Jurnalul de Studii Juridice

JOURNAL OF LEGAL STUDIES

ISSN: 1841 – 6195 (print), ISSN: 2067 – 8509 (electronic)

Coverd in: CEEOL, Index Copernicus, Ideas, RePeC, EconPapers, Socionet

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PROTECTION OF PERSONS AFFECTED BY THE DEPOSIT TRANSFER INSTITUTED WITH THE SPECIAL ADMINISTRATION OF A CREDIT INSTITUTION

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Jurnalul de Studii Juridice, Anul VI, Nr. 3-4,
Decembrie, 2011, pp: 153-164

The online version of this article can be found at:

http://jls.upa.ro/

Published by:

Lumen Publishing House

On behalf of:

Legal Research Center of Petre Andrei University from Iasi

PROTECTION OF PERSONS AFFECTED BY THE DEPOSIT TRANSFER INSTITUTED WITH THE SPECIAL ADMINISTRATION OF A CREDIT INSTITUTION

Rada POSTOLACHE [1]*

Abstract:

The maintenance of trust in the Romanian banking system is mainly insured by the institutionalization of a guarantees system, which insures the restitution of the deposited amounts of money, but also the damages given to depositors, should a transfer of deposits occur. This system is regulated as measure in the context of a credit institution restructuring, by article 240[11] paragraph (2) letter b) and article 240[12] paragraph (1) letter d) of the Emergency Ordinance No. 99/2006 on credit institutions and capital adequacy. Depositors' protection has a specific legal system, is integrated in special administration and is subject to our present analysis which uses law as working instrument.

Keywords:

special supervision, special administration, banking deposit, remedial measures, damages fund, deposits guarantee fund

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1. General guidelines on the crisis situation of credit institutions

The legal treatment of a credit institutions in difficult involves two stages, which are subject to different legal regulations and which have a distinct legal regime:

- administrative stage, with its two components – special supervision and special administration, which constitutes the object of special procedures, thoroughly regulated by articles 237-240 of the Government Emergency Ordinance No. 99/2006 on credit institutions and capital adequacy[2]. The competence for their institution is transferred to the National Bank of Romania, in case the banking discipline is transgressed, in the forms provided for by special law[art. 237 par. (1), art. 240-240[2]];
- judiciary stage, of the credit institution bankruptcy, which has as special legal ground the provisions of the Government Ordinance No. 10/2004 on the judiciary reorganization procedure and credit institutions bankruptcy[3], completed by the provisions of Law No. 85/2006 on insolvency procedure [4] and the common law within the field (Postolache, (2006),): 127-138) Anitei, Lazăr (2011): 76-80).

Special supervision constitutes a special measure, a form of prudential supervision (Silberstein, (2011), : 170), instituted by the National Bank of Romania (NBR), under the given legal circumstances [article 237 paragraph (1)].

Special administration, through its content and effects, is presented as a genuine form of a credit institution reorganization, instituted by the national authority within the field, with the aim of rehabilitating that credit institution from an economical and financial point of view.

In relation to ordinary or common law administration, the administration regulated by articles 240-240[22] of the Government

[2] Off. Gazz. No. 1027 from December 27th 2006, with ulterior modifications and additions, called special law in the present work, Government Ordinance No. 99/2006 or G.E.O. No. 99/2006.

[3] Off. Gazz. No. 84 from January 30th 2004, with ulterior modifications and additions.

[4] Off. Gazz. No. 359 from April 21st 2006, with ulterior modifications and additions.

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Emergency Ordinance No. 99/2006 has a special character, particularized at least by:

a) different legal regulation – special provisions of the Government Emergency Ordinance No. 99/2006 (art. 240-240[22]);

b) scope of instituting – rehabilitation of the credit institution in difficulty, by means of redressing or restructuring methods of that institution, as the case may be;

c) competence of instituting – the National Bank of Romania, excluding the competences instituted by Common Law – Law No. 31/1990 on commercial societies[5]; at this point, the shareholders of the credit institution in question are not entitled to: elect the special administrator; establish the latter's prerogatives; decide the measures which are to be taken for the bank to escape the crisis, clearly regulated by article 240 of the GEO No. 99/2006;

