

# INTERFERENCES OF INSOLVENCY AND CRIMINAL PROCEEDINGS, BETWEEN THE HIGH COURT OF JUSTICE AND CASSATION AND THE CONSTITUTIONAL COURT

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## **Abstract**

*This paper considers certain aspects related to the application of the article 493 paragraph (1) letter (a) of the Criminal Procedure Code versus the insolvency procedure of the legal entity under the conditions of a distinction within the article on the interference with the insolvency procedure of the legal entity. The recent decision of the High Court of Cassation and Justice seems to have cleared the issue, but from our point of view the debates may be made from in the doctrine. The article does not aim so solve this issue, but it presents the three opinions on the application of article 493 paragraph 1 letter a of the Criminal Procedure Code. At jurisprudential level it seems that the intervention of the legislator on the interpretation of this article is not excluded. This orientation is based on the argument that the scope of the preventive measure made in the criminal trial is to prevent evading the criminal liability.*

**Keywords:** *insolvency, legal entity, preventive measure, dissolution and liquidation.*

**JEL Classification:** K22

## **1. Introduction**

The interpretation and the application of law often raises difficulties in practice, especially when we are in front of certain norms that regulates the proceedings belonging to different domains, when the legislator must conciliate different private and public interests, and the interpret of the la must consider, in the same measure, the necessity to conciliation of those interests.

A situation illustrating such a difficulty concerns the interference between the insolvency proceedings and the criminal proceedings, namely the interpretation and application of the provisions of article 493 paragraph (1) letter (a) of the Criminal procedure code, as follows: "(1) *The judge of rights and freedoms, during the criminal proceedings, on a proposal from the prosecutor, or, as the case may be, the judge of the preliminary chamber or the court may order, if there are reasonable grounds justifying the reasonable suspicion that the legal person has committed an act provided for by the criminal law and only in order to ensure the proper conduct of the criminal proceedings, one or more of the following measures: (a) **the prohibition of initiation or, where appropriate, the suspension of the procedure for the dissolution or liquidation of the legal person.***"

The phrase used by the legislature, namely "**suspending the procedure for the dissolution or liquidation of the legal person**", without any distinction, led to the different interpretation of the legal text cited by the courts, the positioning in the literature, the referral to the Constitutional Court and the High Court of Justice and Cassation, both courts having recently ruled, the first on the exception of unconstitutionality concerning Article 493 para. (1) letter (a) of the Criminal procedure code, which it rejected as inadmissible, and the second on the appeal in the interest of the law promoted by the General Prosecutor of Romania on the interpretation of the same legal text. The matter seems to be settled at this time – as long as the High Court of Justice and Cassation has ruled, within the limits of its jurisdiction and has established the compulsory interpretation. However, have the controversies relating to the interpretation and application of article 493 paragraph (1) letter (a) of the Criminal procedure code been genuinely extinguished? This article aims to present, in essence, the debates surrounding that text of the law, illustrating in our view that the legal text referred to is capable of being challenged.

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## 2. The issue that determined a unitary practice on the interpretation and the application of article 493 paragraph (1) letter (a) of the Criminal procedure code. The solution of the High Court of Justice and Cassation

As it also results from the content of the appeal in the interest of the law promoted by the General Prosecutor of Romania<sup>2</sup>, the question of law which gave rise to the non-unitary interpretation by the courts concerns **the interpretation and application of the provisions of article 493 para. (1) letter (a) of the Criminal Procedure Code in respect of the insolvency proceedings of legal persons**, provided for in Law no. 85/2014 on insolvency prevention and insolvency procedures.

In the absence of any distinction in the article 493 paragraph (1) letter (a) of the Criminal Procedure Code, three opinions have been drawn up on its interpretation and application:

### a) A first jurisprudential orientation

- it was considered that "**the preventive measure provided for in the article 493 paragraph (1) letter a) of the Criminal Procedure Code** consisting in the prohibition of initiation or, where appropriate, of the suspension of the procedure for the dissolution or liquidation of the legal person **concerns only voluntary dissolution or liquidation, not the insolvency proceedings of a legal person**. This procedure may not be suspended as an effect of taking, in respect of the debtor legal person, the preventive measure stipulated by article 493 paragraph (1) letter (a) of the Criminal Procedure Code and on no other legal basis, such as article 413 of the Civil Procedure Code, on the grounds that there is a criminal trial against debtors"<sup>3</sup>.

### b) A second jurisprudential orientation

- it as considered that "**the application of the preventive measure taken in the criminal trial against the legal person produces effects on its insolvency** under the conditions of Law no. 85/2014 being compatible with this procedure, so that, if the case, prohibits the opening the insolvency or its continuation"<sup>4</sup>.

