

The Role of Insurance Guarantee Schemes in the Consumers Protection in the European Union

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Abstract

Insurance Guarantee Schemes (IGS) protect policyholders in case of an insurer's insolvency, ensuring financial stability, cross-border protection, and regulatory compliance within the EU. Several EU countries, including Romania, have established IGS to protect consumers, with each country implementing specific funds and coverage limits tailored to their insurance markets. Consumer protection in Europe's insurance sector is governed by a comprehensive legal framework, including key directives like Solvency II and 2002/83/EC, ensuring financial stability and mandating compensation schemes to protect policyholders in insolvency. These measures, along with regulations on solvency margins and technical provisions, aim to safeguard consumers and maintain trust in the insurance market across EU Member States. Insurance company insolvencies are often caused by insufficient solvency, inadequate reserves, regulatory non-compliance, and financial mismanagement, leading to insolvency proceedings and the activation of IGS to compensate policyholders. Reinsurance plays a crucial role in dispersing risk and ensuring the financial stability of insurers, while consumer protection in insurance contracts is reinforced by laws against unfair terms, with regulations across the EU identifying and invalidating such terms to safeguard policyholders. All things considered, consumer protection in insurance is achieved through a combination of methods, including IGS, reinsurance, and the elimination of unfair contract terms, with IGS serving as a last resort when other protective measures are exhausted, while insolvency prevention relies on compliance with Solvency II and careful risk analysis by insurers.

Keywords: *Insurance Guarantee Schemes (IGS), consumers protection, insolvency, insurance contracts, reinsurance, unusual terms.*

1. Introduction

Through the following paper we are proposing to point out and analyze some of the defining legal elements for the insurance field that play a key role in protecting the consumers of insurance services. One of the following elements is presented by the general notion of “Insurance Guarantee Fund”, a specific mechanism that may differ from another state to another, that is meant to ensure the protection of the policyholders in case of the insolvent insurance company's liability. Later on, within this paper, we will discuss some of the legal provisions that build up the *sedes materiae* related, indirectly or directly, to the protection of the consumers, such as

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the minimum requirements that need to be respected by an insurance company in order to prevent its insolvency and the implication of the Fund. Furthermore, we will proceed on determining the role of the reinsurance companies on the axis of Consumers Protection -Insurance Guarantee Funds, the functioning of reinsurance companies and the impact they have on preserving, indirectly, the consumers of insurance services.

2. Insurance Guarantee Funds. Definition. Role. Functions

An insurance guaranty association is a state-sanction organization that protects policyholders and claimants in the event of an insurance company's impairment or insolvency.³ In the European Union, this type of protection is provided by Insurance Guarantee Schemes (IGS), that offer claimants last-resort protection when insurance companies find themselves unable to fulfill their contractual commitments.⁴

The main functions of IGS, often referred to as Insurance Guarantee Associations (IGAs) are policyholders protection, maintaining financial stability, offering cross-border protection and regulatory compliance. IGS ensure that claimants are protected in case an insurance company becomes insolvent, safeguarding their rights to claims. In terms of financial stability, these schemes provide safety nets for policyholders, contributing to the stability of the insurance market, enhancing overall confidence in the sector. Particularly in the European Single Market, certain rules and regulations promote customers' cross-border protection, making sure that policyholders in one member state benefit from protection irrespective of the country their insurer is based on. Regarding regulatory compliance, IGS operate within the framework of EU directives, for instance Insurance Distribution Directive (IDD) and Solvency II, both of them setting standards for consumer protection and financial soundness. In terms of operation, IGS are typically funded by contributions from solvent insurers, that are assessed based on their market share.

3. The Mechanism of IGS in European Jurisdictions

According to the reports of the European Parliament, approximately half of EU countries have insurance guarantee schemes in place. An example of such a country is Romania, whose Insurance Guarantee Fund is established as a legal entity under public law that exercises its powers and competencies in accordance with the provisions of Law of the Romanian Parliament 213/2015. The same law states that the fund protects insurance creditors by paying insurance/ claims representing

³ Insurance Guaranty Association: Meaning, Requirements, FAQs, date of last access: 30.10.2024.

