

## **GENERAL CONSIDERATIONS REGARDING THE PARTICIPANTS TO THE INSOLVENCY PROCEEDINGS OF THE ROMANIAN ADMINISTRATIVE- TERRITORIAL UNITS**

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**ABSTRACT:** *In this article the author intended to continue the study of the concept of insolvency of administrative-territorial units. The insolvency of administrative-territorial units was regulated at legislative level in Romania by a Government Emergency Ordinance in May, 2013. With the adoption of the aforementioned regulations, the Government aimed a reduction in the volume of administrative-territorial unit arrears complying, at the same time, with the Stand-by Agreement with the International Monetary Fund related to the reduction of arrears, as well as to the reopening of the activity of goods and services providers which have to collect arrears from Local Government authorities. The present paper presents and explains the powers of authorities involved in opening insolvency proceedings.*

**KEY WORDS:** *insolvency of administrative-territorial units, insolvency proceedings, arrears, Local Government authorities.*

**JEL CLASSIFICATION:** *K23.*

### **1. INTRODUCTORY NOTES**

Insolvency proceedings of administrative-territorial units can be opened based on an application submitted to the Court by creditors or by the chief authorizing officer. According to the Romanian legislation in the field of insolvency of public administrative-territorial units, the authorities competent to implement insolvency proceedings are: the main budget holder, deliberative authorities, the court, the syndic judge, the creditors' assembly, the creditors' committee and the judicial administrator.

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The law requires all authorities involved in insolvency proceedings to facilitate, expeditiously, the preparation of documents and the carrying out of operations without providing further explanations regarding the category of operations and documents to which it refers.

In the following paragraphs we shall try to analyze the duties incumbent on public authorities involved in the implementation of insolvency proceedings without resuming the general presentation referring to the commencement of insolvency of administrative units, since this has already been the subject of another paper published by the author (Cenușe M., 2013, pp.55-60).

## **2. THE MAIN BUDGET HOLDER AND THE DELIBERATIVE AUTHORITY OF THE TERRITORIAL-ADMINISTRATIVE UNIT**

The main budget holder of the administrative-territorial unit (a one tier system), i.e. commune, city and municipality, is the mayor, and of the intermediate unit ( a two tier system), i.e. the County, is the President of the County Council. They have concrete tasks in the process of opening and closing the administrative-territorial unit, provided by the regulations on the financial crisis and on the insolvency of administrative-territorial units.

The main budget holder has an essential role in starting the insolvency procedure of the ATU whereas this procedure is based on an application submitted to court by the budget holder, or by creditors. After commencing insolvency proceedings the budget holder must assist the judicial administrator by providing the information requested regarding the budget of the administrative territorial unit and to any financial operations with a view to elaborating a recovery plan.

Throughout the insolvency proceedings of administrative-territorial units the main budget holder has managerial powers, if not suspended the right to act as main budget administrator. In the latter case, managerial powers belong to the judicial administrator. Practically, this means that throughout any insolvency proceeding of the administrative-territorial unit, the powers belonging to the main budget holder may be suspended and taken over by the Judicial Administrator.

This proposal can be filed by the appointed judicial administrator with the syndic judge. In the event that the judicial administrator is appointed by the syndic judge as the main budget holder, he can take control of activities with impact on the financial position and/or on the heritage of the specialty apparatus of the mayor or County Council and of institutions or local and county public services, temporarily exercising the powers conferred by law to the Mayor or to the President of the County Council, on his behalf and within the limits of competence established by the syndic.

The deliberative authority may include: the local/municipal council of administrative-territorial units, the County Council, the General Council of Bucharest Municipality or the local council of the administrative-territorial subdivision, according to the administrative territorial unit which opens the insolvency proceedings.

The main budget holder, members of the deliberative authority, any elected local authority or employee of the local public administration, husband, wife, as well as 4th grade relatives, cannot be appointed judicial administrators.

This restriction is valid for a period of 3 years after the person has ceased to occupy such a position.

After opening insolvency proceedings, the provisions of the Mayor who is the main budget holder and the decisions of the deliberative authority related to the financial operations of the administrative-territorial unit and the patrimony of the administrative-territorial units must be approved by the judicial administrator. Moreover, the main budget holder and the deliberative authority may not introduce new services, or borrow funds and they may not hire additional staff without the approval of the judicial administrator.

### **3. THE COURT**

The official body to carry out all procedures provided by the law on insolvency of administrative-territorial units is the Tribunal having jurisdiction within the county where the administrative-territorial unit in question is located. In a tribunal, the syndic judge has the main powers.

