

# RESOLUTION ON INSURANCE

Vasile NEMEȘ\*  
Gabriela FIERBINȚEANU\*\*

## Abstract

*The insurance activity as a whole is of interest and concern for the state power which, by virtue of the principle of market economy organization, must, on the one hand, intervene in order to provide a favorable framework for the insurance activity to be exercised by insurers and, on the other hand, to adopt prudential rules to protect insured and potential insured.*

*In order to implement the prudential rules in the insurance field, the Supervisory Authority controls the patrimonial situation of the insurance companies and steps in when it finds financial difficulties such as the decrease of the solvency margin, the decrease of the minimum safety fund, the imbalance between the tangible assets and the liabilities of the company, of the patrimonial situation.*

*Under the main measures to maintain and, where appropriate, restore the financial situation of insurance companies, the most important are the financial recovery procedure regulated by Law No. 503/2004 on financial recovery, bankruptcy, dissolution and voluntary liquidation in the insurance business and the resolution procedure, regulated by Law no. 246/2015 regarding the recovery and resolution of insurers.*

**Keywords:** *insurers, financial difficulty, financial recovery, resolution, bankruptcy.*

## Preliminary specifications

The insurance activity<sup>1</sup> is carried out by the insurance companies, which, according to our legislation, are divided into two categories: insurers of insurance companies and insurers of mutual insurance companies. The phenomenon of insurance, as a whole, interests and concerns the state power which, by virtue of the principle of market economy organization, must, on the one hand, intervene in order to provide a favorable framework for carrying out the insurance activity by the insurers and, on the other hand, to adopt prudential rules in order to protect the insured persons or the potential insured persons/policyholders. The intervention of the state is required to protect the

policyholders. The intervention and protection of the state are justified / based on the particularly technical and complex character of the insurance operations, the professionalism of the insurers and, from the point of view of the insurance consumers, on the grounds that the policyholders are unfamiliar in this matter, may be subject to abuses by the insurance traders. Therefore, the states have set up administrative authorities to control, supervise and sanction, as the case may be, the abusive practices of the insurers<sup>2</sup>. In Romania, such authority is the Financial Supervisory Authority<sup>3</sup>, which, as the name itself suggests, ensures the legality of the insurance phenomenon in our country. As the insurance operations are of particular importance for the economic and social activity<sup>4</sup>, the legislator has set up a special legal regime which also covers the

---

\* Lecturer, PhD, Faculty of Law, "Nicolae Titulescu" University, Bucharest (e-mail: nemes@nemes-asociatii.ro)

\*\* Assistant Professor, PhD, Faculty of Law, "Nicolae Titulescu" University, Bucharest (e-mail: gabriela.fierbinteanu@gmail.com)

<sup>1</sup> The main insurance regulations are: the Law no. 237/2015 for the authorization and supervision of insurance and reinsurance activity, the Official Gazette no. 800 of 28.10.2015; the Law no. 132/2017 on compulsory insurance against traffic civil liability for the damages caused to third parties by motor vehicle and trams accidents, the Official Gazette no. 431 of 12.07.2017; the Law no. 32/2000 on the activity and supervision of the intermediaries in the insurance and reinsurance activity, the Official Gazette no. 148 of 10.04.2000; the Law no. 503/2004 on financial recovery, bankruptcy, dissolution and voluntary liquidation in the insurance activity, the Official Gazette no. 1193 of 14.12.2004; the Law no. 246/2015 on the recovery and resolution of insurers, the Official Gazette no. 813 of 02.11.2015.; the Law no. 213/2015 on the policyholders' Guarantee Fund; the Official Gazette no. 550 of 24.07.2015; the Law no. 86/2014 on insolvency and insolvency prevention procedures, the Official Gazette no. 466 of 25.06.2014.

<sup>2</sup> For example, in France, the prudential control and supervision are exercised by the Prudential and Resolution Supervisory Authority to address scientific issues, see L. Grynbaun (collectively), *Assurances, Acteur. Contract. Risques desconsommateurs. Risques des entreprises*, L'Argus editions de l'assurance, 2018, page 103 and the next ones; in the Italian system, the administrative authority is called IVASS (*Istituto per la vigilanza sulle assicurazioni*) and it is governed by the Private Insurance Code, see, G. Cassano, R. Razzante, N. Tilli, M. Distasi, M. Iaselli, A. Macrillo, V. Aragona, A. Catricala, *Diritto delle assicurazioni. Questioni risarcitorie e liquidazione danni*, Giuffrè editore, Milano, 2017, page 3 and the next ones; in Denmark, the entity responsible for the supervision and control in the insurance field is the Financial Supervisory Authority (for details, see R. Blanpain, P. Lyngs, *International Encyclopedia of Laws*, Kluwer International Publishing House, Boston, 1992, pages 19-20). In the Belgian law, the control is exercised by the Banking, Financial and Insurance Commission (B.F.I.A.), set up in 2004 under the subordination of the Ministry of Economic Affairs (see M. Fontaine, *Droit des assurances*, 3<sup>e</sup> ed., Larcier Publishing House, Bruxelles, 2006, page 41 and the next ones).