### c) A third jurisprudential orientation

- it was considered that "**the preventive measure ordered in the criminal proceedings does not prevent de plane the opening or conduct of insolvency proceedings, but only those measures taken in the context of that procedure which have the effect of dissolving the debtor or winding up his assets**".

By the decision no. 18 of 7 September 2020 delivered in the file no. 459/1/2020 – appeal in the interest of the law, the High Court of Cassation and Justice – The panel for the resolution of appeals in the interest of the law has decided that: "*In the interpretation and uniform application of the provisions of article 493 paragraph (1) letter (a) of the Criminal Procedure Code: the interdiction of initiation or, where appropriate, suspension of the procedure for the dissolution or liquidation of the legal person shall not also concern the dissolution and liquidation in bankruptcy proceedings provided for in Law no. 85/2014 on insolvency prevention and insolvency procedures*"<sup>5</sup>.

## 3. Considerations on the solution delivered by the High Court of Justice and Cassation, in the context of the alternatives of interpretation submitted to it

At the moment of drafting this research the motivation of the decision of High Court of Justice and Cassation has not been published. It is noticed that the solution delivered - cited above - embraces the first jurisprudential orientation exposed at the precedent point<sup>6</sup>.

<sup>2</sup> <https://www.mpublic.ro/ro/content/ril-civil-din-data-de-17022020>, consulted on 1.10.2020.

<sup>3</sup> Ibidem.

<sup>4</sup> Ibidem.

<sup>5</sup> <http://www.scj.ro/750/5450/Comunicate-privind-deciziile-pronuntate-in-recurs-in-interesul-legii-in-cadrul-Completurilor-pentru-Comunicat-privind-decizia-pronuntata-in-recurs-in-interesul-legii-in-sedinta-din-7-septembrie-2020>, consulted on 1.10.2020.

<sup>6</sup> A. R. Trandafir, *Comment from art. 493 of Code of Criminal Procedure* in M. Udrouiu (coord.), *Code of Criminal Procedure. Comments on articles*, 2<sup>nd</sup> ed., Ed. CH Beck, Bucharest, 2017; Gh. Piperea, „Penalul ține în loc insolvența”, *Curierul Judiciar* no. 12/2014, p. 669; A.R. Trandafir, *Aplicarea legii insolvenței în procesele penale*, „Caiete de Drept Penal” no. 3/2017, p. 92; A.R. Trandafir, „Despre inaplicabilitatea interdicției inițierii sau a suspendării dizolvării ori lichidării persoanei juridice în cadrul procedurii insolvenței. Și alte două motive de neconstituționalitate în materia măsurilor preventive”, *juridice.ro*, 26.10.2016.

That guidance is based, in essence, on the argument that the purpose of the preventive measure taken in criminal proceedings is to prevent evading criminal liability, so that, if the legal person tries to voluntarily evade criminal liability, specific preventive measures must be possible. If, however, the initiative does not belong to it, in principle, it must allow the proceedings to continue to be carried out, as provided for in the special law. Or, the insolvency is a judicial procedure, conducted under the control of the legality of the trade union judge. This procedure, once opened, should have a continuous and uninterrupted flow of legal acts, operations and processes, with a route, usually irreversible and, regardless of the chosen path (reorganisation or bankruptcy); it must be carried out expeditiously, in order to cover claims. Forcing the existence of a company, when it no longer generates profit and even becomes harmful, or the impossibility of valuing goods which diminish its value and which become difficult to sell, may constitute an interference with the ownership of third-party creditors whose claims constitute property within the meaning of Article 1 of the First Additional Protocol to the European Convention on Human Rights.

This interpretation, detailed in the appeal in the interest of the law promoted by the General Prosecutor is supported by a part of the literature which has been strongly and previously expressed, as well as following the ruling by the High Court of Cassation and Justice, meaning that the recent intervention<sup>7</sup> published on the page [juridice.ro](http://juridice.ro) stating that, following the request of the High Court of Cassation and Justice – the Panel for solving the appeal in the interest of the law of 9 June 2020 submitted to the Department of Criminal law within the Faculty of Law of the University of Bucharest, a legal opinion was formulated in which it supported that interpretation. In those interventions, several arguments are made, in essence, that insolvency proceedings and criminal proceedings coexist, and effective remedies exist to ensure that the rights of all persons injured by the offence are ensured and that the blocking of insolvency proceedings is the deprivation of the accused legal persons of an effective remedy to save their business. A suspension of dissolution and liquidation may even cause damage to the assets of the legal person and its creditors: the payment of taxes, taxes and utilities due, although the legal person no longer carries on business, and the devaluation of assets being just some of the examples that can be invoked. It is thus considered that "the blocking the dissolution and liquidation of insolvency proceedings does not serve anyone; indeed, such a measure prejudices all persons interested in the assets of the legal person. Beyond all the above arguments, it does not use the accused legal person – as it sees its heritage diminished; nor to creditors not involved in the criminal proceedings – as they cannot redeem their claims and receive any compensation for this impossibility itself; not even the creditors involved in the criminal proceedings – since, at the end of the criminal process, the assets of the legal person will be smaller and, in any case, do not acquire by the existence of such a process any priority in enforcement. In other words, their claim under suspensive condition will retain the same order of preference if it becomes pure and simple"<sup>8</sup>.

