

BANKRUPTCY AND THE BUSINESS ENVIRONMENT ACCORDING TO THE NEW ROMANIAN CRIMINAL CODE

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Abstract

Sustainable development imperatively requires the existence of a market economy based on fair competition, honest behavior regulations and observance of the law as well as prevention and fight against the offence of bankruptcy. Bankruptcy is an offence pertaining to the business environment. Bankruptcy (insolvency) means the cessation of payments together with financial irregularities to the prejudice of the creditors. As such, the general or group legal scope of the offence of bankruptcy is represented by the business relations. Nevertheless, according to the new Romanian Criminal Code passed by Law no. 286/2009, bankruptcy was included among the offences against patrimony, the subgroup of dishonesty offences, without consideration of our legal tradition or foreign legislations on the part of the legislator.

Key words: *bankruptcy, sustainable development, criminal illegality, business environment.*

JEL Classification: *K14*

I. Introduction

In Romania the business environment and bankruptcy are desirably interrelated in that prevention and fight against bankruptcy lead to a business environment favourable for the sustainable development of a community while a healthy business environment governed by good faith among business partners goes a long way towards eliminating the possibility of bankruptcy to occur.

II. Sustainable development and bankruptcy

Sustainable development imperatively requires the existence of a market economy based on fair competition, honest behavior regulations and observance of the law as well as prevention and fight against the offence of bankruptcy. The legal status applicable to insolvent debtors is very important for the business operators as well as for the local and national economic development. Also there is a need for a uniform enforcement of the bankruptcy legislation and effective protection of the creditors of the insolvent debtors³.

III. Bankruptcy – Legal and economic concept

Bankruptcy is an extremely important economic event or fact because it marks the pathologic end of an economic activity⁴. The disappearance of an insolvent debtor with a prominent position in the economic field is undoubtedly an important issue for the business environment.

Bankruptcy is a legal concept originating and growing in the business field, closely related to other similar concepts pertaining to the same field such as: crash, insolvency, trader, debtor, creditor, companies etc⁵.

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³ Gheorghe Ivan, *Bankruptcy – an offence pertaining to the business environment*, “Criminal Law Magazine” no. 2/2010, pg. 61

⁴ Ion Anghel, *Bankruptcy. Radiography and Prediction.*, The Economic Publishing house, Bucharest, 2002, pg. 11.

⁵ Mihai Adrian Hotca, *Fraudulent Bankruptcy*, C.H. Beck Publishing House, Bucharest 2008, pg. 7-8.

IV. The concept of insolvency

According to article 3, point 1 of Law no. 85/2006 concerning the insolvency procedure⁶, insolvency is defined as the state of the debtor's patrimony characterized by the deficiency of available monetary funds for the payment of the exigible debts. The Law discerns between two types of insolvency: obvious and imminent.

The insolvency is presumed as being *obvious* when the debtor, after 30 days as of maturity of a certain liquid debt, has failed to pay his debts to one or several creditors. The insolvency is *imminent* when it is proved by the creditors that the debtor is not able to pay by the due date the exigible debts employed, with monetary funds available on the maturity date.

Insolvency should not be mistaken for insolvability as the latter is the legal state of a person's patrimony characterized by the liabilities exceeding assets.

Insolvability is not relevant per se for the initiation of the insolvency procedure considering that only insolvency triggers the enforcement of the special procedure and not insolvability⁷.

V. The concept of bankruptcy

Bankruptcy is defined as crash (insolvency) together with financial dysfunctions harming the creditors.

VI. Bankruptcy and insolvency

The question arises as to the relation between the concepts of bankruptcy and insolvency.

Even though, in an extended sense, the two concepts could be deemed as synonyms as bankruptcy is essentially a state of cessation of payments due to unavailable liquidity, in the proper sense, according to our legislation, bankruptcy involves an additional condition which is that the impossibility of due payments should be caused by certain irregularities⁸.

According to DEX (Romanian Language Dictionary⁹), the word "bankruptcy" also covers the meaning of crash (insolvency, cessation of payments). However, bankruptcy could be defined as insolvency caused by certain irregularities¹⁰.

