

Emergency Ordinance No. 138 of 18 October 2001

amending and supplementing Law No. 83-The Bank Insolvency Act,

published in Monitorul Oficial al României, Part One, No. 671 of 24 October 2001

Pursuant to provisions under Article 114 para. (4) of the Constitution of Romania, the **Government of Romania issues the following emergency ordinance:**

Article I - Law No. 83/1998 on bank insolvency published in *Monitorul Oficial al României*, Part One, No. 159 of 22 April 1998, amended by Emergency Ordinance No. 186/1999 published in *Monitorul Oficial al României*, Part One, No. 567 of 19 November 1999, shall be amended and supplemented as follows:

1. The title of Law No. 83/1998 reads as follows:

"Law No. 83/1998 on insolvency of credit institutions"

2. Article 1 reads as follows:

"Article 1 - The bankruptcy procedure established by the present law shall apply to the following institutions:

- a) banks, romanian legal persons, and to the Savings Bank - joint-stock company, hereinafter called "CEC", including their branches abroad; and
- b) head-offices of credit co-operatives, including affiliates, hereinafter referred to as "credit institutions".

3. Article 2 reads as follows:

"Article 2 - A credit institution is deemed insolvent if it undergoes one of the following predicaments:

- a) the credit institution has not paid its firm, liquid and due debts for no less than 7 working days from due date in the case of banks, including CEC, and no less than 30 working days from due date in the case of head-offices of credit co-operatives, including their affiliates;
- b) the solvency rate computed in relation to own capital of the credit institution has dropped below 2%. The solvency rate shall be calculated in compliance with the regulations issued by the National Bank of Romania."

4. Letter c) para. 3 of Article 3 reads as follows:

"c) appointment of the liquidator by court order, establishment of his duties, monitoring his activity and, as the case may be, his replacement."

5. The last paragraph of Article 3 reads as follows:

"The decisions taken by the syndic are final, enforceable, and may be disputed in court."

6. Article 7 reads as follows:

"Article. 7 - By court order, on commencement of the insolvency procedure, the syndic is vested with the power to cancel the administrators' right to represent the credit institution, to manage and realise assets, to designate the liquidator, with the approval of the National Bank of Romania, and to establish the liquidator's tasks. By derogation from the provisions of Article 3 of Government Ordinance No. 79/1999, the Bank Deposit Guarantee Fund, hereinafter called "the Fund" usually acts as the liquidator.

The general meeting of shareholders of the debtor bank and the general meeting of the head-office of the debtor credit co-operative designate with simple majority, as soon as possible, a representative to take part in the procedure. Pursuant to the law, this representative has the right to dispute the measures taken by the liquidator or appeal against court orders.

At the first meeting of creditors, they will be able to elect another liquidator with a narrow majority, i.e. 51% of the value of the valid claims registered with the court by the date when the notification was sent by the syndic, or they can decide not to replace the liquidator appointed by the syndic.

In the case when several liquidators are proposed, the one who gets the votes of the creditors owning the largest share of the claims registered with the court under the provisions of para. 3 is elected. The tasks of the liquidator appointed by the syndic at the beginning of the procedure shall cease on the date the tasks of the new liquidator designated by the syndic are established. The newly appointed liquidator shall take over the activity of the replaced liquidator under the supervision of the syndic.

In the case when the liquidator is proposed by the creditors, he shall be approved by the National Bank of Romania before being designated by the syndic.

During the liquidation period, the rights of the entire management and supervision structures - general meeting, administrators, executive management, and auditors - shall be revoked.

The provisions of Law No. 64/1995 on judicial reorganisation and bankruptcy procedure, republished, concerning the remuneration of the liquidator shall be applied accordingly. The liquidator's remuneration will run at 3% of the amount resulting from the liquidation operations."

