



OPINION OF THE EUROPEAN CENTRAL BANK

of 31 October 2011

on stabilisation measures and bridge banks

(CON/2011/86)

Introduction and legal basis

On 20 October 2011, the European Central Bank (ECB) received a request from Banca Națională a României (BNR) for an opinion on a draft government emergency ordinance amending and supplementing Government Emergency Ordinance No 99/2006 on credit institutions and capital adequacy (GEO No 99/2006)¹ and Government Ordinance No 39/1996 on the setting up and operation of the deposit guarantee fund in the banking system (GO No 39/1996)² (hereinafter the ‘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 third and 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 provisions³, as the draft ordinance relates to BNR and 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 ordinance

1.1 The draft ordinance will provide the supervisory authority with the tools to manage financial stability threats posed by the deterioration of the financial situation of authorised credit institutions or of the group to which they belong. To this end, it will introduce a set of stabilisation measures for the credit institution in distress, in addition to the special administration procedure already applicable.

1.2 *Amendments to GEO No 99/2006*

The draft ordinance will introduce the following stabilisation measures in the legal framework for credit institutions and financial investment companies in Romania:

¹ Published in *Monitorul Oficial al României*, Part One, No 1027, 27.12.2006.

² Republished in *Monitorul Oficial al României*, Part One, No 587, 19.8.2010.

³ OJ L 189, 3.7.1998, p. 42.

- (a) the total or partial transfer of assets and liabilities of a credit institution to one or more eligible institutions;
- (b) the appointment of the Bank Deposit Guarantee Fund (BDGF) as a delegated administrator and shareholder of the credit institution⁴, by increasing that credit institution's share capital and subscribing to the new shares issued by the BDGF. The shares acquired by the BDGF must be sold within two years following the date of acquisition;
- (c) the transfer of assets and liabilities of a credit institution to a bridge bank, established for this purpose, if measures (a) and (b) cannot be applied or if their application does not ensure the removal of the threat to financial stability.

The BDGF, which is a public law legal entity⁵, provides the financing for the stabilisation measures: first, from the resources of the Bank Resolution Fund and, then, if those resources have been used up, from its own resources. Such financing may not exceed a level by which the coverage degree of the BDGF's exposure decreases below the limit of 0.5% of the total value of the guaranteed deposits. Where the BDGF's resources are insufficient, the difference is provided by loans granted by the Ministry of Public Finance to the BDGF within 15 banking days from receipt of the request from the BDGF. A government decision will regulate the loan.

The bridge bank is established and operates for up to two years - unless extended for serious reasons - according to the legislation applicable to the credit institutions and is subject to BNR's prudential supervision. The stated purpose of the bridge bank is to ensure the prudent continuous provision of banking services related to the assets and liabilities taken over in view of its subsequent sale to an eligible third party purchaser. The bridge bank subrogates to the rights and obligations arising from agreements entered into by the credit institution from which the transfer was made. The bridge bank is sold on the basis of BNR's decision by: (a) selling shares, or (b) selling assets with assumption of liabilities.

1.3 *Amendments to GO No 39/1996*

The legal framework for the Romanian Deposit Guarantee Scheme is also amended to foster the stabilisation measures and its new competences: the BDGF may become the delegated administrator and shareholder of a credit institution which is subject to a stabilisation measure; where a bridge bank is created, the BDGF is its sole shareholder and exercises the tasks of the supervisory committee. In these cases, the BDGF finances the stabilisation measures with BNR's prior approval.

The draft ordinance also modifies the regime for the special fund initially created for compensating persons negatively affected by the measures implemented during the special administration procedure. This Fund is renamed the Bank Resolution Fund and it may also finance the stabilisation measures.

⁴ Article 254⁵ to be inserted in GEO No 99/2006.

⁵ Article 1(2) of GO No 39/1996.

2. General observations

- 2.1 The amendments in the draft ordinance are part of Romania's commitments in the Letter of Intent of 14 September 2011 in the context of the Stand-by Arrangement between Romania and the International Monetary Fund and the European Union; their entry into force is envisaged for 31 October 2011. The consulting authority therefore invokes extreme urgency and asks the ECB to deliver its opinion by 26 October 2011 to enable the Romanian legislator to take the ECB's opinion into account. The ECB draws the consulting authority's attention to the second sentence of Article 4 of Decision 98/415/EC according to which 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 carefully 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 Furthermore, the ECB notes that the draft ordinance will need to be reviewed in the light of the future Union regulatory framework on bank recovery and resolution, in particular with regard to resolution tools and resolution authorities' powers, and of the forthcoming recast Directive on deposit guarantee schemes.

