Special procedures, methods of bankruptcy prevention for credit insitutions and companies – a comparative analysis -

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Motto:
"*The lack of money is the root of all evil*"
George Bernard Shaw

Summary

Along time, the treatment of merchants in a difficult position has witnessed interesting developments.

In many cases, the state of insolvency has become treatable, and that is why insolvency became different from bankruptcy. Next in time, a new development was the redress procedure or judicial reorganization, which aimed at ensuring the survival of merchants who deserve to be saved[1].

Warning on crisis situations for a trading company can come from external sources (banks, external auditors) or from internal sources (accounting information, internal auditors or audit). The insolvency prevention measures are the debtor's options, under the general law, while in the case of credit institutions, they are obligations imposed by the special law of the Prudential Supervisory Authority.

INTRODUCTION

A key component of the legal framework of a market economy is to regulate banking and closely linked to it, to regulate trading companies. Between these two legal regulations, there are many similarities but differences as well.

Starting from this premise, in this paper, we shall contemplate the similarities of regulations on special supervision and special administration, applicable to credit institutions, in relation to the regulations on judicial reorganization applicable to trading companies other than banks.

Both cases involve tackling upon special procedures, regulated by the Romanian legislation in force and require a comparative analysis of the treatment specifically applicable to credit institutions against trading companies.

Trading companies are established according to Law no. 31/1990 on trading companies, republished, subsequently amended and supplemented, as amended by Law no.

[1] US Bankruptcy Reform Act, 1978, Gheorghe Piperea, Insolvency: Law, Rules, Reality, *Wolters Kluwer*, Bucharest, 2008.

161/2003, with subsequent amendments and supplementations. For the situation when these companies do not honour their obligations towards their creditors, a special procedure is needed, which involves, as the case may be, a first stage attempting to improve the economic and financial redress of the trading company; and if this fails, it seems necessary to remove the company from the market, through the bankruptcy procedure.

Initially, the legal regulation of such procedures resulted in the adoption of Law no. 64/1995 on the procedure of reorganization and liquidation proceedings[2], which applied to all types of trading companies, including banking institutions[3].

This fact made that, during 1996 - 1997, three banking institutions - Dacia Felix SA, Renasterea Creditului Romanesc - Credit Bank SA and "Columna" Bank S.A. were taken to court by their main creditors under Law no. 64/1995.

At the same time, in practice, the arising difficulties have revealed aspects related to the specifics of credit institutions, drawing attention upon the need of a special procedure for their judicial reorganization and liquidation.

Following a fruitful collaboration between professional experts from Romania and abroad (the National Bank of Romania, the World Bank and the International Monetary Fund) the coordinates deemed to be taken into consideration, when drafting legislation specific to banking institutions, were drawn up.

Thus, in the new banking law - Law no. 58/1998[4] - provisions applicable to special procedures were introduced - special supervision and special administration – meant to ensure the redress of banks' precarious financial stance, as a prerequisite to prevent their introduction into bankruptcy proceedings, while Law no. 83/1998[5] governed the judicial liquidation procedure for banks. The latter law was the special legal framework applicable to banks, offering a specific way for such companies; the special law made reference to the general law applicable to companies when the procedure would apply in a similar manner.

Currently, the procedure regulation is stipulated in G.E.O no. 99/2006[6], amended and approved[7] by Law no. 227/2007 regarding the special supervision and special administration

[2] Published in the R.O.G. no. 608/13.12. 1999.

[3] Banking institutions originally established under Law on nr.33/1991 on banking, had to undergo, during the licensing procedure, two stages: approval for their setting up and the operating license granted by the central bank, the NBR. The formation stage of the company which had the endorsement of becoming a banking institution required the bank to use the procedure provided for by Law no. 31/1990, republished, in order to become a legal status company. Subsequently, the entity would go to the National Bank to be granted the operating license.

[4] Published in R.O.G. no. 121/23.03.1998.

[5] Published in R.O.G. no.159/22.04.1998.

[6] G.E.O. no.99/6 December 2006, on credit institutions and capital adequacy approved, supplemented and amended by Law nr.227/ 4 July 2007 (Romanian Official Gazette, Part I, nr.1027/27 December 2006 and nr.480/ 18 July 2007).

[7] G.E.O. no. 99/2006 applies to credit institutions, Romanian legal persons, including their foreign branches and the credit institutions from other Member States and from third countries, as regards their business carried out in Romania. As a novelty, we mention the enforcement of G.E.O. no. 99/2006 for holding financial companies, which, together with G.E.O. no. 98/2006, creates the prerequisites for a uniform and consistent supervision of financial groups (holding or financial conglomerates) both in Romania, and in the EU member countries as well.

of credit institutions and Government Ordinance no. 10/2004[8], amended and approved by Law no. 278/2004 on the bankruptcy of credit institutions.

As for judicial reorganization, it is governed by the General Law, i.e. Law no. 85/2006[9].

Preventing the entry of companies and, moreover, of credit institutions, into the legal procedure of bankruptcy has a major practical importance, considering its economic and social aspects, and, in the case of the latter category, it can have adverse consequences on both the Romanian banking system as a whole, and on some broad categories of persons – such as savers or other creditors, but on the shareholders of those respective institutions as well.

1. ROLE AND SPECIFICITY OF SPECIAL PROCEDURES FOR CREDIT INSTITUTIONS AS COMPARED TO TRADING COMPANIES

Starting from the considerations mentioned above, we will examine the specificity and role of special procedures for credit institutions, compared with that of trading companies in general.

1.1. Specificity and role of special procedures for credit institutions

In the case of credit institutions, the special procedures covered in Chapter VIII of G.E.O. no. 99/2006 is conducted under the supervision of the national authority in the field.

In accordance with Art. 7, section 2 of this normative act, the competent authority is the national authority empowered by law or other regulation to prudentially supervise credit institutions.

Starting from this basis, Art. 4. (1) of the same regulation expressly establishes that "The National Bank of Romania is the competent authority with regard to regulation, licensing and prudential supervision of credit institutions".

