EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 21 July 2008

at the request of the Romanian Parliament

on a legislative proposal amending Law No 312/2004 on the Statute of Banca Națională a României

(CON/2008/31)

Introduction and legal basis

On 12 June 2008 the European Central Bank (ECB) received a request from the Romanian Parliament, Senate Commission for Budget, Finance, Banking and Capital Market, for an opinion on a legislative proposal amending Law No 312/2004 on the Statute of Banca Națională a României (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[1], 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 amends several provisions of Law No 312/2004 on the Statute of BNR (hereinafter the 'BNR Statute') regarding indemnities, salaries and other pecuniary rights granted to staff, recruitment and BNR's organisation[2]. Second, it excludes the possibility of renewal of the five-year term of office of the members of BNR's Board[3]. Third, it provides for the obligation for the Prime-Minister to participate in the meetings of the BNR's Board, together with the Minister for Public Finance and one of the State Secretaries of the Ministry of Public Finance[4]. Fourth, it provides that Parliament votes and decides on BNR's annual report on its activities, annual financial statements and auditor's report, which are currently only debated by Parliament[5]. Fifth, it introduces a new paragraph in Article 35 of the BNR Statute

1 OJ L 189, 3.7.1998, p. 42.

2 Amendment to Article 33(1)(d) of the BNR Statute, which adds the requirement that the internal organisational structure, indemnities, salaries and other pecuniary rights granted to the staff should be decided by BNR's Board 'according to the law'; amendment to Article 35(2) of the BNR Statute, which provides that the appointment of BNR's staff in BNR's headquarters and managers of the branches and agencies by the Governor should be done 'based on a competition' and 'under the conditions set out in the law' and amendment to Article 53 of the BNR Statute, which limits the maximum level of net remunerations for the members of the BNR's Board to the annual remuneration of the President of Romania.

3 Amendment to Article 33(4) of the BNR Statute.

4 Amendment to Article 33(10) of the BNR Statute.

5 Amendment to Article 35(4) of the BNR Statute.

entrusting the Government with the task of proposing to the Parliament 'constructive solutions aimed at achieving the objectives of economic and social development in Romania, according to the Governance Programme'. Finally, it introduces the concepts of 'objective' and 'subjective' reasons with respect to losses incurred by BNR during a financial year and the liability for such losses[6].

2. General observations

2.1 The compatibility of the national legislation of a Member State, including the statute of its national central bank (NCB), with the requirements of the Treaty and the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'ESCB Statute') concerning central bank independence (Article 108 of the Treaty) must be ensured upon accession to the European Union. In the case of Romania, the compatibility requirement (Article 109 of the Treaty) should have been satisfied by 1 January 2007.

2.2 Instead of addressing the existing incompatibilities of the BNR Statute with the Treaty and the ESCB Statute, also highlighted in the ECB's 2008 Convergence Report[7], the draft law introduces new incompatibilities with the Treaty and the ESCB Statute by limiting BNR's independence. The draft law is, therefore, fundamentally incompatible with the Economic and Monetary Union related Treaty provisions and its enactment could trigger infringement proceedings before the Court of Justice of the European Communities.

2.3 The Treaty's requirement of central bank independence reflects the generally held view that the primary objective of price stability is best served by a fully independent institution with a precisely defined mandate[8]. The convergence reports of the European Monetary Institute and of the ECB, as well as the ECB opinions, have consistently confirmed the importance of central bank independence. It is of the utmost importance to design an institutional structure that guarantees the functional, institutional, personal and financial independence of BNR.

2.4 Contrary to the requirement of central bank independence, the proposed amendments to BNR's Statute considerably limit BNR's independence and clearly put pressure on BNR, its decision-making bodies, its members and BNR staff. Therefore, the draft law raises serious concerns to the ECB.

3. Specific comments

Staff matters

3.1 With respect to the amendments on staff matters, the ECB notes that an NCB may not be put into a position where it has limited or no control over its staff, or where the government of a Member

6 Amendment to Article 44 of the BNR Statute.

7 See ECB Convergence Report, May 2008, p. 246 to 249, available on the ECB's website at http://www.ecb.europa.eu.

8 See 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.

State is in a position to influence its policy on staff matters[9]. According to the explanatory memorandum to the draft law, amendments to Articles 33(1)(d) and 53 of the BNR Statute regarding indemnities, salaries, and other pecuniary rights are necessary to provide for a legal basis for BNR's decisions on these matters. However, it should be noted that the current version of Article 33(1)(d) of the BNR Statute already provides such legal basis, since it stipulates that BNR's Board decides 'under the conditions set out in the law ... on the internal organisational structure, indemnities, salaries and other pecuniary rights granted to the staff'. The purpose of the additional wording 'according to the law' is therefore unclear. It creates uncertainty concerning the applicable legislation to BNR's staff-related matters and the relationship with the BNR Statute.

3.2 In addition, in order to ensure that the amended Article 53 on the maximum level of net remunerations for BNR's Board members is consistent with the Community requirements for personal independence of the members of NCBs' decision-making bodies, the new legislation should be implemented so as to ensure that it does not affect the terms under which the current members of BNR's Board have been appointed. Therefore, this aspect of the new legislation should only apply to future appointments[10].

