

THE ROLE OF THE ROMANIAN NATIONAL BANK IN APPLYING THE BANKRUPTCY PROCEDURE OF THE BANKING CREDIT INSTITUTIONS

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Abstract

The article examines the role of the National Bank of Romania in the insolvency procedure of the banking institutions. The most important regulations regarding this issue consist in the Government's Order 10/2004 regarding the bankruptcy of credit institutions. According to it, the following officials are to be appointed in the insolvency procedure of banking institutions: insolvency courts of justice, insolvency judge and liquidator. Although the National Bank of Romania is not considered a participant, it has a very important role in this procedure.

My article presents in the beginning the Status of the National Bank of Romania. The next chapters are dedicated to the role of the National Bank of Romania in insolvency: withdrawal of the operating license of the credit institution, taking part in the insolvency procedure as an active participant or as a creditor side, appointing and dismissing of the interim administrator, mandatory or advisory opinion, role of information.

Key-words: *insolvency, National Bank of Romania, Banking Credit Institutions, judge, liquidator.*

Introduction

My paper work is about the role of the Romanian National Bank in the bankruptcy procedure of the banking credit institutions participants in insolvency.

The banking credit companies have a very important role in the economy of a nation. They represent the force, the “engine” that sustains the economy, the bases for the future development and a source of stability. Any masive decline of one the banking credit companies could produce a “chain reaction” and could compromise the national economy. For these reasons, based on legal previsions, it is extremely important to avoid the bankruptcy of such companies and its consequences. Thus, it is very important for each legal system to adopt a clear and efficient legislation in this matter. It is also important to create and maintain a mechanism to supervise and prevent the insolvency of the banking credit companies.

The purpose of this paper is to realize a detailed analysis of the contribution of Romanian National Bank in applying the bankruptcy procedure of the banking credit institutions , its duties and powers. The analysis of this issue will help the persons involved in such procedures or which are about to be involved to have a concrete role of RNB in insolvency.

This issue, based on present regulation, tries to synthesize the role and the duties of the RNB in the insolvency procedure of the banking credit institutions.

Paper content

Chapter 1: General Issues. History

Starting with the second half of the 19th century, the specialty literature¹ discussed the development of the Romanian economy on modern bases. The dynamics of the economy strongly

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encouraged credit organization which was weakly developed until then. In this period there was a group of money lenders within which there were five categories: the banks, the bankers, the exchange agencies, the lenders and the money changers. Their activity had a hard time developing because of the lack of adequate instruments and of modern regulations in the field.

To eliminate these flaws and to stop the financial chaos of that time, on April 10th 1867 a law was adopted on “the incorporation of a new national financial system and the manufacture of the national currency” by means of which the financial system of the Latin Financial Union was introduced, on grounds of the gold and silver bimetallism that promulgated national sovereignty on the currency. Yet, the war of 1877 hindered the enforcement of this law provisions, the government being obliged to issue mortgage notes for supplying for the lack of cash and treasury bills².

Another essential issue of the development of the financial system of that period consisted in the creation of an issue institute. The idea of creating an issue institute was formulated ever since 1832 and resumed in 1848. In 1857 this idea was put into practice by the incorporation of the National Bank of Moldavia with the assistance of lord Al. I. Cuza. Later, in 1860, I. Brătianu submitted for the first time to the Parliament a bill to this end. All these trials were unsuccessful in that period because of the opponents to such an idea.

In February 1880, the govern presided by I. Brătianu submitted to the Parliament a bill for the incorporation of a discount, circulation and issue bank, referred to as “The National Bank of Romania”, law promulgated on April 17th 1880. Among the main causes that determined the incorporation of the National Bank of Romania, we mention:

- the need, for new creating class – the bourgeoisie, to procure “cheap money” to be able to develop;

- the needs of the state that had to resort to foreign capital, in the absence of a national bank to support in difficult periods and which might act as intermediary between the foreign capital and the internal market;

- the need to put into practice the financial reform that the war interrupted and created further difficulties by issuing mortgage notes that the further issue authority had to withdraw;

- the demands in the agricultural field that suffered great losses because of the lack of a discount and issue authority;

- the need to state the economic independence, by creating a national institute of issuance, imposed by the conquest of politic independence after the Independence War of 1877.