7. Indent 1 of Article 9 shall be repealed.

8. Article 10 reads as follows:

"Article 10 - The main tasks of the liquidator are the following:

- a) upon receiving the court order, on commencement of the bankruptcy procedure, to open with a bank operating in Romania two accounts, one in ROL and another in foreign exchange, bearing the specification "insolvent credit institution" and used only for the bankruptcy procedure. The amounts held in accounts with other banks shall be transferred into the "insolvent credit institution" accounts. The liquidator shall immediately notify the National Bank of Romania the name of the commercial bank and the accounts opened with it, and the National Bank of Romania shall instantly transfer into these accounts the amounts of the credit institution recorded with it. Further operations of the insolvent credit institution shall be performed through these accounts;
- b) to examine the debtor credit institution's activity in respect to the actual state-of-affairs, to draw up an in-depth report on the causes and circumstances which led to bankruptcy by mentioning the persons responsible for the outcome. The report shall be submitted to the syndic for approval and to the National Bank of Romania for information purposes within at most 30 days from the commencement of the insolvency procedure. The syndic may extend this period on request of the liquidator on well-founded reasons, based on a protocol;
- c) to affix seals, take stock, and take the measures necessary for preserving the assets of the debtor credit institution according to the provisions of Law No. 64/1995, republished, at the beginning of the insolvency procedure;
- d) to hire, by observing the law, and supervise the personnel needed in the liquidation activity. The personnel may be recruited from the former employees of the debtor credit institution;
- e) to ensure the management of the credit institution, i.e. carry out operations related to the insolvency procedure, including credit rescheduling and re-set the interest rate related to the assets of the debtor credit institution, provided any new level be no lower than market rates, take part in the interbank foreign exchange market, downsize staff in order to cut operation and liquidation costs;
- f) to take loans secured with assets of the debtor credit institution or unsecured, with the approval of the syndic;
- g) to file petitions with a view to annulling fraudulent documents concluded by the debtor credit institution in the detriment of the creditors within 3 year prior to the commencement of the insolvency procedure;
- h) to take action in court for the cancellation of establishments or transfers of patrimonial rights to third persons and for the returning by the latter of the transferred assets and amounts for other services rendered by the debtor credit institution to the detriment of the creditor, through:

- free transfers carried out within 3 years prior to the commencement of the insolvency procedure, except charitable actions by law;
- trade operations carried out within 3 years prior to the commencement of the insolvency procedure, in which the amount lent by the debtor credit institution exceeds by far the amount refunded;
- documents concluded within 3 years prior to the commencement of the insolvency procedure, with the intention of all parties involved to avoid assets from being tracked by creditors or to the detriment of any other rights of the latter;
- property transfers to a creditor to pay off a previous debt or to the benefit of the latter carried out within 120 days prior to the commencement of the insolvency procedure, if the amount that could be obtained by the creditor in the case that the debtor institution is insolvent, is smaller than the value of the transfer;
- establishment of real collateral for an unsecured claim 120 days prior to beginning of the insolvency procedure;
- documents signed in the year prior to the commencement of the insolvency procedure with persons having special relations with the debtor credit institution. The persons having special relations with the debtor credit institution are those stated by law;

- i) to set the date of the meeting of the creditors, as often as he deems necessary, and chair these meetings;
- j) to maintain, cancel or denounce contracts concluded by the debtor credit institution, as well as to conclude new contracts necessary for the insolvency procedure;
- k) to look into the claims against the debtor bank, and raise objections, if the case may be;
- l) to receive the amounts in ROL and foreign exchange in the account of the debtor credit institution and to register them within 24 hours with the new accounts of the credit institution bearing the specification "insolvent credit institution account", opened with a commercial bank;
- m) to take the necessary steps as regards the foreign exchange accounts opened with corresponding credit institutions by: - notifying them on the insolvency of the debtor credit institution, and on the freezing of the respective foreign currency accounts; - to subsequently transfer, as soon as possible, these amounts in the "insolvent credit institution" foreign exchange accounts for each currency. The amounts in the foreign exchange accounts shall be converted into ROL and transferred into the "insolvent credit institution" account opened in ROL; - to carry out payments for the ongoing operations of the debtor credit institution, as well as to ensure effective asset management;
- n) to monitor the collection of debts from the estate of the debtor credit institution, resulted from transfer of assets or amounts carried out by the latter before the recording in court of the suit;
- o) to liquidate assets and rights from the estate of the debtor credit institution - all procedures, steps and techniques deemed to realise the insolvent credit institution's assets, by observing the principle of assumed minimum cost, and turn them to best account to pay off the debts to creditors, through:

