EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 22 July 2009

on bank restructuring and reinforcement of credit institutions' own funds

(CON/2009/62)

Introduction and legal basis

On 3 July 2009 the European Central Bank (ECB) received a request from the Spanish State Secretary for Economic Affairs for an opinion on Royal Decree-Law 9/2009 of 26 June 2009 on bank restructuring and reinforcement of credit institution's own funds (hereinafter 'the Royal Decree-Law').

The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community 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 Royal Decree-Law relates to the Banco de España 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 Royal Decree-Law

The Royal Decree-Law is motivated by the ongoing financial market crisis and by the need for an ordered restructuring of the Spanish banking system to avoid potential systemic risks, thus maintaining confidence in the national financial system and enhancing its strength and solvency. This ensures that the institutions that remain are solid and can provide credit as usual.

The restructuring model is based on the three existing deposit guarantee schemes and on the use of a new ad hoc institution: the Fund for Ordered Bank Restructuring (hereinafter the 'FROB'). In a first phase, an action plan will be adopted in the context of the deposit guarantee schemes. If such action plan fails, a second phase will start with intervention by the FROB. The FROB will temporarily replace the directors of the affected institution and will submit a restructuring plan to the Banco de España aimed at a merger with another institution or at an overall or partial transfer of assets and liabilities to another institution. The FROB may grant funding to the affected institution or acquire its assets or shares. It may also support inter-institutional integration processes by acquiring securities, subject to buy back, issued by two or

1 OJ L 189, 3.7.1998, p. 42.

more credit institutions in the context of an integration plan submitted to the Banco de España. The FROB may secure additional funding on the securities markets by issuing fixed-rate securities with a State guarantee. Finally, it may also support restructuring plans by granting funding to the deposit guarantee schemes.

2. General observations

2.1 The Spanish Government has already adopted and published the Royal-Decree Law on an urgent basis, thus giving it normative effects, and the Spanish Parliament has already validated it. Therefore, this opinion relates to any further legislative amendments to the Royal-Decree Law and to its subsequent implementation.

2.2 The ECB reminds the Spanish authorities of their obligation under Article 4 of Decision 98/415/EC to ensure the effective compliance with their duty to consult the ECB, in particular by consulting it at an appropriate stage in the law-making process.

2.3 The ECB understands that implementing rules will complete the details of the Royal Decree-Law[2]. Consequently, the ECB expects to be consulted on any proposed implementing legislation to be adopted under the Royal Decree-Law that materially influences the stability of financial institutions and markets[3].

2.4 The ECB has issued a number of opinions at the request of the Spanish authorities and also other Member State authorities on national measures adopted in response to the global financial crisis[4]. The ECB invites the Spanish State Secretary for Economic Affairs to take into account observations made in its recent opinions on similar draft legislative provisions in other Member States. In particular, the ECB refers to the importance of the guidance provided by the Ecofin Council to the Member States in the conclusions of its Meeting of 7 October 2008[5] as well as the Declaration issued by the Heads of State of the euro area on 12 October 2008 (hereinafter the 'Declaration')[6]. In particular, the ECB emphasises that any initiatives put in place by the competent national authorities to restore confidence in the financial markets should be coordinated and should aim to

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2 See the seventh final provision of the Royal Decree-Law.

3 See the definition of 'draft legislative provisions' under Article 1(1) and also the sixth indent of Article 2(1) of Decision 98/415/EC.

4 All ECB opinions are available on the ECB's website at www.ecb.europa.eu.

5 See 'Immediate Responses to Financial Turmoil', Ecofin Council Conclusions of 7 October 2008, available on the former French Presidency's website at www.ue2008.fr. The Ecofin Council recommended that: (i) interventions should be timely and the support should in principle be temporary; (ii) the interests of taxpayers should be protected; (iii) existing shareholders should bear the due consequences of the intervention; (iv) the Government should be in a position to bring about a change of management; (v) management should not retain undue benefits; (vi) governments may have, *inter alia*, the power to intervene in remuneration; (vii) legitimate interests of competitors must be protected, in particular through the State aid rules; and (viii) negative spill-over effects should be avoided.