We appreciate that, in order to properly understand the legislator's rationale, we should consider the inclusion of the special procedures covered in Chapter VIII of Title III of Part I of the G.E.O. no. 99/2006 which show that these procedures are devised as ways of prudential supervision conducted by the National Bank of Romania.

In fact, the first article of that title of the normative act establishes, in a uniform manner, for the purpose of prudential supervision and the authority that carries it out, the ways and means by which it is carried out. *Expressis verbis,* the text in question - Art. 164 shows that "in order to protect the interests of depositors and ensure the viability and stability of the entire banking system, the National Bank of Romania ensure prudential supervision of credit institutions, Romanian legal persons, including their branches established in other member states or third countries, by establishing rules and prudential banking ratios and monitoring their compliance, as well as other requirements prescribed by law and applicable regulations, at individual, consolidated and under-consolidated levels, as the case may be, in order to prevent and limit risks specific to banking ''.

[8] G.O. no. 10/ 22 January 2004, on the bankruptcy of credit institutions approved, supplemented and amended by Law nr.278/ 23 June 2004 (Romanian Official Gazette, Part I, nr.84 of 30/01/2004 and no. 579 of 30/06/2004).

[9] Published in the R.O.G. no. 359/21 April 2006.

Special supervision and special administration procedures are devised as part of the broad scope of prudential supervision. They are justifiably considered in this field, if we consider that these measures of the competent authority in the field are the result of the findings of “on-site inspections and/or analyses of the reports submitted by credit institutions, and in case of a precarious financial stance” of a credit institution.

That is why the establishment of these measures is a consequence of the National Bank of Romania's ongoing prudential supervision of credit institutions, throughout the completion of this responsibility, from the granting of the operating license and until its withdrawal. Since these two special procedures happen during this period, it is natural that they should be conducted under the supervision of the competent authority in the field.

Supporting the point of view according to which these special procedures belong to the scope of prudential supervision, we should bear in mind that they can be enforced by the National Bank of Romania on a credit institution, Romanian legal person:

- during prudential supervision applied on a permanent basis;
- in situations that can be characterized as pre-bankruptcy proceedings.

Article 237 par. 1 and Art. 240 par. 1 of G.E.O. no. 99/2006 empower the National Bank of Romania to establish the special supervision measure:

a) for breach of the law or regulations issued in its application;

b) when, the credit institution has repeatedly violated the law and/or regulations or other documents issued in its application, or when “the requirement on assuring the operational management of the business of credit institutions by at least 2 people is no longer satisfied ".

The legal provisions referred to above reflect the current activities of the banking supervisory authority, which, through arrangements established by law - changes made during on-site inspections or the analysis of the periodic reports submitted by credit institutions - concludes the imposition of supervision measures.

Besides, via Article 226, paragraph. (1), the legislator empowers the National Bank of Romania to impose on “any credit institution, Romanian legal person who does not comply with the requirements of this emergency ordinance, regulations or other documents issued in their application, or if it does not take into account the recommendations of the National Bank of Romania, to take the measures for redress in the shortest delay of time possible. "

The purpose for which the National Bank is entitled to dispose on such measures is the provision on the “redress in the shortest delay of time possible", implying that the establishment of special supervision or special administration is intended to ensure the redress so as to prevent the credit institution’s entering bankruptcy proceedings.

The measure of establishing special procedures can be seen both as a measure belonging to prudential supervision and as a trigger for preventing the start of bankruptcy proceedings against a credit institution, if we consider they can be established:

- for the breach of regulations or the failure to comply with the requirement on providing the operational management of the business of a credit institution by at least 2 people and in case of a precarious financial stance" of the credit institution (special supervision) or
- when the "establishment of the special supervisory measure was not successful for a period of up to 3 months" or when the “equity stands at a level not exceeding half of the minimum capital requirements calculated according to regulations" (special administration).

When analysing Art. 237 and 240 of the G.E.O. no. 99/2006, for the cases cited above, it appears that the two special procedures are similar to the judicial reorganization

procedures regulated by Law no. 85/2006 on the procedure to prevent triggering bankruptcy procedures.

1.2. Specificity and role of special procedures for trading companies

Judicial reorganization regulated by Law no. 85/2006[10] shall be conducted, as the name of the institution shows, under judicial control, while in case of the two special procedures applicable to the credit institutions analyzed above, it is conducted under the supervision of the national legal authority in the field.

When analyzing the differences, we must start from the fact that the legislator has considered judicial reorganization, established by Law no. 85/2006, as a way under insolvency, under the *judicial system*, while special procedures applicable to credit institutions are the seat of matter in the law on credit institutions G.E.O. no. 99/2006, amended and approved by Law no. 227/2007 and not in the special law – G.O. no. 10/2004 which establishes bankruptcy proceedings for credit institutions.

Thus, the legislator is the one who excluded the special procedures to which we refer from the judicial procedure's scope, which is limited solely to their bankruptcy proceedings.

Judicial reorganization, in itself, is an exceptional insolvency situation procedure. In fact, in one of the initial drafts of Law. no. 85/2006 they even proposed to dispense with judicial reorganization in favour of extrajudicial measures to prevent insolvency, considering the model applicable to credit institutions.

Starting from the foundation of reorganization, which is the reorganization plan[11], the literature has expressed the view that judicial reorganization is contractual in its nature[12].

Last but not least, it should be pointed out that judicial reorganization has a strong institutional feature as well, because it is based on the need and the requirement of structural changes in the debtor's business.

As a result of the provisions of Art. 95 (1) of Law no. 85/2006 "The reorganization plan shall indicate the redress prospects in relation to the debtor's specific business and opportunities, with the financial resources available and market demand for the debtor's offer, and shall include measures consistent with public order, including the selection method, appointment and replacement of administrators and directors." At the same time, the reorganization plan must include the mandatory programme for the payment of claims[13].

After confirmation of the reorganization plan and the start of reorganization, the debtor is obliged to carry out, without delay, the structural changes provided for in the plan.

Penalty loss to the debtor's assets or failure of the reorganization plan means passing to bankruptcy.