3. Specific observations

- 3.1 The ECB welcomes the introduction of a bridge bank as a stabilisation measure, with the specific purpose of transferring to it the assets and liabilities of a troubled credit institution in the circumstances set out by the draft law. As regards the period of two years for the existence of the bridge bank⁶, the ECB considers that BNR should have the power to extend this period if it deems necessary. In that case, the ECB considers that it is not sufficient that this decision will be taken 'for serious reasons...in order to ensure continuity of banking services'. In the interest of legal certainty and in keeping with the interim nature of the bridge bank as a resolution tool, the grounds on which BNR may decide to extend the bridge bank should be set out precisely; such grounds may include a continuing risk to financial stability or the fact that negotiations with a purchaser are not yet completed.
- 3.2 The draft ordinance provides that 'After the transfer, the BDGF shall appoint an authorised independent expert to assess the quality of assets taken over by the bridge bank, to calculate, according to the applicable accounting regulations, the fair value of the transferred assets and liabilities and the total value of the transfer'⁷. It is important for the draft law to express clearly that any State or central bank financial assistance provided or potentially to be provided, apart from ordinary market operations on the usual terms, will be deducted from the calculation of the fair value of the transferred assets and liabilities.

⁶ New Article 254⁶ of GEO No 99/2006.

⁷ New Article 254¹¹(5) of GEO No 99/2006.

3.3 *Funding of resolution measures by the Bank Resolution Fund and by the BDGF*

The purpose of the Bank Resolution Fund (BRF), which is based on the former Special Fund, needs to be clarified. The new BRF appears to support compensation of ‘persons prejudiced by measures taken’ both at an early intervention and resolution phase. In addition the BRF’s financial resources may be used to finance the stabilisation measures⁸ but the draft ordinance does not specify unambiguously when and how such financing will be triggered. Furthermore, the respective roles of the BRF and the BDGF in financing the stabilisation measures are not sufficiently clear and the relationship between the BRF and the BDGF needs to be clarified.

Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes⁹ requires that deposit-guarantee schemes (DGSs) should be in a position to pay duly verified claims by depositors in the periods specified by this Directive¹⁰ which also implies that the DGSs should have adequate financial means at their disposal to realise this objective¹¹. Generally, the ECB considers that, to avoid confusing the deposit guarantee role of the BDGF and the resolution role of the BRF, it would be more appropriate for the BRF’s financial resources¹², rather than the BDGF’s resources, to be used to finance the stabilisation measures and to capitalise the bridge bank. In any case, the BDGF’s financial resources available for paying guaranteed deposits should be ring-fenced and, if necessary, only used to cover the part of the resolution cost that indirectly ensures the depositors’ protection¹³. In resolution, the amount paid by the BDGF for the financing of stabilisation measures¹⁴ should therefore be limited to the amount of guaranteed deposits transferred to a private sector purchaser or a bridge bank¹⁵. This is crucial to ensure that the objective of the deposit guarantee scheme is fully respected. In the same vein, the BDGF’s involvement as shareholder and administrator of the ailing or bridge bank should be reconsidered and the BRF should instead assume this role.

The ECB considers it very important for a satisfactory level of funds to be collected *ex ante* from the financial sector for the deposit guarantee and the resolution fund, given the countercyclical nature of such pre-collected funds. The ECB welcomes the special supplementary contributions *ex post* as a complement to the *ex ante* funding regime for the BDGF and the BRF where BNR considers the financial resources accumulated in the BDGF and in the BRF to be insufficient to ensure payments due.

8 Article 58(1)¹ to be inserted in GO No 39/1996.

9 OJ L 135, 31.5.1994, p. 5.

10 See Article 10(1) of the Directive 94/19/EC.

11 See recital (23) of Directive 94/19/EC specifying that financing capacity of DGSs must be in proportion to their liabilities; see also paragraph 2.5 of ECB Opinion CON/2007/26.

12 Article 60 of GO No 39/1996.

13 See ESCB contribution to the Commission’s public consultation on the technical details of a possible EU framework for bank recovery and resolution, p. 18. All ECB documents are available on the ECB’s website at www.ecb.europa.eu.

14 Section 2 Article 254¹ to be inserted in GEO No 99/2006.

15 This is not the case in the draft ordinance. See Section 2 Article 254²(1) to be inserted in GEO No 99/2006 and Article 9(2) of GO No 39/1996 to be amended.

3.4 *Central bank independence*

The ECB appreciates that any decision on the use of the BDGF's financial resources to finance transactions involving the transfer of covered deposits is subject to BNR's approval and hence recognises BNR's expertise. The ECB restates its view that the functions to be performed by BNR to assist stabilisation measures must be conducted in a manner that is fully compatible with BNR's institutional and financial independence which safeguards the proper performance of its tasks under the Treaty and the Statute of the European System of Central Banks and of the European Central Bank¹⁶.

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

Done at Frankfurt am Main, 31 October 2011.

[signed]

The President of the ECB

Jean-Claude TRICHET

¹⁶ See paragraph 3.7 of Opinion CON/2008/68 and paragraph 3.3 of Opinion CON/2009/51.