6 The text of the Declaration is available on the former French Presidency's website at www.ue2008.fr. The Member States agreed to: (i) ensure appropriate liquidity conditions for financial institutions; (ii) facilitate the funding of banks; (iii) provide financial institutions with additional capital resources to continue to ensure the proper financing of the economy; (iv) allow for an efficient recapitalisation of distressed banks; (v) ensure sufficient flexibility in the implementation of accounting rules; and (vi) enhance cooperation procedures among European countries.

implement the common principles in question, in a spirit of close cooperation with other Member States and the Community institutions[7]. The principles contained in the Declaration, as well as the conclusions raised by the Ecofin Council, were endorsed by the European Council of 15 and 16 October 2008[8]. Moreover, measures taken by competent national authorities in relation to financial institutions in the context of the current global financial crisis have been subject to further coordination at European Union level[9]. As a general remark in this context, the ECB, in line with its previous opinions[10], notes the importance of putting a transparent and predictable framework in place by defining the terms and conditions for financial institutions to have recourse to it and the parameters of and limitations to the exercise by the authorities of their powers when deciding whether to apply such aid measures.

3. Specific comments

3.1 *The Banco de España's financial role*

From Article 2(6) of the Royal Decree-Law the ECB understands that the Banco de España would be solely responsible for the FROB's cash service subject to a specific agreement. The ECB expects that the Banco de España's financial involvement will not go beyond the agent function and, in particular, that it will fully comply with the prohibition on monetary financing laid down in the Treaty.

3.2 *Recapitalisation scheme*

In line with the abovementioned general observations, the ECB recalls that recapitalisation measures in the Member States should be aimed at strengthening the capital position of fundamentally sound financial institutions to improve the functioning and stability of the banking system and to ensure the proper financing of the economy. In particular, there should be a consistent approach to 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 with a view to enhancing the stability of the financial system, facilitating a return to normal market conditions, ensuring a level playing-field and the proper financing of the economy.

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7 See Opinion CON/2009/12.

8 See Brussels European Council of 15 to 16 October 2008, paragraph 3 of the Presidency Conclusions.

9 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 270, 25.10.2008, p. 8); 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 (OJ C 10, 15.1.2009, p. 2); Recommendations of the Governing Council of the European Central Bank on government guarantees for bank debt and Recommendations of the Governing Council of the European Central Bank on the pricing of recapitalisations, both latter documents are available on the ECB's website at www.ecb.europa.eu.

10 See paragraph 3.1.2 of Opinion CON/2009/18.

Against this background, the recommendations of the ECB's Governing Council on the pricing of recapitalisations[11] have been published. The ECB highlights that the pricing conditions for capital support should be risk-based and market-oriented, determined on the basis of the costs of a corresponding guarantee in the market 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.

3.3 *Temporary nature of the scheme*

In line with the previous general considerations, harmonisation of the expiry of national financial support schemes throughout the EU, and in particular within the euro area, is of crucial importance, including in relation to State capital investments in financial institutions. In the same vein, the Declaration clearly draws attention to the need for any national support scheme to be temporary in nature, even if it may be extended or renewed. In this respect, specific provisions on time limits in relation to bank restructuring and reinforcement of credit institutions' own funds under the Royal Decree-Law should be adopted and clearly specified[12].

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

Done at Frankfurt am Main, 22 July 2009.

[signed]

The Vice-President of the ECB

Lucas D. PAPADEMOS

11 Recommendations of the Governing Council of the European Central Bank on the pricing of recapitalisations, issued on 20 November 2008 and available on the ECB's website at www.ecb.europa.eu.

12 See paragraph 3.5 of Opinion CON/2008/76 or paragraph 3.2 of Opinion CON/2009/6.