

MUTUAL INSURANCE COMPANY - A NEW FORM OF COMPANY IN THE LANDSCAPE OF ROMANIAN LEGAL ENTITIES

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Abstract

By adopting Law no. 71/2019 regarding the mutual insurance companies and for the modification and completion of some normative acts, a new category of legal persons was regulated and, implicitly, as the title of the law suggests, a new category of insurers. Our legislative system thus aligns with the European systems that have long implemented this form of society, even in the organic regulations (France, in the Insurance Code, Italy, in the Civil Code and in the Insurance Code, etc.). As a structure, the mutual society is organized and operates in the legal form of joint stock companies, presenting certain features that configure its autonomy and substantiate its existence. Mutual insurance companies are designed as alternatives to traditional insurance companies whose main purpose is to facilitate access to insurance activities and the involvement of policyholders in the management process of the company. The members acquire a double quality, of associates of the mutual society and of insured persons, consumers of the insurance products that their own society practices. The contributions of the associates, as equivalent to the specific contributions of the companies, contribute to the formation of the mutual society's fund, but also have the legal nature of the insurance premiums, as a price of the insurance products they benefit from. From this perspective, the main advantage of the mutual insurance company is that prudent and fair management (in which the insured are involved, including the double insured), exempts the insured from subsequent contributions (premium payments), especially in those areas where the damage rate is low, such as professional insurance. The mutual insurance company thus presents itself as a true vehicle for capitalizing on the insurance portfolio and a real competitor of the profile companies, ensuring the transparency of insurance operations and the participation of policyholders in the efficient use of the company's resources.

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JEL Classification: K22, K23

1. Introductory notions

According to Law no. 237/2015 *on the authorization and supervision of the insurance and reinsurance activity*³, the insurance activities may be carried out by joint stock companies, mutual societies, European companies and European cooperative societies, bearing the generic name of insurers (art. 2, point 56). Mutual insurance companies were listed in the category of insurers and in Law no. 32/2000⁴, but without benefiting from an independent regulation. Only through Law no. 71/2019 regarding the mutual insurance companies and for the modification and completion of some normative acts, the legislative framework of this new category of insurers was created. Our legislative system thus aligns with the European systems that have implemented this form of society, even in the organic regulations (France, in the Insurance Code, Italy, in the Civil Code and in the Insurance Code, etc.).

At the level of the European Union, the issue of the legal form of the entities exercising the insurance trade belonging to the Member States was discussed in 2002 and regulated by Directive no. 2002/83/EC of 5 November 2002 on life insurance⁵. This Directive provides that in the Member States own insurers are to be set up mainly in the form of joint stock companies and mutual societies (Article 6). There are also states, such as France, Italy, Belgium, in which the insurance activity can be carried out by entities other than joint stock companies and mutual societies, such as:

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³ Official Gazette no. 800 of October 28, 2015.

⁴ Law no. 32/2000 was repealed by Law no. 237/2015.

⁵ J.O.L. 345 of December 19, 2002.

institutions subject to the Social Security Code, the Rural Code and Mutual Code⁶. Recent legislation in the Member States complies with European requirements regarding the legal form of insurers. We indicate, for example, the Polish legislation⁷. Subsequently, the landscape of insurers has been enriched by European insurance companies and insurance cooperatives.

Mutual insurance companies are present in most European countries with a tradition in the insurance trade and play a fairly important role in the insurance market. The phenomenon is very widespread in France, where these insurers hold almost half of the market⁸, which is why, in French doctrine, the future of insurers - companies and insurers - mutual companies has even been questioned. Many of these companies are made up of large mutual groups, such as MACIF, which has 4.5 million members and 8,000 employees⁹.

Finally, it is necessary to know whether mutual insurance companies are subject to the same rules of financial prudence as those of commercial insurance companies.

2. Some historical aspects regarding the mutual insurance companies

Mutual societies have existed since ancient times, because, initially in the form of mutual associations, these entities formed the basis for the birth and development of insurance companies. Even on the territory of our country, the existence of a form of mutual insurance of animals for cases of accidents, seems to be, according to historians, "Hopşa"¹⁰.

