

THE CHARACTERISTICS OF THE SPECIAL COMPANIES

Luminita Tuleașcă¹

Abstract:

The major impact of the financial services system on the national and world economies, has determined the creation of a particular framework regarding the access to the activity specific to this sector and the means to exercise it.

The differentiation between the services specific to the financial market of any other commercial activities and the adoption of certain legal provisions applicable solely to these activities and, implicitly, to the trade companies working in this sector, represents the fundamental premise of the special statute of special trade companies.

In this paper, we will analyze, from the perspective of the European and Romanian laws, the characteristics of the main special trade companies: banks and insurance undertakings, characteristics that differentiate the regular trade companies, determining their special legal regime and, as a consequence thereof, their classification as special trade companies.

Keywords: special trade companies, banks, insurance undertakings, supervisory and control authorities.

JEL Classification: K2, K22, K33, G21, G22

1. Premises. Notions. Realm.

1.1. The financial market is defined as the market of available capitals, of the capitals offered to investors for covering the funding needs² and, the sector of financial services that includes three main areas to which similar European policies are applied: banking, insurance and investments; depends on the companies performing these services, operators composing the financial sector: credit institutions (the banking sector), investment companies (the sector of financial instruments), the insurance undertakings and the reinsurance undertakings (the insurance sector)³.

The differentiation between the services specific to the financial market of any other commercial activities and the adoption of certain legal provisions applicable

¹Lecturer Ph.D. ,Faculty of Law, Romanian-American University, Bucharest. E-mail: luminita.tuleasca@tuleasca.com

² Sébastien Neuville, *Droit de banque et des marchés financiers*, Ed. Presses Universitaires de France, Paris, 2005, p.12.

³ According to art.2 paragraph 8 of the Directive 2002/87/EC of the European Parliament of the Council from December 16th 2002 supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate, published in J.O. CE L 35/11.02.2003, p.1-27.

solely to these activities and, implicitly, to the trade companies working in this sector, represents the fundamental premise of the special statute of *special companies*.

The characteristics of the companies carrying out their activity in the financial services sector: their business object: the supply of financial services and the risk inherent to all their operations, that can have a significant impact in the economy, as well as the need to keep the trust in the financial sector, have determined the special regulation of the conditions regarding the initiation and the exercise of these activities within each financial sector: banking, insurance, investments.

Further we will analyze these characteristics of the special companies, from the perspective of the main special entities: the banks and the insurance undertakings, characteristics that differentiate it from the regular trade companies, determining the special legal regime applicable to it, and, as a consequence thereof, their classification as special trade companies.

Considering the aspects mentioned-above, we are of the opinion that the special regulations applicable to the trade companies operating within the financial services sector, are sufficiently characteristic as to determine the special legal regime applicable to it and their classification as special trade companies.

Thus, there shall be regulated and special companies those trade companies pointing out from among the rest by the bellow mentioned special characteristics:

- (i) *the existence of the special conditions regarding their set up, the operation, the change and the winding-up.*
- (ii) *the need to obtain prior authorizations for set up and operation from a competent national authority.*
- (iii) *the subordination of their entire activity to the specific sectoral standards⁴.*
- (iv) *their permanent supervision by a national competent authority benefiting of control and direct intervention right.*

Considering the above, we will include in the special trade companies' category all the types of companies operation in the financial services sector, companies with special regulations, sufficiently characteristic, derogating from the common rules applicable to all types of trade companies, common rules provided under the Law no. 31/1990.

Thus, there shall be considered special trade companies: the credit institutions: the banks, the credit cooperation organizations, economy and funds lending banks in the housing sector, the banks granting mortgage loans and the institutions issuing electronic currency⁵, the non-banking financial

⁴ Sectoral standards mean the entire EU and domestic law on the operational and prudential requirements and on the supervision of the regulated entities.

⁵ These species/categories of the credit institutions are provided by the Government Ordinance no. 99 on 06.12.2006 regarding the credit institutions and the capital adjustment, published in the Official Monitor, Part I no. 1027 on 27.12.2006, as further amended and completed.

According to the Directive no. 2006/48/EC of the European Parliament and of the Council from June 14th, 2006 relating to the taking up and pursuit of the business of credit institutions, published in the European Union Official Journal no. L 177/30.06.2006, the credit institutions are the banks and the electronic money institutions – art. 4 pct.1 of the Directive no. 2006/48/CE.

institutions⁶, the insurance (reinsurance) undertakings, the financial services companies, the financial investment firms, the Fund for Investors' Compensation, the investments management companies, the investment firms, the market operators on the markets regulated by financial instruments and, last but not least, the trade companies whose shares are traded on a regulated market, etc.

Considering the scale of the special companies problematics, this paper intends to analyse the characteristics of two of such companies: the banks (as the main species of credit institutions) and the insurance undertakings, as Romanian legal entities.

2. The Characteristics of the Banks

2.1. In a simple and precise manner, that reflects accurately the traditional specificity of the banks, we can say that the bank “*is a trader speculating the money and the credit*”⁷.

This meaning transverses the history of human kind, as it has its roots from the ancient times when the Egyptians, the Babylonians and the Phoenicians, started to make profit out of loaning and transporting money, continuing with the Middle Age characterized by “handling” the money by the Land lords and by the establishment of the important public banks (Montes pietatis, Banco di Rialto, Bank of England), and ending with the modern age when the liberal capitalism has created the premises for the current complexity of the banking system.