[10] Published in the R.O.G. no. 359/21 April 2006.

[11] N. Ţăndăreanu, Judicial Reorganization Procedure, ALL Beck Publishing House, Bucharest, 2000, p. 217.

[12] For development to see op., P. 217 ff.

[13] Article 95 (2) of Law no. 85/2006.

2. DEPLOYMENT OF SPECIAL PROCEDURES

2.1. Bodies empowered to monitor the deployment of special procedures

2.1.1.Bodies monitoring judicial reorganization

According to Art. 5 of Law no. 85/2006, the bodies enforcing the insolvency procedure are, in general, courts, the syndic judge, the judicial administrator and the liquidator. They must make sure about conducting, with celerity, the acts and operations as provided by law and about the legality of carrying[14] out the rights and obligations of other participants in these acts and operations.

As for the bodies empowered to monitor the deployment of reorganization proceedings as a stage in the insolvency procedure in general, they are the syndic judge and the judicial administrator. These bodies should not be mixed up with the people who can propose the reorganization plan and who are expressly provided for in Art. 94 of the law invoked.

In the articles of Law no. 85/2006 governing matters of reorganization proceedings, the roles of the syndic judge and the judicial administrator are clearly individualized[15].

Thus, corroborating the provisions of Article 11 let. J, and Art. 5 of Law no. 85/2006, we can infer that the syndic judge acknowledges and confirms the reorganization plan after the creditors' vote.

The syndic judge can not go to law himself but pronounce on the admissibility or rejection of the plan as a result of the wording of the request by the persons expressly provided for in Art. 94 point 1 let. a)-c) of Law no. 85/2006[16].

Under the procedure we are analysing, a syndic judge's powers are limited to the judicial control of the judicial administrator's activity underlying the insolvency procedure.

At his turn, the judicial administrator is the natural or legal person, practitioner in insolvency, authorized under the law, appointed by the syndic judge to exercise his powers during the reorganization proceedings.

As a result of the provisions of Article 11. par. 2 of the law invoked, the judicial administrator has managerial powers and his decisions can be controlled in terms of their opportunity by creditors, through their bodies.

In essence, the judicial administrator's role refers to:

- ✓ Supervision of the debtor's activities, meaning that he checks how the debtor conducts his operations in accordance with the commitments he has made in the reorganization plan and observe the schedule of claim payments;
- ✓ Quarterly reporting to the syndic judge and creditors on the debtor's financial stance.

Thus, the quarterly report should reflect the debtor's financial stance, the manner in which during the period under analysis he complied with the provisions of the reorganization plan, the reason for any breach and what measures have been taken to prevent negative effects, and especially the manner in which the debtor has made payments to his creditors,

[14] Celerity is stipulated in Law no. 85/2006 and G.E.O. no. 99/2006.

[15] Case distribution relating to the procedure laid down by the insolvency law to judges appointed as syndic judges is done according to Art.53 of Law no. 304/2004 on judicial organization, republished, at random, in the IT system.

[16] See subcap. 3.2. in this paper.

observing the schedule of claim payments. The report is submitted to the Registry of the Court and creditors will be notified only subsequent to the approval of the creditors' committee.

2.1.2. Bodies monitoring the special procedure for credit institutions

In the case of credit institutions, the establishment of the two special procedures regulated by G.E.O. no. 99/2006 is established to be the responsibility of the National Bank of Romania, which, in accordance with Article 4. (1) of the same normative act, is defined as the authority competent to prudentially supervise them.

According to the provisions of Article 233. par. (2) in conjunction with the provisions of Article 226. par. (2). let. g) of G.E.O. no. 99/2006, establishing special procedures falls within the competence of the Board of the National Bank of Romania[17], who, according to Article 33. par. (1) of Law no. 312/2004 on the Statute of the National Bank of Romania, is empowered to decide on the measures in the field of the prudential supervision of credit institutions.

Thus, the National Bank of Romania is the institution which manages and monitors how the two specific procedures are carried out, contemplates the effect of their establishment and acts accordingly.

The role of **prudential supervision** in the most efficient reorganization of a credit institution is done:

- *On the one hand*, via the daily work of the Special Supervisory Commission in the credit institution in question, as well as via the periodic reports on its situation, submitted to the National Bank of Romania, and

- *On the other hand*, via the role of the Board of the National Bank of Romania, which, according to Article 239. par. (2) of G.E.O. no. 99/2006, is empowered to draw conclusions from the periodic reports of the commission established and therefore, decide on either the continuation or the termination, under the law, of the enforced procedure.

In the case of **special supervision**, the procedure is performed on the one hand, by a collective leadership body - the Board - and, on the other hand, by the specialists of the National Bank of Romania.

The Board is the body that provides a measure on the establishment of the special supervision of credit institutions, in accordance with the law cited, together with the special supervision commission's duties in Article 238. par. (1) of the same legislation, and by analyzing the periodic reports submitted by this commission.

Moreover, according to Article 239. (2) of G.E.O. no. 99/2006, the Board decides on the special supervision continuation or discontinuation, in observance of the law.

At their turn, specialists of the National Bank of Romania make up the commission established for that purpose, which will deploy the activity itself, i.e. special supervision of credit institutions.

The normative act stipulates that special supervision is carried out by the commission, composed of up to 7 specialists from the National Bank of Romania, one of which ensures the fulfilment of duties as chairman of the commission and one as the vice-president of it. " The legislator does not refer to the Division these specialists must come from. Of course, the members of the commission will be selected mainly from among supervisors in the specialised division – the Supervision Division, but there is no impediment

[17] Published in the R.O.G no. 582/30.06.2004.

to include in this commission others employees of the National Bank of Romania who, due to their professional profile, could be useful in the case of the specific special supervision.

The legislator is the entity that, via the provisions of Art. 238, establishes the coordinates within which this commission conducts its mandate[18].

