

ROLE OF THE DELEGATED ADMINISTRATOR COMPARED WITH THE ROLE OF THE SPECIAL ADMINISTRATOR IN BANKING

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Abstract

The article presents the new Romanian legislation referring to a new legal institution about the delegate administrator. This institution is comparable with the legal institution about the special administrator, which was adopted in 2006 when appeared the Government Emergency Ordinance no.99/2006. This instituted the right of the National Bank of Romania to decide to adopt one of the stabilisation measures instituted.

These stabilisation measures are very important in banking practice, especially in the time of the banking crisis.

It is important to distinguish between the two legal institutions for to select the best stabilisation measure.

Keywords: credit institutions, banking crisis, delegate administrator, special administrator, practice in banking, supervisory authority, the National Bank of Romania.

JEL Classification: K10, K22

Credit institutions' business can no longer be considered as an activity limited merely to the interests of these institutions' shareholders or, at most, limited to their customers' interests. Needless to say, shareholders' interest is fully justified since shareholders have invested their resources and have been involved in the business of these credit institutions. But, when a credit institution has a certain market share in its business sector and, more and more, it expands cross-border into several national systems – some credit institutions being even considered significant for the global banking system - it is but natural that the business of such a credit institution attract more and more the interest of other persons, institutions and states working directly with it or the interest of those on whose territory this institution conducts business.

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At global level, the phenomenon represented by the current banking crisis has meant a lot of problems for those involved and a lot of problems for the entire community as well, due to the consequences of this crisis. Indeed, at global level, the current crisis is a particular phenomenon, beyond the ordinary, known patterns - if it were only due to the fact that this crisis has affected the most developed countries from an economic point of view, countries that impact the developments of the global economy. Today, we could no longer state that in a certain country, a person can afford not to be interested in the fact that this phenomenon becomes manifest more strongly or more chronically in another far-away country. Every day, practice in banking has shown us that the perception of states, the national banking supervisory authorities and even each person has changed. At the beginning of the crisis – i.e. less than six years ago - we were all less interested whether the crisis happened in a small, far-away country like Iceland or in the most developed country of the globe, since our own banking sector was not anchored through immediate or strategic ties to the banking institutions of these countries. The persons and banks from Romania had no links with the banks of Iceland, and our banking sector included only two banks with US capital: one was a peripheral bank, belonging to a family who owned it, while the other one, despite being the subsidiary of a major bank of the USA, represented only 1% of the Romanian market, so it could not generate worries. But, since the crisis expanded to Europe as well and, more precisely, to the countries that make up the union we are part of – the European Union – the perception had to change. Whether we liked it or not, as an EU Member State and as a participant to the European system of central banks, we had to put on our agenda the same concerns that are of interest for all those who are part of this body. Our banking legislation has increasingly integrated the new regulations devised at EU level, enforced, in a direct manner, in the Romanian banking sector too. On the other hand, the prudential supervisory system - adapted to be in line with this legislation - has included, besides solo supervision, consolidated and sub-consolidated supervision as well, as the case may be, with a view to prevent and mitigate the risks specific to banking.

Moreover, the Romanian banking supervisory authority has now new concerns in its activity. Contemplating the provisions of Art. 186 of the Government Emergency Ordinance nor. 99/2006 on credit institutions and capital adequacy, with subsequent amendments and

completions, the National Bank of Romania (NBR) cooperates closely with other competent national authorities and with the European Banking Authority, to which it provides all the necessary information with a view to carry out its competencies set forth by Directive no. 2006/48/CE of the European Parliament and the European Council of 14 June 2006 on initiating and exercising the business of credit institutions. In order to exercise supervisory competencies for a solo entity and/or for consolidated supervision, the respective authorities provide, upon request, all the relevant information and, *ex officio*, all essential information. In paragraph (2) of the same law, the notion of 'essential information' is defined, by mentioning that information "*is considered essential if it can influence significantly the assessment of the financial stability of a credit institution or of a financial institution from another Member State*".

With every day that passes, this cooperation has become more and more obvious and, at the same time, more and more efficient. The examples are countless, from the Vienna meetings that started in 2009, meetings with international financial institutions, with the parent banking institutions of the main banks that operate in the banking sector of Romania, to the recent collaboration with the supervisory authority of Cyprus on the situation of the Romania-based banking entities with Cyprian capital.

