

ROMANIA - CONSIDERED AMENDMENT OF THE EMERGENCY GOVERNMENT ORDINANCE NO. 113/2009

It is of actuality and interest at this moment, the process by which the National Bank of Romania authorises different companies for performing „payment services” to customers, in accordance with the provisions of the Emergency Government Ordinance 113/2009. According to the legal provisions issued in this respect, the process should end by the 31st of April and any company which is not authorised by that time, shall not be able to further perform payment activities for its customers.

Such process is mainly of interest for the nonbanking financial institutions which along with their specific lending activity, offer to their customers payment services. In many cases, the two services (lending and payment services) are connected and the first may not function without the second. We refer here to the nonbanking institutions which are granting loans to the consumers by using a card which is now considered under the provisions of the Emergency Government Ordinance no. 113/2009 as a payment instrument which falls under the need of the respective company to be authorised by the National Bank of Romania as a payment institution.

Our office is currently handling from the legal point of view the authorisation process of a major player in the specific market, as a payment institution.

Taking into consideration different aspects which arose from practice, the authorities are considering the amendment of the Emergency Government Ordinance no. 113/2009, and a project of amendments has been issued.

We therefore highlight below the major amendments proposed by the project (the „Project”) compared to the Emergency Government Ordinance no. 113/2009 (the „Ordinance”):

A. Cooperation between the National Bank of Romania and the National Office for controlling and preventing money laundering.

According to art.11 paragraph 2, from the Ordinance, the National Bank of Romania consults the National Office for controlling and preventing money laundering in order to issue the authorization request for activity conduction. Art. 11 proposed to be amended by the Project, regulates the responsibility of the National Office for controlling and preventing money laundering to inform the National Bank of Romania regarding persons and entities exposed to the risk of money laundering and the financing of terrorism acts.

Also, the paragraph 2 from the Ordinance, transformed into paragraph 3 according to the Project, provides that the National Bank of Romania can also consult other capable authorities in order to issue the authorization.

If the initial art.52 stated that the National Bank consults the National Office for controlling and preventing money laundering after the notification made by the EU state regarding the intention of a payment institution to conduct its activity in Romanian, the modified art.52,

establishes the obligation of the National Office for controlling and preventing money laundering to give to the National Bank ,at its request, information about the risk of money laundering and terrorism acts financing.

B. Segregation of the activities of a payment institution (PI), from the activities of a nonbanking financial institution (NFI).

Another amendment proposed by the Project refers to art.22. Paragraph 1', proposed to be introduced in this article, provides for the obligation of the payment institutions to conduct their activities according to paragraph number 1 and also on prudent practice basis. Also, the amended art.22 provides that payment institutions can give other loans than those written in paragraph 1, based on the Law 93/2009 regarding nonbanking financial institutions. This represents a clear delimitation between the payment institutions regulated by the Ordinance as proposed to be amended by the Project, and the nonbanking financial institutions regulated by the Law 93/2009.

Paragraphs 2,3 and 4 of art.27 are also, proposed to be modified by the Project. Thus, the initial paragraph contains the possibility of payment institutions to renounce to their authorization, but only with the obligation that they announce the National Bank. The disclaimer must be published in the National Gazette, Part 4 and in 2 nation wide dailies (newspapers).The amended paragraph provides that the National Bank is obliged to communicate in writing the authorization withdrawal to the payment institution along with its reasoning. They are also published in the National Gazette, Part 4 and in 2 nation wide dailies (newspapers).

Paragraph 2 of art. 27 from the Project provides for the fact that members and shareholders can decide the renunciation to the authorization or the dissolution of the payment institution, if the insolvency procedure did not begin. This provisions is also followed by the proposed amendment of paragraph 4 of the same article, which impose the obligation that in case of voluntary renunciation to the authorisation, or the voluntary dissolution of the payment institution, the company must inform the National Bank regarding the decision of the general assembly, followed by a plan that ensures the extinguishment of all payment users' obligations.

The Project completes the art.27, by adding five more paragraphs. So, paragraph 5 states that the National Bank approves the request for renunciation to the authorization, only if paragraph 3 and 4 are fulfilled. In paragraph 6, there are listed the conditions in which the validity of the authorization stops: the existence of a merger or a division of the payment institution that leads to the non-existence of the payment institution, and the issuance of a decision to start the insolvency procedure. Paragraph 7 states that the withdrawal and the cessation of the authorization validity, produces effects after it is published in the National Gazette, Part 4 and in 2 nation wide dailies (newspapers), within the terms and conditions set in the following paragraph 8..In the last paragraph added, paragraph 9, it is held that entities can no longer provide payment services after the decision to withdraw the authorization enters into force.

C. Own funds calculation for the purpose of securing the payment institution' activities, should be completely separated from calculations used in relation to other activities eventually performed by the payment institution.

The modifications proposed by the Project in this aspect are minor and only bring clarifications to the way that the calculation of proper funds of a payment institution should be performed, completely separate from the calculation of other funds, respectively the fact that certain elements from the actives of the payments institution may not have multiple use when taking into account for such calculation.

Art.33 is followed by an article 33' proposed by the Project to be introduced, which provides that payment institutions use specific provisions of credit risk, when it comes to payment services' credits. The provisions are certified from the tax following the regulations of Law 571/2003 as amended.

According to the amended art.34, payment institutions that give credits for payment services must conduct their accountancy in accordance to Law 82/1991, regarding the accountancy, and also in accordance with the specific regulations issued by the National Bank and the Public Banking Ministry.

D. Provision of information from its data base, by the Credit Risk Center organized by the National Bank of Romania.

The Project proposes the introduction of Art.63', providing that the National Bank sets the way payment institutions conduct their lending activity , as well as the fact that company reports its activities to the Credit Risk Center from the National Bank. Also, the new proposed article provides that the disbursement of information from its data base, by the Credit Risk Center, does not represent a violation of the law.

E. Priority of the users of the services provided by a payment institution, towards third parties in case of insolvency of the payment institution.

The Project proposes the introduction of a new article -185'- is, providing that the users of the services offered by a payment institution benefit of priority in payment of indemnification, compared to third parties' claims, in case of insolvency of the payment institution. The article also provides the ways that such priority shall be made known (registration in the publicity registers).