VII. The offence of bankruptcy in the Romanian criminal law in force

At present the offence of bankruptcy with its two types - simple and fraudulent bankruptcy - is stipulated in article 143 of Law no. 85/2006 concerning the insolvency procedure. Thus, it is considered as simple bankruptcy offence, punishable by imprisonment ranging from 3 months to 1 year or fine, the failure to or belatedly submit the application requiring the initiation of the insolvency procedure in due time, by the debtor- natural person or the legal representative of the debtor- legal person, exceeding the deadline stipulated in art. 27 of Law no. 85/2006 (that is no more than 30 days from the appearance of the insolvency state) by more than 6 months.

Likewise, it is considered as fraudulent bankruptcy offence, punishable by imprisonment ranging from 6 months to 5 years the action of a person who:

- a) Fabricates, tampers with or destroys the debtor's records or covers up part of his assets;

⁶ Published in the Official Monitor, Part I, no. 359 from April 21st 2006.

⁷ Gheorghe Ivan, cited work, pg. 62.

⁸ Mihai Adrian Hotca, cited work, pg. 20.

⁹ The Romanian Academy, DEX - The Romanian Language Dictionary, 2nd edition, Univers Enciclopedic Publishing House, Bucharest, 1998, pg. 84.

¹⁰ Gheorghe Ivan, cited work, pg. 63.

- b) Submits inexistent debts or enters unreal sums as debts in the debtor's registers, documents or financial statements, each of this actions harming the interests of the creditors;
- c) Alienates part of the assets in case of the debtor's insolvency, to the prejudice of the creditors.

VIII. The offence of bankruptcy in the new Romanian Criminal Code

In the new Romanian Criminal Code, passed by Law no. 286/2009¹¹, both simple and fraudulent bankruptcy are incriminated, in Title II of the Special Part (Offences against patrimony), chapter III (dishonesty offences). According to article 240 it is considered as *simple bankruptcy offence* the failure to or belatedly submit the application requiring the initiation of the insolvency procedure in due time, by the debtor- natural person or the legal representative of the debtor- legal person, exceeding the deadline stipulated by the law by more than 6 months and is punishable by imprisonment ranging from 3 months to 1 year or fine. The legal action is initiated upon the complaint filed by the injured party.

Likewise, according to article 241 of the new Criminal Code, it is considered as *fraudulent bankruptcy offence* the action of a person who:

- a) Fabricates, tampers with or destroys the debtor's records or covers up part of his assets;
- b) Submits inexistent debts or enters unreal sums as debts in the debtor's registers, documents or financial statements;
- c) Alienates part of the assets in case of the debtor's insolvency. The punishment consists in imprisonment ranging from 6 months to 5 years. The legal action is initiated upon the complaint filed by the injured party.

It is worth mentioning that according to the new Romanian Criminal Code, the offence of bankruptcy does not involve the business environment but the person's patrimony which is prejudiced through the dishonesty offence. Considering the reasons we will bring forward, we believe that this offence should be stipulated in the special laws regulating the social relations pertaining to the business environment, such as those regarding bankruptcy and insolvency, due to the predominance of the field it occurs in. We appeal to our legislative tradition and the Italian law as arguments even though the latter is not the only one embracing our view.

IX. The offence of bankruptcy in the Italian criminal law

In the Italian criminal law, the offence of bankruptcy is listed among the collective insolvency offences which include all the actions committed by the insolvent party or any other person before or during the collective insolvency procedure, which the law punishes as offences.

These actions are incriminated by the Royal Decree no. 267/1942 concerning bankruptcy, admission in composition with creditors, controlled management and forced administrative liquidation, which was successively amended, the last amendment having been carried out by means of the Legislative Decree no. 78/2010 which stipulated that with these offences the collective insolvency procedure represents a prerequisite or objective condition for punishability.

Offences related to bankruptcy make up the most important class/category of the collective insolvency offences. Besides these, the law also incriminates other actions committed in the other collective insolvency procedures: offences committed during the admission in composition with creditors and during the forced administrative liquidation¹².