⁴ Carriages preview | Legislative Train Schedule, date of last access: 30.10.2024.

compensation due from the insurer as a result of the occurrence of the insured risks under the insurance contracts previously concluded.⁵

France also has an Insurance Guarantee Scheme named *Fonds de Garantie des Assurance de Personnes* (FGAP), that protects life insurance and accident policies, offering policyholders protection in case of insolvency of insurance companies, with benefits covering both capital and accumulated interest up to set limits. The FGAP is funded by insurance companies' contributions.

In Italy, *Fondo di Garanzia per le Vittime della Strada* is the main IGS, offering compensation for motor vehicle accident victims, including the case when insurers become insolvent. Although it primarily covers motor insurance, discussions in Italy have also been centered on expanding protection to life and general insurance policies.

Spain also has a practical system in this matter: *Consorcio de Compensación de Seguros*, a government-backed fund that provides compensation not only for natural disaster events, but also for insurance policyholders in cases of insurer's insolvency. This fund is unique in its dual role, supplying individuals with both compensation in case of catastrophe and insolvency protection across several types of insurance.

Last but not least, Ireland offers protection in case of insurance companies' insolvency through *Insurance Compensation Fund (ICF)*, covering up to 65% of a claim of €825.000. This fund operates under the supervision of the Central Bank of Ireland and covers both life and non-life related insurance, with recent legislative changes expanding the scope and funding of ICF.

4. The Protection of Consumer in Insurance in the Legislation of the European Union

The protection of consumers of insurance services in Europe is a multi-faceted framework that encompasses legislation, regulatory oversights and consumer rights initiatives, some of the most important legislative acts in this regard being Directive 2009/138/EC (Solvency II), that focuses on the financial stability of insurance companies in the benefit of consumers, Directive 2002/83/EC that aims to regulate the life insurance market, Regulation (EU) 2016/679 (GDPR) that is essential for protecting customers' personal and financial information, Regulation (EU) No. 1286/2014 (PRIIPs) that applies to investment and insurance products and aims to provide policyholders with clear information.

In terms of the connection between IGS and protection of consumers, it is crucial for ensuring financial security and trust in the insurance market, as well as for aiding insurance companies in their target of covering certain costs in the event of force majeure and fortuitous events. The IGS provide a safety net for consumers by compensating them for unpaid claims if their insurance company becomes

⁵ Law No. 213 21/07/2015 regarding the Insurance Guarantee Fund (Official Gazette of Romania, No. 550, July, 24, 2015). LEGE 213 21/07/2015 - Portal Legislativ, date of last access: 10.11.2024.

insolvent, guaranteeing that they do not have to face total financial loss due to an insurer's failure. Moreover, by installing confidence in the insurance market, it encourages consumers to continue purchasing insurance policies in the foreseeable future, maintaining the stability of the insurance market.

At the level of European Union, the most important act that regulates the consumer protection is Directive 2009/138/CE (Solvency II)⁶. In this regard, article 45 states some capital requirements for insurance companies, specifying the obligations concerning the own funds of insurers, in order to ensure that they maintain sufficient resources to fulfill their contractual obligations, irrespective of their insolvency. In case of insurers not respecting capital requirements, article 138 is applicable. Article 48 in the same directive imposes the obligation on insurers to periodically assess their solvency and to implement corrective measures when necessary. Article 114 refers to implementing the measures necessary for managing the risks associated with insolvency in order to protect policyholders.

Besides imposing the importance of insurers identifying and managing risk properly, as a measure of preventing the company from becoming insolvent, the Solvency II Directive mandates member states to set up compensation schemes or guarantee funds to protect policyholders in case an insurer fails to manage its funds properly. As mentioned before, these schemes provide compensation to policyholders for unpaid claims, ensuring a minimum level of financial protection.

Article 76 addresses the calculation of technical provisions that insurance and reinsurance undertakings must maintain. As stated in Article 76 (2), the value of technical provisions shall correspond to the current amount insurance and reinsurance undertakings would have to pay if they were to transfer their insurance and reinsurance obligations immediately to another insurance or reinsurance undertaking. This provision is essential for ensuring that insurers are financially equipped to meet their future obligations to policyholders, thereby strengthening consumer protection.

In cases of non-compliance with technical provisions, Article 137 of the same directive allows the supervisory authorities of the undertaking's home Member State to prohibit the free disposal of its assets after having communicated their intentions to the supervisory authorities of the host Member States. Furthermore, the supervisory authorities of the home Member State shall designate the assets to be covered by such measures. These measures ensure that an insurer's assets remain available to fulfill policyholder obligations in the event of financial instability.

