

**THE CONFIGURATION OF JOINT LIABILITY FOR  
ADMINISTRATORS, ASSOCIATES AND SHAREHOLDERS IN  
THE FISCAL FIELD; TYPOLOGY AND PROCEDURES**

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**ABSTRACT:***In the landscape of legal mechanisms which attract the liability of other persons in addition to the principal debtor of the payment obligation, joint liability takes a special place. This is mainly because, the analyzed mechanism is created, within the indicated configuration, having consequences exclusively in the fiscal field. The forceful execution of debtors through joint liability is a priority for ANAF in its chase for revenue and as a result old provisions of the Procedural Fiscal Code have been brought to light, which had not produced many results up to date.*

*Secondly, the typology of the cases in which joint liability can be imposed and the procedures utilized by the fiscal authorities for this purpose are specific even for the fiscal environment however, beyond the procedural aspects, remains a matter of principle. The entire process is based upon proving the bad faith of the debtors and the persons who may be jointly liable. The present study is aimed towards these particular research perspectives, perspectives which are complemented by the analysis of applicable case law.*

**KEY WORDS:** ANAF, joint liability, fiscal obligation, bad-faith; imposing liability; procedure;

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## **1. SEDES MATERIAE**

Joint liability in the fiscal field represents a method for recovery of amounts due to the consolidated general budget establishing a liability on natural or legal persons, other than the debtor taxpayer. The incurring of joint liability is accomplished by the competent tax authorities in the course of the debtor's forceful execution.

Throughout this paper we will peruse the situations in which the joint fiscal liability of administrators, associates, and shareholders can be triggered. The tax authorities are the ones that can attract the joint liability of associates from enterprises without legal

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personality as well as their legal representatives', who, in bad faith, determined either the non-declaration or the failure to pay tax liabilities when becoming due. The taxpayer's legal representative can also be held jointly liable, if it declares to the bank, in bad faith, that it has no liquidities, and so can the third parties/garnishees, within the limits of the amounts that they withheld from the garnishment.

Articles 27 and 28 of the Code of Fiscal Procedure institute a procedure *sui-generis* according to which, certain categories of persons shall be jointly and severally liable with the debtor, in accordance with the conditions and terms determined expressly throughout these articles, for the debtor's outstanding fiscal claims.

In the hypotheses provided for in Article 27 paragraph (1), points a) to c), the following shall be jointly and severally liable with the debtor: (a) associates of enterprises without legal personality, including the members of partnerships, for tax obligations owed by them, in accordance with the conditions laid down in Article 20, together with the legal representatives who, in bad faith, have determined the misreporting and/or the non-payment of tax obligations at maturity; (b) the third party garnishees, in the circumstances referred to in Article 149 paragraphs (9), (10), (12) and (15), within the limits of the amounts withheld from garnishment; (c) the taxpayer's legal representative who, in bad faith, declared to the bank, pursuant to Article 149 paragraph (2) letter a) that it does not have any cash liquidities.

In the hypotheses provided for in Article 27 paragraph (2), points a) to e), the following shall be jointly and severally liable with the debtor, for the payment of outstanding obligations, subject to the debtor being declared insolvent, under the conditions set forth in the Code of Fiscal Procedure: (a) any natural or legal persons which, prior to the date of the bankruptcy declaration, in bad faith, have acquired in any way assets from debtors who have caused such insolvency; (b) administrators, associates, shareholders and any other persons who have caused the insolvency of the taxpayer- legal person by transferring or concealing, in bad faith, in whatever form, the debtor's assets; (c) the administrators, which, during the period of exercising their mandate, in bad faith, have not fulfilled their legal obligation to require the competent court the initiation of insolvency proceedings, for the tax obligations relating to that period and left unpaid at the time of declaring the state of insolvency; (d) the administrators or any other persons which, in bad faith, have determined the misreporting and/or the non-payment of outstanding tax obligations; (e) the administrators or any other persons which, in bad faith, have caused the refund or reimbursement of funds from the consolidated budget without such being due to the debtor.

In the hypotheses provided for in Article 27, paragraph (3), the following shall be jointly and severally liable with the debtor, subject to the debtor being declared insolvent, under the conditions stipulated by the Code of Fiscal Procedure, if, directly or indirectly, they control, are controlled or are under common control with the debtor and if at least one of the conditions set out in points a) to c) is fulfilled: (a) it acquires, on any basis, the right of ownership against any of debtor's tangible assets and the book value of these assets represents at least half of the book value of all tangible assets of the transferee; (b) it has or has had contractual relationships with commercial customers and/or suppliers, other than suppliers of utilities, which have had or have contractual relationships with the debtor in a proportion of at least one-half of the total value of the transactions; (c) it has

or has had any employment relationships or contracted services with at least half of the debtor's employees or service providers.

