Available online at www.sciencedirect.com

ScienceDirect

Procedia - Social and Behavioral Sciences 149 (2014) 753 – 758

Procedia
Social and Behavioral Sciences

LUMEN 2014

Bank – Universal Credit Institutions

Rada Postolache [a,*]

[a]*Associate Professor PhD, Faculty of Law and Administrative Sciences, "Valahia" University Târgovişte, Târgovişte, 130105, România*

Abstract

Banks represent a type of credit institutions, subject to the provisions of the Government Emergency Ordinance No 99/2004 on credit institutions and adequacy of capital. The special law offers them the legal regime of companies, their constitutive elements – independent organization, own property and object of activity – acting like circumstances, making them special. From the perspective of the activity purpose, the Special law acknowledges the principle of the universal bank, offering to it the possibility to perform a diversity of banking operations, but also activities connected to the latter. Yet, the freedom of action that banks enjoy must transgress neither the public interest nor the need for an open competition, the lawmaker instituting some limitations, restrictions and even interdictions within banking activity, which will be analyzed by the present work. On the one hand, the current study is aimed to delineate the legal statute of the universal bank, setting it apart from specialized banks, while on the other hand to establish the interferences of banks with other agents within the banking market, particular the one regarding credits. The present work is based on the Romanian Special law and the banking literature and specialized practice.

Selection and peer-review under responsibility of the Organizing Committee of LUMEN 2014.

Keywords: universal bank; special bank; credit institution; banking activity; banking authorization;

1. Introduction

At the European Union's level, the credit institutions are governed by: Directive 2013/36/EU of the European Parliament and of the Council on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (published in the Official Journal of the European Union Law No. 176 from June

* Corresponding author. Tel.: +40724538090; fax: +40245606049.
E-mail address: radapostolache@yahoo.com

Selection and peer-review under responsibility of the Organizing Committee of LUMEN 2014.
doi:10.1016/j.sbspro.2014.08.305

27th 2013); Regulation (EU) No. 575/2013 of the European Parliament and of the Council on prudential requirements for credit institutions and investment firms (published in the Official Journal of the European Union Law No. 176 from June 27th 2013). In the national law, these are subjected to the Government Emergency Ordinance No 99/2006 on credit institutions and capital adequacy (published in the Official Gazette No. 1027 from December 27th 2006), called the banking law or the special law, transposing the above mentioned European regulations.

The banking law states the following types of credit institutions: banks, credit co-operative organizations, savings banks for housing, mortgage banks/mortgage loan banks. Banks represent the basic component of the Romanian banking system, the law offering them a significant space for regulation.

The banking law establishes them as special enterprises and attributes to them the vocation of universality in the banking area, aspect representing the subject of our present analysis.

2. The banking notion

The banking law, the European regulations and, generally, the special literature, do not define in *stricto sensu* the bank. In this context, given that the bank, as specie, wears the characteristic print of this type (as credit institution) we shall consider as guide mark the legal definition of the credit institution. For the purpose of the law, the credit institution means an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account (Art 3 Para 1 Point 1 of the Directive, Art 4, Para 1 Point 1 of the Regulation).

In consonance with this definition, we identify in the Emergency Ordinance No 99/2006 the notion of the banking activity, applicable for all credit institutions, implicitly for banks – "taking of deposits or other repayable funds from the public and granting of credits for its own account" (Art 7 Para 1 Point 1). The definition reveals the features of the banking area: a) *its specificity*, resulted from the taking of deposits or other repayable funds from the public and granting of credits, generically called "banking operations" and seen by us as true poles of the existence of a credit institution; b) *the exertion of the mentioned activities only for its own*, the law not accepting intermediation in their case.

The doctrine considers the credit institution as "the legal person who performs as profession banking operations" (Gavalda and Stoufflet, 2000, 21); "the organization having a specific activity" (the one mentioned by the banking law), "a special category of collective traders" (Gheorghe, 2006, 6).

Usually, it is considered that credit institutions and banks are synonym notions. Without denying the existing similarities, the bank is specie of the credit institution. Being unable to suppress the characteristic diversity of this area, the special law distinctly states four types of credit institutions, which are differentiated by their object of activity.

A definition of the bank is given by the old literature – "an interposer organism in the credit operations, the bank taking money as credit from those who seek to place their capitals and granting money as credit for those who need capital, thus achieving a benefit" (Demetrescu, 1939, 53 and subsequent), definition revealing its specificity.

Synthetizing, having as guide mark the notion of the credit institution and of the banking activity, we define the bank as the organization authorized to perform, as profession, the attraction of deposits or other repayable funds from the public and granting credits for its own account.

