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MANAGEMENT IN THE FIELD OF INSOLVENCY. THE RECOVERY NEED OF A BANK COMPANY IN THE FIELD OF THE CONTEMPORARY CRISIS

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Abstract *In this hereby work there is the legal frame regarding the bank companies for the insolvency procedure, as well as the recovery need of a bank for the systemic financial stability. The bank resolution shows up as an alternative to the common insolvency procedures in case of a credit institution under difficulty. The financial crisis has showed that when a bank is affected by problems, they can influence the entire financial-banking sector. Therefore, there is the need of far more firm agreements regarding the management of contemporary crises, as well as of certain proper authorities and mechanisms in the solving of the situations of the banks under difficulty.*

Key words:
Bank insolvency, bank recovery plan, bank resolution, bank resolution tools, internal recapitalization
JEL Codes:
G11, G23, K35

1. Legal provisions in the internal law and in the European space in the insolvency procedure. The Insolvency Code

The Insolvency Code was adopted on April 15th, 2013 by the Chamber of Deputies with 212 pro, 111 against and 8 withhold, through the Emergency Government Ordinance no. 91/2013, was declared unconstitutional starting November 1st, 2013. The provisions of the Law no. 85/2006, republished, as currently applied.

The Constitutional Court delivered the Decision no. 447/2013 from October 29th, 2013 regarding the acceptance of the non-constitutionality exception of the provisions of the Emergency Government Ordinance no. 91/2013 regarding the insolvency avoidance and insolvency procedures, published in the Official Gazette, Part I no. 674 from November 1st, 2013. The Law came into force on November 1st, 2013.

In accordance with the jurisprudence of the European Court of the Human Rights and with the jurisprudence of the Court of Luxembourg, the Constitutional Court stated regarding the significance of insurance of the accessibility and predictability of the law, including under the aspect of its stability, providing a series of benchmarks that the legislator should comply with for the insurance of such exigencies (Decision from April 26th, 1979, delivered in the Cause Sunday Times against the United Kingdom of Great Britain and of the Northern Ireland, the Decision from May 20th, 1999 delivered in the cause Reckvenyi against Hungary, the Decision from May 4th, 2000 delivered in the cause Rotaru against Romania, the Decision from April 25th, 2006 delivered in the cause Dammann against Switzerland, as well as the resolutions delivered by the Court of Justice of the European Union in the Cause C-325/85, Ireland against the Commission, the Cause C-237/86, the Netherlands against the Commission, the Cause C-255/02 and Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd against the Commissioners of Customs & Excise).

In the essence, there was stated that the Emergency Ordinance of the Government no. 91/2013 does not bring an issue in the legislative frame which has not been regulated before, but such has had as scope the unification of the norms in the field of the insolvency, under the form of a code, as a need generated by the differences between the general norm and the special norms, and the emergency ordinance affects directly the property right and the economic freedom of the debtors appointed by the subject matter of the law – article 348 from the Insolvency Code – and indirectly the right of the citizens to information and free expression.

In this case, the Court withholds the observance of the non-constitutionality of the provisions of the Emergency Ordinance of the Government no. 91/2013 regarding the avoidance of insolvency and the insolvency procedures which has not as effect the occurrence of a legislative emptiness, but establishes the reentering in the active fund of the legislation of the abrogated laws, after the publishing of the Constitutional Court in the Official Gazette of Romania, part I (in the same way there is also the Decision no. 1039 from December 5th, 2012, published in

the Official Gazette of Romania, Part I, no. 61 from January 29th, 2013).

The Court withholds that in such cases, in which the laws which abrogate other laws as being non-constitutional are observed, no "abrogation of the abrogation" occurs for being withheld the incidence of the provisions of the article 64, paragraph (3), second thesis of the Law no. 24/2000, according to which "It is not permitted that, through the abrogation of a previous abrogation law to come into force the initial law" – provisions opposable to the legislator in the legal activity, but it is about an specific effect of the non-constitutional observance decisions of an abrogating law, effect based on the constitutional provisions of article 142 paragraph (1), which sets up the role of the Constitutional Court os guarantor of the supremacy of the Constitution, and of the article 147 paragraph (4) according to which the provisions of the Court are compulsory.

Therefore, the Court observed expressly such distinction within the decisions no. 414 from April 14th, 2010, published in the Official Gazette of Romania, Part I, no. 291 from May 4th, 2010, and no. 1039 from December 5th, 2012, published in the Official Gazette of Romania, Part I, no. 61 from January 29th, 2013, withholding that "such is a specific effect of the loss of constitutional legitimacy […], a different and more serious sanction than a simple abrogation of a law".