The concerns of the Romanian supervisory authority must be all the more active as the information flooding us every day has been more and more alarming. The daily press such as *Ziarul financiar* tells us that: "*In the race to reduce debts and budget deficits, the European Union incurred a recession in the first quarter, while the euro area continued its longest economic downturn since the introduction of the European currency, in 1999, with its main growth engine, Germany, fuelled "almost exclusively" by the population's spending*" (Cojocaru, 2013). This finding relies on the statements of the German statistics institute quoted by *Bloomberg*, supported by the fact that investments are lower and net trade had a minimal contribution to growth, a growth which, anyway, stood at merely 0.1%.

From the discussions of some businessmen and journalists invited to a CNN talk show on economic issues, we could infer that the "club" of the EU rich countries has been facing the slow breakdown of their economies, while trying hard to absorb the poor countries from Eastern and Southern Europe.

If Quentin Peel, an editor of the Financial Times, suggested that the problem of Europe is its “dramatic expansion” i.e. to include all the economies of Eastern Europe, Marco Simoni, an economist with the European Institute, stated that: “The Europeanization has not gone far enough. One is not safe even being inside. One must go on doing one’s lessons.”

On the same date and in the same *Ziarul financiar* newspaper, there was a title stating that “*The Supervisors of the Central Bank Have Put the Screw on Banks*”, the title of an article which underlined the fact that the “*National Bank of Romania maintains pressure for an assessment as close to reality as possible of the collateral banks rely on*” (Voican, 2013). The article showed that the “*verification conducted last fall ended up with impressive additional provisions, i.e. €600 million, which made the system incur a record loss of lei 2.12 billion. But the market conditions were different: some banks that kept postponing recognizing the depreciation of their collateral, set new provisions even as high as €100 million, while as regards other banks, the amounts were much lower*” (Voican, 2013). In the current general context, special interest is given now to approaching the aspects related to the stabilisation measures introduced in the Romanian law via point 18 of the Government Ordinance no. 1/2012, starting with 21 January 2012, i.e. in the middle of the European crisis. Thus, Art. 240²³ of the Government Emergency Ordinance no. 99/2006, supplemented on that date, instituted the right of the National Bank of Romania to decide to adopt one of the stabilisation measures instituted, as follows:

1. Total or partial transfer of the assets and liabilities of a credit institution to one or more eligible institutions;
2. Involvement of the Bank Deposit Guarantee Fund as delegated administrator and, as the case may be, as shareholder, if beforehand, the measure of suspending the voting rights was disposed of for the shareholders who hold control over the respective credit institution; and
3. The transfer of the assets and liabilities of a credit institution to a bridge-bank established for this end.

Any of these measures can be decided by the banking supervisory authority based on its findings, when this authority thinks that “*there is a threat to financial stability*”, as the legislator words it. Previous to adopting such a decision, the supervisory authority has the obligation, instituted by law, to decide which of these stabilisation

measures would be best to be applied - a situation which shows the responsibility of the National Bank of Romania as regards its selection, function of the concrete situation of the respective credit institution, as the adopting of the respective decision should not be a random measure.

Implementing such a measure implies the responsibility of the National Bank of Romania both as regards enforcing the appropriate provisions from other law texts of the same law chapter, and as regards the express requirements instituted by law applied for the stabilisation measures.

Analysing the institution of delegated administrator, we must contemplate this institution compared with other roles, such as the role of the administrator and the role of the special administrator, whose regulating was set forth previously in other normative acts.

About the institution of the administrator, the legal framework is found in chapter VII – the company contract in Book V of the Civil Code, including concrete provisions under Art. 1913 – 1919 of this normative act. Art. 1913 paragraph (2) determines who can be an administrator, mentioning that “*they can be associates or non-associates, Romanian or foreign, natural or legal persons*”. The governing of this institution is provided via the company contract or via separate acts, set forth expressly in par. (1) of the same article, which shows that via such acts, diverse aspects can be set, such as: appointing the administrators, their manner of organizing themselves, the limits of their mandates, as well as any other aspect pertaining to company management.

As regards its scope, Art. 1914 sets forth that, in the absence of the opposition of his/her associates, the administrator “*can perform any administration action for the company’s best interest*” and, taking into account his/her activity, the administrator is *personally* accountable, in conformity with Art. 1915, “*before the company for the prejudice generated by breaching the law, the mandate received or by guilt, while administering the company*”. At the same time, administrators can have the right of representing the company in court, by observing Art. 1919.