Without disputing the relevance of the legal argument which supports the opinion/orientation to which the High Court of Cassation and Justice appears to have stopped, **we consider that the third opinion/jurisprudence orientation, more nuanced, argued by one part of the doctrine<sup>9</sup>** and embraced by the Attorney General in the appeal in the interest of the promoted law, is also of interest, a kind of 'golden middle way'. This opinion is apparent between the various legal acts or operations carried out in the insolvency proceedings and considers that the preventive measure may relate exclusively to those acts or operations which have the effect of partially or totally winding up the debtor's assets and its dissolution, not those benefiting from a stationary, conservative effect. It is argued that "this opinion (...) capitalise on the purpose of the preventive measure in the criminal process in the context of the competition these takes with an open insolvency procedure, ensuring

<sup>7</sup> Andra-Roxana Trandafir (Ilie), George-Alexandru Lazăr, *Măsura preventivă prevăzută de art. 493 alin. (1) lit. a) C. pr. pen.*, <https://www.juridice.ro/695425/masura-preventiva-prevazuta-de-art-493-alin-1-lit-a-c-pr-pen-nu-vizeaza-dizolvarea-sau-lichidarea-din-procedura-falimentului-prevazuta-de-legea-nr-85-2014.html>, consulted on 1.10.2020.

<sup>8</sup> Ibid.

<sup>9</sup> M. Bratiș, *Aplicarea măsurilor de siguranță privind confiscarea specială și confiscarea extinsă, precum și a măsurii preventive a suspendării lichidării judiciare asupra debitorului persoană juridică aflată în insolvență*, „Revista Română de Dreptul Afacerilor” no. 3/2017, p. 51-68.

their balance and compatibility". It is borne in mind that "the insolvency procedure, once opened, does not automatically lead to the dissolution or liquidation of the debtor unless there is a decision to open bankruptcy proceedings, the preventive measure ordered in the criminal proceedings to be received, in insolvency proceedings, by the syndic judge, pursuant to article 412 paragraph (1) point 8 of the Civil Procedure Code, an interlocutory judgement of suspension of any operations to liquidate the debtor's assets, to distribute sums of money from the debtor's estate to any creditors, including the insolvency practitioner"<sup>10</sup>.

As far as we are concerned, we consider that the latter opinion should not be neglected, in the light of the need for proportionality of regulation and for the reconciliation of competing interests – public and private.

#### 4. Conclusions

It would appear that the recent decision of the High Court of Cassation and Justice in the resolution of the appeal in the interest of the law has cut the doctrinal debate on the interpretation of the article 493 paragraph (1) letter a) of the Criminal Procedure Code with regard to the insolvency proceedings.

However, we believe that **the issue still remains open**, since in its turn, the article 493, paragraph (1) letter a) of the Criminal Procedure Code in the interpretation given by the High Court of Cassation and Justice may be appealed to the Constitutional Court in order to decide whether the text, in that interpretation, is constitutional.

In this regard, it should be recalled that, according to the case-law of the Constitutional Court<sup>11</sup>, **"in the context of the constitutional review** which it carries out over the provisions of a law or ordinance, in accordance with the provisions of article 146 letter d) of the Constitution and article 29 paragraph 1 of Law no. 47/1992, republished, **may examine the interpretation given to certain texts of law by the supreme court** pursuant to Articles 514-518 and 519-521 of the Civil Procedure Code, relating to the appeal in the interest of the law and the referral to the High Court of Cassation and Justice for a preliminary ruling on questions of law. In the context of this review, however, the constitutional court must circumscribe the issues concerning compliance with the provisions of the fundamental law, **it can thus examine both the constitutional conformity of the content of the provisions of the law, as interpreted by the Supreme Court, and the way in which the High Court of Cassation and Justice complied with the constitutional provisions in the exercise of its powers aimed at ensuring a uniform judicial practice** (see, for example, Decision no. 51 of 4 February 2020, published in the Official Gazette of Romania, Part I, No. 204 of 13 March 2020).

