bank<sup>21</sup>, the European principles concerning insolvency<sup>22</sup> and from the UNCITRAL Guide<sup>23</sup> on insolvency. Their

<sup>17</sup> V. Nemeș, *Drept comercial, 2<sup>nd</sup> Edition reviewed and supplemented*, Hamangiu, Bucharest, 2015, p. 462.

<sup>18</sup> S. D. Cârpenaru, M.A. Hotca, V. Nemeș, *Codul insolvenței comentat*, Universul Juridic, Bucharest, 2014, p.53.

<sup>19</sup> Csaba Bela Nasz, *Procedurile de prevenire a insolvenței*, Universul Juridic, Bucharest, 2015, p.41.

<sup>20</sup> Gh. Piperea, *Drept comercial, Vol. II*, Ed. C.H. Beck, Bucharest, 2009, p. 178.

<sup>21</sup> In this respect, The World Bank - 2011 Principles for Effective Insolvency and Creditor/Debtor Regimes, [http://siteresources.worldbank.org/INTGILD/Resources/ICRPrinciples\\_Jan2011.pdf](http://siteresources.worldbank.org/INTGILD/Resources/ICRPrinciples_Jan2011.pdf).

<sup>22</sup> For details, see Principles of European Insolvency Law-1445 wds, <http://www.iiiglobal.org/component/jdownloads/finish/39/405.html>.

<sup>23</sup> UNCITRAL Legislative Guide on Insolvency Law, [http://www.uncitral.org/uncitral\\_texts/insolvency/2004Guide.html](http://www.uncitral.org/uncitral_texts/insolvency/2004Guide.html).

integrating function reflects the Romanian legislator's interest in implementing the entire "insolvency architecture" at internal level, because these principles can also be found in the entire normative structure of the Insolvency Code, undoubtedly adjusted to the differences of structure, purpose, concepts and formulations.<sup>0727123152</sup>

The new vision and approach of the insolvency phenomenon are also a reflection of the recent communications of the European Commission, by which member countries are urged to encourage the second chance for the debtor, more specifically to grant support for the restructuring of the business, at the beginning, as well as to facilitate the adoption of a reorganization plan in the case of honest, viable debtors. As a matter of fact, the casuistry of certain successful reorganizations at the level of the European and international jurisprudence, such as American Airlines and General Motors<sup>24</sup>, reflects even more the need of supporting the debtor in its attempt to recover and stabilize, and the reorganization proves to be a great success in the case of good faith and interest in the honest reinsertion into the economic market.

Moreover, at European Union level, programmes were completed for the improvement and coding of the laws on insolvency, applicable to the internal market. Thus, the European legislator adopted Regulation no. 848/2015 on insolvency proceedings, and Council Regulation (EC) no. 1346/2000 was repealed, and its text was reworded in such a way as to take into account the developments of the legislations of the member countries on insolvency prevention and proceedings, as well as the jurisprudence of the Court of Justice of the European Union. Mention should be made of the fact that the new text will be applicable to the insolvency proceedings opened starting with June 2017. The regulation is related both to the insolvency proceedings themselves, as well as to the insolvency prevention proceedings (hybrid proceedings). The main objectives of the Regulation are to support the internal market along with the improvement of its functioning in general, facilitating the restructuring of viable companies and improving the treatment of creditors, and is also based on the experience of the activity of the Court of Justice of the European Union, thus making a coding of its jurisprudence. For Romania, Annex A mentions the insolvency procedure (reorganization, bankruptcy and the composition agreement, while the ad-hoc mandate is not included in the list due to the confidential nature of this procedure.<sup>25</sup>

Moreover, the involvement of the European bodies and the interest showed by them in this respect are also inferred from European Commission Recommendation no. 135/2014 concerning a new approach of business failure, whose objective is to guarantee the fact that the viable companies facing financial difficulties, regardless of their place in the Union, will have access to national insolvency frameworks which will allow them to structure their business at an early stage, in order to prevent their insolvency and to maximize the total value for creditors. In this respect, the European Commission recommends to the member states to adopt, for honest entrepreneurs, different winding-up measures compared to dishonest entrepreneurs, to develop accelerated proceedings for the companies that went bankrupt in an honest manner. Consequently, the goal is to promote the entrepreneurial spirit, investments and employment, thus contributing to the alleviation of the obstacles in the way to a good functioning of the internal market.<sup>26</sup>

De lege ferenda, the Insolvency Code should transpose, at internal level, these proposals that can constitute levers for the quick relaunching of honest and viable debtors on

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<sup>24</sup>See R. Bufan, Andreea Deli-Diaconescu, F. Moțiu, op.cit., p. 598.

<sup>25</sup>Alina Oprea, *Reforma regimului european al insolvenței transfrontaliere: Regulamentul nr. 848/2015*, Revista Română de Drept al Afacerilor, no. 1/2016, Wolters Kluwer, Bucharest, p. 76.

<sup>26</sup>Mirela Iovu, *Efectele implementării Recomandării Comisiei Europene nr. 135/2014 privind o nouă abordare a eşecului în afaceri și a insolvenței*, Revista Română de Drept al Afacerilor nr. 4/2015, Wolters Kluwer, Bucharest.

