EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 19 March 2013

on the recapitalisation of credit institutions

(CON/2013/19)

Introduction and legal basis

On 7 and 13 February 2013, the European Central Bank (ECB) received separate requests from the Portuguese Minister of State and for Finance and the President of the Portuguese Parliament, respectively, for an opinion on a draft law (hereinafter the 'draft law') amending Law No 63-A/2008 of 24 November 2008 establishing measures to strengthen the financial soundness of credit institutions (hereinafter the 'Law on recapitalisation'). Given that the subject matter of both consultations is the same, the ECB has decided to consider both requests together and issue one opinion.

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 on the third and sixth indents 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 the Banco de Portugal and 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 introduces changes to the Law on recapitalisation, as amended and republished by Law No 4/2012 of 11 January 2012, on which the ECB adopted its Opinion CON/2011/95[2] on 22 November 2011. The Law on recapitalisation was one of the actions considered necessary under the Economic Adjustment Programme for Portugal, with a view to restoring confidence in the banking sector and financial stability in the economy. It aims at reinforcing the resilience of the banking sector by establishing the conditions and procedures for providing temporary public support to viable credit institutions having their head office in Portugal.

1.2 The Portuguese Government undertook, under section 2.15 of the Memorandum of Understanding on Specific Economic Policy Conditionality, to propose amendments to the legal framework governing access to public capital in order to (a) allow the State, under strict circumstances and in

1 OJ L 189, 3.7.1998, p. 42.

2 All ECB's opinions are published on the ECB's website at www.ecb.europa.eu.

accordance with State Aid rules, to exercise control over a credit institution, and (b) impose mandatory recapitalisations with recourse to public funding.

1.3 In view thereof, the draft law aims mainly at:

(i) lifting the prohibition under Article 2(2) of the Law on recapitalisation on the State acquiring control of a credit institution by exercising voting rights, and

(ii) allowing mandatory recapitalisation of credit institutions by the State on a proposal from the Banco de Portugal.

In addition, the draft law aims at:

(iii) reducing the requirements for shareholders meetings convened specifically to decide on amendments to the articles of association necessary for a recapitalisation operation under the law,

(iv) prohibiting the acquisition of State shares by new or existing shareholders during the investment period if there is a materially relevant breach of the recapitalisation plan, and

(v) improving the procedures for credit institutions to access public funds and State guarantees.

2. Mandatory recapitalisation

2.1 Interaction of mandatory recapitalisation with the resolution framework

The ECB welcomes that the amended law will empower the Banco de Portugal to propose the mandatory recapitalisation of viable credit institutions, if this is necessary to preserve financial stability. The ECB believes that the Banco de Portugal is best placed to assess and propose such recapitalisation, as it is required to have carried out a viability assessment[3] and to have evaluated the overall circumstances justifying intervention with public funds in a given credit institution including, notably, the expected return to the State from the investment in line with Union State Aid rules and the terms and conditions of public disinvestment. Nonetheless, the ECB underlines that recapitalisation of distressed credit institutions with public funds should be a temporary measure[4] and, as such, it may not resolve the difficulties of the benefiting credit institution in the longer term. In particular, it is important that such State intervention (a) should not be used to circumvent the application of the resolution framework and (b) ensures the least costly approach to resolving financial difficulties of distressed credit institutions, whilst safeguarding public funds as much as possible[5]. The Banco de Portugal should, in the case of any credit institution which does not achieve the required capital ratios by its own efforts, assess whether the conditions for triggering the resolution framework, which explicitly states that shareholders and creditors should

3 See proposed Article 16(5).

4 See 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", point 11 (OJ C 10, 15.1.2009, p. 2).

5 See, in particular, Opinion CON/2013/3, paragraph 6.

first bear the losses[6], have been fulfilled. A mandatory recapitalisation by the State may be found to be a viable option pursuant to that assessment, in order to prevent the failure of the credit institution in question, so that its entry into resolution may not be required.

2.2 Shareholder rights

The ECB welcomes the fact that the draft law allows for an effective intervention in a credit institution by the State, by means of the exercise of the proprietary right to vote its shares even if this means the State will acquire control of the institution. This will foster the State's influence in the institution concerned with the aim of preserving financial stability and thus protecting the public interest[7]. However, as far as mandatory recapitalisation under Article 16 of the draft law is concerned, any overriding of shareholder rights would require careful consideration in the light of shareholder rights protected under Union company law directives. In this respect, the ECB underlines that such overriding of shareholder rights might be considered, as a measure of last resort, if systemic and financial stability are at stake.

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

Done at Frankfurt am Main, 19 March 2013.

[signed]

The President of the ECB

Mario DRAGHI

6 See Article 145B(1) of the Legal Framework of Credit Institutions and Financial Companies (Decree-Law298/92 of 31 December 1992).

7 See Opinion CON/2011/72, paragraph 6.1.