Second Chapter: The Status of the National Bank of Romania

The National Bank of Romania is governed by a special regulation, Law no. 312/2004 on the status of the National Bank of Romania and benefits from well featured legal status and identity, which firmly distinguishes it from the credit institutions. According to Law no. 312/2004, art. 1 paragraph 1, the National Bank of Romania is the central bank of Romania and it is a legal entity. Its structure comprises a main head office in Bucharest and it may have branches and agencies in the capital city as well as in other cities in the country. The main objective of the National Bank of Romania consists of the insurance and the maintenance of the prices, and finally of financial stability³.

¹ D.D. Saguna, C.F. Donoica, *Banking and Financial Law*, Prodarcadia Publishing House, Bucharest, 1994, p.37-42.

² I. Bostan, M. Avram, O. Filimon, *Financial and Banking Law*, Universitaria Publishing House, Craiova, 2010, p. 182.

³ R. Postolache, *Banking Law*, Cartea Universitară Publishing House, Bucharest, 2006, p.28.

The National Bank of Romania is a public law legal entity, an independent public institution; in accomplishing its tasks and attributions, the National Bank of Romania and the members of the management do not request nor receive instructions from the public institutions or other institutions or authority. The National Bank of Romania is a state capital institution, its patrimony belonging to the public field of state property.

According to the economic doctrine⁴, the independence of the central bank is approached from two points of view:

-relative independence, taking into account that its activity is subordinated to the executive authority;

-absolute independence, the central bank being coordinated by the legislature, but the financial policy is accomplished within the state macroeconomic wide frame.

It is considered that⁵ a bank is independent if its main objective is to ensure the stability of the prices, benefiting from the full discretion in using the specific instruments for reaching this goal, if needed even against the will of the executive authority. Even if regulated, the law includes issues that might lead to the conclusion of partial autonomy:

- Shared capital entirely belonging to the state;
- Its members are appointed by the Parliament;
- Obligation of the National Romanian Bank governor to present a yearly report to the Parliament concerning the financial statements and the credit situation;
- Profit distribution
- The position of the National Bank of Romania as an agent on the account of the state and the circumstances it acts on the behalf of the state, according to the law;
- The National Bank of Romania supports the general economic policy of the State without prejudicing its fundamental goal concerning the insurance and the maintenance of prices stability" (art. 2 paragraph 3) and consequently, the natural question – how can an entity (the National Bank of Romania) support the general economic policy of the state without affecting its independence ?

The independence does not exclude the collaboration or the cooperation, regulated by art. 3 and 4 of the Law.

The main duties of the National Bank of Romania are:

- a) drafting and applying the financial policies and the exchange rate policy;
- b) authorization, regulation and prudential supervision of the credit institutions, promotion and monitoring the smooth operation of the payment systems to ensure financial stability;
- c) issuing bank notes and coins as legal payment means in Romania;
- d) establishing the financial regime and monitoring its observance;
- e) administration of the international reserves of Romania.

The National Bank of Romania supports the general economic policy of the state, without prejudicing the fulfillment of the fundamental goal concerning the insurance and the maintenance of the prices stability.

As I previously mentioned, in fulfilling its attributions the National Bank of Romania and the members of the management body will not demand nor receive instructions from the public authorities or from another institution or authority. Any bill of the central public authorities on the fields the National Bank of Romania has attributions in shall be adopted after previously requesting the opinion of the National Bank of Romania. The opinion shall be provided within maximum 30 days from the request.

⁴ I. Costică, S.A. Lăzărescu, *Banking Policies and Techniques*, ASE Publishing House, Bucharest 2004, p.15, quoted by R. Postolache, *quoted work*, p.29.

⁵ A. Cukierman, *Measuring the Independence of Banks and Its Effects on Policy Outcomes*, World Bank Economic Review (sept.1992), quoted by R. Postolache, *quoted work.*, p.29.

For its own needs, the National Bank of Romania drafts studies and analyses on the currency, the exchange rate, the credit and the payment systems' operations and the credit institutions.

To observe the undertaken obligations arising out of the agreements, treaties, conventions Romania is part of the National Bank of Romania collaborates with the authority in the country and abroad, by providing information, adopting adequate measures or in any other way compatible to the law.

The National Bank of Romania plays a major role in the bankruptcy proceedings of credit institutions, as I shall further present.