Throughout the period of special supervision, statutory bodies and the persons designated pursuant to the statute of the credit institution, provide the management of its current business. However, one can not talk about total management, as exercised until the establishment of this procedure. Here, we are in paragraph. (3) of Art. 238 of the emergency ordinance under which, "during the period of special supervision, the shareholders' general meeting, the Board and the management of the credit institution can not act contrary to the measures ordered by the special supervisory commission." From the wording of the quoted text, undoubtedly, we understand that the governing bodies of the credit institution have to subordinate their decisions to the measures ordered by the special supervisory commission, but these decisions relate solely to the measures previously adopted by the commission.

Nevertheless, the question arises what would be the regime of the decisions of the governing bodies which are not contrary to the commission's decisions, which had previously not discussed and pronounced on the decisions of the credit institution's statutory governing bodies.

If these decisions are prior to any pronouncement by the commission, this does not mean that such decisions, detrimental to the institution and the established procedure, can produce effects under any conditions. Blocking such decisions can be conducted by the special supervisory commission, if we read carefully the powers of the commission established by Article 238. (1). a) - e). Thus, this is entitled to monitor how the Board and / or directors of the credit institution act for the establishment and implementation of the

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[18] *First*, the commission's duties are set out expressly by the Board of the National Bank of Romania, but their nature is indicatively referred to in paragraph. (1) of the article, which shows that they relate mainly to:

a) Monitoring how the Board and directors of the credit institution or, where appropriate, the supervisory council and the directorate, act for the establishment and implementation of the measures necessary to remedy deficiencies or, as appropriate, formulate recommendations and measures ordered by the National Bank of Romania;
b) a) suspend or abolish the decisions of the credit institution's statutory bodies, if they are contrary to prudential requirements and leading to the deterioration of its financial stance;
c) formulate requests for modifications / supplementation of the management framework, strategies, processes and mechanisms implemented by the credit institution;
d) limit and/or suspend activities and operations for a certain period;
e) any other measures deemed necessary to remedy the situation of the credit institution;
f) submit proposals to the National Bank of Romania for imposing certain measures or applying sanctions provided by law, if the Board or managers of the credit institution or, where appropriate, the supervisory council and Directorate, breach the measures ordered by the commission.

Second, the status of the special supervisory commission is determined. Thus, the text of paragraph. (2) shows *expressis verbis* that it does not replace the directors of the credit institution with regard to the current administration of business and the competence to bind the credit institution." So, the responsibility for the management of the institution is maintained at the level of the executive management of the credit institution which is committed in relations with third parties, and also with the prudential supervision authority, via the leaders of the institution, in the same way as until the time of special supervision.

measures necessary to remedy deficiencies", to suspend or even abolish “acts, decisions of the statutory bodies of the credit institution, which are contrary to prudential requirements and would lead to the deterioration of its financial stance", including to limit and suspend certain activities or transactions over a certain period. Even more, the legislator grants total freedom to the commission to take “any other measures deemed necessary to remedy the situation of the credit institution." The wording of this text in the regulation clarifies the measures the special supervisory commission may take. i.e. they “should be deemed necessary to remedy the situation." Hence, the conclusion that the legislator had in mind the responsibility of the commission members for taking action under the purpose for which the special procedure was established.

If it is demonstrated that the measure ordered by the commission can not be considered necessary to remedy the situation, or even more, if it is demonstrated not to have been necessary for this purpose, the liability of the commission members who took that measure can be invoked. As the legal text stipulates, these measures can be taken only by the commission as a whole and not by one or some of its members.

Liability is individual, but it arises from the actual participation of commission members to taking that measure in the commission.

In order to take the most reasonable decision, par. (4) of the same article of the emergency ordinance, *expressis verbis*, stipulates the right of access of the special supervisory commission members “to all documents and records of the credit institution" and, as a correlative obligation, to keep professional secrecy on the operations of the respective credit institution.

We believe that the legislator has sought to strengthen both the right and obligation of the supervisors, members of the commission, precisely in order to ensure the smooth enforcement of the procedure provided for by the National Bank of Romania. We support this point of view, taking into account that the legal grounds on the right and correlative obligation mentioned existed throughout the respective regulation. Thus, this right may be based on various legal texts, starting with Art. 4. (2) which states that “in exercising its powers provided by law, the National Bank of Romania can collect and process any relevant data and information ", or in this particular case, we are in the presence of experts from the National Bank of Romania, performing a task established by this authority.

When we deal with **special administration**, the procedure shall be exercised by a special administrator appointed by the National Bank of Romania by the decision of establishing such a measure. A special administrator can be a natural or legal person, who has the appropriate experience or the Bank Deposit Guarantee Fund. Throughout these proceedings, the special administrator takes over all the duties of the Board and of the directors of the credit institution, established by law, the by-laws and the internal regulations of the credit institution[19].

In essence, the power of the special administrator lies in determining the optimal conditions to maintain the value of the credit institution’s assets, the elimination of existing deficiencies in the patrimony management, receivables collection and establishing the possibility of redress of the credit institution’s financial stance.

The appointment - and replacement for that matter - of the special administrator is an attribute of the competent authority, which can appreciate, function of the concrete situation, who may be the right person to perform the particular tasks of a special administrator. The law stipulates, in Article 242. (1), that the special administrator can be

[19] Art.244 of G.E.O. no. 99 / 2006.

both a natural or a legal person, required to have adequate experience (of course, in the specific field); it can be a specialized legal entity from the system, as indicated by law, i.e. the Bank Deposit Guarantee Fund. This provision is consistent with that contained in Art. 2. (1). b) of G. O. no. 39/1996 on the establishment and operation of the Bank Deposit Guarantee Fund, introduced by Law no. 178/2004, which sets as one of the purposes of this institution," the conduct of business, if it is appointed as special administrator .... ".

The special administrator, once appointed, under the law, must take into account, in carrying out his mission, the provisions of Art. 246 of the Emergency Ordinance, which provides the legal framework regarding this exercise.

The text of the law establishes as its main task: to establish optimal conditions for the maintenance of the value of the credit institution's assets; the elimination of existing deficiencies in the patrimony management in writing off claims and establishing the possibility of redress of the credit institution's financial stance. To accomplish these tasks, the special administrator is given the opportunity to take whatever measures he deems necessary but only within[20] the limit of his powers as provided by law".

