EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 24 March 2009

at the request of Lietuvos bankas on behalf of the Ministry of Finance of Lithuania on a draft law amending the Law on Lietuvos bankas as regards the rules on the distribution of the profits of Lietuvos bankas

(CON/2009/26)

Introduction and legal basis

On 13 March 2009 the European Central Bank (ECB) received a request from Lietuvos bankas on behalf of the Ministry of Finance of Lithuania for an opinion on a draft law amending the Law on Lietuvos bankas as regards the rules on distribution of the profits of Lietuvos bankas (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 third 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 Lietuvos bankas. 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 provides that Lietuvos bankas should contribute, extraordinarily, 100 % of its profit for the financial year 2008 to the State budget, instead of 50 % of its profit as currently provided for in the Law on Lietuvos bankas. The contribution to the State budget is to be made only after making a deduction to cover any losses carried forward from previous financial years.

1.2 According to Article 23(3) of the Law on Lietuvos bankas, the profit for a financial year is to be allocated: first, to cover losses carried forward from previous financial years; second, to contribute to the State budget 50 % of the profit of Lietuvos bankas for the financial year, or a part thereof remaining after covering losses carried forward from previous financial years; and third, after the first and the second allocations, the part of the profit remaining is to be transferred to the authorised and/or reserve capital. If the amount required to enable the authorised capital to reach 200 million litai (about EUR 58 million) is less than the amount available, then the required

1 OJ L 189, 3.7.1998, p. 42.

amount is allocated to the authorised capital, and the residual amount is allocated to the reserve capital.

1.3 If the draft law is adopted, Lietuvos bankas will have no funds to transfer to the authorised and/or reserve capital for 2008.

2. General observations

2.1 The national legislation of a Member State must be fully compatible with the institutional and financial independence of Lietuvos bankas, thus ensuring the proper performance of Lietuvos bankas's tasks under the Treaty and the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB'). In particular, the compatibility of the Law on Lietuvos bankas with the requirements of Article 108 of the Treaty and the provisions of the Statute of the ESCB concerning central bank independence is of utmost importance, as Lietuvos bankas's primary objective of price stability is best served by a fully independent institution with a precisely defined mandate[2]. The proposed amendment raises concerns with respect to the institutional and financial independence of Lietuvos bankas.

2.2 The principle of institutional independence is expressly referred to in Article 108 of the Treaty and Article 7 of the Statute of the ESCB, which prohibit the national central banks (NCBs) and members of their decision-making bodies from seeking or taking instructions from Community institutions or bodies, from any government of a Member State or from any other body. In addition, these provisions prohibit Community institutions and bodies and the governments of the Member States from seeking to influence the members of the decision-making bodies of the NCBs in the performance of their tasks related to the European System of Central Banks (ESCB)[3].

Therefore the rights of third parties to give instructions to NCBs, their decision-making bodies or their members are incompatible with the Treaty and the Statute of the ESCB as far as ESCB-related tasks are concerned.

2.3 The concept of financial independence should be assessed from the perspective of whether any third party is able to exercise either direct or indirect influence not only over the tasks of an NCB, but also over its ability - understood both operationally in terms of manpower[4], and financially in

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2 See ECB Opinion CON/2007/14 of 24 May 2007 at the request of the Hungarian Ministry of Finance on a draft law amending the Law on the Magyar Nemzeti Bank. All ECB opinions are available on the ECB's website at www.ecb.europa.eu.

3 See the ECB's Convergence Report May 2008, p. 18.

4 See ECB Opinion CON/2008/9 of 21 February 2008 at the request of the German Ministry of Finance on a draft law amending the Law on the Deutsche Bundesbank; ECB Opinion CON/2008/10 of 21 February 2008 at the request of the Italian Ministry of Economic Affairs and Finance on some provisions of the Law on the State annual and pluriannual budget (2008 Budget law); ECB Opinion CON/2008/34 of 4 August 2008 at the request of the Swedish Ministry of Finance on a report concerning the financial independence of Sveriges Riksbank; ECB Opinion CON/2008/82 of 2 December 2008 at the request of the Spanish State Secretary for Economic Affairs on a draft royal decree on the arrangements for paying the Banco de España's profits to the Treasury; ECB Opinion CON/2009/4 of 16 January 2009 at the request of the Belgian Minister for Finance on a draft law amending the financial provisions of the Law of 22 February 1998 establishing the Organic Statute of the Nationale Bank van België/Banque Nationale de Belgique.

