„BABEŞ-BOLYAI" UNIVERSITY CLUJ-NAPOCA
LAW SCHOOL

INSOLVENCY OF THE NATURAL PERSON. PHYSIOGNOMY OF THE DEBTOR. THE LEGAL TREATMENT OF OVER-INDEBTMENT OF THE DEBTOR IN CASE OF AN INSOLVENCY PROCEDURE

PhD Thesis Coordinator:
Prof. univ. dr. Radu N. Catană

PhD Candidate:
MIHAELA S. SĂRĂCUŢ

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SUMMARY

In a case pending before the Court of Justice of the European Union[1], Advocate General Damaso Ruiz-Jarabo Colomer argued for a true *common genetic code of possible solutions offered by national law* and, even if the reference was to actions in annulment of fraudulent acts of the debtor, the statement regarding the existence of several common elements in the various insolvency proceedings is valid and needs to be analysed. Thus, regulations such as those concerning the insolvency principle of the procedure, the equality of creditors of the same rank, the suspension of interest, increases or penalties after the beginning of the procedure, the suspension of individual foreclosures, the continuation of ongoing contracts can be successfully included in this common code of procedures.

Reality has shown, however, that there are countless national and international legal provisions, which characterize the various stages or activities in the specific and derogatory insolvency proceedings, regardless of whether it is the insolvency of a legal entity or a natural person.

The insolvency proceedings that can be applied to professionals have been the subject of analysis by many experts, both from the perspective of the existing legislation, especially from that of the solutions pronounced by the courts. The insolvency of the individual consumer, whose liabilities stem from other activities than those of operating an enterprise, as defined by art.3 paragraph 2 of the Civil Code, is, however, a new topic of debate both for the Romanian litigant and for the legal experts. If in most states, the insolvency of a natural person benefits from a

[1] Case C-339/07, *Rechtsanwalt Christopher Seagon als Insolvenzverwalter über das Vermögen der Frick Teppichboden Supermärkte GmbH* against *Deko Marty Belgium,* Recital 26

wide regulation and jurisprudence, Romania adopted the first law of the insolvency of a natural person in 2015 (Law on the insolvency procedure of a natural person no. 151), which entered into force in 2018, after several postponements. Denmark is the first EU member country to adopt specific natural person insolvency legislation (in 1994), followed by France, Germany, Austria, Belgium, the United Kingdom, the Netherlands, Italy and Spain.

The doctoral thesis aims to analyse the actual legal conditions and means by which a natural person who cannot honour obligations assumed when they become due, in a state of systemic, general insolvency, can benefit from an insolvency procedure that provides the former with the possibility of financial recovery and a new beginning without the accumulated debt. And since real life is complex, and a natural person carries out, alongside daily, ordinary activities, specific activities of operating a company, we aim to identify the mechanism and procedure by which the consumer's over-indebtedness and the insolvency of the natural person professional can be solved, the importance and actuality of the topic being obvious.

We aim to answer a seemingly simple question: *what are the legal solutions that can be used by an individual entrepreneur who is in a state of over-indebtedness, who is at the same time insolvent, in order to be able to honour obligations and achieve a new beginning*?

Therefore, in order to identify that common genetic code of solutions in insolvency proceedings referred to by Advocate General Damaso Ruiz-Jarabo Colomer, we propose to analyse, on one hand, the various national laws, with a tradition in the field of insolvency of the natural person (Denmark, France, Italy, Germany, USA, etc.) and, on the other hand, the national legislation, whilst keeping in mind that the Romanian legislator opted for a separate law on the insolvency of a natural person, contrary to the recommendations made by means of (EU) Regulation 2015/848 of the European Parliament and of the Council of May 20th, 2015 on insolvency proceedings, according to which identical treatment should be provided for insolvent debtors, with no distinction between natural persons or legal entities, traders or non-traders, without the existence of a differentiated regime between traders and non-traders, in terms of insolvency. The same recommendation was reiterated by the European legislator and by means of (EU) Directive 2019/1023 on preventive restructuring frameworks, debt remission and forfeiture, as well as measures to increase the efficiency of restructuring, insolvency and debt remission procedures, which, from its preamble, proposes Member States to lay down

appropriate measures to be applied to the financially distressed debtor, private entrepreneurs or consumers.

The scientific research methodology used in this approach involves the use of a set of specific research methods and procedures that ensure the achievement of the goal proposed. Thus, we first used the historical method to present the legal institution chosen in its evolution, correlated with the comparative method, in order to observe the legislative and socio-economic evolution in each analysed legal system. The same comparative method was used also to observe and highlight the common elements but also the differences (where they exist) between the international regulations of the personal bankruptcy institution to show how the various features are actually reflected on the beneficiary, and on the natural person respectively, subject of law.

Finally, during the research we used both the deductive method and the inductive method to ensure, on one hand, reaching the general established objective, by formulating new concepts and theories regarding the chosen legal institution, and, on the other hand, the identification of problems of application of normative provisions and the gaps in legislation. Through the logical method used in research, I aim to demonstrate that only starting from existing principles, the deductive reasoning can be capitalized (from general to particular or singular).

In order to facilitate the separation of solutions for the legal problem under research, that of the legal treatment that the over-indebtedness of the consumer, also individual entrepreneur in insolvency, can receive, we designed the paper in two main parts: Part I - dealing with the insolvency of the individual consumer and Part II which analyses the insolvency of the individual entrepreneur. Each of the two parts, in turn, include chapters and subchapters that allow the analysis of the issue in question. We will first present Part I of the paper and then present the elements that are included in Part II.

Thus, the paper begins by presenting the historical evolution of personal bankruptcy regulation, both in European insolvency and national legislation, to justify the legislative intervention in this area. The presentation of the historical evolution of the bankruptcy institution of individuals - consumer, which highlights the changes in the approach of the debtor’s situation, the sanctions applied for the hypothesis of non-payment of debt is meant to ensure a better understanding of the current regulation of insolvency proceedings and equality to legitimize the conclusions related to the debtor's status in the proceedings. The research of this evolution

confirms that the genesis, regulation, and evolution of the institution of bankruptcy of individuals was closely related to the evolution of the society and its mentality on individuals who can no longer cope with their due debt.

The different approach of the social phenomenon and equally of the economic one, the change of the social mentality, also influenced the legal regime of insolvency. However, regardless of changes that occurred over time in economic, political, social or cultural terms, the insolvency law has had to reconcile on one hand, the interests of the debtor with those of creditors, legislation that ensures excessive protection of creditors being harmonized with the one that aims at trying to save by any means the insolvent debtor, and, on the other hand, the social protection policy with the tendencies to promote consumerism.