<sup>3</sup> The Financial Supervisory Authority was set up by the G.E.O. no. 93/2012 on the setting up, organization and operation of the Financial Supervisory Authority, the Official Gazette no. 874 of 21.12.2012.

<sup>4</sup> We take into account the many forms of insurance regulated by the legislation in force, such as: the compulsory insurance of civil liability for the owners of motor vehicles, the insurance specific to different professions (lawyers, experts, insolvency practitioners, physicians etc.), the insurance for people, the property insurance, the credit insurance etc.

situations of financial difficulty that the insurance providers go through during their existence.

## 1. The legal treatment applied to insurance companies in financial difficulty

### 1.1. Introductory considerations

As has been seen, the legislator expresses a particular concern over the patrimony of the insurance companies in order to create a sound financial situation thereof, a sound and prudent management of the patrimony and the protection of the policyholders and injured persons, as a result of the occurrence of risks that were the subject of an insurance report. In this respect, the insurers are required to provide a minimum safety fund, a solvency margin and to contribute money to the Guarantee Fund, the Road Traffic Victims Protection Fund etc.

The Financial Supervisory Authority is authorized by law to control the patrimonial situation of insurance companies and, when it finds financial difficulties, such as the decrease in the solvency margin, the decrease of the minimum safety fund, an imbalance between the assets and liabilities of the company etc., establishes certain measures to restore the patrimonial situation<sup>5</sup>.

Among such measures, the most important are those that make up the financial recovery procedure and the insurers' resolution procedure. These measures are designed to prevent the financial collapse of insurers and, implicitly, to initiate the bankruptcy proceeding against them.

### 1.2. The financial recovery procedure for the insurance companies

#### Brief presentation

According to the provisions of article 3, paragraph (1) letter b) of the Law no. 503/2004, the financial recovery procedure means all the methods and administrative measures carried out by the Financial Supervisory Authority, as a competent authority, designed to preserve or to restore the financial situation of an insurance/reinsurance company. It follows that the financial recovery is a special administrative procedure conducted under the supervision of the Supervisory Authority<sup>6</sup>.

The measures specific to the financial recovery procedure are carried out in two distinct ways<sup>7</sup>:

- a) the recovery of the insurance company on the basis of a financial recovery plan;

- b) the recovery of the insurance company by a special administration.

Each of the two methods of recovery is subject to a special regime, and the actual method of recovery is determined by a motivated decision, by the Financial Supervisory Authority<sup>8</sup>.

### 1.3. The resolution in the insurance field

A special category of measures available to the Financial Supervisory Authority, aiming to prevent, identify and address the situations of financial difficulty of the operators in the insurance market, are those that make up the resolution in the insurance field.

The resolution in the insurance field means the legal regime made up of a set of instruments available to the Financial Supervisory Authority, necessary to intervene promptly, at an early stage, in the activity of a non-viable insurer or of an insurer liable to go into difficulty, so as to ensure continuity of the critical financial and economic functions thereof, at the same time minimizing the impact of the insurer's difficulty on the economy and financial system (article 2, point 39 of the Law no. 246/2015).

According to the law, the main objectives of the resolution in the insurance field are as follows:

- a) protecting the insurance creditors;
- b) minimizing the impact on the protection funds, protecting the public funds by minimizing the dependence on public financial support;
- c) avoiding the significant adverse effects on the financial stability of the insurance market, in particular by preventing the contagion, including the market infrastructures, and by maintaining the discipline in the market (article 40).

It is easy to see that the main purpose of the resolution in the insurance field is the same with the purpose of the financial recovery regulated by the Law no. 503/2004, namely the identification in optimal time of the insurance operators with financial difficulties and the establishment of measures and procedures designed to contribute for recovering the patrimonial situation and avoiding the bankruptcy of the insurer who is found in such a situation.

<sup>5</sup> See St. D. Cârpenaru, M-A Hotca, V. Nemeș, the commented Insolvency Code, 2<sup>nd</sup> Edition, revised and supplemented, Universul Juridic / Legal Universe Publishing House, Bucharest, 2017, page 642.

<sup>6</sup> There were law systems, such as the Italian one, where the financial recovery procedure for the debtors in the common law is carried out under the direction and control of an administrative authority in this field, called the Controlled Administration Institute (A. Fiale, *cited works*, page 935 and the next ones). This procedure was abrogated by the decree of January 9, 2006.

<sup>7</sup> The Italian legislation regulates the institution of the provisional management commissioner who is a specialist appointed by the administrative authority (I.S.V.A.P.), authorized to manage the company found in difficulty. While exercising the mandate of the provisional management commissioner, the other institutions are suspended, but this procedure cannot last more than two months (S. Lanna, *cited works*, page 118).

<sup>8</sup> For more details concerning the recovery of the financial situation of the insurance companies on the basis of a recovery plan and by a special administration, see, V. Nemeș, Insurance Law, 4<sup>th</sup> Edition, Hamangiu Publishing House, Bucharest, 2012, page 120 and the next ones.