terms of appropriate financial resources - to fulfil its mandate. The NCBs must also, at all times, have sufficient financial means to carry out their other functions, i.e. to perform their national tasks, to meet their international obligations and properly cover their administrative and operational expenses. With regard to profit allocation, an NCB's statutes may prescribe how profits are to be allocated. In the absence of such provisions, the decision on allocation of profits should be taken by the NCB's decision-making bodies on professional grounds, and should not be subject to the discretion of third parties unless there is an express safeguard clause stating that this is without prejudice to the financial means necessary for carrying out the NCB's ESCB-related tasks[5].

2.4 In addition, the draft law must comply with the monetary financing prohibition laid down in Article 101(1) of the Treaty and Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b(1) [now Articles 101 and 103(1)] of the Treaty [6]. As referred to in previous ECB opinions[7], in order to comply with the monetary financing prohibition, it is of crucial importance that the distribution of profits by instalments, or in full, does not imply advances on future or provisional profits but is rather the result only of profits that are fully realised, accounted for and audited, which in turn requires due calculation of profits and losses.

3. Specific comments

3.1 The draft law raises concerns regarding its compatibility with the institutional independence of Lietuvos bankas to the extent that it can be construed as an instruction to Lietuvos bankas in the specific context of this legislative initiative. Indeed, the rules on the allocation of Lietuvos bankas's profits are being modified on a temporary basis. In substance, this amounts to an instruction by the Lithuanian Parliament to deviate from the established rules on profit distribution in order to transfer 100 % of the profits to the State.

3.2 The draft law modifies the rules on the allocation of Lietuvos bankas's profits in the current financial turmoil. The financial turmoil or any other exceptional circumstance cannot justify infringing Article 108 of the Treaty or Article 7 of the Statute of the ESCB. Notwithstanding the aim of the draft law, as specified by the consulting authority, of enhancing the stability and credibility of the Lithuanian financial system, it is in any circumstances particularly important to ensure and strengthen the independence of Lietuvos bankas, and even more so in periods of crisis. Moreover, overcoming the current financial turmoil depends on the ability of central banks to carry out their functions independently.

3.3 The draft law also raises concerns about the financial independence of Lietuvos bankas, as all its profit is to be contributed to the State budget. First, the draft law would deprive Lietuvos bankas of

5 See the ECB's Convergence Report May 2008, p. 21.

6 OJ L 332, 31.12.1993, p. 1.

7 See e.g. Opinion CON/2008/82.

the possibility of allocating part of the profit to its authorised and/or reserve capital. According to the principle of financial independence, as stressed by the ECB in all its convergence reports as regards financial provisions or buffers, including the Convergence Report of May 2006 regarding Lithuania, an NCB must be free independently to create financial provisions to safeguard the real value of its capital and assets. Second, the draft law could also deprive Lietuvos bankas of sufficient financial means to carry out its mandate and could impair its independent functioning.

3.4 Finally, the provisions in an NCB's statutes on how profits are to be allocated are aimed both at serving central bank independence and giving the shareholders legal certainty. Even though amendments to such rules are possible, it is important to protect the rules related to the distribution of profit from third-party interests and to ensure a legal framework that provides a stable and long-term basis for the central bank's functioning[8]. An *ad hoc* change to the rules on the distribution of profits, which reflects a particular financial need of the main shareholder and which takes all the profits from the central bank, is a cause of particular concern and is not compatible with the Treaty or the Statute of the ESCB.

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

Done at Frankfurt am Main, 24 March 2009.

[signed]

The President of the ECB

Jean-Claude TRICHET

8 See Opinion CON/2007/14.