

THE DEVELOPMENT OF A “RESCUE CULTURE”. INSOLVENCY GLOBALIZATION

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ABSTRACT

We are heading towards a phenomenon of internationalization and globalization of the substantiation of law, due to the fact that Romania is, inevitably, part of the process of integration and reflection of its own identity in a European and global context. Ultimately, law derives from observing the society and analysing its needs, passing through the filter of equity the final legal form in order to ensure the completeness of law, and also the structural coherence of society. Although the continental European legal culture is attached to the “general will”, globalization managed to erase many of the symbolical boundaries between the legal culture promoted by the Common-law, the one promoted by our system deeply marked by the Romano-Germanic System, and also the legal system outlined by American Realist trends, thus allowing the law to become the result of the self-adaptation of the society, not just the creation of the State.

KEY WORDS: insolvency, globalization, rescue culture, reorganization, interdisciplinarity, comparative law.

INTRODUCTION

Insolvency law managed to assert itself due to the legislative abundance which has expanded remarkably in the past few years both at national, as well as at international level (cross-border insolvency), due to the legislator’s constant concern for the modernization of this field and the need to align to the regulations prepared by bodies of the European Union, and also by international bodies. We are currently talking about an expansion of the insolvency phenomenon, through Law no. 151/2015¹ on the insolvency of natural persons, and

¹ Originally, Law no. 151/2015 on the procedure of insolvency of natural persons, published in the Official Journal of Romania, Part I, no. 464 of 26 June 2015, should have come into force on 26 December 2015. The first postponement was made through Government Emergency Ordinance no. 61/2015 for the date of 31

the insolvency of territorial-administrative units, respectively, regulated by Government Emergency Ordinance no. 46/2013 and approved by Law no. 35/2016², provisions that reflect and strengthen the current trends at European level and outline a new "architecture" of insolvency in the Romanian legal space, as an undisputable effect of the current economic and social reality. Insolvency has acquired new valences, being legislatively harmonised in the context of the Monist system implemented by the new Civil Code, but also driven, at the same time, in its evolution, by the principles promoted at the level of the European Union and other levels as well.

The substantiation and promotion of a "culture of salvation" through mechanisms developed in stages by the insolvency right, which tends, in its evolution, towards an independent law³, is reflected in the modern normative purpose aiming at being focused on and prioritizing the judicial reorganization as it is regulated by Law no. 85/2014 on prevention insolvency proceedings and on insolvency procedure, the financial recovery according to the norms of Government Emergency Ordinance no. 46/2013 regarding the financial crisis and the insolvency of territorial and administrative units, approved by Law no. 35/2016, as well as the reinsertion of natural persons in the social environment through a well-deserved fresh-start, as regulated by Law no. 151/2015 on the insolvency of natural persons, passing through the current social and economic filter the importance and need of approaching these mechanisms promoted in the national, European Union and international context.

1. THE EMPHASIS PLACED ON RESCUE – AN ILLUSORY PHILOSOPHICAL CHANGE OR REALITY?

The provisions of Regulation (EU) 2015/848⁴ that have recently come into force (June 2017) paved the way for the stimulation and the consolidation of a legislation focused on debtor rescue mechanisms, as well as proceedings of debt repayment or debt adjustment in relation to the consumers and to self-employed persons, and this Regulation expands its scope by including of the insolvency proceedings and those providing the early restructuring of a company in a stage where there is only a probability of the insolvency. In Romania, the aforementioned Regulation is directly applied in relation to the regulation of international relations in the field of insolvency in the relationships with the Member States of the European Union, while in relation to non-EU third countries, the rules of private international law contained in Law no. 85/2014 on "Cross-border insolvency" are applicable. Mention

December 2016, followed by Government Emergency Ordinance no. 98/2016, which postponed the date of its coming into force to 1 August 2017, mean while the Methodological norms for the application of Law no. 151/2015 were also approved. Nevertheless, the application of the Law of insolvency of natural persons faced a last postponement of the date of its coming into force, i.e. 1 January 2018, according to Government Ordinance no. 6/2017, published in the Official Journal of Romania no. 614 of 28 July 2017, due to the fact that the complexity of the field regulated by this law was invoked, as well as the viewpoint of the Superior Council of Magistracy which highlights that a rigorous preparation of the administrative capacity of the courts called upon to apply the proceedings of the insolvency of natural persons is required.

² Official Journal no. 219/ 24.03. 2016.

³ See I. Didea, D.-M. Ilie, *Un nou statut al instituției insolvenței raportat la viziunea monistă promovată de Noul Cod Civil. Conturarea unui drept special, particular - dreptul insolvenței - urmare abrogării Codului Comercial*, in *Curierul Judiciar* no. 8/2017, pp. 425-434.

⁴ Regulation (EU) 2015/848 on insolvency proceedings repealed Regulation (EC) 1346/2000 of the European Council, its text being reformed to take into account the evolutions in the legislations of the member countries concerning the insolvency prevention proceedings, as well as the jurisprudence of the Court of Justice of the European Union. The new text is applicable to insolvency proceedings opened from July 2017.

should be made of the fact that the Regulation makes reference, in recital (48), to the principles and guidelines adopted by European and international organizations operating in the field of insolvency law, in particular the guidelines drawn up by UNCITRAL. We can say that Romania has an important role in the consolidation of certain principles and orientations in the field of insolvency, because, together with other 12 Member Countries of the European Union, it is part of the UNCITRAL Working Group V concerning the insolvency, in which aspects are debated in relation to the insolvency proceedings. Consequently, not only at the European Union level, attempts are made to find the best and the most viable solutions concerning the approach of the insolvency phenomenon, but also at *global* level, currently, the United Nations Commission on International Trade Law having in the strategic action plan a project for the improvement of the Model Law in the field of international insolvency.⁵

