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EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 19 November 2008

at the request of the Romanian Parliament

on a legislative proposal regarding the use of Banca Națională a României's foreign reserves for tourism development and modernisation

(CON/2008/72)

Introduction and legal basis

On 10 October 2008 the European Central Bank (ECB) received a request from the Romanian Parliament's Senate Commission for Budget, Finance, Banking and Capital Markets for an opinion on a legislative proposal regarding the use of Banca Națională a României's foreign reserves for tourism development and modernisation[1] (hereinafter the 'draft law').

The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community and the third indent of Article 2(1) of Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions[2], as the draft law relates to Banca Națională a României (BNR). In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

1. Purpose of the draft law

The draft law will allocate EUR 3 billion from Romania's foreign reserves, managed by BNR, to set up the Fund for Development and Modernisation of Tourism (hereinafter the 'Fund')[3]. In return, BNR is to receive interest equal to the average capitalisation of the foreign reserves for the last three years[4]. Casa de Economii şi Consemnațiuni C.E.C. - S.A. (CEC BANK – S.A.), a State-owned undertaking operating as a bank, will manage the Fund. It will grant credit to eligible borrowers including tourist accommodation structures i.e. graded hotels or guest houses, tour operators and other public and private law entities involved in the development of ecotourism[5]. The

1 Draft law registered at the Romanian Senate under L528/03.09.2008.

2 OJ L 189, 3.7.1998, p. 42.

3 See Article 1(1) of the draft law.

4 See Article 2(1) of the draft law.

5 See Article 3(1) of the draft law.

credit may be granted for a maximum period of 20 years with a grace period of up to five years, except for the interest rate[6].

2. General observations

2.1 The draft law affects the manner in which BNR manages its foreign reserve holdings by requiring a part to be controlled by an outside body (CEC BANK – S.A) and used as funding for the loans to the tourism sector. In this respect, the draft law is incompatible with the requirement to ensure BNR's independence under Article 108 of the Treaty, as well as with the prohibition on monetary financing specified in Article 101 of the Treaty. For the above reasons, the ECB does not support the draft law. The ECB notes that the Romanian Legislative Council and the Senate Commission for Economy, Industry and Services have also issued negative opinions on the draft law and have voiced concerns regarding its impact on BNR's independence[7].

2.2 The compatibility of a Member State's national legislation with the provisions of the Treaty and the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'ESCB Statute') on central bank independence and the prohibition on monetary financing must be ensured upon accession to the European Union. As already emphasised in the ECB's 2008 Convergence Report[8] and in a previous ECB opinion concerning BNR[9], the incompatibilities of the Romanian legislation with the Treaty and the ESCB Statute should have been addressed by 1 January 2007, in line with Article 109 of the Treaty. However, instead of addressing the current incompatibilities, the draft law introduces new incompatibilities by limiting BNR's independence and by breaching the prohibition on monetary financing. The draft law is, therefore, fundamentally incompatible with the Treaty's provisions on economic and monetary union (EMU) and its enactment could trigger infringement proceedings before the Court of Justice of the European Communities.

2.3 Moreover, the ECB would like to emphasise that, although Member States with a derogation do not yet participate in EMU, they have a legal duty to adapt the statutes of their national central banks (NCBs) 'to ensure compatibility with the Treaty and the Statute in respect of Eurosystem-related tasks'[10]. In this respect, any legislative reform should aim to gradually achieve consistency with Eurosystem standards. In this case, it should facilitate the convergence of the Romanian legal framework, necessary for Romania to become a full participant in EMU without the need for

6 See Article 6(1) of the draft law.

7 Both opinions are available on the Romanian Senate's website at www.senat.ro.

8 See ECB Convergence Report, May 2008, pp. 246 to 249, available on the ECB's website at www.ecb.europa.eu.

9 See paragraph 2.1 of ECB Opinion CON/2008/31 of 21 July 2008 at the request of the Romanian Parliament on a legislative proposal amending Law 312/2004 on the Statute of Banca Națională a României.

10 See ECB Convergence Report, May 2008, p. 26.

subsequent legislative reforms[11]. In particular, Article 105(2) of the Treaty defines holding and management of the official foreign reserves of the Member States as a basic task to be carried out through the ESCB. This Treaty provision entails that the competence to take decisions on the use of an NCB's assets remain with the NCB. The adoption of legislation that would impose a compulsory allocation of part of a Member State's foreign reserves in contradiction with the assignment of this task to the NCB would be inconsistent with the Treaty, as it would deprive the NCB to that extent of one of its basic tasks under the Treaty and transfer from the NCB to a third party a competence that the Treaty clearly assigns to the NCBs.

