



EUROPEAN CENTRAL BANK  
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## OPINION OF THE EUROPEAN CENTRAL BANK

of 11 December 2018

on amendments to the liability regime concerning the Board members and employees of Banca Națională a României  
(CON/2018/56)

### Introduction and legal basis

On 27 September 2018 the European Central Bank (ECB) received a request from the Vice Chairman of the Romanian Senate for an opinion on draft amendments to the Law on Banca Națională a României<sup>1</sup>.

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 (TFEU) and the third indent of Article 2(1) of Council Decision 98/415/EC<sup>2</sup>, as the draft law relates to Banca Națională a României (BNR). 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

The purpose of the draft law is to remove Article 25(3) and (4) of the Law on BNR which provide, respectively, that the Board members and employees of BNR who are entrusted with prudential supervision tasks do not incur criminal or civil liability for discharging their duties in good faith and without negligence and that BNR bears the costs related to court proceedings which involve BNR's Board members and employees entrusted with prudential supervision tasks.

### 2. General observation

Although it is not apparent from the draft law and accompanying documents, the ECB understands that the removal of Article 25(3) and (4) of the Law on BNR will indirectly affect Article 8 of the Law on the recovery and resolution of credit institutions and investment firms<sup>3</sup>. Article 8 provides that Article 25(3) and (4) of the Law on BNR apply in respect of the liability regime that covers the resolution authority, its employees and any person under the control of that authority in the exercise of the tasks under the Law

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<sup>1</sup> Lege nr. 312/2004 privind Statutul Băncii Naționale a României, publicată în Monitorul Oficial al României nr. 582 din 30 iunie 2004.

<sup>2</sup> Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (OJ L 189, 3.7.1998, p. 42).

<sup>3</sup> Lege nr. 312/2015 privind redresarea și rezoluția instituțiilor de credit și a firmelor de investiții, precum și pentru modificarea și completarea unor acte normative în domeniul financiar, publicată în Monitorul Oficial al României nr. 920 din 11 decembrie 2015.

on the recovery and resolution of credit institutions and investment firms. In this respect, it is noted that BNR is the resolution authority in Romania.

### 3. Specific observations

#### 3.1 *Proposed amendment to the liability regime*

3.1.1 In its current form, Article 25(3) of the Law on BNR provides that BNR's Board members and employees entrusted with prudential supervision tasks cannot incur criminal or civil liability for actions or omissions discharged '*in good faith and without negligence*'.

3.1.2 It is apparent from the wording of Article 25(3) of the Law on BNR that, contrary to the views included in the statement of reasons that accompanies the draft law<sup>4</sup>, criminal and civil liability may, in fact, be incurred for all other actions or omissions, namely those discharged with intent or by negligence.

3.1.3 Article 25(3) of the Law on BNR incorporates Principle 2 of the Core Principles for Effective Banking Supervision of the Basel Committee on Banking Supervision<sup>5</sup> (the 'Basel Core Principles') on independence, accountability, resourcing and legal protection for supervisors into national legislation. Principle 2 sets out in essential criteria 1 and 9, respectively, that the supervisor should possess '*operational independence*' and that laws should '*provide protection to the supervisor and its staff against lawsuits for actions taken and/or omissions made while discharging their duties in good faith*'. As the Law on BNR refers exclusively to employee liability, without referring to BNR's liability as a supervisor, Article 25(3) transposes the cited criterion 9 in part.

3.1.4 The ECB understands that removing Article 25(3) of the Law on BNR cannot be seen as substantially impacting the liability regime applicable to BNR's Board members and employees, as both the Romanian Civil Code<sup>6</sup> and the Criminal Code<sup>7</sup> require either intent or negligence for liability to be incurred at all. This is already the case under the current wording of the Law on BNR.

3.1.5 However, the ECB notes the benefit of keeping Article 25(3) in the Law on BNR. In this manner, both legal certainty and the stability of the legal framework are ensured as far as the liability regime applicable in respect of the discharge of BNR's prudential supervisory tasks is concerned.

3.1.6 At the same time, the ECB acknowledges that different supervisory liability regimes currently exist at national level and understands that it is, in principle, a matter for national law to determine the scope of such liability<sup>8</sup>.

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<sup>4</sup> According to the statement of reasons, BNR's Board members and staff entrusted with supervisory tasks are subject to a 'privileged' immunity regime and do not incur any criminal or civil liability.

<sup>5</sup> Principles for Effective Banking Supervision of the Basel Committee on Banking Supervision, available at <https://www.bis.org>.

<sup>6</sup> Articolul 16 din Lege nr. 287/2009 privind Codul civil, publicată în Monitorul Oficial al României nr. 505 din 15 iulie 2011.

<sup>7</sup> Articolul 16 din Lege nr. 286/2009 privind Codul penal, publicată în Monitorul Oficial al României nr. 510 din 24 iulie 2009.

<sup>8</sup> See Opinion CON/2014/43, paragraph 5.1.

- 3.2 *Proposed amendment on the litigation costs of BNR Board members and employees*
- 3.2.1 In addition to the abovementioned observations on the liability regime, Article 25(4) of the Law on BNR also incorporates Principle 2 of the Basel Core Principles into national legislation. Principle 2 sets out in essential criterion 9 that the law should ensure that *'the supervisor and its staff are adequately protected against the costs of defending their actions and/or omissions made while discharging their duties in good faith'*. In its current form, Article 25(4) of the Law on BNR protects the Board members and employees of BNR who are entrusted with prudential supervision tasks from having to bear their own litigation costs.
- 3.2.2 The ECB notes the benefit of keeping Article 25(4) in the Law on BNR. In this manner, both legal certainty and the stability of the legal framework are ensured as far as the personal responsibility of the Board members and employees of BNR who are entrusted with prudential supervision tasks for costs related to court proceedings concerning their personal liability is concerned. At the same time, while the draft law would require the Board members and employees of BNR to bear their own litigation costs, the ECB acknowledges that such costs are recoverable according to applicable national law<sup>9</sup>, and that it is, in principle, a matter for national law to determine the scope of such cost recovery arrangements.

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

Done at Frankfurt am Main, 11 December 2018.

[signed]

*The President of the ECB*

Mario DRAGHI

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<sup>9</sup> Articolul 453 din Lege nr. 134/2010 privind Codul de procedură civilă, publicată în Monitorul Oficial al României nr. 247 din 10 aprilie 2015.