Ever since 2014, the European Commission has drafted Recommendation no. 135/2014 on a new approach to business failure whose objective is to guarantee and to allow for the access of viable businesses facing financial difficulties, regardless of the place in the Union where they are established, to national insolvency frameworks enabling them to structure their activity 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 Member States to adopt different liquidation measures for honest entrepreneurs compared to dishonest entrepreneurs and to develop accelerated procedures for businesses that have gone bankrupt in an honest way, promoting entrepreneurship, investments and employment for a better functioning of the internal market.⁶

The implementation of the Recommendation of the Commission of 12 March 2014 on a second chance was assessed⁷ twice, in 2015, as well as in 2016 respectively, and the conclusion was that the impact desired at the level of an even chance in all member states was not achieved, i.e. the facilitation of rescue and of a second chance given to debtors in distress. Nevertheless, there is currently a Directive proposal⁸ concerning the preventing restructuring frameworks, the second chance and the measures for the increase in the efficiency of the restructuring, insolvency and debt repayment proceedings, meant to amend Directive 2012/30/EU, to consolidate the Recommendation of the Commission of 2014 and to supplement Regulation 2015/848. The Directive is mainly focused on entrepreneurs, natural persons or legal entities, with the possibility to expand the application of the debt repayment mechanisms to individual consumers. Although it was communicated to the Council of the European Union and to the European Parliament in December 2016, and the first meeting of the JUSTCIV Working Group on this topic took place on 16 January 2017, the proposal remained subject of examination, with the hope that it is however, on the list of priorities and strategic initiatives of the EU bodies and of other organizations, as can be seen by accessing their sites.⁹

⁵ http://www.uncitral.org/uncitral/fr/commission/working_groups/5Insolvency.html.

⁶ Mirela Iovu, *Efectele implementării Recomandării Comisiei Europene nr. 135/2014 privind o nouă abordare a eşecului în afacerişi a insolvenţei*, Revista Română de Drept al Afacerilor no. 4/2015, pp. 121-133.

⁷ See Marcela Comşa, *Regulamentul privind procedurile de insolvenţă, Jurisprudenţa Curţii de Justiţie a Uniunii Europene*, Universul Juridic, Bucharest, 2017, pp. 353-357.

⁸ Available on:

- <http://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:52016PC0723&from=EN>,

- https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/civil-justice/civil-and-commercial-law/insolvency-proceedings_en#insolvencyinitiative.

⁹ https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/civil-justice/civil-and-commercial-law/insolvency-proceedings_en#insolvencyinitiative.

However, the reorganization and success of the accomplishment of a reorganization plan that gives a second chance to debtors in distress involves many strategies¹⁰ and support, such as, for example, the financing of such companies in distress, taking into account the precarious situation of the self-financing prospects, on the background of eroded own reserves and financial restrictions. This role could be fulfilled by banks themselves, which, in addition to the measures for the restructuring of loans granted to companies subject to reorganization (rescheduling, granting grace periods, expanding maturity dates), can also grant new financing and can conclude partnerships providing for financing strategies for the suppliers, vendors and customers of the companies in distress, measures included and proposed in the reorganization plan that will thus become a much more useful and advantageous tool both for the debtor and for the creditors, and which will lead to a successful reconsolidation of the professional trader. Moreover, this protection for *fresh-money* is an object of interest of the proposal of the new Directive of the European Commission, being part of the content of the second Title "Preventing restructuring frameworks".

Nevertheless, we need a collective awareness of the benefit that can be achieved through the insolvency proceedings, especially from the key factors, often with a decisive role in safeguarding or not the debtor, otherwise this dimension of insolvency, so strongly promoted at the Union and international level, risks to remain a pure theory, an illusory philosophical tendency that cannot be materialized into reality. However, there are a legislative support and assistance, both at the Union and international level, as well as at national level. We also take into account practices and examples of successful reorganizations at the level of the European and international jurisprudence, such as American Airlines and General Motors¹¹, which objectively prove the benefit and the effect of giving a second chance, which is why we need to materialize the theory, the principles promoted internationally and to effectively support debtors in their recovering and stabilization attempts, as the reorganization proves to be a great success in the case of good faith and interest in honest reinsertion in the economic market. Moreover, we believe that it is useful to exchange real success stories identified in different countries, in relation to the legal systems and the specific insolvency norms, the economic and social context, the disturbing factors, which destabilize the business environment, among others, also taking into account natural persons in their quality of consumers, in order to substantiate a integrative and viable legal mechanism of success.

2. WHY RESCUE? IS REORGANIZATION A SPECULATION OF THE DEBTORS OR NOT?

We already know that insolvency has developed in Romania as a result of the financial crisis that has manifested itself progressively from 2008. According to the statistical data of the National Romanian Trade Register Office, between 2008 and 2013, the number of insolvencies grew, reaching in 2013 more than 29,500 companies, i.e. 10% more than the one registered in 2012. However, the number of insolvent companies in 2014 decreased by 30% compared to 2013, and in 2015 it will decrease by 50% compared to the year 2014. Statistics

¹⁰ See I. Didea, D.-M. Ilie, *Direcția extinderii fenomenului „insolvență” – conturare anoului Cod al insolvenței prin filtrul economico-social actual*, in *Curierul Judiciar* no. 1/2017, p. 16-25.

¹¹ See Simona-Maria Miloș, Ș. Dumitru, Andreea Deli-Diaconescu, Otilia Doina Milu, *Reorganizarea*, in R. Bufan (scientific coordinator), *Tratat practic de insolvență*, Hamangiu Publishing House, Bucharest, 2014, p. 598.