In this respect, the law establishes, at par. (2), which are the measures that can be taken by the special administrator; and paragraph. (3) sets those which the legislator believes must be taken by him. Beyond this framework, the legislator grants the right to the National Bank of Romania, via Art. 243, if they deem necessary, to set certain limits and/or conditions on the business of that credit institution, which they communicate to the special administrator who is liable for their observance.

The scope of the special administrator is comprehensive, if we consider Art. 244, stipulating that he takes the full powers of the Board and of the directors of the credit institution, which they hold on various grounds, the law indicating that this refers to their duties, as established by "law, the by-laws and internal regulations of the credit institution".

The active role of the special administrator is not limited to the tasks related to the administration of that credit institution, but, unlike its managers, he must draw up special reports, on regular basis, to notify the competent authority which charged him with this mandate, the measures taken and their effects. The first report must be submitted to the National Bank of Romania within 2 months from appointment, which, according to Article 251. (3) may be extended by the supervisory authority with maximum another month and only for reasons which the central bank consider necessary.

In order to have a fair view of the credit institution in question, the report of the special administrator must:

1. assess the possibility of its redress in terms of financial security, presenting, in this regard, his recommendations;

2. be sufficiently detailed to substantiate the recommendations made by the administrator;

3. be accompanied by documents relating to the valuation of the credit institution's assets and liabilities, the situation of the receivables collection, the cost of maintaining the assets and the liabilities' liquidation.

[20] With this wording, we believe that the legislator contemplates the training and experience in banking of the person concerned, and his capacity to apply, in a professional manner and with accountability, the measures he takes and for which he is liable.

1.1. Category of persons covered by special procedures

Initially, the regulation of legal procedures covered by our analysis was Law no. 64/1995 on the procedure of judicial reorganization and liquidation proceedings[21], which applied to all types of companies, including banks.

Currently, as already indicated, the regulation of special procedures shall apply to:

- **credit institutions** in accordance with the provisions of G.E.O. no. 99/2006, amended and approved by Law no. 227/2007 and G.O. no. 10/2004 as amended and approved by Law no. 278/2004;

- **trading companies**, in accordance with Law no. 85/2006.

Both special procedures contemplate, in essence, trading companies. In support of this view, we take into account the fact that the law on banking includes a few special rules with regard to by-laws of banking institutions and issuers of electronic cash[22]. That is, the rules of common law in matters contained in Law no. 31/1990 apply.

Compared to the common law, which is represented by trading companies, particulars refer to: the shareholders of banks and issuers of electronic cash; the share capital; the registered office; bank management; the lines of business; the feasibility study; and the independent auditor.

In addition to the general issues mentioned above, we should bear in mind that the legislator expressly lists the companies that may or not benefit from the special procedure.

It should be pointed out that the **judicial reorganization** provided by Law nr.85/2006 **shall apply** to the following categories of debtors who are in a state of insolvency or imminent insolvency, except as provided in Article 1. (2). c) and d):

1. trading companies;
2. cooperative companies;
3. cooperative organizations;
4. agricultural firms;
5. economic interest groups;
6. any other legal entity of private law deploying economic activities.

The procedure mentioned above **is not accessible** to borrowers to whom the simplified procedure applies, namely:

- ✓ individuals traders (and family associations)
- ✓ companies that meet one of the conditions of:
  - not having goods
  - not submitting accounting documents
  - headquarters no longer existing / does not correspond with that of the ORC
  - administrator not found
  - expressing their bankruptcy intention

[21] Published in R. O.G. no. 608/13.12.1999.

[22] According to Article 15 of Law no. 58 of March 5 1998 on banking, "Banks, Romanian legal persons, can operate only on the basis of a licence issued by the National Bank of Romania. They constitute the legal form of a joint stock company, under the approval of the National Bank of Romania, in compliance with the provisions in force for trading companies. Banks, Romanian legal persons, will have their head office and, where appropriate, their actual office, in the location of their main leadership and management centre for their statutory business on the Romanian territory".

- not benefiting from reorganization (5 years)
- not recognizing the state of insolvency, when demand for triggering the procedure is submitted by creditors.

As to the **procedure laid down by G.E.O. no. 99/2006, amended and approved by Law no. 227/2007**, this **applies** to[23] credit institutions, Romanian legal persons that are set up and operate in compliance with the general provisions applicable to credit institutions and with specific requirements, in one of the following categories:
a) banks;
b) credit co-operative organizations;
c) saving and lending banks for housing;
d) mortgage banks;
e) issuers of electronic cash.

3. Ways of deploying special procedures

3.1. Judicial reorganization of trading companies

General Law, Law no. 85/2006[24], defines in Art. 3. (1) 20, judicial reorganization as the procedure applicable to the debtor, legal person, in order to pay off his debts, according to the schedule of claim payments. At the same time, this procedure involves the "drawing up, approval, implementation and compliance with a plan, called reorganization plan, which may provide, together or separately:

a) the debtor's operational and/or financial restructuring;
b) corporate restructuring by altering the capital structure;
c) business downsizing by the liquidation of certain assets of the debtor's.

Since in this paper we intend to conduct a comparative study of the special procedures as a means of bankruptcy prevention of banking institutions and trading companies, we shall focus only on this in our comparative analysis.

Thus, just like in the case of prudential supervision and special administration, the judicial reorganization procedure is done under the law, under the supervision of competent authorities and based on a plan[25].

As for the reorganization plan, the legislator has sought to redress the lines of business specific to each trading company.

However, daily, in real life, only 1-1.5% of reorganization cases are successful.