One of the most representative mutual insurance associations for animals was the Insurance House attached to the Insurance Bank from Colceag Commune, Prahova County, which in the period 1906-1912 insured over 2300 cattle. In 1909, two large mutual associations were organized: the "Reunion of Cattle Owners from Orăștie" and the second in Cacova (Banat), which managed to include 400 communes in their sphere. In 1914, the National Society of Agriculture introduced the mutual insurance of agricultural crops of the village communes through the Central House of Communal Banks, thus ensuring over 155 lease communes, spread throughout the country, with an area of about 878 ha. In 1923, the Central Cooperative of Village Cooperatives organized an agricultural mutual insurance service against hail and it seems that it was among the first forms of mutual insurance against such risks.

We conclude our historical presentation by stating that, in 1937, 140 mutual animal insurance associations were known, which insured about 40,000 cattle and 3,200 horses¹¹.

The main regulations of the establishment and operation of mutual insurance associations were undoubtedly constituted by the Commercial Code (art. 257-263)¹², as well as by the Law for the establishment and operation of private insurance enterprises and the regulation of the insurance contract, from 1930.

To our knowledge, in Romania, there is no mutual insurance company, but, comparing the historical figures with the current ones in the states with developed economy, the appearance of such insurers with Romanian initiative is not excluded.

3. The notion and particularities of the mutual insurance company

The Law no. 71/2019 defines the mutual insurance company as a non-profit legal entity,

⁶ For details, see J.-L. De Boissieu, *Introduction à l'assurance*, Ed. Collection Plus, 2005, p. 86 et seq.; Y. Lambert Faivre, *Droit des assurances*, VIII^e ed., Dalloz, Paris, 1992, p. 135 et seq.; N. Jacob, Ph. Le Tourneau, *Les assurances*, Dalloz, 1979 p. 145 et seq.; C.-J. Berr, H. Groutel, *Droit des assurances*, Dalloz, Paris, 1993 p. 134 et seq. Moreover, in the newer French doctrine, the entities in the insurance field are analyzed on three categories: enterprises subject to the Insurance Code, insurance bodies subject to the Social Security Code and the bodies regulated by the Mutual Code.

⁷ Law on insurance activity of May 22, 2003, art. 5.

⁸ See in this regard J.-L. de Boissieu, *op. cit.*, p. 92.

⁹ *Ibid.*, p. 93.

¹⁰ I. Văcărel, F. Bercea, *Asigurări și reasigurări*, Ed. Expert, Bucharest, 1993, p. 112.

¹¹ For more details, see I. Văcărel, F. Bercea, *op. cit.*, p. 112 et seq.

¹² See I. N. Ființescu, *Curs de drept comercial*, edited by Al. Th. Doicescu, Bucharest, 1929, p. 323-326.

with an unlimited and variable number of members, having as object the development of the insurance activity according to the provisions of Law no. 237/2015 and which is financed mainly by members' contributions (art. 2 paragraph 1, letter g.)

The Romanian legal doctrine was not particularly concerned with the notion of the mutual insurance company, but was limited to specifying that it is called "mutual" due to the fact that each partner is, at the same time, an insurer to others and insured to them¹³. The French doctrine also does not give its own definition to mutual insurance companies, but either reproduces the provisions of the Insurance Code (art. 322.42), or presents the main elements of difference from public limited companies.

Considering the existing legal regulations in Romanian law and the clarifications made in the French doctrine in relation to mutual insurance companies, we will present below the particularities of this category of insurers¹⁴, which represent, at the same time, the main differences compared to commercial companies. insurance.

A first peculiarity of mutual insurance companies, from the patrimonial point of view, is that they do not have a share capital divided into shares, as is the case of commercial companies. The law speaks of the initial fund¹⁵, the free reserve fund and the balancing fund for unfavorable situations, but they do not have the meaning, composition and finality of the share capital. It is worth noting that there are national legislations such as the Italian one, which allow the establishment of associations without their own patrimony and without legal personality¹⁶.