Similarly, the Court held that **"it is competent to penalise the unconstitutionality of an interpretation which a text of law has received in practice, since 'the diversion of legal regulations from their legitimate purpose, by a systematic interpretation and misapplication of them by the courts or by the other subjects called upon to apply the provisions of the law, may render that regulation unconstitutional"**<sup>12</sup>. The Court also held that it has **"the power to eliminate the defect of unconstitutionality thus created**, which is essential in such situations being to ensure respect for the rights and freedoms of persons, as well as the supremacy of the Constitution"<sup>13</sup>.

In this respect, we note that the **recent decision of the Constitutional Court No. 614 of 17 November 2020 contains**, according to the statements on the website of the Constitutional Court<sup>14</sup>,

<sup>10</sup> <https://www.mpublic.ro/ro/content/rii-civil-din-data-de-17022020>, consulted on 1.10.2020.

<sup>11</sup> See M. Safta, *Nota de jurisprudență a Curții Constituționale [3-28 august 2020]. Neconstituționalitatea legii versus problema interpretării și aplicării legii*, <https://www.juridice.ro/694507/nota-de-jurisprudenta-a-curtii-constitucionale-3-28-august-2020-neconstituionalitatea-legii-versus-problema-interpretarii-si-aplicarii-legii.html>, consulted on 1.10.2020.

<sup>12</sup> E.g., Decision No. 448 din 29 octomber 2013, published in the Romanian Official Gazette, Part I, no. 5 of 7 january 2014, Decision No. 224 of 13 March 2012, published in the Romanian Official Gazette, Part I, no. 256 of 18 April 2012 and Decision No. 336 of 30 April 2015, published in the Romanian Official Gazette, Part I, no. 342 of 19 May 2015.

<sup>13</sup> Ibid.

<sup>14</sup> [www.ccr.ro](http://www.ccr.ro).

a solution rejecting the exception of unconstitutionality as inadmissible. This means that the constitutional court has not ruled on the merits of the exception of unconstitutionality, and therefore on the compatibility of article 493 paragraph (1) letter a) of the Criminal Procedure Code with the constitutional rules and principles, being prevented by a prior issue concerning the legality of its referral in that case<sup>15</sup>.

Similarly, the only previous decision of the constitutional court having the same object, referred to both in the appeal in the interest of the law and in the legal literature, namely the decision of the Constitutional Court no. 139 of 10 March 2016<sup>16</sup> does not apply to the question of law which has been appealed in the interests of the law. As judiciously observed in that legal literature, "The subject-matter of the analysis of Decision No. 139/2016 was mainly the absence of a maximum duration of preventive measures applicable to legal persons. Even if the authors of the exceptions in that file also tried to address the question of the lack of predictability of the concepts of 'dissolution' and 'liquidation', the considerations on which that decision is based do not present sufficient common aspects with the question which is the subject of the referral to the Public Prosecutor's Office, since the Constitutional Court has not, in fact, examined the question of compatibility between article 493 paragraph (1) letter a) of the Criminal procedure code and the Insolvency Law"<sup>17</sup>.

In conclusion, the cutting of the problem resulting from the interpretation and application of article 493 paragraph 1 letter a) of the Criminal Procedure Code and the Insolvency Law is likely, at least in theory, to close itself after exhaustion and the possibilities that the constitutional review of constitutionality puts at its disposal in the above detailed way, that is to say the law in the interpretation of the High Court of Cassation and Justice.

Undoubtedly, however, it is also not excluded that the legislature will intervene to tell us, clearly, what is the content of the legal rules, correspondingly to the regulatory intention, which is subsumed by the principle of legal certainty.

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<sup>15</sup> For a larger view on the issue of inadmissibility in constitutional justice see T. Toader, M. Safta, *Ghid de admisibilitate la Curtea Constituțională*, Ed. Hamangiu, 2020.

<sup>16</sup> Published in the Romanian Official Gazette, Part I, no. 350 of 6 May 2016.

<sup>17</sup> Andra-Roxana Trandafir (Ilie), George-Alexandru Lazăr, *Măsura preventivă prevăzută de art. 493 alin. (1) lit. a) C. pr. pen.*, <https://www.juridice.ro/695425/masura-preventiva-prevazuta-de-art-493-alin-1-lit-a-c-pr-pen-nu-vizeaza-dizolvarea-sau-lichidarea-din-procedura-falimentului-prevazuta-de-legea-nr-85-2014.html>, consulted on 1.10.2020.