EN

EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

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

(CON/2009/3)

Introduction and legal basis

On 30 December 2008 the European Central Bank (ECB) received a request from the Slovenian Ministry of Finance (hereinafter the 'Ministry') for an opinion 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 (hereinafter the 'draft decree').

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 decree 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 decree

1.1 The legal basis for the adoption of the draft decree is the Law on public finance (hereinafter the 'Law')[2] which provides for four categories of measures to limit the effects of the global financial crisis in Slovenia and maintain the stability of the domestic financial system. One of these measures is the implementation of State capital investments in credit institutions, insurance companies, reinsurance companies and pension companies with their seat in Slovenia. Article 88.a(1) of the Law requires the Government to adopt separate decrees for each of these measures setting out the criteria, conditions and charges for their implementation. This opinion

1 OJ L 189, 3.7.1998, p. 42.

2 Law on public finance, published in *Uradni list Republike Slovenije* No 79/1999.

focuses on those aspects of the draft decree that concern State capital investments in credit institutions.

1.2 Under the draft decree, the credit institutions that may obtain State capital investments are credit institutions as defined in the Law on banking[3] with their seat in Slovenia, which due to the effects of the global financial crisis will probably not be able to fulfil minimum capital requirements under the legislation in force without State capital investments.

1.3 State capital investments will take the form of ordinary or preference shares or any other instruments with the characteristics of basic capital as defined in the legislation in force. The rights to be acquired by the State arising from capital investment in the form of preference shares (i.e. voting rights, rights to a dividend, certain rights in the event of a reduction in the share capital of the credit institution in order to cover losses, rights to a share of the estate in bankruptcy or liquidation) are defined in detail in the draft decree.

1.4 The Ministry will be responsible for processing applications for State capital investments. If it assesses, on the basis of an assessment of the need for and appropriateness of State capital investments provided by Banka Slovenije as the competent supervisory authority, that a credit institution is entitled to obtain State capital investment, it can propose to the Government that it should adopt a decision approving State capital investment in that credit institution. Terms and conditions as well as commitments to be accepted by the beneficiary (e.g. restrictions on the income and other benefits of the company's management, including options over the company's shares, and restrictions with respect to dividend payments and other shareholder rights) will be defined in such Government decision and the Government will notify Banka Slovenije of the adoption of the decision.

1.5 In the event of realisation of a guarantee granted to a credit institution under Article 86.a of the Law or in the event of a State claim in respect of a loan under Article 81.a of the Law arising against a credit institution, the Government can adopt a decision to convert State claims into capital shares in that credit institution if the State is not otherwise able to enforce them against the credit institution. For such a debt to equity swap, the rules on obtaining State capital investments apply *mutatis mutandis*.

1.6 In accordance with Article 15 of the draft decree, the decree will apply until 31 December 2010.

2. General observations

It is proposed to adopt the draft decree on the basis of the Law on which the ECB has already issued an Opinion, CON/2008/76[4]. As the ECB is now being consulted on legislation implementing the Law, the observations made in Opinion CON/2008/76 also apply to the draft decree.

---

3 Law on banking, published in *Uradni list Republike Slovenije* No 131/2006.

4 ECB Opinion CON/2008/76 of 25 November at the request of the Slovenian Ministry of Finance on a draft law amending the Law on public finance. All ECB opinions are available on the ECB's website at www.ecb.europa.eu.

3. Specific observations

3.1 Conditions for State capital investments and relationship with the single monetary policy of the euro area

3.1.1 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], Member States must act in a coordinated manner to avoid significant differences in national implementation having a counter-productive effect and creating distortions in global banking markets. The Declaration acknowledges the need to work in cooperation with the ECB to ensure consistency with the Eurosystem's management of liquidity and compatibility with its operational framework. Against this background, 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. In this respect, the ECB makes the following observations, which are important from a monetary policy perspective, as regards State capital investments under the draft decree.

3.1.2 In accordance with Article 5 of the draft decree, State capital investments take the form of ordinary or preference shares or any other instruments with the characteristics of basic capital as defined in the legislation in force. In this respect the ECB notes that the recapitalisation measures considered in Member States are aimed at strengthening the capital position of fundamentally sound financial institutions, in order to improve the functioning and stability of the banking system and to ensure the proper financing of the economy. In particular, a consistent approach should be used in defining the conditions for recapitalisations and the pricing of the instruments intended to provide Tier 1 capital to financial institutions. The ECB underlines the importance of appropriate pricing for recapitalisations to reflect 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. Against this background, the ECB has published recommendations of its Governing Council on the pricing of recapitalisations (hereinafter the 'Recommendations')[6]. The ECB highlights that the pricing conditions for capital support should be risk-based and market-oriented, determined by taking into consideration the specific risk of both the specific instrument chosen for injecting capital and the institution concerned. Specific features of the instruments for capital injections (such as preference shares) should be appropriately chosen so that, while encouraging an early end to the State's capital support of banks, they should not result in an excessive increase in the cost of capital.

3.1.3 Pursuant to Article 15 of the draft decree, the decree will apply until 31 December 2010. In line with the Declaration, the ECB emphasises that harmonisation regarding the expiry of national financial support schemes across the EU and in particular within the euro area is of crucial importance. Although Article 1 of the draft decree mentions that capital investments under the Law

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.

and the draft decree will be of a temporary nature and introduced in order to limit the effects of the global financial crisis as well as to maintain the stability of the financial system, the draft decree should expressly provide for the temporary nature of the Slovenian State's intervention. Furthermore, 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. In this respect, and in accordance with the Recommendations, the draft decree should set out terms for the redemption or conversion of the instruments either on the basis of a period of time or the development of market conditions. This would serve to ensure the temporary nature of the State's involvement and discourage financial institutions from maintaining such involvement for an extensive period of time.

3.2 Central bank involvement in the support measures

3.2.1 The ECB understands that under the draft decree, Banka Slovenije is responsible for assessing the need for and appropriateness of State capital investment in a credit institution, indicating whether the credit institution concerned fulfils the conditions for State capital investment under the Law and the draft decree and whether State capital investment is the most appropriate measure to achieve the Law's aims[8].

3.2.2 In line with its previous opinions[9], the ECB reminds the Slovenian authorities that the tasks performed by Banka Slovenije must comply with the monetary financing prohibition under Article 101 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) of the Treaty[10]. It is also expected Banka Slovenije will perform any tasks in connection with State support measures in a manner fully compatible with its institutional and financial independence thereby safeguarding the proper performance of its tasks under the Treaty and the Statute of the European System of Central Banks and of the European Central Bank.

3.2.3 Moreover, the ECB understands that the entire cost of implementing State capital investments will be exclusively financed from State funds acquired by additional State borrowing in accordance with Article 81.a of the Law. The ECB understands that such additional State borrowing will not include prefinancing or refinancing of the State budget by Banka Slovenije, e.g. by Banka Slovenije extending overdraft credit facilities to the Slovenian State or directly acquiring State debt instruments.

---

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 Article 7 of the draft decree.

9 See paragraph 3.3 of ECB Opinion CON/2008/88 of 19 December 2008 at the request of the Slovenian Ministry of Finance on a draft decree laying down criteria and conditions for granting guarantees under Article 86.a of the Law on public finance and paragraph 3.2 of ECB Opinion CON/2008/92 of 22 December 2008 at the request of the Slovenian Ministry of Finance on a draft decree laying down criteria and conditions for granting loans under Article 81.a of the Law on public finance.

10 OJ L 332, 31.12.1993, p. 1.

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

Done at Frankfurt am Main, 8 January 2009.

[signed]

The President of the ECB

Jean-Claude TRICHET