In the European economic area the banks – special trade companies – represent a category of credit institutions, a species that is no longer regulated under this name by the European laws, which prefers to indicate only the type of such companies: credit institutions, and to leave for the discretion of the member states to include it in the realm of this type of certain categories / types of actual set up of the same.

According to the European legislator, “*Credit Institution*” means:

i) An undertaking whose activity consists in the preservation of deposits or other refundable funds deposited by citizens and the lending of loans in its own behalf, or

ii) An electronic money institution in the sense of the Directive 2000/46/CE.⁸ “- Art.4 paragraph 1 of the Directive 2006/48/CE⁹-.

The Romanian law defines in a similar manner the credit institutions, opting however for avoiding the references to other legal texts:

“*Credit institution* means:

⁶ The non-banking financial institutions are regulated by the Law no. 93 on 08.04.2009 regarding the non-banking financial institutions, published in the Of. M. Part I, no. 259 on 21.04.2009.

⁷ G. Ripert, R. Roblot, Phillippe Delebecque, Michel Germain, *Traite de droit commercial*, Tome 2, 16e edition, Ed. L.G.D.J, Paris, 2000, p.279.

⁸ The Directive 2000/46/CE of the European Parliament and of the Council of 18 September 2000 on the taking up, pursuit of and prudential supervision of the business of electronic money institutions, published in the OJ L 275 on 27.10.2000, p.39.

⁹ The Directive no. 2006/48/CE of the European Parliament and of the Council of June 14th 2006 relating to the taking up and pursuit of the business of credit institutions, published in the O.J. L 177/30.06.2006.

i) *An entity whose activity consists in drawing deposits or reimbursable funds from the public and in granting credits on its own behalf;*

ii) *an entity, other than those provided under the let. a), issuing payment instruments in the form of electronic currency*” (art. 7 para. 1 pct. 10 of the G.E.O. no. 99/2006).

2.2. The banking activity, *stricto sensu*, consists in drawing deposits or other non-reimbursable funds from the general public and in granting loans in its own behalf – art.7 para.1 pct.1 of the G.E.O. no.99/2006.

Thus, there are created two main segments of the banks activities: receiving funds from the public (the deposits market) and the credit operations (credits market)¹⁰.

As species of this type of concept, the banks are credit institutions with universal vocation that can perform all the banking activities allowed for the credit institutions¹¹ (art. 285 para. 1 of the G.E.O. no. 99/2006), the banks being the only credit institutions that can have as business object funds deposits from the general public, while the credit operations represent an activity that is allowed to all these entities and non-banking financial institutions.

The limitation of the domestic and European legal regulations is pointed out by the lack of any defining of the operations representing the banking activity.

The French Monetary and Financial Code¹² includes definitions of the two types of banking activities, definitions that we will further use for understanding the field of banking activity.

Thus, funds received from the public shall be considered to be those funds an entity accepts from a third party (from thirds), especially as deposits, with the right to use such funds for their own accounts and with the obligation to refund it.

A credit operation means any act by which a person uses or promises to use funds, for good and valuable consideration, upon the disposition of another person, or by which it undertakes in favour of such person by signing an aval (or endorsement), a security or another guarantee.

According to the law, there shall be assimilated to the credit operations: the leasing and, in general, all the leases associated with the buying option.

2.3. *The monopoly of the credit institutions* consists in the interdiction imposed on any individual or legal entity with no legal personality that is not a credit institution, to engage in an activity of deposits or other reimbursable funds drawing from the general public, in an electronic money issuing activity or in an activity consisting in drawing and/or managing amounts of money coming from the contributions of the

¹⁰ G. Ripert, R. Roblot, Phillippe Delebecque, Michel Germain, *Traité de droit commercial*, Tome 2, op.cit., p.289; Vergile Andronache, Ion Bunescu, *Aspecte ale activității bancare după recentele modificări operate în textul Legii bancare nr.58/1998 prin Legea nr.485/2003*, "Revista de Drept Comercial", nr.2/ 2004, p.95.

¹¹ The conception on the bank meaning – *stricto sensu*-, is the same in all the domestic laws.

¹² The definitions of the two aspects of the banking activity are provided in the art. L 312-2 para.1 (funds received from the public) and in the art. L 313-1 (credit operations) of the French monetary and financial code, introduced by the order no. 2000-1223 from December 14th 2000, published in the O. J. F. of December 16th 2000, source: www.legifrance.gouv.fr.

members of certain groups set up for gathering collective funds and for granting credits out of the funds thus composed for procurement of goods and/or services by its members¹³.

Imposing the monopoly on the banking activity is reinforced by the obligation to carry out the specific activity of the banking sector only by the credit institutions – Romanian legal entities as well as credit institutions from member states and from third states –art.5 para.1 of the G.E.O. no. 99/2006.

This monopoly takes into account the exercise of the banking activities, regular, professional or occasional, only three derogations from this interdiction being allowed, which do not apply to the drawing of deposits or other reimbursable funds:

- i) By a member state or by the regional administrations or by the local public administration authorities of a member state;
- ii) By the international public organizations to which one or several member states participate;
- iii) In the cases expressly provided by the Romanian or EU laws, provided that these activities to be adequately regulated and supervised, for the purpose of protecting the depositors and investors¹⁴.

The general monopoly is doubled by the special monopoly of the banks on the activity of deposits and other reimbursable funds drawing from the public, the other credit institutions having the possibility to perform solely credit operations and banking activity.

The violation of the general monopoly is sanctioned by the criminal law, the National Bank of Romania being the competent authority for qualifying the illegal activities and for deciding their inclusion in the realm of the general monopoly.