Third Chapter: The Role of the National Bank of Romania in the Bankruptcy Procedure of the Bank Credit Institutions

According to the provisions of art. 3 of the Government Order no. 10/2004, the authorities enforcing the bankruptcy procedure to the credit institutions are:

- the law courts
- the bankruptcy judge and
- the liquidator

Even if the Government Order no. 10/2004 does not include the National Bank of Romania among the participants in the bankruptcy procedure of the credit institutions, the National Bank of Romania has various attributions and roles in the bankruptcy procedure of the bank credit institutions, namely:

- May determine the opening of the bankruptcy procedure, by withdrawing the operating license of the credit institutions;
- May have an active procedural role in the bankruptcy procedure, being able to file the proceedings' opening petition, or, as a creditor, being entitled to take part in the distribution of the amounts obtained from the winding up;
- May play an active role and may have duties within the procedure by:
 - Appointing or revoking an intermarry administrator;
 - Approving the offers of assets purchase;
 - transfer of the available funds of the bankrupt credit institution in the accounts opened by the liquidator;
- may be summoned within the bankruptcy procedure;
- might issue different opinions within the procedure;
- information attributions

1. The National Bank of Romania is entitled to withdraw the operating license of the credit institution, according to the legal provisions, as a consequence of the impossibility of financial adjustment of a credit institution, whose consequence is the determined insolvency of the credit institution (art. 2 letter h).

2.a. The law (lato sensu) acknowledges the active procedural quality of the National Bank of Romania, as:

a) this may file the petition of opening the bankruptcy procedure of a credit institution. Thus, according to art.11, *The Bankruptcy Procedure starts on the grounds of a petition filed by the debtor credit institutions or by their Creditors or by the National Bank of Romania and according to art. 14, paragraphs 1 and 2, the National Bank of Romania, as banking supervision authority, will file a petition for opening the bankruptcy procedure against the credit institutions in one of the cases provided in art. 2 paragraph (1) letter h). The petition of the National Bank of Romania will be accompanied by the Decision of the Board of Directors of the National Romanian Bank of Romania*

to withdraw the operating license of that particular credit institution and by any other necessary actions to justify the deed the Court was informed by.

b) might notify the bankruptcy judge, according to art. 41 of the Government Order no.10/2004, so that this one orders that a part of the liabilities of the insolvent credit institution is borne by the members of the Board of Directors, censors, financial auditors, execution personnel and/or having control duties, who held those particular positions 3 years before the opening the procedure, provided that they contributed to the insolvency by one of the facts mentioned in art.39.

2.b. The National Bank of Romania may have the quality of creditor within the procedure and may take part in the distribution of the funds obtained from the winding up. Thus, according to art. 38 of the Government Order 10/2004:

In case of bankruptcy, the receivables shall be paid in lei, as it follows:

1. *the taxes, stamp duties and any other expenses afferent to the bankruptcy procedure, including the necessary expenses for preserving and administrating the assets of the debtor credit institution patrimony and also the payment of the employed persons remuneration according to the law, including the liquidator.*

2. *the receivables resulted from the guaranteed deposits, including those of the Bank Deposit Guarantee Fund resulted from the payment of the indemnities to the guaranteed depositors and/or the financing, including by the issuance of securities, of certain operations that involved the transfer of guaranteed deposits of the debtor credit institution, as well as of the receivables arisen out of the employment relationships maximum 6 months prior to the procedure opening;*

3. *the receivables resulting from the activity of the debtor after the opening of the procedure;*

4. *budget receivables, receivables of the Bank Deposit Guarantee Fund, others than those at point 2, and also the receivables of the National Bank of Romania resulting of the credits granted by it to the credit institution ;*

5. *the receivables resulting from the treasury operations, inter-banking operations, clients operations, securities operations and other banking operations, and those resulted from products delivery, services or other works execution, rents and other chirographer debts etc.*

3.a The National Bank of Romania appoints (and revokes, if applicable) an intermarry administrator – natural personal or legal entity to take conservatory measures to prevent the diminishing of the assets and the increase of the liabilities of the credit institution, from the moment of filing a petition to open the bankruptcy procedure until the appointment of the liquidator. Thus, according to art. 15 of the Government's Decision 10/2004:

(1) *After registering the petition filed according to art. 12, 13 and 14, the bankruptcy judge shall immediately notify it to the parties mentioned in these articles.*

(2) *The National Bank of Romania shall appoint an intermarry administrator and shall establish his/her remuneration when submitting its demand or when receiving the notification mentioned in paragraph (1). If the credit institution is under a special administration procedure, the attributions of the intermarry administrator are exerted by the special administrator, according to the herein Order.*

(4) *If the credit institution was not under a special administration, the attributions of the Board of Directors of the debtor credit institution are duly suspended when appointing the temporary administrator until the expiry of his/her mandate. The Board of Directors may contest the filed petition, according to art. 13 and 14 also during the suspension.*

As a consequence of the principle of the equability of the judicial deeds, the temporary administrator appointed by the National Bank of Romania, may be revoked by the National Bank of Romania.