Then, the share capital represents the value expression of the totality of the contributions of the shareholders who participate in the establishment of the company, with the legal function of constituting the general pledge of the unsecured creditors; the initial fund, the reserve fund and the balancing fund for unfavorable situations are the main financial sources for the payment of damages to the insured or third parties affected.

Another peculiarity concerns the associates of the mutual insurance companies, in the sense that, unlike the commercial companies in which a clear distinction is made between shareholders and insureds, within the mutual society, the associates are both insured and insurers¹⁷.

Another difference reported in the French literature¹⁸ is that mutual societies do not have a commercial object, a speculative purpose, but one of self-protection against risks. Moreover, in the French system, the mutual association is completed with the rules applicable to public limited companies¹⁹. Therefore, corroborating the legal provisions regarding the mutual insurance company, we note that we are in the presence of a civil legal entity (art. 2 of Law no. 71/2019), but whose object of activity is to carry out operations that are commercial services²⁰. Even in France, where, as we have shown, the doctrine considers the object of activity of mutual societies to be non-commercial, they are subject to the same prudential, accounting, financial and fiscal rules²¹. Mutual societies in the Italian system have the same legal status²².

It is also worth mentioning that mutual insurance companies, like other insurers, are subject

¹³ *Codul comercial adnotat*, Ed. Tribuna Craiova, 1994, p. 298; I. N. Fiñescu, *op. cit.*, p. 324.

¹⁴ For more details on mutual insurance companies in French doctrine, see M. L. Pares, *Les Sociétés d'Assurances à forme mutuelle*, Paris, 1950, p.19 et seq.; N. Jacob, Ph. Le Tourneau, *op. cit.*, p. 511 et seq.; Y. Lambert-Faivre, *op. cit.*, p. 137 et seq.; C.-J. Berr, H. Groutel, *op. cit.*, p. 34 et seq.; J.-L. de Boissieu, *op. cit.*, p. 190 et seq.

¹⁵ In French doctrine it is also called a stability fund; see M. L. Pares, *op. cit.*, p. 23.

¹⁶ Under Italian law, these associations without legal personality and without their own assets are called mutual distribution companies, the others being called contribution companies (S. Lanna, *Diritto delle assicurazioni private*, Esselibri-Simone, Milano, 2006 p. 55; A. La Torre, *Le assicurazioni, seconda edizione, ampliata e aggiornata*, Giuffrè Editore, Milano, 2007, p. 35).

¹⁷ In the French doctrine a distinction is made between the founding associations of the mutual society and the adherents, who are the persons later co-opted within the association. (see M. L. Pares, *op. cit.*, p.29).

¹⁸ J.-L. de Boissieu, *op. cit.*, p. 91; C. Eliashberg, F. Couilbault, *Risques et assurances de responsabilité civile*, 4^e ed., Ed. L. Argus, Dalloz, 2002., p. 108.

¹⁹ See M.L. Pares, *op. cit.*, p. 30 et seq.

²⁰ Also in the Italian specialized doctrine it is appreciated that the activity of the mutual insurance companies has an economic nature (see A. La Torre, *op. cit.*, p. 36).

²¹ See J.-L. de Boissieu, *op. cit.*, p. 92.

²² See A. La Torre, *op. cit.*, p. 40-41.

to the supervision of the Financial Supervision Authority (FSA), the purpose of supervision being to protect policyholders and maintain the stability of the insurance market (art. 6 of Law no. 237/2015).

In conclusion, the mutual insurance company is not a commercial company such as those regulated by Law no. 31/1990, but it remains a civil society, but endowed with legal personality.

In relation to the above, we define the mutual insurance company as a civil company endowed with legal personality, non-profit, in which the partners participate with a fixed or variable contribution, to constitute the initial fund in order to compensate the partners who suffers an injury (damage) as a result of the insured risks, and to return the surplus of the associates or to carry it over for the next insurance period²³.

In the following we will briefly present some aspects regarding the establishment, organization and functioning of the mutual insurance company as it is regulated in the current legislative context.