were in a continuous dynamic. Nevertheless, the number of companies that went bankrupt in 2014 decreased by 30% compared to 2013, and it further decreased by 50% in 2015 compared to 2014. The statistics were followed a continuously dynamical trend. Thus, the number of professionals who became insolvent during the 01.01.2017 - 31.12.2017 period reached a threshold of 9,102, exceeding the number of professionals who had become insolvent in the same period of 2016, respectively 8,371, but not exceeding the number of companies who became insolvent during 2015, more specifically 10,269. In the 01.01.2018-31.08.2018 period, the number of professionals who became insolvent reached the threshold of 5,615, decreasing by a percentage of 2.48% compared to the same period of last year.¹² We can consider that this reduction is an effect of the regulations, measures and mechanisms set up by the new legal norms that support and emphasize the opportunity for bona fide viable borrowers to achieve an efficient and effective business recovery through insolvency prevention proceedings. From the statistical data, it is clear that the triggering phenomenon of insolvency was the financial crisis, which is proved by the fact that, over the years, with the gradual overcoming of the economic crisis, the number of professionals who become insolvent decreased. However, can we still talk about ill-will, speculation and strategy of the debtors to temporarily benefit from the effects of this insolvency procedure and to swiftly consolidate the bases of a new business, misbalancing, in the meantime, an entire chain of interdependent companies, suppliers of goods and service providers, due to the lack of necessary liquidities? In the attempt of reaching an economic rebalancing which is inevitably reflected into the social environment, what do we choose to opt for? Reorganization or bankruptcy? Why recovery? Why common empathy and sacrifice to rescue a company, an individual debtor, or a consumer? If we guide ourselves from statistics, the figure of 4-6% of the total number of pending insolvency cases related to professionals (approximately 35,000 at national level), which represent cases of judicial reorganization, may seem disarming, disappointing, in the sense that the reorganization does not seem to be a successful tool in relaunching the economy by solving the difficulties faced by professionals. Nevertheless, from this huge number of cases, we should exclude the number of those cases directly subject to a simplified procedure, more specifically, going bankrupt, which are in any case prone to fail, by camouflaging fraudulent business, money laundering or tax evasion. Consequently, this direct migration to bankruptcy should aim strictly at businesses that have no chance, thus accepting judicial reorganization as a real means of saving viable, credible companies and avoiding bankruptcy that often triggers "cascade" insolvencies. Currently, statistics show that approximately 200,000 employees work in these companies found, let's say under the protection of legal insolvency norms, and the taxes and taxes generate significant percentages in the GDP¹³. Moreover, these companies are horizontally interdependent with a large number of stakeholders who also have business potential, and a single bankruptcy generates a chain reaction and a social disturbance, not just an economic one.

It remains to see in what direction the economic system will go, i.e. reorganization or bankruptcy, the debtor in financial distress facing new legal challenges, as Law no. 85/2014 is to be republished in the Official Journal of Romania, and to receive a new renumbering of the texts after the approval by law of Government Emergency Ordinance no. 88/2018 amending and supplementing certain normative acts in the field of insolvency and other normative acts,

¹² <https://www.onrc.ro/index.php/ro/statistici?id=252>.

¹³ See Gh. Piperea, in Gh. Piperea (coordinator), *Codul insolvenței. Note. Corelații. Explicații*, C.H.Beck Publishing House, Bucharest, 2017, p. 208.

recently published in the Official Journal of Romania no. 840/02 October 2018. Although the stated purpose of this Government Emergency Ordinance is to create "*the premises for the recovery of viable businesses and the faster recovery of claims, including the budgetary ones, being in line with both the budgetary interest and the general economic and social interest of Romania*", avoiding fraudulent insolvencies and implementing "*urgent legislative and administrative measures meant to lead to the recovery companies and keep them in the economic circuit, given that, currently, more than 6,000 companies with an approximate number of 64,000 employees are in insolvency proceedings, the period of observation*", the proof of practice will show whether these provisions really lead to a real recovery of debtors in financial difficulty, or there is a "counterbalance" of rights in favour of the state, and the regulations "conceal" a much more aggressive recovery of budgetary debts, and the companies with debts to the state no longer have access to insolvency under any conditions when faced with financial problems under the new provisions. As a matter of fact, this Government Emergency Ordinance already faces harsh criticism from the business environment and insolvency practitioners, who argue that it breaks the constitutional provisions by not granting equal treatment to creditors in the insolvency proceedings, and, at the same time, the regulations of the European directive that concern the granting of a second chance. Moreover, in the content of the European Union 2020 Strategy, we find as objectives precisely the need to create jobs, reduce unemployment and reduce poverty by stimulating a competitive economy.¹⁴

3. IS INSOLVENCY VIEWED AS A SYSTEMIC RISK?

Insolvency is also regarded reluctantly by the banking system as a creditor, and especially as a debtor in difficulty, insolvency being perceived as early as 2012 as a systemic risk according to reports on the financial stability of the National Bank. It was thus considered that if these entities go through these insolvency proceedings, with the risk of going bankrupt, this would lead to an absolute imbalance of the economy, based on the *big to let fail* principle. This was also premise used when many countries determined that certain economic operators were too big to be allowed to go bankrupt. Thus, we take into account the need for the survival of systemically important entities, which consequently become exceptionally very large exceptions from the rule, with the ultimate stated general interest goal, in the sense of maintaining an economic balance not only at national level but even at the international one. However, the opinion of the great specialists criticizes this method of total escape from the insolvency law, which involves an orderly and fair approach to a business failure, as a basic rule of competition, the idea of eliminating the insolvency intensely promoted in the circuit of this banking system becoming even dangerous, insolvency being "a pillar of the market economy, an idea opposed to the feudalism of rents and socialism... a condition of competition which must lead to progress".¹⁵ As a matter of fact, we also know the reticence of the banking system concerning the recently adopted consumer protection legislation, considering that all these proposals lead to the creation of a major and severe systemic risk by

¹⁴ See "Citizens' dialogues on the future of Europe" - https://publications.europa.eu/en/publication-detail/-/publication/46f6ae9d-aa40-11e7-837e-01aa75ed71a1?Wt.mc_id=NEWSLETTER_october2017-interested-in-blurbs.

¹⁵ See Gh. Piperea, *Carecterele sacrificial, colectiv, concursual și necesar în procedura insolvenței*, in *Curierul Judiciar* no. 7/2017, pp. 400-401.

multiplying consumer protection tools and agglomerating their intersections.¹⁶ Moreover, the World Bank report highlights that “steps must be taken to avoid sacrificing the great general welfare of a system simply because perfection cannot be assured” (World Bank Report on the Treatment of the Insolvency of Natural Persons, p. 42).