3.b The National Bank of Romania approves the offers received by the liquidator from other credit institutions considered eligible by the National Bank of Romania to take part in the transactions for purchasing assets and undertaking liabilities. Thus, according to art. 28 of the Government Order 10/2004, after the bankruptcy judge approved the winding up procedure provided at art. 5 letter n) point1, the liquidator immediately organizes, provided that the approved winding up method stipulates it, the negotiation on the assets purchase and the undertaking of liabilities; this way the liquidator organizes an information session with all the credit institutions considered eligible on grounds of the previous evaluation of the National Bank of Romania that shall take into account the effects of the transaction on the financial statements of the purchaser credit institution and of its ability to observe the prudential requirements, in order to present the conditions and the terms of the negotiation.

As soon as possible the liquidator analyses the received offers and chooses according to the lowest cost principle, with the approval of the National Bank of Romania that shall take into account the criteria provided in art. 28, the offer of the tendering credit institution / institutions with which it is going to conclude the assets purchase and liabilities undertaking convention.

3.c The National Bank of Romania has the role of transferring in the bankrupt credit institution accounts opened by the liquidator all the availabilities of the credit institutions recorded in its registers. Thus, according to the stipulations of art. 5 of the Government's Order no. 10/2004, when the legal decision on the opening of the bankruptcy proceedings is received, it shall open with a bank, Romanian legal entity or a branch of a foreign bank licensed to operate on the Romanian territory, two accounts, one in lei and another one in foreign currency, mentioning bankrupt credit institution account type, with exclusive right of disposal in the interest of the bankruptcy proceedings. In the bankrupt credit institution type accounts the amounts existing in other accounts of other financial – banking institutions shall be transferred at the order of the liquidator. The liquidator shall immediately inform the National Bank of Romania on the name of the commercial bank and of the accounts opened there and afterwards the National Bank of Romania shall immediately transfer in these accounts the available funds of the credit institution in its records. The operations of the bankrupt credit institution shall be still carried out through these accounts.

4. The National Bank of Romania may be summoned for:

a) the ruling of the last appeal if the National Bank of Romania filed the petition for the opening of the proceedings, it shall be summoned according to the conditions of art. 86 - 94 of the Civil Procedure Code.

Thus, according to art. 4 paragraph 2 of the Government's Order no. 10/2004, *the last appeal shall be ruled within 15 days from the registration of the case at the Court of Appeal. The parties shall be summoned observing the conditions of art. 86 – 94 of the Civil Procedure Code for the Bank Deposit Guarantee Fund and for the liquidator and by advertising in two national newspapers for the other parties. When the National Bank of Romania files for the start of the proceedings, it shall be summoned in terms of art. 86 - 94 of the Civil Procedure Code.*

b) Solution of the challenge drafted by the representative of the shareholders of the debtor credit institution and the creditors' committee against the measures adopted by the liquidator

In this case, according to art. 8 of the Government's Order no. 10/2004, *the bankruptcy judge shall rule the challenge within 10 days from its registration at the Counsel Chamber, summoning the challenger party and the liquidator and, if appropriate, being entitled to suspend the execution of the challenged measure. The bankruptcy judge shall also summon the National Bank of Romania if it filed the statement of claim.*

5. The National Bank of Romania provides a mandatory or an advisory opinion during the proceedings.

a) Mandatory opinion

If the petition of opening the proceedings is filed by the debtor credit institution or by its creditors it must be accompanied by a previous endorsement of NBR to be registered at the Court of Law.

On the grounds of art.12 paragraph.2, *In advance, the debtor credit institution must request the National Bank of Romania, within 10 days from the date the insolvency, a prior approval for filing the petition of bankruptcy proceedings opening.*

According art.13 paragraph 2, *the creditor shall not be entitled to file the petition without proving the prior approval of the National Bank of Romania of filing the petition of bankruptcy proceedings opening. The National Bank of Romania passes a verdict on the creditor's petition within 10 days from its reception making a motivated decision.*

The National Bank of Romania is entitled to reject the petition of the debtor credit institution or of its creditors if it considers that it is not insolvent as per the definition of art. 2 paragraph (1) letter h) point 1 or /and 2. In these circumstances, the National Bank of Romania is entitled to decide the creation of special administration if the legal provisions for the creation of this procedure are complied with. The decision of the National Bank of Romania to approve or reject the petition shall be motivated and it may be challenged in court observing the stipulations of the Emergency Government's Order no. 99/2006, approved with additions and amendments by Law no. 227/2007, with further additions and amendments.