Also, in the plan of the approached theme there are to be mentioned the following legal instruments, without removing the hypothesis that now, in the field of insolvency there is a loop: the Government Ordinance no. 10/2004 regarding the procedure of the judicial reorganization and bankruptcy of the credit institutions, with its subsequent changes and surveillance legal instruments of the credit institutions, the Cooperation agreement between the financial surveillance authorities, central banks and ministries of finances from the European Union regarding the trans-border financial stability and the Remarks[1] regarding the Cooperation agreement between the financial surveillance authorities, central banks and ministries of finances from the European Union regarding the trans-border financial stability.

Starting January 1st, 2014, there is to be mentioned the legal frame adopted on the level of the European Union, the Directive no. 2013/36/EU concerning the access to the activity of the credit institutions and careful surveillance of the credit institutions and of the investment companies, of change of the Directive 2002/87/EC and abrogation of the Directives 2006/48/EC and 2006/49/EC and Regulation (EU) no. 575/2013 of the European Parliament of the Council from June 26th, 2013 regarding the prudential requirements for the credit institutions and investment companies and change of the Regulation (EU) no. 648/2012, legal documents whose application and implementation must be insured simultaneously on the level of the member states.

The Regulation (EU) no. 575/2013 is of direct application in all the member states starting January 1st, 2014, which imposes the transposition and implementtation in the primary and secondary national law of the Directive no. 2013/36/EU to be completed by the end of 2013, for the insurance of the compliance with the transposition liability within the term provided by the directive and of avoidance of registration, starting January 1st, 2014, of a law conflict between the provisions of the EU Regulation and of the national law in the field of prudential requirements applicable to the credit institutions and investment companies.

2. Strategies of the European Union regarding the recovery need of a bank company in the insolvency procedure

In the information note of the European Commission from June 22nd, 2012 from Brusselles, the Commission considers that there should be a clear and long-term vision regarding the future of the Economic and Monetary Union, which should set up an accurate direction of the reforms and decisions necessary for the EU and the member states to be able to face the current challenges.

Therefore, the Commission insisted on that an advanced economic integration represents one of the remedies of the current crisis, respectively a new stage in the European integration which might complete the existing Monetary Union. In this context, the Commission presented the concept of bank union[2].

Therefore, it is deemed that it did not represent a new legal instrument through the European Bank Union, but a political vision on a more advanced European integration, having as base the recently performed measures in the scope of consolidation of the regulation of the bank sector, following to adopt other measures subsequently.

Regarding the European Bank Union, it started man conflicts regarding its effectiveness in relationship with the ideological-political and scientific-methodological factors. Currently, under such aspect, not only prognosis methodologies are really necessary for its accomplishment in the European space, which should emphasize the financial-fiscal trends of recovery of the bank – generally speaking – in the context of the crisis, but also in the palpable strategies and tactics in the economical-social reality of the member states. Nevertheless, in the context of the crisis infiltrated in the entire Europe and in the U.S.A. – the latter finding pragmatic solutions with immediate and reasonable scope through the reorganization of the bank company

and/or any optimal financial-fiscal remedy in the insolvency procedure.

On January 1st, 2011, three surveillance European authorities were incorporated with the introduction of a surveillance architecture:

- the European Bank Authority (EBA) which is dealing with the bank surveillance, including the surveillance of the recapitalization of the banks;
- the European Authority for movable assets and markets (EAMAM), which is dealing with the surveillance of the capital markets;
- the European Authority for insurances and occupational pensions (EAIOP), which is dealing with the surveillance of the insurance sector.

The bank institutions entered into the crisis with insufficient capital, both quantitative and qualitative, for which reason they needed support without precedent from the national authorities. Through the proposition regarding the capitalization of the banks ("CRD IV") presented in July of last year[3], the Commission launched the implementation process of the new international standards in the European Union regarding the bank capital agreed on the G20 level (hereinafter called Basel III agreement).

The plenum of the European Parliament voted the project of the Bank Union on April 15th, 2014, as well as the Law Project regarding the insolvency prevention and insolvency procedures, adopted by the plenum of the Chamber of Deputies of the Romanian Parliament.

The Bank Union "is the end of the era of massive recapitalizations of the banks. The bankruptcy of an European bank is a national large project when the government is trying to save it, investing money from the national budget. It is a direct attack on the citizens as contributors whose money is spent for repairing the others' mistakes"[4]

In other words, the liquidation mechanism of the banks in the Euro area under difficulty (bank resolution mechanism) shall not permit any possible costs to be borne by the contributors, but by the bank system itself[5]. There is to be mentioned that the European Union took measures regarding the bank capitalization.