The appeals filed against the decisions of the syndic judge are settled by the Court of Appeal. The deadline for appeals is 10 days from the date of acknowledgment of the decision, if the law does not stipulate otherwise. The appeal is settled by a specialized panel of judges within 30 days from the date the request has been filed with the court of appeal. For all appeals against the decisions of the syndic judge regarding the insolvency proceedings of an administrative-territorial unit, only one procedure can be opened.

The main tasks of a syndic judge are as follows:

- to decide upon the opening of insolvency proceedings;
- to settle potential objections filed by the administrative-territorial unit against creditors opposing the opening of insolvency proceedings; to settle the opposition of creditors regarding the procedure;
- to appoint or, as the case may be, replace a judicial administrator, set forth their attributions, establish their fees and exercise control over their activity;
- to settle the judicial administrator's request to cancel transfers of assets prior to the opening of proceedings;
- to settle complaints filed by the administrative-territorial unit or by creditors, as well as by other interested parties against measures taken by the judicial administrator;;
- to accept and confirm the plan of the administrative-territorial unit to recover from insolvency, hereinafter referred to as the reorganization plan;
- to settle the challenges filed against the judicial administrator's reports;
- to suspend enforcement procedures against the administrative-territorial unit;
- to examine the legal actions filed by the judicial administrator to suspend payments made by the administrative-territorial unit to creditors after acknowledging the state of insolvency and until a plan for the payment of debts is drawn up;

- to settle the legal actions filed by the judicial administrator and the creditors' assembly to annul all fraudulent operations concluded by the main budget holder;
- to settle the judicial administrator's request to suspend the main budget holder and to give a decision in this respect;
- to decide upon the closing of insolvency proceedings;
- to set fines, according to legal provisions.

When opening insolvency proceedings of an administrative territorial unit the powers of the syndic judge are limited to judicial control of the judicial administrator's activity and to judicial actions and requests for insolvency proceedings, while the managerial powers belong to the judicial administrator or to the main budget holder of the administrative territorial unit, if the former has not been suspended from this position. Decisions given by the syndic judge are final and enforceable. They may be subject to a separate appeal.

#### **4. CREDITORS' ASSEMBLY AND CREDITORS' COMMITTEE**

The creditors' assembly is convened at request and chaired by the judicial administrator unless the syndic judge decides otherwise. The secretary of the creditors' meetings is the judicial administrator. The creditors mentioned in the list submitted by the administrative-territorial unit are summoned whenever necessary. The creditors' assembly may also be convened at the request of the creditors' committee or at the request of creditors holding at least 30% of the total value of receivables.

The creditors' assembly must have a specific agenda. Any deliberation over a matter which is not included in the agenda is considered null and void, except for the cases in which the meeting is attended by all creditors.

Creditors can be represented in the assembly by delegates with a special authentic proxy or in the case of budget creditors and any other legal entities, by representatives with an authorization signed by the head of the unit.

Unless the law forbids it, creditors can also vote by mail. The letter containing the vote is signed by the creditor. The letter certified by a public notary or by a lawyer or the electronic documents signed with an extended electronic signature based on a valid qualified certificate shall be transmitted by any means and will be registered with the judicial administrator with at least 5 days before the date established for the vote.

The meetings of the creditors' assembly may be attended by one or two representatives of the employees of the local public administration authority who can vote as regards the claims representing salaries and other pecuniary rights due to them.

The minutes of the creditors' assembly will be signed by the chairman of the meeting and will include a summary of all the debates, the vote of creditors for each element and the approved decisions.

The creditors' assembly has the right to examine the financial status of the administrative territorial unit, the reports drafted by the creditors' committee, the measures taken by the judicial administrator and their impact and moreover he can make other recommendations, if the case.

Except for the cases in which the law requires a special majority, the meetings of the creditors' assembly are held in the presence of creditors holding at least 30% of the total amount of receivables, while the decisions approved by the creditors' assembly shall be adopted by a majority vote, considering the value of the current debts. The creditors' assembly may appoint during their first meeting a creditors' committee formed of 3 to 7 creditors of the ones holding secured or unsecured claims.

The attributions of the creditors' committee are as follows:

- to analyze the financial status of the administrative territorial unit and to make proposals to the creditors' assembly regarding the reorganization plan;
- to analyze the reports drafted by the judicial administrator and, as the case may be, to challenge such reports;
- to draft reports on the measures taken by the judicial administrator and their effects, to present them to the creditor's assembly and make new recommendations if the case;
- to request the withdrawal of the debtor's right to manage its business;
- to submit to the syndic judge claims for the annulment of fraudulent acts/operations concluded by the debtor at the expense of the creditors, provided that such claims were not submitted by the judicial administrator/liquidator.

The creditors' committee is convened monthly by the judicial administrator or at the request of at least two of its members, whenever necessary. Deliberations of the creditors' committee will be made in the presence of the judicial administrator and shall be recorded in the minutes, presenting the content of discussions and the decisions taken. The creditors' committee decides by a simple majority of the total number of its members.

