



## **OPINION OF THE EUROPEAN CENTRAL BANK**

**of 27 May 2009**

**on strengthening Banca Națională a României's remedial powers  
in relation to credit institutions in distress**

**(CON/2009/48)**

### **Introduction and legal basis**

On 19 May 2009 the European Central Bank (ECB) received a request from Banca Națională a României (BNR) for an opinion on a draft law approving Government Emergency Ordinance No 25/2009 amending Government Emergency Ordinance No 99/2006 on credit institutions and capital adequacy (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 and the sixth 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<sup>1</sup>, as the draft law relates to BNR and to 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 aims to strengthen BNR's remedial powers by expressly allowing it, after assessing the financial condition of a credit institution in distress, to request significant shareholders to financially support the credit institution, and/or to prohibit or limit profit distributions by the credit institution until its financial condition has been restored. Under the draft law, BNR is empowered:
- (a) to require significant shareholders of a credit institution in distress to provide necessary financial support to it either: (i) by increasing its share capital; or (ii) by providing subordinated loans that can be converted into ordinary share capital, also at BNR's request;
  - (b) to prohibit or limit distribution of profits until the credit institution's financial condition has been restored; and

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<sup>1</sup> OJ L 189, 3.7.1998, p. 42.

(c) to decide that voting rights for shareholders who do not comply with the request to provide additional financial support to the credit institution will be suspended.

1.2 Under the Romanian constitutional procedure, the draft law is adopted for the purpose of approving Government Emergency Ordinance No 25/2009 (GEO No 25/2009), which amended and supplemented Government Emergency Ordinance No 99/2006 on credit institutions and capital adequacy (GEO No 99/2006). GEO No 99/2006 is the main piece of legislation regulating the activity of credit institutions and financial investment companies in Romania, as well as their prudential supervision and the supervision of payment systems and settlement systems for financial instruments. The draft law forms part of the legislative measures to be adopted by Romania, as agreed during recent negotiations between the Romanian Government, on the one hand, and the International Monetary Fund, the World Bank and the European Union, on the other.

## 2. General observations

2.1 The ECB has issued a number of opinions at the request of the competent authorities of the Member States on national measures adopted in response to the global financial crisis<sup>2</sup>. The ECB invites the Romanian authorities to take into account the relevant observations made in its recent opinions on similar draft legislative provisions in other Member States.

2.2 The ECB also draws attention to the guidance provided by the Ecofin Council to the Member States in the conclusions of its Meeting of 7 October 2008<sup>3</sup>, as well as the Declaration issued by the Heads of State of the euro area on 12 October 2008 (hereinafter the ‘Declaration’)<sup>4</sup>. In particular, the ECB emphasises that any initiatives put in place by the competent national authorities to restore confidence in the financial markets should be coordinated and should aim to implement the common principles in question, in a spirit of close cooperation with other Member States and the Community institutions<sup>5</sup>. The principles contained in the Declaration, as well as the conclusions raised by the Ecofin Council, were endorsed by the European Council of 15 and 16 October 2008<sup>6</sup>. Moreover, measures taken by competent national authorities in relation to financial institutions in the context of the current global financial crisis have been the object of further coordination at EU

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<sup>2</sup> All ECB opinions are available on the ECB’s website at [www.ecb.europa.eu](http://www.ecb.europa.eu).

<sup>3</sup> See ‘Immediate Responses to Financial Turmoil’, Ecofin Council Conclusions of 7 October 2008, available on the former French Presidency’s website at [www.ue2008.fr](http://www.ue2008.fr). The Ecofin Council recommended that: (i) interventions should be timely and the support should in principle be temporary; (ii) the interests of taxpayers should be protected; (iii) existing shareholders should bear the due consequences of the intervention; (iv) the Government should be in a position to bring about a change of management; (v) management should not retain undue benefits; (vi) governments may have, *inter alia*, the power to intervene in remuneration; (vii) legitimate interests of competitors must be protected, in particular through the State aid rules; and (viii) negative spill-over effects should be avoided.

<sup>4</sup> The text of the Declaration is available on the former French Presidency’s website at [www.ue2008.fr](http://www.ue2008.fr). The Member States agreed to: (i) ensure appropriate liquidity conditions for financial institutions; (ii) facilitate the funding of banks; (iii) provide financial institutions with additional capital resources to continue to ensure the proper financing of the economy; (iv) allow for an efficient recapitalisation of distressed banks; (v) ensure sufficient flexibility in the implementation of accounting rules; and (vi) enhance cooperation procedures among European countries.

<sup>5</sup> See ECB Opinion CON/2009/12.

<sup>6</sup> See the Presidency Conclusions of Brussels European Council of 15 to 16 October 2008, paragraph 3.

level<sup>7</sup>. In particular, the ECB wishes to draw the consulting authority's attention to the European Council Declaration that Member States' actions 'will be designed in order to avoid any distortion in the level playing field', which is a crucial element for the integration of European financial markets. As a general remark in this context, the ECB, in line with its previous opinions<sup>8</sup>, notes the importance of putting a transparent and predictable framework in place by defining the terms and conditions for financial institutions to have recourse to it.

- 2.3 The ECB was not consulted on GEO No 25/2009. Although there is no requirement to consult the ECB on the transposition of Community directives into national law, provided that the transposing provisions have no impact on matters falling within the ECB's fields of competence other than the transposition of the directives, the ECB has on a limited number of occasions encouraged national authorities to consult it on draft legislative provisions transposing Community directives of particular interest to the European System of Central Banks.
- 2.4 With these general observations in mind, and against the background of the guidance previously given in its opinions and by the EU institutions and other institutions in this regard, the ECB has the following specific observations on the draft law.

