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Abstract of the PH. D. thesis titled:

CRIMES RELATED TO INSOLVENCY PROCEEDINGS

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Bucharest

2018

This thesis purports to analyze a subject that is of paramount importance in the context of a market economy. Insolvency proceedings are a legal concept thoroughly regulated in any free economy, seeing as insolvency represents an unwanted but, all the same, possible moment in the „*life*" of any business. We have noticed, as of the very first pages of the present work, that in the immediate aftermath of 1989, the necessary conditions for the development of a market economy surfaced in Romania. Freedom of trade and the encouragement of private initiative in economy led to a sudden surge in the evolution of the Romanian business environment. The number of persons taking part in all the varying forms of economic activity on the Romanian market steadily grew year after year. Just as those numbers grew, so too did the corresponding proportion of insolvencies, starting 1990.

Criminal legislation also intervenes to regulate such an important moment in the affairs of any professional. The Romanian Criminal Code provides for criminal liability in relation to conduct that is directly connected to insolvency proceedings. We refer herein to the crimes of simple bankruptcy, as provided for by art. 240 of the Criminal Code, and fraudulent bankruptcy, as provided for by art. 241 of the Criminal Code. The legal analysis of these two crimes represents the core of this thesis but, so as to create the scientific frame necessary for the understanding of the subject-matter made up by those two crimes, we did not stop at merely noting the content of simple and fraudulent bankruptcy.

This thesis is structured in an introduction, four titles and, finally, conclusions and *de lege ferenda* proposals.

The Introduction expounds, first of all, the reasons which led us to approach this subject in the research specific to a doctoral thesis. We noticed that, albeit the number of insolvencies is high, with more such proceedings being initiated each year, the number of criminal cases having as an object crimes related to insolvency proceedings is, comparatively, quite low. Given these conditions, even in the absence of clear means of measuring the dark figure of crime in the field of crimes related to insolvency proceedings, one can, however, intuitively conclude that action taken by criminal law judicial bodies is insufficient, leaving many crimes undiscovered. We also found that in the writings of Romanian legal scholars, the study of crimes related to insolvency proceedings has not received the attention it merits. All the same, quite paradoxically, even

though existing studies are not numerous, these to lead to a picture of relative confusion regarding multiple aspects specific to the subject of simple and fraudulent bankruptcy.

Also in the introduction, we attempted to answer a question that arises naturally given the subject at hand: is criminal liability necessary in the matter of insolvency proceedings? After discussing several different viewpoints and approaches, as well as the general characteristics of the more general category of economic crime, we were of the view that criminal law regulatory intervention was necessary in this area. The thesis puts forward several reasons for the necessity of this regulation, foremost among which being the reason that it is necessary to ensure appropriate safeguards to creditors in the face of debtors that willingly abandon the imperatives of good faith in their legal relationships, preferring instead to use fraudulent means in connection to insolvency proceedings or even the legal concept of insolvency itself in a fraudulent manner.

The introduction also contains clarifying remarks concerning methodology, sources used in research and the structure of the thesis.

Prior to the analysis of the crimes of simple bankruptcy and fraudulent bankruptcy, in **Title I** of the thesis we held it necessary to perform some terminology clarifications and, additionally, to present the history of criminal liability in the matter of insolvency proceedings.

Chapter I of Title I in many ways leaves the limits of criminal law, the very nature of the object under research imposing analysis of concepts and notions belonging to other fields of law. We showed, thus, that, from our point of view, the starting point for any discussion relating to crimes in connection with insolvency proceedings is represented by a proper understanding of the notions and concepts utilized in the field of insolvency law itself. By necessity, the first concept that must be defined is that of "*insolvency*" itself, from a private law perspective, without approaching the manner in which this concept is used in the constitutive elements of the crimes of simple and fraudulent bankruptcy. In this given context, we have made use *in extenso* of the milestones provided by Law no. 85/2014 on insolvency proceedings, the main piece of legislation regulating this field of law. An important topic that had to be addressed at this introductory phase was the difference between an entity being subject to insolvency proceedings (either restructuring or bankruptcy) and an entity simply being insolvent. The analysis did not

stop, however, at merely defining the notion of insolvency, but also went on to discuss the terms provided for at art. 5, point 29 of Law no. 85/2014, namely "*presumed insolvency*" and "*imminent insolvency*".