Retaining the basic concepts expressed in the adopted legislation, the doctrine admits that the bankruptcy laws were divided into three categories: the Latin group, the Germanic group, and the Anglo-Saxon group. The first category includes states that have been influenced by French law and that have given priority to credit protection by recovering receivables and sanctioning bankruptcy, Belgium and Luxembourg being the first countries to adopt laws in 1851 that are the closest to the French Commercial Code. Italy followed, which initially adopted the Commercial Code in 1865, inspired by French legislation, and later, through the legislative reform of 1882, via the way some institutions were regulated, brought it closer to the rules of the German group[2]. The Italian Commercial Code influenced the adoption of the Bankruptcy Code (February 10th, 1877) in Germany, the legislator taking over both institutions from French legislation and specific rules, the most important being those that provide that it applies to both traders and non-traders. Legislations that took over the Anglo-Saxon model (especially the USA[3], England) enshrined rules by which the remedies granted to the creditor should be combined with those aimed at protecting the bankrupt, by the survival of his business and the discharge of debt in order to give him/her a new chance, a new beginning.

The evolution and adaptation of insolvency legislation has continued over time, with the improvement or sometimes adoption of new, specific institutions being continuous.

[2] C.A. Stoeanovici, op. cit., p.37
[3] *Bankruptcy and Debtor/Creditor* – Brian A. Blum, Fifth Edition, Wolters Kluwer, Law/Business, pp.128-210

Chapter 3 contributes to the identification of the main cause of the insolvency of individuals and establishes the fact that the over-indebtedness of the natural person determines the objective impossibility to pay assumed obligations when they are due.

The establishment of an effective mechanism for preventing and resolving the financial difficulties of individuals has been hampered by the fact that, on one hand, there is no unitary definition of the over-indebtedness notion accepted at European Union level which differs significantly from country to country and, on the other hand, several ways of measuring over-indebtedness have been identified, different from state to state, the mechanisms being influenced mainly by the elements decided to be the main causes of over-indebtedness.

The over-indebtedness concept that exists in some national legislations has its origin in the legal provisions that establish the conditions for access to any debt restructuring procedure, regardless of whether it is extrajudicial or judicial. Thus, the French law, for example, ensures the right of access to debt restructuring proceedings for bona fide debtors who are unable to pay all their outstanding or about to become due professional debt (Article L.331-2 of the Code de la consommation). Finnish law (1993) also considers that debtors are over-indebted or insolvent when they are unable to pay their debt when due if this is a permanent situation and not an accidental or temporary one. In similar legislation, in Belgium (Law of July 5th 1998, as amended by the Law of April 19th, 2002), the definition of over-indebtedness is limited to a number of procedural and personal conditions regarding access to over-indebtedness management systems, without providing a proper definition thereof.

The Romanian legislator did not understand to define this notion, so that also for this reason determining the sphere of the persons to whom the law of personal bankruptcy is applicable is difficult.

Analysing different categories of events identified as causes of the lack of financial availability of the individual (e.g. excessive financing, irresponsible both from the banks and debtors, personal events that could not have been foreseen by the debtor, etc.), Professor U.

Reifner[4] defined over-indebtedness as the *objective inability to pay as evidenced by insufficient relevant income to allow the payment of liabilities when due, after deducting the living expenses*.

Research has shown that there is no cause or set of causes that finds general applicability, they are specific to each company, but it has been decided that there is a direct correlation between the financial difficulties and age, the most at risk being the young but also those with a large number of dependents[5].

As a result of this analysis, we managed to identify a series of causes of over-indebtedness that generate the risk of non-payment of liabilities due starting from the analysis of the family situation in particular, the causes being macroeconomic such as wages, unemployment, exchange rate fluctuations, growth of subsistence costs, high interest rates on loans, etc. as well as personal: illness, death, divorce, business failure, personal financial management wrong decisions, etc.

Having established that over-indebtedness is the main cause of debt non-payment, I considered it necessary, on one hand, to adopt measures leading to the provision of a higher financial education for consumers so that they are able to ensure an adequate management of the personal and family budgets, avoiding an impulsive, exaggerated consumption but also the accumulation of debt from excessive loans that would bring a high degree of indebtedness, impossible to manage. On the other hand, the legislator must adopt legislative measures to prevent over-indebtedness (e.g. through restrictive lending policies, a low degree of indebtedness, etc.) and to provide adequate means of its legal treatment for those situations where over-indebtedness is a constant in the life of the consumer.

Regarding the European formulas or models for measuring over-indebtedness (subjective, objective and administrative model), I have showed that Law no. 151/2015 presents an original

[4] U. Reifner is Emeritus Professor of Commercial Law at the University of Hamburg. He analyses personal over-indebtedness and bankruptcy in the Responsible Credit in European Law study, available at https://www.academia.edu/38426004/U._Reifner_-_Responsible_Credit_in_European_Law, accessed on 12.03.2019

[5] G. Betti, N. Dourmashkin, M. C. Rossi, Y. Ping Yin (2007) , Consumer over-indebtedness in the UE: measurement and characteristics, Journal of Economics Studies, Vol.34 Iss:2, pp.136-156 available at https://www.researchgate.net/publication/24110186_Consumer_Over-Indebtedness_in_the_EU_Measurement_and_Characteristics, accessed on 03.12.2018

model that sets out the objective model as an initial point of insolvency analysis, but understands to apply a correction regulating by imperative legal norms the extent to which the subsequent income of the debtor and of his family as well as his behaviour can influence the insolvency procedure and implicitly the treatment applied to his over-indebtedness state. Thus, the law stipulates (art. 4) that in order to establish that the over-indebted debtor will be subject to insolvency proceedings, will also be taken into account the elements that allow to determine that his economic situation will be maintained and that there is no *reasonable probability to become once again, within a maximum period of 12 months, able to perform its obligations as contracted*, and if the debtor has violated, during the insolvency proceedings, the obligations imposed by law or the repayment plan, including having a negligent behaviour or lacking interest regarding the execution of his obligations, the request for release of his residual debt will be rejected (art. 75 para. 1).

Chapter 4 presents the principles governing personal bankruptcy, on one hand, those provided by law under this name and compared to those mentioned by the legislator in the insolvency of the professional and, on the other hand, those contained in various international regulations [European Economic and Social Committee, Insol International, Vienna Initiative, (EU) Regulation 2015/848 of the European Parliament and of the Council, (EU) Directive 2019/1023].

It should be noted that the existence of principles governing insolvency proceedings was also observed by Professor Paşcanu[6], who identified as fundamental rules in the bankruptcy of debtors, and which he generically calls "characters", the collectivist character, the generalist character and the egalitarian character. These rules are still preserved today, in other forms or names, but they essentially express the reason for their establishment. Insolvency is therefore a bankruptcy procedure (the old collectivist character), in which all the debtor's creditors exercise their rights and obligations recognized by law, the procedure is unique and general on the patrimony of the insolvent debtor (generalist character), and the creditors of the same class benefit from an equal treatment, an expression of the egalitarian character, supported today as the principle of equality between creditors.

