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Cooperation in banking between the national bank of Romania and competent authorities in the European Union

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Abstract

In Romania, the legal framework which regulates the legal regime of credit institutions is Government Emergency Ordinance no. 99/2006 on credit institutions and capital adequacy, amended and approved by Law no. 227/2007.

This regulation includes also the legal framework for the activity of the authority competent in the field, as well as the legal relations established between the national authority and the competent authorities in other European Union member states. Pursuant to provisions of Art. 4 par.(1), the authority competent as regards the regulation, licensing and prudential supervision of credit institutions in the National Bank of Romania. Moreover, this institution provides this activity as one of its main responsibilities stipulated in Art.2 par. (2) of Law no. 312/2004 on the Statute of the National Bank of Romania. In support of this competence, Art.25 par.(1) of the law expressly mentions that “the National Bank of Romania has exclusive competence to license credit institutions and is in charge with the prudential supervision of the credit institutions which it has authorised to operate in Romania”; in the next paragraph, the article stipulates the empowerment limits for the authority, with the declared purpose of assuring the operating and viability of the banking system.

Keywords: competent authorities, banking system, credit institutions

Taking into account the social and economic importance of the prudential supervision of credit institutions in Romania, as well as the strong presence of foreign equity participations in these institutions – following the globalization of the banking system, the close relationship which must exist between the national supervisory authority and the competent authorities in other states is an intrinsic must, particularly in the case of the countries where the credit institutions in the domestic banking system come from. That is why, Art. 3 par.(6) of Law no. 312/2004 sets the legal grounds for the National Bank of Romania to collaborate with competent authorities in EU member states, so as to be empowered to provide “the conditions needed for the fulfilment of information exchange with these authorities”. But, this information exchange must be conducted under the terms set forth in Art.3 par.(10) of the law, complying with the following three minimal requirements:

1. This information is subject to the requirements regarding keeping professional secrecy. In this respect, this requirement is set forth in the provisions of Art. 52 in Law no.312/2004 which regulates professional secrecy in the field. So, as regards providing such information, it can be done only with the signature of the governor of the National Bank of Romania or other people empowered in this respect.

The wording “in this respect” reflects the will of the legislator according to whom the empowerment of these people by the National Bank of Romania governor – who, pursuant to Art. 35 par. (3) of the same normative act “represents the National Bank of Romania in relation to third parties”, is conducted precisely in order to

provide information under the terms set forth in Art.52 of the law. Therefore, we can make the distinction between empowerment in this case and the one set forth in Art.35 par.(3) on empowerment given for signing treaties and conventions on behalf of the National Bank of Romania; and, at the same time, the distinction as regards the delegation of responsibilities to the first-vice-governor and vice-governors as set forth in Art.35 par.(1) of the law, on the concrete attributions which are delegated “under the terms established by the Board”.

In the same rationale, the legislator expressly established in Art.2 par.(4) that, when exercising its duties as regards licensing, regulating and prudentially supervising credit institutions, the National Bank of Romania can utilize the information received pertaining to professional secrecy, only in one of the following cases :

- a) checking the fulfilment of the conditions regarding the establishment of credit institutions;
- b) supervising, at individual and consolidated level, the business of credit institutions;
- c) applying sanctions;
- d) the credit institutions' disputing the administrative acts issued by the National Bank of Romania.

Consequently, the National Bank of Romania shall not be in the capacity to utilize the information received under the conditions of Art.3 of the law from other competent authorities in other situations which exceed the scope of Art.52 par.(4), since the interpretation of this law text is *stricto sensu*.

2.The information provided by the National Bank of Romania shall be utilized by the competent authorities to whom it has been exclusively communicated solely for the purpose of fulfilling their duties. The formulation “fulfilling their duties” refers to the duties of competent authorities as set forth in the relevant regulation in the legislation of that respective country; the express provision in this regulation cannot be extended, at one's own discretion. Moreover, our view is that the expansion of this scope by a competent authority damages the grounds of getting this information, namely the agreement concluded between parties.

3.The information received from a member state can be provided only with the express agreement of the competent authority who has sent it and only for the purposes for which there is an agreement in this respect. Here, we have a situation similar to the above mentioned one, which, in this case, concerns the information received by the National Bank of Romania and refers to its behavioural regime. The central bank must obtain the express agreement of the competent authority which has provided the information, an agreement which must be obtained before the information utilization and which must be express as regards the respective utilization for the purposes for which this information was obtained.

