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EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 3 November 2006

at the request of the Italian Ministry of Economic Affairs and Finance

on a draft legislative decree exercising powers delegated under the Law on the protection of savings

(CON/2006/51)

Introduction and legal basis

On 25 September 2006 the European Central Bank (ECB) received a request from the Italian Ministry of Economic Affairs and Finance for an opinion on a draft legislative decree (hereinafter the 'draft legislative decree'), which is to be adopted in exercise of powers delegated under Article 43 of Law No 262 of 28 December 2005 on the protection of savings (hereinafter 'Law 262/2005').

The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community 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 provisions[1], as the draft legislative decree relates to the Banca d'Italia and 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. Purpose of the draft legislative decree

1.1 Article 43 of Law 262/2005 requires that coordination measures between Law 262/05 and the consolidated Law on banking (TUB), the consolidated Law on finance (TUF) and other relevant special legislation be issued within one year of the entry into force of Law 262/2005.

1.2 The ECB was consulted on an early draft of Law 262/2005, which extensively modified the institutional framework for the regulation and supervision of financial markets and intermediaries in Italy, as well as on later amendments and certain implementation measures[2].

1.3 According to the explanatory memorandum, one of the main aims of the draft legislative decree is to 'restore coherence to the system' on the basis of the founding principles of the 2005 reform, in particular the principle of allocating regulatory and supervisory tasks between the various

1 OJ L 189, 3.7.1998, p. 42.

2 See ECB Opinions: CON/2004/16 of 11 May 2004 at the request of the Italian Ministry of Economic affairs and Finance on a draft law on the protection of savings; CON/2005/34 of 6 October 2005 at the request of the Italian Ministry of Economy and Finance on an amendment to the draft law on the protection of savings concerning the Banca d'Italia; CON/2005/58 of 23 December 2005 at the request of the Italian Ministry of Economy and Finance on an amendment to the draft law on the protection of savings concerning the Banca d'Italia; and CON/2006/44 of 25 August 2006 at the request of the Banca d'Italia on the amended Statute of the Banca d'Italia.

authorities in accordance with those authorities' objectives. The draft legislative decree does in fact further clarify and improve the allocation of supervisory powers between the Banca d'Italia, the financial markets regulator (*Commissione nazionale per le Società e la Borsa*, CONSOB) and the insurance supervisory authority (*Istituto per la Vigilanza sulle Assicurazioni Private e di Interesse Collettivo*, ISVAP), in accordance with their specific supervisory purposes.

1.4 The draft legislative decree also amends certain provisions regarding listed companies to enhance corporate governance mechanisms.

1.5 Finally, in amending Law No 287 of 10 October 1990 on competition and fair trading (hereinafter 'Law 287/1990') and Article 19 of Law 262/2005, the draft legislative decree also revises the institutional arrangements for coordination between the Banca d'Italia and the Italian Competition Authority *(Autorità Garante della Concorrenza e del Mercato*, AGCM).

2. Refinement of the supervisory model

2.1 The ECB welcomes the draft legislative decree as it further refines the Italian supervisory model. By eliminating possible operational problems arising from overlapping competences, the draft legislative decree aims to enhance the efficiency and effectiveness of the overall supervisory activity.

2.2 The Banca d'Italia will remain responsible for safeguarding financial stability and for the prudential regulation and supervision of credit institutions and other financial intermediaries. CONSOB will be responsible for the overall transparency of financial markets, including conduct of business regulation of all financial intermediaries and corporate disclosure practices. The draft legislative decree rightly clarifies[3] that bank deposits do not constitute financial products, which are subject to CONSOB's transparency competence pursuant to the TUF, and streamlines the application of investor protection rules for insurance products of a financial nature. Furthermore, Article 129 of the TUB is amended[4] in accordance with the aim of giving CONSOB full powers in relation to investor protection and the transparency of financial instruments. Under the new provision, Banca d'Italia's current task of authorising the issue or offer of financial instruments in Italy or abroad by Italian entities will be replaced by the power to seek information, for the sole purpose of monitoring financial markets.