Another key provision is Article 39, which concerns the Transfer of Portfolios. This article states that an insurance or reinsurance undertaking may transfer its entire portfolio of insurance contracts to another undertaking. This clause is critical in upholding policyholder protections even when an insurer faces operational difficulties, allowing policy obligations to be smoothly transferred and

⁶ Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II). Directive - 2009/138 - EN - solvency ii directive - EUR-Lex, date of last access: 10.11.2014.

maintained.⁷Overall, the purpose of the directive is to regulate not only the prevention of insurance companies' insolvency, but also solutions in case insolvency still occurs, both of them in the benefit of consumers.

Another important source for protecting consumers (policyholders) in the life insurance sector is Directive 2002/83/EC⁸, which pertains to life insurance regulations. This directive includes several articles addressing the financial stability of insurers, an essential factor in cases of insolvency that further safeguards policyholders.

For instance, Article 27 (Available Solvency Margin) stipulates that available solvency margins must consist of the insurer's assets, free from any foreseeable liabilities, and excluding intangible items. The article outlines specific components that can contribute to this margin. Essentially, this provision emphasizes the technical reserves that insurers are required to maintain to meet their financial obligations to policyholders. Accurate calculations of these reserves are necessary to ensure that companies can effectively cover policyholder claims as they arise.

Article 28 (Required Solvency Margin) details the solvency margin that life insurance companies must uphold as a financial buffer. This margin serves as an additional layer of protection beyond the technical provisions (financial reserves), equipping insurers to address unexpected losses or adverse financial conditions. The required solvency margin is calculated based on the information provided in this article.

Furthermore, Article 29 (Guarantee Fund) specifies that one-third of the required solvency margin, as defined in Article 28, must constitute the guarantee fund. This fund will include the items listed in Articles 27 (2) and (3), and may also incorporate items from Article 27 (4) (c), subject to the approval of the competent authority in the insurer's home Member State. Importantly, the guarantee fund cannot be less than a minimum of EUR 3 million. Additionally, Member States have the option to reduce the minimum guarantee fund by one-fourth for mutual associations, mutual-type associations, and tontines.⁹

In the Romanian legislation, according to the Law of the Romanian Parliament 85/2014 regarding to procedures of preventing insolvency and of insolvency, article 5, (1), 29, insolvency is the state of a debtor's assets characterized by insufficient available funds to pay certain liquid and due debts. According to the same legal provision, the insolvency of a debtor is presumed when, after 60 days

⁷ Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II). Directive - 2009/138 - EN - solvency ii directive - EUR-Lex, date of last access: 10.11.2014.

⁸ Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance. Directive - 2002/83 - EN - EUR-Lex, date of last access: 03.11.2024.

⁹ Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance. Directive - 2002/83 - EN - EUR-Lex, date of last access: 03.11.2024.

from the due date, the debtor has not paid the debt owed to the creditor, the presumption being relative. Additionally, insolvency becomes imminent when it is proven that the debtor will be unable to pay due debts with the available funds at the due date.¹⁰ In the European Union, the definition of insolvency can vary slightly depending upon the specific legal context. However, generally, insolvency refers to the situation in which an individual or entity is unable to meet their financial obligations as soon as they become due.

5. The Liability of IGS in case of Insurance Companies' Insolvency

Regarding the contractual liability of bankrupt insurance companies, although the role of Insurance Guarantee Schemes (IGS) varies from one jurisdiction to another, the main majority of these schemes assume liability in cases when insurance companies are insolvent and do not have the necessary funds to pay policyholders' claims, or when it is more advantageous for policyholders to claim compensation directly from the guarantee fund. While there are some differences in procedure and operational methods from country to country, IGS substantially fulfill the same role in consumer protection.