d) competence of exercising – a special administrator, nominated by the NBR – one or more physical persons or a legal one, that may be represented by the Bank Deposits Guarantee Fund (art. 240[5]). During the special administration period, the mandate of the administration board and managers or, as the case may be, of the supervision board and directorship, ceases, so that the special administrator completely takes over the administration and leadership attributions of that credit institution [art. 240[8] paragraph (1)];

e) temporary character – law has instituted a 4 month period, providing an unlimited assessment right to NBR, thus giving to the latter the possibility to extend[6] or to restrict the deadline or even to decide that the supervision period must end, as the case may be;

f) circumstances of instituting – are clearly regulated by special law, article 240, being extended with the Government Emergency Ordinance No 26/2010[7]. They are non-cumulative, relatively homogenous and determinant when it comes to instituting special supervision, generating the precarious financial situation of a credit institution, capable to affect the interests of the customers-depositors. In terms of circumstances, are important for the current work the following: serious drawbacks

[5] Republished, Official Gazette No. 1066 from November 17th 2004, with subsequent modifications and additions.

[6] If such an extension is necessary for finishing the measurements of the credit institution restructuring.

[7] This structurally modifies the procedures specially instituted by G.E.O. No. 99/2006, Official Gazette No. 208 from 1st April 2010.

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acknowledged in relation to a credit institution administration and/or leadership or serious repeated transgressions of legal provisions and/or regulations or of other acts issued for the law application, which seriously menace depositors' interests [paragraph (1) letter c)]; unavailability of the credit institution deposits[8], declared by the NBR, according to the provisions of the Government Ordinance No. 39/1996 on the creation and functioning of the Bank Deposits Guarantee Fund[9] in the banking system [paragraph (1) letter h)][10].

The settlement of the crisis situation has *depositors' interests* as main objective, confirmed precisely by the provisions of article 240[11] paragraph (1) of special law – „The special administrator's attributions, established with the decision of the NBR, may include taking any redressing measure on behalf of the credit institution's depositors, which are necessary for preserving the value of the assets of that credit institution, for eliminating drawbacks existing in relation to that credit institution administration or for cashing debt titles, but also any other measure necessary for restructuring the activity of the credit institution…".

By instituting accomplishment perspectives, costs and benefits as criteria, law offers the following *alternatives* which the administrator has to *evaluate* when it comes to the instituted special administration: a) a) *redressing* the credit institution; b) *restructuring* the credit institution activity by *implementing* the measures provided for by art. 240[12] paragraph (1); c) introducing the demand for starting the procedure on the credit institution bankruptcy, regulating the circumstances of institution for each of the cases[11]. When it comes to each of the aspects mentioned above, the

[8] In accordance with art. 2 paragraph. (3) letter. c) of the G.O. No. 39/1996, unavailable deposit signifies: "due and payable deposit, which was not paid according to legal and contractual conditions applied by a credit institution which can be found in any of the following situations: (i) the National Bank of Romania has acknowledged that the credit institution involved is not capable, out of reasons concerning directly its financial situation, to pay the deposit and has no immediate perspectives to do it; (ii) it was a instituted a judicial sentence regarding the opening of the bankruptcy procedure of the credit institution, before the National Bank of Romania acknowledged the situation described at point (i)."

[9] Called *the Fund* in the present work.

[10] Republished, Official Gazette No. 587 from August 19th 2010, with ulterior modifications and additions, called in the present work the Government Ordinance No. 39/1996 or G.O. No. 39/1996.

[11] For that purpose, see the provisions of article 240[11] paragraph (5), 240[12] paragraph (1) of G.E.O. No. 99/2006

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decision on the implementation belongs to NBR, on the basis of the report drafted by the special administrator, this decision having as main objective the fact of maintaining financial stability and protecting depositors' interests, by choosing the less expensive alternative for that purpose.

Since they generate radical changes upon the situation of credit institutions, the *restructuring* methods mentioned by law, article 240^{12} paragraph (1), must be approved by the General shareholders assembly. Nonetheless, by derogation from the provisions of article 153^{22} of Law No. 31/1990 on commercial societies, the approval of the General shareholders assembly is not necessary for *implementing* operations such as: assets selling; *deposits transfer*; assets selling with liabilities commitment, by means of which another credit or financial institution acquires assets of the credit institution under special administration and takes over liabilities of the same institution in counter-performance [240^{12} paragraph (1) letters c), d) and e)].