The banks monopoly, of the credit institutions in general, indirectly regulated by the EU laws on credit institutions, is justified by *the need to protect the public interest* – the banking activity being an *activity of public interest* – by accepting in this field only those entities offering sufficiently serious guarantees as provided under the conditions imposed by special legal regulations.

2.4. Our laws in the banking area – special characteristic regulation – are perfectly harmonized with the European laws in force, harmonization required as a result of establishing the European single banking market¹⁵.

By means of successive legislative amendments – generally the most applied method for reaching the result imposed by a directive – but also by means of different deeds: Orders, Norms of the National Bank of Romania, we are now in the

¹³ Some authors, considers that, the banking monopoly refers to both banking activities as well as to certain aspects for the identification of the credit institutions. See: Christian Gavalda, Jean Stoufflet, *Droit bancaire, Institutions-Comptes, Operations-Services*, 6 edition, Ed. LexisNexis, Paris, 2005, p.34.

¹⁴ The substance of this exceptional situation has been detailed with the last amendment of the G.E.O. no. 99/2006 amended by the G.E.O. no. 25/18.03.2009 published in the Off. M., Part I no.179/April 23rd, 2009.

¹⁵ Ion Turcu, *Realizarea Pieței Bancare Unice Europene prin Directivele Consiliului*, in the "Revista de Drept Comercial" no. 6/1999, p.20.

position of having no difference between the domestic and international legal regulations (in the sense of EU regulations).

The main special regulation in the matter of trade banking companies and of the other credit institutions, Romanian legal persons, is the G.E.O. no. 99/2006 on credit institutions and capital adjustment¹⁶.

2.4.1. The EU law, by its first directive in the field of credit institutions – the Council Directive no. 77/780/ EEC of 12th of December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions¹⁷, has set the conditions regarding the authorization of the banking institutions, establishing the principle of prior authorization of these entities as well as, minimum terms and conditions regarding the banks funds and its officers.

The conditions for obtaining the banks authorization have been pointed out again by the second directive 89/646/EEC on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions¹⁸.

The main merit of the Directive 89/646/EEC consists in establishing a legal framework, suitable to the banking sector, and in introducing the principle of mutual recognition of the authorization obtained by a credit institution in the origin state – the state where the registered office is located -, this authorization having the statute of "European Passport" of the credit institutions.

The Directive 2000/12/EC of the European Parliament and of the Council of 20th of March 2000 relating to the taking up and pursuit of the business of credit institutions, has replaced these two directives -containing all their amendments and completions - by codifying it in a single text, for the unity and clarity of provisions. This directive contains all the principles and reference provisions from the previous directives.

The European laws goes through a complex reviewing process determined by the *Action plan on the financial services 1999-2005 (PASF)*, by the *White chart of financial services 2005-2010* and by the adoption, under the Lisbon Strategy, of the *plan: "A better regulation"* (March 2000), targeting the creation of an integrated European financial market, that is open, competitive and economically efficient, by simplifying, modernizing, encoding the EU instruments and by annulling the instruments that are no longer part of the active *acquis*¹⁹.

The Directive 2006/48/EC relating to the taking up and pursuit of the business of credit institutions follows the same trend representing, at this point, the main legal

¹⁶ G.E.O. no. 99 of 06.12.2006 on the credit institutions and capital adjustments, published in the Of. M. Part I no.1027 on 27.12.2006, effective as of January 1st 2007, approved, completed and amended by the Law no. 277 of 04.07.2007, published in Of.M. Part I no. 480 on 18.07.2007.

¹⁷ Directive 77/780/EC published in the O.J. EC L 386 of 30.12.1989; annulled directive.

¹⁸ Published in the O.J. EC L 386 of 30.12.1989; annulled directive.

¹⁹ Details in the General Report of the European Commission on the European Union activity - 2006, Brussels, Luxemburg 2007, adopted by the European Commission on January 26th, 2007 under the SEC (2006) 1000 final.

regulation of the credit institutions, annulling the Directive 2000/12/EC considered to be the first “European banking law”²⁰.

2.4.2. On the territory of Romania only the credit institutions that are Romanian legal entities and the credit institutions from member states and third states are allowed to carry out activities specific to the banking sector.

The distinct statute of the credit institutions from the member states, the existence of the “European passport”, reflects in the opportunity such institutions have to carry out the banking activity either directly or indirectly, by setting up branches, while the banking institutions from third states can carry out the banking activity solely by setting up branches.

The foreign credit institutions can also open subsidiaries in Romania; these cannot carry out banking activity and shall be limited to information activities, to market research, representation and advertising.

According to the Credit Institutions Register ²¹, in our country there are 30 banks, Romanian legal entities²², no branch of a third state bank, 9 branches of member states banks and 224 banks from the European Economic Area that have notified N.B.R. on the direct supply of services on the territory of Romania²³.

2.5. The supervision of the banking companies represents an essential coordinate of the financial market activity and targets, in particular, the protection of interests of the depositors and the provision of the financial system steadiness.

The supervision is accomplished on two main levels: at the internal/domestic level, through the competent national authority, in our country this authority being the National Bank of Romania and, at the EU level through the European Commission having the following specialized entities: the European Committee of the banking inspectors (set up by the Decision no. 2004/5/EC of the 5th of November 2003²⁴), as an independent consultative group for the banking control within the Community and, the European Banking Committee (set up by the Decision 2004/10/EC²⁵) a consultative committee regarding the regulation of the banking activities within the Community.