For instance, under Romanian law, from the date on which the decision to initiate bankruptcy proceedings against an insurer becomes final, the Insurance Guarantee Fund is entitled to make payments from its available funds for the settlement of amounts due to insurance creditors, in compliance with legal provisions. Specifically, for the purpose of receiving compensation/indemnities, the aggrieved party or the insured, as applicable, must submit a substantiated request within 90 days from the date on which the decision to initiate bankruptcy proceedings becomes final, according to Article 12, paragraph (1) of Law no. 213/2015. Judicially¹¹, it has also been established that a third party/insured must submit a compensation request to the Insurance Guarantee Fund, even in cases where the claimant had previously filed a compensation request with the RCA insurer and a claim file had been opened before the insolvency proceedings began. Additionally, whenever there is a dispute regarding the determination of liability in causing the motor accident, the 90-day period for submitting the request to the FGA begins from the date on which the final ruling resolving that dispute is communicated.¹²

To make compensation/indemnity payments, the Fund proceeds with verifying the claim files and insurance claims registered in its records, taking into account the applicable rules and the general and specific terms and conditions provided in the insurance contracts concluded with the insolvent insurer. The Fund is authorized to make payments from its resources only after the bankruptcy decision

¹⁰ Law No. 85, 25/06/2014 regarding the proceedings of preventing insolvency and of insolvency (Official Gazette of Romania, No. 466, June, 25, 2014). LEGE 85 25/06/2014 - Portal Legislativ, date of last access: 10.11.2024.

¹¹ Bucharest Court of Appeal, 8th Administrative and Fiscal Division, Decision No. 2413 of May 25, 2018, available on www.rejust.ro.

¹² Vasile Nemeș, *Dreptul asigurărilor*, Ediția a 5-a, Ed. Hamangiu, București, 2021, p. 420

against an insurer becomes final, as stipulated in Article 266, paragraph (2) of Law no. 85/2014¹³. The relevant legislation does not specify a timeframe for processing claims submitted to the Fund. Given that the FGA is a legal entity of public law, and that a special administrative procedure is involved, the provisions of the Administrative Litigation Law will apply.¹⁴

Furthermore, the insurance creditor may pursue, separately and concurrently, the bankruptcy proceedings of the insurer under Law no. 85/2014¹⁵ to recover their claim from the assets of the bankrupt insurer, including any amounts owed that exceed the guarantee cap, in accordance with Article 17 of Law no. 213/2015. However, if the insurance claim is paid by the Fund, the law (Article 266, paragraph (3) of Law no. 85/2014¹⁶) stipulates that the creditor may no longer file claims and/or request payment within the bankruptcy proceedings, except for amounts that exceed the statutory guarantee cap. The guarantee cap is set at 500.000 RON per insurance creditor of the bankrupt insurer.¹⁷

Although in most of the EU countries, IGS are focused on civil compensation, with little to no direct involvement in criminal proceedings, the involvement of guarantee funds as civilly responsible parties during civil actions in criminal proceedings, is primarily a characteristic of the legal framework in Romania. Such a guarantee fund is The Bureau of Motor Insurers in Romania (Biroul Asiguratorilor de Autovehicule din România, generically BAAR¹⁸), that has the status of a civilly responsible party and can be required individually, not jointly with the defendant, to pay civil damages to people harmed in accidents involving uninsured vehicles.¹⁹ However, BAAR can be forced neither to pay the hospitals where the car accidents' victims the medical treatment costs, nor to cover the victim's legal expenses.²⁰ In case of an insurance company that becomes insolvent, it was established judicially that the FGA does not have the status of a civilly responsible party in the criminal proceedings for damages caused by accidents

¹³ Law No. 85, 25/06/2014 regarding the proceedings of preventing insolvency and of insolvency (Official Gazette of Romania, No. 466, June, 25, 2014). LEGE 85 25/06/2014 - Portal Legislativ, date of last access: 10.11.2024.

¹⁴ Elena-Cristina Savu, *Contractul de asigurare*, Ed. C.H.Beck, București, 2018, p.56.

¹⁵ Law No. 85, 25/06/2014 regarding the proceedings of preventing insolvency and of insolvency (Official Gazette of Romania, No. 466, June, 25, 2014). LEGE 85 25/06/2014 - Portal Legislativ, date of last access: 10.11.2024.

¹⁶ *Idem*, date of last access: 10.11.2024.

¹⁷ Law No. 213 21/07/2015 regarding the Insurance Guarantee Fund (Official Gazette of Romania, No. 550, July, 24, 2015). LEGE 213 21/07/2015 - Portal Legislativ, date of last access: 10.11.2024.

¹⁸ Atributii – BAAR, date of last access: 06.11.2024.

¹⁹ ICCJ, The decision rendered in the appeal in the interest of Law No. 3/2010 (Official Gazette of Romania, No. 866, December, 23, 2010).