4. Establishment of the mutual insurance company

Law no. 71/2019 enshrines some special rules regarding the establishment of mutual insurance companies regarding the members of the company, the object of activity, the purpose of the company, registration and authorization.

Like companies, the mutual company is formed on the basis of the agreement of the partners, materialized in the articles of incorporation of the company. The law expressly provides that the act underlying the establishment of mutual societies is the articles of incorporation, which are concluded under the private signature of the founding members (art. 6).

As mentioned above, according to the law, the mutual insurance company is established, organized and operates in the legal form of the joint stock company.

5. Members of society

In the very first article, Law no. 71/2019 stipulates that, in order to carry out the insurance activity, natural persons, legal persons and/or entities without legal personality²⁴ established according to the law may associate and set up mutual insurance companies on the territory of Romania, with legal personality.

Therefore, the associates of the mutual society can be natural persons, legal persons, including entities without legal personality, bearing the specific name of “members of the society”, without the law establishing any special condition in this respect.

The law stipulates that the number of founding members²⁵ upon incorporation is at least 5, as they are not conditioned by acquiring the quality of insured at the time of incorporation. The founding members will conclude the insurance contract after obtaining the operation authorization (art. 9).

We also specify in the previous ones that the members have both the quality of associates of the mutual insurance company and that of the insured, holders of insurance policies practiced by the company in question. The conclusion is strengthened by the provisions of art. 11 of the law, which stipulate that, after the authorization of the mutual society, the quality of membership is acquired by concluding at least one insurance contract with the mutual society. Consequently, a person who is neither insured in that company nor insured without being an associate in the mutual society cannot be a member of the mutual insurance company.

²³ See also M.L. Pares, *op. cit.*, p. 52-53.

²⁴ According to Law no. 71/2019, entity without legal personality represents the form of organization constituted on the basis of a company contract according to the common law or on the basis of the provisions of special laws, without legal personality, aiming to carry out production, trade, services, agricultural activities or the exercise of regulated or liberal professions (art. 2 paragraph 1, letter h).

²⁵ According to the law, the founding members of the mutual society are the signatories of the constitutive act (art.11).

6. Object of activity

The mutual insurance company, like the commercial insurance company, is distinguished from the other entities and by the object of activity. Thus, according to the law (art. 3), mutual societies carry out only insurance activity and operations directly related to this activity for their members, based on the principle of mutuality. Legal regulation is one of the most representative forms of application of the principle of the specialty of the legal person's capacity to use. According to the same text, by way of exception, mutual societies may conclude with their members legal persons or entities without legal personality and group insurance contracts for their employees, without the latter becoming members, the obligation to pay the contributions provided by law, the articles of association and the contracts in question reverting to those members²⁶.

7. The purpose of the mutual insurance company

The mutual societies aim at covering, through insurance contracts, the risks of its members and the payment of indemnities and insurance indemnities to them, the beneficiaries of the contracts and/or damaged third parties, in case of insured risks (art. 3). Therefore, the purpose of the mutual insurance company is well defined by law, distinguishing them both from other legal entities and from commercial insurance companies.

Expression of the principle of legal personality of the mutual insurance company, the law stipulates that the social obligations of mutual societies are guaranteed with their social patrimonies, and the members are not held personally liable to the creditors of the mutual society (art. 4).

8. Registration and authorization

The law stipulates that the mutual company acquires legal personality from the date of registration in the trade register, this being considered the date of incorporation of the company. It is observed that, although, according to Law no. 71/2019, the mutual insurance company is established without profit, it is subject to registration in the trade register, identical to professional traders.

The operating license obtained by mutual societies supervised by law is valid in all Member States, including for the exercise of the activity under the right of establishment or the freedom to provide services, and is published by the Financial Supervisory Authority according to the publication regime established by its own regulations (art. 23)²⁷.