In the view of academics and practitioners[26], the real and fundamental cause of reorganization failure is precisely its judiciary character, the reorganization procedure is an

[23] Article 3 of G.E.O. no. 99/Dec. 6. 2006.
[24] Published in R.O.G. no. 359/21 April 2006.
[25] The special administrator's report is the starting point of the analysis conducted by the Board of the National Bank of Romania in order to take the appropriate decision for the future of that credit institutions. Thus, according to Article 252. (1), "within 15 days from receiving the report of the special administrator, the National Bank of Romania decides on the opportunity of maintaining special administration and decides on the recommendations made by the special administrator". After studying the report, the National Bank of Romania may reach one of two conclusions that are valid, raised by law and, accordingly, take a decision.
[26] Gheorghe Piperea**,** Insolvency: Law, Rules, Reality, Wolters Kluwer Publishing House, 2008.

insolvency proceeding which, invariably, is public. The negative publicity is considered to affect very much the debtor's credibility. Meanwhile, the inevitable delay and the formalism of the judicial proceedings could prevent the company to initiate and implement successfully the reorganization proceedings. We consider that confidentiality which is essential for a successful redress, can be ensured only for preventive, extrajudicial or consensual measures, outside judicial proceedings.

This argument can only strengthen further the view that the redress of a credit institution's business can be a total success solely through special supervision or special administration, and not turn it into a failure many times, as things happen in the case of reorganization proceedings.

On the other hand, judicial reorganization is a bankruptcy procedure *lato sensu* involving the debtor's insolvency, which is the negative element affecting most the debtor's credibility and image.

As for the reorganization plan content, it is set in Art. 95 pt. 5 of Law no. 85/2006; the duration of its execution shall not exceed 3 years, counting from the date of confirmation.

According to Art. 98 (1) of Law no. 85/2006, one copy of the proposed plan shall be submitted to the Court Registry and to the Trade Register or, to the Register of agricultural companies and shall be communicated to the debtor by the special administrator, to the judiciary administrator and to the creditors' committee.

Within 20 days from the registration of the plan in court, the syndic judge will convene a meeting where he will summon those who proposed the plan and the persons mentioned above, with a view to hearing them. By analyzing the content of the reorganization plan, after the expressing of the creditors' opinion that were present at the convened meeting[27], the syndic judge examines whether it has been filed with regard to Art. 94 of Law no. 85/2006[28], and it will admit or reject it[29].

The measures to prevent bankruptcy are options of the debtor and creditor/or creditors and not obligations. Thus, in practice. it was found many times that the debtor has not submitted any reorganization plan, even if he had expressed such an intention[30]. Moreover, unfortunately, as a rule, none of the subjects entitled has proposed a plan, which makes us conclude that the procedure of judicial reorganization is the exception.

Or, in the case of credit institutions, the special supervision procedure or special administration is mandatory.

Another aspect that needs to be reviewed in the context of our comparative analysis is the confirmation of the reorganization plan.

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[27] Against actions, measures and decisions taken by the creditors' committee, any creditor may dispute, at creditors' meeting after, previously, he had informed the creditors' committee about the challenged measures, and the solution adopted by it did not answer creditors' interests. (Article 17. 6).

[28] This law article lists the categories of persons who may propose a reorganization plan and establishes certain conditions that must be met.

[29] In a case decision (No. 207/10.03.2008, file. no.15901/54/2006 Craiova Court of Appeal) the judicial administrator's argument on the debtor's entering bankruptcy because of the lack of a reorganization plan has been rejected as groundless, as the company could not propose this plan since its opposition against the application by which the creditor requested opening insolvency proceedings was rejected by sentence no. 329/11.05.2007. In this case, the reorganization plan could be formulated only by the judicial administrator or by creditors that hold together or separately 20% of the claims.

[30] Decision no. 203/28.02.2006, file no. 74/F/1/2006 Craiova Court of Appeal

Thus, we must show that, although the judicial reorganization plan was accepted by the syndic judge, afterward, it can be confirmed or unconfirmed[31]. In the latter case, that of an unconfirmed plan, the syndic judge will dispose of the debtor's entering bankruptcy.

For a plan to be confirmed, the syndic judge will check whether the cumulative conditions laid down by Art.101 paragraph 1, let. a-c and Law no. 85/2006 have been complied with. At the same time, he will determine whether the reorganization plan presents a fair and equitable treatment with respect to all creditors[32].

Confirmation of a reorganization plan prevents the proposal, acceptance, confirmation or vote of any other plan.

In fact, according to Article 252. (4), based on the reports of the special administrator, the National Bank of Romania may decide, at any time, to terminate the special administration, with the resumption of the business of the credit institution under the control of its statutory bodies, or it may withdraw the operating license of the credit institution, with natural legal consequences. This principle is similar to that provided in Article 103. (1) of Law no. 85/2006, referring to trading companies stipulating that the "syndic judge shall dispose, on grounded reasons, either the end of the insolvency procedure and the taking of all measures for the debtor's reintegration in trading business, or the reorganization termination and the switch to bankruptcy."

Such an approach is found in the texts of Government Emergency Ordinance no. 99/2006 as well. Thus, Article 253. (1) shows that when the National Bank of Romania, based on the special administrator's report, finds that the credit institution to which special administration was established has recovered from a financial point of view and falls within the prudential requirements set by regulations, the National Bank of Romania can decide to terminate special administration and resume the credit institution's business, under the control of its statutory bodies.

In the second case, according to Article 252. (2), if examining the special administrator's report, the central bank considers that there are no conditions to improve the credit institution's financial stance for it to comply with prudential requirements prescribed by the regulations in the field, then, the National Bank of Romania can, depending on the concrete situation, decide either to establish a period within which the special administrator must take steps to identify any credit institution interested in taking over - by merger /splitting of the credit institution under special administration or withdraw the credit institution's operating license and refer to the competent court to launch bankruptcy proceedings.

3.2. Prudential supervision, special supervision and special administration of credit institutions

3.2.1. Prudential supervision of credit institutions

As a result of provisions of Art.56. of Law No. 58/1998, in their operations, banks are subject to the regulations and orders issued by the National Bank of Romania, in the enforcement of legislation on monetary, lending, foreign exchange, payments policies, in order to provide banking prudence and banking supervision.

[31] Sentence no. 425/5.04.2007 Mures Commercial Court

[32] Article 101 paragraph 2, let. a-c and Law no. 85/2006.

