EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 19 November 2014

on euro banknote production by a special-purpose entity

(CON/2014/82)

Introduction and legal basis

On 7 October 2014, the European Central Bank (ECB) received a request from the Banco de España for an opinion on two provisions of the draft law on the general State budget[1] (hereinafter the 'draft law').

The ECB's competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union and the third indent of Article 2(1) of Council Decision 98/415/EC[2], as the draft law relates to the restructuring of the production of euro banknotes by the Banco de España. 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 amends Law 13/1994 of 1 June 1994 on the autonomy of the Banco de España and entitles the Banco de España to entrust its production of euro banknotes to a publicly-owned separate legal entity (hereinafter, the 'new legal entity') in which it has a majority holding. The exclusive purpose of the new legal entity is the production of euro banknotes allocated by the ECB to the Banco de España.

1.2 In this respect, the purpose of the draft law is to restructure the Spanish production of euro banknotes in compliance with Union procurement law and Guideline ECB/2014/44[3] (hereinafter the 'EPPS Guideline') by creating as a separate legal entity an in-house printing works within the meaning of Article 1(2) of the EPPS Guideline. The Banco de España would then be entitled to entrust its production of euro banknotes directly to the new legal entity without carrying out a competitive tender procedure.

1.3 The draft law also regulates the relationship between the Fábrica Nacional de Moneda y Timbre – Real Casa de la Moneda (FNMT-RCM, Spanish Royal Mint) and the new legal entity. Until 31 December 2017, FNMT-RCM may hold an ownership interest of up to 20 % in the new legal entity, which must have the human and material resources needed to perform its functions. During

1 *Official Gazette of the Spanish Parliament (BOCG), Serie A No 118-1, of 2 October 2014.*

2 Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (OJ L 189, 3.7.1998, p. 42).

3 Guideline ECB/2014/44 of 13 November 2014 on the establishment of the Eurosystem Production and Procurement System (not yet published in the Official Journal).

that period, FNMT-RCM and the new legal entity may share the common services required for them to carry out their tasks.

1.4 The draft law also stipulates that FNMT-RCM may produce banknotes other than euro banknotes and, subject to the applicable hiring and procurement regulations, provide the new legal entity with such services ancillary to the production of the euro banknotes as it may need.

2. General observations

The ECB notes that the draft law aims at the reorganisation of Spanish production of euro banknotes in line with Union procurement law and the EPPS Guideline.

3. Public contracts concluded between the Banco de España and the new legal entity

3.1 In the event that the Banco de España entrusts the production of euro banknotes to the new legal entity, Union procurement rules will apply. In particular, the envisaged structure for such an operation must comply with the criteria developed in the case-law of the European courts[4]. These criteria are contained in Article 12(1) of Directive 2014/24/EU of the European Parliament and of the Council[5], which is to be implemented by the Member States by April 2016. The criteria may be summarised as follows:

a) the contracting authority exercises over the legal person concerned a control similar to that which it exercises over its own departments, which, pursuant to the second subparagraph of Article 12(1) of Directive 2014/24/EU, shall be deemed to be the case if the contracting authority exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person;

b) more than 80 % of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the contracting authority[6]; and

c) there is no direct private capital participation in the controlled legal person.

3.2 Article 6(2) of the EPPS Guideline provides that so-called 'in-house group NCBs'[7] shall ensure that their in-house printing works neither participate in any tender procedures for the production of euro banknotes organised and carried out within the Union, nor accept orders for the production of euro banknotes from third parties outside the in-house group NCBs. Therefore the new legal entity

4 Case C-107/98 *Teckal* [1999] ECR I-08121, para. 50; Case C-26/03 *Stadt Halle* [2005] ECR I-00001, paras. 48 *et seq.*; Case C-324/07 *Coditel Brabant* [2008] ECR I-08457, para. 26; Case C-573/07 *Sea* [2009] ECR I-08127, paras. 37 and 40.

5 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65).