[6] M. Paşcanu, R*omanian bankruptcy law, with the legislation of attached theories*, Cugetarea Publishing House, Bucharest, 1926, pp.11-13

In Chapter 5 we presented the rules and exceptions that make it possible to apply insolvency proceedings to consumers.

As for the subjects of the consumer insolvency procedure, we have demonstrated, using the rules of formal logic, that the procedures regulated by law can be applied to: individual debtors, with full capacity, those with limited capacity or lack of capacity, for obligations arising, on the one hand, from the conclusion of conservation legal acts, of current disposition, of low value and which are executed at the time of their conclusion as well as, on the other hand, to other civil legal acts if they are confirmed the conditions of the law or if they were executed voluntarily on the date on which they could have been confirmed, conditioned by the fulfilment of the other conditions imposed by art. 1 and 4 of Law no. 151/2015, excluding the insolvency proceedings provided by law, those civil legal acts concluded by persons lacking capacity that do not concern legal acts of conservation, current disposition, of low value and which are executed at the moment of their conclusion if they were not confirmed in the conditions of the civil law as well as those for which the person lacking capacity used malicious manoeuvres to hide his lack of capacity. We find, therefore, that the legislator did not exclude from the application of insolvency proceedings, the natural person who has limited capacity or lacks such capacity but only those who carry out specific activities of operating an enterprise, under the conditions of art.3 of the Civil Code and the *ubi lex non distinguit, nec nos distinguere debemus* principle becomes applicable.

The legislator also opted for the exclusion of the liberal professions from the scope of the insolvency law. We have shown that we consider that this exclusion from the consumer insolvency procedure is justified because individuals who carry out activities specific to liberal activities (as lawyers, doctors, architects, etc.) although they cannot be characterized as traders, being prohibited by special laws that regulate the respective professions performing commercial activities, they do carry out specific activities for professionals, respectively systematically carry out organized activities of operating service providing enterprises (legal, medical, etc.).

It seems less justified, however, to exclude the liberal professions from the scope of application of Law no. 85/2014 as long as, as shown above, they carry out specific activities of

operating an enterprise (services) and the carrying out these activities may determine the natural person to end up in a situation where he can no longer cope with certain, liquid and due liabilities, with the amounts of available funds. If we also note that the over-indebtedness resulting from business, commercial or civil, is essentially different from that which may occur in the daily life of a consumer, we can argue with reason that this category of debtors-individuals must be able to benefit from a form of protection in the form of an insolvency procedure (specific to professionals), when and if it can no longer pay the accumulated debt. Of course, individuals who carry out activities that fall within the scope of the liberal professions, may be subject to an insolvency procedure provided by Law no. 151/2015, but only for obligations that do not result from their professional activity.

The option of the Romanian legislator corresponds to the existing regulations in other EU member states. Thus, for example, in Germany, any natural person who does not carry out or did not carried out economic activities on his own account can be subject to insolvency proceedings. As an exception, the debtor is a natural person who has carried out economic activities in the past, in insolvency, to become the subject of insolvency proceedings if (i) he has less than 20 creditors at the date of application and (ii) there is no requests for the application of the insolvency procedure resulting from the activity previously carried out. Also, in France, any natural person in a state of insolvency may be the subject of insolvency proceedings, provided that he does not have the quality of trader, artisan, entrepreneur, farmer or does not exercise a liberal profession[7].

From the perspective of the access conditions in the insolvency procedure, Chapter 6 highlights both the general and the specific conditions. Thus, although the Romanian legislator has been constant in defining the notion of insolvency, both of the consumer and the professional, establishing that it aims at a crisis of the debtor's treasury, regardless of whether it is a natural person or professional, characterized by insufficient financial resources for the payment at maturity of the debt (of the consumer) respectively of the certain, liquid and due claims (belonging to the professional) understood to regulate differently the modalities and the procedures applicable to the individual consumer respectively the professional. Thus, if in the

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7 Domurath, Irina; COMPARATO, Guido; MICKLITZ, Hans-Wolfgang *The over-indebtedness of European consumers : a view from six countries,* EUI LAW; 2014/10; European Regulatory Private Law Project (ERPL-08) available at http://cadmus.eui.eu/handle/1814/32451

case of the consumer it offered no less than three insolvency proceedings - administrative on the basis of debt repayment plan, judicial by liquidation of assets and simplified - for the individual entrepreneur it regulated only the simplified insolvency procedure.

Thus, if for the consumer, the main purpose of the application of insolvency protection procedures is his financial recovery, the release of residual debt and only in the subsidiary, the payment of liabilities, the professional individual when becoming insolvent, has as main purpose the payment to the greatest extent possible of the claims, since at the end of the procedure, the debtor is removed from the registry he was registered in.

From the insolvency perspective, we notice that unlike the consumer's insolvency[8], for the professional both the obvious, installed insolvency and the imminent insolvency are regulated. Thus, the legislator stipulates that the professional is in a state of *obvious insolvency*[9] (which is presumed) when, after a period of 60 days from the due date, it has not paid his/her debt to the creditor. The established presumption is a relative one that can be removed by evidence that the professional has the necessary liquidity to pay his/her debt.

Moreover, in the insolvency of the professional, if the insolvency is obvious and the cessation of payments is general, the debtor is obliged to address the competent court with a request to begin the insolvency proceedings, under penalty of criminal[10] or civil[11] liability for any damage caused, the provisions of art.66 paragraph 1 of Law no.85 / 2014 being edifying*: the debtor in a state of insolvency is obliged to address a request to the court* (...). The consumer debtor, however, has only the vocation to address such a request to the insolvency court or to the special commission, as the case may be, not being obliged to formulate it[12].

We underlined the fact that the obligation imposed on the natural person debtor - professional regarding the formulation of the request to begin his insolvency procedure is debatable under the conditions of amending Law no. 85/2014 by GEO no. 88/2018. Thus, according to art.5 para. 72 of Law no.85/2014 in the form in force after October 2nd, 2018, the start of insolvency proceedings at the request of the debtor is not possible if the amount of

[8] The definition of insolvency can be found in art.3 para.12 of Law no. 151/2015
[9] Art.5 para.29 of Law no. 85/2014
[10] The failure to submit at the optimal time the request to start the insolvency proceedings meets the constitutive elements of the crime of simple bankruptcy according to art. 240 of the Criminal Code
[11] Art.66 para.9 of Law no.85/2014 regulates the patrimonial liability of the debtor, legal or natural person, for the damage caused by the formulation in bad faith of a request to start the insolvency procedure
[12] Art.6of Law no. 151/2015

budget receivables is greater than or equal to 50% of the declared total of its claims and, therefore, even in the presence of an obvious, installed insolvency, the formulation of the request is possible only when all the declared receivables do not include in the mentioned percentage budgetary receivables. We consider that in this case the debtor can no longer be sanctioned criminally, nor as misdemeanour and cannot be obliged to pay any possible damages resulting from failure to formulate the request to start its insolvency proceedings as its manifestation of will is conditioned by the existence of objective elements (the composition of the claims declared) which acts as an end of non-receipt.

