EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 25 February 2011

on amendments to the legislation on the deposit guarantee fund

(CON/2011/15)

Introduction and legal basis

On 28 January 2011 the European Central Bank (ECB) received two requests from Banca Națională a României (BNR), for an opinion on a draft Government Emergency Ordinance amending and supplementing Government Ordinance No 39/1996 on the setting up and operation of the deposit guarantee fund in the banking system[1] (hereinafter the 'first draft ordinance') and on a draft Government Emergency Ordinance amending and supplementing Government Emergency Ordinance No 99/2006 on credit institutions and capital adequacy[2] (hereinafter the 'second draft ordinance').

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 sixth 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[3], as the draft ordinances relate to rules applicable to the 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 ordinances

1.1 *The first draft ordinance*

Government Ordinance (GO) No 39/1996 is the main Romanian legislation regulating the activity of the deposit guarantee fund in the banking system (hereinafter 'the Fund'), which is the Romanian deposit guarantee scheme. Its purpose is to guarantee deposits and to pay compensation to depositors for covered deposits held with credit institutions and declared unavailable[4]. The aim of the first draft ordinance is to:

1 Republished in Monitorul Oficial al României, Part One, No 587 of 19 August 2010.

2 Published in Monitorul Oficial al României, Part One, No 1027 of 27 December 2006.

3 OJ L 189, 3.7.1998, p. 42.

4 According to Article 2(3)(c)(i) of GO No 39/1996 an 'unavailable deposit' is a deposit that is due and payable but has not been paid by a credit institution, where either:

(a) enable the use of the Fund's financial resources to finance, including through the issuance of guarantees, transactions involving the transfer of covered deposits[5]. This would be possible in the context of the restructuring measures adopted in the special administration procedure[6], but only if the amount to be paid by the Fund is smaller than the direct payment of compensation for covered deposits. The amounts related to this financing would be recorded as a debt of the credit institution from which the covered deposits are transferred;

(b) extend the possible lending by the Government to the Fund to the situation where the Fund finances (including through the issuance of guarantees) transactions involving a transfer of covered deposits;

(c) establish that the Fund's claims on the credit institution in distress and related to the transfer of covered deposits are compensated from the patrimony of the credit institution. These claims have the same position in the payment order as the Fund's claims resulting from the payment of compensation to covered depositors;

(d) make any decision on the use of the Fund's financial resources to finance transactions involving the transfer of covered deposits subject to BNR's prior approval;

(e) exclude own capital from the uncovered liabilities taken into account for the calculation of the contribution to another fund, that is the Special Fund created for payment of compensations to persons negatively affected by the measures implemented during the special administration procedure[7]. The purpose of this exclusion is to prevent the negative treatment of credit institutions which have a prominent equity support from shareholders.

1.2. *The second draft ordinance*

1.2.1 Government Emergency Ordinance (GEO) No 99/2006 is the main legislation regulating the activity of credit institutions and financial investment companies in Romania. The second draft ordinance is designed to amend in GEO No 99/2006 the special administration procedure[8] applicable to credit institutions in distress in order to facilitate the proposed changes to GO No 39/1996. In relation to restructuring measures involving a transfer of deposits it establishes the following:

(a) the need for an adequate financial standing of the credit institution which is the beneficiary of the assets sale, deposits transfer, purchase of assets with assumption of liabilities transactions ('P&A transactions') or merger/split-up;

(a) BNR has determined that the credit institution concerned appears to be unable to repay the deposit and has no immediate prospect of being able to do so;
(b) a court has ordered the opening of a bankruptcy procedure with regard to the credit institution, before BNR findings as referred to in point (i) are provided.

5 Article 1(2) of the first draft ordinance.

6 Such restructuring measures as the transfer of covered deposits are already foreseen in Article 240^{12} of GEO No 99/2006; see also Article 240^{14} of GEO No 99/2006.

7 According to Article 240^{21} of GEO No 99/2006.

8 The ECB was consulted on the regulation of the special administration procedure. Opinion CON/2010/12 is available on the ECB's website at www.ecb.europa.eu.

(b) the criteria for receiving information by the credit institutions interested in participating in the implementation of restructuring measures;

(c) the mechanism for P&A transactions, which consists of a tender-like procedure based on the best price offered by an eligible credit institution;

(d) in the case of partial P&A transactions, the transfer of covered deposits has priority; it can be concluded only if all covered deposits are transferred and the eligible assets have a high degree of liquidity and/or are of good quality[9];

1.2.2 By adopting restructuring measures, the credit institution's creditors may not be in a less favourable position than if the measures had not been implemented and the credit institution had gone directly into liquidation.

