EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 24 October 2008

at the request of the Swedish Ministry of Finance
on a draft proposal on stabilising measures for the Swedish financial system

(CON/2008/59)

Introduction and legal basis

On 20 October 2008 the European Central Bank (ECB) received a request from the Swedish Ministry of Finance for an opinion on a draft proposal on stabilising measures for the Swedish financial system (hereinafter the 'draft law').

The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community and on 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 draft law 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. Purpose of the draft law

1.1 The draft law is aimed at securing financial stability in Sweden and restoring confidence in the markets. To this end, the draft law provides a general legal framework allowing for the establishment of: (i) a Governmental body responsible for administering any support provided under the draft law (hereinafter the 'support authority'); (ii) a stability fund to finance the support measures and the administration of the support authority (hereinafter the 'stability fund'); and (iii) an appeal board with the authority to review decisions on the conditions that are applied in relation to support provided to credit institutions (hereinafter the 'appeal board'). Under the draft law, the support authority is given a broad mandate to manage problems associated with insufficient liquidity and potential future solvency problems, while making sure that the Swedish taxpayers are not responsible for bearing the costs of any future measures. The draft law enables the exercise of a wide variety of appropriate stability measures, including, *inter alia*, the issuance

1 OJ L 189, 3.7.1998, p. 42.

of State guarantees, capital injections and compulsory share redemptions[2]. Credit institutions can decide whether they will make use of the support that may be provided under the draft law. Participation will be based on contractual agreements between the support authority, which is currently the National Debt Office, and the credit institutions receiving the support[3]. In specified cases, the State will also have right to redeem shares held in a credit institution, if this is justified by public interest[4]. The Government or the support authority will be responsible for administering the guarantee scheme, with the support authority managing and, if necessary, crediting the stability fund in order to finance the support measures[5].

1.2 The Financial Supervisory Authority has been assigned the task of monitoring the situation in order to ascertain whether the benefits arising from the draft law are also passed on to households and businesses.

2. General observations

2.1 The Government submitted the draft law to the Council of Legislation on 20 October 2008; the ECB was consulted on the same day. The draft law will come into effect immediately after a review by the Council of Legislation and approval by the Parliament. The Government expects this to occur during the week starting 27 October 2008.

2.2 As already mentioned in recent ECB opinions on draft national laws in other Member States relating to emergency measures arising out of the current financial turmoil[6], it is important for national authorities to coordinate their responses to the current financial situation with their EU partners. Given the similarities of the causes and consequences of the financial crisis across Member States and the potential interdependencies of policy responses, the ECB notes that coordination is already taking place at the international and European level to preserve confidence and financial stability. More specifically, the ECB refers to the conclusions adopted at the Ecofin meeting on 7 October 2008, which highlighted common principles to guide the action of Member States as follows: (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) the legitimate interest of competitors must be protected, in particular through the State aid rules; and (viii) negative spill-over effects

2 See the first sentence of Chapter 1, Section 2 of the draft law.

3 See Chapter 1, Section 4 of the draft law.

4 See Chapter 4, Section 1 of the draft law. The conditions under which redemption of the shares is possible include the following: (i) the company or the shareholder has not accepted the proposed agreement whose terms are not found unreasonable by the specially established Appeals Board; (ii) the company or the shareholder do not comply with the conditions of an agreement; and (iii) the company's capital base falls below the specified limit.

5 See Chapter 1, Section 3 and Chapter 7 of the draft law.

6 See, e.g., ECB Opinion CON/2008/44 of 3 October 2008 at the request of the Irish Minister for Finance on a draft Credit Institutions (Financial Support) Bill 2008.

should be avoided[7]. Against this background, the ECB is pleased to note that the draft law closely follows these conclusions.

2.3 On 12 October 2008, the Heads of States of the euro area issued a 'Declaration on a concerted European action plan of the euro area countries' (hereinafter the 'Declaration')[8], in which they confirmed their commitment to act together in a decisive and comprehensive way in order to restore confidence and the proper functioning of the financial system, aiming at restoring appropriate and efficient financing conditions for the economy. They agreed on common principles to be followed by the EU and euro area governments, central banks and supervisors to avoid national measures adversely affecting the functioning of the single market and the other Member States. Such coordinated approach includes initiatives aimed at: (i) ensuring appropriate liquidity; (ii) facilitating the funding of banks through various means; (iii) providing additional capital resources to financial institutions; and (iv) recapitalisation of distressed banks. These principles were also endorsed by the European Council on 16 October 2008 for all Member States. Against this background, the ECB highlights that all the initiatives put in place by national governments to restore confidence in financial markets should be aimed at implementing such common principles, in the spirit of close cooperation with other Member States and EU institutions.