Nevertheless, on the other hand, we also take into account the macroeconomic misbalance triggered as early as in 2008 as a consequence of the financial crisis of an entire banking system. Several banks in Ireland, the United Kingdom and Belgium triggered an irreversible domino effect, being forced to resort to governmental financial support strategically set in mutual rescue plans substantiated at Union level, and therefore, from 2009, all the sectors of the economy were touched by the crisis, and the European and international such as the European Commission, the European Central Bank, the International Monetary Fund, and the involved countries mobilized themselves in order to avoid the propagation of the banking crisis on the entire continent and drafted a 200-billion EUR European economic recovery plan financed by the member countries by allocating 1.5% of the GDP. Despite the “injection” of this fabulous amount into the EU economy, in January 2009 statistical data proved the opposite by the increase in unemployment and the decrease in industry, while the countries borrowed increasing amounts and the public debt became a risk factor for many countries (here we can mention the example of Greece). This context created a sequence of unprecedented crises, starting with the 2008 financial crisis and continuing with the 2009 economic crisis, the 2010 public debt crisis, the euro system crisis and Europe’s crisis in the years 2011-2012, and ending with the unemployment crisis in 2013. As a result of this macro systemic degradation, in 2012 the European Union instituted the European Stability Mechanism (ESM), focusing in the financial sector, and especially in banks, which established strict measures concerning the economic and budgetary policy of the states. This crisis generated a bank Union, by the establishment of a monitoring and supervision of the financial sector of banks, since from September 2014 the European Central Bank has been cooperating with national banking surveillance bodies and insures financial assistance and stability for almost 130 banks in the Eurozone. This single bank supervision mechanism may require corrective measures, and becomes gradually mandatory for other member countries of the European Union besides those in the Eurozone. Moreover, the application of certain “resistance tests” substantiated at the level of the central banks, lead to the establishment of the bases of credit institutions able to avoid scenarios related to a new financial crisis which, as we saw, required a major intervention, and even sacrifice, both from the member countries and from other banks, for the rescue of the banks that would have created a continuous flow of macroeconomic misbalance.¹⁷

This survival system has created levers of economic recovery that ensure social stability, however, as we have already seen, it has involved a common sacrifice of the Member Countries and of the society in general. Nevertheless, in this context, we accept the fact that bankruptcy, as insolvency proceedings, would indeed represent a systemic risk. However, their strategic reorganization can only represent a means of systemic rebalancing,

¹⁶ M. Isărescu, Raportul asupra stabilității financiare, 7 April 2016, Opening speech at the press conference organized by the National Bank of Romania -<http://www.bnr.ro/Mugur-Isarescu,-guvernatorul-BNR-Raportul-asupra-Stabilita%C8%9Bii-Financiare,-7-aprilie-2016-13892.aspx>.

¹⁷ See “10 answers to the economic crisis in Europe” - https://publications.europa.eu/en/publication-detail/-/publication/b89e2b0b-dda7-4ea3-936c-37adcf74ce27?Wt.mc_id=NEWSLETTER_october2017-interested-in-banners.

an effective way of achieving convergence between the economic and social dimensions, a complex integration of security and social rights into the general economic interest of an entity. In such circumstances, an economic shock such as the financial/economic crisis has prompted the emergence of a much-enriched economic, monetary and political architecture of the union, by finding solutions by an equitable coordination of several policies, namely the economic policy, the budgetary policy, the macroeconomic policy and the social policy aiming, among other things, at combating poverty and avoiding social exclusion, unemployment, etc. This mechanism can certainly be assimilated to a successful judicial reorganization, which involves many actors in the economic and social environment, but also a common sacrifice for a much more favourable outcome at a macrosystemic level.

We are mentioning that banking institutions benefit from special recovery regulations, provided by Government Emergency Ordinance no. 99/2006 on credit institutions and capital adequacy, genuine financial restructuring and stabilization mechanisms, which actually represent an equivalent, a “surrogate solution”¹⁸ to the traditional judicial reorganization, which may also involve an “action plan”, an equivalent of the judicial reorganization plan, with slight procedural nuances, in the sense that it is carried out under the supervision of the National Bank of Romania, correlated with the higher authority and supervision of the European System of Financial Supervision (ESFS)¹⁹. Thus, by virtue of its prudential supervisory attributions, NBR may establish three recovery proceedings, more specifically: the special surveillance procedure, the special administration, and stabilization measures. We are in the presence of certain concrete effects of the problems emerged in the world economy, which problems have generated to new measures for the management of the risk of failure of a credit institutions.

4. GLOBALIZATION. PERSPECTIVES. COMPARATIVE LAW

We believe that we cannot limit ourselves to a *stricto sensu* interpretation of the “globalization” of law, of the principles, theories, interferences and influences reflected in the internal legislative systems, but extensively, in relation to a “globalization of insolvency” itself, as a multifaceted institution also placed in the context of the other rights, sciences, branches approached in diversity. Thus, we seek to approach the meaning of “globalization” of insolvency from two perspectives.

Consequently, from a first perspective, we take into account the institution of insolvency outlined in an interdisciplinary manner,²⁰ through an *in globo* research, due to the fact that it is one of the institutions of law that has evolved remarkably along the history and up to the present, becoming a product of the intersection of legal, social and economic factors, which is heading towards an autonomous law which has filtered its own operating principles and proceedings. Obviously, law, by nature, is the result of the approach of

¹⁸ For details, see S. Târnoveanu, *Falimentul instituțiilor de credit*, in R. Bufan (scientific coordinator), *op.cit.*, pp. 850-855.

¹⁹ The European System of Financial Supervision, comprising the European Systemic Risk Board and the European Banking Authority, supplemented by the Committee of European Banking Supervisors, has the role to supervise financial institutions and prevent systemic risks, all banking institutions exceeding a certain impact threshold set through the Regulation of the European Union being individually supervised by these institutions, NBR cooperating with the European Union in this respect.