2.5.1. The National Bank of Romania has exclusive competence for authorizing the credit institutions, Romanian legal entities and is liable for the prudential

²⁰ Francesco Giorgiani, Carlo-Maria Tardivo, *Manuale de Diritto Bancario*, Giuffre Editore, Milano, 2005, p.31.

²¹ Special records-keeping and banks publicity system, created by the N.B.R. Regulation no.1/01.02.2007 on the credit institution registry, Published in the OF. M., Part I no. 119 of 16.02.2007; detailed in: Francoise Dekeuwer-Defossez, *Droit Bancaire*, Ed. Dalloz, Paris, 1999, p.12; Lucian Bercea, *Sistemul de evidență și publicitate a instituțiilor de credit*, "Revista de Drept Comercial" nr.4/2004, p.149.

²² Source N.B.R., www.bnro.ro, information supplied on 18.01.2012.

²³ Source N.B.R., www.bnro.ro; the list with the banks notifying N.B.R. on the direct service supply on the territory of Romania drafted as on January 2012.

²⁴ Published in the O.J. of EU L 3 of 7.01.2004.

²⁵ Published in the O.J. of EU L 3 of 7.01.2004.

supervision of the same, under the Law no. 312 of 28.06.2004 relating to the Statute of the National Bank of Romania²⁶.

With over 132 years of existence, the National Bank of Romania is the central bank²⁷ of Romania, is an independent public institution and has the following main duties:

(i) Drafting and application the monetary policy and the foreign exchange policy

(ii) Authorization, regulation and prudential supervision of the credit institution, promotion and monitoring of the proper operation of the payment systems for securing the financial stability

(iii) Issuing of the banknotes and coins as legal payment means on the Romanian territory

(iv) Establishing the foreign exchange regime and the supervision of its compliance

(v) The management of the international reserves of Romania.

Moreover, the N.B.R. supports the overall economic policy of the state, without prejudicing the fulfilment of its main objective on the prices provision and maintenance.

The independence of the National Bank of Romania is complete, considering that, in complying with its tasks, the National Bank of Romania and the members of its management authorities do not request and do not receive instructions from the public authorities or from any other institution or authority – art.3 para.1 of the Law no. 312/2004 and the art.7 of the Statute of the European System of Central Banks.

The EU institutions and bodies, as well as the member states governments, have undertaken to comply with the principle of European Central Bank (ECB) and with the national central Banks independence and to refrain from trying to influence the members of the management boards of ECB and of the national central banks in accomplishing its missions.

As member of the European System of Central Banks (ESCB) – created by the Maastricht Treaty and by the Protocol regarding the Statute of the European System of Central Banks and of the European Central Banks of 07.02.1992, N.B.R. is invested with the control of monetary policy.

The European System of the Central Banks (the Eurosystem) is composed of the European Central Bank and the national central banks and its main responsibilities regarding the definition and management of the monetary policy of the Community, the promotion of the good functioning of the payment system, the management of the exchange operations, the holding and security of the official exchange reserves of the member states, contributes to the good conducts of policies established by the competent authorities as far as the prudential control of the credit institution and the financial system stability are concerned.

²⁶ Published in the Of.M. Part I no.582 of 30.06.2004.

²⁷ Flouzant Osmont D'Aurilly, *Le concept de banque central*, "Bull. Banque de France", nr.70, octombrie 1999.

The European Central Bank regularly grants endorsements, and it is consulted by the Council, by the European Commission and by the competent authorities of the member states, regarding issues like adoption and application of the EU law on the prudential control of the credit institution and the financial system stability²⁸.

By the art.282 of the Treaty for the Functioning of EU, the European Central Bank becomes one of the major institutions of the EU, the principle of the loyal cooperation between institutions being applicable, given that the institutional framework of the Union targets „the promotion of its values, the continuation of its objectives, serving the best interests of the citizens and of the member states, as well as the insurance of the coherence, efficacy and continuation of its policies and the member states policies”²⁹.

This is the context the National Bank of Romania operates, by centralizing the information regarding the credit institutions and playing a fundamental role in liquidating the financial system, in preserving the health of the Romanian banking system.

3. The Characteristics of the Insurance Companies

3.1. Now, in the modern times, the insurers *”valorise the pecuniary liquidities on the capital market, contributing to a country’s economy crediting, by using a part of their funds for the funding of prevention and risks fighting projects, contribute to the decrease of the economic uncertainty and to the resuming of the prematurely interrupted activities”*³⁰.

The insurances are a necessity of the commercial activity, of both the entrepreneurs and the individuals and, in the sophisticated national economies, the commercial sector cannot function if not covered by the umbrella offered by insurances, allowing the entrepreneurs to effectively operate and offering to them risks transfer mechanisms, thanks to the fact that some of the risks related to their activity are incurred by third parties.

The spectacular evolution of the insurances during the last few decades and their role in the economy, have lead to the reanalysis of the entire legal concept, both the insurance and reinsurance services as well as the entities specialized in service supply, benefiting of a special regulation at European and national level.

If, as far as the capital market specific activity is concerned, its inclusion within the realm of the activity of public interest, the insurance-reinsurance services are indicated by law as being of public interest.

²⁸ For a detailed presentation of the European system of Central Banks and of the statute of the European Central Bank see: Dan Grosu Saguna, Monica Amalia Ratiu, *Drept bancar*, Ed. C.H.Beck, Bucuresti, 2007, pp.314-319.

²⁹ Alina Oprea, *Tratatul reformator de la Lisabona, etapa semnificativă în istoria construcției comunitare*, "Pandectele Romane" no.2/2008, p.54.