¹¹ Published in the Official Monitor, Part I, no. 510 from July 24th 2009. The new Criminal Code will become effective on the day established in the law for its enforcement.

¹² Luigi Delpino, *Diritto penale. Parte speciale*, XV Edizione, Giuridiche Simone Publishing house, Napoli, 2006, pg. 787.

The typical offence in the field is bankruptcy, which can be by fault or mala fide and displays two subtypes: simple bankruptcy (article 217 of the Royal Decree no. 267/1942) and fraudulent bankruptcy (article 216 of the Royal Decree no. 267/1942).

In the Italian Criminal Code there is an offence listed among the offences against patrimony by fraud but it is different from the offence of bankruptcy. Thus, article 641 stipulates the offence of fraudulent insolvency consisting in the action of entering into an obligation without any intention to fulfill it by concealing their own insolvency.

X. The type of the bankruptcy offence

Bankruptcy is an offence pertaining to the business environment.

Reflecting on the provisions of Law no. 85/2006 concerning the insolvency procedure we could conclude that bankruptcy is a criminal illegal act, pertaining to the field of business. The same conclusion: bankruptcy is an offence pertaining to the business environment, was also reached by various Italian authors¹³.

As such, the general or group legal scope of the offence of bankruptcy is represented by the business relations.

XI. Insolvency – prerequisite for the offence of bankruptcy

We believe that the insolvency state represents a prerequisite for the offence of bankruptcy, a conclusion coming out from the entire regulation of the new Romanian Criminal Code as well as from other constituents: the core of bankruptcy, its name (*nomen iuris*, the actions and non-actions making up the material element of the offence of bankruptcy with its two types: simple and fraudulent bankruptcy, also stipulated in the provisions of article 228 of the new Criminal Code – regarding theft, article 320 of the new Criminal Code - regarding forgery in deeds etc., which shows that the difference from the mentioned offences resides in the very state of insolvency¹⁴.

If insolvency plays this part in the content of the bankruptcy offence, the question arises whether it is necessary to declare the state of insolvency by means of a court decree.

For the offence of bankruptcy to exist the legislator of the new Romanian Criminal Code did not stipulate the necessity to legally declare the bankruptcy therefore reaching a conclusion to that effect and regarding the legal declaration of bankruptcy as a prerequisite would imply amendments to the law whereas it was only the necessity to cease payments that was specifically stipulated as prerequisite for the offence.

Thus, a better protection of business relations can be guaranteed, considering the notorious case law in which certain debtors, with the intention of fraud, alienated part of the assets before the bankruptcy procedure was officially initiated¹⁵.

XII. Conclusions

The option of the legislator of the new Romanian Criminal Code to include bankruptcy – with its two types: simple and fraudulent bankruptcy-among the “offences against patrimony”,

¹³ *Ibidem*.

¹⁴ Gheorghe Ivan, cited work, pg. 68. In the same sense, concerning simple bankruptcy offence, Constantin Duvac, *Simple Bankruptcy in the New Criminal Code*, “Criminal Law Magazine” no. 4/2011, pg. 68. As for fraudulent bankruptcy, the author considers the state of insolvency to be necessary only in case of incrimination stipulated in article 241 paragraph 1 letter c) of the new Criminal Code – in case of insolvency, the offender alienates part of the assets (Constantin Duvac, *Fraudulent Bankruptcy in the New Criminal Code*, “Criminal Law Magazine” no. 1/2012, pg. 49).

¹⁵ Gheorghe Ivan, cited work, pg. 69-70.

the subgroup of “dishonesty offences” is debatable¹⁶. As previously shown, bankruptcy is an offence pertaining to the business environment and its legal scope is represented by the business relations.

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¹⁶ There are authors however who share the legislator’s opinion (Constantin Duvac, *Simple Bankruptcy in the New Criminal Code*, cited work, pg. 81; Constantin Duvac, *Fraudulent Bankruptcy in the New Criminal Code*, cited work, pg. 70).