EUROPEAN CENTRAL BANK

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OPINION OF THE EUROPEAN CENTRAL BANK

of 26 October 2020

on the provision of short-term liquidity from Banca Naţională a României to the Bank Deposit Guarantee Fund

(CON/2020/24)

Introduction and legal basis

On 9 September 2020 the European Central Bank (ECB) received a request from Banca Naţională a României (BNR) for an opinion on a draft law amending the Law on deposit guarantee schemes and the Bank Deposit Guarantee Fund (hereinafter the 'draft law').[1]

The ECB's competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union and the third and sixth indents of Article 2(1) of Council Decision 98/415/EC,[2] as the draft law relates to BNR and rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets. 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

1.1 The draft law mainly aims at providing the *Fondul de Garantare a Depozitelor Bancare* (Bank Deposit Guarantee Fund, hereinafter the 'Fund'), as the statutory deposit guarantee scheme officially recognised in Romania, with the necessary liquidity for its interventions in emergency situations. Accordingly, the draft law introduces the possibility for the Fund to access short-term repurchase (repo) facilities from the BNR.

1.2 The draft law stipulates that, for the purpose of ensuring financial stability, BNR may, in emergency situations, in order to cover the liquidity needed for the payment of compensations, grant financing to the Fund through repo transactions secured by financial instruments accepted as eligible collateral for monetary policy operations conducted by BNR. Such financing may be granted only exceptionally and on a case-by-case basis, with a maturity that cannot exceed 90 days.

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1 Legea nr. 311/2015 privind schemele de garantare a depozitelor şi Fondul de garantare a depozitelor bancare (*Monitorul Oficial,* Partea I nr. 918 din 11.12.2015). According to the explanatory memorandum attached to the consultation request, the amending legislative proposal was submitted by BNR to the Ministry of Finance in order to initiate the legislative process. BNR is authorised under Article 129 of Law No 311/2015 to issue regulations necessary for the application of the legislative provisions regarding the activities of the Fund.

2 Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (OJ L 189, 3.7.1998, p. 42).

1.3 The Fund has the status of a legal person of public interest, the main objective of which is to guarantee deposits in accordance with the relevant statutory provisions.[3] It is managed by a seven-member Supervisory Board comprising five BNR representatives, of whom one shall be appointed Chairperson, and two representatives of the Ministry of Finance, as well as by an Executive Board consisting of a minimum three members mandated to ensure the operational management of the Fund.[4] The Supervisory Board of the Fund supervises the activity of the Executive Board's members and the way in which they fulfil the objectives established in their mandates.[5]

1.4 As a deposit guarantee scheme, the Fund has the following financial resources: (a) annual and extraordinary contributions of the participating credit institutions; (b) loans from credit institutions, financial companies, other deposit guarantee schemes and from other institutions; (c) exceptional loans from the Government, as specified further; and (d) other resources.[6,7] In exceptional situations, when the available financial resources of the Fund are insufficient to cover compensation payouts, the Government, through the Ministry of Finance, shall make available to the Fund within five working days the necessary amounts in the form of a loan, under the terms and conditions established in an agreement.[8] Amongst others, the Fund's Supervisory Board analyses and proposes to BNR for approval (i) the budget for the activities of the statutory deposit guarantee scheme; (ii) the annual target level of the Fund's financial resources as a deposit guarantee scheme; (iii) the level of the annual contribution of each participating credit institution; (iv) the imposition of extraordinary contributions and their level; and (v) requesting the above loans to ensure adequate financial means of the deposit guarantee scheme.[9]

2. Observations regarding the prohibition of monetary financing

2.1 In line with previous opinions, the ECB reiterates its view that national legislation which provides for the financing by a national central bank (NCB) of a deposit guarantee scheme would be compatible with the monetary financing prohibition laid down in Article 123(1) of the Treaty only if it were short term, addressed urgent situations, systemic stability aspects were at stake, and decisions were at the NCB's discretion.[10] The ECB welcomes the fact that the wording of the draft law reflects these criteria when providing the possibility for the Fund to access short-term financing from BNR in emergency situations. In addition, the ECB expects that the provision of short-term financing to the Fund will be conducted in a manner compatible with BNR's institutional and financial independence, as a safeguard for the proper performance of the BNR's tasks under the Treaty and the Statute of the European System of Central Banks and of the European Central Bank.[11]

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3 See Articles 91 and 92 of Law No 311/2015. The Fund shall also operate as the administrator of the bank resolution fund in compliance with the legislation on the recovery and resolution of credit institutions.