³⁰ Ion Turcu, *Redresarea financiară și falimentul societăților de asigurare*, "Revista de Drept Comercial" no.2/2005; see also: Ion Vacarel, Florina Bercea, *Asigurari și Reasigurari*, Ed. Expert și Marketer, Bucuresti, 1993; Violeta Ciurel, *Asigurări și reasigurări, abordări teoretice și practice internaționale*, Ed. All Beck, Bucuresti, 2000.

This classification of the insurance-reinsurance services, their impact on the economic and social life, justifies the special attention granted to the activity itself and, in particular, to the entities performing such activity.

3.2. The insurance undertaking is the main entity operating in the insurance sector implementing all types of insurance services: the offering, the negotiation, the insurance-reinsurance contract signing, the premiums collection, the damage liquidation, the regress and recovery activity, as well as the investment and capitalization of undertaking's own funds and of the funds drawn by the undertaking's activity.

The main element of the insurance undertakings distinguishing them from the other market operators acting on the insurance services market, is their possibility to carry out insurance operations – insurance activities *stricto sensu*.

Without a legal definition, we will define the insurance undertaking by the specificity of its activity: the insurance activity understood as performance of insurance operations.

The option for the use of such a criterion is determined by an inadequate definition of the insurance activities offered by the Romanian legislator: *the insurance activity – the activity exercised in or from Romania, referring mainly to the offering, the negotiation, the insurance-reinsurance contract signing, the premiums collection, the damage liquidation, the regress and recovery activity, as well as the investment and capitalization of undertaking's own funds and of the funds drawn by the undertaking's activity* - art. 2 para. 1 let. A pct. 1 of the Law no. 32/2000 on the insurance activity and insurance supervision³¹.

Apart from the inadequate limitation of the insurance activity to the Romanian territory, such a definition, that is far too lax, of the insurance activity, does not allow us the separation of the insurance undertakings from the insurance intermediaries (that do not have the statute of insurers).

For this purpose, *the European laws regulating the insurance activities, refer to the initiation of the “independent activity of direct insurance”* (art. 1 paragraph 1 of the Directive 84/641/CEE³² for the amendment of the first Directive 73/239/EEC on general insurances³³ and, art. 2 paragraph 1 of the Directive 2002/83/EC on the direct life insurance³⁴) and not to the “indirect” ones carried out by the reinsurers or by the insurance products distributors: insurance intermediaries (agents, brokers and banking insurances agents) whose activity is regulated by specific laws: Directive 2005/68/EC on reinsurances³⁵, Directive 2002/92/EC of the European Parliament and of the Council of 9th of December 2002 on insurance mediation³⁶.

³¹ Published in the Off. M. Part I no. 148 on 10.04.2000, as further amended and completed.

³² Directive 84/641/EEC of 10.12.1984, published in the O.J. CE L339/27.12.1984, p.21-25.

³³ Directive 73/239/EEC of general insurances of July 24th 1973, published in the O.J. L228/16.08.1973, p.3-19.

³⁴ Directive 2002/83/EC on the direct life insurance of 05.11.2002, published in the O.J. L345/19.12.2002, p.1-51.

³⁵ Directive 2005/68/EC of 16.11.2005 on reinsurance, published in the O.J. L 323 on 9.12.2005.

³⁶ Directive 2002/92/EC of the European Parliament and of The Council of 9 December 2002 on insurance mediation published in the O.J. L 9 on 15.01.2003; the Commission Recommendation no. 92/48/EEC of 18th of December 1991 on insurance mediation, published in the O.J. L19 on 28.01.1992 had an essential role in adopting this second directive in the matter of insurance intermediaries.

The insurance activity specific only to the insurance undertakings does not include the distinct performance of the insurance mediation activity, in the sense of activity consisting in the presentation or proposing or carrying out other work preparatory to the conclusion of contracts of insurance, or of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim.

These activities when undertaken by an insurance undertaking or an employee of an insurance undertaking who is acting under the responsibility of the insurance undertaking shall not be considered as insurance mediation”- art. 2 paragraph 3 of the Directive 2002/92/EEC.

The correct definition of insurance undertakings and of the insurance activity is necessary because these undertakings form the object of specific rules regarding the set up, functioning, control a.s.o., therefore it is vital to know the specific field of regulation.

3.2.1. From the legal point of view, the insurance has been defined from the perspective of the insurance contract, as the contract by which the insurance contractor or the insured undertakes to pay a premium to the insurer, and the later undertakes to indemnify, in case of the occurrence of insured risk, the insured, the beneficiary of the insurance or the affected third party by paying to it the compensation or the insured amount, hereinafter referred to as indemnity - art. 9 of the Law no. 136/1995 on insurances and reinsurance in Romania³⁷.

In a similar manner, the insurance has been defined as representing that convention by which, in exchange for the insurance premium payment, the insurer undertakes to hold the insured harmless against any risks covered by the contract, by paying an indemnity, generally under the form of pecuniary indemnity³⁸.

Simpler versions of such definition are the following: “the insurance activity is an economic operation consisting in the security against the damaging patrimonial consequences occurred from a determined risk and in the distribution of such securities among the subjects facing the same type of risk”³⁹ or, “the undertaking and administration of the risks carried out by an insurance undertaking”- art. 1 para. 1 let. c of the Italian Private Insurance Code⁴⁰.

³⁷ The Law no. 136 of 29.12.1995 on insurances and reinsurance in Romania, Published in the Off. M. Part I no. 303 on 30.12.2005, as further amended and completed; A similar definition to the legal one we find also in the French doctrine: Lambert-Faivre, Y. & Levener, L. (2005). *Droit des Assurance*, 12e edition, Paris: Dalloz, p.41-42.