### 3.1. The recovery plan within the resolution of insurers

According to the law, the insurance companies with a significant influence in the national insurance system<sup>9</sup> have the obligation to draw up a recovery plan.

The recovery plan should include, in particular, the measures to be taken by the insurer for the recovery of the financial situation in case of significant deterioration of the financial indicators and must contain the following elements:

- a summary of the main elements of the plan;
- the information provided in the annex to the law<sup>10</sup>;
- the measures which may be taken by the insurer if the conditions for early intervention provided by law are met;
- the appropriate conditions and procedures to ensure the implementation of the recovery measures in due time, as well as the recovery options;
- additional information and scenarios provided in the regulations issued by the Financial Supervisory Authority;
- a summary of the important changes made in relation to the insurer, according to the most recent information relevant for resolution purposes;
- a presentation of the method in which the critical functions and core business lines could be separated from other functions, legally and economically, to ensure the continuity thereof in case of major difficulty of the insurer;
- an estimate of the timing of the implementation of each important aspect of the plan;
- a description of the procedure for determining the value and the possibility of sale of the critical functions, core business lines and insurer's assets;
- a detailed description of the measures designed to ensure that the required information is updated and made available to the FSA, at any time;
- a presentation of the method in which FSA considers that the resolution measures could be funded;
- a detailed description of the different resolution strategies which could be applied according to the possible scenarios and applicable deadlines;
- an analysis of the impact of the plan on the insurer's employees, including an assessment of any associated costs and a description of the consultation procedures during the resolution process of the staff, of the employers' organization and of the trade union or of the employees' representatives, as appropriate;
- a communication plan with the media and the audience;
- the solvency capital requirements and the

minimum capital, as well as the qualitative and quantitative requirements of own funds and the deadline for reaching this level, if applicable;

- a description of the essential operations and systems in order to maintain the continuous operation of the insurer's business process;
- as the case may be, any opinion expressed by the insurer regarding the resolution plan;
- a detailed description of the assessment of the possibilities for implementing the resolution plan;
- a description of all the measures necessary to remove the obstacles to the implementation of the resolution plan<sup>11</sup>.

The law forbids insurers to base the recovery plan relying on the access to the public financial support.

The recovery plan is approved by the insurer's management bodies and then it is submitted for evaluation to the Financial Supervisory Authority. The Supervisory Authority examines the recovery plan and assesses to what extent it contains the information and meets the requirements provided by law, as well as whether the plan provides the measures to preserve or to recover the viability and financial position of the insurer in a short time and efficiently, avoiding to the maximum the significant adverse effects on the financial or insurance system. If the Financial Supervisory Authority considers that the recovery plan has major deficiencies or significant obstacles to the implementation of the plan, it shall communicate to the insurer the outcome of the evaluation and shall request him/her to make a presentation, within two months, of a revised plan containing solutions to remedy the deficiencies or to overcome the obstacles (article 15). If the insurer fails to comply with the requirements of the Financial Supervisory Authority, it may require the insurer to take the following measures:

- the decrease in the risk profile of the insurer, including the decrease in the solvency and/or liquidity risk;
- applying recapitalization measures;
- reviewing the insurer's business strategy and structure;
- the change in the management structure and leadership of the insurer;
- to check the adequacy of the technical reserves and covering them with admissible assets (article 16).

In order to achieve the purpose of the resolution, the Financial Supervisory Authority shall reassess and, where appropriate, shall update, annually and after any significant change in the organizational structure, the resolution plans of the activity or financial situation of the insurer, which could have a significant impact on

<sup>9</sup> For the purposes of the law, an insurer has a significant influence in the national insurance system, if meets any of the following conditions: a) the value of the insurer's gross technical reserves exceeds 5% of the total value of the gross technical reserves at market level; b) he/she has a market share of at least 5%.

<sup>10</sup> The Law no. 246/2015 contains the annex on the information to be included by the insurer in the recovery plan within the resolution.

<sup>11</sup> The main measures to be provided by the resolution plan are set out in the article 8 and article 23 of the law; as regards the procedure and the measures which can be taken within the bank resolution, see the provisions of the Law no. 312/2015 on the recovery and resolution of credit institutions and investment companies, as well as for amending and supplementing some legislative acts in the financial field, the Official Gazette no. 920 of 11.12.2015, and for a thorough study in this field, we recommend J.S. Capdeville, M. Storkp, R. Routier, M. Mignot, J.-Ph. Kovar, N. Ereseo, Droit bancaire, Daloz, 2017, page 273 and the next ones.

the effectiveness of the resolution plans or which would require a modification thereof (article 22 of the Law no. 246/2015).

### 3.2. Early intervention

As we pointed out above, the FSA must monitor the financial situation of the supervised insurers in order to identify their financial crisis situations. The leverages by which the FSA can intervene to identify and prevent the financial difficulties are called “*early intervention measures*”.

