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EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 14 July 2009

on the State recapitalisation scheme

(CON/2009/58)

Introduction and legal basis

On 30 June 2009 the European Central Bank (ECB) received a request from the Swedish Ministry of Finance for an opinion on a draft ordinance (hereinafter the 'amending ordinance') amending the Ordinance on capital contributions to solvent banks and others (SFS 2009:46) (hereinafter the 'Ordinance').

The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community 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 provisions[1], as the amending ordinance relates to rules applicable to 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. Background

1.1 On 16 February 2009 the ECB received a request from the Swedish Ministry of Finance for an opinion on a draft of the Ordinance, which entered into force on 17 February 2009. Because of the late consultation by the Swedish Ministry of Finance, the ECB did not issue an opinion.

1.2 Furthermore, the ECB established that the Ordinance fell within the scope of the second indent of Article 105(4) of the Treaty and the sixth indent of Article 2(1) of Council Decision 98/415/EC and reminded the Swedish authorities of their obligation to consult the ECB on draft legislation at a stage in the legislative process that allows sufficient time to take into account its views.

2. Purpose of the Ordinance

When the Ordinance was adopted, the Swedish Ministry of Finance stated in a memo accompanying the proposal that the main aim was to guarantee that Swedish companies would have continued access to

1 OJ L 189, 3.7.1998, p. 42.

finance. Due to the shock to global credit markets and its transmission into the national financial system, a lack of capital and credit had emerged in Sweden. This threatened to undermine the financing of companies of all sizes, an effect that could have stifled economic activity as a whole.

3. Purpose of the amending ordinance

The amending ordinance's purpose is to extend the validity of the Ordinance by six months, from 17 August 2009 until 17 February 2010.

4. General observations

4.1 Due to the late consultation by the Swedish Ministry of Finance in February, the ECB has not until now provided an opinion on the Ordinance itself. Moreover, as the ECB has issued a number of opinions at the request of the competent authorities of various Member States on national measures adopted in response to the global financial crisis, the consulting authority is invited to consider the relevant observations made in the ECB's recent opinions on similar draft legislative provisions in other Member States[2].

4.2 The ECB also draws the consulting authority's attention to the guidance provided by the Ecofin Council to the Member States in the conclusions of its Meeting of 7 October 2008[3], as well as the Declaration issued by the Heads of State of the euro area on 12 October 2008 (hereinafter the 'Declaration')[4]. In particular, the ECB emphasises that any initiatives put in place by the competent national authorities to restore confidence in the financial markets should be coordinated and should aim to implement the common principles in question, in a spirit of close cooperation with other Member States and the Community institutions[5]. The principles contained in the Declaration, as well as the conclusions raised by the Ecofin Council, were endorsed by the European Council of 15 to 16 October 2008[6]. Moreover, measures taken by competent national authorities in relation to financial institutions in the context of the current global financial crisis have been the object of

2 All ECB opinions are available on the ECB's website at www.ecb.europa.eu.

3 See 'Immediate Responses to Financial Turmoil', Ecofin Council Conclusions of 7 October 2008, available on the former French Presidency's website at www.ue2008.fr. The Ecofin Council recommended that: (i) interventions should be timely and the support should in principle be temporary; (ii) the interests of taxpayers should be protected; (iii) existing shareholders should bear the due consequences of the intervention; (iv) the Government should be in a position to bring about a change of management; (v) management should not retain undue benefits; (vi) governments may have, *inter alia*, the power to intervene in remuneration; (vii) legitimate interests of competitors must be protected, in particular through the State aid rules; and (viii) negative spill-over effects should be avoided.

4 The text of the Declaration is available on the former French Presidency's website at www.ue2008.fr. The Member States agreed to: (i) ensure appropriate liquidity conditions for financial institutions; (ii) facilitate the funding of banks; (iii) provide financial institutions with additional capital resources to continue to ensure the proper financing of the economy; (iv) allow for an efficient recapitalisation of distressed banks; (v) ensure sufficient flexibility in the implementation of accounting rules; and (vi) enhance cooperation procedures among European countries.

5 See Opinion CON/2009/12.

6 See Brussels European Council of 15 to 16 October 2008, paragraph 3 of the Presidency Conclusions.

further coordination at European Union level[7]. As a general remark in this context, the ECB, in line with its previous opinions[8], notes the importance of putting a transparent and predictable framework in place by defining the terms and conditions for financial institutions to have recourse to it and the parameters of and limitations to the exercise by the authorities of their powers when deciding whether to apply such aid measures.

4.3 The ECB further notes that recapitalisation measures in the Member States should aim to strengthen the capital position of fundamentally sound financial institutions in order to improve the functioning and stability of the banking system and ensure the proper financing of the economy. In particular, there should be a consistent approach to defining the conditions for recapitalisations and the pricing of the instruments intended to provide Tier 1 capital to financial institutions. The ECB underlines the importance of appropriate pricing for recapitalisations with a view to enhancing the stability of the financial system, facilitating a return to normal market conditions, and ensuring a level playing-field and the proper financing of the economy.

4.4 Against this background, recommendations were issued by the Governing Council on the pricing of recapitalisations on 20 November 2008. The ECB highlights that the pricing conditions for capital support should be risk-based and market-oriented, determined on the basis of the costs of a corresponding guarantee in the market by taking into consideration the specific risk of both the specific instrument chosen for injecting capital and the institution concerned. Specific features of the instruments for capital injections (such as preference shares) should be appropriately chosen so that, while encouraging an early end to the State's capital support of banks, they should not result in an excessive increase in the cost of capital. In line with the Declaration, the ECB also emphasises that harmonisation regarding the expiry of national financial support schemes throughout the EU, and in particular within the euro area, is of crucial importance, including in relation to State capital investments in financial institutions. Finally, the ECB notes that the Declaration clearly draws attention to the need for any national support scheme to be temporary in nature, even if it may be extended or renewed. The ECB therefore recommends including specific provisions on time limits when stabilisation aid measures are adopted[9].

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7 Communication from the Commission — The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis (OJ C 270, 25.10.2008, p. 8); Communication from the Commission — The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition (OJ C 10, 15.1.2009, p. 2); Recommendations of the Governing Council of the European Central Bank on government guarantees for bank debt and Recommendations of the Governing Council of the European Central Bank on the pricing of recapitalisations, both latter documents available on the ECB's website at www.ecb.europa.eu.

8 See paragraph 3.1.2 of Opinion CON/2009/18.

9 See paragraph 3.3 of Opinion CON/2008/76 or paragraph 2.3 of Opinion CON/2009/6.

5. Specific observations

The ECB notes that, in a decision dated 10 February 2009 taken under the Treaty's State aid rules, the European Commission approved this Swedish recapitalisation scheme[10]. The scheme was found to be in line with the Commission's guidance on support measures for banks during the financial crisis, since the measures were limited in time and required a significant proportion of private investment alongside the State intervention. The Commission concluded that the scheme was an adequate means to remedy a serious disturbance of the Swedish economy and, as such, was compatible with Article 87(3)(b) of the Treaty.

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

Done at Frankfurt am Main, 14 July 2009.

[signed]

The President of the ECB

Jean-Claude TRICHET

10 State Aid Case No N 69/2009; decision available on the European Commission's website at http://ec.europa.eu/competition/state_aid/register/.