1. transactions, futures or options, to purchase assets and assume liabilities by which a financially sound credit institutions acquires part or all assets of the debtor credit institution, and to take over part or all of its liabilities, including all guaranteed deposits. For the transactions mentioned under this paragraph, the liquidator may collect a premium, negotiated according to the quality of the purchased assets and the assumed liabilities, and paid when the estate is transferred, as well as a premium for exerting the options, according to the term of the option, paid upon conclusion of negotiations. Provided that the value of liabilities recorded as collateralised deposits exceeds that of the assets, the transaction may be effected by the Fund, paying out the rest from its own resources, in the case when the Fund is the liquidator. Upon purchase, for the assets acquired through fraud or theft of financial instruments, the parties may alter the original transaction. Hence, the buyer credit institution shall receive from the liquidator, as equivalent, other assets or amounts as well as the related part of the premium negotiated according to the quality of the purchased assets and of the assumed liabilities, provided such a premium has been paid off;
2. sale of property, such as buildings, land, equipment, transferable securities. The liquidation operations shall be effected consistent with the provisions under Section 6 "Insolvency" of Law No. 64/1995, republished;
3. other ways of realising assets, such as claim assignment or novation at a negotiated value, in the interest of the insolvency procedure;

p) to draw up a monthly report on the progress of the insolvency procedure and the fulfilment of tasks by the liquidator. The report shall be submitted to the syndic for approval and to the National Bank of Romania for information. The report shall provide information on the total value of the claims against the debtor credit institution, total value of its realised assets, proceeds from liquidation and collection of claims, as well as on distribution among creditors of the retrieved claims;

q) to draw up the final liquidation balance sheet. The liquidator is bound to draw up the annual balance sheet and submit it to the relevant authorities at the terms settled in the form of financial reports for banks, should the liquidation take longer than a fiscal year;

r) to notify the syndic about all the issues the solving of which requires his involvement;

s) to conclude any document, initiate and co-ordinate any legal action or procedure, in the name of the debtor credit institution;

t) carry out any procedure required by the provisions of the present law."

9. Article 13 shall be repealed.

10. Article 16 reads as follows:

"Article 16 - Any creditor having a firm, liquid and enforceable claim may submit a petition in court against the debtor credit institution who has not honoured such a claim under the provisions of Article 2 letter a).

The creditor cannot file a petition without proving that prior to the submission in court of a petition for the enforced execution on the debtor credit institution's account, the National Bank of Romania, as third custodian party, has

previously reported that the respective credit institution was insolvent."

11. Article 17 reads as follows:

"Article 17 - The National Bank of Romania, in its capacity as banking supervision authority, may file a petition against the insolvent credit institution in one of the situations mentioned under Article 2."

12. Article 18 reads as follows:

"Article 18 - After recording the petition according to Articles 14, 16 and 17 hereof, the syndic shall immediately notify the parties involved, including the National Bank of Romania.

Upon receiving the notification, the National Bank of Romania shall designate a special administrator until the final and enforceable court order on commencement of the insolvency procedure. The administrator shall accomplish the tasks under Article 81 of Law No. 58/1998-The Banking Act.

All expenses related to procedures established by the present law shall be covered by assets of the debtor credit institution.

Should the accounts mentioned under Article 10 letter a) lack liquid funds, the proceeds from the liquidation fund established by Law No. 64/1995, republished, shall be used."

13. Article 19 reads as follows:

"Article 19 - On the first session in court, the syndic shall examine the petition and, in the event that the debtor credit institution does not dispute insolvency, decides the commencement of the insolvency procedure.

The appeal against the insolvency order may be lodged within 5 days from notifying the petition. This term may be extended only once, by 5 days.