Under the terms of the law, the early intervention measures are those measures provided by the Financial Supervisory Authority in order to recover the financial situation of the insurer and to avoid the deterioration of the solvency capital, as well as the own funds covering the solvency capital requirement (article 2, point 29 of the Law).

In particular, the law regulates that if an insurer breaches or is likely to breach the requirements for maintaining the authorization provided by law, in the near future, as a result of a sudden deterioration of the financial situation which includes a deterioration of the solvency capital situation and of the own funds covering the solvency capital requirement, the Financial Supervisory Authority, besides the corrective or punitive measures, may take, as appropriate, the following measures:

- to request the management body of the insurer to implement one or more measures established in the recovery plan or to update such a recovery plan if the circumstances which led to the early intervention are different from the assumptions foreseen in the initial recovery plan and to implement one or more of the measures foreseen in the updated plan, in a certain period of time;
- to request the management body of the insurer to examine the situation, to identify the measures addressing to any identified problems and to develop an action program for solving such problems and a timetable for the implementation thereof;
- to request the management body of the insurer to convene a general meeting of the shareholders of the company or, if the management body fails to comply with this requirement, to directly convene that meeting and, in both cases, to establish the agenda and to require certain decisions to be taken into account in order to be adopted by the shareholders;
- to require the replacement of one or more members of the management body or senior management of the insurer, if these persons prove to be inappropriate for exercising their duties;
- to request the management body of the insurer to develop a plan to negotiate the restructuring<sup>12</sup> of the debts of the insurer’s creditors, in accordance with the recovery plan, as appropriate<sup>12</sup>;

- to request changes in the business strategy of the insurer;
- to request changes in the business/operational structure of the insurer;
- to request the insurer to provide all the necessary information in order to update the resolution plan and to prepare a possible resolution of the insurer, as well as to perform an assessment of the assets and liabilities.

If the aforementioned measures do not achieve their purpose or if there is a significant deterioration of the insurer’s financial situation or there are serious violations of the legislation, the Financial Supervisory Authority may require the replacement of the senior management or the management body of the insurer, as a whole, or the replacement of some of his/her members (article 29 of the Law).

### 3.3. The appointment of the temporary administrator

According to the law, if the Financial Supervisory Authority considers that the replacement of the senior management or of the management body is insufficient to remedy the situation, it may appoint one or more temporary administrators of the insurer, also establishing their role, duties and powers.

For the purposes of the Law no. 246/2015, the temporary administrator is any natural person or legal entity, including the policyholders’ Guarantee Fund, appointed by the Financial Supervisory Authority for the supervision or temporary replacement of the insurer’s management body, in order to maintain or to recover his/her financial situation and to ensure a sound and prudent management of the insurer’s activity.

The appointment of the temporary administrator is public, except when he/she is not authorized to represent the insurer. The temporary administrator may be entrusted with all the powers of the insurer’s management body, in accordance with the articles of association of the insurer and the applicable national legislation, including the power to exercise any and all the administrative duties of the insurer’s management body.

The actions of the temporary administrator, excepting those relating to the current activity of the insurer, are subject to the prior approval of the Financial Supervisory Authority.

With the approval of the FSA, the temporary administrator may exercise, in any case, the power to convene the general meeting of shareholders of the insurer and to establish the agenda of that meeting (article 34).

The period for which a temporary administrator may be appointed cannot exceed one year, but, in special circumstances, this period may be extended by the FSA.

<sup>12</sup> This measure is very similar to the institution of the preventive arrangement with the creditors regulated by the Law no. 85/2016, for details on preventive arrangement with the creditors, see St. D. Cârpenaru, M-A Hotca, V. Nemeș, cited works, page 67 and the next ones; R. Bufan, A. D. Diaconescu, F. Motiu (collectively) Practical Insolvency Treaty, Hamangiu Publishing House, Bucharest, 2014, page 107; N. Țândăreanu, Commented Insolvency Code, Universul Juridic / Legal Universe Publishing House, Bucharest, 2017, page 99 and the next ones.

According to the law, the Financial Supervisory Authority is responsible for determining to what extent the conditions for keeping a temporary administrator are met and to justify such a decision in front of the shareholders.

### 3.4. The conditions for triggering the resolution in the insurance field

The law provides that the Financial Supervisory Authority may take a resolution measure on an insurer if the following conditions are cumulatively met:

- a) if it determines that the insurer is or may be in a major difficulty;
- b) the resolution measure is necessary from the public interest point of view.

An insurer is or may be in a major difficulty if any of the following conditions is met:

- the insurer violates the requirements for holding the authorization or is likely to violate them in the near future, due to a sudden deterioration of the financial situation which includes a deterioration of the solvency capital situation and own funds covering the solvency capital requirement to an extent that would justify the withdrawal of the operating license, inclusively, if the insurer has incurred or is likely to incur losses which will deplete all or a significant part of his own funds;
- the assets of the insurer are inferior to the obligations or, according to objective elements, it can be concluded that this will happen in the near future;
- the insurer is unable to pay the damages/indemnities due to the insurance creditors or, according to objective elements, it can be concluded that this will happen in the near future (article 43).