Only if the minimal legal requirements are cumulatively fulfilled, the provided information can be utilized by parties as set forth by the law and the contracts concluded by them at the negotiation and conclusion of the bilateral collaboration document. As we can see, the Law on the National Bank of Romania Statute sets the legal grounds for the establishing of the collaboration between this institution and competent authorities, in order to conduct an adequate prudential supervision of credit institutions.

Romania's joining the European Union on 1 January 2007 brought about the adopting of new regulations for credit institutions at the very end of the year 2006.

In this respect, we must mention Government Emergency Ordinance no.99/2006 on credit institutions and capital adequacy, published in the Romanian Official Gazette no.1027/27 December 2006. This normative act represents a transposition in the Romanian legislation of the relevant Community directive adopted by the European Parliament and the European Union Council, in the same year. That is why, the principles set forth in the Community act are to be found in the Romanian normative act as well.

Firstly, we must mention that both normative acts stipulate the wording “competent authorities”, defined under point 4 of Art. in Directive 2006/48/CE of 14 June 2006 on the initiation and exercising of the business of credit institutions, as meaning the national authorities empowered – on the grounds of an act binding as a law or an administrative norm, to supervise the business of credit institutions, and under point 2 of Art. 7 par.(1) of the Government Emergency Ordinance no.99/2006 as being the national authority empowered by law or other regulations to prudentially supervise credit institutions. Apparently, the two definitions are identical, but, in reality, they are suitable for a comparative analysis. It is obvious that both refer to the national authorities who exercise such a power – prudential supervision of credit institutions, on the national territory, having their competence set forth in a normative act adopted in that respective state. What actually differs is the fact that, in the first definition, they mention the authority empowered based on an act binding as a law or an administrative norm, while in the second definition they refer, in a much more concrete manner, to an empowerment by law or other regulations. After analysing these wordings, we can reach the conclusion that if the notion “act binding as a law” has a wider scope than the law, the notion “other regulations” includes a much wider scope than the “administrative norm” mentioned in the European Directive. If we were to mention the example of the Romanian regulation of the competent authority, we could say that it has found expression – in conformity with the Romanian law, in Law no.312/2006, both in Art.2 and in Art.25.

Nevertheless, we must remark that the normative act which regulates the entire activity related to the prudential supervision of credit institutions is a Government ordinance which is not a law - *stricto sensu* - but an act binding as a law from a constitutional point of view, in conformity with its formulation, thus answering the definition in the European Directive, but also the wide scope which the notion “other regulation” implies in the Romanian legislation. Moreover, we consider that, taking into account the socio-economic importance and the effects implied by the activity of such a national authority, its empowerment is justified only by its inclusion in a law or an act binding as a law, which could offer it the power and legal authority that such a normative act brings about.

Passing now to the legal framework offered by the Romanian law as regards the collaboration between competent authorities in EU member states, we shall try to point out the scope of this collaboration. As concerns regulation, the national authority benefits from the European directives in the field, which implies the fact that all competent authorities in EU states shall regulate the field having as grounds the same European normative acts, as regards licensing and prudential supervision of credit institutions – inspired by the same source, they will regulate, but at the same time resorting to the possibilities offered by the collaboration with competent authorities in other EU member states.

In this spirit, we think, should be read the provision in Art.37 of Government Emergency Ordinance no.99/2006 referring to the consultations of the National Bank of Romania with the competent authorities of a member state involved, before licensing a credit institution, Romanian legal person. Such consultation should take place only if it refers to one of the situations requesting this consultation. The situations are expressly set forth by law and refer to the fact that the respective credit institution, Romanian legal person, is either an affiliate of a credit institution licensed in the respective member state, or an affiliate of the parent company of the credit institution licensed in that state, or is controlled by the same persons who control a credit institution in the respective member state.

This consultation, requested by law, is justified by the fact the competent authority in the member state has useful information, resulting from its own process of licensing and supervision of the credit institution which is in one of the mentioned relations with the credit institution Romanian legal person that is to be licensed, as well as from the common interest of both competent authorities regarding the supervision of the credit institution on the national territory of each one. Moreover, in par. (3) of the same article, in support of this rationale, it is mentioned expressly that the information exchange is relevant not only for being granted a license by the National Bank of Romania but also for the ongoing assessment of compliance with business conditions. The same law text refers also to the information content for which the consultation takes place, stipulating that the authorities must be consulted especially in the context of assessing the shareholders' quality and the reputation and experience of the persons involved in administering and managing another entity in the same group, who are to be entrusted duties in the operative administering or management of credit institution, Romanian legal person.