²⁰ Andrei-Viorel Iugan, *Procedură penală, Partea generală*, Ediția 2, Ed. C.H. Beck, București, 2024, p. 209.

involving vehicles insured by a company in bankruptcy, this status belonging to the insured through the liquidator.²¹

6. Causes that May Determine Insurance Companies' Insolvency

Regarding the main causes of insolvency among insurance companies, it is noticeable that they can be multifaceted, often involving a combination of internal and external factors. Firstly, insurers may underestimate the risks associated with certain policies, leading to premiums that are too low to cover expected claims. A higher than anticipated number of claims (frequency) or unusually large claims (severity) can lead to underwriting losses. This might occur due to factors like natural disasters, economic downturns or increased healthcare costs. Such events that often cause extensive damage and affect a large number of policyholders simultaneously, may result in the increase of reinsurance rate, reflecting the higher risk environment.

On the other hand, intense competition on the insurance market may drive insurers to lower premiums to attract customers, sometimes below sustainable levels. While this could be beneficial for consumers in the short term, it could also result in inadequate pricing, where premiums do not cover the expected claims and administrative costs in the long run. Supposing that the profit margins shrink to unsustainable levels, insurance companies have to cope with financial difficulties, sometimes even insolvency. Moreover, in an effort to remain competitive, insurers might take on riskier clients and offer policies with broader coverage terms, resulting in the same financial instability.

Another situation that might cause insolvency in the case of insurance companies has to do with regulatory non-compliance. It is common knowledge that the insurance sector is subject to a multitude of laws, regulations and guidelines established by national and supranational regulatory authorities. Therefore, insurers may struggle to keep up with the changing regulations, leading to inadvertent non-compliance, likely to determine regulatory authorities to impose significant fines and penalties, impacting the financial stability of the companies. Smaller insurers may even lack the necessary resources, such as skilled personnel and technology, to fully comply with all regulatory requirements. Similarly, some companies may not be fully aware of the rules and regulations applicable to them, especially if the legislation tends to be superfluous or if they operate across multiple jurisdictions.

Increased policyholder complaints serve as a significant indicator of underlying issues within an insurance company.²² A rise in complaints typically necessitates more resources for claims handling, customer service, and dispute resolution. These increased operational costs can strain an insurer's financial resources, particularly if complaints lead to more claims or larger settlements. Complaints can escalate to legal disputes, resulting in additional costs for legal

²¹ ICCJ, The decision rendered in the appeal in the interest of law No. 26/2017 (Official Gazette of Romania, No. 162, February, 21, 2018).

²² Understanding Insurance Company Insolvency: Causes and Impacts - The Insurance Universe, date of last access: 03.11.2024.

defense, settlements, or court awards. These expenses can further erode an insurer's capital base.

Defective management practices can significantly contribute to the insolvency of insurance companies. Poor management may fail to establish a clear strategic vision or adapt to changing market conditions, leading to decisions that do not align with long-term sustainability. Management that does not effectively identify and assess risks can expose the company to unforeseen financial challenges, such as natural disasters or economic downturns.

7. Jurisprudence regarding Insolvent Companies

Building on the causes discussed above that can lead to an insurance company's insolvency, it is useful to examine some specific cases that highlights, from a practical standpoint, the primary challenges an insurance company might face in its operations that could drive it into insolvency.

As an example, significant informations can be found within the Decision No. 132/2017 issued by the Commercial Division of the Timiș Court²³, published in the Insolvency Proceedings Bulletin of Romania.

At the initiation of the financial recovery procedure based on the Financial Recovery Plan for Carpatica Asig SA (Decision No. 183/16.05.2014 of the Romanian Financial Supervisory Authority), Carpatica Asig SA was found non-compliant with several mandatory financial requirements, including the available solvency margin, liquidity ratio, and reserve coverage with admissible assets. Specifically, as reported by the Romanian Financial Supervisory Authority, the company's liquidity indicator was below the required threshold as of March 31, 2014.