Subsequent to the court order to commence the insolvency procedure following the petition recorded according to Articles 14, 16, and 17 and the designation of the liquidator, with the approval of the National Bank of Romania, the syndic shall notify the parties involved, including the liquidator and the Fund, with a view to fulfilling their lawful tasks, as well as the Trade Registry where the debtor credit institution is registered, in order to make the specification "insolvent bank" or "insolvent head-office of credit co-operatives". The notification shall be published in two newspapers. In the case of insolvent credit institution with branches abroad, the National Bank of Romania shall notify at once the banking supervision authorities in the host country about the commencement of the insolvency procedure.

After the commencement of the insolvency procedure, all the documents of the debtor credit institution shall bear the specification "insolvent bank" or "insolvent head-office of credit co-operatives".

For statistical purposes, the insolvent credit institutions shall be further considered as part of the banking system. The periodicity and the way of submitting the reports shall be established by norms issued by the National Bank of Romania."

14. Article 20 reads as follows:

"Article 20 - The syndic shall notify on the same day the National Bank of Romania about the decision on the commencement of the insolvency procedure. Upon notifying about the decision on the commencement of the insolvency procedure, the National Bank of Romania shall close immediately after the final settlement of the respective day the accounts of the debtor credit institution opened with it and transfer the amounts into the "insolvent credit institution" account opened with a commercial bank according to Article 10.

On the day the decision is notified, the payments and collections approved by the payment system - licensed by the National Bank of Romania - prior to the decision on commencement of the insolvency procedure of a credit institution shall be settled finally and irrevocably according to standard procedures.

The collateral set up by the debtor credit institution shall be used within the payment system they have been established for, in order to settle all the financial obligations of the credit institutions accepted prior to the notification on beginning the insolvency procedure. The collateral remaining after the final settlement of the financial obligations under the previous paragraph shall be used in the insolvency procedure.

The moment of acceptance of a payment instruction by the payment system shall be established according to the rules governing the system, the law and the regulations of the National Bank of Romania.

After the final and irrevocable settlement of fund transfers accepted by the payment system prior to the notification of the decision to start the insolvency procedure, the National Bank of Romania shall transfer the amounts extant in these accounts into "insolvent credit institution" accounts with a commercial bank singled out by the liquidator.

As of the opening of the accounts, the National Bank of Romania and the payment system administrator shall accept for the insolvent credit institution only payments performed by the liquidator. Further operations of the insolvent credit

institution shall be finally and irrevocably settled through the accounts mentioned in the present law."

15. Article 20³ reads as follows:

"Article 20³ - Once the commencement of the insolvency procedure is decided upon, the administrator of the debtor credit institution may not transfer, without the syndic's approval, the shares of the debtor credit institution subject to the insolvency procedure. The syndic shall order the shares be recorded as unavailable in the special registers or in the electronically recorded accounts, in compliance with para. 1."

16. Article 21 reads as follows:

"Article 21 - The provisions under Chapter III, Section 6 "Bankruptcy" of Law No. 64/1995, republished, shall apply to the insolvency procedure of credit institutions as well, except for Article 79 and Article 100 para. (2) regarding commencement of the insolvency procedure upon publishing the list with the claims, and Article 108 on the succession of payment of claims to creditors."

17. Article 21¹ reads as follows:

"Article 21¹ - The claims of creditors against the insolvent credit institution shall be paid in ROL in the following order:

1. Taxes, stamps, and any other expenses related to the insolvency procedure, including expenses for preservation and management of assets from the estate of the insolvent credit institution, as well as the remuneration of the liquidator;
2. Claims representing credits, with the related interests and costs granted to the insolvent credit institution during the insolvency procedure, at the request of the liquidator and with the approval of the syndic;
3. Claims incurred from labour contracts, for a period of 6 months at most from commencement of the insolvency procedure;
4. Public claims incurred from taxes, fees and other amounts representing public incomes according to Law No. 72/1996 on public finance, as amended subsequently, claims of the Fund in its capacity as subrogator regarding the depositors' rights and following the payments for guaranteed deposits, as well as claims of the National Bank of Romania resulting from credits granted to the insolvent credit institution;
5. Claims collateralised with actual guarantees on goods;
6. Claims of guarantor depositors, provided that the claims have not been turned to account by the Fund within the legally established term of prescription of compensation payments;
7. Claims arising from treasury operations, interbank bank/client operations, securities operations, other bank operations, as well as claims arising from delivery of goods, provision of services, and from rents;
8. Other unsecured claims, including those of depositors left out of the deposit guarantee scheme, as well as unsecured parts of claims of depositors included in the deposit guarantee scheme;
9. Claims of the insolvent bank's shareholders, i.e. claims of members of the insolvent credit co-operative head-office affiliates."

