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EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 17 March 2009

at the request of the German Ministry of Finance
on a draft law on the further stabilisation of the financial market

(CON/2009/24)

Introduction and legal basis

On 10 March 2009, the European Central Bank (ECB) received a request from the German Ministry of Finance for an opinion on a draft law on the further stabilisation of the financial market (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 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 purpose of the draft law is to make the instruments introduced by the law on financial market stabilisation in October 2008[2] more flexible and to provide for additional options for action. In particular, the draft law provides for an extension of the maximum maturity period for guarantees from 36 months to 60 months. Furthermore, it amends provisions of takeover and company law, in particular as regards the convening of shareholders' meetings and amendments to the voting procedure for capital increases.

1.2 Moreover, the draft law provides for the possibility of expropriation of shares and other rights in financial sector institutions (hereinafter 'expropriation') and nationalisation of such institutions. Expropriation and nationalisation will be restricted to cases where there is no other solution and it is necessary to ensure the stability of the financial system. Expropriation as a stabilisation measure

1 OJ L 189, 3.7.1998, p. 42.

2 Law on the implementation of a package of measures to stabilise the financial market of 17 October 2008 ((2008) *Bundesgesetzblatt*. I p. 1982).

under the draft law requires the adoption of a Federal statutory order in respect of the specific expropriation. Expropriation is subject to the payment of compensation, the nature and extent of which are to be determined in accordance with current market value, which is principally calculated based on the average stock exchange price during the two weeks before the day of the expropriation decision. The Federal Ministry of Finance may only initiate expropriation procedures before 30 June 2009 and must adopt a regulation on specific expropriations by 31 October 2009. The expropriated object needs to be reprivatised as soon as it has been stabilised.

2. General observations

2.1 The ECB notes that the draft law amends the law providing for State intervention in the financial sector to mitigate the current financial turmoil[3] on which the ECB was consulted in October 2008, and accordingly reminds the consulting authority of its views expressed in its previous opinion[4].

2.2 In line with the 'Declaration on a concerted European action plan of the euro area countries' issued by the Heads of State of the euro area on 12 October 2008 (hereinafter the 'Declaration')[5], the ECB has highlighted in its opinions that close coordination at the European Union level of Government measures intended to alleviate tensions in the financial markets is of crucial importance[6]. This coordinated approach includes initiatives aimed at ensuring appropriate liquidity, facilitating the funding of banks by various means, providing additional capital resources to financial institutions and recapitalising distressed banks.

In line with the Declaration, the ECB emphasises that the support measures brought in by Member States should be temporary in nature and harmonised throughout the EU. Furthermore, and in line with previous ECB opinions[7], it should be ensured that such measures are in accordance with the requirements of Community competition law, in particular State aid rules, and that the State's role as shareholder is limited in time[8].

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3 See footnote 2.

4 ECB Opinion CON/2008/57 of 21 October 2008 on a Law on the implementation of a package of measures to stabilise the financial market and an order on its implementation. All ECB opinions are available on the ECB's website at www.ecb.europa.eu.

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

6 See the Recommendations of the Governing Council of the European Central Bank on the pricing of recapitalisations issued on 20 November 2008, available on the ECB's website at www.ecb.europa.eu. See also ECB Opinion CON/2008/79 of 27 November 2008 at the request of the Greek Ministry of Economy and Finance on a draft law on enhancing liquidity of the economy to address the impact of the international financial crisis and on a draft decision on its implementation, as well as ECB Opinion CON/2009/3 of 8 January 2009 at the request of the Slovenian Ministry of Finance on a draft decree laying down criteria and conditions for the implementation of State capital investments and for the conversion of State claims into capital shares under Article 81.a of the Law on public finance.

7 See e.g. paragraph 3.8 of ECB Opinion CON/2008/68 of 13 November 2008 at the request of the Finnish Ministry of Finance on a draft government proposal for laws amending the Law on the Government Guarantee Fund and the Law on credit institutions.

8 See '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 208 of 25.10.2008, p. 8). Also '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', available on the Commission's website at www.ec.europa.eu.