The national legislation, in the current regulation, requires, when referring to the consumer debtor, subject of the insolvency procedure, that it is in good faith, without defining, however, the notion. Applying the rules of analysis and systematic interpretation of the legal norms in civil law corroborated with those of the commercial law, we defined the notion of *debtor-natural person in good faith*, subject of Law no. 151/2015 and, as such, may be subject to regulated insolvency proceedings, an honest individual who cannot meet his/her certain, liquid and due liabilities, resulting from activities other than the operation of an enterprise and who agrees to comply with a series of obligations and prohibitions, in order to cover his/her liabilities as much as possible through a plan-based repayment procedure or through the liquidation of assets or in a summary, simplified procedure to obtain the release of residual debt.

Also from the perspective of the applicability conditions of insolvency laws, we have demonstrated that insolvency, although not mentioned as an admissibility condition of the consumer insolvency procedure request notice, is, in fact, an essential requirement in analysing the insolvency application request. Thus, the legislator imposes on the insolvency commission the obligation to analyse the situation of the traceable asset of the consumer, present but also its evolution in the next period ("there is no reasonable probability to become once again, in a maximum period of 12 months, able to fulfil his/her obligations… ", the reasonable probability being defined by reporting to the debtor's assets) and depending on the result of this analysis to rule both on the admissibility of the request and on the procedure that will be applied to the debtor. Therefore, what interests from the perspective of the insolvency of the individual is his/her state of insolvency, respectively the lack of liquidity necessary for the payment of liabilities but also his financial evolution, i.e. the objective impossibility to have the income he

needs to become able to fulfil the assumed obligations without harm to his private life but also to his dependants.

Then, it is important from the perspective of the insolvency of the natural person that the assets are lower than the liabilities, so the debtor is insolvent and does not have the prospect of recovery within a maximum of 12 months, because only in this situation of installed and structural over-indebtedness is the intervention justified through insolvency proceedings, not being allowed for a natural person who has the opportunity to pay his debt within a reasonable time, through a financial effort of his own or helped by his family, to benefit from a cancellation of liabilities owed to creditors. Obtaining such a benefit is recognized only to over-indebted and insolvent individuals who are in this situation for reasons not attributable to them and for which the future financial evolution does not have positive estimates.

We note, therefore, that the insolvency of the natural person is essentially different from the insolvency of professionals where the insolvency of the debtor is not legally relevant to determine its insolvency, being possible that a solvent debtor is in insolvency, subject to legal procedures. For the natural person debtor, however, if he owns traceable assets and has revenues whose value exceeds the patrimonial liabilities, the legislator did not allow for the application of insolvency procedures as it is estimated that by capitalizing his assets, in advantageous conditions, at a fair price it is possible to cover the liabilities to creditors so that its over-indebtedness does not affect the assets of his creditors. Only if, after carrying out these operations of individual capitalization of the goods in his patrimonial assets, the liability would remain higher than the traceable asset and would be higher than the threshold value, the debtor may request the application of insolvency proceedings.

Finally, the paper also highlights the way in which insolvency is reflected by the rules of the civil code, the civil procedure and the fiscal procedure, noting that the civil law regulates insolvency from the perspective of the deadline benefit violation, while the fiscal law establishes the conditions and the procedure by which a natural person is declared insolvent, so that in the matter of the insolvency of the professionals, the insolvency is analysed in direct relation with the insufficiency of the available funds.

The conclusion that is required as a result of this comparative analysis is that in the proceedings for the execution of goods in the debtor's patrimony, the value of the asset that can be enforced in insolvency proceedings is less than that which can be foreclosed in the common

law proceedings, regulated under the conditions of the civil procedure code. Thus, in the insolvency procedure of the natural person debtor, according to art.3 para. 2, *non-traceable goods* are those that cannot be subject to capitalization, being necessary to ensure a reasonable standard of living and that have a predetermined value: personal or household goods, objects of worship, if not more than one of the same kind, an indispensable vehicle for the debtor and his family, food necessary for upkeeping during the procedure, goods intended for the exercise of the debtor's profession or occupation, agricultural inventory, etc.; to the non-traceable goods *the non-traceable revenues*[13] are added respectively the share of the total income of the debtor necessary for the expenses that ensure a reasonable standard of living such as the necessary amounts for housing, food, transport, health, those for compulsory education but also the necessary post-secondary, university or postgraduate studies, but also the mandatory insurance premiums.

We note, therefore, that the individual debtor subject to insolvency proceedings has the opportunity to keep a relatively large and diversified asset base, the legislator being concerned to ensure all the elements necessary for a reasonable living standard for both the debtor and his family members in his dependence, the situation being different from the laws of other states (e.g. Portugal, France). Under these conditions, by analysing the situation of the traceable asset, the individual debtor can determine whether he intends to submit to special insolvency proceedings that guarantee him a non-traceable asset necessary to ensure a *reasonable standard of living* for him and his dependent family or will opt for the capitalization procedures under the conditions of the common law, when the non-traceable asset will be limited to the level of *some assets indispensable to life*.

If, however, he opts for the insolvency proceedings, the consumer will comply with the rules established by law, which are real legal innovations. We remind here: only the debtor is the holder of the request to start the administrative insolvency procedure, the creditors are not obliged to submit a request for admission of their claim but only an information addressed to the administrator, there is no possibility of organizing the creditors in a meeting or committee as in the case of professionals, there is no regulation of an opportunity control of creditors in their debtor's procedure, the suspension of individual proceedings against the bankrupt debtor are (in the debt repayment plan procedure) interim and temporary in nature, the suspension of interest is

[13] Art. 3 para.25 of Law no.151/2015

not provided in the administrative insolvency proceedings, while the action for the annulment of fraudulent acts from the suspect period is regulated only in the insolvency proceedings by liquidation of assets.

Chapter 7 aims to present the legal treatment of the over-indebtedness, the general rules but also the specific ones, which precede the achievement of the final purpose of the procedure: the remission of residual debts.

Constantly with the purpose of modernizing the legislation, the Romanian legislator established its own rules for starting the insolvency procedure of individuals, recognizing active procedural legitimacy only to the debtor. Of course, special attention must be paid to the request made by both spouses, cohabitants, or the person with whom the debtor coexists when the procedure will be a joint one, with a single debt repayment plan or with two related plans.