Article 28 of the Code of Fiscal Procedure regulates the procedure by which the liability of the persons referred to in Article 27 will be established, procedure also detailed by Order no.127 from 29/01/2014 for the approval of Instructions regarding the implementation of the procedure regarding joint liability covered by the provisions of Articles 27 and 28 from the Government Decree No. 92/2003 relating to the Code of Fiscal Procedure.

## **2. THE CONFIGURATION OF JOINT LIABILITY FOR FISCAL OBLIGATIONS; THE CONCEPT OF BAD FAITH AND ITS APPLICABILITY IN THIS FIELD.**

In recent practice, the most frequent situation where an attempt was made to attract such liability is when the debtor who owes money to the state budget, is unable to pay its tax obligations, when it does not have sufficient liquidities or even sources of income or assets that could be harnessed for the purposes of paying off its debts and when, before reaching this state, it committed certain acts or breached certain legal obligations.

In the event a taxpayer is in a state of insolvency, the state, through its tax authorities, will attempt through all available means to recuperate as much as possible of the outstanding tax claims. In such a situation, the taxpayer being insolvent, the state may proceed with the recovery of tax obligations from the assets of other persons which are not insolvent, such as the company's administrators or shareholders. However, in order to compel a person, other than the debtor, to cover the partial payment/non-payment of the insolvent debtor's tax obligations, there must be a causal relationship based on bad-faith and intention of fraud. Therefore, the role of the state in its capacity as creditor is to verify whether this condition of the debtor was caused deliberately and if so, who is responsible. Where the insolvency was caused by the concealment or transfer of the debtor's assets in bad faith, the administrators, shareholders, associates or any other persons who had a power of decision regarding the disposal of those assets can be held jointly liable, as well as the persons, whether natural or legal, which, in bad faith, have acquired those assets. At the same time, the administrators, which in bad faith, have not filed for bankruptcy proceedings in court in respect of outstanding tax obligations at the date of declaring the insolvency status, may be liable jointly with the debtor.

With respect to the provisions of Article 27 of the Code of Fiscal Procedure, exemplified above, we note that in the fiscal field the issue of joint liability is conditioned upon the existence of bad faith.

The bad faith is a complex concept that cannot be analyzed just on the basis of its own aspects, but by comparison with the notion of good faith. Furthermore, we need to bear in mind the principle of the presumption of good faith which derives from roman law -bona fides praesumitur- an pursuant to relevant practice "This is an important presumption, because the person who desires and has the interest of invoking bad faith towards another, it will have to prove such beyond any doubt". Therefore, if good faith is presumed, the lack thereof (bad faith) has to be proven. Bad faith contrasts from good faith, good faith is more precisely in direct contrast with deceit and fraud which are the product of bad faith.

In theory, it was claimed the idea of priority and the universality of good faith, with the reasoning that it is virtually impossible to distinguish between the legal effects of good faith, on the one hand, and of bad faith, on the other hand, since a normal legal provision cannot really be defined independent of the good or bad faith of the legal subjects with a further determination of which of these two notions is bringing changes to the normal legal consequences of said norm (Ripert, 1953). In conclusion, with reference to the famous maximum of Cicero according to which *fundamentum iustitiae est fides* (Justice is the foundation of good faith), it is our opinion that in order for the premises of bad faith to operate, this must be established on the basis of evidence and so we ask ourselves who has the competence to establish bad faith; the legal courts undoubtedly, but is the tax authority entitled to reach such a decision? In accordance with the provisions of the Code of Fiscal Procedure and the ANAF issued orders for its effective implementation, we could argue that the tax body is competent to issue decisions involving joint liability for tax purposes, in the event that certain individuals, with bad faith, have caused the debtor's insolvency state; therefore it would result that fiscal commissioners should also be able to determine the existence or lack of bad faith in the decision making which caused such condition.

The principle of good faith in the judiciary was elevated to constitutional rank in art. 57 of the Constitution of Romania. The regulation of the Code of Fiscal Procedure is rather simplistic and requires only that the relationships between the taxpayers and the tax authorities be based on good faith, in order to carry out the requirements of the law (Article 12 of the Code of Fiscal Procedure). Therefore, good faith constitutes-in the application and interpretation of the tax law rules -a requirement for both the taxpayers and the tax authorities (Bragaru, 2004, p159). As such, from the previous analysis it results that in order to establish the existence of bad faith, it will be necessary to administer evidence, in order to determine the causal link between actions/inactions and the insolvency state, but at the same time it is evident that this determination is left at the discretion of the tax authority, which will have to respect the principle of exercising the determination right (Article 6 of the Code of Fiscal Procedure) which requires the correlation of measures and decisions with the factual circumstances that underline the nature and severity of the legal violations (Bufan *et all*, 2005).