### 3.5. General principles of the resolution in the insurance field

In the procedure for implementing the resolution, the Financial Supervisory Authority should ensure that the resolution measures are taken in accordance with the following principles:

- a) the shareholders of the insurer subject to the resolution are the first to bear the losses;
- b) the creditors of the insurer subject to the resolution shall bear the losses after the shareholders, in accordance with the order of priority of their debts in the ordinary insolvency procedure, unless expressly provided otherwise in the law;
- c) the management body and the senior management of the insurer subject to the resolution are replaced, excepting the cases when the full or partial keeping of the management body or of the senior management, according to circumstances, is considered necessary to achieve the objectives of the resolution;
- d) the management body and the senior management of the insurer subject to the resolution provides all the support necessary to achieve the objectives of

the resolution;

- e) the natural persons and legal entities who have contributed to the major difficulty of the insurer subject to the resolution are held liable, according to the civil or criminal law;
- f) the creditors in the same category are equally treated;
- g) no creditor shall bear losses higher than those which would have been borne if the insurer had been liquidated by ordinary insolvency procedure;
- h) the assets admitted to cover the technical reserves are fully protected; and
- i) the resolution measures are taken in compliance with the safety mechanisms (article 44).<sup>13</sup>

### 3.6. The administrator of the resolution

In order to carry out the measures set out in the resolution, the Financial Supervisory Authority, in its capacity of resolution authority, in compliance with the state aid legal framework, may appoint an administrator of the resolution in order to replace the management body of the institution subject to the resolution, in which case the appointment is made public.

According to the law, the administrator of the resolution is any natural person or legal entity, including the policyholders' Guarantee Fund, appointed by the Financial Supervisory Authority in order to implement the resolution measures (article 2, point 2).

The administrator of the resolution has all powers of the shareholders and of the insurer's management body. However, the administrator of the resolution may exercise such powers only under the control of the Financial Supervisory Authority (article 50).

According to the law, the administrator of the resolution has the obligation to take all the necessary measures to achieve the objectives of the resolution and to implement the resolution measures, in accordance with the decision of the Financial Supervisory Authority. The resolution measures may include a capital increase, the change of the shareholders structure of that insurer or the taking over of the control by the insurers with an adequate financial strength.

The administrator of the resolution has the obligation to draw up and submit to the Financial Supervisory Authority, on a regular basis established by it, as well as at the beginning and at the end of his mandate, reports on the economic and financial situation of the insurer to whom he/she has been appointed as administrator of the resolution and the actions undertaken during the exercise of his/her duties.

The mandate of an administrator of the resolution cannot exceed one year. It may be renewed, in exceptional cases, if the Financial Supervisory Authority considers that the conditions for the appointment of an administrator of the resolution are still met (article 54).

<sup>13</sup> The principles of the resolution are partly different from the principles of the insolvency procedure provided by the Law no. 85/2016, for details, see St. D. Cârpenaru, M-A Hotca, V. Nemeş, cited works, page 67, page 30 and the next ones; R. Bufan, Cârpenaru, R. Bufan, A. D. Diaconescu, F. Moşiu (collectively), cited works, page 61 and the next ones; N. Țândăreanu, cited works, page 20 and the next ones.

It is noted that the duties of the administrator of the resolution are similar to those of the temporary administrator<sup>14</sup>.

In the absence of explicit and detailed provisions regarding the situations and the conditions for the appointment of the two categories of bodies, FSA will be the only one who will choose one of the two options. The cause is common, namely the insufficiency or lack of competence of the administrative and management bodies of the insurer found in a financial difficulty.

### 3.7. The assessment of the insurer subject to the resolution

Before undertaking any resolution measure, is required a fair, prudent and realistic assessment of the insurer's assets, liabilities and equity, which will be performed by a financial auditor - a legal entity.

The objective of the assessment is to determine the value of the assets and liabilities of the insurer who fulfills the conditions for triggering the resolution (article 57).

The purposes of the assessment are:

- to support the assessment of the manner in which the conditions for triggering the resolution or the conditions for the decrease or conversion of the debts into relevant capital instruments are met;
- if the conditions for triggering the resolution are met, to contribute to the decision on the appropriate resolution action to be undertaken in relation to the insurer;
- upon exercising the power to decrease the value or to convert the debts into relevant capital instruments, to contribute to the decision on the extent to which the shares or other proprietary tools are canceled or reduced, as well as the extent to which the decrease or conversion of the debts into relevant capital instruments occur;
- upon applying the bridge institution tool or the asset separation tool, to contribute to the decision on the assets, rights, liabilities, shares or other proprietary tools to be transferred and the decision on the value of any consideration to be paid to the insurer subject to the resolution or, as the case may be, to the owners of the shares or other proprietary tools;
- upon applying the sales tool for the business and portfolio, to contribute to the decision on the assets, rights, liabilities, shares or other proprietary tools to be transferred and to provide information enabling the Financial Supervisory Authority to determine what measures are necessary for a transfer, according to the law;
- in all the cases, to ensure that any losses concerning the insurer's assets are fully assumed when applying the resolution tools (article 58).