9. Organization and operation of mutual insurance companies

The normative act also contains special provisions regarding the organization and operation of mutual insurance companies. Thus, as a matter of principle, the law stipulates that the general meetings of mutual societies are similarly subject to the provisions of Law no. 31/1990 on companies. With the exception of ordinary companies, decisions of the general meeting of members on the change of legal form, merger, division or dissolution of the mutual society take by a majority of at least two-thirds of the voting rights held by members present or represented at the general

²⁶ There are countries such as France where, from the perspective of the object of activity, mutual societies fall into two broad categories, professional societies (which can group only persons practicing the same profession, with the consequence that such an insurer practices only insurance specific to the risks of the associate's profession) and regional companies, characterized in that they can underwrite only the insured risks in the region in which they have their registered office, see Luc Grynbaun (coord.), *Assurances*, Edit. L'Argus, 2018, p. 40 et seq. Our law is much more permissive because it does not regulate any condition in this regard.

²⁷ The text is an expression of the principle of freedom of establishment and performance enshrined in both insurance companies (see art. 20 para. 6 of Law no. 237/2015), enshrined at European level for the first time by Directive no. 88/357/EEC and Directive no. 90/619/EEC. And by Directive no. 92/46/EEC and no. 92/96/EEC, the principle of "home country control" has been implemented, expressed in that the prudential supervision of the insurer is carried out by the authority of the home Member State, ie of the state where the company was registered. See also R. Razzante, N. Tilli, M. Iaselli, A. Macillo, V. Aragona (coord.), Giuseppe Cassano, *Diritto delle assicurazioni. Questioni risarcitorie e liquidazione danii*, Edit. Giuffrè, Milano, 2017 p.10.

meeting.

A peculiarity is also that mutual insurance companies may provide in the articles of association that the members may be represented in the general meeting by a board of members²⁸ consisting of persons who are also members of the company. If the company chooses to create a board of members, the articles of association must include rules on the composition of the board and the procedure for appointing representatives to it, ensuring compliance with the law regarding the requirements of quorum, majority and respect for the rights of members. which represents them. Regarding the management of the mutual insurance company, the law stipulates that they organize their management in a similar way to the joint stock insurance companies provided in art. 1 para. (2) point 56 letter a) of Law no. 237/2015, respectively in unitary system or in dualistic system²⁹.

As a specific obligation of the mutual insurance company, not met in the case of other insurers, it is worth mentioning their duty to include in the insurance contracts clauses on the additional contributions they may request from members³⁰, relating, at least, to the situations in which they may be requested. to establish them, their maximum amounts, payment terms and members' liability according to the legal provisions. Also, the insurance contract must include clauses showing the quality of members of the mutual society, their rights and obligations as members, by reference to the provisions of the articles of association. That is, including the risk of making new contributions in case of need or financial difficulty of the mutual society (art. 24, para. 12).

10. Termination of mutual insurance companies

The mutual societies establish in the constitutive act the situations, the conditions and the way of dissolution and liquidation, with the observance of the legal provisions, of the present law and the regulations issued by the Financial Supervisory Authority in its application, of Law no. 503/2004 regarding the financial recovery, bankruptcy, dissolution and voluntary liquidation in the insurance activity, republished, with the subsequent modifications, as well as, insofar as they do not contradict them, of the provisions of Law no. 31/1990, republished, with the subsequent modifications and completions, and of other incidental normative acts, applicable to the joint stock insurance companies.

As a result of the liquidation, the insurance portfolio will be taken over by another insurer, company or mutual insurance company.

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²⁸ The members' council is not to be confused with the board of directors, regulated by Law no. 31/1990 in the case of the classic system of administration and management of the joint stock company. This is because the members' council is a group of members with multiple voting rights (both for themselves and for the associations they represent).

²⁹ For a detailed analysis of the management of insurance companies, from the perspective of the two management and administration systems, see V. Nemeș, *Dreptul asigurărilor*, Ed. Hamangiu, Bucharest, 2012, p. 85 et seq.

³⁰ According to Law no. 71/2019, the additional contribution represents the additional amount that the mutual companies can request from each of their members in case the total financial resources available for the payment of indemnities and insurance indemnities would not cover the obligations resulting from the insurance contracts, according to the legal provisions, or in the situation of non-compliance with the solvency requirements and/or regarding the prudential indicators in the insurance activity according to the legal provisions.

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