### **3. Specific observations**

#### *Extension of regulatory and supervisory powers of BNR*

- 3.1 The ECB understands that the draft law will complete the current Romanian legal framework concerning credit institutions and will allow BNR to take timely action to prevent a credit institution's financial condition from deteriorating and so contributing to financial stability. The relevant provisions of the draft law will accordingly enforce BNR's obligation to prevent the capital of a credit institution from falling below the required threshold and will introduce a private sector resolution option as the first choice for dealing with a credit institution in distress, before other measures such as State aid are considered necessary.
- 3.2 While the ECB appreciates that the draft law recognises BNR's expertise in this context, 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

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<sup>7</sup> Communication from the Commission — The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis (OJ C 270, 25.10.2008, p. 8); Communication from the Commission — The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition (OJ C 10, 15.1.2009, p. 2); Recommendations of the Governing Council of the European Central Bank on government guarantees for bank debt and Recommendations of the Governing Council of the European Central Bank on the pricing of recapitalisations, both latter documents available on the ECB's website at [www.ecb.europa.eu](http://www.ecb.europa.eu).

<sup>8</sup> See paragraph 3.1.2 of ECB Opinion CON/2009/18.

Treaty and the Statute of the European System of Central Banks and of the European Central Bank<sup>9</sup>.

According to the explanatory memorandum to the draft law, a key objective of the amendments will be to strengthen BNR's remedial powers with new provisions as stated in paragraph 1.1, above. In this context and in line with its previous opinions<sup>10</sup>, the ECB reminds the Romanian authorities that the functions performed by BNR must fully comply with the provisions of Article 101 of the Treaty and of Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Article 101 of the Treaty<sup>11</sup>.

- 3.3 As regards the extension of BNR's regulatory and supervisory powers, the ECB notes the changes to the Romanian legislative framework for financial institutions and underlines that 'Member States may not put their national central banks in a position where they have insufficient financial resources to carry out their ESCB or Eurosystem-related tasks, as applicable'<sup>12</sup>. Moreover, the ECB expects that when BNR's tasks are extended, care will be taken to ensure that it has sufficient financial and personnel resources both in terms of quantity and quality to carry out all its tasks, and, in particular, that its capacity to carry out ESCB-related tasks will not be affected<sup>13</sup>.

*Measures concerning the share capital of credit institutions and shareholders' voting rights*

- 3.4. As already noted in paragraph 1.1 above, the draft law gives BNR certain additional remedial supervisory powers, in particular to require significant shareholders to sustain a credit institution in distress by increasing its share capital or by providing it with loans that are eligible to be included in its own funds<sup>14</sup>. Pursuant to Article 230(3) of GEO No 99/2006, as inserted by Article I, point 3, of the draft law, BNR may decide to suspend the exercise of shareholders' voting rights if they fail to comply with the abovementioned measures. Finally, Article 230(3) of GEO No 99/2006 also provides for the applicability of Article 230(2) thereof, which refers, in turn, to Article 232. As stated in the explanatory memorandum to the draft law and pursuant to the latter provisions, those shareholders who fail to comply with a request to provide additional financial support to the credit institution, and whose voting rights have therefore been suspended, will not be allowed to purchase new shares in that credit institution and will be required to sell their participation within three months. In case of failure to comply, BNR will order the credit institution to cancel the shares involved and to issue and sell new shares bearing the same number. The money raised from the sale will be made available to the original shareholder, after deduction of costs related to the sale.

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<sup>9</sup> See paragraph 3.7 of ECB Opinion CON/2008/68.

<sup>10</sup> See, e.g., paragraph 3.2 of ECB Opinion CON/2008/52.

<sup>11</sup> OJ L 332, 31.12.1993, p. 1.

<sup>12</sup> See e.g. the ECB's Convergence Report 2007, p. 19, available on [www.ecb.europa.eu](http://www.ecb.europa.eu).

<sup>13</sup> See paragraph 3.2 of ECB Opinion CON/2007/17.

<sup>14</sup> See Article 227(2) of GEO No 99/2006, as inserted by Article I, point 2, of the draft law.

- 3.5 The ECB expects that the above provisions will comply with all applicable domestic company, civil, property and constitutional laws and also international public and human rights law. The ECB also expects that the provisions will be implemented in compliance with the Community company law framework<sup>15</sup>. The abovementioned measures should also be proportionate to the situation addressed. In all cases, suspension of the exercise of voting rights, compulsory sale and compulsory cancellation of shares, which are severe measures with far-reaching effects on market participants, should remain a tool of last resort for use in clearly defined and emergency circumstances only, when less severe measures would be inadequate<sup>16</sup>.
- 3.6 To improve legal certainty, which is especially important in such situations, the ECB considers that BNR's new powers should be further defined and clarified, specifying the actual conditions under which each power will be used objectively and transparently. In this context, the ECB would like to point out that the conditions triggering the application of BNR's new powers are not yet clearly defined, since the draft law only states that the relevant measures can be adopted 'if a depreciating trend in relation to prudential and financial performance indicators is detected'. The ECB also notes that BNR's power to suspend shareholders' voting rights and to order the sale and the cancellation of their shares if the shareholders fail to comply with a request to sustain the credit institution financially by increasing its share capital, provide loans or prohibit and restrict profit distributions, appears not to be subject to clear and predictable limits and conditions. To summarise, therefore, the ECB stresses that the draft law, or the necessary implementing provisions, should specifically provide for the actual conditions under which the new measures will be used.

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

Done at Frankfurt am Main, 27 May 2009.

[signed]

*The President of the ECB*

Jean-Claude TRICHET

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<sup>15</sup> See, in particular, the Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ L 26, 31.1.1977, p. 1).

<sup>16</sup> See, by analogy, paragraph 3.2.2 of ECB Opinion CON/2009/24, referring to expropriation measures.