The ratio between the special supervision and special administration is pointed out by the provisions of article 237 paragraph (1) of the G.E.O. No. 99/2006 – "The National Bank of Romania may order for a special supervision measure to be instituted in relation to a credit institution, Romanian legal person, as a result of the infringement of law or of the regulations issued for the law enforcement, acknowledged after the check-ups performed on the spot and/or after the analysis of the reports sent by the credit institution, but also in the case in which is acknowledged a financial precarious situation of the credit institution, if the Bank does not decide for the special administration to be instituted". In reality, the text quoted above points out the right of the NBR to assess the institution of special supervision or administration, and not to rank them. The ratio between the two does not involve either presupposition or exclusion. Finally, the intensity of the "financial precarious situation" is determined by the option for one of the alternatives mentioned above, so that the circumstances of the special supervision may be, as a consequence, causes of the special administration as well.

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2. Measures for deposits protection within special administration. Legal regime

The causes which determine special administration can irremediably affect depositors' interests. Lawmaker has instituted, as protection measures and in the modified form of the special law, the suspension of deposits attraction and the deposits transfer.

2.1. Suspension of deposits attraction. Instituted at article 240[11] paragraph (5) letter b), „*the suspension of deposits attraction and/or of credit granting*" constitutes the basic measure when it comes to *redressing* a credit institution in difficulty, which is ranked after „the debt titles of the credit institution are negotiated and/or a new maturity date of them is established". If the interruption of deposits and other liquidities attraction constitutes a legal ground which is enough for the NBR to withdraw the authorization, then, in this case, the suspension has the role to avoid for the agony state to continue, through an activity artificially performed or illusory and, implicitly, the role to protect depositors.

2.2. Deposits transfer

Deposits transfer constitutes a principal measure when it comes to restructuring a credit institution. Although deposits are unavailable (otherwise the issue of their transfer would never exist in the first place), the lawmaker has opted for the solution of transferring them and not for the solution of their compensation by the Bank Deposits Guarantee Fund, which is more simple and efficient for depositors and regulated by the Government Ordinance No. 39/1996. The administrator may choose for this measure to be implemented only by observing the *minimum cost principle* – thus, the amount of money corresponding to the financing by the Bank Deposits Guarantee Fund of such an operation must be smaller than the compensations to be paid for such deposits.

Deposit transfer operations may be performed by credit institutions or, as the case may be, by financial institutions agreed upon by the NBR, according to the legal eligibility criteria, article 240[14] paragraph (1) of the G.E.O. No. 99/2006, on contractual bases, by observing the minimum cost principle mentioned above and giving priority to the transfer of *guaranteed* deposits.

It may be performed not only the transfer of all guaranteed deposits, but also the transfer of some parts of the latter's. In the case of a partial transfer, the operation is performed so as to *minimize* the risk, if

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such risk exists, for the Bank Deposits Guarantee Fund to remain with the obligation, after the transfer financing, to pay the compensation corresponding to the deposits of the same depositor to the credit institution from which the partial transfer was performed.

The implementation of the deposits transfer does not require the agreement of depositors or of other creditors or debtors of the credit institution, the law providing for the obligation of the restructuring measure to be published, immediately after its implementation, in the Romanian Official Gazette, Part IV, and in one or more newspapers with international circulation, so that the persons involved are notified. The transfer is comparable with the *debt taking over* regulated by common law and here particularized.

Still, it must be insured an equilibrium, so that the transferred depositors must express their option either for maintaining deposits at the beneficiary credit institution, under the conditions established independent of their will („conditions agreed with the credit institution") or to withdraw their deposits, if the latter are not under other duties or interdictions, *without undergoing any penalty form for anticipated withdrawal*. Practically, transferred deposits have at this point the regime of deposits arrived at maturity and, moreover, the withdrawal option is not conditioned by the existence of an anticipated notice.

Transferred deposits are subject, within the beneficiary entity, to their common legal regime, so that the natural operation is here constituted by the withdrawal and not by the compensation of deposits, according to G.O. No. 39/1996. In fact, the statement mentioned above can be upheld also by the provisions of article 240[18] paragraph (2) of the G.E.O. No. 99/2006, according to which „In case there are implemented some restructuring methods consisting in operations which involve the *transfer of deposits* placed at the credit institution under special administration, the National Bank of Romania withdraws that institution's authorization (if the case may be), starting from the date when the contract which is at the basis of the operation of transfer and selling of assets produces effects and, according to the case, notifies the competent legal authority to start the *bankruptcy* procedure"[12].