In the absence of express regulations regarding the verification of claims, the participation of creditors in the procedure, the suspension of individual foreclosures, the following question naturally arises: whether the existing regulations in the insolvency of professionals can be applied?

The research establishes that all the considerations for which the ICCJ excluded from the scope of verification of the judicial administrator/liquidator the claims found by an enforceable title in the insolvency procedure of the professionals remain valid also in the insolvency procedure of the natural persons since, on the one hand, the attributions of the administrator of the procedure in the stage of elaboration of the preliminary table of claims are identical with those of the judicial administrator/liquidator, and, on the other hand, the executory titles belonging to the consumer emanate from the same authorities (ANAF, territorial administrative units, etc.).

Thus, in the verification stage of the claims to the natural person debtor, the administrator of the procedure will not be able to make substantive verifications of the claims included in enforceable titles and his verification will be limited to the formal control of total or partial settlement of claims by payment, the incidence of the statute of limitations as well as the extent of the claim in relation to the moment of occurrence, before or after the beginning of the procedure.

We have shown that the main desideratum pursued by regulating the insolvency proceedings of individuals is that of rehabilitating the over-indebted consumer, ensuring, at the same time, the protection of his/her main assets and the possibility of obtaining debt write-off, total or partial with the consequence of its social reintegration in reasonable time, free from the over-indebtedness it had, through the active participation of the debtor in the economic and social life, in the conditions of maintaining a decent standard of living.

Whether based on a financial recovery plan in which the liquidation of traceable assets takes place in a controlled manner or based on the immediate liquidation of traceable assets, insolvency proceedings for bona fide individuals allow for debt relief, in whole or in part, conditioned by the debtor's participation in good faith in his/her financial recovery, by paying his/her creditors.

If regarding the legality control of the creditors in the insolvency procedure we can admit that it is done through the appeals that the creditors can formulate against the reports drawn up by the administrator or liquidator of the procedure, or even through the requests to replace him in their debtor's procedure, the opportunity control did not receive any regulation. In the insolvency of professionals, the provisions of art.45 paragraph 2 of Law no.85/2014 unequivocally establish that the business decision belongs to the debtor if the right of management has not been revoked, of to the or judicial administrator, under the control of creditors, through their bodies, the personal bankruptcy however does not include a similar regulation, and in the absence of this regulation, the exercise of this attribution, of the control of opportunity is not allowed to the creditors even if they are the first interested that the decisions adopted by their debtor correspond to the declared purpose of insolvency.

Along with other special attributions, derogatory, the Law on insolvency proceedings of individuals no. 151/2015 imposes on the administrator of the procedure[14] the obligation to analyse the housing situation of the debtor and his family and to propose, through the debt repayment plan, housing measures at least during the insolvency proceedings. The adoption of such a legislative solution corresponds to the constant jurisprudence of the Court of Justice of the

[14] Art.26 of Law no. 151/2015

European Union[15] which required the adoption of appropriate conduct, consumer protection, when the residential building belonging to the insolvent debtor is targeted by enforcement proceedings. It was also emphasized[16] that, on the one hand, the right to housing is a fundamental right guaranteed by Article 7 of the Charter of Fundamental Rights and, on the other hand, the loss of the family home puts the debtor and his entire family in a particularly fragile situation (*see, to that effect, the Order of the President of the Court Sánchez Morcillo and Abril García, EU: C: 2014: 1388, paragraph 11*). The European Court of Human Rights[17] also stressed that the loss of housing is one of the most serious violations of the right to respect for a person's home, with national courts being obliged to ensure that any person at risk of such interference has access to procedures for examining the proportionality of this measure.

In the national legislation, the legislator imposed the obligation to analyse the housing situation of the debtor and his family only in the insolvency procedure based on a repayment plan, without establishing what will be his/her fate in case the debtor will be subjected to an insolvency proceeding other than the administrative one. Therefore, we appreciate that in the absence of express provisions to ensure the protection of the debtor regarding his home, the provisions of Law no. 151/2015 can be criticized from the perspective of conventionality and, maybe, of non-compliance with ECHR and CJEU jurisprudence.

Of particular importance in the context is the recognized possibility of the debtor for the transmission of the procedural quality, by law and not conventionally, analysed separately for each insolvency procedure, the implications being different depending on the type of procedure but also on the time at which this legal operation is of issue; specific rules have been established in relation to the request to initiate the procedure. It was also possible to conclude that the legislator does not allow the continuation of the simplified insolvency procedure by the heirs of

[15] The ruling from December 20th, 2012 in Case C 34/13, subject of the case: a preliminary ruling under Article 267 of TFEU by Krajský súd v Prešove (Slovakia), received by the Court on January 23rd 2013, in the proceedings of *Monika Kušionová v SMART Capital as*, available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=157486&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=368433, accessed on 05.04. 2018

[16] Case C-34/13, *Kušionová v. SMART Capital a.s*., paragraphs 51-64

[17] European Court of Human Rights, McCann v. The United Kingdom, no. 19009/04, § 50, and the Rousk v. Sweden Decision, no. 27183/04, § 137, available at https://www.google.ro/search?q=McCann+%C3%AEmpotriva+Regatului+Unit%2C+nr.+19009%2F04%2C&oq=McCann+%C3%AEmpotriva+Regatului+Unit%2C+nr.+19009%2F04%2C&aqs=chrome..69i57.1150j0j7&sourceid=chrome&ie=UTF-8, accessed on 05.04.2018

the insolvent debtor, thus emphasizing its *intuitu personae* character. Moreover, through its regulation manner, the simplified procedure aims to support the debtor in a difficult financial situation – it has no assets, no income, with diminished work capacity - for a decent living, which does not incur on him/her other liabilities. Therefore, it is natural to terminate this insolvency procedure, which had the role of social protection of the debtor, upon his/her death.

The special procedure for transmitting the procedural quality in the insolvency procedure of individuals is also found in other legislations. For example, in the United States, the death of the bankrupt debtor does not result in the immediate termination of the proceedings because, on the basis of a notification of death by the debtor's lawyer or his/her designated representative, the procedure may continue, being possible to obtain debt relief under the Debt Relief Proposal prepared[18]. In the United Kingdom, Chapter 54 of the Bankruptcy Act from 1986 regulates the procedure process for the case in which the debtor's death occurred, differing according to the time when this event occurred: before the filing of a bankruptcy application (paragraphs 54.31-54.37) or after the beginning of bankruptcy proceedings (paragraphs 54.38-54.72). Thus, if the debtor dies before the application is submitted, the administrator of the debtor's assets will request an insolvency administration order from the insolvency court, and not a bankruptcy order, while if the death occurs after the start of the bankruptcy procedure, it will continue as in the case the debtor would be alive, a number of special provisions[19] being stipulated.