²⁰ I. Didea, D. M. Ilie, R.-D. Vidican, *The interdisciplinarity of the scientific research of law. The insolvency - an integrative area configured and resized by the intersection of the legal, economic and social realities*, in *Agora International Journal of Juridical Sciences*, no. 2/2017, available at - <http://univagora.ro/jour/index.php/aijjs/article/view/3155>;

multidisciplinarity, interdisciplinarity and transdisciplinarity, being an essential factor of the organization of life and society that cannot be detached from a historical time, from the economic, political, cultural, organizational state of an age, being redimensioned with the evolution of humanity.

In an rather atypical way, we seek to refer, initially, to the expansion of insolvency, seen as a form of "globalization" of the law institution itself in this case, in an interdisciplinary vision which involves the intersection, synthesis and remodelling of sciences in general, a multiplication of perspectives that synthesizes and interactively creates a complex end "product", such as in the case of insolvency, which has exceeded the boundaries of the branches of law, by incorporating social, economic, administrative, management factors, as law manifests a flexible legal sizing and management, adapted to the needs required in full economic crisis, global conflicts and problems. We are considering the accelerated legislative expansion in this field, as insolvency becomes a complex system of legal norms harmonized in their turn in a generally fragile context which is under the pressure of globalization, unbalanced by factors such as the economic crisis, unemployment, the refugee crisis, current topical subjects in the implementation of strategies by the bodies of the European Union²¹, but also by the international bodies, in order to ensure the security and respect of citizens' rights.

Although it interferes with internal and international normative acts, on labour law, criminal law, civil law, civil procedural law, administrative law, banking law, etc. and it is based on an integrative vision of the branches pertaining to the economy, sociology area, etc., the insolvency law has created its own path in the attempt of achieving its own objectives, being currently harmonized with the monist system implemented by the new Civil Code but also driven, in its evolution, by the principles and guidelines adopted and promoted by European and international organizations active in the field of insolvency law, in particular the guidelines developed by UNCITRAL. In relation to this aspect, we can find, in the specialized literature, a new perspective to approach the insolvency law, more specifically, its incorporation into a more complex law, i.e. the business law²², in the attempt of re-dimensioning the commercial law by outlining a new law that includes, in addition to the specific norms of the commercial law, other legal norms established in the businessfield (fiscal law, administrative law, procedural law, labour law, etc.). Moreover, such a legal vision seems to be outlined taking into account the initiative of the executive to lay, in the near future, the bases of an economic Code of Romania, viewed as a revolutionary economic and fiscal measure the main objective of which is to improve the business environment, as well as the increase in the welfare of all Romanians. This fusion prospect aims at including all laws specific to the economic field, especially the Fiscal Code, the Code of Fiscal Procedure, the Law on the Establishment of Trading Companies, and the Tax Evasion Law. Nevertheless, an economic law is also Law no. 85/2014 on insolvency and insolvency prevention procedures, but it is understood that the focus of this legislative code is only the category of professional traders.

In our opinion, an effective absorption of the special law regulating insolvency, which tends to establish a complex joint corpus, extending Law no. 85/2014 (viewed, in the

²¹ *Document de reflexion sur la maîtrise de la mondialisation*, 10 Mai 2017, - https://ec.europa.eu/commission/publications/reflection-paper-harnessing-globalisation_fr.

²² See M. Nicolae, *Unificarea dreptului obligațiilor civile și comerciale*, Universul Juridic, Bucharest, 2015, pp. 618-632.

specialized literature as a genuine Insolvency Code, which proposes an integrative vision and includes in a single normative corpus the general legislation applicable to all economic operators, the special legislation applicable to credit institutions and insurance companies, to groups of companies as well as regulations on cross-border insolvency, to which insolvency prevention tools, namely the ad hoc mandate and the arrangement with creditors) are added, by incorporating the other special insolvency laws into a General Insolvency Code cannot be achieved because it would lead to a new dissemination of the normative acts which have been grounded in their evolution on the basis of common Union and international principles and which can only be interpreted in a unitary way in a legislative harmonization logic. Moreover, the absorption of so many specific laws, which already tend towards their own evolutions and resizing, is a difficult legislative step, especially as we already have the example of the unification of the civil and commercial obligations under the monist system, which gave rise to numerous doctrinal controversies, legislative interpretations, and at the same time have put in motion an entire mechanism of legislative correlation and harmonization which can create dangers of legal insecurity. Indeed, this is a form of manifestation of the complexity, of the multidisciplinary, as the business environment involves an “open frontier” mechanism, which means nothing else but evolution by processes of fragmentation, followed by unification, leading to the combination of various elements in order to create something new, and in this case, we can notice how the disappearance of a branch of law, such as commercial law, has led to the construction of other possible branches, such as in the case of the insolvency law which, in relation to its evolution, manages to become gradually detached as special distinctive law in relation to the civil law and, even more so in relation to the commercial law, unlike the old bankruptcy legislation, and thus insolvency exceeds the narrow sphere of traders, as we are currently talking about the insolvency of the professionals, the insolvency of natural persons, but also the insolvency of the administrative-territorial units, with a normative *corpus* separated indeed, but which could be part of a joint *corpus* in the future, approached indeed in an integrative vision that would be the subject of a true Insolvency Code. Nevertheless, in this context of legislative expansion, we cannot imagine that the insolvency institution would only become a chapter of the Romanian Economic Code, Law no. 85/2014 being redefined by restricting target subjects or simply repealed, as was the case with the Commercial Code. Consequently, we believe that it is useful for such a legal construction, which tends to an autonomous law, the right of insolvency, to preserve its identity and its evolution outlined *in globo*.

We take into account especially an interdisciplinary nature of insolvency, exceeding the multidisciplinary stage, the insolvency law focusing, in its evolution, on an integrative style that has managed to exceed the boundaries of the traditional disciplines, the boundaries between public law and private law, which thus exceeds civil law, commercial, through integration and intersection with norms of public interest, with emphasis on reorganization, recovery, rehabilitation as procedures extending especially towards the direction of safeguarding the subjects involved, due to a general interest that is required in the economic and social context currently in line with the new objective of the European Commission.