Having this acceptation, the banks, credit institutions in their integrality, must be differentiated by the entities with access to certain banking activities – those who "take the excess liquidities from the economy and place them in other categories and forms of loans, different than bank credits" (Gheorghe, 2006, 4), mainly: insurance companies, stockbrokers, mutual funds, financial investments companies, non-bank financial institutions; these are entities with a different legal statute, according to their special law.

3. Banking legal statute

The special law states the bank as a legal person – joint stock companies, subjected to the legal statute of the banking profession, oriented towards "banking or exchange operations". As legal persons, the banks are included in the area of the common law, Art 187-251 of the Civil Code. As joint stock companies, they are subjected to the Law

No. 31/1990 on trading companies. As professionals, having a special nature, banks are subjected to the Government Emergency Ordinance No. 99/2006, mainly under the aspect of the requirements on the access to the banking profession, prudence and banking supervision. Operationally, these are also under the incidence of the G.E.O No 99/2006, without ignoring the applicability of the Civil Code, especially Art 2184-2198 stating the "Current bank account and other banking contracts", though they only state principles.

The legal statute of banks is the one attributed to companies – joint stock companies, but particularized by the requirements of its foundation (Postolache, 2012, 61-82) and specific object of activity, placed in the area of services, in this case banking services.

4. The universality of banks

4.1 Specialized banks

Using as criteria the object of activity, the banks can be thus delimited: *a*) specialized banks; *b*) universal banks.

The specialization was a trend manifested among the banks during an entire period, and, though in decrease, it continues to characterize their world. Specialized banks are of a wide variety, with differences and special statutes in each country. In their entirety, they can perform all banking operations, but each of them is subjected to limitations regarding its functionality, or it exclusively assumes certain operations (Basno and Dardac and Floricel, 1997, 193). In literature, it is appreciated that between specialized banks a certain place is held by those who are entrusted with a public service mission; medium/long term credits offered for certain areas, usually agriculture; supporting real estate mortgages; credits offered for local collectivities (Basno and Dardac and Floricel, 1997, 194-196).

Contemporary legislation mitigated, without completely suppressing, the specialization of credit institutions, being, to a certain extent, the counterbalance of the banking monopoly. The G.E.O No 99/2006 states as specialized credit institutions:

a) *Mortgage credit banks*, having a particular object of activity. According to Art 19 Para 1 of the G.E.O No. 99/2006, "granting of mortgage credits financed through mortgage bond issues shall be performed according to the *special laws* in this field", sending in this respect to Law No 31/2006 on the securitization of receivables (published in the Official Gazette No. 25 from March 13th 2006); to Law No 190/1999 on the mortgage credit for real estate investments (published in the Official Gazette No. 61 from December 14th 1999); to Law No 32/2006 regarding mortgage bonds (published in the Official Gazette No. 264 from March 23rdrd 2006). It is prohibited for these institutions to attract deposits from natural or legal persons, their specificity being the granting of mortgage bonds, method commonly practiced by the developed markets from Central and Western Europe. We do not have such credit institutions in Romania.

b) Savings banks for housing – these are banks offering long term financing for housing, which have collective saving and lending for housing included in their scope, the G.E.O No 99/2006 having special provisions for them (Art 288-317). By the law's permissiveness they enjoy the legal regime of the universal bank, due to the fact that the banking product for which these are specialized can be performed by other banking entities. As special banks, in Romania are registered: Raiffeisen Housing Bank, HVB Housing Bank.

Beside all the above mentioned, in the Romanian banking system we identify, as specialized banks, also the Eximbank, for financing export-import operations, Porche Bank for car credit financing, CEC Bank for household savings, but really is able to offer diverse bank products and services to its clientele, performing as an universal bank. Their small number reveals the tilting of the balance towards the universal banks.

4.2 Universal banks

According to Art 285 of the G.E.O No 99/2006 "banks are credit institutions with universal activity, which may perform any of the activities mentioned by this law". Also called banks for deposits, they can perform all types of banking operations, including the taking of funds from the public (Decocq and Gérard and Maroger, 2010, 76.) being, on this reason, the wider and most general category. They can perform a variety of banking operations

"which can be freely modified, depending on the requirements, possibilities and own orientation" (Basno and Dardac and Floricel, 1997, 194).

The causes for this diversification can be multiple, such as: certain services are only an extension of the traditional banking activities; large concentrations from the banking and financial areas have ended the traditional distinction between merchant banks and retail banks, the large credit institutions offering an increasing number of banking services; accepting an extra-banking channel of financing, which determined the credit institutions to diversify their activity.

Circumstantiation of the banking activity considered universal. Synthetically, the universality is stated by the doctrine as it follows: "the performance of any type of operations involving amounts of money, in cash, credits, debentures, negotiable values and operations in relation to these" (Demetrescu, 1939, 24).