Of course, these legal provisions apply to the administrators of credit institutions also, taking into account the fact that these institutions are trading companies, to which the general regulations of the matter apply in principle.

The institution of the special administrator occurred in banking legislation at the same time with regulating the institution of special administration, i.e. as a supervisory measure that can be decided by the national banking supervisory authority, observing the law. The special administrator is a person appointed by the National Bank of Romania via the decision to institute the measure of special administration, being the person with whom this measure is actually realized; this person is accountable before the National Bank of Romania for the deployment, under the best conditions, of his/her entire activity during his/her mandate, a mandate that, in principle, lasts for 4 months, in conformity with Art. 240⁴ or for another period of time mentioned in the decision issued by the supervisory authority, either initially, or later, if the period is prolonged and if this action is deemed necessary to complete the measures for the restructuring of a credit institution.

The special administrator appointed can be one or several natural persons or a legal person. Contemplating legal persons, the legislator stipulated that the Bank Deposit Guarantee Fund can also be one of them, considering the specialization of this institution.

The decision of the National Bank of Romania must include the appointment of the person nominated as special administrator, and his/her specific goals and competencies, in conformity with the law text, his/her remuneration, the permitted level of expenditure that can be engaged when carrying out the competencies and any other conditions considered important by the National Bank of Romania. Art. 240⁵ paragraph (3) sets forth the conditions that the National Bank of Romania must contemplate when appointing a person as special administrator. Thus, the natural person appointed or, if it is a legal person, the natural persons empowered by the legal person to assure its representation, should not be in any of the incompatibility situations set forth by the law text that regulates incompatibilities for the position of a credit institution's administrator. They are mentioned under Art. 110 of the Government Emergency Ordinance no. 99/2006 and refer to concrete cases. If the first case refers to a certain situation regarding a job in the same credit institution which could not have been carried out for practical reasons, the other two refer to the notoriety of the person, as regards his/her legal situation and refers either to the fact that, in the last 5 years, the person was withdrawn by the supervisory authority, his/her endorsement to exercise the competencies of administration or management in a credit institution,

a financial institution or an insurance/reinsurance company or another entity doing business in the financial sector, or was removed from the position exercised in such entities due to reasons he/she can be blamed for, or due to the fact that he/she is forbidden, via a legal disposition, a court sentence or the decision of another authority, to exercise administration or management duties in such an entity or to do business in one of the domains specific to these entities. Moreover, he/she must not be debtor or creditor of the credit institution or a person with strong ties with the institution. In addition, this person or those who support the special administrator to carry out his/her duties must have a good reputation, the appropriate qualifications and the professional experience and be independent, in conformity with the criteria set forth by Law no. 31/1990 on trading companies, recast, with subsequent amendments and supplementations, for the appointment of an independent administrator.

Related to the person of special administrator, the National Bank of Romania has the obligation to mention in the decision appointing this person, in case several natural persons are appointed, the distribution of competences among these persons and their coordination and subordination.

The persons appointed to exercise the capacity of special administrator can be replaced by the National Bank of Romania if they do not act in conformity with legal provisions or in accordance with the instructions and dispositions of the banking supervisory authority or if they do not comply any longer with the conditions set forth by law.

The duties are exercised by special administrators in conformity with legal provisions and applicable regulations. Special administrators must observe the instructions and dispositions given by the supervisory authority during the entire period of applying special administration and are accountable only before this authority for the carrying out of the duties conferred by this capacity.

The National Bank of Romania can set certain limitations or conditionality as regards the activity and the administration of the credit institution that is under special administration and can restrict fully or partially the provision of certain financial services. A special administrator is accountable for their carrying out and for his/her entire activity and for carrying out the duties conferred by this position. A special administrator is empowered by law, to be able to

hire other persons: auditors, lawyers, valuers, other independent certified experts, to support him/her in carrying out his/her duties; this administrator can delegate specific tasks only in conformity with the instructions conferred by the National Bank of Romania. The liability of the special administrator and of any other person hired by him/her is limited only if there is proof that this person acted in bad faith or with gross negligence.