In order to avoid any confusion between the specific notions customary to the field of insolvency law, we held it necessary to discuss and define other specific concepts such as restructuring, bankruptcy and liquidation. The same chapter also mentions and lists the principles of insolvency prevention procedures.

In the final part of Chapter I of Title I, so as to near the main subject of research, we directly discussed the criminal law notion of bankruptcy, noting, quite regrettably, that this too was sometimes confused with the concept of insolvency, even though, from our perspective, it is clear that in criminal law the term "*bankruptcy*" clearly refers to the specific definitions of such conduct as legally provided for in the relevant crimes, both simple bankruptcy and fraudulent bankruptcy.

Chapter II of Title I presents the historic evolution of incrimination related to insolvency proceedings. We found it fit to divide this chapter into two sections. In the first, we showcased the evolution of criminal liability in the field from antiquity to the first codifications. Of course, from this perspective the analysis is not limited to Romania's geographic space. Section two does, however, perform such a geographic limitation, discussing the development of criminal liability in the area in Romanian law specifically.

Title II has as an object the study of the crime of simple bankruptcy. The study adheres to the typical analytical frame used in legal literature, discussing each constitutive element. We tried to include all opinions resulting from the writings of legal scholars, as well as the admittedly sparse case law existing with regard to simple bankruptcy. We noted in this context that simple bankruptcy is a crime the content of which cannot be properly analyzed or understood absent a necessary correlation between the provisions of the Criminal Code and those complementary provisions that regulate the legal concept of insolvency.

Without summarizing all chapters of Title II herein, each corresponding to a specific element of the crime, we must, however, point out that we have identified some complex issues

regarding some of these elements, issues which we have analyzed from the perspective of the various arguments that could be utilized. For example, quite some debate is generated in the matter of simple bankruptcy by the active subject of the crime. We noted that, as results from the incriminating text itself, the qualified active subjects of simple bankruptcy can only be the natural person debtor or the legal representative of the legal person debtor, not the legal person debtor itself. We argued that, in our opinion, this legislative option is difficult to justify, especially in a field where such liability is called for, with legislators continuously ignoring the extension of the ambit of simple bankruptcy active subject to the legal person debtor itself.

The constitutive element of simple bankruptcy that probably leads to most controversy is, as can be readily noticed from the structure of the thesis, the initial situation in which the crime can occur. We have noted that, in simple terms, this initial situation is represented by the appearance of a state of insolvency. However, this begs the justified question: what does the "*appearance of a state of insolvency*" mean? After showcasing all relevant arguments, regarding the concepts of presumed insolvency and imminent insolvency, we show that in our opinion, the initial situation necessary for the crime of simple bankruptcy to occur is the appearance of a state of actual insolvency, defined as that economic situation in which available monetary amounts are insufficient in relation to debts that are certain, determined and outstanding.

Another important subject discussed is the controversy related to the requirement of there being a previous judgement by a syndic judge, whereby the judgement officially declares a state of insolvency, so as to be able to begin criminal proceedings. We mentioned that the distinction between opinions was brought about depending on how the state of insolvency was viewed: as a matter of law (*ens juris*), or as a matter of fact (*ens facti*). After taking into consideration all the differing arguments, we were of the opinion that a solution is provided by the provisions of art. 52 of the Romanian Code of Criminal Procedure. Insofar as, prior to a judgement being issued in the criminal lawsuit having as an object simple bankruptcy, a syndic judge issues a final judgement on the state of insolvency, this judgement will have authority over the criminal lawsuit. Additionally, if the syndic judge concludes that a state of insolvency does not exist, then the criminal lawsuit will not be initiated or, if already initiated, it will lapse because, via a previous judgement with binding authority over the criminal lawsuit, the initial situation necessary for the crime to occur was found as nonexistent. Insofar as the criminal lawsuit is

underway, without there having been a judgement issued by the syndic judge beforehand ruling on the existence of the state of insolvency, pursuant to art. 52, para. (1) of the Code of Criminal Procedure, the criminal law court would itself rule on this matter.