The law provides that the assessment is an integral part of the decision to apply a resolution tool or to exercise a resolution power or of the decision to exercise the power to decrease the amount or to convert the debts into relevant capital instruments.

### 3.8. The resolution tools in the insurance field

The resolution procedure in the insurance field is carried out by various legal means bearing the specific name of "resolution tools".

According to the Law no. 246/2015, the resolution tools in the insurance field are:

1. the sale of business and portfolio;
2. the bridge institution;
3. the asset separation<sup>15</sup>.

The resolution tools may be established by the FSA, individually or in any combination, in compliance with the law, but the asset separation tool can be applied only together with another resolution tool (article 70).

#### 3.8.1. The sale of business and portfolio

In accordance with the provisions of the Law no. 246/2015, the sales tool of business and insurance portfolio is the mechanism by which a resolution authority transfers shares or other proprietary tools, issued by an insurer subject to the resolution, or assets, rights or liabilities of an insurer subject to the resolution, in whole or in part, to an asset management vehicle or to an insurer who fulfills the solvency requirements.

According to the Law no. 246/2015 (article 2, point 42), the asset management vehicle in the insurance field is the legal entity controlled by the Financial Supervisory Authority and created to receive, in whole or in part, the assets, rights and liabilities of one or more insurers subject to the resolution or of a bridge institution.

For the implementation of the sales tool of the activity and portfolio of an insurer, the Law (article 73) provides that the Financial Supervisory Authority may transfer to a buyer who is not a bridge institution:

- shares or other proprietary tools issued by an insurer subject to the resolution;
- any categories of assets, rights or liabilities of an insurer found in resolution or all of them, including the transfer of portfolio in the insurance field.

For carrying out the transfer is not required the agreement of the shareholders of the insurer subject to the resolution or of any third party, other than the buyer, or the compliance of any procedural requirement provided by the civil law or by the legislation specific to the insurance market, except as provided in articles 89 and 90 of the Law. However, the transfer must be carried out in compliance with the provisions of the

<sup>14</sup> It is easy to see that the prerogatives of the administrator of the resolution are almost identical to those specific to the judicial administrator in the judicial reorganization procedure within the insolvency chapter of the common law, see St. D. Cârpenaru, M-A Hotca, V. Nemeș, cited works, page 177 and the next ones; R. Bufan, Cârpenaru, R. Bufan, A. D. Diaconescu, F. Moțiu (collectively), cited works, page 154 and the next ones; N. Tândăreanu, cited works, page 204 and the next ones.

<sup>15</sup> As can be seen, the resolution of insurers lacks the internal recapitalization tool provided by article 281 and the next ones of the Law no. 312/2015.

Law no. 32/2000 and in accordance with the legal framework on the state aid.

The price of the transferred assets is paid, as the case may be, to the owners of the shares or of other proprietary tools or to the insurer subject to the resolution if the transfer aims the assets or liabilities of the insurer found in resolution.

An extremely important effect caused by the transfer of shares/tools/assets is that the shareholders or creditors of the insurer subject to the resolution and other third parties whose assets, rights or liabilities are not transferred have no right over the transferred assets, rights or liabilities or in connection therewith.

The law provides that, after applying the sales tool of the activity and portfolio, FSA may exercise, with the buyer's approval, the transfer powers in respect of the transferred assets, rights or liabilities for the transfer of the assets, rights or liabilities back to the insurer subject to the resolution or of the shares or other proprietary tools back to their original owners, and the insurer subject to the resolution or the original owners have the obligation to take back any such assets, rights or liabilities, shares or other proprietary tools (article 78).

If we consider that we are found in the presence of a transfer of assets, we can think that the transfer of a business or enterprise could also have some implications in the insurance field.<sup>16</sup> Although it is not legally enshrined under this terminology, the transfer of an enterprise is required by current economic evolutions, materialized in many operations of merger, conversion, division or outsourcing of certain types of services<sup>17</sup>. The transfer of assets is also regulated by the Tax Code, but unlike the provisions of the legislation in the insurance field where the price of the transferred assets is paid, as the case may be, to the owners of the shares or of other proprietary tools or to the insurer subject to the resolution, the article 32, paragraph 1, letter (d) of the Tax Code provides that, by the transfer of assets, a company transfers, without being dissolved, all or one or more branches of its business to another company in exchange for the transfer of the shareholdings representing the share capital of the beneficiary company.

### 3.8.2. The bridge institution

The bridge institution tool in the insurance field is defined as the mechanism by which a resolution authority transfers the shares or other proprietary tools, issued by an institution subject to the resolution, or the assets, rights or liabilities of an insurer subject to the resolution, to a bridge institution (article 2, point 25).

As can be seen, by the bridge institution tool, only shares and other proprietary tools may be transferred, and not the assets, rights or liabilities of an insurer

subject to the resolution, as in the case of the sale of business and portfolio. In other words, the ability to acquire of the bridge institution is narrower than the ability of the management vehicle.