2.4 In line with the Declaration, there is a need for coordination in order to avoid significant differences in national implementation from having a counter-productive effect and creating distortions in global banking markets. In particular, the ECB stresses that uncoordinated decisions related to state guarantee schemes in some Member States should be avoided as they may involve a fragmentation of money markets within the EU. Moreover, the ECB notes that the draft law provides a general legal framework enabling the Government to provide support to credit institutions, in the form deemed appropriate depending on each credit institution's situation, through an agreement between the support authority and the credit institution concerned. The draft law provides that the terms and conditions of such agreements are to be drafted according to the following principles: (i) the receiving institution and its owners will be the first to bear any loss which arises; (ii) the support should be granted under normal market conditions to prevent any distortion of competition; and (iii) the cost to the state should be as low as possible. The ECB notes that these principles, as set out in the draft law, are broadly in line with the common principles adopted at the Ecofin meeting on 7 October 2008 and highlights that the various forms of support which may eventually be granted in the future will have to be consistent with the principles enshrined in the Declaration.

2.5 The ECB also wishes to draw the consulting authority's attention to the recent ECB opinions issued at the request of other Member States, where the ECB has commented on legislative proposals

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7 See the press release of the 2894th Council meeting (13784/08), available on the Council's website, www.consilium.europa.eu.

8 The Declaration is available on the French Presidency's website at www.ue2008.fr.

sharing some of the features of the draft law[9]. It is the ECB's intention to facilitate coordination of the various national efforts addressing the current financial situation, *inter alia*, through the timely adoption and publication of ECB opinions on such draft national legislation.

3. Specific comments

3.1 *Conditions of support*

The ECB acknowledges that the draft law is aimed at ensuring that sound business practices are followed by the supported credit institutions, that support is provided insofar as possible in a commercial way, with the supported credit institution and its owners being the first to bear any losses and that the State is protected against undue liabilities[10]. The ECB further notes that the share redemption mechanism provided for under the draft law allows the State to intervene using direct administrative powers in cases where proposed or contractually agreed measures with credit institutions are not effective in ensuring the financial soundness of an institution[11]. The ECB considers that such measures, applied in a non-discriminatory and proportional manner, are in accordance with the principles of the Declaration, in particular the need to ensure that the shareholders and management of the credit institution bear the consequences of any intervention[12].

3.2 *Prohibition on monetary financing*

The ECB welcomes the stabilising measures, which are structured to encourage the Swedish financial sector to take an active and responsible role in ensuring financial stability. In line with its

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9 See ECB Opinion CON/2008/44 of 3 October 2008 at the request of the Irish Minister for Finance on a draft Credit Institutions (Financial Support) Bill 2008, ECB Opinion CON/2008/46 of 8 October 2008 at the request of the Belgian Ministry of Finance on a preliminary draft law on measures promoting financial stability and in particular establishing a State guarantee for the provision of credit in the context of financial stability, ECB Opinion CON/2008/48 of 15 October 2008 at the request of the Irish Minister for Finance on a draft Credit Institutions (Financial Support) Scheme 2008, ECB Opinion CON/2008/50 of 17 October 2008 at the request of the Belgian Ministry of Finance on a draft royal decree adopted under Article 117bis of the Law of 2 August 2002 on the supervision of the financial sector and on financial services; ECB Opinion CON/2008/51 at the request of the Greek Ministry of Economy and Finance on a draft law on, *inter alia*, the establishment of the 'Depositors and Investors of Credit Institutions Compensation Fund'; ECB Opinion CON/2008/52 of 17 October 2008 at the request of the Spanish State Secretary for Economic Affairs on a Royal Decree-Law creating a Fund for the acquisition of financial assets and on a Royal Decree-Law adopting urgent financial and economic measures in relation to the concerted European action plan of the euro area countries; ECB Opinion CON/2008/54 of 17 October 2008 at the request of the Danish Ministry of Economic and Business Affairs on a proposed Law on financial stability; ECB Opinion CON/2008/55 of 20 October 2008 at the request of the Austrian Ministry of Finance on draft legal measures to ensure the stability of the Austrian financial market; ECB Opinion CON/2008/56 of 21 October 2008 at the request of the Banque de France on a draft amending finance law for the financing of the economy; ECB Opinion CON/2008/57 of 21 October 2008 at the request of the German Ministry of Finance on a Law on the implementation of a package of measures to stabilise the financial market and an order on its implementation; and ECB Opinion CON/2008/58 of 23 October 2008 at the request of the Banca d'Italia on behalf of the Italian Ministry for Economic Affairs and Finance on two Decree-Laws containing urgent measures to guarantee the stability of the banking system and the continuity of the provision of credit. All ECB opinions are available on the ECB's website at www.ecb.europa.eu.