In the judicial insolvency procedure by liquidation of assets, the legislator established the rule according to which the debtor's traceable assets are subject to capitalization by selling them under the conditions regulated by the respective common law according to the norms of the civil procedure code.

However, given that the recovery of assets can take a long time and to remove the risk that an insolvency proceeding will be excessive, punishable from the point of view of respecting the right to a fair trial by ensuring a reasonable time, it was provided as exception to the sale of goods rule, the possibility of *a transfer in lieu of payment(datio in solutum)*.

What does this procedure entail?

[18] Details at http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics, accessed on 13.07.2015

[19] Details http://www.legislation.gov.uk/ukpga/1986/45/contents accessed on 18.09.2017

The special transfer in lieu of payment procedure regulated by art. 59 of Law no. 151/2015 is essentially different from the transfer in lieu of payment procedure regulated by the Civil Code[20], the Law on insolvency prevention and insolvency proceedings no. 85/2014 or the Law on the transfer in lieu of payment of real estate in order to settle the obligations assumed by loans no. 77/2016[21] and involves the exercise by which any of the creditors of the insolvent individual can take over the property on account of the claim, separately or even together being possible several options depending the number of creditors participating in the special procedure of transfer in lieu of payment, the amount of the claim and covered by the asset.

Through this procedure established by the legislator, that of special transferring in lieu of payment, it is possible that the rules for distributing the revenues obtained in the procedure of the insolvent debtor are disregarded, the creditor or creditors who opted for accepting the good as payment, being paid with priority, regardless the claim's rank.

For the debtor in good faith, over-indebted, who became insolvent for excusable reasons, the court may impose the transfer in lieu of payment of the good that belongs to him/her and the effect is a release of all his/her unpaid liabilities. In this special procedure, the legislator imposed the transformation of the transfer in lieu of payment from a convention, into a legal procedure that can ensure increased protection to the bankrupt individual. Equally, however, if the debtor owns several assets (land and construction, for example), the application of this procedure may become unfair to the debtor as it is required to hand over all the assets he owns as payment.

Last but not least, the application of the transfer in lieu of payment in the insolvency proceedings of the over-indebted debtor implies the relief for the debtor from the unlimited liability of his debt, transferring in payment and transmitting to his creditor the good, which does not happen in any of the other forms of transfer in lieu of payment procedures, the provisions of art. 2324 paragraph 1 of the Civil code being removed from application.

Chapters 7 and 8 present the ways in which the natural person subject to insolvency proceedings benefits from the residual debt relief, which is practically the purpose of establishing the insolvency proceedings but also the remedy of this benefit and respectively the revocation of debt remission. The conditions under which the release of residual debt can be

[20] Art. 1492 of the Civil Code;
[21] Published in the Official Gazette of Romania no.330 from April 28th, 2016

granted but also those under which revocation can be ordered underline the fact that only the bona fide debtor can be subject to Law no. 151/2015, and good faith must be maintained throughout the procedure but must have existed before the occurrence of generalized, systemic over-indebtedness.

Part II, begins with an analysis from a historical perspective of the insolvency of the professional, in terms of existing regulations, emphasizing the way to regulate the insolvency of individuals, traders or non-traders, so that in Chapter 2 the various forms of presentation of the professional-natural person regulated by GEO no. 44/2008 to be analysed, their particularities being highlighted both from the perspective of constitution and functioning, but especially of the responsibility in case of insolvency.

An important element in the analysis of the professional's insolvency is his patrimony, especially the one destined to performing the economic activity.

Establishing the dedicated patrimony, optional under Romanian law, on the one hand, limits the responsibility of the professional towards personal creditors who cannot be satiated with the goods affected by performing the economic activity and on the other hand, ensures a favourable regime for creditors who hold receivables against him/her in the exercise of an operating activity of an enterprise. And it is so because in the conditions regulated by art.2324 par.3 of the Civil code, in case of forced execution, the creditors whose claim appeared in connection with a certain patrimonial mass with special assignment are obliged to pursue the goods that are the object of that patrimonial masses first and only in the subsidiary, insofar as those goods are not sufficient, they can go, for the satisfaction of the claim, against the other goods of their debtor also.

The Romanian legislator established that the damage of some assets from the owner's patrimony for a special assignment is not mandatory and in the absence of an express manifestation of establishing such patrimony not even the use of certain goods determined for carrying out a certain activity regulated by law or authorized professions, does not impose the conclusion that the professional understood to constitute within his unique patrimony a patrimonial mass with special assignment. Thus, since the essence of private law relations is the freedom of contract, under the conditions regulated by the Civil code, it can be justifiably argued that the owner of the patrimony cannot be obliged to constitute a dedicated patrimony or to include certain goods of a certain value in such a patrimony. This is all the more so as the

creditors whose claims arose in connection with the activities of operating an enterprise have as collateral for the payment of the claims all the debtor's assets, as an expression of their overall collateral. It is true that in the absence of a patrimony of assignment, the professional creditors come in competition with the debtor's personal ones, but, nothing prevents the former to constitute their personal guarantees on the goods in the patrimony of their debtor.

The problem of the existence of goodwill, distinct and separate from the assignment patrimony as well as the particularities of this legal institution in the case of professional individuals was generated by the existing doctrinal disputes regarding the possibility to mark the equality between the assignment patrimony and the goodwill.

The current legal regulation of the individual trader allows us to observe that on account of this category, the own patrimony of the natural person, with the patrimony of assignment, specific to the professional who carries out an economic activity can coexist, insofar as in this patrimony the goodwill belonging to the trader was also constituted. In reality, the natural person in question is one and the same, but due to some legal fictions it can appear under various presentations: professional natural person, trader natural person. While the patrimony is mandatory for any natural person, the patrimony of assignment can be constituted only by the persons to whom the law recognizes this right and under the established conditions and the goodwill is regulated only for the category of traders.

If the owner of the patrimony has not opted for the establishment of a patrimony of assignment at the date of the registration of the natural person professional, the goods in the actual patrimony of the natural person will be used for the economic activity, as goodwill even if these goods are and remain the property of the natural person. We consider that the use of these elements from the patrimony of the natural person by the trader is equivalent only to a de facto attribution of the goodwill since the goods preserve their legal affiliation to the actual patrimony of the natural person, with all the legal effects they generate. Instead, the goods that are acquired by the individual trader for carrying out the specific commercial activities will return to the property of the natural person in the case of a registered sole trader (PFA) and of the individual enterprises respectively in the co-ownership of the members, according to the quotas established by the family enterprise articles of incorporation. These goods cannot constitute a distinct patrimony of the professional as in the case of the legal person as it does not have legal personality in this capacity but nor will it become a patrimony of assignment because the will of

the owner of the good is not in fact doubled by the formalities that validate the legal constitution of the patrimony of assignment, as part of the actual patrimony.