3. Specific observations

3.1 *Extension of duration of debt guarantees*

The ECB notes that the European Commission in its decision of 12 December 2008[9] approved modifications of the German rescue package for financial institutions which it had originally approved on 27 October 2008[10]. These approved modifications concern, *inter alia*, the possibility of extending the duration of debt guarantees to a maximum of five years under certain circumstances. The ECB understands that Article 1 § 6 a) of the draft law aims at implementing this particular modification. As stated in its previous opinions[11], the ECB emphasises in line with the Declaration that harmonisation regarding the duration of national financial support schemes across the EU is of crucial importance.

3.2 *Expropriation and the relationship with the single monetary policy of the euro area*

3.2.1 In line with the Declaration, the ECB reiterates that uncoordinated decisions among Member States should be avoided as they may lead to a fragmentation of the euro area money market. The possibility for expropriation pursuant to Article 3 of the draft law raises questions as to: (a) evaluation from the point of view of a market economy; (b) its factual scope of application; (c) its temporal scope of application; (d) the pricing for compensation paid for the assets of a nationalised institution; and (e) an adequate exit strategy. In this respect, the ECB would like to make the following observations.

3.2.2 Expropriation is a severe measure with far-reaching effects on market participants. For this reason, expropriation by the State in relation to companies in distress should remain a tool for use in clearly defined and exceptional circumstances. The ECB stresses that it should be ensured that such measures are only used as a last resort, that the disturbances to the level playing-field are minimised and that the State's role is limited in time. Due to the importance of the impact of expropriation on the credit institutions concerned and on their shareholders as well as on the market in general, it is crucial to achieve absolute legal certainty in relation to such measures. In this connection, the ECB notes that individual expropriation measures may raise Community and international private law questions due to their possible cross-border impact.

3.2.3 Concerning the factual scope of application of the proposals, the ECB notes that the draft law in Article 3 § 1(4) no 1 limits expropriation to cases where it is 'necessary to ensure financial market stability and other legal and commercially reasonable solutions are no longer available in the period necessary to ensure financial market stability to the same extent but in a less radical way.' Moreover, under Article 3 § 1(4) no 2, expropriation will only concern systemically relevant institutions, institutions for which stabilisation measures under the Fund have proved to be

9 European Commission, N 625/2008, K (2008) 8629, available on the Commission's website at www.ec.europa.eu.

10 European Commission, N 512/2008, K (2008) 6422, available on the Commission's website at www.ec.europa.eu.

11 ECB Opinion CON/2009/6 of 26 January 2009 at the request of the Danish Ministry of Economic and Business Affairs on a proposal for a Law on State investments in credit institutions and a proposal for a Law amending the Law on financial stability.

insufficient for stabilisation and cases where the expropriating authority has previously made serious but unsuccessful endeavours to find an alternative solution. The ECB understands that these provisions effectively restrict the scope of expropriation to cases of last resort and subject it to a detailed proportionality test.

3.2.4 On the temporal scope of application, the ECB welcomes the introduction of precise deadlines in the draft law[12] both for the decision to initiate an expropriation (30 June 2009) as well as for the adoption of a legal order by which the expropriation is effected (31 October 2009).

3.2.5 As regards the pricing of compensation, even in a case of expropriation the ECB reminds the consulting authority of the importance of pricing that reflects appropriately the goals of enhancing the stability of the financial system, facilitating a return to normal market conditions and ensuring the proper financing of the economy. In order to monitor the preservation of a level playing-field, transparency of valuation is of the essence.

3.2.6 As concerns an exit strategy, according to the explanatory memorandum to the draft law, expropriation is only meant to be temporary. The ECB understands that the draft law provides in Article 3 § 6(2) for reprivatisation once the institution in question has been sustainably stabilised. As mentioned in previous ECB opinions, it is important to ensure that the State's involvement is limited in time[13]. In this respect, the ECB welcomes that the abovementioned provision already set outs different methods of reprivatisation and stipulates that former shareholders have the first right to purchase[14].

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

Done at Frankfurt am Main, 17 March 2009.

[signed]

The Vice-President of the ECB

Lucas D. PAPADEMOS

12 See Article 3 § 6(1) of the draft law.

13 See footnote 11.

14 See Article 3 § 6 (2) of the draft law.