Thus, insolvency tends towards a unified coordination and an integrative vision of these protection mechanisms, which really address distinctive legal subjects, but which have the same main objective reflected in the judicial reorganization regulated by Law no. 85/2014 on insolvency and insolvency prevention procedures, i.e. the *financial recovery* according to the provisions of Government Emergency Ordinance no. 46/2013 regarding the financial

crisis and the insolvency of the administrative-territorial units, approved by Law no. 35/2016, as well as the well-deserved *fresh-start* granted to natural persons, as regulated by Law no. 151/2015 on the insolvency of natural persons.

Insolvency, viewed as a transcendent matter, in the dynamics of an internal globalization process, has claimed its presence in all sectors, both in the public domain and in the private domain, exceeding the boundaries established between the traditional branches and systems of law, and becoming a complex institution, in full expansion that creates a viable "resuscitation" mechanism of the economy and the survival against budget misbalances, which is in the centre of the interest of national, EU and international bodies.

In a second perspective, we are referring to the globalization of insolvency as legal institution expanded at the world legislative level, both as an institution substantiated and dynamized in the internal regulation of each state, depending on the specific economic, political, cultural, organizational state, as well as an institution in the hands of international bodies, which creates the prerequisites for the international legislative harmonization and international unification, identifying viable solutions and guiding principles in the approach of the insolvency phenomenon, and currently the United Nations Commission on International Trade Law has in the strategic plan of action even a project to improve the model Law in the field of international insolvency.

Moreover, the divergences between the national systems related to the restructuring, reorganization and granting a second chance may cause difficulties in assessing investment risks in another country, all the more so as we are considering globalization and its effects, which have become a source of concern for Europeans, especially in relation to the repercussions on the rise of social inequalities and unemployment linked to the economic crisis under the pressure of a globalized world.

In relation to this phenomenon of internationalization and globalization of the foundation of law in general, we consider it appropriate to increase the interest in identifying and absorbing internally the successful practices of other legal systems in creating reorganization strategies for debtors in difficulty, who have already explored and tested the practice of strengthening a "saving culture" outlined from the point of view of insolvency, a vision which is timidly, but surely outlined in our legislation and other legal systems as a result of these inevitable influences.

In this respect, we remind the legislation outlined in the UK, where, since the late 1990s, the law of company insolvency has changed in a way that emphasizes rescue and measures taken in time to address the problems of the company. Moreover, the specialised literature²³ highlights the onset of a new change that emphasizes anticipatory approaches to company problems. Moreover, unlike the reticence of the banking system which is faced by insolvent debtors in Romania, both professionals as well as natural persons in their quality of consumers, as we have seen in the section above in relation to the possibility of triggering a systemic risk through insolvency, in the common-law system, banks are increasingly concerned to solve the problems of the company, subjecting the risk management and control systems used by companies to an external control, and increasingly employing professional independent specialists to evaluate and support those that have poor performance and endanger the company, focusing on audit and review procedures in this respect.

²³ See Vanessa Finch, *Corporate insolvency law. Perspectives and principles*, second edition, Cambridge University Press, Cambridge, UK, 2009, pp. 253-276.

In relation to banking strategies, which aim to shift insolvency from a reactive philosophy to an anticipative philosophy, we have also noticed an additional emphasis on banks' approaches in lending to companies that might have had difficulties. Banks have long used the terms of loan contracts to keep up-to-date with the performance and management behaviour of companies, using restrictive clauses where the borrower agrees not to adopt certain behaviours or not to modify their activity in certain specified ways, positive clauses in order to make sure that the borrower regularly provides the creditor with a variety of information as well as financial (positive and negative) clauses to regulate the various aspects of financial performance such as financial autonomy, liquidity, profitability or indebtedness.

These conditions have provided the main creditors with the opportunity to monitor companies, allowing British banks to react to potential problems of companies at a much earlier stage. This approach is obvious in increasing the rigour with which banks now look at three issues: early warning signals related to company issues, company management quality, and the company performance in managing the trade risks it faces. The new focus on early warning signals is based on a more active data monitoring through the Declaration of Principles in 1997 (reviewed in 2001 and 2005) issued by the British Bankers' Association, clarifying that when banks lend to small businesses and medium-sized businesses, they usually agree what kind of monitoring information will be needed, banks using this information not only to place the borrower in a risk category but also to provide early warning signals related to these problems.

Thus, when difficulties are signalled, the company is usually transferred to a "commercial support team". At this stage, the bank is more actively involved and can arrange an appointment with an accountant for an independent business review -IBR. The bank and the debtor company agree on a way to go further after analysing the recommendations made by the IBR. Under such circumstances, companies heavily rely on the assistance of the bank, which can propose and initiate recovery strategies, using their monitoring skills to gain a competitive edge. This first involves a structured approach to assessing the strengths and weaknesses of the company management and whether or not it is capable of facing the challenges. In such processes, banks and analysis teams do not only pay attention to assessing the likelihood of insolvency or recovery but they also try to determine whether managers can solve the business problems of the company themselves, or whether they need active assistance to manage those risks, which implies, again, a proactive approach to the company's insolvency prospects.

Consequently, the legal system thus built implies a common and assumed role to assist banks or companies in achieving recoveries, developing real professions in this respect such as recovery professionals, company doctors, business recovery professionals, risk consultants, solution providers, debt management companies, and cash flow managers. These specialists offer their services to assist both main creditors and companies when difficulties are encountered. Their role is often double, to control and monitor on behalf of a main creditor, and also to assist in the process of designing and implementing recovery solutions. The increase in their number and importance is a measure of the progress made in the area of the preoccupations to address the risks of insolvency through preventive measures.²⁴

²⁴ See R. Bufan, Gabriela Carmen Sanda, *Regimul fiscal al insolvenței*, in R. Bufan (scientific coordinator), op.cit., 1033.