Bad faith is the attitude of a person who committed a fact or an act law in breach of the law or other social standards norms, fully aware of the nature of its illicit behavior. Even if bad faith is obvious, in order to attract the joint and several liability, the forceful execution organisms must follow certain steps, in accordance with the new order, namely:

- Identification of all persons who hold or have held the capacity of administrator, associate, shareholder or any other capacity within the debtor company, as well as any other persons who owned, on any basis, assets of the debtor declared insolvent;

- Identification of all persons who have acquired in any way assets from the debtor declared insolvent prior to the declaration of bankruptcy. Acquisition in any way of assets refers to the sale and purchase, assignment, donation, exchange or any other way of transfer ownership against the debtor's assets;

- As a result of the establishment of the persons who have contributed to the alienation of the debtor's assets, one will need to determine which of these persons were acting in bad faith;

- Eventually the causal link must be established between the transfer of assets and the declaration of the state of insolvency, namely that, because of the disposal of the debtor's

assets, the latter has reached the status of no longer having sufficient goods to set-off its debt towards the state budget.

We notice that the conditions of bad faith are set forth insofar as the transfer of assets is concerned, but in practice many times the debtor becomes insolvent because of abuse of management or abnormal acts of management which may consist of certain expenditures charged against a corporation or the surrender of any of its income, without such operations being justified by the interest of a normal commercial exploitation (Bufan, 2003, p.48-50). Practice shows not only that bad faith is difficult to prove but also, that it can lead to abuses by the tax inspectors who are trying to substitute themselves to the courts. According to some specialists, in recent years, cases of joint liability have been very few, and usually the taxpayers won. On the one hand, the reason was that Tax Authority's actions were based on bad faith. On the other hand, the inspectors did not complete too many cases precisely because they lacked the procedure and paperwork. The current order has been issued in the hope that there will be more cases and collection to the budget will automatically increase.

### **3. PROCEDURAL ASPECTS IN ATTRACTING JOINT LIABILITY**

In February of this year, ANAF has issued Order No. 127/2014, published in the Official Gazette, detailing for each category of persons who may be held jointly liable with the main debtor, the documentation that must be verified, the types of forms that need to be completed and the procedure for the issuance of such decisions. However, beyond the procedural aspects, remains an issue of principle. The whole process rests solely on proving the bad faith of debtors and the persons' who may be held jointly liable, and as far as defining bad faith, no clarifications were provided. Therefore, the problem of determining whether or not the facts which led the debtor to a state of insolvency were executed in bad faith or not, should remain at the discretion of the judiciary. The forceful execution of the debtors by means of attracting joint liability has become, starting this year, a priority on the ANAF's agenda, which, in its quest for income, has rediscovered old provisions of the Code of fiscal procedure, which have not really paid off so far (Petre, 2014).

Prior to the issuance of the above mentioned order, the Code of Fiscal Procedure did not stipulate the manner in which, the persons holding the capacity of associates, administrators of indebted enterprises, could be held jointly liable. The most important aspect introduced by this act is the requirement to produce documents held by the person against which this procedure is initiated in order to prove bad faith. Until said instructions, there was no explicit mention of the need for documents to prove bad faith, nor was there an explanation of what constitutes supporting documentation or the needed statements, but bad faith is still not defined. As such, we wonder if it is sufficient for an ANAF order to list all procedural phases that the fiscal body will follow, in order to exercise such a prerogative.

For these purposes was raised an exception of unconstitutionality of Article 28 paragraphs (1) and (2) of the Ordinance No. 92/2003 regarding the Code of Fiscal Procedure motivated primarily by the fact that this is in essence creating a suitable framework for the substitution of the courts system by the tax authorities, which violates

the principle of separation of powers in the state. It is considered that the establishment of the debtors' bad faith and the triggering of joint liability in respect of the insolvent debtor's administrators should be the courts' sole attribute and not that of some administrative bodies.

Analyzing the exception of unconstitutionality raised, the Constitutional Court found that in the legal relations pertaining to fiscal laws, tax authorities have the legal entitlement to issue administrative fiscal acts. Tax law and tax procedure are part of the public law, which means that the subjects of such relations cannot be equal in rights and obligations. Thus, one of the subjects, namely the tax authority, benefits from a dominant position, being endowed with the exercise of state power by virtue of which it has the legal power to set taxes, fees, contributions and other amounts owed to the consolidated budget, as well as to keep track of their collection, so that, in the event that the amounts of money owed to the budget can no longer be collected from the original debtor, among other things for the reasons set out in the criticized text, they shall be able to trace other persons in addition to the debtor, who actually contributed to its entry in a state of insolvency.

