CENTRE DE DROIT
BANCAIRE ET FINANCIER

Run-off procedure

FINMA refuses dividend distribution by an insurance company

Par Adrien Alberini le 25 April 2025

Was FINMA, and subsequently the Federal Administrative Court, right to refuse dividend payments by an insurance company in connection with the approval of a liquidation plan and a modified business plan on the grounds that the company had failed to comply with its obligation to cooperate with the supervisory authority ? This is the question that the Federal Supreme Court had to answer in a ruling handed down on 18 February (2C_94/2024).

The case in question concerns an insurance company that wished to voluntarily cease its activities. Its amended liquidation plan and business plan were approved by FINMA, as were several requests for dividend distributions. The company subsequently requested a modification of these plans and authorisation to pay additional dividends totalling CHF 25 million for 2019 and 2020. In this context, FINMA requested further information and documents, to the point where the insurance company considered that the authority had all the necessary information and therefore requested that a formal decision be issued. A negative decision was issued by FINMA on 14 August 2020, which was confirmed by the Federal Administrative Court in its ruling B-4592/2020 of 15 December 2023.

After providing a general overview of the regulatory framework applicable to the supervision of insurance companies, particularly in the specific context of the termination of insurance activities, the Federal Court began by addressing the interesting question of whether the level of protection afforded to policyholders in voluntary liquidation proceedings (known as ‘run-off’ proceedings) is higher than that which applies in normal circumstances. In this regard, the Federal Supreme Court states that it is incorrect to consider, contrary to the appellant’s assertion, that only Articles 8, 9, 16 and 17 to 19 LSA (which concern cash requirements, technical provisions and tied assets) are applicable in this particular type of procedure ; Article 51 LSA on protective measures for insured persons, with its arsenal of measures available to FINMA, is also applicable. This is justified by the fact that, in the special circumstances of a run-off, the insurance company’s income gradually declines, which increases the risk of the insurance company becoming insolvent and therefore the need for greater protection for policyholders. Furthermore, the regulatory provisions on the solvency test (SST) do not alter this, as these provisions merely give concrete form to the aforementioned Art. 9 LSA mentioned above ; as previously indicated, the specific financial situation of an insurance company in liquidation must be taken into account when determining the specific requirements applicable to it, with a view to protecting policyholders.

In support of its position on the distribution of dividends, the appellant also argues that, within the framework of Article 60 LSA on the termination of insurance activities, a distinction must be made between the liquidation procedure and the procedure for release from supervision. Although the judgment is brief on the appellant's reasoning, it appears that the appellant considers that it should be released from supervision (with which it has complied until now) during the final phase of voluntary liquidation. For its part, the Federal Court considers that liquidation and release from supervision are intrinsically linked. Only when there is a certain guarantee that no claims based on an insurance contract can be asserted against the insurer does FINMA close the liquidation proceedings and order the release of the insurance company from supervision. It follows that Art. 60 para. 5 LSA, which requires contractual claims to be secured in order to distribute dividends, is fully applicable during the liquidation proceedings, contrary to the opinion defended by the appellant.

In the present case, it should also be noted that FINMA refused the distribution of dividends not because of an established risk to policyholders, but because the appellant had simply failed to provide the information necessary to assess whether such a risk existed ; such uncertainty must be borne by the supervised entity and is sufficient to justify protective measures in the interests of policyholders.

In our view, the Federal Supreme Court rightly concluded, in view of the purpose and structure of the regulations governing the supervision of insurance companies, that special protection for policyholders is required in the event of voluntary liquidation proceedings, that the claims of policyholders must be guaranteed until the end of such proceedings and that only at that point that supervision can be terminated. However, the exact scope of the information and documents that must be provided to FINMA so that it can determine with sufficient certainty that there is sufficient substance remaining in the company until the end of the liquidation remains a delicate issue in practice and is ultimately only addressed marginally in the present case.