Further on, in the contents of Title II we proceeded to analyze the objective elements of the crime. In the context of this summary we reaffirm the fact that we held, in our opinion, that the alternative material element consisting of "*the late lodging of a request to open insolvency proceedings*" is of no use, taking into consideration that the crime will have always been committed beforehand by way of the other alternative material elements, such as not lodging the request within the time limits provided for by the law. We argued that the crime of simple bankruptcy has as its immediate result the endangering of the estate of any natural person or equity of any legal person, the rights of whom could be affected in the eventuality that the request for the opening of insolvency proceedings is not lodged.

Title II ends with an analysis of the subjective elements of the crime, of the forms in which the crime can be committed and aspects relating to applicable penalties and various procedural matters.

Title III of this thesis analyzes, according to the same pattern, the crime of fraudulent bankruptcy. In relation to this subject, in a manner corresponding to each element of the crime, the issue of fraudulent bankruptcy being classified as a complex crime has surfaced recurrently. We show that, in our opinion, the crime is partially complex, namely only with regard to the alternatives for the material element of "*forgery*" and "*destruction*", as provided for under art. 241, para. (1), letter a) of the Criminal Code, with the consequences therein incurred in relation to the legal object, immediate result and its relationship with other crimes.

We also took note of the vast content of incriminated conduct, namely the high number of alternative variants of the material element of the crime. Given this situation, Chapter II of Title III, regarding the material object, has been structured in relation to the different variants of the material element.

Similarly to the crime of simple bankruptcy, more detailed discussions have been generated by the initial situation in which the crime can occur. This is the constitutive element

that brings to question the role of insolvency in the structure of the crime. In the analysis of the initial situation of the different legal variants of fraudulent bankruptcy, we built on the fact that the legal provisions mention insolvency *expressis verbis* only in the case of art. 241, para. (1), letter c) of the Criminal Code. Therefore, the analysis had to be performed in a differentiated manner between, on the one side, art. 241, para. (1), letters a) and b) of the Criminal Code and, on the other side, art. 241, para. (1), letter c) of the Criminal Code. We argued that, in the case of art. 241, para. (1), letters a) and b), a state of insolvency does not represent a requirement for the initial situation, seeing as the initial situation is characterized by preexisting debtor – creditor relationships. More specifically, we discussed the relationship between a debtor that can be made subject to insolvency proceedings, on the one side, and its creditors on the other. With regard to the legal variant provided for by art. 241, para. (1), letter c) of the Criminal Code, we found that indeed the initial situation is represented by the state of insolvency, seen as a matter of fact, a prior ruling in a procedure before the syndic judge not constituting a requirement.

Within Title III, Chapter V is the largest, taking into account the obvious need for a distinct study of each variant of the material element. Taking into consideration the different *verbum regens*, we analyzed each situation and its possible interaction with other crimes (such as, *inter alia*, forgery in official documents, forgery in private documents, use of a forged document, digital forgery, false statements, destruction, theft, appropriation or destruction of documents, and so on). We then argued that, in our opinion, the main immediate result of the crime of fraudulent bankruptcy is the danger for the proper upholding of the creditors' economic interests. In those cases in which the crime is complex, then, most certainly, the immediate result will also be complex.

Title III ends with an analysis of the subjective elements of the crime, of the forms in which the crime can be committed and aspects relating to applicable penalties and various procedural matters.

Title IV of the thesis is dedicated to a comparative analysis, being divided into two chapters. In the first chapter, we looked at the relationship between insolvency proceedings and the crimes of confidence abuse by defrauding creditors, provided for by art. 239 of the Criminal

Code and art. 88 of Law no. 151/2015 on insolvency proceedings for natural persons. In the second chapter we performed a comparative law analysis.