The regulation of joint liability with the debtor's is one aspect of the substantive fiscal relations, so that the tax authority, part of the executive power, has the constitutional legitimacy to determine, according to the law, the joint liability of the persons referred to in Article 27 of the Code of Fiscal Procedure, therefore, it cannot be argued that an agent of the executive power interferes in the sphere of competence of the judicial power. The latter has the power to censure the lawfulness and grounds of the administrative acts pursuant to Article 205 and the following from the Code of Fiscal Procedure.

In these circumstances, the Court finds that the free access to justice is effectively assured, since the merits and legality of the tax authority's decision that established the joint liability of the insolvent debtor's administrator can be challenged and thus rejected as unfounded the plea of unconstitutionality. In this instance, the Constitutional Court did not look into the essential problem, namely the tax authority's prerogative to establish the existence of bad faith which constitutes the grounds for issuance of such decision.

There are many classes of persons who are likely to incur joint liability, but, as specified, to be able to perform this procedure, the forceful execution authorities must follow several steps, so as to ensure not only the identity of the persons who may be held liable, but also the causal link between the acts and deeds of these individuals and a state of insolvency declaration in respect of the debtor responsible for payment to the state budget. After completing these steps, in order to establish joint liability, the tax authority must issue a decision stating the reasons in fact and law according to which the person concerned is liable, a decision that represents a debt security.

Regarding the failure to comply with the legal obligation to request the competent court to open insolvency proceedings for unpaid tax liabilities at the date of declaration of the state of insolvency, we shall extend the analysis and try to show that in any of the situations listed above we could find such premises, in relation to the recent and relevant case law in this field. In accordance with the provisions of Article 66, paragraph (1) of the Act 85 of 2014, the insolvent debtor must notify the court with an application to be subject to the provisions of the insolvency law, within 30 days after the occurrence of the state of insolvency therefore, the consequence this state of insolvency for the debtor is that it is mandated to submit an application to open insolvency proceedings.

Relevance of bad faith lies in the fact that the debtor, through its representative, was aware of the state of insolvency and has not requested within the period prescribed in the special law, the initiation of such proceedings.

An important aspect to note is that if the debtor was declared insolvent, the triggering of joint liability is contested without the intervention of the courts. Obviously, in the event of the issuance of a decision for purposes of joint liability by ANAF, this administrative act will be subject to judicial review or control in accordance with the provisions of the Code of Fiscal Procedure and Administrative Act provisions.

In the event that procedure to attract joint liability shall apply concurrently to multiple persons responsible, the competent tax authority shall issue a corresponding decision for each, and every such decision shall make mention of the other persons responsible. The creditor has the opportunity to pursue, at its choice, either co-debtor in whole or in part, jointly or individually, for the entire debt. In such a case, where a co-debtor pays the debt in its entirety, it acquires a right of recourse against the other joint co-debtors for the amounts paid in excess to what it owed. The joint liability procedure ceases when all tax liabilities have been paid or when the decision to attract joint liability has been cancelled, administratively or by judicial process.

The High Court of Cassation and Justice ruled that, in accordance with the provisions of Article 27 paragraph 2 (b) from the Code of Fiscal Procedure, for the payment of outstanding obligations of the debtor declared insolvent, under the Code, the administrators, associates and any other persons that have caused the debtor's insolvency through disposal or concealment of debtor's assets, in bad faith, in whatever form, are jointly liable. In this respect, the High Court made it clear that the holding by a person of the capacity of associate and administrator of a company declared insolvent, in a period in which part of its assets were disposed of, without proof that the amounts obtained from these transactions were used to extinguish tax liabilities or otherwise be in the interest of this company, satisfies the conditions of incurring joint liability by the administrator of the debtor company. Therefore, fulfilling the condition relating to bad faith arises precisely from such alienation of property without the payment of tax liabilities with the sums obtained in return by the company which owned the assets in question. However, joint liability may be engaged only for the period in which the person concerned has held the capacity of associate, administrator of the debtor company and to the extent only of the assets capitalized in violation of the aforementioned legal provisions (Cioroaba, 2013). This decision is one of guidance and is rendered in this scenario, whereas the deeds/acts that may cause a state of insolvency are numerous and diverse.

Another jurisprudence stated the following regarding bad faith: "Therefore, given that the companies in question were part of the same group of companies, under common control, being aware, at least in principle, of the legal and economical aspects of the group's components, as well as the fact, that the disposal of production assets led to the insolvency state of the debtor company, the appeal court held that the transfer of such assets was conducted in bad faith, by defrauding the creditors" (Albu, 2010, p151).