The primary factors contributing to Carpatica Asig SA's insolvency included: insufficient assets: the company's total assets were inadequate to satisfy its liabilities, creating a significant financial shortfall; negative equity: the company's negative equity position was below the minimum capital requirement, reflecting an inability to sustain its financial obligations; market influence in MTPL sector: Carpatica Asig SA held a significant share in the general insurance market, particularly in the compulsory motor third-party liability (MTPL) insurance sector (known as RCA); high volume of issued policies: a considerable number of general insurance policies, especially in the MTPL sector, had been issued by the company; significant claims reserves and notifications: as of December 31, 2015, the company recorded a large number of notified claims and a substantial claims reserve, reflecting significant anticipated payouts; failure to secure financial resources: by December 31, 2015, the company had not secured the necessary financial resources as stipulated in the Financial Recovery Plan, which were critical for restoring financial stability and achieving compliance with prudential indicators.

²³ Timiș Court, Commercial Section, Decision No. 132/2017, published in the Insolvency Proceedings Bulletin No. 4791/09.03.2017, Microsoft Word - 4791_2017.docx, date of last access: 10.11.2024.

In light of these findings, Decision No. 132/2017 issued by the Commercial Division of the Timiș Court mandated the initiation of bankruptcy proceedings against Carpatica Asig SA, marking the formal start of liquidation processes due to its inability to meet legal solvency and liquidity standards.

A relevant case of an insurance company that became insolvent was Euroins, the market leader in CAL (compulsory automobile liability) insurance in Romania (over 95% of the insurance policies emitted). In this respect, CITR Bucharest Branch, part of Impetum Group, the judicial liquidator of Euroins, drafted a report concerning the main causes of the insurer's insolvency. The first and most significant cause identified is the failure to meet solvency indicators, meaning that the capital required by the company to cover all the potential liabilities to all policyholders and reinsurers was insufficient. On the 30th of September 2022, the funds required to meet the Solvency Capital Requirement (SCR) was 2.2 billion RON, while the funds demanded to comply with the Minimum Capital Requirement (MCR) was about 1.75 billion RON.²⁴ According to Solvency II Capital, the MCR is set at a level that ensures an insurance company can meet its obligations over a short time horizon, typically calculated as a percentage of the SCR (article 128). Specifically, the MCR must be at least 25% of the SCR, with specific minimum values established by the regulatory authority (at €2.700.000 for non-life insurance undertakings and at least €3.900.000 for life insurance undertakings).²⁵ The SCR itself is calculated based on the insurer's risk profile and is intended to ensure that the company can absorb significant losses, according to article 101 from Solvency II Directive.

Furthermore, another detail that led to the company's insolvency was the fact that the adequate level to cover potential policyholders damages. CITR, the judicial liquidator of Euroins identified a discrepancy of 1 billion RON between the records existing at the time of the insolvency proceedings and the result of the inventory, ranging from approximately 600 million RON to 1.7 billion RON.²⁶

Pertaining to CITR, the insurer's insolvency was the result of several critical issues, including late payment of claims, that led to increased enforcement risks and diminished assets, with penalties exceeding 300 million RON, lack of debt recovery efforts, as insufficient actions were taken to recover receivables and loans, ineffective regress recovery consisting of wal unrecovered amounts of 15.5 million RON, plus nearly 60 million from various debtors, investment losses, totaled 18.3 million RON between 2019 and 2023 and consistent insurance losses, that peaked in 2022, with 917.6 million RON lost for CAL insurances.

²⁴ CITR CITR a finalizat raportul privind cauzele falimentului Euroins, date of last access: 04.11.2024.

²⁵ Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II). Directive - 2009/138 - EN - solvency ii directive - EUR-Lex, date of last access: 10.11.2014.

²⁶ CITR CITR a finalizat raportul privind cauzele falimentului Euroins, date of last access: 04.11.2024.

Last but not least, Euroins concluded a contract with EIG AD, an insurance company from Bulgaria, member of the Euroins Insurance Group, that involved the transfer of financial assets, totaling over 1.5 billion RON. As a result of the aforementioned causes, on the 17th of March 2023, The Financial Supervisory Authority of Romania (ASF) decided to withdraw the operating license of Euroins Romania, having determined indications of the company's insolvency. It was also decided to file a petition to initiate insolvency proceedings and appointed the Insurance Guarantee Fund (FGA) as the interim administrator of the company, tasked with managing and overseeing the insurer's operations and implementing necessary measures to preserve its assets.²⁷