[12] The bankruptcy of the credit institution in difficulty does not produce legal effects upon the transferred deposits, which can already be found as assets of customers at the new entity.

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Deposit transfer is integrated to the conditions provided for by article 240[14] paragraph (1), in particular in what concerns the continuation of banking services corresponding to liabilities transferred; finally, it concerns the safeguarding of the credit institution in difficulty and the maintenance of resources attracted in the financial-banking area, which is *insured*, in counter-balance, by the enactment of the possibility to finance operations involving both the transfer of the amounts of money and the commitment to guarantees regarding the latter[13] by the Bank Deposits Guarantee Fund. The provisions of article 240[14] paragraph (2) of special law, corroborated with the provisions of article 9 paragraph (7) of the Government Ordinance No. 39/2006 establish the limitation of the financial support by the Fund when it comes to the implementation of the transfer measure of guaranteed deposits ("transfer of guaranteed deposits")

The institution which takes over liabilities of the credit institution under special administration is accountable only for the obligations corresponding to the liabilities which are subject to the transfer according to contractual terms and which are pointed out in the financial statement drafted by the special administrator.

3. Damages received by the deponents prejudiced by a deposit transfer

The protection measures already mentioned and their consequences can be financially supported by the Bank Deposits Guarantee Fund, under the conditions of the Government Ordinance No. 39/1996 – art. 9 par. (2), (7)[14], (8)[15], art. 57-59, corroborated with the

[13] Having the legal regime instituted at article 9 paragraph (9)-(11) of G.O. No. 39/1996. The guarantee is issued when the taking over of liabilities consisting in deposits is not based on the valuation (estimation) provided for by law.

[14] According to art. 9 par. (7) of G.O. No. 39/1996, „When it comes to the enforcement of provisions of art. 240[14] par. (2) of the Government Emergency Ordinance No. 99/2006, the Fund will finance, including by *issuing of guarantees*, *operations involving the transfer of guaranteed deposits* of a participant credit institution and for which the sum which is to be paid by the Fund is smaller than that of the compensations to be paid for the deposits in question. For that purpose, the Fund has the duty to render available to the special administrator, upon his request, the information regarding the value of the compensations to be paid and, respectively, the financing requested.

[15] According to art. 9 par. (8) of the G.O. No. 39/1996, „The amounts of money corresponding to financing, including those resulting from the execution of guarantees

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provisions of art. 240^{5} par. (6)[16], 240^{14} par. (2), 240^{15} par. (1) and (4), 240^{16} par. (5), 240^{21} of the Government Ordinance No. 99/2006.

The financing of operations which involve the transfer of deposits is proposed and justified by the special administrator, with the observance of procedural elements of special law; the justification is based on the analysis regarding the estimated value of the compensations corresponding to deposits in the evidence of the credit institution under special administration, transmitted by the Bank Deposit Guarantee Fund to the special administrator. The financing is demanded from the Bank Deposit Guarantee Fund by the special administrator, on the basis of the approval of the National Bank of Romania [art. 240^{14} par. (2) G.E.O. nr. 99/2006].

As principle, special law establishes, at article 240 paragraph (5), the right of the credit institution *creditors* to receive damages, if they are to be found in a less favorable situation once the restructuring measures are taken than the situation in which they would have been if such measures had never been implemented in the first place and the credit institution had entered directly in liquidation; "the less favorable situation" is determined by taking into account the estimative value which would have been obtained by creditors in case of liquidation, established according to art. 240^{15} par. (1) letter b) and par. (3) of G.E.O. No. 99/2006.