Similarly, we could extend the analysis pertaining to the joint liability of administrators or other persons, which, in bad faith, determined the refund or reimbursement of funds from the consolidated state budget without such being due to the debtor. In these conditions, can the fiscal commissioner decide if such deeds were

conducted in good or bad faith and more importantly, if the causal link exists? In the event of the debtor's insolvency, the request for refund or reimbursement of undue amounts could be viewed as a "last resort" measure, a desperate gesture (fraudulent indeed), however one that could not determine this state, but on the contrary, an act that would imply the intention "to produce" liquidities.

#### **4. INTERFERENCES AMONG THE INSTITUTION OF JOINT LIABILITY AND THE BANKRUPTCY PROCEEDINGS**

As delimited by the present study, in the scene of the legal mechanisms for attracting the liability of other people beside the main debtor, joint liability in the fiscal field takes a special place. This is mainly because the mechanism is created, in the configuration shown, having consequences solely in the fiscal area. In conclusion, the forceful execution of the debtors by way of engaging joint liability is a complex process that relies on proving the bad faith of debtors and the persons who are jointly responsible.

The multitude of scenarios which mention joint liability of other persons in respect of the debtor's outstanding fiscal obligations as well as the conditions mentioned by the legislator in order for these scenarios to exist, require a special analysis. We delimit the following part of this study to the situation provided under Article 27 paragraph 2 (c) according to which, the following are jointly liable with the debtor for its outstanding tax obligations subject to such debtor being declared "insolvent" under the provisions of the Code of Fiscal Procedure: "*administrators which, during the exercise of their mandate, in bad faith, did not fulfill their legal obligation to request to the competent court the initiation of bankruptcy proceedings in respect of the fiscal obligations due for such period and left unpaid at the time of declaring the insolvency state.*"

##### *Insolvency in the civil and fiscal field; from "state" to "ascertainment"*

A first observation is that in order to attract joint liability in respect of other persons, in the scenarios provided under Article 27 paragraph 2, (a) through (e), it is required, *ab initio*, that the insolvent debtor be declared as such in accordance with the Code of Fiscal Procedure. The term utilized by the legislator, "insolvent debtor", with an express mention that the declaring of insolvency shall be accomplished "according to the terms stipulated in the Code of Fiscal Procedure", constitutes a reference to the express norms stipulated therein, which we will analyze in the subsequent sections.

First we notice that Article 176 paragraph 1 from the Code of Fiscal Procedure defines the notion of "insolvent debtor" as the debtor "*whose traceable assets or income have a value lower than the outstanding fiscal obligations or the debtor which does not have any traceable assets or income*".

The notion of "insolvability" is also defined by the provisions of Art. 1417 Civil Code which, regulating the forfeiture of the benefit of the term for the debtor in insolvability or in insolvency, declared under the law (i.e. in accordance with the provisions of Law 85 of 2014) makes reference to the "*state of insolvability*" that "*results from the inferiority of the assets that may be subject, under the law, to enforcement, against the total amount of the outstanding debt. If not otherwise provided by law, this state is ascertained by the court, which, for this purpose, may take account of certain circumstances, such as the*

*unexpected disappearance of the debtor, non-payment of the debts due, initiation of enforcement proceedings against him and other alike*".

The doctrine (Turcu, 2013, p.551) deems that the latter definition differs from the similar concept previously regulated in the Civil Code, "in that it does consider as a liability only the total debt outstanding and not the overall liabilities assumed", and as one can observe, for the debtor to be forfeited of the benefit of the term, the state of insolvability is ascertained by the court, which, for this purpose, may take account of particular premise-circumstances of insolvability, and the unexpected disappearance of the debtor, non-payment of debts fall due, initiating the enforcement proceedings against him and other circumstances, the enumeration not being exhaustive.

Upon a textual comparison of the two definitions of the state of insolvability, which at first glance lead to the conclusion of a polymorphic notion, we observe that between the concept of "revenues or pursuable assets" used in tax matters, and that of "the assets that can be subject to enforcement" used in civil matters there is a certain synonymy. Analyzing the notion of "tax obligations", "tax liabilities to be paid, which are due" and "total amount of outstanding debt", we note that, although not clearly distinguished, the notion of "tax obligations" seems to include those obligations for which payment must be made, namely those which are "to be paid" which reached the due date, so they are payable.

We mention that the analysis of the state of insolvability as a result of the difference between revenues or pursuable assets and payment obligations is determined in tax matters by exclusive reference to this category of obligations, namely the tax obligations, and in civil matters to the total amount of debt due, regardless of the nature of the obligations.