From the economy of the provisions of the Law no. 246/2015, the legal status of a bridge institution in the insurance field has the following features:

- is a legal entity set up as a joint stock company and it can be set up with only one shareholder;
- upon the setting up, the share capital cannot be less than the equivalent in RON of EUR two million;
- is controlled by the Financial Supervisory Authority;
- is designed to receive and to hold some or all the shares or other proprietary tools issued by an insurer subject to the resolution or some or all the assets, rights and liabilities of one or more insurers subject to the resolution in order to maintain the access to the critical functions and to the sale thereof;
- the persons who provide the management of the departments responsible for the risk management activities, internal audit, compliance, as well as any other activities which may expose that bridge institution to significant risks, are appointed by the FSA<sup>18</sup>. The bridge institution may acquire shares or other proprietary tools issued by an insurer subject to the resolution, as well as any assets, rights and liabilities of one or more insurers subject to the resolution. The transfer to the bridge institution shall be performed without the consent of the shareholders of the insurer subject to the resolution or of any third party and without complying with the procedural requirements provided by the Law no. 237/2015 for the authorization and supervision of the insurance and reinsurance activity.

The price of the shares and other proprietary tools shall be paid to their owners and the price of the assets or liabilities shall be paid directly to the insurer subject to the resolution.

Like the other resolution tools, the FSA may transfer:

- shares or other proprietary tools or assets, rights and liabilities from the bridge institution to a third party;
- rights, assets or liabilities from the bridge institution back to the insurer subject to the resolution or shares and other proprietary tools back to their original owners, and the insurer subject to the resolution or the original owners have the obligation to take them back, provided that this aspect is expressly stipulated in the tool by which the transfer was made or if the transfer conditions are not met (article 93).

The loss of the legal status of a bridge institution in the insurance field occurs in accordance with the

<sup>16</sup> See L. Tuleașcă, Transfer of business, Romanian Journal of Business Law no. 7/2016, pages 53-71

<sup>17</sup> Transfer of enterprise. Categories of employees, Court of Appeal, Bucharest, the 7<sup>th</sup> Civil Department and for labor disputes, the civil decision no. 3951 of June 12, 2012, sent, in the summary and with an approving comment, by the Judge Dr. Romeo Glodeanu, Romanian Journal of Jurisprudence no. 5 dated May 31, 2012, <https://idrept.ro>

<sup>18</sup> See St. D. Cârpenaru, M-A Hotca, V. Nemeș, cited works, page 663

provisions of article 95 of the Law no. 246/2015 in the following situations:

- the merger of the bridge institution with another entity;
- the bridge institution no longer complies with the requirements provided by law;
- the transfer of all or part of the assets, rights or liabilities of the bridge institution to a third party takes place;
- a period of two years elapsed from the date of the last transfer from an insurer subject to the resolution or at the end of the extension period;
- the assets of the bridge institution are completely liquidated, and its liabilities are fully paid.

It is noted that the occurrence of any of the above mentioned situations entails the cessation of the existence of the bridge institution in the insurance field.

### 3.8.3. The asset separation

The asset separation tool in the insurance field is the mechanism by which a resolution authority transfers an insurance portfolio of an insurer subject to the resolution to an asset management vehicle.

Upon applying the asset separation tool, the Financial Supervisory Authority may order the transfer of the assets, rights or liabilities of an insurer subject to the resolution or of a bridge institution to one or more asset management vehicles. Like the other resolution tools, the asset separation tool does not require the consent of the shareholders of the insurers subject to the resolution or of any third party, other than the bridge institution and does not require the compliance of any procedural requirement provided by law.

As shown above, the asset management vehicle in the insurance field is the legal entity controlled by the Financial Supervisory Authority and created in order to receive, in whole or in part, the assets, rights and liabilities of one or more insurers subject to the resolution or of a bridge institution.

In the process of setting up and operating an asset management vehicle, the Financial Supervisory Authority has the following powers:

- approves the content of the documents regarding the setting up of the asset management vehicle;
- appoints or approves the management body of the asset management vehicle;
- approves the remunerations of the members of the management body and establishes their responsibilities;
- approves the strategy and the risk profile of the asset management vehicle (article 115).

According to the law, the Financial Supervisory Authority may order the application of the asset separation tool only if one of the following conditions is met:

- the situation on the specific market of those assets is such that their liquidation under the normal insolvency procedure could have a negative effect on one or more financial markets;
- such a transfer is necessary to ensure the proper operation of the insurer subject to the resolution or of

the bridge institution; or

- such a transfer is necessary to maximize the proceeds from the liquidation.

The Financial Supervisory Authority shall also determine the consideration in exchange for which the assets, rights and liabilities are transferred to the asset management vehicle, in accordance with the principles provided by law and with the legal framework on the state aid.

The Financial Supervisory Authority can also transfer assets, rights and liabilities from the insurer subject to the resolution to one or more asset management vehicles, several times, and can transfer back assets, rights and liabilities of one or more asset management vehicles of the assets to the insurer subject to the resolution, and the insurer subject to the resolution has the obligation to take back any such assets, rights and liabilities (article 120).