Chapter I of Title IV is itself divided into two sections. In the first, we performed a necessary comparison between the crime of fraudulent bankruptcy, as provided for by art. 241 of the Criminal Code, and the crime of confidence abuse by defrauding creditors, provided for by art. 239, para. (1) of the Criminal Code. Such a comparison was justified, not least by the fact that both legal texts posed similarities in their drafting, variants for the material elements being similar. After listing the various opinions presented in the writings of legal scholars regarding this issue, we proceeded to show that, in our opinion, the essential difference between the two crimes is represented by the measure in which the state of insolvency, as defined by relevant legislation, namely, at present, Law no. 85/2014, is a constitutive element of the crime. Thus, in the case of fraudulent bankruptcy, the factual state of insolvency is either a condition attached to the objective elements of the crime, in the variants provided for under letters a) and b), or the initial situation, in the variant provided for by letter c). In the case of confidence abuse by defrauding creditors, the state of insolvency does not pose any practical importance in terms of the constitutive elements of the crime being met, the only constitutive element being the purpose of creating a state of being insolvent, either apparently or in reality.

The second section of the first chapter of Title IV discusses the crime provided for by art. 88 of Law no. 151/2015 on insolvency proceedings for natural persons. We have noted, in this context, that art. 88 of Law no. 151/2015 is a legal text that refers to the provisions of art. 239 of the Criminal Code. In this section, without having as a purpose to analyze *in extenso* the provisions of Law no. 151/2015, we have merely presented the elements essential to the understanding the incriminating provisions of art. 88. With regard to the crime provided for by art. 88, we are of the opinion that there are no differences of essence between this crime and confidence abuse by defrauding creditors. We argued in the sense that the reason for including the referral text in Law no. 151/2015 is the special context being regulated. Practically, the legislator wished to ensure that no person could conclude that, insofar as a natural person debtor would opt for insolvency proceedings, such debtor would not be criminally liable for acts such as those incriminated under art. 88 of Law no. 151/2015 and art. 239 of the Criminal Code.

Chapter II of Title IV contains a comparative law analysis, presenting the manner in which crimes related to insolvency proceedings are regulated in French, Italian, Dutch, Russian and English law. We believe that the necessity for such a comparative law analysis is outlined by the lack of a longstanding tradition in both Romanian case law and legal literature with regard to bankruptcy crimes, and the fact that the incrimination of such acts is not original to Romanian legislation, but a model adopted from the incrimination practiced by other states. Within this chapter we noted both similarities and important differences between the incrimination options of Romanian lawmakers and foreign lawmakers. An important similarity is represented by the fact that variants of the material element of fraudulent bankruptcy are met in nearly identical form in all legislation analyzed. However, in relation to fraudulent bankruptcy, it must be underlined that several legislations also contain additional variants of the material element. Additionally, we took note of the fact that the main debates that occurred in the legal literature corresponding to the foreign legislation studied, as well as in the case of law of various states, are similar to the debates that appeared as a result of the incrimination provided for in art. 240 and 241 of the Romanian Criminal Code.

At the end of the thesis, we presented the **conclusions** of our research and some ***de lege ferenda* proposals** corresponding to the main issues discussed in the body of the thesis. In essence, we advanced the following *de lege ferenda* proposals:

- the need for the incriminating legal text of simple bankruptcy to include within the ambit of active subject the debtor legal person;
- elimination of the variant of the material element of simple bankruptcy consisting of "*late lodging*" of the request for opening of insolvency proceedings;
- the use, in the incriminating text corresponding to fraudulent bankruptcy, of the expression "*state of insolvency*", instead of the current "*case of insolvency*";
- the need to replace the phrase "*resulting in fraud against creditors*" with "*for the purpose of defrauding creditors*";
- the creation of a clearer delimitation between the crime of confidence abuse by defrauding creditors and the crime of fraudulent bankruptcy, delimitation that could be performed, in our opinion, via "rendering" the state of insolvency into an initial situation for all variants of fraudulent bankruptcy;

- the restructuring of various alternative variants to the material element of fraudulent bankruptcy.

In the conclusions to the thesis, we held that an approach of the crimes connected to insolvency proceedings should take account of both the contents of relevant private law in the field, and of the fundamental principles of criminal law. We believe that technical rigour is what should guide both the legal scholar and the judicial bodies in interpreting and applying the crimes analyzed. Additionally, we also affirmed our conviction regarding the necessity for a legislator that can listen to criticism presented in legal literature and, if the legislator should hold such criticism to be justified, to act promptly, so as to remove any obstacles before the coherent intervention of criminal liability in a field that is essential for the healthy life of an economy.