4 See Articles 94 and 100 of Law No 311/2015.

5 See Article 98(1) of Law No 311/2015.

6 Such as donations, sponsorships, financial assistance, receipts from the recovery of receivables from deposit guarantee schemes, and income from the investment of available financial resources.

7 See Article 114 of Law No 311/2015.

8 See Article 119 of Law No 311/2015.

9 See Article 98(2) of Law No 311/2015.

10 See the ECB's Convergence Report 2020, p. 35, and the ECB Opinions cited therein.

11 See paragraph 3.1 of ECB Opinion CON/2015/40 All ECB Opinions are published on EUR-Lex.

2.2 As the Treaty prohibits the NCBs from granting overdraft facilities or any other type of credit facility to the public sector, this opinion further considers whether the Fund is a 'body governed by public law' within the meaning of Article 123(1) of the Treaty. To this end, it first clarifies the concept of 'body governed by public law' and then analyses whether the Fund is covered by this concept.

2.3 Notwithstanding the absence of a specific definition of the concept of 'body governed by public law' in Council Regulation (EC) No 3603/93,[12] other areas of Union law[13] and the related case-law of the Court of Justice of the European Union[14] provide guidance on its interpretation for the purposes of the monetary financing prohibition.[15] Accordingly, a body is 'governed by public law' within the meaning of Article 123(1) of the Treaty if it has all of the following characteristics: (a) it is established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; (b) it has legal personality; and (c) it is closely dependent on the public sector entities referred to in Article 123(1) of the Treaty. A close dependence on those public sector entities is presumed when a body is financed, for the most part, by them; or is subject to management supervision by them; or has an administrative, managerial or supervisory board, more than half of whose members are appointed by them.

2.4 As it is apparent from paragraph 1.3 above, the first two conditions are met in respect of the Fund since (a) it has been established for the purpose of meeting needs in the general interest – the Romanian statutory deposit guarantee scheme; and (b) it has legal personality. To guarantee deposits as a statutory deposit guarantee scheme is in the general interest insofar as the establishment and functioning of deposit guarantee schemes increase the stability of the banking system and the protection of depositors.[16]

2.5 As further follows from paragraphs 1.3 and 1.4 above, the Fund appears closely dependent on BNR since the majority of the members of the Supervisory Board of the Fund, including the Chairperson, are BNR representatives. In addition, the management of the Fund is subject to BNR's supervision and, while BNR does not finance the Fund for the most part, it approves the budget of the Fund and its financial resources as a deposit guarantee scheme. However, the Fund's close dependence on BNR does not meet the third condition regarding a close dependence

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12 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 (OJ L 332, 31.12.1993, p. 1).

13 See, for instance, Article 2(2) of Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information (OJ L 345, 31.12.2003, p. 90) and Article 2(1)(4) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65).

14 See, for instance, Judgment of the Court of Justice of 5 October 2017, *'LitSpecMet' UAB,* C-567/15, EU:C:2017:736, paragraphs 28 et seq.; Judgment of the Court of Justice of 12 September 2013, *IVD GmbH & Co. KG*, C-526/11, EU:C:2013:543, paragraphs 19 et seq.; Judgment of the Court of Justice of 11 June 2009, *Hans & Christophorus Oymanns GbR, Orthopädie Schuhtechnik*, C-300/07, EU:C:2009:358, paragraphs 48 et seq.; and the case-law cited therein.

15 Similarly, the concept of 'public undertaking' has been defined for the purposes of the monetary financing prohibition by reference to the definition provided for by Article 2 of Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ L 195, 29.7.1980, p. 35), now replaced by Article 2(c) of Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L 318, 17.11.2006, p. 17). See, in this regard, Article 8(1) of Council Regulation (EC) No 3603/93 and Recital 15 thereof.

16 See Recital 3 to Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (OJ L 173, 12.6.2014, p. 149).

on public sector entities because the NCBs do not form part of the public sector for the purposes of the monetary financing prohibition.[17]

2.6 In light of the foregoing, the ECB is of the view that the Fund does not qualify as a 'body governed by public law' within the meaning of Article 123(1) of the Treaty and, therefore, BNR is not generally precluded from providing short-term liquidity to the Fund. Against this background, the possibility for the Fund to access short-term repo facilities from the BNR under the conditions specified under paragraph 2.1 above is in line with the monetary financing prohibition.

This opinion will be published on EUR-Lex.

Done at Frankfurt am Main, 26 October 2020.

[signed]

The President of the ECB

Christine LAGARDE

17 See Article 8(2) of Council Regulation (EC) No 3603/93.