EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 21 September 2007

at the request of Banca Națională a României
on a draft regulation on oversight of payment systems, securities settlement systems and payment instruments

(CON/2007/27)

Introduction and legal basis

On 30 July 2007 the European Central Bank (ECB) received a request from Banca Națională a României (BNR) for an opinion on a draft regulation on oversight of payment systems, securities settlement systems and payment instruments (hereinafter the 'draft regulation').

The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community and the third and fifth indents 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 regulation relates to BNR and payment and settlement systems. 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 regulation

1.1 The draft regulation sets up the regulatory framework for the oversight by BNR of payment systems, securities settlement systems and payment instruments. In particular, it specifies: (i) the categories of systems and entities subject to oversight; (ii) the requirements for operators of payment systems, securities settlement systems and infrastructure services and for persons who issue/put into circulation and/or manage payment instruments; and (iii) the oversight activities to be carried out by BNR to ensure the smooth functioning of these systems and, ultimately, to ensure financial stability, including BNR's right to carry out on-site inspections to obtain and verify information.

1.2 The draft regulation is issued on the basis of Article 405 of Government Urgency Ordinance No 99/ 2006 on credit institutions and capital adequacy[2] (hereinafter the 'GUO 99/2006'), which

1 OJ L 189, 3.7.1998, p. 42.

2 Published in the *Monitorul Oficial al României*, Part One, No 1027, 27.12.2006, as amended and approved by Law No 227/2007, published in the *Monitorul Oficial al României*, Part One, No 480, 18.7.2007.

establishes that BNR 'shall issue regulations' concerning payment and securities settlement systems, and, in particular, 'the criteria and the rules for the supervision of the systems, including the participants in these systems and their operators'.

2. General observations

2.1 The ECB welcomes the draft regulation which establishes the rules applicable to the oversight of payment systems, securities settlement systems and payment instruments, as the oversight function is inherent in the central banks' task of promoting a sound market infrastructure to safeguard the effectiveness of monetary policy and the overall stability of the financial system[3].

2.2 As mentioned in previous ECB opinions[4], payment systems and securities settlement systems are interlinked, particularly in view of the use of the 'delivery versus payment' mechanism, under which settlements of securities and transfers of funds take place simultaneously. There is therefore a strong argument in favour of the model used in some Member States of integrating the oversight of payment systems and securities settlement systems, and for the national central banks (NCBs) to perform the oversight function.

2.3 The oversight of payment systems has always been recognised as one of the NCBs' main tasks and the framework for this function has been effective and successful. Article 2(2)(b) and Article 22(1) of Law No 312/2004 on the Statute of Banca Națională a României[5], which entitle BNR to oversee payment systems, including payment instruments, Article 404 of GUO 99/2006, which entitles BNR to regulate, authorise and supervise the payment systems and securities settlement systems from Romania, including their operators, Article 405 of GUO 99/2006 and Article 13(4)[6] of Law No 253/2004 on settlement finality in payment and securities settlement systems[7], reflect, at the national level, the general legal framework for the oversight of payment systems created at the Community level through Article 105(2)[8] of the Treaty and Article 3.1 and Article 22 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the

3 See, e.g. ECB Opinions CON/2005/24 of 15 July 2005 at the request of the Ministry of Finance of the Czech Republic on a draft law on the integration of financial market supervisors; CON/2003/14 of 7 August 2003 at the request of Banca d'Italia on a draft regulation on payment systems, payment infrastructures and payment instruments; and CON/99/19 of 20 January 2000 at the request of the Luxembourg Ministry for the Treasury and the Budget on a draft legislative proposal implementing Directive 98/26/EC on settlement finality in payment and securities settlement systems in the law of 5 April 1993, as amended, relating to the financial sector and completing the law of 23 December 1998 creating a commission in charge of the prudential supervision of the financial sector. See also the Bank for International Settlements (BIS) Committee on Payment and Settlement Systems, 'Central bank oversight of payment and settlement systems', May 2005, available on the BIS website at www.bis.org.

4 See ECB Opinion CON/2006/20 of 25 April 2006 on the Dutch draft law concerning financial sector supervision.

5 Published in the *Monitorul Oficial al României,* Part One, No 582, 30.6.2004.

6 'Banca Națională a României will permanently oversee the payment systems and the securities settlement systems which settle through systemically important payment systems or through payment systems of prominent importance.'

7 Published in the *Monitorul Oficial al României*, Part One, No 566, 28.6.2004.

8 Article 105(2) of the Treaty states that '[t]he basic tasks to be carried out through the ESCB shall be … to promote the smooth operation of payment systems.'

'ESCB Statute')[9].

2.4 Within the Eurosystem, oversight activities are performed by NCBs in line with the common oversight policy, as defined by the ECB's Governing Council. This will also apply to BNR once Romania adopts the euro. Furthermore, on Romania's adoption of the euro the securities settlement system selected to provide securities settlement of central bank credit operations will be assessed against the Eurosystem standards for the use of European Union securities settlement systems in ESCB credit operations[10]. For that reason, this opinion is without prejudice to any future ECB assessment of the securities settlement system selected to provide securities settlement of central bank credit operations against the abovementioned standards[11].