³⁸ Ibidem, op.cit., p.41, quoted also in: Radu N. Catana, *Dreptul Asigurărilor – Reglementarea activităților de asigurare, Teoria generală a contractului de asigurare*, Ed.Sfera Juridica, Cluj-Napoca, 2008, p.15.

³⁹ Antigono Donati, Giovanna Volpe Putzolu, *Manuale di Diritto delle Assicurazioni*, Giuffre Editore, Milano, 2006, p.3.

⁴⁰ The Private Insurance Code– the Decree Law no. 209 of September 7th 2005 published in the G.U on 13th of October 239-Supplemento Ordinario n.163, in: Marino Bin, *Codice delle Assicurazioni, La nuova disciplina della assicurazioni dopo il D.LGS. 7 settembre 2005*, Giuffre Editore, Milano, 2006, p.3.

3.2.2. The activity of commercial insurance⁴¹ is divided in “branches”, in categories of insurances including different classes of insurances, categories corresponding to certain types of risks, the official list of such being established by the European laws and by the art.3 para.1 and by the Annex no. 1 of the Law no. 32/2000.

The official list of insurance activities has a fundamental role for the insurances sector considering that, all the insurance undertakings need a permit issued by the supervisory authority – and the compliance with certain specific terms – for being entitled to carry out one of the insurance categories.

On the other hand, at the level of the EU laws on insurances there is no definition of the meaning of insurances operations and, in such conditions, the only criterion for establishing the field including it is this official list, this enumeration of the different types of insurances.

According to the Law 32/2000 the insurance activity is grouped in life insurances and general insurances.

Thus, the insurance undertaking is that *trade company – subject to a specific control⁴² – delivering professional insurance operations⁴³, and operations by which an insurer sets up, based on the mutual assistance principle, an insurance fund, by the contribution to a number of insured, exposed to the occurrence of certain risks and indemnifies the ones suffering a prejudice based on the fund established from the collected premiums, as well as based on the other income resulting from the activity carried out by such insurer.*

3.4. The insurance undertakings differentiate from any other trade companies by the structure of their activity, by the specific applicable rules and, by the permanent control exercised by an independent administrative authority.

The special legal regime of the insurance undertakings is justified because, as the banks, these companies deal with a large amount of money, carry out a high socio-economic impact activity, the trust in such activity is quite high, and this trust should not be affected considering that these insurance undertakings operate in a sector where the operators’ bankruptcy generate more negative consequences than in the case of any other entity.

3.4.1. At the national level, the insurance undertakings are regulated by the special Law no. 32/2000 regarding the insurance activity and the insurances supervision completed by the Law no. 136/1995 on insurances and reinsurances in Romania⁴⁴ as well as by the norms issued by the national supervisory and control

⁴¹ For the difference between the commercial insurances and the social insurances (that are not the business object of the insurance companies) see: Radu N, Catana, op.cit., p.24 and the following.

⁴² This emphasize on the insurance undertakings is deemed as required by the need to distinguish between the insurance undertakings and the mutual ones that also carry out professional insurance operations but, do not fall under the realm of the insurance undertakings specific regulation – see also, Jean Bigot, *Traite de droit des assurances*, tome 1, Entreprises et organisme d'assurance, 2e edition, Ed. L.G.D.J., Paris, 1996, p.34.

⁴³ Ibidem, p.34.

⁴⁴ Law no. 136/1995 of 29.12.1995 on the insurances and reinsurances in Romania, published in the Of. M. Part I, no.303 / 30.12.1995, as further amended and completed.

authority for the insurance and reinsurance activity: The Insurance Supervision Commission.

The national regulation of the insurance undertakings complies with the singularities of these entities, establishing for them a special legal regime that allows them to classify them as special companies.

3.4.2. The EU regulations regarding the Insurances market⁴⁵ are not yet unified – in the sense of a single act that would coordinate the entire area of interest specific to insurances - being specialized depending on the insurances categories: life insurances and general insurances (direct insurances other than life insurances).

As of January 2012 there are 34 directives - directly or indirectly applicable to the insurance activity – on : general insurances, life insurances, reinsurances, car insurances, loan and securities insurances, legal protection insurances, legal assistance insurances, regarding the insurance intermediaries, annual balance sheets and consolidated balance sheets of the insurance undertakings, regarding the solvability and the solvability margin of the insurance companies, the additional supervision of the financial conglomerates, the restoration and winding-up of the insurance undertakings, a.s.o.

In the matter of general insurances, the first European directive 73/239/EEC of July 24th 1973 for the coordination of legal provisions and administrative provisions on the initiation of the direct insurance activity, other than the life insurance⁴⁶, has introduced the fundamental principle of access to this activity based on an administrative permit, such principle being completed by removing the restrictions on the freedom of the insurers to set up –that have been considered illegal considering the provisions of the art. 52 of the EEC Treaty - implemented by the Directive 73/240/EEC on the removal of restrictions related to the freedom of set up in the field of direct insurance activity, other than the life insurance⁴⁷.

The second directive in general insurance: 88/357/EEC of 22nd of June 1988⁴⁸ for the coordination of legal provisions and administrative provisions on direct insurance other than the life insurance, for establishing the provisions meant to facilitate the effective exercise of the freedom to provide services and for amending the Directive 73/239/EEC, had established the distinction between the large risks and the general risks.