Once the patrimony of assignment is constituted by fulfilling the specific formalities, the goods assigned to this special destination as well as those acquired, under the law, for carrying out the specific economic activity but also those acquired as a result of this activity become part of the assignment patrimony, with all effect that such an affiliation generates, and, implicitly, part of the general patrimony of the natural person.

Therefore, if an individual trader has not opted for the establishment of an assignment patrimony, its goodwill represents a part of the patrimony asset itself, generally belonging to the natural person who acquires the quality of trader, but, when the constitution of a special assignment patrimony was established, destined to the specific economic activity carried out, the goodwill is a part of the asset of the patrimony of assignment.

A question that arises is that to know how to justify the different legal treatment that is applicable to the liability of the natural person in a limited liability company and, for example, a sole proprietorship or a registered sole trader?

In essence, both forms of organization involve a single natural person - the sole shareholder respectively the individual entrepreneur - which only through a legal fiction forces us to perceive him in duplicate. Therefore, the limited liability of the sole shareholder, within his participation in the formation of the share capital, for the liabilities of sole proprietorship and the unlimited, subsidiary liability, which is true, of the natural person - individual entrepreneur appears unnatural as long as the protagonist (natural person - sole proprietor or individual entrepreneur) carries out the same activity of operating an economic enterprise, organized only from a legal point of view under another name.

We consider, however, that from the perspective of the extent of his liability, the sole partner of the sole proprietorship approaches the legal regime of the responsibility of the individual entrepreneur only in case of insolvency. Thus, for this hypothesis, the sole shareholder who caused the debtor's state of insolvency can be held accountable to pay the entire liability so that the social creditors are fully compensated, in a general or simplified insolvency proceeding, as the case may be.

The individual entrepreneur, however, in case of insolvency of the registered legal entity (PFA, II or IF) will be subject only to the simplified procedure and the exercise of his liability under the conditions of art. 169 of Law no. 85/2014 will not be possible.

Chapter 3, after presenting the possible procedures from the perspective of Law no. 85/2014 but also its beneficiaries, highlights the specific rules applicable to the individual entrepreneur but also possible solutions for problems that may arise in the insolvency procedure.

We have shown that difficult problems can arise in the event that the family business cannot meet certain and due debts whose value is higher than the threshold value, the insolvency procedure will apply to all members of the enterprise who meet the conditions of being a trader.

This hypothesis is bizarre and difficult to understand how it will apply in practice. It says as principle that each of the traders who own a patrimony, possibly divided into several special assignments, but their patrimonies have as a common element the existing family relations between the members of the family enterprise. Under these conditions, the goods constitute the co-ownership of the members of the family enterprise and the application of the collective procedure will be difficult to perform as long as the establishment of the insolvency state presupposes a thorough, detailed analysis of the assets and liabilities of each of the traders. Similarly, the determination of the liability to which each is called to be responsible for is difficult if not impossible to establish as long as the state of co-ownership or even the joint tenancy of the goods is not ceased. If we add to this whole picture the hypothesis in which one or more members of the family enterprise also have personal liabilities, the effective application of the rules of the insolvency procedure under the conditions regulated by Law no. 85/2014 becomes illusory.

The paper also presents bankruptcy prediction methods developed over time that have been assessed as the most significant to determine when the event will occur, methods that are classified into two categories: parametric methods (which use multiple variable parameters) respectively non-parametric methods. Among the essential parametric prediction methods were considered *the Beaver model*, *the multiple discriminatory analysis*, *the Logit model*; from the category of non-parametric methods the most important are *the alternative portioning algorithm* and *the neural networks*.

As a result of the research conducted, the experts concluded that today's multi-variable analysis, especially non-parametric, have a high level of efficiency and a high level of accuracy

compared to the primary prediction models and, as such, they can be used in determining when a company's insolvency will occur[22]. Also, the scoring method used in parallel with the classical methods of analysing the financial equilibrium, profitability, financial flows allow the assessment of the overall risk of the company and the prediction of the default risk thus being possible to determine when insolvency will be imminent and the provisions of Law no. 85/2014 applicable. Applying this method to the professional individual is easy because, given that the economic activity is not generally large, the financial indicators involved in the analysis are few in number but also real so that determining when insolvency becomes imminent can be done with some precision.

In the United States, the law allows companies to begin the proceedings even when there are no signs of imminent insolvency or any likelihood of its occurrence provided that the debtor, in financial difficulty is in good faith and the purpose of starting the proceedings is the reorganization of the business[23].

In practice, the date on which a request to start the insolvency proceedings for the case where the insolvency is not obvious is difficult to determine as there are no legal provisions in this regard. However, we appreciate that in order to determine this moment, the analysis may have as a benchmark the terms provided by the legislator to regulate various other activities of the insolvent debtor, relevant to its treasury.

The research highlighted the fact that in the context that an analysis of the activity carried out in a time frame of 1-2 years before the onset of insolvency can be considered appropriate to establish the time when the beginning of the insolvency proceedings can be requested, for a state of imminent insolvency, as a series of actions, acts and operations carried out in this interval can provide indications of it, the term being similar to the suspicious period, taken into account for the fraudulent acts of the debtor. For example, the legislator stipulates[24]

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[22] Ahmad AHMADPOUR KASGARI, Seyyed Hasan SALEHNEZHAD, Fatemeh EBADI, A Review of Bankruptcy and its Prediction, International Journal of Academic Research in Accounting, Finance and Management Sciences Vol. 3, No. 4, October 2013, pp. 274–277, at https://pdfs.semanticscholar.org/f0d2/74d744e3fcca2d28fc9173aa70be70a120da.pdf

[23] Stefania Bariatti, Robert van Galen, European Commission, *Study on a new approach to business failure and insolvency - Comparative legal analysis of the Member States' relevant provisions and practices*, in Publications Office, 2015, p.40 available at https://publications.europa.eu/en/publication-detail/-/publication/3eb2f832-47f3-11e6-9c64-01aa75ed71a1/language-en accessed on 26.06.2018

[24] art.117 para.2 b, d, e and f of Law no.85/2014

that a series of acts from the suspicious period - unbalanced acts, those of transferring in lieu of payment, of establishing a right of preference, payments before maturity - are subject to annulment if they are concluded to the detriment of creditors. However, it is permissible to exclude them from the cancellation operation if they have been concluded in good faith in the execution of an agreement concluded with the creditors, following extrajudicial negotiations, capable of leading to the financial recovery of the debtor.

From the perspective of the receivables verification activity, we consider that an interesting hypothesis can be the claims established by European enforceable titles represented by judgments attesting uncontested claims provided by (EC) Regulation 805/2004[25] on the creation of an European enforceable title for uncontested claims. The natural question is whether also the claims mentioned in these judgments are subject to the verification procedure by the official receiver?