A special administrator replaces the administrators of the respective credit institution, taking over in full the competencies pertaining to the bank's administration and management. The law requests him/her, immediately after the taking over of the credit institution, to notify the bank's departments and branches, the correspondent credit institutions, the Trade Register and, as the case may be, the Bank Deposit Guarantee Fund, about this measure, while having unrestricted access to all the premises and locations of the respective institution and to all its assets, records, accounts and other records, having full control over them.

A special administrator must assess the outlook as regards realization and the approximate costs and benefits, and be able to choose to redress the credit institution, to restructure its business or to introduce a petition to start the winding up procedures.

We should remember that, in a delay of maximum two months, the special administrator must submit to the National Bank of Romania a written report with enough details to fundament his/her recommendations regarding the measures he/she deems adequate, function of the assessments made. In addition, during the whole period of special administration, the administrator must report to the National Bank of Romania, by the deadlines set by the central bank, the financial position of the credit institution and the stage of the measures implemented and, when impediments occur during the implementation of the measures approved, to propose to the National Bank of Romania either to amend these measures, or to withdraw the license of this credit institution. These reports submitted by the special administrator are the grounds for the National Bank of Romania to decide at any moment, the cessation of the special administration followed, as the case may be, by the resuming of the business of the credit institution under the control of its statutory bodies, or by the withdrawal of its license. In the first case, the special administrator is empowered, in conformity with Art. 240¹⁹ par.(3), to provide the administration and management of the credit institution

until the appointment and approval by the National Bank of Romania of the new persons who shall exercise responsibilities pertaining to the administration or management of this credit institution. This legal right prolongs the legal status of the special administrator after the cessation of the special administration measure as well. In conclusion, a special administrator is the only person empowered to provide the administration of the credit institution during the measure and the special procedure instituted by the supervisory authority.

Unlike this situation, during the enforcement of the stabilisation measure decided by the National Bank of Romania, the central bank appoints, via the same decision to adopt the measure, the person who shall assure the entity's administration and who shall acquire the capacity of delegated administrator. This title reflects the specific of the position of the person who shall administer the institution as a delegate of the supervisory authority, empowered to take all the measures necessary to assure the enforcement under the best conditions of the decision adopted by the National Bank of Romania. During the enforcement of the stabilisation measure, the functioning of the credit institution's general shareholders' meeting is adjourned, a situation which strengthens the idea that the delegated administrator shall act only observing his/her capacity of delegate of the authority, while not being subject to the shareholders' will.

The capacity of delegated administrator can be granted, in conformity with the law to the Bank Deposit Guarantee Fund also, the Fund being a specialised institution empowered with this capacity by its own by-laws. Choosing such an institution staffed with specialised employees can be a guarantee for the National Bank of Romania that such a delegated administrator shall be able to exercise competencies adequately, assuring the enforcement under the best conditions of the competent authority's decision.

If the Bank Deposit Guarantee Fund is involved, the National Bank of Romania's decision includes the person or persons endorsed to exercise the competencies of the delegated administrator, on behalf of the Fund.

The law sets forth expressly the deployment of the business of the credit institution for which stabilisation measures have been disposed, if the role of the delegated administrator is well defined. Moreover, Art.240²⁸ indicates the duration of the mandate of the Fund's delegated administrator, which ceases with its express

repealing by the National Bank of Romania, as the institution that delegated the Fund.

Conclusions

As we can observe, the delegated administrator, both via his/her statute, and via his/her competencies set forth by law, is a *sui-generis* legal construction, different from the administrator of a credit institution or the special administrator instituted via special procedures. This position occurred as a need determined by the National Bank of Romania's instituting stabilisation measures, adopted via the amendment that took place at the beginning of the year 2012 as regards the framework normative act on credit institutions. His/her competencies are different from those of the special administrator, even if both persons are appointed by the same authority and both report to it about the development of the measure related to their appointment. The special administrator serves a special procedure instituted under certain conditions for which the legislator has set certain finality. The delegated administrator acquires the role of direct instrument of the authority which appointed him/her, with the obligation to assure the enforcement under the best conditions of the mandate conferred to him/her via the National Bank of Romania's decision. The necessity to create such an instrument was determined by the creation of the legal framework for adopting stabilisation measures for a credit institution in case there is a threat to financial stability. Thus, we see how an economic need brings about the occurrence of a legal institution as an instrument to carry out the goal pursued. Moreover, instituting this instrument reflects the Romanian legislator and the national supervisory authority's concern to create the legal means needed to avoid problems in the banking sector during the banking crisis that occurred in European countries.

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