In the chapter on the regime of credit institutions in other member states, the collaboration between competent authorities plays an essential role. Thus, considering the license granted by the competent authority in the home member state, the respective credit institution can deploy, in conformity with Art. 45 par. (1) in the Government Emergency Ordinance no.99/2006, in Romania, the business permitted by the Romanian legislation, by establishing branches and by providing services directly, on condition that this business be mentioned in the license granted by the competent authority of that state and that compliance with the Romanian legislation adopted to protect general interest be assured. Concretely, Art.46 sets forth that, when establishing a branch by such a credit institution, there is no need to get a license from the National Bank of Romania or to provide endowment capital for that branch. In this case, the National Bank of Romania will register it in its credit institution' Register, based on the notification set forth in Art. 48, notification submitted by the competent authority of the home member state, accompanied by the data and information requested by the provisions of par. (2) of the same article.

Similarly, any intention to change this information must be notified to the National Bank of Romania by the respective credit institution, at least one month before the date when the change is to be made.

Based also a notification submitted to the National Bank of Romania by the competent authority of the home member state – including the lines of business that a credit institution licensed and supervised by it intends to deploy in Romania, the respective credit institution will be able to provide services directly on our national territory. Moreover, credit institutions from other member states shall notify the

National Bank of Romania when opening representative offices in Romania, in conformity with Art.53.

The natural consequence of a notification regarding a branch or providing services directly in Romania is the provisions of Art. 60, according to which, in case the respective credit institution does not comply with the Romanian regulations in the field the National Bank of Romania – after having requested that credit institution to take measures to remedy the situation within a certain time limit and the latter has not complied, can inform the competent authority of the home member state to dispose the measures deemed appropriate. If the credit institution keeps breaching the Romania legislation in force, the National Bank of Romania – after informing the competent authority in the home member state, can dispose measures for the prevention or sanctioning of the law breaches, including preventing the delinquent credit institution to initiate new transactions on the territory of Romania.

Similarly, the same regime is applied to credit institutions licensed and supervised by the National Bank of Romania, when they intend to deploy lines of business allowed by law in other member states, by establishing branches or by providing services directly. In these cases, the National Bank of Romania – based on the request of the credit institution Romanian legal person, accompanied by the data and information as set forth in Art.81, submits them to the competent authority in the host member state, together with information on the level of the equity and the capital requirements of the credit institution.

The provision in Art. 85 must be contemplated as a provision similar with the one in Art. 60, namely when the competent authority in the host member state informs the National Bank of Romania that a credit institution Romanian legal person that deploys business in that state, though warned, has not complied with the legal provisions of that state; then, the Romanian competent authority will take, at once, the appropriate measures for the ceasing of the facts mentioned, measures which it communicates to the competent authority in the host member state as well.

We must read – as an acknowledgement of the cooperation of the competent authorities in the two states and observance by the Romania legislation of the community directive, the provision of par. (3) of Art.85, setting forth that the acts issued by the competent authorities in the host member state – about which the National Bank of Romania has been informed, through which measures are taken or sanctions applied on the credit institution Romanian legal person, are recognised and produce legal effects in Romania. Such a provision demonstrates that the Romanian law applies appropriately the express provisions of Art.30 par. (3) of Directive C.E. no. 48/14, June 2006 on the powers of competent authorities in the host member state. We must read with a similar approach the imperative provision in Art.86 of the Government Emergency Ordinance no.99/2006, according to which „the credit institution Romanian legal person deploying business on the territory of another member state in subject to the legal provisions in force in the host member state, adopted to protect general interest and to the measures or sanctions ordered by the authorities of that respective member state”.

The expression of the cooperation of competent authorities as regards the prudential supervision of credit institutions is reflected also in the provision of Title III of the emergency ordinance on prudential supervision. Thus, Art. 172 setting forth that the National Bank of Romania assures the prudential supervision of credit

institutions Romanian legal persons deploying business in other member states, stipulates that this principle does not exclude the right of the competent authority in the host member state to exercise its competence as regards implementing its own monetary policy, reporting requirements for statistics purposes or liquidity requirements. Moreover, Art.173, strengthening the principle of collaboration between the National Bank of Romania and competent authorities in host member states in such situations, stipulates in par. (2) that during this collaboration, the exchange of all information regarding the management and the shareholders of the credit institution Romanian legal person is assured in order to facilitate its supervision and assess its compliance with the conditions set at the time of the licensing as well as the exchange of all information, in order to facilitate the ongoing verification of the business of that credit institution, particularly as regards liquidity, solvency, the deposit guarantee scheme, limiting large exposures, administrative and accounting procedures and the internal control mechanisms. In order to verify the business of the branches set up in other member states by credit institutions Romanian legal persons, the National Bank of Romania can, according to Art. 174, conduct verifications at the premises of these branches, after having previously informed the competent authorities in the host member states or it can request the performing of verifications by these authorities, when exercising their competences, situation in which, the National Bank of Romania, via its supervisors, can take part to the performing of verifications, if it deems it necessary.