2.5 The explanatory memorandum states that BNR will issue norms which will specify the standards and the methodology for carrying out an assessment for each type of system. Once such draft provisions are prepared, BNR should consider whether these are also subject to the duty of consultation which stems from Article 105(4) of the Treaty and Decision 98/415/EC. 'Given the objectives of Decision 98/415/EC … an opinion should only be sought from the ECB on such draft secondary legislation if the subject matter is closely related to the ECB's tasks and if the impact on areas within the ECB's fields of competence is different from that resulting from the primary legislation itself.'[12]

3. Specific observations

3.1 The ECB recommends clarifying the definitions of 'payment system' and 'securities settlement system' set out in Article 2(4) and (6) of the draft regulation to avoid uncertainties, in particular in view of the definition of 'system' contained in Law No 253/2004 on settlement finality in payment and securities settlement systems, which implements the Directive on settlement finality in payment and securities settlement systems[13]. Furthermore, the definition of 'significant infrastructure' in Article 2(8) is rather open-ended. Therefore, the ECB would encourage establishing objective and transparent criteria, and making them publicly available. In addition, there is no reference to the oversight of clearing systems. Therefore, the draft regulation should include clearing systems in the scope of oversight conducted by BNR.

---

9 Article 3.1 of the ESCB Statute states that '[i]n accordance with Article 105(2) of this Treaty, the basic tasks to be carried out through the ESCB shall be … to promote the smooth operation of payment systems.' Article 22 states that '[t]he ECB and national central banks may provide facilities, and the ECB may make regulations, to ensure efficient and sound clearing and payment systems within the Community and with other countries'. See also Article 34.2, which states that a 'regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.'

10 The standards are available on the ECB's website at www.ecb.int.

11 See ECB Opinion CON/2006/52 of 14 November 2006 at the request of Latvijas Banka on a draft regulation on Latvijas Banka's securities settlement system, paragraph 2.1.

12 Guide to consultation of the European Central Bank by national authorities regarding draft legislative provisions, p. 14, available on the ECB's website at www.ecb.int.

13 Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ L 166, 11.6.1998, p. 45).

3.2 Article 3(f) and Article 7 refer to 'persons that issue and/or manage payment instruments' and provide for their obligations under the draft regulation, respectively. The scope of the term 'persons' in these articles, as well as in the definition of 'infrastructure' in Article 2(7) of the draft regulation, is unclear and could lead to legal uncertainty; therefore, the range of entities that fall within this category require clarification.

3.3 In line with Article 6 of the draft regulation, which mentions several measures to address operational risks, BNR could consider also mentioning operational risk more generally in Article 5 (1)(b).

3.4 According to Article 6(2)(b) significant infrastructure services operators 'shall have the ... obligation … to promote interconnection with other infrastructures'. Since this constitutes a requirement imposed on entities subject to the scope of the draft regulation, against which they will be assessed, the obligation contained in this rule needs to be further clarified, because its exact content and scope of application is unclear[14].

3.5 Article 14 states that BNR will use the information and data collected pursuant to Chapter III, Section I of the draft regulation to assess compliance by the entities subject to the draft regulation with specific requirements and principles applied by BNR in the field of oversight of payment systems, securities settlement systems and payment instruments. The ECB recommends adding to this purpose a more general purpose, which is the provision of data for participation in ESCB-related tasks and also ensuring the general availability of information.

3.6 With regard to the assessment of systems, 'the objectives and responsibilities as well as roles and major policies of … the central bank should be clearly defined and publicly disclosed'[15]. Although there is a Memorandum of understanding[16] between BNR, the National Securities Commission and the Insurance Supervisory Commission on cooperation aimed at promoting the stability of the financial system under which the parties agree to exchange information to ensure the proper licensing, regulation and supervision of the financial system, BNR could also set out the criteria under which BNR and the National Securities Commission may exchange information in the draft regulation.

14 See paragraph 13 of ECB Opinion CON/2003/14 of 7 August 2003 at the request of Banca d'Italia on a draft regulation on payment systems, payment infrastructures and payment instruments.

15 See CPSS-IOSCO Recommendations for securities settlement systems, 2001, No 18, paragraph 3.86.

16 Signed on 10 March 2006, as amended by the Additional Act No 1 of 14.12.2006.

3.7 Article 16(b) of the draft regulation states that BNR 'may apply sanctions, according to banking legislation', if the persons performing activities subject to the scope of the draft regulation do not comply with the recommendations and/or adjustments set out by BNR. As the entities subject to the scope of the draft regulation may not always be credit institutions, the reference to banking legislation under this Article 16(b) seems ambiguous regarding its scope of application.

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

Done at Frankfurt am Main, 21 September 2007.

[signed]

The President of the ECB

Jean-Claude TRICHET