The lack of necessary funds was stated through a report of The European Insurance and Occupational Pensions Authority (EIOPA). The report, based on the data submitted by The Financial Supervisory Authority of Romania (ASF), concluded that the company had a capital shortfall between €550 million and €581 million.²⁸ EIG AD challenged the report of EIOPA before the Court of Justice of the European Union (CJEU), considering that both ASF's license withdrawal and EIOPA's report contravene internal regulation and EU law in the matter. The appeal submitted to the CJEU is part of a series of actions intended to protect the shareholders and stakeholders of EIG from the harms caused by the way this report was drafted, issued and presented.²⁹

In the situation of Euroins, the aforementioned Insurance Guarantee Fund (FGA) processed a total of 30.924 payment requests for the creditors of Euroins, with an approved payment amount of 255,2 million RON up to the 31st of March 2024 from the total of 232.219 payment requests.³⁰

8. Other Methods of Consumer Protection in Insurance Contracts

As stated in the Article 13, paragraph 7 of the Solvency II Directive, the activity of reinsurance consists of accepting risks ceded by an insurance undertaking or third-country insurance undertaking, or by another reinsurance undertaking or third-country reinsurance undertaking.³¹

²⁷ Autoritatea de Supraveghere Financiară - Autoritatea de Supraveghere Financiară retrage autorizația de funcționare a Euroins România și constată starea de insolvență a societății, date of last access: 04.11.2024.

²⁸ Parliamentary question | A full review of the EIOPA report on Euroins Romania | E-000374/2024 | European Parliament, date of last access: 04.11.2024.

²⁹ Economica.net - Bulgarii de la EIG au contestat raportul EIOPA privind Euroins România la Curtea de Justiție a Uniunii Europene - Economica.net, date of last access: 04.11.2024.

³⁰ FGA, plăți de 1,86 miliarde lei, pentru creditorii de asigurări ai City Insurance SA și Euroins SA, până la 31 Martie 2024 – www.fgaromania.ro, date of last access: 04.11.2024.

³¹ Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II). Directive - 2009/138 - EN - solvency ii directive - EUR-Lex, date of last access: 10.11.2014.

To address increasingly diverse and significant risks, insurance companies are legally entitled to enter into insurance contracts themselves. Reinsurance thus contributes to a greater dispersion of risks among insurance companies, facilitating the prompt payment of large claims without causing the original insurer to become insolvent. The subject of reinsurance is always the liability that the insurer has under the insurance contract concluded with the insured, not the insured's property, their liability to third parties, life, or bodily integrity. The reinsurance contract indirectly benefits the insured, as the insurer is guaranteed regarding the obligation owed to the insured, reinsurance being “insurance for the insurance”.³² Moreover, if in liability insurance the injured party could directly seek payment from the insurer for the insurance indemnity, they lose this right in relation to the reinsurer.

In international reinsurance, three methods of reinsurance are utilized³³: the facultative method, the obligatory (contractual) method, and the facultative-obligatory method, as well as reinsurance pools. In the facultative method, each proposed risk for reinsurance is treated and analyzed separately, and the reinsurer is not obliged to enter into a contract under the conditions proposed by the cedent. The contractual method is the mandatory form of reinsurance in which the contract must be concluded for a portfolio of risks. The reinsurer does not have the right to refuse an individual risk or assess it separately and they will globally accept all risks that the cedent wishes to transfer. In the case of the facultative-obligatory method, the cedent has the right to choose the risks they wish to cede in reinsurance and to set the contract conditions, while the reinsurer is obliged to accept them as proposed. Last but not least, insurance pools are formed from insurance companies that each contribute capital to reinsure a portion of the risks underwritten by these companies. Consequently, reinsurance can represent a genuine method of consumer protection in the event of an insurer's bankruptcy.

Regarding the protection of consumers, it is of high importance to address the issue of unfair terms in insurance contracts. According to article 3 of the Directive 93/13/EEC, a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.³⁴ By transposing the directive, the German, the British and the French legislators have drawn up “black lists” of terms that should always be considered as unfair, as well as “gray lists” of terms that are relatively presumed to be potentially unfair for consumers.³⁵ In the British regulation related to consumer goods contracts, a list of terms that should be perceived as unfair in insurance contracts has been adopted (terms that limit the insurer's obligation to

³² Irina Sferdian, *Dreptul asigurarilor*, Ediția a 5-a, Ed. C.H.Beck, București, 2023, p.24.

³³ *Idem*, p. 28.