b) Advisory Opinion

The National Bank of Romania must express its point of view whenever requested by the bankruptcy judge or by the liquidator, either by expressing a point of view or providing information whenever it considers appropriate during the proceedings. Thus, according to art. 6 of the Government's Order 10/2004, *in the execution of their attributions, the bankruptcy judge and the liquidator are entitled to request the point of view of the National Bank of Romania, as prudential supervision authority, on any prudential issue. During the bankruptcy proceedings the National Bank of Romania may send its point of view or other information considered relevant to the bankruptcy judge and to the liquidator whenever necessary.*

6. National Bank of Romania has information attributions:

a) of a bank supervision authority from a different country on the opening of the bankruptcy proceedings of the credit institution having branches opened in that country. According to art. 16 paragraph 5 and 6 of the Government's Order 10/2004,

(5) *If the credit institution has branches in other countries, the National Bank of Romania shall immediately inform the bank supervision authorities of the country where the branch is located on the opening of the bankruptcy proceedings according to the stipulations of this order.*

(6) *The bankruptcy judge shall inform the National Bank of Romania on the opening of the bankruptcy proceedings of the debtor credit institution the day of its passing by fax, e-mail or phone. The National Bank of Romania shall immediately close, after the settlement of the payments of that day according to the applicable regulations, the accounts of the debtor credit institution opened as per its records. The available funds shall be transferred in the accounts of bankrupt credit institution type opened at a commercial bank according to [art. 5](#).*

b) on the bankruptcy proceedings of credit institutions, Romanian legal entities and their branches of other member states. This way, the competent court which is the only authority

authorized to decide the enforcement of bankruptcy proceedings of a credit institution, Romanian legal entity, including its branches of other member states, shall immediately inform by means of the National Bank of Romania the competent authorities of the host member states on the decision to open the bankruptcy proceedings, including on the practical effects such procedure may have.

c) on the bankruptcy proceeding of a credit institution and its Romanian branch when the credit institution has its registered office in a different state than the member state and it has branches opened on the territory of other member states as well

The National Bank of Romania shall immediately inform the competent authorities of the host member states on the reorganization measures or on the decision to open the liquidation proceedings adopted in non member state related to the credit institution and its Romanian branch, when the credit institution has the registered office in a different state than a member state and it has branches opened on the territory of other member states as well.

The notification shall be immediately after the National Bank of Romania withdrew the branch operating license or as soon as it is informed on the adoption of reorganization measures of the branch. The notification shall also mention the fact that the operating license of the Romanian branch was withdrawn.

Fourth Chapter: Conclusions

Following the accession of Romania to the European Union, the National Bank of Romania, focused more on the regulations that cover the quality management of the banks, on the fulfillment of every banking company of some key indicators in banking activity, on the internal control performed in each banking company and less on the individual banking supervision.

Consequently, the National Bank intervenes indirectly in the business of the banking companies, through policies and general regulations, particularly in the monetary field, so the banks have to adapt their activities and capital according to the general regulations stated by the National Bank of Romania.

Therefore, the National Bank of Romania changed the responsibility to the management of the banking companies, so that the banks are obliged to transpose these general regulations in policies and in the internal rules of each banking company.

By means of the role and duties which have been conferred, the National Bank of Romania has the responsibility to ensure stability of the banking circuit, to supervise the credit institutions and to prevent their decline. If this purpose could not be achieved, the only solution is to open bankruptcy of the credit institutions, the Law conferring among others, the capacity to pursue the proceedings.

We consider the solvency and liquidity indicators, calculated by the banking companies according to NBR Regulation no. 1/2005 regarding the payment systems which ensure funds clearing, published in Official Gazette no. 265/2005, republished in 2007, in the Official Gazette no. 596/2007, respectively NBR Regulation no. 24/2009 on the liquidation of credit institutions, published in the Official Gazette nr.891/2009.

Even if at the European level there is a unity approach on the insolvency of the credit institutions, there is no effective cooperation between national authorities in case of financial crises of credit institutions operating cross borders. We believe that a first step to this end would be the creation of responsibility for serious lack of supervision for the national supervision authorities that may endanger the European financial market by their negligence⁶.

⁶ L. Sorescu, *Insolvența bancară în dreptul comerțului internațional*, Ed. Universul Juridic, București 2010, p.288.

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