According to the special law, the universality is carried upon the activities stated by Art 18. The banking law does not clarify nor defines these activities, being resumed only to their enumeration. The interpretation of the provisions regarding the object of activity of banks reveals the circumstantiation of the universality offered to these institutions:

a) A bank has the vocation to perform any activity stated by Art 18, the law revealing both theoretically, as well as in the spirit of the Civil Code, its general legal competence;

b) A bank may perform only the activities stated by its object of activity expressly authorized by the National Bank of Romania (N.B.R), in the virtue of the prerogative of supervision conferred by the law;

c) A bank as a Romanian legal person must perform effectively and especially on the Romanian territory the activity for which it has been authorized, requirement directly linked to the principle of prudential supervision of the credit institution by the national authority from the state of origin, in this case the N.B.R;

d) A bank may perform auxiliary services or related to the activities performed, in order to achieve the authorized object of activity, without being necessary their inclusion in the already given authorization.

Types of activities. The universality is applied for the activities stated by Art 18-22 of the G.E.O No 99/2006, structured as follows: a) specific or traditional banking activities; b) auxiliary services; c) non-banking activities.

a) Specific or traditional banking activities. In the hierarchy of the banking activities, the special law places the traditional ones – taking of deposits from the public and granting of credits for its own account, operations revealing the banks' feature of "saving-lending" (Art 18 Para 1 Let a)-b) of the G.E.O No 99/2006). Being representative in the banking area these activities are the reason of existence of a credit institution.

Taking of deposits or other liquidities from the public. The banks may accept deposits from every entity – natural or legal persons – trading companies, credit institutions, financial institutions, insurance companies, the state by its representative etc., but it enjoys the legal regime established by the special law only for the repayable funds (and other liquidities) taken from the public. According to Art 7 Point 18 of the special law, by *public* it is understood "any natural or legal person or entity without legal personality without the knowledge or experience necessary for the evaluation of the risks for default for the investments made". According to the law, are not included in this category: the state, the central, regional or local public administration authorities, government agencies, central banks, credit institutions, financial institutions, other similar institutions and any other person considered as a qualified investor, in the meaning of the legislation on the capital market. The funds or other liquidities taken from the public are those that offer the credit institution the right to freely use them (the amounts entrusted), directly conditioning the crediting activity – the second pillar of the banking activity.

Even more, the law offers for banks a veritable monopoly regarding the taking of deposits and other repayable funds from the public (Postolache, 2012, 52-60). By the created monopoly, the funds are removed from the extra banking circuit, are protected by the Bank Deposit Guarantee Fund and controlled by the national authority in this area (N.B.R).

Nevertheless, for economic reasons, usually for the budgetary balance, the interdiction of attracting deposits is not applicable: to Romania, to a Member State and to the international public bodies in which Romania is member. The state can always be a possible competitor; can contract the public debt by borrowing including from the population, by certificates of deposit, treasury certificates, subjected to a different legal regime.

In order to eliminate all doubts, the National Bank of Romania has the ability to determine whether an activity represents an attraction of deposits or other repayable funds from the public (Art 5 Para 5 of the G.E.O No 99/2006).

Crediting. The special law considers the credit *lato sensu*, by enumerating among others: consumer credits, mortgage credits, factoring with or without regress, financing commercial transactions, including lump. But in practice, the banking credit has a variety of forms, as result of customs, particularized especially in relation to the legal techniques used (Postolache, 2012, 244-255); their existence shows the overcoming of the traditional or classic acceptations attributed to the banking credit and reconfirms the interference of the banking activity with diferent economic areas, subjected to different regulations.

Unlike the attraction of funds from the public, here is accepted and encouraged the extra banking practice of crediting, by non-banking financial institutions, but within the restrictive conditions stated by the Law No 93/2009 on the non-banking financial institutions (published in the Official Gazette, No 259/21 April 2006). According to Art 2 Para 2 of this law, "it is prohibited the performance of the activity of crediting under a professional title by other persons (…)", for the protection of the contracting clients.

Managing means of payment. We must add here the managing of the payment means, even if it is not found in the legal definition of the banking activity, also mentioned by the French legal literature (Neau-Leduc, 2010, 22; Piedelièvre, 2003, 42). A credit institution cannot exist outside these elements, given the complexity of its activities.