In order to protect the interests of depositors and ensure the viability and stability of the entire banking system, the National Bank of Romania ensures the prudential supervision of credit institutions, Romanian legal entities[33].This is achieved by establishing norms and prudential banking ratios and monitoring their compliance, together with other requirements prescribed by law and applicable regulations with the aim of preventing and limiting the risks specific to banking[34].

Moreover, Article 171. (1) of G.E.O. no. 99/2006 expressly establishes that "credit institutions, Romanian legal persons, are obliged to allow the National Bank of Romania staff (the members of the special supervisory commission fall within this category) and other empowered persons to conduct verifications, to examine records, accounts and transactions and provide them all the documents and information relating to the conduct of business, as requested by these people" .

Similarly, the obligation of professional secrecy was stipulated in Art. 116 of G.E.O. no. 99/2006, which shows that people empowered to request and/or receive information pertaining to banking secrecy, under this regulation, "are required to maintain confidentiality and may use it only for the purpose for which they have requested it or they have been provided with it, according to the law" .

To remove anomalies and irregularities in a credit institution, found during prudential supervision, the National Bank of Romania may invoke the measures provided for in Art. 70 of Law no. 58 / March 5 1998 on banking[35].

In principle, it is unanimously known that banks need to organize all their business in accordance with the rules of prudent and sound banking practices, with the requirements of the law and the regulations of the National Bank of Romania.

But what happens in a situation when there is violation of law or regulations issued by the National Bank?

In such situations, according to banking law, special supervision can be established. If it is found that there is no chance of redress, since the credit institution's business is found to have serious deficiencies, the National Bank of Romania is entitled to decide, on a case by case basis, either the establishment of special administrative measures, or the withdrawal of its operating license.

We appreciate that this is why Article 239. (3) of G.E.O. no. 99/2006 establishes the possibility of taking "other measures provided by law, including license withdrawal."

In the wording "other measures provided by law", in addition to the establishment of special administration, already mentioned, the only measures considered could have been those contained in Article 226. (2) of the same normative act. Or, in principle, such measures are used by the prudential supervisory body before the establishment of the two special procedures.

Therefore, we consider that the only measure could be the withdrawal of the operating license of that credit institution, that the National Bank of Romania can dispose of, observing Art. 39 of the Emergency Ordinance for one of the situations described in point. c)

[33] The law text considers their branches established in other member states or third countries as well.

[34] Art.164 of G.E.O. no. 99/2006.

[35] The text of Law. 58/1998 was republished in the Romanian Official Gazette, Part I, no. 78 of January 24 2005, and was amended by Law no. 131/2006 published in the Romanian Official Gazette, Part I, of 16 May 2006.

- e) of the text, or Art. 41 of the same normative act, when the operating license ceases to be valid according to the law.

In such a situation, the National Bank of Romania has the mission to ascertain the license withdrawal as a result of some actions of the shareholders of that credit institution or a competent court, in conformity with the special law.

The example of former B.R.C.E. demonstrated that via the shareholders' will - the same for two credit institutions - a merger by absorption of the credit institution was done, an institution where reorganization has not given the results expected by another credit institution, followed by the withdrawal of the operating license of that credit institution by the National Bank of Romania.

Moreover, in other credit institutions where bankruptcy proceedings have been triggered in the last decade of the twentieth century, the withdrawal of the operating license was done according to the law applicable at the time.

We must, however, emphasize that the renunciation to the credit institution's operating license by its shareholders, under Article 40. (1), is not feasible where the credit institution is in a situation of insolvency provided by law for the commencement of bankruptcy, but only if it were not in such a situation, and shareholders would submit a plan to liquidate assets and liabilities, to ensure full payment of depositors and other creditors' claims. Such a solution is given to ensure compliance with the prudential norms and ratios which the competent authority is entitled to pursue.

On the same rationale, the legislator has established another special procedure, which is the subject of this comparison with judicial reorganization, established under Law. 85/2006.

3.2.2. Special supervision of credit institutions

The special supervision measure has a character similar with judicial reorganization in the insolvency procedure for trading companies. The establishment of such a measure is justified only in the case of a precarious financial stance of the credit institution concerned, complying with Art.237 paragraph. (1) of G.E.O. no. 99/2006.

Special supervision is a temporary measure, which can be established for a maximum of 3 months. This relatively short period is determined by the need for the commission to enforce with celerity [36] the measures deemed necessary to remedy the situation of the credit institution. Taking into account the importance of the social - economic business of a credit institution, the legislator decided to establish a time as short as possible to redress the situation of the credit institution, and in the case of maintaining or even deepening of the serious deficiencies in the business, to pass to liquidating it, thus limiting the consequences that can be generated in the future[37].

3.2.3. Special administration of credit institutions

If the credit institution's business is found to have serious deficiencies and no chance of redress, the National Bank of Romania is entitled to decide, on a case by case basis, whether to establish its special administration, or withdraw its operating license.

[36] Celerity is stipulated in Law no. 85/2006 and G.E.O. no. 99/2006

[37] Besides, in the old regulation, that of Law. 58/1998, the delay was of maximum 120 days.

The legislator establishes, expressly, four cases in which it can provide special administration, according to Article 240. (1) of G.E.O. no. 99/2006[38].

We believe that only the first two cases, those referred to in letters a) and b) invoked in the Article, justify the parallel with the institution governed by Law no. 85/2006. They concern the following situations:

a. establishing a special supervision measure did not give results in a period of up to 3 months;
b. equity is at a level not exceeding half of the minimum capital requirements calculated according to legal regulations.

In these two cases, we might consider that the credit institution is in a stage prior to triggering bankruptcy proceedings, because of the lack of results from the application of special supervision for the maximum period provided by law, and the situation of equity being at a level that can not ensure the continuation of the credit institution's business which may be considered justifiable grounds for the establishment of a special procedure that tries to save a credit institution from bankruptcy.

