



THE IMPLICATIONS OF THE MEASURES RELATED TO THE STATE OF EMERGENCY IN THE INSOLVENCY PROCEDURE

1. The general and legal context

In view of the evolution of the international epidemiological situation caused by the spread of Coronavirus, which determined the pandemic declared by the World Health Organization, on March 11, 2020, the Decree no. 195/2020 on imposing the state of emergency on the territory of Romania (the "**Decree**")¹ has been adopted.

By Decree, a series of urgent measures with an exceptional character were taken in the social, economic and justice fields, on one hand, in order to limit the infection with Coronavirus and, on the other hand, to diminish the negative effects on the economy.

The major impact generated both on the global economy and on the national economy, which could be reflected as a negative evolution of the gross domestic product for the current year, as a consequence of the Covid-19 outbreak, imposes measures in order to mitigate these negative repercussions on the economy. In this regard, the member states of the European Union have already begun to promptly respond to the imperative of adopting instruments protecting the business environment².

Thus, continuing the measures provided by the Decree imposing the state of emergency, the Government Emergency Ordinance no. 29/2020 regarding certain economic and fiscal-budgetary measures ("**G.E.O. no. 29/2020**")³ anticipates the inevitable confrontation with an extended payment incapacity or even with a sudden lack of cash-flow with respect to the small and medium-sized companies.

¹ In this regard, please see <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>.

² Article "*The effects of the coronavirus on the economy and the measures undertaken by the European states to help the affected companies*", published in Forbes Romania on March 13, 2020, available on <https://www.forbes.ro/efectele-coronavirusului-asupra-economiei-si-masurile-luate-de-statele-europene-pentru-ajuta-firmele-afectate-155207>.

³ Published within the Official Gazette no. 230 on March 21, 2020.

The following measures aimed at mitigating the socio-economic impact of the Coronavirus pandemic concern the postponement of the credit rates payment for the benefit of the individuals and companies, whose incomes have been directly or indirectly affected, for a period of one to nine months, namely by the end of this year at the latest.

At the level of the European Union, in order to mitigate the negative effects on the population standard of living and on the economy, the European Commission⁴ has adopted a wide set of economic measures, adapted the European budget provisions and revised the rules on state aid, instating the initiative to invest the amount of EUR 37 billion as a response to Coronavirus, in order to provide liquidities to small businesses and to the healthcare sector.

2. The economic context

The global nature of the spread of Coronavirus infection, according to Bloomberg⁵, could cost the world economy a price amounting to USD 2.7 trillion, considering factors such as the distribution of the infected cases in a large number of countries, the forecasted risk for global supply chains and the large-scale model of the global economy.

The effects of the economic crisis premise are already experienced in Romania, in a first phase, by the depreciation of the national currency against euro, an evolution that has been already quantified in the bank loans rates, in the higher utilities bills as well as in the real estate or automotive field.

The Frames⁶ analysts conclude in a recent study that growing problems in the supply chains, especially in China, the world's leading exporter, significant fluctuations in resource rates, such as oil, gas, copper, represent elements likely to generate the prospects for an economic crises, accentuated by the significant drop in the worldwide consumption level, the main economic engine.

Beyond the fact that the epidemic has already led many factories in China to shut down, the spread of Coronavirus in Europe, in countries such as Italy, one of Romania's main trading partners, is likely to generate significant blockage in the economic chain and over 70% of companies do not have a strategy for such situations.

The lack of management plans to respond to crisis situations, the weak or non-existent digitization of the operational processes of the production allowing the remote control as well

⁴ In this regard, please see https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/economy_ro.

⁵ Article "Coronavirus could cost the global economy USD 2.7 trillion", published by Bloomberg on March 6, 2020, available on <https://www.bloomberg.com/graphics/2020-coronavirus-pandemic-global-economic-risk/>.

⁶ Article "The effects of the coronavirus on the economy and the measures undertaken by the European states to help the affected companies", published in Forbes Romania on March 13, 2020, available on <https://www.forbes.ro/efectele-coronavirusului-asupra-economiei-si-masurile-luate-de-statele-europene-pentru-ajuta-firmele-afectate-155207>.

as the lack of financial reserves for such situations represent situations that are likely to lead to late payments and inevitably, to payment incapacity.

One of the viable measures preventing the payment incapacity may be the release of the capital blocked in non-core business assets, such as land, warehouses, commercial spaces, vehicles or equipment which are not dedicated to the main object of activity in order to ensure a reasonable level of liquidities for the payment of the outstanding debts.