³⁴ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts Directive - 93/13 - EN - Unfair Terms Directive - EUR-Lex, date of the last access: 07.11.2024.

³⁵ Irina Sferdian, *Dreptul asigurarilor*, Ediția a 5-a, Ed. C.H.Beck, București, 2023, pp. 103-104.

fulfill commitments made by its agents, terms through which the insurer establishes a mechanism to exempt itself from liability, terms through which the insurer reserves the exclusive right to interpret a contractual provision in its own favor, terms that exclude or obstruct the policyholder's right to take legal action or initiate any other type of legal proceeding).³⁶ According to the specialized legal doctrine in the field, absolute nullity should be the sole sanction applicable to unusual terms, as it allows the removal of their effects in the benefit of consumers, granting the court the possibility to invoke their abusive nature *ex officio*, holding the same value as national rules in European jurisdictions with the rank of public policy, thus serving as a consumer protection measure.³⁷

9. Conclusions

The protection of consumers may be achieved through a number of methods, including assumption of liability of IGS, reinsurance and circumvention of unfair terms. Specifically, in the case of an insurance company's insolvency, IGS play a key role in compensating policyholders. In spite of the provisions of the Solvency II Directive that state the necessity of establishing IGS in all member states, such a mechanism is only put into practice in a restrictive number of countries.

Taking into account that the involvement of IGS is carried out in specific conditions and the sum of money allocated by these funds is limited, it is common knowledge that not all policyholders' claims are able to be covered, thus it is of utmost importance to shed a light on other methods of protecting consumers in the insurance field, for instance reinsurances and concluding insurance contracts without any unfair terms. Overall, IGS are strongly related to reinsurance and unfair terms stipulated in insurance contracts, IGS having the purpose of interfering only in those situations when these means of protecting consumers had already been exhausted, acting as an *ultima ratio*.

Related to insurance companies' insolvency, its prevention itself can be visualised as a genuine method of protecting consumers. In this respect, insurance companies should take into consideration complying with the imperatives of the Solvency II Directive and analysing the risk of all types of insurance contracts individually.

10. *De lege ferenda* Proposals

Based on the case of Euroins, the Romanian leader on the market of CAL insurance in Romania, in order to prevent insurance companies' insolvency, the Directive Solvency II should include a provision forcing companies not to focus exclusively on a singular type of insurance contract. Its reasoning is that certain insurance contracts, such as CAL insurance, that, as their name implies, are

³⁶ *Idem*, p. 104.

³⁷ Mihaela Gheorghe, Radu Rizoïu, *Avem o clauză abuzivă, cum procedăm?*, în RRDP nr. 1/2018, p. 262.

compulsory for all vehicles owners in the European Union, present a higher risk than others, for example private health insurance that only cover standard medical services or homeowners insurances, that are not considered risky, especially in the states with good infrastructure, such as most member states. In this respect, the Directive should impose that insurance companies have to consult experts in the field of insurances that are entitled to evaluate risks and establish a precise percentage of companies' resources that can be allocated to specific types of insurances, for instance a maximum of 25% of resources allocated to CAL insurances.

IGS, as a method of ensuring the protection of consumers, should be regulated in a separate directive (because consumer protection is a subject of shared competences between the EU and the member states, as article 4 from TFUE states³⁸), including the mechanism behind these schemes, the cases when they have to take on liability, the extent of certain policyholders' claims that they cover, as well as the means of financing themselves. Regarding the method of financing the national IGS, the directive should involve an article imposing insurance companies to pay the IGS a sum of money directly proportional to the risk assumed in different insurance contracts, considering the aforementioned evaluation conducted by the expert.

Additionally, an efficient method to boost the trust in the insurance market and the protection of the consumers of this type of services may be reflected in the idea of creating an European Insurance Guarantee Fund that operates as a body within the European Investment Bank. Regarding the financial resources that will be directed to the European Insurance Guarantee Fund, they will consist of the contribution of all the functioning insurance companies placed on the territory of each member state and will interfere to financially assist the National Guarantee Fund when it is summoned to compensate the policyholders in case of the insurance company's insolvency.

Last but not least, from a technical point of view, we believe that each member state should take into consideration the implementation of a national Insurance and Reinsurance Code that should include the provisions related to the functioning of the insurance and reinsurance companies, for improved transparency.

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