⁴⁵ I. Vacarel, F. Bercea, F. op.cit., p.68, are the authors that initiate in Romania the use of the notion “insurance market”.

⁴⁶ Directive 73/239/EEC of July 24th 1973 for the coordination of legal provisions and administrative provisions on the initiation of the direct insurance activity, other than the life insurance, published in the O.J. E.C. L 228 on 16.08.1973.

⁴⁷ Directiva 73/240/ EEC on the removal of restrictions related to the freedom of set up in the field of direct insurance activity, other than the life insurance, published in the O.J. E.C. L 228 on 16.08.1973.

⁴⁸ Published in the O.J. EC L 172 on July 4th, 1988.

The Directive 92/49/EEC of 18th of June 1992⁴⁹ for the coordination of legal provisions and administrative provisions on direct insurance, other than the life insurance and for amending the Directives 73/239/EEC and 88/357/EEC (the third directive on general insurance), has introduced the system of “the single license”, of the “European passport” effective as of July 1st 1994, system that allows the insurance undertakings authorized in the member state where their registered office is located, to have the liberty to establish agencies and branches and the liberty to supply services in all the other member states of the European Union (at that time the European Communities), based on the authorization granted by the competent authority from the state of origin.

In the matter of life insurances the system of the “European passport” has been introduced by the Directive 92/96/EEC of 10th of November 1992⁵⁰ for the coordination of legal provisions and administrative provisions on direct life insurance and for amending the Directives 79/267/CEE and 90/619/CEE (the third directive on life insurance), directive that has been partially annulled by the Directive 2002/83/EC⁵¹ of 5th of November 2002 on direct life insurance.

The number of regulations in the insurances sector and the successive amendments of the directives create major difficulties; therefore, the *European Commission has proposed a ground-breaking revision of EU insurance law designed to improve consumer protection, modernise supervision, deepen market integration and increase the international competitiveness of European insurers*⁵².

Thus there has been adopted the Directive 2009/138/EC - Solvency II⁵³, based on which the insurance undertakings shall have to hold different accounts for all types of risks they are subject to and to manage such risks much more efficiently. Moreover, as far as the groups of insurers are concerned, a better supervision of the same is estimated to be established.

By this directive that will become effective in 2013, the legislator targets also the replacement of the 14 main directives on insurances, with a single main directive (skeleton directive) representing the number one regulation level, further details and technical rules being subsequently adopted as implementation measures issued by the Commission.

Obviously, the new trend in the field of EU regulation on insurances frames under the Lamfalussy procedure style and implicitly in the European Union Strategy *“A better regulation”*.

⁴⁹ Published in the O.J. EC L 228 on August 11th, 1992.

⁵⁰ Published in the O.J. EC L 360 on December 9th 1992.

⁵¹ Published in the O.J. L 345 on December 19th, 2002.

⁵² *Solvency II: EU to take global lead insurance regulation*, 10 July 2007, Brussels, Reference: IP/07/1060.

⁵³ Directive 2009/138/EC of March 25th 2009 on the access and carrying on the insurance and reinsurance activities, published in the O.J. of E.U. L335 on December 17th 2009.

The European directives on insurances have been transposed in our laws in a more or less complete or adequate manner, by complying also with the basic principles promoted by such European Instruments.

3.5. The monopoly of the insurance companies is imposed at the European level and at the national level, for all insurance categories.

In the case of European directives, the monopoly is indirectly established by the conditioning on granting the necessary authorization for initiating the insurance activity on the limitation of the business objects of the company to the activity provided by directives and to the operations directly resulting from it, excluding any other trade activities (in addition, indicating exactly the types of the insurance undertakings) – art. 6 paragraph 1 let. b of the Directive 2002/83/EC on direct life insurance and the art. 8 paragraph 1 let. b of the Directive 73/239/CE on general insurance.

The Romanian law adopts the same European model of indirect regulation of the monopoly on the insurance activity that can be exercised solely by insurance undertakings, entities with a single business object: the insurance activity and authorized by the competent authority (art. 11 and art.12 para. 4 let. f of the Law no. 32/2000).

3.6. The supervision of the insurance undertaking, during its existence, *is mainly accomplished, at the national level, by the competent authority, i.e.* Insurance Supervision Commission, as the national authority of the origin member state, empowered by the Law no. 32/2000 to authorize, supervise and control the Romanian insurance undertakings.

The role of the European Commission in the supervision of the insurance undertakings, manifests by the permanent monitoring and coordination of the insurance sector and, especially, of their failure.

The Commission is assisted in its activity, by the European Committee on insurances and occupational pensions⁵⁴ that offers counselling upon request, on the issues related to the policies in the insurance field, to the reinsurance and occupational pensions, as well as on the proposals of the Commission in this field. The Committee analyses any legal aspect related to the application of the EU provisions in the field of insurance, reinsurance and occupational pensions, especially the directives regarding the insurance, reinsurance and occupational pensions.

The European committee of the insurance and occupational pensions inspectors, set up by the Decision of the European Commission 2004/6/CE of 5th of November 2003, is the second organism that has the purpose of counselling the

⁵⁴ By the Directive a 91/675/CE of December 19th 1991 for the set up of a Committee for insurances, published in the O.J. EC L 374 / 31.12.1991 there has been established gthe Committee for insurances transformed in the European Committee for insurances and occupational pensions based Decision of the Commission 2004/9/EC OF November 5th 2003 for the set up of the European Committee for insurances and occupational pensions, published in the O.J. L 3/ 07.01.2004;

Commission in the insurance sector, including ex officio, especially in the case of the projects for implementation measures that have to be drafted in the insurance, reinsurance and occupational pensions sector, has the role to analyze, debate and issue endorsements to the Commission on the problems related to the insurance, reinsurance and occupational pensions.