3. The implications of the measures related to the state of emergency in the insolvency procedure

As a preliminary aspect, we mention the main measures imposed by Decree, G.E.O. no. 29/2020 and by the Decision of the Superior Council of Magistracy no. 417 dated March 24, 2020 applying the Decree, with potential consequences over the insolvency procedure, which we shall be analyzed from a pragmatic perspective, as follows:

- (i) the limitation periods and any other type of time limits do not start to run and, if it has already started to run, it is suspended throughout the state of emergency;
- (ii) during the state of emergency, the activity of the courts of law continues only with respect to the special emergency cases; it is considered a matter of special emergency, in the insolvency field, the request for the provisional suspension of any enforcement measure over the debtor's assets until the claim to open the insolvency procedure is settled, in urgent cases, which could endanger the debtor's assets;
- (iii) the deadlines for lodging appeals, which are pending at the date of the commencement of the state of emergency, are interrupted, and new time limits, of the same duration, will start from the date of cessation of the state of emergency;
- (iv) the extension of the maturity dates with respect to the taxes on land, buildings and means of transport from March 31, 2020 to June 30, 2020, while maintaining the bonus granted by the local authorities for payment;
- (v) small and medium-sized companies, which have partially or totally ceased its activity based on the decisions issued by the competent public authorities, according to the law, during the emergency state decreed and have obtained the emergency situation certificate issued by the Ministry of Economy, Energy and the Business Environment, benefit of payment postponement for utilities services, namely electricity, natural gas, water, telephone and internet services, as well as the payment postponement for the rent of the building destined for corporate headquarters and secondary offices;
- (vi) the postponement of the banking rates payment for the individuals or companies, whose incomes have been directly or indirectly affected, for a period between one to nine months.

The suspension of the limitation periods and other time limits will not modify the conditions for the opening of the insolvency procedure, whether it opens at the request of the debtor or of the creditor, which remain those provided by the Law 85/2014 on insolvency proceedings. These conditions are, in essence, the appearance of the inability to pay, at the request of the debtor, respectively the existence of a certain debt, liquid and due for more than 60 days and with a value of more than RON 40,000, at the request of the creditor.

Nevertheless, the 30 days deadline as of the date of the appearance of the state of insolvency, within which the debtor has the obligation to submit the claim to open the insolvency procedure, will be suspended during the state of emergency. In case that the request for the commencement of the insolvency procedure is filed by the creditor, if he holds an outstanding debt due for less than 60 days, the term is suspended, so that the creditor will be able to file the claim only after the fulfillment of this term, after the emergency period.

The suspension of the limitation periods and other time limits cumulated with the interruption of the deadlines for lodging appeals as well as with the suspension of the courts of law activity during the emergency state have as an immediate consequence the delay of the wave of insolvencies predicted by the inevitable payment incapacity which the small and medium-sized companies will face. Following the cessation of the state of emergency, there will most probably be registered an increase of the number of insolvencies, both at the request of creditors and of the debtors, but the time frame for the settlement of these requests will be significantly extended as a result of the rising workload of the courts and of the lack of hearing dates set during the state of emergency.

This postponement related to the state of emergency could have the desired effect of safeguarding the business and avoiding insolvency only to the extent that all the other leverages, namely the postponement of payment of the utility bills, of the taxes for three months or of the credit rates up to nine months would constitute sufficient instruments in the face of all the other negative factors affecting the income and leading to payment incapacity.

By interpreting the presumption that insolvency means that state of the patrimony characterized by the insufficiency of the funds for the payment of certain debt, liquid and due, the doctrine⁷ found that "*the cessation of payments must have a general character and constitute the external indicator [...] of the company inability to execute the certain, due, liquid and assumed obligations*".

In other words, the doctrine⁸ also considers that this supposed state of the cessation of payments must be a general one, effective and of permanent character, manifested by external signs which show that the debtor is unable to carry on the operation of its business and that the patrimony cannot face the debts.

⁷ In this regard, please see "*Insolvency practice treaty*" Radu Bufan, Andreea Deli Diaconescu și Florin Moțiu, Hamangiu, Bucharest, 2014, page 225.

⁸ Article "*The commencement of the reorganization and the bankruptcy procedure upon the request of the creditors*", by Marcela Comșa, published in Phoenix Magazine no. 11/2005, page 20.

However, according to a recent study performed by Frames⁹, 72% of investors declared they did not have a risk plan for such a situation, while only 11% said they had developed a business continuity plan. In an economy where over 90% of companies are small and medium-sized companies, with low financial power and rather limited economic know-how, the existence of a risk strategy is rare and the lack of coherent plans for managing certain epidemic situations is also confirmed by the fact that 61% of the surveyed business people said that the manner of addressing the health risks is inadequate.

Considering the context presented within the first two sections, the measures instituted during the state of emergency can constitute a real financial buffer only if a drastic control of the costs is put in place, which must be correlated with the volume of activity and the performance indicators, cumulated with the avoidance of the expenses unrelated to the essence of business and the release of the capital blocked in non-core business assets in order to face the challenges generated by the accumulation of current debts while reducing the period of collecting the receivables.



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⁹ Article "The effects of the coronavirus on the economy and the measures undertaken by the European states to help the affected companies", published in Forbes Romania on March 13, 2020, available on <https://www.forbes.ro/efectele-coronavirusului-asupra-economiei-si-masurile-luate-de-statele-europene-pentru-ajuta-firmele-afectate-155207>.