According to the European Enforcement Order procedure provided for in the Regulation, if a creditor holds an uncontested title and wishes to recover it in another Member State, he can obtain its enforcement immediately, without the need to involve the judicial system of the Member State where execution is desired. As the Regulation is directly applicable, the certified judgment on uncontested claims will be recognized in the Member State where enforcement is sought and will have to be enforced. Obviously also in Romania, an EU member state, the rules will apply identically and the European Enforcement Order obtained and certified will be able to be capitalised under the conditions of the direct application of the (EC) Regulation 805/2004, and its execution can be refused only in situations provided by art.21, the substantive revision of the decision by the judicial system of the executing state not being allowed.

Under these conditions, the judicial liquidator who is opposed to such a title will be required to proceed with its execution, under the conditions of art. 105 of Law no. 85/2014. We consider that the European Enforcement Order, although not mentioned in the category of exceptions to the claims verification procedure, will have the legal regime of a court decision as what validates this European title is in fact an enforceable (European) judgment which under the conditions of the (EC) Regulation 805/2004 is part of the domestic law.

[25] Published in Official Journal of the European Union L143/15, vol. 7/19

Regarding the problems of applying the insolvency of the natural person, we underlined the fact that on one hand, the insolvency is applicable to those individual professionals who did not proceed to their valid registration in the trade register and, on the other hand, the liability rules specific to the situation in which there is a patrimony of assignment constituted under the conditions of the law, does not work at the expense of a patrimony constituted implicitly by assigning some goods to a certain economic destination since the legislator conditioned its valid constitution by fulfilling the specific formalities. Then, the procedure for cancelling fraudulent transfers from the suspicious period is applicable, while an action in the exercise of personal liability, under the conditions of art. 169 of Law no. 85/2014 is not admissible.

Finally, we analysed the legal mechanisms that allow solving the existing treasury crisis in the patrimony of the over-indebted individual debtor and who is also an individual entrepreneur in insolvency. The analysis had as premise the hypothesis of an over-indebted, bona fide natural person, who is at the same time an individual entrepreneur, owner of an economic enterprise (organized in one of the forms provided by GEO no. 44/2008), in insolvency, to establish how the insolvency rules and procedures provided in the two laws apply (Law no. 85/2014 respectively Law no. 151/2015) and, especially, if it is possible the unitary application of these regulations, noting that the legislator excluded, by default, the individual debtors who are in bad faith.

Identifying the possible situations that the natural person can develop - 1. the natural person owns goods in his/her patrimony, with two options: it has not constituted a patrimony of assignment respectively there is a special assignment of the goods; 2. there are no goods in the patrimony itself - we have exposed the bizarre situation that can arise due to the legal fiction that the duality of the natural person implies in these hypotheses: two tables of receivables, one belonging to the consumer, and the second, belonging to the professional for which it will be difficult to establish the order of payment of claims, two experts in insolvency and, in concurrence, different rules of priority for payment.

If, with regard to the establishment of consumer and professional creditors, the operation does not involve complicated activities, provided that there is a certain type of coordination between the persons designated to manage the two procedures, as it is usually easy to detect between civil and commercial liabilities of the natural person, regarding the distribution of amounts to creditors, the procedure can raise serious problems. On one hand, determined by

the lack of a regulation that would allow a prioritization of payments, and, on the other hand, by the incompatibility of the simplified insolvency procedure of the individual professional with some consumer insolvency procedures.

Even if we identified as a solution for the order of distribution of payments between the creditors of the natural person, consumer respectively professional, the rules of imputation of payment regulated by art. 1506-1509 of the Civil Code, these provisions do not cover all possible assumptions in real life. Thus, we have demonstrated that the rules mentioned are verified for the hypothesis in which a procedure of liquidation of assets applied to the consumer with the simplified insolvency procedure of the professional individual concurres because only in this hypothesis, the goods in the patrimony will be capitalised, the procedures being compatible, art. 58 of Law no. 151/2015 being an almost identical copy of art. 154 of Law no. 85/2014. Thus, the debtor's assets are subject to capitalization, in principle, under the Civil Procedure Code, the creditors having the opportunity to engage in this activity, by deciding the manner of selling the assets of the respective professional by appealing to the measures adopted in the procedure. The liquidation of the goods starts in both procedures as soon as the inventory process has been completed, the liquidator is the one who concludes the sale contract on behalf of the debtor, and if the good is sold at public auction, the report holds ownership title, the goods being acquired free of encumbrances. Once the goods are liquidated, the amounts obtained will be able to be distributed in the conditions mentioned above, respecting the rules of payment imputation, the insolvency procedure having the same stages both for the consumer and for the professional individual.

However, if the consumer will be subject to the administrative insolvency procedure on the basis of a reimbursement plan, the stages of the procedures the insolvent individual is subject to, as the individual consumer respectively individual entrepreneur, are essentially different and their conciliation is not possible, the norms being imperative, not being admissible, for example, the staggered payment of some claims of the professional in a simplified procedure within 5 years or the payments made out of the income that the natural person holding an individual entrepreneur status. The simplified procedure that can be applied to the individual entrepreneur is a soft, short procedure, usually without an observation period through which the debtor enters the bankruptcy procedure directly and involves establishing the debt pool, inventorying the debtor's

assets, their controlled liquidation and deregistration of the professional natural person from the Trade Registry.

Therefore, a payment plan is not possible, for a determined period of time in which the claims are paid, either according to the agreement concluded with the creditors (as in the case of negotiating the consumer debt repayment plan), or according to a plan agreed by the majority of creditors. Therefore, we considered that the application of the insolvency procedure based on the consumer debt recovery plan at the same time as the insolvency of the professional individual is not compatible although the application of the two regulations in parallel is not prohibited. In these circumstances, we are of the opinion that the simplified insolvency procedure applied to the sole proprietor will only allow an insolvency procedure by liquidation of assets or a simplified procedure applied to the consumer.

The separate and essentially different regulation of insolvency proceedings in the two presentations of the individual - consumer and individual entrepreneur - and the limitation of the insolvency of the professional only to the simplified insolvency procedure, condemns the consumer to liquidate his assets, restricting his access to a procedure based on a debt repayment plan, which is not allowed.

Therefore, we appreciated that applying a single insolvency procedure to the insolvent debtor, regardless of whether he is a consumer or an individual entrepreneur, would allow a real restructuring of the debtor in financial difficulty, giving him the chance of a new beginning, free from his civil and commercial liabilities. In fact, we have shown that it is often difficult if not impossible to make a clear and real distinction between the liabilities that the individual assumes as a consumer and those that he engages in the current business activity of the enterprise he manages. We note that being subject to separate procedures, with different access conditions, different periods prior to obtaining a debt remission for the domestic activity and that arising from the operation of an enterprise, makes it difficult to obtain a second real chance of financial recovery.

Content