## RELAUNCHING OF THE ECONOMY AND THE PROTECTION OF JOBS BY REFORMING THE NATIONAL RULES ON PREVENTING INSOLVENCY AND INSOLVENCY

the Romanian market, the same legal regime being currently applied to both categories of debtors.

### **3. The expansion of the insolvency phenomenon—the delineation of a new Insolvency Code**

The legislative novelties, such as Law no. 151/2015 on individuals' insolvency, which has not passed the practical test yet, and is going to come into force in December 2016, and the insolvency of the administrative and territorial units respectively, regulated through Government Emergency Ordinance no. 46/2013 and approved by Law no. 35/2016, can be approached by analogy with the Insolvency Code, as well as with the principles and practices used at European Union level and not only at this level, even with unification proposals, with the purpose of concentrating, in a single document, the legislation applicable to insolvency, in order to be able to talk about a proper insolvency code.

Undoubtedly, the provisions of the aforementioned regulatory documents are supplemented by the provisions of Law no. 85/2014 on insolvency prevention proceedings and on the insolvency proceedings, whose corroboration, or even the contrast between them, or their concept of integrating them in an insolvency code do not represent, however, the object of this article dedicated to the insolvency phenomenon viewed from a general perspective, which phenomenon was gradually established in the economic and social space as a lever supporting the economic market, investments, and employment.

Therefore, the adoption of such regulations outlines the current European trends, because the European Union legislation does not distinguish between traders and non-traders, natural persons and legal entities, in relation to the application of the insolvency proceedings. Moreover, Council Regulation (EC) no. 1346 of 29 May 2000 on insolvency proceedings provides for the fact that there should not be a differentiated regime between traders and non-traders in relation to their insolvency. The regulation does not establish a single and common system of rules applicable to insolvency in the European Union member countries, but it was considered as imperiously necessary to adopt, as soon as possible, in Romania, a regulation on individuals' insolvency, taking into account that Romania is among the few member countries of the European Union that does not have a regulation in this field. Moreover, Recommendation CM/Rec (2007)8 of the Committee of Ministers to member states on legal solutions to debt problems, concluded, following the analysis of the problems of the over-indebted individuals that "over-indebted individuals and their families should have effective access to impartial advice and to debt adjustment, for which clear criteria should be established".<sup>27</sup>

Moreover, the legislator's preoccupation to give individuals with good faith and over-indebted, from the consumer perspective, the chance to benefit from a "fresh start", to recover from the financial point of view, through the coverage, to the maximum extent possible, of their liabilities and through their debt discharge, results from important mechanisms that have been regulated recently, more specifically Law no. 151/2015 on individuals' insolvency, aforementioned, and also Government Ordinance no. 38/2015 on alternative dispute resolution between consumers and traders. The two regulatory documents have the common role to contribute to the legal treatment of consumers' over-indebtedness.<sup>28</sup>

In relation to Government Emergency Ordinance no. 46/2013 on financial crisis and insolvency of administrative-territorial units, approved by Law no. 35/2016, the doctrine deems that it outlines the idea of gradual decentralisation, which represents the regulatory

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<sup>27</sup>R. Bufan, Andreea Deli-Diaconescu, F. Moțiu, op.cit., p. 1007 - 1009.

<sup>28</sup> L. Bercea, *Convergență normativă sau concurență normativă? Accesibilitatea procedurii insolvenței persoanei fizice și a procedurii de soluționare alternativă a litigiilor în domeniul bancar*, *Revista Română de Drept al Afacerilor* 10/2015, Wolters Kluwer, p. 85 and the following.

framework of the transfer of responsibilities from the central to the local level.<sup>29</sup> According to the current concept, decentralisation is the indispensable attribute of democracy and involves the idea of autonomy, the public administration becoming more efficient and more effective by decentralization, and the problems are solved at local level, with utmost efficiency.<sup>30</sup>

### Conclusions

There is a continuous preoccupation, at European Union level, with the improvement and coding of the laws applicable to the internal market, in the specific field of insolvency, and the European Commission encourages member states to establish common principles applicable to the insolvency and pre-insolvency proceedings, in order to promote entrepreneurial spirit, investments, employment, to create an attractive market able to outline a good functioning of the internal market. The laws in force in Romania have transposed and applied part of the provisions recommended, and the advantages of the new implementations should become visible as we will have as many debtors as possible saved from bankruptcy through successfully implemented preventive measures or judicial reorganizations.

Insolvency should be viewed as a manner of protection offered to the debtor in difficulty, in view of a revival and consolidation of a strong, diversified and high-quality industry at national level, through a common acceptance effort, empathy, and interest in creating an attractive economic and social space.

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<sup>29</sup> Cristina Oneț, *Din nou despre criza financiară și insolvența unităților administrativ-teritoriale*, *Revista ACTA - Universitatis Lucian Blaga*, Juridic Publishing House, no. 1/2013, p. 19 and the following.

<sup>30</sup> P. I. Nedelcu, *Descentralizarea - Studiu comparativ*, Universul Juridic, Bucharest, 2015, p. 17.



RELAUNCHING OF THE ECONOMY AND THE PROTECTION OF JOBS BY  
REFORMING THE NATIONAL RULES ON PREVENTING INSOLVENCY AND  
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