In their specificity, these operations are approached in banking contracts (see for that matter: Aniţei and Lazăr, 2011*,* 21; Gheorghe, 2006, 113-168; Postolache, 2012*,* 145-354).

b) Auxiliary services. The banks have the possibility to also perform *other* activities, stated by Art 18 Para 1 Let c)-r) of the G.E.O No 99/2006, enjoying, within the limits of their authorization, a direct and free access on the financial-banking market. Also called *auxiliary*, they mainly aim: financial leasing, trading for own account and/or for account of clients with money market instruments, transferable securities and other financial instruments, participation in securities issues and other financial instruments by underwriting and selling them or by selling them and the provision of services related to such issues. The banks are more and more involved in the multitude of financial services, in competition with the entities specialized in this area, especially as these activities once reserved for a wealthy clientele are now democratized.

The relevant activities are exhaustively stated, but their content is widely understood, covering according to Art 18 Para 3 of the G.E.O No 99/2006 "any operations, transactions, products and services which fall within the scope of these activities or may be considered similar to them, including ancillary activities".

c) Non-banking activities include the activities stated by Art 20 of the G.E.O No 99/2006 which, where appropriate, the banking law limits, restricts or excludes from the banking object of activity in order to not distort the mechanism of the competition and to maintain the credit institutions within the area of their specificity. The law states: non-financial mandate or commission operations, especially for the account of other entities within the group the credit institution is part of; managing a portfolio of movable and/or immovable assets, which are the property of the credit institution, but are not used for the performance of its activities; rendering of services to own clients, which, although are not ancillary to its activity, are related to banking operations.

As a conclusion, a universal bank can perform a variety of activities, but defining for the purpose for which was created, initially revealed by the action plan, mandatory piece for its authorization for functioning. The universality does not remove the bank from the control and supervision area of the N.B.R, nor can defeat the competition.

The universality and legal capacity of the bank. The analyzed universality is consonant with the general legal capacity of the bank, with which it must not be mistaken for. In the virtue of the general legal capacity and according to the Civil Code, the bank may have "any civil rights and obligations". But the expression "any civil rights and obligations", stated by Art 206 Para 1 of the Civil Code, must be corroborated with G.E.O No 99/2006, stating both certain circumstantiations, as well as some extensions on the already analyzed banking activity. The revealed elements support the particularity of the legal capacity of the credit institutions, essentially limited by the purpose of their foundation.

We appreciate that the universality sustains and develops the banks' feature as true intermediaries in the relation savings-investments, crucial to the economic growth (Gheorghe, 2006, 3).

5. Conclusions

We reveal the banking universality as a rule attributed by the law to banks; the special law does not state this

concept, nor differentiates between universality and specificity. As the banking system being open, it is operationally permitted the slide between universal and specialized banks, in compliance with the restrictive requirements, where necessary, aiming the latter category.

The universality aims the banking activity and must not be exhaustively interpreted. It supports the spreading of the banks in society, but also their external opening, eased by the possibility offered to perform any of the activities stated by Art 18 and 20 of the banking law: typical banking activities, ancillary activities, non-banking activities, but all these within the limits of the authorization and in compliance with the prudential requirements of their performance stated by the National Bank of Romania.

The banking universality is consonant with the general legal capacity of a bank, itself circumstantiated by the conditions and limits established by the banking law, separating the banks from the other entities organized as joint stock companies, especially by the financial investment companies and financial institutions.

In the current economic context, the universality corresponds better to the present needs of the economy, proving the possibility for dispersing the banking risks and minimizing the possible losses.

Also, the banking universality cannot represent an argument for an absolute monopoly on the attraction of funds from the public, or for the suppression of the competition in the area of crediting.

References

Aniţei, N., C. Lazăr, E., R. (2011). *Drept bancar şi valutar*. Bucharest: Universul Juridic Publ. House. 21, 72-102 .
Basno, C., Dardac, N., Floricel, C. (1997). *Monedă. Credit. Bănci, Didactică şi pedagogică*. Bucharest: Publ. House. 193, 194-196, 194.
Decocq, G., Gerard, Y., Morel, Maroger, J. (2010). *Droit bancaire*. Paris: RB Publ. House. 76.
Demetrescu, P., I. (1939). *Societăţile bancare pe acţiuni*. Bucureşti: Romanesca Publ. House. 53, 24.
Gavalda, Ch., Stoufflet, J. (2000). *Droit Bancaire - Institutions-Comptes, Opérations-Services*, 4e édition. Paris: Litec Publ. House. 21.
Gheorghe, C., A. (2006). *Drept bancar*. Bucharest: C.H. Beck, Publ. House. 6, 4, 113-168, 3.
Neau-Leduc, Ph. (2010). *Droit bancaire*, 4e édition. Paris: Dalloz Publ. House. 22.
Piedelièvre, St. (2003). *Droit bancaire*. Paris: Presses Universitaires de France Publ. House. 42.
Postolache, R. (2012). *Drept bancar*. Bucharest: C.H. Beck, Publ. House. 61-82, 52-60, 244-255, 145-354.