Mention should also be made of the fact that British banks do not act solely in their own interest, which is aimed primarily at repaying debts whether they are in the recovery phase or in the official procedures of the company's decline, there is increasingly more evidence in support of the fact that, during the intensive assistance procedures, banks are normally prepared to stimulate activities that are meant to strengthen risk management systems and the prospects of companies in distress, instead of merely leading to the early repayment of debt. Moreover, we must highlight that, if banks initiate a "doctor of companies" intervention in the business of a company in distress, the company doctor will be hired, in most cases, not by the bank but by the company, and will be legally and professionally bound to act in the interest of the company and not in the interest of the bank. Moreover, the earlier the Bank's intervention, the lower the default risk to the bank, and the greater the prospect of its recovery.

Consequently, in redefining its role, the bank will build a flexible relationship with a healthy company that can easily take another form when the company faces problems. Company managers stand to gain, because they receive new levels of assistance from independent banks and consultants, thus abandoning the "agony" of the old regime in which a manager in difficulty would be tempted to go through these issues alone and secretly, even with the fear that the bank might find out what is happening and could put an end to the situation by appointing a judicial administrator, a regime that still makes its presence felt in our current economic environment, although the approach of a very transparent system would be more advantageous to the success of a reorganization plan.

The philosophy of redressing and giving a second chance to the debtor in distress was in fact a source of inspiration triggered by the American system of the Bankruptcy Code, due to which the most important principles governing such procedures, including the elimination of a substantial part of the liability in the absence of which the debtor could not become reorganized, the so-called "hair-cut" operation, involving the elimination of those creditors who would never have received anything in case of bankruptcy anyway, the premise of this common sacrifice being the maintenance in the commercial circuit of the entrepreneur, with positive macroeconomic effects, by creating jobs, paying contributions, taxes and maintaining a healthy business climate among contractual partners.²⁵ As a matter of fact, the fundamental stated purpose of the laws of the American state is to provide debtors with a fresh start of business - *a fresh start* – while prioritizing the reorganization over bankruptcy, a procedure governing the American insolvency proceedings²⁶. The reorganization category within the American Insolvency Code covers town halls, municipalities, companies and natural persons, individual farmers and regular income individuals, and the reorganization plan becomes a real rescue tool in the sense that, unlike our legislative system, the court has the sovereign power to approve a plan, even in the case of the objections and the negative vote expressed by the creditors, but only if it is convinced that the plan is honest and is drawn up in good faith in identifying a balance of interests between the creditors and the debtor. The absorption of such a measure in our legislation would be auspicious, given the current and obvious reticence in

²⁵ See Simona-Maria Miloş, Ş.Dumitru, Andreea Deli-Diaconescu, Otilia Doina Milu, op.cit., in R. Bufan (scientific coordinator), op.cit., pp. 583-590.

²⁶ In a decision of the Supreme Court of the United States, passed as early as in 1934, it is highlighted that the reorganization proceedings "give the honest debtor found in an unfortunate situation, a new opportunity in life and free horizon to its efforts, unmarked by the pressure and discouragement of pre-existent debts." - *Ibidem*.

relation to the general insolvency procedure, despite the efforts to reform the internal legislation. Although we may consider that insolvency is prevented by raising awareness of the causes of difficulty that it generates, the manager restructuring loans/debts in a timely manner or the business and resorting, why not, to extrajudicial methods, such as simple voluntary negotiation, according to the Guide for Extrajudicial Restructuring of the obligations of trading companies, issued by the World Bank, assisted voluntary negotiation - mediation²⁷(approaches that are rarely used due to the imbalance of forces), namely pre-insolvency procedures, ad-hoc mandate or the arrangement with creditors, procedures increasingly brought to the attention of professional traders with the improvement of regulations and facilitating their access by adopting the Insolvency Code, we cannot deny the reality of the fragile economic context in recent years, characterized by the unpredictability of the business environment dynamics, which certainly affected even the established debtors on the market. We believe, however, that bankruptcy should become an objective, not just of the debtor but also of the stakeholders, only in the case of businesses that have no chance, the exit from the business environment and the debt discharge really representing a benefit to the economic environment in such situations.

Other law systems as well, such as those in Australia and New Zealand, have adopted the American model, giving priority to the recovery and reorganization of the debtor in financial difficulty.²⁸

Also, the Chinese law system promotes reorganization to the detriment of bankruptcy, considering that giving a second chance brings added value to the economic environment, while contributing to social stability and prosperity.²⁹

CONCLUSIONS

The link between the new worldwide rescue concerns and the awareness of the fact that global financial waves can even hinder fundamentally sound businesses becomes the basis for accepting the judicial reorganization process as a priority and a necessary measure in the current and future internal context.³⁰

It is obvious that the development of global financial markets has brought about significant changes in the structure and dynamics of trade relations, the international integration of the economy inevitably leading to the creation of consequences and interdependencies, social and economic, legal interdependencies, forcing national laws and various legal systems to some extent recode and redesign their internal legislation through a coordinated harmonization of international bodies that created the laws and model principles needed to stabilize the new economic arena.

Globalization allows for a transparent analysis of functional insolvency practices and implicitly of reorganization, recovery, debt remittance, offering alternative models in outlining and substantiating a viable right, adapted, however, to the economic, political,

²⁷ See Simona-Maria Miloş, *Prevenția insolvenței prin mijloace contractuale*, in *Curierul Judiciar* no. 6/2013, p. 337-338.

²⁸ See Arnd Wiebusch, *Business Rehabilitation. Voluntary Administration in Australia and New Zealand in comparison to the German Insolvency Plan*, VDMVerlagDr. Muller Publishing House, 2010 - <https://www.morebooks.de/gb/search?utf8=%E2%9C%93&q=insolvency>.

²⁹ See H. Zhang, *Corporate rescue in Chinese Insolvency Law*, LAP LAMBERT Academic Publishing, 2012 - <https://www.morebooks.de/store/gb/book/corporate-rescue-in-chinese-insolvency-law/isbn/978-3-659-16072-1>

³⁰ Westbrook, „*Globalisation of Insolvency Reform*”, p. 403, *apud* Vanessa Finch, *op.cit.*, p. 253.

cultural and organizational state of each country, which is why we currently enjoy the cultivation of a law system that has gradually abandoned the autonomous, closed system of hypostasis and has inevitably turned towards an open, flexible, integrative, interdisciplinary, complex system, which are, as a matter of fact, specific features of our century, a century of complexity.