1.2.3. In the case of restructuring measures consisting of transactions involving the transfer of deposits placed with a credit institution under special administration, BNR withdraws the authorisation of that credit institution on the date when the contract related to the relevant transaction takes effect and, if necessary, will notify the competent court for the initiation of bankruptcy proceedings.

2. General observations

2.1 According to BNR, the amendments in the draft ordinances are the subject of the structural benchmarks of the Stand-by Arrangement between Romania and the International Monetary Fund[10] and their entry into force is envisaged for 15 March 2011. In view thereof, the consulting authority invokes reasons of extreme urgency and asks the ECB to deliver its opinion by 25 February 2011 to enable the Romanian legislator to take the ECB's opinion into account, before deciding on the substance of the draft ordinances. The ECB would like to draw the consulting authority's attention to the fact that according to Article 4, second sentence of Decision 98/415/EC the ECB must be consulted 'at an appropriate stage' in the legislative process. This implies that the consultation should take place at a point in the legislative process that affords the ECB sufficient time to examine the draft legislative provisions and to adopt its opinion in the required language versions and which also enables the relevant national authorities to take the ECB's opinion into consideration before the provisions are adopted.

2.2 The ECB also notes the ongoing work in the Union to establish a harmonised Union crisis management and resolution framework for the financial sector which covers, *inter alia*, similar areas as those covered by the draft ordinances. While the Romanian framework seems to be in line with the Ecofin Council's recent conclusions on crisis management[11], it may require further

9 To be determined by BNR regulations.

10 According to the Letters of Intent of 9 September 2010 and 22 December 2010.

11 Council conclusions on crisis prevention, management and resolution – Ecofin Council meeting of 7 December 2010.

adaptations, depending on the final outcome of the Union framework and the recast of Directive 94/19/EC of the European Parliament and of the Council on deposit-guarantee schemes[12].

3. Specific observations

3.1 The ECB has previously expressed its view[13] that further efforts could be devoted to identifying additional tasks that could be delegated to deposit guarantee schemes. Using the financial resources of a deposit guarantee scheme to facilitate the transfer of covered deposits or a P&A transaction is an example of such possible tasks that, if properly designed, could contribute to improving crisis management preparedness and thereby financial stability. Nonetheless, given the limited size of deposit guarantee schemes, provisions that aim to safeguard the core functions of these funds (i.e. payout of covered deposits) are important. Against this backdrop, the ECB welcomes that, according to the draft ordinances (a) the resources of the Fund can only be used to finance such transfers if this is less costly than the direct payment of covered deposits; and (b) in the case of a P&A transaction, all guaranteed deposits have to be transferred. However, the ECB also identifies some areas in the proposed legal acts, described below, that may require further consideration.

3.2 The ECB notes that some important aspects of the mechanism intended to be implemented through the draft ordinances are not clearly regulated, *inter alia*: (a) the legal regime for guarantees to be issued by the Fund, in order to facilitate the implementation of a restructuring measure consisting of operations that involve the transfer of deposits; (b) the cost of the transfer of covered deposits; and (c) the debt of the credit institution from which the covered deposits are transferred, as referred to in paragraph 1.1(a).

In order to foster the stability of financial institutions and the market and to have a clear legal basis for the Fund, as well as for reasons of legal certainty, the ECB recommends a clear regulation of these issues.

3.3 The ECB appreciates that any decision on the use of the Fund's financial resources to finance transactions involving the transfer of covered deposits is subject to BNR's approval and hence recognises BNR's expertise in this context. However, the ECB restates its view that the functions to be performed by BNR to aid the stabilisation measures to be carried out must be conducted in a manner that is fully compatible with BNR's institutional and financial independence and that safeguards the proper performance of its existing tasks under the Treaty and the Statute of the European System of Central Banks and of the European Central Bank[14].

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12 OJ L 135, 31.5.1994, p. 5.

13 See 'The Eurosystem's stance on the Commission's consultation document on the review of Directive 94/19/EC on deposit-guarantee schemes', 13 August 2009 and 'Commission Communication on "An EU Framework for Cross-Border Crisis Management in the Banking Sector": Eurosystem's reply to the public consultation', 4 February 2010 (both published on the ECB's website at www.ecb.europa.eu).

14 See paragraph 3.7 of Opinion CON/2008/68 and paragraph 3.3 of Opinion CON/2009/51.

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

Done at Frankfurt am Main, 25 February 2011.

[signed]

The President of the ECB

Jean-Claude TRICHET