6 In relation to the production of euro banknotes this criterion is reinforced by Article 6(2) of the EPPS Guideline for the in-house group NCBs: see paragraph 3.2.

7 'In-house group NCBs' within the meaning of the EPPS Guideline are a group of NCBs that procure their euro banknotes using an in-house printing works. 'NCBs' within the meaning of the EPPS Guideline are the national central banks of the Member States whose currency is the euro.

will not be allowed, for instance, to produce euro banknotes for other central banks outside the in-house group NCBs.

3.3 The definition of in-house printing works in Article 1(2) of the EPPS Guideline only covers printing works that are controlled by one NCB or jointly by several NCBs. It does not cover printing works that are controlled jointly by an NCB and another public authority. In relation to the planned interim model to be used until 31 December 2017, FNMT-RCM may hold an ownership interest of up to 20 % in the new legal entity. However, in order to comply with the abovementioned criteria for in-house printing works, the new legal entity must be controlled by the Banco de España alone, with no direct private capital participation in the new legal entity. The draft law ensures a controlling stake of the Banco de España in the new legal entity, but this does not in itself suffice to meet the criteria listed above[8]. It must also be ensured that the Banco de España exercises a decisive influence over the new legal entity's strategic objectives and significant decisions. The details of the governance arrangements for the new legal entity should be laid down in by-laws and should ensure that minority shareholder rights cannot negatively impact on such control by the Banco de España. However, it is for the Spanish legislator to determine whether the new legal entity can be controlled by the Banco de España alone under an arrangement in which FNMT-RCM will hold an ownership interest of up to 20 % in the new legal entity.

4. Public contracts concluded between the new legal entity and FNMT-RCM

4.1 The draft law stipulates that FNMT-RCM may provide to the new legal entity, 'pursuant to current hiring and procurement regulations, the services ancillary to the production of the euro banknotes'[9] which the new legal entity may require. The new legal entity would qualify as a contracting authority within the meaning of points (1) and (4) of Article 2(1) of Directive 2014/24/EU and would as such only be entitled to award public supply or service contracts to FNMT-RCM if it complies with the applicable procurement rules. Therefore, subject to the applicable procurement rules, the new legal entity may only request services or supplies (e.g. raw materials such as paper) from FNMT-RCM on the basis of a competitive tender procedure[10].

4.2 Article 12(4) of Directive 2014/24/EU, under which horizontal (public-public) cooperation for the fulfilment of public tasks falls outside the scope of the Directive, is not applicable as public service or supply contracts concluded between the new legal entity and FNMT-RCM can not be considered as contracts for the performance of a common public task that these two cooperation partners have to perform[11]. The public task of the new legal entity will be exclusively the production of euro

8 Direct private capital participation in the controlled legal person (the new legal entity) would not meet the third criterion. (with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person). See point (c) of subparagraph (1) of Article 12(1) of Directive 2014/24/EU.

9 Draft law, 70th Final provision, second paragraph.

10 Article 12(2) of Directive 2014/24/EU is not applicable to the case at hand as the Spanish Printing Works are controlled by the Ministry of Finance and Public Administration (and not by the Banco de España).

11 Case C-159/11, *Azienda Sanitaria Locale di Lecce and Università del Salento v Ordine degli Ingegneri della Provincia di Lecce and Others*, para. 34; Case C-386/11, *Piepenbrock*, paras. 36 and 39.

banknotes, while FNMT-RCM will have other public tasks such as the production of banknotes other than euro banknotes.

4.3 Article 7(1) of the EPPS Guideline is relevant in this regard. It provides for cooperation, e.g. a cooperation group for joint purchases of raw materials, among in-house group NCBs. Pursuant to this provision, competitive procurement procedures for services ancillary to the production of euro banknotes are intended for joint purchasing in order to improve cost-efficiency.

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

Done at Frankfurt am Main, 19 November 2014.

[signed]

The President of the ECB

Mario DRAGHI