Consequently, an identification and reporting of best practices in the field certainly leads to a qualitative management of insolvency risks, in a more open and preventive way, in this context of globalization, international and EU institutions and bodies outlining a true "palette of rights" that restructured and revolutionized the institution of insolvency in almost every legal system, promoting and developing as a priority a "rescue culture", which leaves the area of exclusive interest of the creditors, balancing social and distributive goals, public and private interests alike, and prioritizing values such as fairness and accountability.

REFERENCES

Arnd Wiebusch, *Business Rehabilitation. Voluntary Administration in Australia and New Zealand in comparison to the German Insolvency Plan*, VDM Verlag Dr. Muller Publishing House, 2010 -
<https://www.morebooks.de/gb/search?utf8=%E2%9C%93&q=insolvency>.

R. Bufan, Gabriela Carmen Sanda, *Regimul fiscal al insolvenței*, în R. Bufan (scientific coordinator), *Tratat practic de insolvență*, Hamangiu Publishing House, Bucharest, 2014.

Marcela Comșa, *Regulamentul privind procedurile de insolvență, Jurisprudența Curții de Justiție a Uniunii Europene*, Universul Juridic, Bucharest, 2017.

I. Didea, D.-M. Ilie, *Direcția extinderii fenomenului „insolvență” – conturarea noului Cod al insolvenței prin filtruleconomico-social actual*, în *Curierul Judiciar* no. 1/2017.

I. Didea, D.-M. Ilie, *Un nou statut al instituției insolvenței raportat la viziunea monistă promovată de Noul Cod Civil. Conturarea unui drept special, particular - dreptul linsolvenței - urmare abrogării Codului Comercial*, în *Curierul Judiciar* no. 8/2017.

I. Didea, D. M. Ilie, R.-D. Vidican, *The interdisciplinarity of the scientific research of law. The insolvency - an integrative area configured and resized by the intersection of the legal, economic and social realities*, în *Agora International Journal of Juridical Sciences*, no. 2/2017, Available on - <http://univagora.ro/jour/index.php/aijjs/article/view/3155>;

Vanessa Finch, *Corporate insolvency law. Perspectives and principles*, second edition, Cambridge University Press, Cambridge, UK, 2009.

Mirela Iovu, *Efectele implementării Recomandării Comisiei Europene no. 135/2014 privind o nouă abordare a eșecului în afaceriși a insolvenței*, *Revista Română de Drept al Afacerilor* no. 4/2015.

Simona-Maria Miloș, *Prevenția insolvenței prin mijloace contractuale*, în *Curierul Judiciar* no. 6/2013.

Simona-Maria Miloș, Ș. Dumitru, Andreea Deli-Diaconescu, Otilia Doina Milu, *Reorganizarea*, în R. Bufan (scientific coordinator), *Tratat practic de insolvență*, Hamangiu Publishing House, Bucharest, 2014;

M. Nicolae, *Unificarea dreptului obligațiilor civile și comerciale*, Universul Juridic, Bucharest, 2015;

Gh. Piperea, în Gh. Piperea (coordonator), *Codul insolvenței. Note. Corelații. Explicații*, Ed. C.H.Beck, Bucharest, 2017;

THE DEVELOPMENT OF A "RESCUE CULTURE". INSOLVENCY GLOBALIZATION

Gh. Piperea, *Carecterele sacrificial, colectiv, concursual și necesar în procedura insolvenței*, in *Curierul Judiciar* no. 7/2017;

S. Târnoveanu, *Falimentul instituțiilor de credit*, in R. Bufan (scientific coordinator), *Tratat practică de insolvență*, Hamangiu Publishing House, Bucharest, 2014;

H. Zhang, *Corporate rescue in Chinese Insolvency Law*, LAP LAMBERT Academic Publishing, 2012 - <https://www.morebooks.de/store/gb/book/corporate-rescue-in-chinese-insolvency-law/isbn/978-3-659-16072-1>;

Westbrook, „Globalisation of Insolvency Reform”, p. 403, *apud* Vanessa Finch, op.cit http://www.uncitral.org/uncitral/fr/commission/working_groups/5Insolvency.html.
[http://eur-lex.europa.eu/legal-](http://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:52016PC0723&from=EN)

[content/FR/TXT/HTML/?uri=CELEX:52016PC0723&from=EN](http://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:52016PC0723&from=EN);

https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/civil-justice/civil-and-commercial-law/insolvency-proceedings_en#insolvencyinitiative.

https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/civil-justice/civil-and-commercial-law/insolvency-proceedings_en#insolvencyinitiative.

www.onrc.ro - <https://www.onrc.ro/index.php/ro/statistici?id=252>.

„Citizens' dialogues on the future of Europe" - https://publications.europa.eu/en/publication-detail/-/publication/46f6ae9d-aa40-11e7-837e-01aa75ed71a1?Wt.mc_id=NEWSLETTER_october2017-interested-in-blurbs.

M. Isărescu, *Raportul asupra stabilității financiare*, 7 April 2016, Opening Speech at the press conference organized by the National Bank of Romania - <http://www.bno.ro/Mugur-Isarescu,-guvernatorul-BNR-Raportul-asupra-Stabilita%C8%9Bii-Financiare,-7-aprilie-2016-13892.aspx>.

„10 answers to the economic crisis in Europe" - https://publications.europa.eu/en/publication-detail/-/publication/b89e2b0b-dda7-4ea3-936c-37adcf74ce27?Wt.mc_id=NEWSLETTER_october2017-interested-in-banners.

Document de reflexion sur la maîtrise de la mondialisation, 10 Mai 2017, - https://ec.europa.eu/commission/publications/reflection-paper-harnessing-globalisation_fr.