10 See the third sentence of Chapter 1, Section 2, the first sentence of Chapter 2, Section 2 and the fifth sentence of Chapter 2, Section 2, together with Chapter 3, Section 3 of the draft law.

11 See Chapters 4 and 5 of the draft law.

12 See, e.g., paragraph 3.5 of ECB Opinion CON/2008/53, paragraph 3.3 of ECB Opinion CON/2008/56 and paragraph 3.5 of ECB Opinion CON/2008/57.

previous opinions[13], the ECB reiterates that it is important that the implemented measures comply with the Treaty provisions on the prohibition of monetary financing. In particular, the draft law will lead to the establishment of a stability fund, which would qualify as a 'public undertaking' within the meaning of Article 101(1) of the Treaty. Although the draft law does not address the possible role of Sveriges Riksbank in this context, the ECB would remind the Swedish authorities that a number of elements must be observed with regard to the stability fund in order to comply with the monetary financing prohibition laid down in the Treaty. First, the stability fund should not be allowed to benefit from any type of lending or overdraft facilities from Sveriges Riksbank. Second, should the stability fund issue debt instruments in the future, the ECB considers it important to point out that central banks of the European System of Central Banks would be prohibited from purchasing such debt instruments directly from the stability fund. Third, in case Sveriges Riksbank performs any activities for the benefit of the stability fund, these activities would also need to comply with the monetary financing prohibition as regards the remuneration of such activities.

3.3 *Community rules on State aid and financial services*

Finally, it should be ensured that the beneficiary institution(s) will not be unfairly advantaged by making undue use of their guaranteed status[14]. In this context, the ECB draws the consulting authority's attention to the Commission's recently adopted guidance on compliance by the financial sector support schemes with EU State aid rules[15], particularly since the state guarantee of interbank deposits is considered an option, and which includes in the specific context of the provision of State guarantees, detailed rules on setting eligibility criteria for the beneficiary institutions[16]. Further, in line with its previous opinions[17], the ECB reiterates the importance of ensuring that the proposed arrangements will be implemented in full compliance with the relevant Community law provisions, including EU financial services legislation and the single market principles.

13 See, e.g., paragraph 3.3 of ECB Opinion CON/2008/52, paragraph 3.1 of ECB Opinion CON/2008/56 and paragraph 3.1 of ECB Opinion CON/2008/57.

14 See, e.g., paragraph 3.4 of ECB Opinion CON/2008/48, paragraph 3.1 of ECB Opinion CON/2008/50 and paragraph 3.4 of ECB Opinion CON/2008/57.

15 See the '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' of 13 October 2008, available on the Commission's website at www.ec.europa.eu (hereinafter the 'Commission's guidance').

16 See paragraph 18 of the Commission's guidance, specifying that 'The eligibility criteria of financial institutions … must be objective, taking due account of their role in the relevant banking system and the overall economy, and non-discriminatory so as to avoid undue distortive effects on neighbouring markets and the internal market as a whole. In application of the principle of non discrimination on the grounds of nationality, all institutions incorporated in the Member State concerned, including subsidiaries, and with significant activities in that Member State should be covered by the scheme'.

17 See paragraph 2.3 of ECB Opinion CON/2008/44 and paragraph 3.5 of ECB Opinion CON/2008/48.

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

Done at Frankfurt am Main, 24 October 2008.

[signed]

The President of the ECB

Jean-Claude TRICHET