If a member of the committee enters a conflict of interests with the business of creditors participating in the procedure, because of his own interest, he must abstain from voting. If the solution adopted by the creditors' committee does not meet their interests, then any creditor can challenge the actions, measures or decisions taken by the creditors' committee during the creditors' assembly meeting, within 10 calendar days of their adoption, having previously notified the creditors' committee about the challenged measures.

## **5. THE JUDICIAL ADMINISTRATOR**

Following the commencement of the proceedings, the syndic judge appoints the judicial administrator and sets his remuneration, which shall not exceed the monthly fee of the Mayor of the insolvent administrative territorial unit or of its subdivision, or of the President of the insolvent County Council, as the case may be, increased by 50%. It is said that this limitation on the judicial administrator's fee keeps away professionals (Tărnoveanu S., 2013).

As I have already stated in the section dedicated to the budget holder and to the deliberative authority, any elected local authority or employee of the local public administration, husband, wife, and relatives up to the 4th grade, cannot be appointed

judicial administrators. This restriction is valid for a period of 3 years after the person has ceased to occupy this position.

Prior to his appointment, the judicial administrator must prove that he is insured for professional liability, by submitting a valid insurance policy to cover any possible prejudice caused while carrying out his duties, representing at least one-third of the value of the debt. The insured risk must represent the consequence of the judicial administrator's activity during his mandate.

In an article, this legal regulation regarding the appointment of the judicial administrator by the syndic judge has been criticized on the grounds that there are no criteria to be considered by the judge for the appointment of a judicial administrator, and there is no selection method (Dimitriu O., 2014). Moreover, only the syndic judge can replace an administrator, even though there is no law that states the damaging actions which require such a measure.

The judicial administrator's main duties are the following:

- to examine the debtor's activity and to draft a detailed report on the causes and circumstances that led the debtor into insolvency state, whilst mentioning the members of the management bodies who could be held accountable for the debtor's insolvency situation; the report would also conclude on the debtor's possibility to reorganize its activity and must be submitted within a 30 days period after his designation;
- to verify the accuracy of the information contained in the documents drafted and presented by local public administration authorities which claim the opening of the insolvency procedure and, if necessary, to correct and complete them; in case local public authorities fail to comply with this obligation, the judicial administrator will be the one to draw up the documents accompanying the request to open insolvency proceedings;
- to elaborate together with the main budget holder and within 30 calendar days, the reorganization plan with the approval of the General Directorate of Public Finance of Bucharest Municipality and of the Chamber of Auditors, after confirming the final table of claims
- to approve and oversee financial operations, to confirm decisions and regulations issued by the deliberative authority, by the main budget holder, respectively or by his representatives, concerning the financial operations of the administrative-territorial unit and the patrimony of the administrative-territorial unit;
- to examine the possibility of limiting the expenditure of the administrative-territorial unit so as to cover only important public services;
- to convene, preside and provide the secretariat for creditors' assembly meetings;
- to file actions for declaring void any fraudulent acts, concluded by the main budget holder of the administrative territorial unit and causing damage to the creditors' rights, as well as certain asset transfers and business operations entered into by the debtor and the setting up of guarantees likely to prejudice the creditors' rights within a time frame of 120 days prior to the commencement of proceedings;

- to send proposals to the deliberative authority to cancel or unilaterally terminate contracts concluded by the administrative-territorial unit, which cannot be included in the reorganization plan;
- to approve decisions of the deliberative authority and administrative acts of the main budget holders referring to the management of human resources of public institutions under the authority of the local public administration, including the commencement, amendment, suspension and termination of service or employment, as the case may be, according to the reorganization plan;
- to examine the method of establishing budgetary claims and, when necessary, to order recalculation in accordance with the legal provisions;
- to monitor the payment of debts owed by natural or legal entities to the administrative-territorial unit, the transfers prior to the opening of insolvency proceedings, as well as the payment of taxes and fees owed to the consolidated budget;
- to file actions for claiming the collection of debts of the administrative territorial unit;
- to send proposals to the deliberative authority regarding transactions, the granting of exemptions from payment of some local budgetary claims, discharge personal guarantors, relinquish security interests, according to the reorganization plan, upon the confirmation by the syndic judge;
- to send proposals to the deliberative authority regarding the establishment of new special local taxes/fees, according to the law, until the termination of insolvency procedure;
  - o I consider that the attribution of the judicial administrator to be able to ask to the Local Council of the insolvent administrative territorial unit to set forth new taxes has as main objective the attraction of new sources of income to the local budget. This stipulation must be consistent with the provisions of Law 500 from 2002 on public finances, which means that tax represents the amount paid by a natural person or by a legal entity for services rendered by a public institution or for a public service.
- to apply seals, to participate to the inventory of goods and to take measures regarding their preservation,
- to make proposal to the deliberative authority and with the approval of the syndic judge regarding the selling of private assets belonging to the administrative territorial unit, as a last resort to settle the debt;
- to notify the syndic judge about any problem within his competence;
- to make recommendations to the syndic judge to suspend payments of the administrative territorial unit to creditors until the elaboration of the payment plan;
- to submit immediately to the tribunal the table of all debts accumulated by the insolvent administrative-territorial unit; the obligation to display at its headquarters the final schedule of payments of the administrative territorial unit;
- to carry out any other tasks required by the syndic judge, according to the law.