3. Specific observations

Central bank independence

3.1. Article 108 of the Treaty, reinforced by Article 7 of the ESCB Statute, provides for the principle of independence of the central banks within the ESCB. It ensures that the primary ESCB objective of price stability[12] is served by fully independent central banks with a precisely defined mandate[13]. In particular, central bank independence crucially upholds credibility of the central bank's monetary policy, which is a key condition for controlling inflationary expectations[14]. Also contributions which the ESCB provides to stability of the financial system[15] are rooted in independent and credible standing of the ESCB central banks. Hence, in ensuring BNR's participation in the ESCB in compliance with the applicable Community law provisions it is of utmost importance to design an institutional structure that guarantees BNR's functional, institutional, personal and financial independence[16].

3.2 In particular, BNR's financial independence would be jeopardised if it could not autonomously avail itself of sufficient financial resources to fulfil its mandate, the key element of which is the price stability objective. As noted in the ECB Convergence Reports[17], Member States may not put their NCBs in a position where they have insufficient financial resources to carry out their functions. In this regard, NCBs must have sufficient means not only to perform their ESCB-related tasks but also their own national tasks, e.g. financing their administration and own operations, and covering their operational risks. The concept of central bank independence should therefore be assessed from the perspective of whether any third party is able to exercise influence, not only over

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11 See, similarly, paragraph 3.4 of the ECB Opinion CON/2008/34 of 4 August 2008 at the request of the Swedish Ministry of Finance on a report concerning the financial independence of Sveriges Riksbank. Nevertheless, statutory requirements relating to the full legal integration of an NCB into the Eurosystem need only enter into force at the moment that full integration becomes effective, i.e. the date on which the Member State with a derogation adopts the euro.

12 See Article 105(1) of the Treaty and Article 2 of the ESCB Statute.

13 See paragraph 2.1 of ECB Opinion CON/2007/14 of 24 May 2007 at the request of the Hungarian Ministry of Finance on a draft law amending the Law on the Magyar Nemzeti Bank.

14 See paragraph 6 of ECB Opinion CON/2004/35 of 4 November 2004 at the request of the Hungarian Ministry of Finance on a draft law amending the Law on Magyar Nemzeti Bank.

15 See Article 105(5) of the Treaty and Article 3.3 of the ESCB Statute.

16 See paragraph 2.3 of ECB Opinion CON/2008/31.

17 See ECB Convergence Report, December 2006, p. 27; ECB Convergence Report, May 2008, p. 20.

performance of an NCB's tasks, but also over its ability to fulfil its mandate, understood both operationally in terms of manpower, and financially in terms of appropriate financial resources[18].

3.3 Under the draft law, part of BNR's foreign reserve holdings would be taken outside BNR's control and management, and hence BNR would not have the possibility to hold and manage such part of the foreign reserve holdings in an independent manner. Such draft law provisions are incompatible with the principle of central bank financial independence under Article 108 of the Treaty.

Compliance with the prohibition on monetary financing

3.4 Article 101 of the Treaty provides that 'overdraft facilities or any other type of credit facilities with the ECB or with the central banks of the Member States … in favour of … central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings … shall be prohibited …'.Article 21.1 of the ESCB Statute mirrors this provision. Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b(1) of the Treaty[19] (now Articles 101 and 103(1) of the Treaty) further clarifies the precise scope of application of the monetary financing prohibition. It specifies that the prohibition under Article 101 of the Treaty includes any financing of the public sector's obligations vis-à-vis third parties[20]. The abovementioned Community law provisions are therefore intended to prohibit NCBs from financing the public sector[21].

3.5 The draft law provisions allocating a part of BNR's foreign reserve holdings as a contribution to the Fund so that they can be invested in tourism development and modernisation, i.e. with the view to providing credit to a specified national economic sector, and hence accepting a commensurate level of market and credit risk, constitute a breach of the monetary financing prohibition under Article 101 of the Treaty. Such allocation of foreign reserve holdings is not connected with any statutorily-defined BNR objectives or tasks. Noting that State support to the tourism sector is the declared purpose of the draft law[22], the draft law's allocation of BNR's foreign reserves needs to be considered as funding of credit facilities that would otherwise have to be financed at the State's

18 See e.g. paragraph 9 of ECB Opinion CON/2004/16 of 11 May 2004 at the request of the Italian Ministry of Economic Affairs and Finance on a draft law on the protection of savings. See also paragraph 3.3 of ECB Opinion CON/2008/20 of 21 May 2008 at the request of the Polish Minister for Finance on a draft law amending the Law on trading in financial instruments and other legislation.

19 OJ L 332, 31.12.1993, p. 1.

20 See Article 1(1)(b)(ii) of Regulation (EC) No 3603/93.

21 See paragraph 9 of ECB Opinion CON/2003/27 of 2 December 2003 at the request of the Austrian Federal Ministry of Finance on a draft Federal law on the National Foundation for Research, Technology and Development.

22 See fifth paragraph of the explanatory memorandum to the draft law.

expense, following normal budgetary procedures, i.e. financing of the public sector's obligations vis-à-vis third parties, as prohibited by Regulation (EC) No 3603/93.

This opinion will be published on the ECB's website.

Done at Frankfurt am Main, 19 November 2008.

[signed]

The President of the ECB

Jean-Claude TRICHET