In conclusion, the state of insolvability - ascertained by tax authorities, taking into account elements quasi-similar to those in the civil matters, may pave the way for joint responsibility with the insolvent debtor of other persons in tax matters, being a prerequisite / precondition for the assessment of meeting the substantive conditions, to attract such liability, which is *finally* a species of tort liability, and, as a consequence, shall require the meeting of the conditions stipulated by Art. 1349 and following of the Civil Code. In civil matters, the ascertainment of insolvability will retroactively entail the forfeiture of the benefit of the term granted / settled in favour of the creditor for meeting its obligation, and the forfeiture of the benefit of the term makes the obligation immediately become payable - 1418 Civil Code.

In both matters, the existence of the state of insolvability must be ascertained "under the law", and the provisions of each of the two regulations: - in tax matters by tax enforcement authorities, in the circumstances detailed by Order no. 539 of 28 April 2009 approving the Procedure for declaring the state of insolvability of debtors natural or legal persons, pursuant the provisions of Art. 176 of Government Ordinance no. 92/2003 regarding the Fiscal Procedure Code, published in the Official Gazette, Part I, no. 328 of 18 May 2009, updated version, and in civil matters, by court, as retained by the doctrine". (Baiaş *et al.*, 2013, p.1496).

The debtor's state of insolvability, ascertained under the conditions specific to each regulation, indicated *ut supra*, has distinctive legal effects: in case of joint liability in tax matters it precedes, is an *ex ante* requirement of entailing liability, and in civil matters, in

case of forfeiture of the benefit of the term it entails the forfeiture of this benefit, which operates as of right and is ascertained exclusively by the court.

I.C.C.J. Section of administrative and fiscal contentious stated in the Decision 3204 of 9 June 2009 that joint liability cannot be entailed in the absence of ascertaining the state of insolvability in tax matters by the competent authorities, materialised in drafting the “state of insolvability protocol”, noting that: “The measure of entailing joint liability without the pre-existence of declaration of debtor’s state of insolvability cannot be ordered by the tax authority as simple proof of the opening of the the insolvency proceedings against the debtor SC R & M SRL, through a commercial judgment about which there is no proof that it is final and irrevocable (judgment no. 478 of 13 September 2007 of Timiș Court, Commercial Division - bankruptcy), referred to by the appellant-defendant, is not equivalent, for the purposes of the above mentioned law text, with the declaration of the state of insolvability or insolvency of the debtor, and the tax authority is not competent to issue declaratory acts of insolvency, such competences belonging exclusively to the court or the syndic judge, according to the Law 85 / 2006, as amended”.

Consequently, a requirement necessary to be fulfilled in advance in order to entail joint liability in the circumstances specified in Art. 27, paragraph (2) from section a) to e), is the declaration of the debtor’s state of insolvability, and the lack of pre-existence of this ascertainment is cause for inadmissibility in case of the decision issued to entail joint liability.

#### *Insolvability vs. Insolvency; Parallelism and Convergence*

It was up to the doctrine (Turcu, 2006, p.4-6 and the jurisprudence indicated on footnote no. 3 to distinguish between “insolvability” and “insolvency”, and it notes that insolvability “expresses the financial imbalance of the debtor’s assets, characterized by the preponderance of assets over liabilities”, and the insolvency “is the absence of the amounts necessary for the payment of outstanding obligation.”

Given the several difficulties of “survival” that the economic crisis has generated for professionals, including the lack of liquidity, we deem as justified the doctrine’s proposal (Turcu, 2009, p.46-47) to redefine insolvency with no reference to the concept of “cash funds” but to “available assets”, namely that “state of the debtor’s assets which is characterized by insufficient assets available to pay the outstanding debts.”

The provisions of Law 85 of 2014, Art. 3, section 29 define insolvency in terms similar to the previous regulations in the matter, without accepting the doctrine’s proposal indicated *ut supra*, of that state of the debtor’s assets which is characterized by the shortage of funds available for payment of certain, liquid and payable debts; the insolvency of the debtor is presumed when he failed to pay, after 60 days in arrears, his debt to the creditor; the presumption is relative.

The editors of the new insolvency regulation may claim, to support the option chosen for the definition of the notion of “insolvency”, the need for correlations within the same notion, between the nature of payment funds and the claim over the debtor’s property, both with a purely monetary, pecuniary nature. It is know that in terms of the claim which the creditor holds against the professional debtor, its legal nature “*is of no interest*” (Carpenaru, 2012, p.694).