Through the requirements related to the politics imposed to the member states in the bank system there have been provided political measures regarding: the good liquidation of the non-reliable institutions, the restructuring of the reliable banks, more severe capital requirements, recapitalization of the banks, detailed crisis simulations (stress tests), settlement of certain objectives regarding the decrease of the indebtedness, as well as the consolidation of the regulation and surveillance frames, reorganization programs and recovery strategies of the capitals of the credit institutions.

The main resolution instruments are the following[8]:

3. Management measures of the financial crises

The general bankruptcy laws applied to the bank companies proved to be ineffective and too slow for preventing systemic financial crises. The national insolvency procedure was not successful, the Insolvency Code being declared unconstitutional, applying only the Law no. 85/2006.

There are necessary strategies regarding: the examination of the reform regarding the structure of the bank sector, the increase of the reliability of the credit ratings, the reorganization or recovery of the banks according to certain consolidated norms, being removed the non-performing credits or the abusive ones declared by legal judgments, by virtue of the legal provisions, under the consumer's protection, the insurance of an integrated surveillance system of the transnational banks.

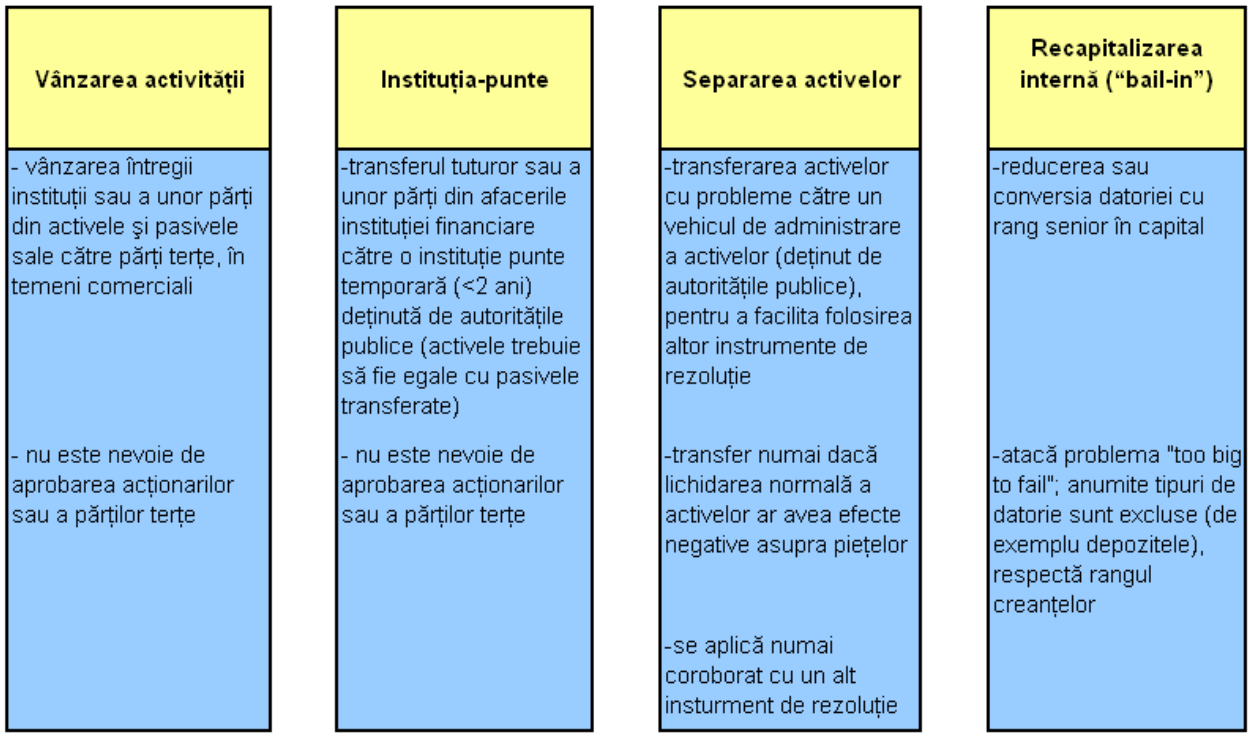
On international level, in the last years, an interest for the increase for adopting special regimes for solving the conditions of the banks under difficulty has been showed up. The financial crisis proved that the public authorities' does not have the proper means for managing the condition of such banks on the globalized markets. During the crisis, several important banks were in such condition (Fortis, Lehman Brothers, Island banks, Anglo Irish Bank, Dexia), which indicated that the existing mechanisms were not effective[6].