Paragraph. (3) of Art. 240 provides an additional situation to the cases in which in order to establish special administration, the same procedure applies. The measure is taken for a strictly limited period of time, namely until the appointment, by the syndic judge, of the liquidator in the case of referral by the National Bank of Romania, as a prudential supervisory authority, to the court competent to launch bankruptcy proceedings for the credit institution. In this case, however, its bankruptcy can not be prevented, ensuring only a transitory administration of the institution.

On the contrary, the two cases mentioned above can be viewed exclusively as typical for the purpose of the law to prevent a credit institution's bankruptcy[39].

The situations that warrant special administration establishment as a form of reorganization for a credit institution to avoid its entering bankruptcy are, in fact, those which have led to the legal configuration of special administration, as it is regulated under Section second, Chapter VIII of Title III of Part I of the Government Emergency Ordinance no. 99/2006.

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[38] Art.240 paragraph 1 of the G.E.O. no. 99/2006 provides that the National Bank of Romania can establish special administration measures on a credit institution, Romanian legal person, including the business of its branches in Romania and abroad. The special administration measure can be established in the cases in which: a) the establishment of the special supervision measure did not give results in a period of up to 3 months; b) equity is at a level not exceeding half of the minimum capital requirements calculated according to the regulations issued under Article. 126 and 148; c) the credit institution has repeatedly violated the law and / or regulations or other documents issued in its application; d) the responsibilities of administration and / or management are no longer assured in the credit institution.

[39] In fact, Article 240. (1) states two more cases that can establish special administration, but they are not the purpose of our analysis. Thus, its establishment in the event that "the credit institution has repeatedly violated the law and / or regulations or other documents issued in its application" can be judged as a prudence measure taken by the authority, as part of the measures available to it, according to Art. 226 of G.E.O. no. 99/2006.

On the other hand, the establishment of special administration where "there is no longer satisfied the requirement to provide for the operational management of the credit institution's business at least 2 people" can be regarded as a temporary measure to ensure the current administration of the credit institution, which, for one reason or another, can not be carried out according to Article 107. (1) of the Ordinance, being outside the scope of this study.

Special Administration as revealed by its very name, is a special status in relation to the ordinary administration of a credit institution, which is performed under the provisions of Law no. 31/1990 on trading companies, with subsequent amendments and supplementations and Government Emergency Ordinance no. 99/2006.

Ordinary administration is the result of the credit institution shareholders' will, while special administration represents the will of the prudential supervision body, which is empowered by law to establish it. Ordinary administration is usually done in terms of acts of establishing and operating of a credit institution, based on the list of leadership positions provided for in those documents, namely the people chosen to carry out this activity for the expressly set mandate. Moreover, ordinary administration is an activity that takes place, regardless of the extent of the mandate of individuals who are empowered, during the entire existence of this institution.

The special administration activity is exercised by a person, designated by the Board of the National Bank of Romania, in the decision establishing such procedures. Accordingly, the credit institution's shareholders can not act in any respect as regards the person designated or the scope of his mandate, nor as regards the activity which he carries out, including the measures taken regarding the suspension of some of the credit institution's lines of business or the reorganization of the business, in order to reduce costs.

If ordinary administration has a regular standing throughout the existence of the credit institution, special administration has a temporary character, set by the National Bank of Romania. Although the law in Art. No 241 of the G.E.O. no. 99/2006 establishes the generic period for special administration - one year after the date of the decision of the National Bank of Romania - through the wording of the law text, we find that this authority is empowered to establish concretely, on a case by case basis, the period of establishing special administration. It is the legislator that enables it to establish, by decree, a shorter period, at the time of establishing it or afterwards, during the exercise of special administration, or to decide to terminate the special administration before the expiration period of one year. The rationale of this law text is determined by the fact that, throughout the whole period, the special administration deployment is under careful surveillance of the authority which, function of the reports, the information and analyses it is submitted, can appreciate the effect and consequences of carrying out this procedure and what is beneficial for the development of the credit institution in question.

Also, in paragraph (2) of the same article, the law gives the competent authority the legal grounds to extend special administration. The period of extension has provided a maximum period of 6 months, which leads to the conclusion that the National Bank of Romania can extend the period originally set by any deadline, but without exceeding the maximum time limit prescribed by the regulation.

Extension is subject to the law *under two aspects*:

- The existence of exceptional circumstances which are not materialized, i.e. it means they are left to the discretion of the competent authority, on a case by case basis, and

- "under the conditions for the establishment of special administration ", so the National Bank of Romania will appreciate at the time of extension, contemplating the conditions envisaged by law.

From the category of conditions for establishing the procedure, we must mention paragraph (2) of Art. 240, according to which "an announcement on the establishment of special administration is published by the National Bank of Romania in the Romanian Official

Gazette, Part IV". The purpose of this provision is determined by the social - economic importance of the credit institution and the public interest in that institution[40].

In conclusion, examining, in parallel, reorganization governed by Law no. 85/2006 and special supervision and special administration set up by G.E.O. no. 99/2006, we can draw the natural conclusion that, following the similarity of special regulations, special supervision and special administration are forms similar to reorganization of trading companies, with the difference that in the first case, judicial reorganization - as the name says – is carried out under the guidance of a syndic judge, while the two forms applicable to credit institutions can be established and carried out with the same finality, but under the supervision of the authority competent in banking prudence matters. In fact, this is the reason why the legislator has not included in the special law on bankruptcy of credit institutions - Government Ordinance no. 10/2004, amended and approved by Law no. 278/2004, the institution of judicial reorganization, initially invoked by the regulation.

This approach is due to the specific of banking and the risk involved in the deterioration of the financial stance of credit institutions, including on the entire banking system and, therefore, the legislator has contemplated to transfer to the competent authority the entire business, in order to avoid a credit institution entering bankruptcy.

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Case-Law:

[40]Such an announcement refers to communication, the task of the NBR, observing Art. 56 par. (3) of Law no. 312/2006 on the Statute of the NBR stipulating that the "subject of communication is to offer the general public, the domestic and international business environment, the public administration and academics, a clear image on the policies and measures adopted by the NBR to carry out its responsibilities".

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