Romania - Draft Personal Insolvency Law up for endorsement

On 3 June 2015 the Romanian Parliament sent a Draft Personal Insolvency Law to the President of Romania for endorsement. The draft bill is expected to be endorsed within the following weeks and published as a Law in the Official Gazette of Romania, or the President may send the draft bill back to Parliament for review. Even though it was long awaited and discussed upon, the Draft Personal Insolvency Law does not rely on any impact study to estimate the number of personal insolvency procedures which are expected to start once the Law enters into force and how these would impact existing retail loan portfolios or utility providers or creditors generally.

Purpose and scope

The purpose of the Draft Personal Insolvency Law is to create a collective procedure aiming for the financial recovery of individuals acting in good-faith, satisfaction of their outstanding debts and debt release, in certain conditions.

The Draft Personal Insolvency Law applies to individuals in a state of insolvency, whose debts result from activities performed for satisfying a personal need (such as debts toward utilities providers, bank loans contracted to purchase a product or personal service etc.) and not from a commercial enterprise. The individual must have resided *de facto* in Romania for at least 6 months prior to opening of insolvency. Also the minimum value of unpaid debt necessary to open the insolvency procedure consists of 15 minimum wages (not clear whether net or gross wages, but the value is relatively low in either case – currently around EUR 2,400 or EUR 3,200).

Concept of "personal insolvency"

Pursuant to the provisions of the Draft Personal Insolvency Law a state of "*insolvency*" occurs when an individual debtor is unable to meet outstanding debts as they fall due with available funds. The Draft Law assumes (this assumption may be rebutted) that a debtor is in a state of insolvency when the debtor has not paid its debt towards one or several creditors within 90 days from maturity.

A state of insolvency is an essential condition for opening the proceeding, but not a sufficient one**.** A cumulative condition requires the inexistence of a reasonable probability for the debtor to recover financially within maximum 12 months while maintaining a decent living. Such reasonable probability is assessed by considering the ratio of total debt to (actual or projected) income and assets which are available for creditor pursuit.

Insolvency procedures

There are three insolvency procedure types regulated by the Draft Personal Insolvency Law:

- **Insolvency based on a debt recovery plan –** it is regulated as an administrative procedure under minimum judicial supervision, which takes places mainly before Insolvency Commissions**.** A plan will generally be deemed approved if creditors representing at least 55% of the total claims and 30% of the secured claims voted in favour.
- **Insolvency based on liquidation of assets –** it is regulated as a judiciary procedure which takes place before common courts**.**
- **Insolvency based on a simplified form of procedure –** applicable to insolvent individuals whose debts exceed the amount of 10 minimum wages, who own no pursuable revenues or assets and who passed the standard retirement age or lost at least half their labour capacity.

If the financial situation of the debtor is irremediably compromised but without meeting the requirements to qualify for a simplified proceeding, he or she may only apply for the procedure based on liquidation of assets.

Persons entitled to request the opening of the proceedings

The only person entitled to ask for the insolvency procedure opening in all three forms is the debtor itself. However, debtors may not benefit from any insolvency procedure if they incurred an insolvency procedure resulting in debt release in the previous five years, if they were dismissed from their workplace on imputable grounds within the previous two years of were irrevocably convicted on grounds of tax evasion or forgery, among others.

Creditors may also request the opening of the procedure based on liquidation of assets.

Bodies enforcing the procedure

The official bodies enforcing the procedure are the Insolvency Commission, the administrator of the procedure, the courts of law and the liquidator.

