



OPINION OF THE EUROPEAN CENTRAL BANK

of 3 December 2010

on the temporary holding of shares by credit institutions in the course of financial reconstructions or rescue operations of undertakings

(CON/2010/86)

Introduction and legal basis

On 5 November 2010, the European Central Bank (ECB) received a request from Banca Națională a României (BNR) for an opinion on a draft Regulation on shares held temporarily during a financial reconstruction or rescue operation of an undertaking operating outside the financial sector (hereinafter the 'draft regulation').

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 provisions¹, as the draft regulation relates 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 regulation

- 1.1 The draft regulation sets out requirements for credit institutions' prudent decision-making processes when they seek to temporarily acquire shares in (and possibly control of) a non-financial undertaking during a financial reconstruction or a rescue operation, by way of a debt-to-equity swap.
- 1.2 For this reason, the draft regulation provides further details on the exemption clause under Article 145 of the Government's Emergency Ordinance No 99/2006 (GEO 99/2006)², which transposes Article 121 of Directive 2006/48/EC³. This clause provides that shares held temporarily during a financial reconstruction or rescue operation shall not be counted as qualifying holdings. Therefore, the limitation applicable to qualifying holdings of credit institutions in non-financial

¹ OJ L 189, 3.7.1998, p. 42.

² Emergency Ordinance No 99 of 6 December 2006 on Credit Institutions and Capital Adequacy, *Monitorul Oficial al României*, Part One, No 1027 of 27 December 2006.

³ Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast), OJ L 177, 30.6.2006, p. 1.

undertakings, as laid down in Articles 143 and 144 of GEO 99/2006, which transposes Article 120 of Directive 2006/48/EC, does not apply.

- 1.3 Article 5 of the draft regulation sets out the specific requirements to be met by a credit institution before acquiring shares in order for it to benefit from the exemption. In particular, the credit institution needs to provide a strategy and an overall policy⁴. It must formulate and implement a concrete, viable and well-founded financial reconstruction or rescue plan for the undertaking concerned⁵. It must also properly justify its view that the acquisition of shares is a measure of last resort⁶ and it must have suitable risk management policies/procedures⁷ in place.
- 1.4 Furthermore, the credit institution needs to notify BNR's Supervision Department of its intention to acquire the shares and to submit documentation demonstrating that it meets the requirements stipulated in Article 5 of the draft regulation. The Supervision Department shall then deliver an opinion as to whether these requirements⁸ have been met.
- 1.5 The 'temporary' holding of shares acquired under the exemption clause is limited to a period of 36 months, with the possibility of a one-off extension which may be granted by BNR's Supervision Department. However, shares cannot be held for more than a total of 48 months⁹.

2. Specific observations

- 2.1 The ECB welcomes the intention of the Romanian authorities to provide further details on the conditions under which credit institutions may acquire shares in non-financial undertakings and on the restrictions which apply in this context. This approach is in line with the spirit of the exemption clause in Article 121 of Directive 2006/48/EC, as implemented by Article 145 of GEO 99/2006.
- 2.2 The ECB notes that, for the purposes of clarity and legal certainty, some of the provisions in the draft regulation need to be further clarified. In particular, the consequences of a negative opinion of BNR's Supervision Department on whether a credit institution meets the requirements to temporarily acquire shares in accordance with the exemption clause should be clearly stated. To this end, concrete provisions setting out the measures that BNR could take in such cases, including sanctions for non-compliance, would contribute to the enforcement of prudential supervision in this field.

4 Article 5 (1)(a) of the draft regulation.

5 Article 5 (1)(b) of the draft regulation.

6 Article 5 (1)(c) of the draft regulation.

7 Article 5 (1)(d) of the draft regulation.

8 Article 7 of the draft regulation.

9 Article 9 of the draft regulation.

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

Done at Frankfurt am Main, 3 December 2010.

[signed]

The President of the ECB

Jean-Claude TRICHET