This aspect is retained by the doctrine: “Moreover, the current regulation does not condition the initiation of the procedure to the nature of the claims (commercial, civil,

labour, fiscal etc.) or by their source. Therefore, we consider that whatever the nature of the claims or their source, if the requirements of insolvency are met, with special focus on the threshold value of the claim, the debtor is obliged to submit a request to the court in this regard (Cărpenaru *et all*, 2014, p.195-196). Furthermore, an essential mention accompanies the first one: the debt liable to trigger the insolvency proceedings resides in the obligation to pay a sum of money (without ignoring the other characteristics of the claim that can substantiate a request to open the insolvency proceedings: the requirement of certainty, the chargeability of more than 60 days and the amount thereof, located at or above the threshold of RON 40,000, characteristics determined in accordance with the provisions of Law 85 of 2014) and “the rules of common law shall apply for the failure by the debtor to fulfil its obligations having a different object than the payment of money, and not the insolvency proceedings” (Carpenaru, 2012, p.693) in reference to the provisions of Law 85/2006, which is maintained under the rule of Law 85 of 2014 (Dimitriu, 2014, p.50-51, Nasz, 2014, p.328-331).

As a consequence, the centre of gravity in the analysis of insolvency incidence is also maintained under the influence of new regulation in this matter on the existence / nonexistence of funds in relation to the claim / claims, and insufficient available funds to cover the certain, liquid and payable debt / debts outstanding more than 60 days from maturity, establishes a presumption of insolvency.

On the convergence of the two concepts, the doctrine identifies the moment when the assessment of the state of insolvability is relevant in the insolvency proceedings: “The amendment of the natural report between the assets and liabilities, which only indicates the state of solvency of the holder of that assets, is not conclusive regarding the insolvency of that individual or legal entity. The presence of insolvency alone can lead to the opening of the concursual procedure, as insolvability alone is not likely to lead thereof, the existence of a liability greater than the asset can only be taken into account in determining the way to adopt: reorganization or bankruptcy. In fact, at the time the court is required to rule on the claims of creditors, which is of interest in this procedural stage, is not whether the debtor is viable, i.e. his economic situation is or is not irremediably compromised, but only to ensure a safe and objective criterion to decide quickly on the initiating of the collective procedure in order to protect the debtor and, implicitly, the body of creditors”. (Bufan, 2014, p.229)

*Features of the administrator’s failure to fulfil his legal obligation to request the competent court to open the insolvency proceedings*

The act provided for by Art.27, paragraph (2), section c), the committing of which entails the joint responsibility with the debtor for its tax liabilities, is the one committed by the administrators who, during their mandate, in bad faith, failed to fulfil the legal obligation to request the competent court to open the insolvency proceedings for tax liabilities relating to that period and remained unpaid at the date of declaration of the state of insolvability.

The decoding of the provisions set out in Art. 27, paragraph (2) section c) necessarily requires the researching of the collocations therein. We highlight the notion of “legal obligation to request the competent court the opening of the insolvency proceedings” as an obligation stemmed from the law or regulation in force in the field of insolvency,

namely Art. 66, paragraph (1) of Law 85 of 2014. In fact, we examine the obligations of the debtor's administrator on the "way" from the imminent insolvency to the installed insolvency, from the debtor which "will be able to submit a request to initiate the proceedings" to "the debtor who is obliged to submit a request to open the proceedings". Imminent insolvency is that state of insolvency which is going to take place, to install in advance, as it proves that the debtor cannot pay the undertaken outstanding liabilities with the funds available on the maturity date. The consequence of the imminent insolvency for the debtor is that he shall *be able* to submit, by his legal representative, a request to open the insolvency proceedings.

The installed insolvency is the state of the debtor's assets which is characterized by shortage of funds available for the payment of certain, liquid and payable debts; the insolvency of the debtor is presumed when he failed to pay his debt to the creditor after 60 days from the maturity date; the presumption is relative.

According to the provision of Art. 66, paragraph (1) of Law 85 of 2014, the debtor in insolvency is obliged to submit a request to the court to be subject to the provisions of insolvency law, not later than 30 days after the occurrence of insolvency, therefore, the consequence of occurrence of this state for the debtor is that he *is obliged* to submit a request to open the insolvency proceedings.

The origin of the debtor's legal obligation to submit his own request to initiate the proceeding is the following: it is presumed that the non-fulfilment of this legal obligation deepens the impossibility of coping with the amount of money available for certain, liquid and payable debts, creating a greater gap between the creditors' possibilities to recover their debts, and the debtor's amounts available to cover them, a gap which would have been stopped by the opening of the proceedings.

The relevance of the bad faith for this hypothesis remains that the debtor, by its representative, had knowledge of the occurrence of the state of insolvency and failed to request, within the 30 days stipulated in the special law, the insolvency, the opening of the proceedings, which is the period in which that legal obligation should have been met.

Furthermore, the opening of insolvency proceedings had to be requested for tax liabilities relating to that period and remained unpaid at the date of declaration of the state of insolvability. Therefore, the ascertaining / onset of the state of insolvability is relevant and correlated to the request for the opening of insolvency proceedings, because the tax obligations remained unpaid at the date of declaration of the state of insolvability are those that can and must substantiate the request to open the insolvency proceedings. Unless the request to open the insolvency proceedings has been made in relation to these tax obligations and are tax obligations outstanding at the time a declaration of the state of insolvability, the legal obligation to submit a request for opening the insolvency proceedings is not deemed fulfilled by the debtor's administrator.