The judicial administrator submits a monthly report to the file which includes a description of how he has fulfilled the tasks, as well as a justification for expenses incurred for administering the proceedings.

As we have already stated in the section dedicated to the main budget holder, the judicial administrator may ask the syndic judge to suspend the managerial duties of the main budget holder and to arrange that these attributions to be takeover by the judicial administrator.

In case the judicial administrator is appointed the main budget holder, he takes control of activities with impact on the financial position and/or heritage of the special apparatus of the mayor or of the County Council and from institutions or public services at local or County level, as the case may be, and he shall temporarily exercise the powers conferred by law to the Mayor or to the President of the County Council, on their behalf and within the limits of competence determined by the syndic judge.

The administrative-territorial unit, through the main budget holder or any of the creditors, as well as through any other interested person may request for an appeal to the syndic judge against the measures taken by the judicial administrator. The appeal must be registered within 5 days of the submission of the monthly report. The syndic judge must settle the appeal within 10 days of its registration, in the Council Chamber, with the attendance of the appellant and of the judicial administrator; he may also suspend the execution of the measures challenged.

In exercising control, the syndic judge may annul the measures taken by the judicial administrator, even though they have not been challenged. He may summon, in the Council Chamber, the judicial administrator and the interested parties.

During insolvency proceedings, for good reasons, the syndic judge may order the replacement of the judicial administrator. In order to adopt this measure, the syndic judge convenes the judicial administrator and the creditors' committee in the Chamber Council. As I have already stated, the law does not establish the grounds for which the judge orders the replacement of the judicial administrator.

According to legal provisions, the judicial administrator can be sanctioned by the syndic judge with a fine between 5000 and 20,000 ron if he negligently, or in bad faith, does not fulfil or delays the attributions provided by law or the ones determined by the syndic judge or if he renounces his function without a compelling reason. If this action of the judicial administrator has caused damage, the syndic judge may, at the request of any interested party, oblige the judicial administrator even to pay for them.

## **6. CONCLUSIONS**

Upon opening insolvency procedure the syndic judge must appoint a judicial administrator and establish his duties. The judicial administrator, together with the main budget holder, prepares a recovery plan that could potentially put at a disadvantage some claims, extending the maturity date or changing interest rates, penalties, or other contractual clauses. Practically, the process of reorganization includes the rescheduling, the cutting or the adjustment of certain receivables, waiving or reducing nonessential service costs.

Furthermore, considering the judicial administrator's powers presented at section 5, we can conclude that he may require the deliberative authority to cancel or terminate contracts made by an administrative-territorial unit which cannot be honoured during the recovery plan without prescribing the right of compensation for unilateral termination. We believe that in this situation the regulatory act favours the administrative-territorial unit.

Moreover, the main budget holder and the deliberative authority cannot issue regulations and provisions, respectively; they cannot introduce new services, may not borrow funds and may not hire additional staff without the approval of the judicial administrator.

In addition, during the insolvency procedure of the administrative territorial unit, the judicial administrator can take over the duties of the main budget holder, of the mayor or of the President of the County Council, respectively. If such a situation occurs, when the syndic judge appoints the judicial administrator as the main budget holder, the latter will take control of activities with impact on the financial position and/or heritage of the special apparatus of the mayor or of the County Council and of the institutions or the public services of local or county interest; he temporarily exercises the powers conferred by law to the mayor or to the President of the County Council, acting on their behalf, within the limits of the competence determined by the syndic judge.

Therefore, we may find that in the process of insolvency, the judicial administrator who, according to the recovery plan, aims to liquidate the debts of the administrative territorial unit plays an essential role, which is considered absolutely normal. Moreover, the judicial administrator can even take over duties which belonged to the main budget holder, as a result of his appointment in this position by the syndic judge. We believe that this provision supports the opinion already expressed with regard to the essential role the judicial administrator in insolvency proceedings of administrative-territorial units, also applying penalties to the Mayor, as a suspended budget holder.

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