The provisions of article 240^{16} paragraph (5) are reiterated, by receiving efficiency, in the text of article 240^{21} G.E.O. No. 99/2006 („*any prejudiced person*[17], through the measures ordered and implemented during special administration, can address the competent authority for the recovery of the caused prejudice, within 15 days from the date when discovered or should have discovered the occurrence of the prejudice"),

issued by the Fund, according to provisions of paragraph (7), take the form of a debt title of the Fund upon the credit institution from which guaranteed deposits are transferred"

[16] According to art. 240^{5} par. (6) of G.E.O. No. 39/1996, „All the expenses concerning special administration, including those performed by the Bank Deposit Guarantee Fund for carrying out special administration activities, are supported by the credit institution subject to such a measure"

[17] According to art. 59 letter a) of G.O. No. 39/1996, prejudiced person - „any person who, in accordance with the provisions of art. 240^{21} par. (2) of the Government Emergency Ordinance No. 99/2006, approved with modifications through Law No. 227/2007, with the ulterior modifications and additions, *has obtained an enforceable judicial decision* by means of which is recognized his *right to receive damages* for the prejudice suffered as a result of the measures ordered and implemented throughout the special administration of a credit institution".

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being at the same time in accordance with the provisions of article 57 G.O. No. 39/1996.

Since the texts of the articles mentioned above make no distinction, they regard all the persons who receive damages, including the owners of transferred deposits. Consequently, prejudiced persons can receive damages without distinction, on the legal basis of the provisions already mentioned, through the Bank Deposit Guarantee Fund.

Damages[18] are established as the difference between the estimative value which could have been received by the creditor, through distribution, in case of bankruptcy of the credit institution, and the amounts of money effectively cashed after the product of the liquidation is *distributed* to all the goods and assets of the credit institution, operation performed in accordance with the extinguishment order of debt titles provided for by the Government Ordinance No. 10/2004 on the bankruptcy of credit institutions. The estimative value is calculated for the date when special administration is instituted. It must be pointed out that the prejudice of depositors is possible, taking into account the transfer of deposits outside their legal influence sphere, so that they have to accept "the agreed conditions"; moreover, the bankruptcy of a credit institution, started after the end of the deposit transfer, can easily bring a creditor in role of the person receiving damages.

The measures implemented during special administration cannot be suspended or abolished by courts – which can at most acknowledge their *illegality*, so that the party on behalf of which was given a sentence can be the beneficiary of *a claim for damages* for the caused prejudices, except for the cases involving penal accountability [art. 240^{22} par (1)].

Damages fund. Damages are supported through a Fund specially constituted for that purpose and administered by the Bank Deposit Guarantee Fund. The Special Damages Fund is regulated by the Government Ordinance No. 39/1996 art. 58-67, so as to be *insured the financial resources* necessary for the payment of damages *for prejudiced persons*, through the measures ordered and implemented during special administration, in accordance with the provisions of art. 240^{21} of the Government Ordinance No. 99/2006; credit institutions have the duty to

[18] According to art. 59 letter. b) of the G.O. No. 39/1996, damages signify the „amount of money determined in accordance with the provisions of paragraph (2) of article 240^{21} of the Government Emergency Ordinance No. 99/2006, *which must be paid*, from the special fund, to the prejudiced person.

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pay an annual contribution to the Fund, the paid contributions being recognized as expenses deductible from a fiscal point of view (art. 64 of the G.O. No. 39/1996).

The debt titles of the Fund upon a credit institution, corresponding to *the transfer of guaranteed deposits*, according to articles 9 paragraphs (7) and (8), will be compensated *from the fortune* of the credit institution in question [art. 27^1 of G.O. No. 39/1996].

Conclusions

The world financial-banking crisis has determined the reformation of special law, by enforcing banking supervision by the National Bank of Romania, by rendering responsible the entities dealing with the leadership and administration of credit institutions and, not least, by making essential special procedures, particularly special administration, a rule in the cases of banking crisis situations. Finally, the measures taken aim to prevent great bankruptcies, but also to save national banking systems, equally.

In the context described, lawmaker's preoccupation has also been centered on banking customers, depositors of funds, law containing special provisions capable to save their investments and with an impact upon the banking system itself. The possibility of customers to choose the maintenance of transferred deposits, but also to receive damages after such a measure is taken, takes the form of a genuine guarantee of their rights, together with the guarantee of restitution, through the payment of a compensation, according to the Government Ordinance No. 39/1996.

To summarize, irrespective of the option of the National Bank of Romania, in a concrete case, the customer of the bank is saved, through the totality of the measures instituted, between the limits of the deposits guarantee ceiling, provided by law.

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