As a consequence, the joint liability of the administrator with the debtor for its tax liabilities shall be entailed if the conditions stipulated at Art. 27, paragraph (2), section c) are met, an aspect also ruled by the jurisprudence in Decision no. 10663 of 7 November 2013, and Decision no. 10518 of 4 November 2013. Both decisions note that "the declaration of insolvability by the tax authority is a procedure specific to the budgetary debts provided by Art. 176 of Government Ordinance no. 92/2003 regarding the Fiscal Procedure Code, and it has the value of an ascertainment preliminary to the submission to

the court by the tax authority of the request for opening the insolvency proceedings according to Art. 177 of the same act.”

Furthermore, by the Civil Decision no. 23/2008 of 9 January 2008, Cluj Court of Appeal, Commercial Section, Administrative and Fiscal Contentious on the joint liability in the event that the insolvent debtor was deregistered from the Trade Registry, notes the following: “Tax receivables due by the debtors to legal entities deregistered from the Trade Register shall be deducted from the analytical records of payments after deregistration, whether or not they entailed other persons’ liability for payment of tax liabilities under the law. In a logical and systematic interpretation of the rule provided in the last paragraph of Art.172 of the Government Ordinance no. 92 / 2003 it results that the liability of other persons to pay tax obligations in terms of Art. 27 of the Government Ordinance no. 92/2003 must be engaged prior to the time of deregistration. The legal personality of the company ceases at the date of deregistration, with all the consequences arising thereof.”

The late submission of the debtor’s request to open the insolvency proceedings, under the onset of insolvency, represents, under the provisions of the Criminal Code, Art. 240, paragraph 1 a simple bankruptcy offense, and is punishable with imprisonment from 3 months to a year, or a fine. The criminal matter regulation incriminates the non-submission or late submission by the debtor natural person or the legal representative of the debtor legal entity, of the request for opening the insolvency proceedings, with reference to a deadline that exceeds by more than 6 months the period prescribed by the law since the occurrence of insolvency.

## **5. CONCLUSIONS**

A first conclusion of the analysis of joint liability institution is that its juridification was the result of an objective economic need ascertained in the business environment. Practice reveals numerous cases of theft of companies’ assets, so that they do not own property and no longer be able to meet, due to their capitalization, their obligation to pay such tax liabilities. The specificity of such claims required specific methods in such cases, so that tax authorities would not be confined in holding competences only in the sphere of ascertaining the debtor’s state of insolvability and assist helpless to the dispossession of property of their assets and non payment of debts.

Thus, by establishing this category of liabilities, the tax authority acquired competences in researching the potential fraudulent situation and passing the decision to entail joint liability for certain categories of persons, in the event that they acted in bad faith and committed fraud to the detriment of the company. Among the findings made by the tax authorities in such a case, the ascertainment of the state of insolvability of the debtor holds an important place in terms of importance, being an ex-ante requirement for joint liability; in fact, the entailment of joint liability is not justified except under the prior ascertainment of the state of insolvability.

It is common ground that, in terms of procedures, following the entry into force of ANAF instructions in 2014, a trend toward a new stage of rigor can be noted, both regarding the type, extent and scope of documents to be drafted your body by the tax authority to entail joint liability.

As for joint liability of the company's administrator for the non-fulfilment of the legal obligation to request the opening of the insolvency proceedings, the role of this regulation is included in the package of measures designed to prevent aggravation of the debtor's situation, and weaken the possibility of paying tax liabilities. It is stipulated in normative distinctive acts: Fiscal Procedure Code; Insolvency Code; Criminal Code, and receives, besides the common fund, its connotations in each of these regulations: if in accordance with the provisions of the Fiscal Procedure Code, the ascertainment of the act commitment leads to joint liability, in accordance with the provisions of the Criminal Code it represents the offense of simple bankruptcy; and in the regulation provided by the Insolvency Code, the act has no correlative sanction.

It is also noted that between the procedures for the recovery of different types of claims, such as those for tax debt recovery and the recovery of commercial claims, and we refer here to the concepts of "insolvability" and "insolvency", there are parallels and converging points which, essentially, need to be defined as clearly as possible by the doctrine. Otherwise, the procedures created purposeful for the business environment – the recovery of claims - can dissipate and lose their effectiveness. This article follows the line of these concerns of the doctrine, designed to highlight the aspects that need to be clarified and given full meaning within the general regulation regarding joint liability.

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