One of the Draft Law's shortcomings is the implementation of **Insolvency Commissions** that do not include any representatives of the creditors. A Central Insolvency Commission will include representatives of the National Authority for Consumer Protection, Ministry of Public Finance, Ministry of Justice, Ministry of Labour, Family and Social Protection, the National Trade Register Office - Insolvency Bulletin Department, while Territorial Insolvency Commissions will include representatives of the decentralized territorial structures of the National Authority for Consumer Protection, Ministry of Labour, Family and Social Protection, as well as a representative of the Ministry of Public Finance. Such Commissions will be invested with decisional, control and supervisory duties upon the debtor's actions and upon the activity of the administrator of the procedure. Insolvency Commissions are expected to be established within three months of publication of the Law in the Official Gazette, while secondary legislation regulating their activity is expected to be published within 60 days after publication of the Law in the Official Gazette.

The **administrator** of the procedure (only in case of insolvency based on a debt recovery plan) is appointed by the Insolvency Commission and it may be an enforcement officer, a lawyer or a public notary. The Law does not provide for the possibility of the individual debtor or the creditors to appoint an administrator of the procedure, as it is the case for companies.

Any claim for insolvency procedure based on liquidation of assets or challenges of the Insolvency Commission's decisions fall within the jurisdiction of the **lower court of law** of the place of domicile or habitual residence of the debtor within the six months prior to the insolvency claim.

A **liquidator** administrates the judiciary insolvency procedure based on liquidation of assets, under court supervision.

Main effects on creditors

Any institutions or companies which have ongoing contracts with the debtor are obliged to maintain them. The law deems null and void events of default that accelerate or terminate an agreement on the sole basis that insolvency proceedings have been opened with respect to the debtor. While the law is not clear on its effect on such clauses in agreements entered into before its date of entry into force, there is a risk that these will be affected as well upon an insolvency proceeding being opened against an individual debtor.

From a banking regulatory perspective, depending on the number of retail borrowers using the procedure, it may impact banks' retail non-performing loan portfolios from a provisioning perspective. This is because the opening of a "bankruptcy proceeding" against a borrower having a debt overdue for more than 15 days would account as "initiation of judicial proceedings" within the meaning of the National Bank of Romania's rules on provisions, triggering the automatic characterisation of the relevant loan as "loss" and its provisioning in full.

In the case of insolvency based on liquidation of assets and of the simplified insolvency procedure, individual enforcement procedures are suspended from the moment the insolvency is opened. In the case of insolvency procedure based on a debt recovery plan, individual enforcement procedures are suspended as of the date of approval of the plan.

If an insolvency procedure based on liquidation of assets was opened upon creditors' request where a recovery plan failed because of the debtor, the liquidator or any creditor may ask the court to render null and void certain fraudulent transactions, aiming to recover assets thereby envisaged. Such transaction include transactions at undervalue made within six months before the opening of the proceeding, transactions with creditors who are relatives of the debtor made within the two years prior to the proceeding, transactions securing an unsecured debt within the six months preceding the opening of the proceeding and debt prepayment made within the six months prior to the opening of the proceeding, among others.

As a rule, interest, default interest, penalties and other accessories of the claim are suspended as of the date of the opening of the proceeding or (in the case of procedure based on a recovery plan) as of the date of approval of a debt recovery plan, provided that in case of secured claims, interests and other accessories continue according to the claim documents within the limit to the charged asset value.

Residual debt remaining after the closing of a procedure based on a recovery plan or after a simplified procedure may be erased by a court of law.

Closing of the insolvency proceedings

In the case of insolvency based on debt recovery plan, if the plan succeeds the Insolvency Commission issues a decision through which the procedure is closed. If the plan is not observed, the debtor and/or the administrator of the procedure, as well as creditors, may ask for the insolvency based on liquidation of assets. In any case, the duration of a recovery plan may not exceed five years as of the date of opening of proceedings (with the possibility for the debtor and creditors to agree to an extension of up to 12 months).

In case of insolvency based on liquidation of assets, the liquidator may sell the debtor's assets and distribute resulting proceeds to creditors according to a certain priority order provided by the law. Once proceeds are distributed the liquidator will reflect this in a final report which is submitted to court, which will close the procedure on its basis.

A simplified proceeding is expected to close within approximately three years as of its opening.

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