Participants in the meetings of BNR's Board

3.3 The draft law adds the Prime-Minister to the list of third parties that participate in BNR's Board meetings, together with the Minister for Public Finance and one of the State Secretaries in the Ministry of Public Finance; it also introduces an obligation for them to participate in such meetings[11]. These amendments raise serious concerns with respect to the institutional independence of BNR in two respects: (i) the obligation of third parties to participate in BNR's Board meetings must not impede the functioning of the meetings and, in particular, the absence of such third parties must not prevent the meetings from being held; and (ii) the participation of such third parties must not result in these third parties actually giving direct or indirect instructions to BNR, its decision-making bodies or its members.

3.4 In the context of the close cooperation between the European Union institutions, it may be noted that the President of the Council of the European Union and a member of the Commission of the European Communities have the possibility to participate, without voting rights, in the meetings of the ECB's Governing Council[12]. Nevertheless, such third parties are not obliged to participate in the meetings. This mirrors other forms of interaction, notably the fact that the ECB's President is invited to participate in Council meetings when the Council is discussing matters relating to the ESCB's objectives and tasks. Thus, the ECB would strongly recommend clarifying the scope of the

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9 See in particular ECB Opinion CON/2008/9 of 21 February 2008 at the request of the German Ministry of Finance on a draft law amending the Law on the Deutsche Bundesbank and ECB Opinion CON/2008/10 of 21 February 2008 at the request of the Italian Ministry of Economic Affairs and Finance on some provisions of the Law on the State annual and pluriannual budget (2008 Budget law).

10 See ECB Opinion CON/2008/10 of 21 February 2008 at the request of the Italian Ministry of Economic Affairs and Finance on some provisions of the Law on the State annual and pluriannual budget (2008 Budget Law), paragraph 3.2.2.

11 Amendment to Article 33(10) of the BNR Statute.

12 See Article 113(1) of the Treaty.

obligation of the Prime Minister and the Ministry of Public Finance representatives to participate in BNR's Board meetings.

Parliamentary vote and decision on the annual and audit reports and on the annual financial statements

3.5 The Parliament's competence to vote on and adopt a decision on BNR's annual report on its activities, annual financial statements and auditor's report, could affect the institutional independence of BNR, as it goes beyond the transparency and accountability of a central bank towards the Parliament.

3.6 The ECB recalls that, in general, dialogue between NCBs and third parties is welcome and compatible with central bank independence, provided that:

- this does not result in interference with the independence of the members of the NCB's decision-making bodies;
- the special status of Governors in their capacity as members of the ECB's General Council is fully respected;
- confidentiality requirements resulting from the ESCB Statute are observed.

3.7 A decision of the Parliament as regards these documents must not result in actually giving direct or indirect instructions, e.g. to amend the annual report, to BNR, its decision-making bodies or its members[13]. Moreover, any rights of the Parliament to approve, suspend, annul or defer BNR's decisions would be contrary to BNR's institutional independence.

BNR's statutory objectives

3.8 The draft law introduces a new paragraph in Article 35 of the BNR Statute on the prerogatives of BNR's Governor. It provides that the Government suggests to the Parliament 'constructive solutions aimed at achieving the objectives of economic and social development in Romania, according to the Governance Programme'. This provision could be understood as establishing new objectives for BNR, as well as allowing the Government to give indirect instructions to or influence BNR, its decision-making bodies or its members. As such, it would be contrary to the principle of institutional independence of BNR. Moreover, it would also compromise the functional independence of BNR as it would contravene Article 105(1) of the Treaty and Article 2 of the ESCB Statute concerning the primary objective of price stability and the secondary objective of supporting the general economic policies in the Community.

Loss coverage

3.9 Under the draft law, the loss incurred by BNR 'based on objective reasons' will be covered, as currently all of BNR's losses (with no distinction) are covered, from the available sources in the following order: (a) special revaluation account; (b) statutory reserves. When BNR incurs a loss

13 See in particular ECB Opinion CON/2001/17 of 2 August 2001 at the request of the German Ministry of Finance on a draft Seventh Law amending the Deutsche Bundesbank Act, paragraph 11.

'based on subjective reasons established by the Court of Auditors', the loss will be covered by the persons found liable for the loss[14].

3.10 The ECB notes that such personal liability for losses resulting from 'subjective reasons established by the Court of Auditors' jeopardises the independence of BNR's decision-making bodies and staff. If they were to incur financial liability linked to their performance of central banking tasks, which are complex, subject to a considerable degree of discretion and dependent on the national and international economic and financial environment, their capacity to function fully and independently would be seriously compromised as a result of the inhibiting effect that the risk of having to bear the damages would trigger. Indeed, NCBs cannot be hindered in making their decisions by the prospect of personal liability of their staff acting in good faith.

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

Done at Frankfurt am Main, 21 July 2008.

[signed]

The President of the ECB

Jean-Claude TRICHET

14 Amendment to Article 44 of the BNR Statute.