## 4. The reduction in the value of the capital instruments

The Financial Supervisory Authority may order the reduction or conversion, as applicable, of the debts of the insurer subject to the resolution, regardless of the actual method, in relevant capital instruments (article 126).

The reduction or conversion of the debts in relevant capital instruments operates if one of the following conditions is met:

- a) if the Financial Supervisory Authority has determined that all the conditions for triggering the resolution provided by law have been met before the implementation of a resolution measure;
- b) the Financial Supervisory Authority establishes that, if the power is not exercised in respect of the relevant capital instruments, the insurer will cease to be viable.

The law provides that an insurer is no longer viable if the following conditions are cumulatively met:

- the insurer is or is likely to be in a difficult situation;
- the alternative measures in the private sector, the supervisory measures, including early intervention measures, excepting the measure of reduction of value or conversion into capital, taken individually or combined with another resolution measure, are not likely to eliminate the difficult situation of the insurer;
- there is no reasonable perspective according to which an insurer's difficulty could be hindered in due time by a measure, either an alternative measure in the private sector or a supervisory measure, including an early intervention measure, a measure of reduction of value or conversion of the debts in relevant capital instruments, taken individually or combined with a resolution action (article 128).



## 5. Security and funding mechanisms

During the implementation of the resolution instruments, the Financial Supervisory Authority has the obligation to comply with the security and funding mechanisms specifically regulated by law.

Specifically, the article 133 of the Law no. 246/2015 provides that the Financial Supervisory Authority shall ensure that, in cases where one or more resolution tools have been applied and only certain parts of the rights, assets and liabilities of the insurer found in resolution are transferred, the shareholders and those creditors whose debts have not been transferred shall receive, as a settlement of their debts, an amount at least equal to the amount which would have been received if the insurer found in resolution had been liquidated by the insolvency procedure when taking the decisions regarding the implementation of the resolution measures.

As regards the funding mechanisms, shall be set up, pursuant to the law, the Resolution Fund for the insurers whose resources are used according to the objectives and principles of the resolution and it will be managed by the policyholders' Guarantee Fund.

## Conclusions

From the analysis of the above mentioned regulations, it is noted that the specific measures and the resolution tools are very different from the mechanisms and procedures applicable to the common law professionals, mainly regulated by the Law no. 85/2016.

Moreover, the resolution procedure with the specific implementation tools is a complex mechanism for identifying, preventing and recovering the patrimonial situations of the insurers having a poor financial situation.

In order to achieve the purpose of the resolution, the Financial Supervisory Authority is entitled to implement the measures provided by law which are thus mandatory both for the insurer subject to the resolution and for those persons holding shares in the share capital of that insurer.

Finally, the main purpose of the resolution is to protect the legitimate interests and the rights of the insurance creditors, by implementing all the measures provided by law, for recovering the financial situation, in order to prevent the insolvency and to avoid the bankruptcy procedure of the insurers in financial difficulty.

## References

- St. D. Cărpenaru, M-A Hotca, V. Nemeş, the commented Insolvency Code, 2<sup>nd</sup> Edition, revised and supplemented, Universul Juridic / Legal Universe Publishing House, Bucharest, 2017
- V. Nemeş, Insurance Law, 4<sup>th</sup> Edition, Hamangiu Publishing House, Bucharest, 2012
- R. Bufan, A. D. Diaconescu, F. Moşiu (collectively) Practical Insolvency Treaty, Hamangiu Publishing House, Bucharest, 2014
- N. Țândăreanu, Commented Insolvency Code, Universul Juridic / Legal Universe Publishing House, Bucharest, 2017
- L. Grynbaun (collectively), Assurances, Acteur. Contract. Risques desconsommateurs. Risques des entreprises, L'Argus editions de l'assurance, 2018
- G. Cassano, R. Razzante, N. Tilli, M. Distasi, M. Iaselli, A. Macrillo, V. Aragona, A. Catricala, Diritto delle assicurazioni. Questioni risarcitorie e liquidazione danni, Giuffrè editione, Milano, 2017
- R. Blanpain, P. Lyngs, *International Encyclopedia of Laws*, Kluwer International Publishing House, Boston, 1992
- *Droit des assurances*, 3<sup>e</sup> ed., Larcier Publishing House, Bruxelles, 2006
- J.S. Capdeville, M. Storkp, R. Routier, M. Mignot, J.-Ph. Kovar, N. Ereseo, Droit bancaire, Daloz, 2017
- L.Tuleaşcă, Transfer of business, Romanian Journal of Business Law no. 7/2016
- Transfer of enterprise. Categories of employees, Court of Appeal, Bucharest, the 7<sup>th</sup> Civil Department and for labor disputes, the civil decision no. 3951 of June 12, 2012, sent, in the summary and with an approving comment, by the Judge Dr. Romeo Glodeanu, Romanian Journal of Jurisprudence no. 5 dated May 31, 2012, <https://idrept.ro>