The collaboration with the competent authorities in other member states is carried out also as regards consolidated supervision, including in the cases when parties can decide jointly not to apply the criteria in the field included in the provisions of Art. 176 par. (1) let.c) – e), cases when, before taking a decision, the competent authorities must grant the possibility to express their opinion on that respective decision to the parent credit institution from the European Union, or to the holding parent financial company from the EU, or to the credit institution with the biggest total balance sheet assets, as the case may be. Moreover, the legislator stipulates that any agreement concluded in this respect by competent authorities must be notified to the European Commission.

Aspects of the cooperation of the National Bank of Romania with competent authorities in home member states as regards exercising the supervision of credit institutions from other member states deploying business in Romania are included in the provisions of Art. 208 – 211, where we find the position of the National Bank of Romania as the competent authority in the host member state, with a role identical with the one that the competent authorities in member states had in relation with the National Bank of Romania when they were host member states. Also, the emergency ordinance sets forth the rights and obligations of competent authorities as regards the exchange of information and professional secrecy.

On the other hand, Art. 43 sets forth, as the effect of withdrawal of the credit institution license or, as the case may be, of the termination of its validity, the submission of notifications by the National Bank of Romania, without delay, to both the European Commission as well as to the competent authorities in host member states. Such communication is extremely important for these authorities, who, being informed, in due time, about the measure taken, will be able to act so as to considerably limit the consequences if the respective credit institution conducts operations on the territory of these states. Moreover, the legal grounds which allow

and, at the same, oblige the National Bank of Romania to inform the competent authorities in host member states as regards such an event are represented by Art. 88, which supplements the provisions of Art. 43, by stipulating that the National Bank of Romania's informing will refer to „including the consequences of the license withdrawal”, which can have an even greater importance for the respective authorities that monitor the credit institution in the situation mentioned, concerning the operations conducted on the territories of these states.

In the same line of thought we must also read Art.259 which strengthens the celerity character of the information submitted by the National Bank of Romania to the competent authorities in host member states by the wordings „informs without delay, by any available means on the adopted decisions, their legal consequences and the effects they involve” (par. 1) or „ the National Bank of Romania assures the informing set forth in par. (1) immediately after adopting the decision” (par.2).

On the other hand, from Art. 64, we can infer the similar obligation of the competent authority in the home member state when such an event takes place , i.e. being obliged to inform the National Bank of Romania, while the latter is empowered – based on this law text, to take „the measures necessary to prevent the credit institution from initiating new transactions on the territory of Romania and to assure protection of the interests of depositors and other creditors”.If we consider only the obligation of mutual informing in such a case and it is enough to appreciate how important for a competent authority in a member state can be to know the moment and consequences when a foreign credit institution acting on its territory does not hold a valid license any longer.

Moreover, in principle, Art. 215 of the Government Emergency Ordinance no. 99/2006, and Art. 3 of Law no. 312/2004 on the Statute of the National Bank of Romania offer this institution, considering its quality of authority competent to license, regulate and prudentially supervise credit institutions on the territory of Romania, the possibility to exchange information with the competent authorities in the other member states.Nevertheless, the text stipulates that this exchange can happen only „according to the provisions of this emergency ordinance and other normative acts applicable to credit institutions”This information is subject to, in conformity with par. (2) of Art. 215, the requirements regarding professional secrecy set forth in Art. 214 and, of course, to the conditions set by the provisions of Art. 52 of Law no. 312/2004.

In this very spirit, the National Bank of Romania has concluded agreements with the competent authorities of other member states, especially with those in the home or host states of the credit institutions operating in Romania.

Conclusion

The beneficial character of legal provisions quoted is reflected in the daily business of competent authorities who, thus, hold information and use the means needed to assure a qualitative prudential supervision of credit institutions, being able to prevent negative consequences for the viability of the banking system and protecting the interests of depositors and other creditors.

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