18. The title of Chapter IV reads as follows:

"The responsibility of the management, internal and external auditors of the insolvent credit institution".

19. Article 22 reads as follows:

"Article 22 - The court may order part of the cost of the insolvent credit institution's liabilities be borne by management members, staff charged with internal and external audit, and independent auditors in office no less than 3 years prior to the commencement of the insolvency procedure, if by one of the following actions they contributed to bankruptcy:

- a) made use of assets or credits of the institution for personal advantage;
- b) performed trade operations for personal advantage allegedly in the interest of the credit institution;
- c) ordered to carry on business obviously leading the credit institution to insolvency;
- d) kept fictitious accounting records, concealed them, or failed to keep accounting records in accordance with the law;
- e) embezzled or concealed part of the credit institution's assets or fictitiously increased its liabilities;
- f) used ruinous means to raise funds for in order to delay stopping payments;
- g) paid or ordered the payment to a certain creditor to the detriment of the other creditors during the month before ceasing payments;
- h) approved balance sheets or other financial statements or reports not drawn up by law, failed to inform about the inaccuracies in the structure and activity of the credit institution, or put forward his/her own opinions on the financial standing of the credit institution, thereby infringing the law;
- i) failed to inform about actions resulting in fraud and estate mismanagement during auditing. The enactment of the

criminal law for infringement of the law shall not be hindered by the enactment of the provisions under para. 1."

20. Article 26 reads as follows:

"Article 26 - The insolvency procedure will be considered closed when the syndic approves the final report, all funds and assets belonging to the insolvent credit institution have been distributed, and the uncalled-for amounts are to be deposited with the National Bank of Romania.

Following the request of the liquidator, the syndic shall order the closure of the insolvency procedure. The decision shall be notified in writing, or published in at least two national dailies, for the information of all the creditors of the debtor credit institution, of the Trade Registry, the National Bank of Romania and the liquidator, who will close the "insolvent credit institution" accounts. The rest shall be transferred to the government budget."

21. Article 27 reads as follows:

"Article 27 - The provisions of the present law shall be supplemented to the extent of their harmonisation with the Code of civil procedure and Law No. 64/1995 on judicial reorganisation and bankruptcy, republished."

Article II - The phrase "debtor bank" in Articles 3, 4, 8, 12, 14, 15, 20¹, 20², 20³, 20⁴ and 23 of Law No. 83/1998, as amended subsequently, is replaced by "debtor credit institution."

Article III - Article II of Emergency Government Ordinance No. 186/1999 for amending and supplementing Law No. 83/1998 Bank Insolvency Act published in *Monitorul Oficial al României*, Part I, No. 567 of 19 November 1999, is amended and reads as follows:

"Article II - The legal reorganisation initiated according to the provisions of Law No. 64/1995, as amended subsequently, shall be carried on in compliance with the provisions of the present law. The bankruptcy proceedings initiated according to Law No. 83/1998, subsequently amended, will be carried on by the provisions of the present law."

Article IV - The present emergency ordinance shall come into force 30 days from its publication in the *Monitorul Oficial al României*, Part 1.

Law No. 83/1998-The Bank Insolvency Act, published in *Monitorul Oficial al României*, Part 1, No. 159 of 22 April 1998, as amended subsequently and including the amendments hereof, shall be republished upon passing of the present emergency government ordinance by the Parliament, thereby renumbering the Articles.