The Committee contributes to the coherent application of the EU directives and to the convergence of the prudential practices of the member states in the entire Community and represents a cooperation forum between the control authorities, especially by the information exchange on the institutions subject to controls.

3.7. In Romania, the insurance activity is under development and is exercised by:

- i) Romanian legal entities, set up as joint stock companies and/or mutual companies, authorized by the Insurance Supervision Commission;
- ii) insurers or reinsurers authorized in the member states, that carry out the insurance or reinsurance activity on the territory of Romania in accordance with the right to set up and the freedom to supply services;
- iii) branches belonging to mother companies governed by laws of a third country, authorized by the Insurance Supervision Commission;
- iv) subsidiaries of insurers or reinsurers from third countries, authorized by the Insurance Supervision Commission;
- v) Insurers or reinsurers adopting the form of a European joint stock company (SE - Societas Europaea).

According to the Register of insurers and insurance brokers, at the level of the January 2012, the Romanian insurance market included 41 insurance undertakings and 587 insurance – reinsurance brokers, Romanian legal entities⁵⁵ and 441 insurance undertakings and intermediaries from the European economic area that have notified the Insurance Supervision Commission their intention to perform insurance activities in our country, based on the principle of free movement of services⁵⁶.

4. Conclusions

Any approach of the of the special companies should consider the general characteristics of these special entities: they operate on the financial market, are regulated entities and subject to the permanent monitoring and control of the national autoritrys from the member state of origin, the risk is the defining coordinate of their activity, they perform activities considered to be of general interest and benefit from special legal regulations at European and national level.

The characteristics of the main special companies analyzed in this paper, offer us the possibility to properly understand the essence and the running principles of

⁵⁵ Source: The register of the insurers and insurance brokers published on www.csa-isc.ro;

⁵⁶ Source: CSA- www.csa-isc.ro;

companies acting in the financial services sector at the national, European and world level.

Moreover, their characteristics are those that have justified and imposed their differentiation from among the regular trade companies, and, automatically, the creation and application of a special legal system, under the form of a special legal regime, derogating from the Common corporate law, based on the classical structure of the common law but, naturally, adjusted to the specificity and implications of the system in which they work.

References

Vergile Andronache Vergile, Ion Bunescu, 2004, *Aspecte ale activității bancare după recentele modificări operate în textul Legii bancare nr.58/1998 prin Legea nr.485/2003, "Revista de Drept Comercial nr.2/2004".*

Lucian Bercea, 2004, *Sistemul de evidență și publicitate a instituțiilor de credit*, "Revista de Drept Comercial nr.4/2004".

Jean Bigot, 1996, *Traité de droit des assurances*, tome 1, Entreprises et organisme d'assurance, 2e edition, L.G.D.J., Paris .

Marino Bin, 2006, *Codice delle Assicurazioni, La nuova disciplina della assicurazioni dopo il D.LGS. 7 settembre 2005*, Giuffre Editore, Milano

Radu N. Catana, 2008, *Dreptul Asigurărilor –Reglementarea activităților de asigurare, Teoria generală a contractului de asigurare*, Ed. Sfera Juridica, Cluj-Napoca.

Violeta Ciurel, V. (2000). *Asigurări și reasigurări, abordări teoretice și practice internaționale*, Ed. All Beck, Bucuresti.

Flouzat Osmont D'Aurilly, 1999, *Le concept de banque centrale*, "Bull. Banque de France", nr.70, octombrie.

Francoise Dekeuwer-Defossez, 1999, *Droit Bancaire*, Ed. Dalloz, Paris.

Antigono Donati, Giovanna Volpe Putzolu, 2006 *Manuale di Diritto delle Assicurazioni*, Giuffre Editore, Milano.

Christian Gavalda, Jean Stoufflet, 2005, *Droit bancaire*, Institutions-Comptes, Operations-Services, 6 edition, Ed. LexisNexis, Paris.

Francesco Giorgiani, Carlo-Maria Tardivo, 2005, *Manuale de Diritto Bancario*, Giuffre Editore, Milano.

Yvonne Lambert-Faivre, Laurent Levener, 2005, *Droit des Assurance*, 12e edition, Ed. Dalloz, Paris.

Sebastien Neuville, 2005, *Droit de banque et des marchés financiers*, Paris: Presses Universitaires de France, Paris.

Alina Oprea, *Tratatul reformator de la Lisabona, etapa semnificativă în istoria construcției comunitare*, 2008, "Revista Pandectele Romane" nr.2/2008.

G. Ripert, R. Roblot, Phillippe Delebecque, Michel Germain, 2000, *Traité de droit commercial*, Tome 2, 16e edition, Ed. L.G.D.J, Paris.

Dan Grosu Saguna, Monica Amalia Ratiu, 2007, *Drept bancar*, Ed. C.H.Beck.

Solvency II: EU to take global lead insurance regulation (10 July 2007), Brussels, Reference: IP/07/1060, 2007.

Ion Turcu, *Realizarea Pieței Bancare Unice Europene prin Directivele Consiliului*, "Revista de Drept Comercial" nr.6/1999.

Ion Turcu, *Redresarea financiară și falimentul societăților de asigurare*, "Revista de Drept Comercial" nr.2/ 2005.

Iulian Vacarel, Florina Bercea, 1993, *Asigurari și Reasigurari*, Ed. Expert și Marketer, Bucuresti.