The proposition of the Commission regarding the recovery and resolution instruments for the banks in crisis can be a first step to a resolution fund on EU level. In addition, if such financial situation of a bank is falling without recovery, the costs corresponding to the restructuring and resolution are borne by the owners and creditors, not by the contributors.

According to the new frame, the banks are obliged to draw up recovery plans to establish the measures to be adopted in case of damaging the financial statement, for settling their reliability.

The competencies in the field of early intervention are launched by the time in which an institution does not fulfill or fails to fulfill the compulsory capital requirements.

The resolution is taking place when the preventive and early intervention measures do not succeed to avoid the damaging of the situation by the time the bank enters to or can enter to crisis. If it is established that no alternative actions can be performed in order to avoid the entering to crisis and that the public interest is in stake (regarding the access to critical functions of the bank, the financial stability, the integrity of the public finances, etc.), the authorities must take control of the institution and must initiate decisive actions of resolution.[7]



Sale of activity

- *The sale of the entire institution or of a part of the assets and liabilities to third parties, under commercial terms*
- *The approval of the shareholders or of third parties is not necessary*

Bridge-institution

- *The assignment of all or of a part of the business of the financial institution to a temporary bridge-institution (under 2 years) held by the public authorities (the assets must be equal to the assigned liabilities)*
- *The approval of the shareholders or of the third parties is not necessary*

Separation of assets

- *The assignment of the assets with problems to an asset administration instrument (held by the public authorities), to facilitate the use of other resolution instruments.*
- *Assignment only if the normal liquidation of the assets might have negative effects on the markets.*
- *It is applied only with another resolution instrument*

Internal recapitalization ("bail-in")

- *Decrease or conversion of the senior range debt into capital*
- *Attacks the problem of "too big to fail", certain types of debt are excluded (the deposits for example), comply with the debt range*

The internal recapitalization instrument might allow the resolution authorities to depreciate the debts of the shareholders and of the creditors of the institutions which enter to or are suspected to enter to such crisis or to convert them into capital.

The internal recapitalization can be reflected as it follows on the balance of the bank company

Table 1. The bank balance before the internal recapitalization

ASSETS	AMOUNT (mil. euro)	LIABILITIES	AMOUNT (mil. euro)
Cash	25	Capital	50
Debenture titles	300	Guaranteed bank deposits	400
Loans	400	Not-guaranteed debentures	300
Fixed assets	25		
TOTAL ASSETS	750	**TOTAL LIABILITIES**	750

Table 2. Balance of the bank after the decrease of the amount of loans by 50 mil. Euro

ASSETS	AMOUNT (mil. euro)	LIABILITIES	AMOUNT (mil. euro)
Cash	25	**Capital**	**0**
Debenture titles	300	Guaranteed bank deposits	400
Loans	**350**	Not-guaranteed debentures	300
Fixed assets	25		
TOTAL ASSETS	700	**TOTAL LIABILITIES**	700

Table 3. Balance of the bank after the recapitalization through he application of the internal recapitalization

ASSETS	AMOUNT (mil. euro)	LIABILITIES	AMOUNT (mil. euro)
Cash	25	**Capital**	**50**
Debenture titles	300	Guaranteed bank deposits	400
Loans	350	Not-guaranteed debentures	**250**
Fixed assets	25		
TOTAL ASSETS	700	**TOTAL LIABILITIES**	700

According to the European Union Council, certain types of liabilities might be permanently excluded from the internal recapitalization:

- Guaranteed deposits;
- Debts covered by movable guarantees, including the guaranteed liabilities;
- Debts to the employees of certain institutions in crisis, as well as the established salaries and the pension rights;
- Commercial debts regarding the assets and indispensable services for the daily operation of the institution.
- Liabilities arising from the participation to a payment system having a residual maturity under seven days
- Interbanking debts with an initial maturity under seven days.

4. Conclusions

The financial crisis has showed that when a bank is affected by problems, they can influence the entire financial-banking sector. Therefore, there is the need of far more firm agreements regarding the management of contemporary crises, as well as of certain proper authorities and mechanisms in the solving of the situations of the banks under difficulty.

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[1][1] Source – Website of the National Bank of Romania

[2] Information note of the European Commission from June 22nd, 2012 from Bruxelles.

[3] (IP/11/915) (MEMO/11/527) source http/europa.eu/rapid/

[4] Michael Barnier, Euronews.15/IV.2014

[5] The officials of the member states of the European Union agreed with the context of the Agreement regarding the assignment and the mutual condition of the contributions to the Unique Resolution Fund – one of the basics of the Bank Union recently approved by the European Union

[6] European Commission (2012) – *New management measures of crises for avoiding the salvation of the banks with problems in the future*

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