2.3 In particular, the ECB welcomes Article 1 of the draft legislative decree, which contains several important amendments to the TUB. First, it provides that the Chairperson of the Interdepartmental Committee for Credit and Savings (*Comitato Interministeriale per il Credito ed il Risparmio*, CICR) may invite the chairpersons of supervisory authorities to take part in CICR meetings when topics within their competence will be discussed. This amendment is consistent with the requirement under Law 262/2005 to coordinate between the various supervisory authorities in the financial sector. However, the operational independence of supervisory authorities, which is an

3 See Article 3 of the draft legislative decree.

4 See Article 1 of the draft legislative decree.

essential and internationally recognised standard, should be safeguarded by avoiding any interference by political authorities in day-to-day supervisory activity. In this respect, the role of the CICR might need to be further clarified, given that regulation is to a large extent determined at Community level and that coordination with the Government is subject to the requirement of professional secrecy of banking supervision authorities. Second, the Banca d'Italia is given extensive regulatory powers, in accordance with CICR resolutions, to lay down the conditions and limits for banks' assumption of risk activities in cases of possible conflicts of interest. Such cases are no longer explicitly described in the TUB and this will enhance the flexibility of the regulatory framework, making it possible to take future developments into account, and ultimately the effectiveness of supervisory action.

3. Relationship between the Banca d'Italia and the AGCM

3.1 Articles 2 and 4 of draft legislative decree contain amendments to Article 20 of Law 287/1990 and Article 19 of Law 262/2005 which affect the powers of the AGCM and its relationship with the Banca d'Italia. These provisions are welcome as they comply with the general principles of Community law in this area and follow the recommendations previously made by the ECB on this issue[5]. The draft legislative decree confirms that, for operations which constitute a bank merger requiring prior notification, the AGCM is responsible for the assessment of market competition, while the Banca d'Italia retains the responsibility for assessing the compatibility of the merger with sound and prudent management. More specifically, the draft legislative decree clarifies two aspects relating to coordination between the two authorities.

3.2 First, Article 4 of the draft legislative decree repeals paragraphs 12 to 14 of Article 19 of Law 262/2005, which provided that the authorisations of the AGCM and the Banca d'Italia concerning mergers and acquisitions involving banks should be adopted as a single measure. This clarification is welcome as it follows an ECB recommendation to maintain a clear distinction between the two procedures[6].

3.3 Second, the new paragraph 5*bis* of Article 20 of Law 287/1990[7] provides that, notwithstanding competition concerns, the AGCM may, at the Banca d'Italia's request, authorise: (a) an agreement, on the basis of the operational requirements of the payments system and provided that the authorisation is for a limited period; and/or (b) a banking merger which creates or reinforces a dominant position, for reasons of the stability of one or more of the parties involved. However, the draft legislative decree contains an additional safeguard as Article 2 requires that such exceptional authorisations by the AGCM do not unduly restrain competition. The ECB welcomes the proposed arrangements, which balance the potentially conflicting objectives of market competition and

5 See paragraph 14 of Opinion CON/2004/16 and paragraphs 7 and 8 of Opinion CON/2005/58.

6 See paragraph 8 of Opinion CON/2005/58.

7 Introduced by Article 2 of the draft legislative decree.

financial stability by introducing safeguards similar to those which apply under Community law and follow previous ECB recommendations on this important subject.

4. Liability regime

The ECB takes note of the new liability regime introduced by Article 4 of the draft legislative decree. This provision states that, in exercising their own control functions, the relevant supervision authorities and the members of their decision-making bodies and their employees will be liable for losses caused by wilful misconduct or gross negligence (*dolo o colpa grave*), but not for losses caused by simple negligence (*colpa*)[8]. The provision is welcome as it is fully in line with the Core Principles for Effective Banking Supervision adopted by the Basel Committee on Banking Supervision[9].

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

Done at Frankfurt am Main, 3 November 2006.

[signed]

The President of the ECB

Jean-Claude TRICHET

8 See also paragraph 4 of ECB Opinion CON/2006/38 of 25 July 2006 at the request of the Bank of Greece on a draft provision on the Bank of Greece's powers in the field of consumer protection.

9 Available on the website of the Bank for International Settlements at www.bis.org.