



**OPINION OF THE EUROPEAN CENTRAL BANK**  
**of 3 October 2008**  
**at the request of the Irish Minister for Finance**  
**on a draft Credit Institutions (Financial Support) Bill 2008**  
**(CON/2008/44)**

**Introduction and legal basis**

On 1 October 2008 the European Central Bank (ECB) received a request from the Irish Minister for Finance for an opinion on a draft Credit Institutions (Financial Support) Bill 2008 (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 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<sup>1</sup>, as the draft law relates to a national central bank (the Central Bank and Financial Services Authority of Ireland (hereinafter the ‘Central Bank’)) and contains 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 provides that, as from 30 September 2008, the Minister for Finance (hereinafter the ‘Minister’) may provide financial support in respect of the borrowings, liabilities and obligations of any credit institution or subsidiary (including to the Central Bank or any person) which the Minister may specify by order where the Minister is of the opinion, after consulting the Governor of the Central Bank and the Irish Financial Services Regulatory Authority (the ‘Financial Regulator’), that there is a serious threat to the stability of credit institutions in Ireland generally<sup>2</sup>. Such financial support may be provided in any form and manner and determined by the Minister and on such commercial or other terms and conditions as the Minister thinks fit. The draft law contains provisions to the effect that all financial support provided should be, as far as possible, ultimately recouped<sup>3</sup>. The draft law also contains provisions authorising the Minister to purchase shares in a credit institution or subsidiary to which financial support is provided<sup>4</sup>. All money to be

---

<sup>1</sup> OJ L 189, 3.7.1998, p. 42.

<sup>2</sup> See Sections 1 (definition of ‘financial support’), 2(1), 3 and 6(1) of the draft law.

<sup>3</sup> See Section 6(4) of the draft law.

<sup>4</sup> See Section 6(9) of the draft law.

paid out may be paid out of Government funds<sup>5</sup>. Financial support would not be provided beyond 29 September 2010<sup>6</sup>.

- 1.2 The draft law also provides that a notification of a merger or acquisition that involves a credit institution or subsidiary is required to be given to the Minister, and not to the Irish Competition Authority, in the case where the Minister is of the opinion that the proposed merger or acquisition is necessary to maintain the stability of the financial system in Ireland<sup>7</sup>. The Governor of the Central Bank and the Competition Authority will provide advice, information and assistance to the Minister regarding this matter<sup>8</sup>. The Minister may approve a merger or acquisition even if he is of the opinion that the result of the merger or acquisition will substantially lessen competition in markets for goods or services in Ireland but that the merger or acquisition is necessary for financial stability reasons<sup>9</sup>.

## **2. General observations**

- 2.1 On 30 September 2008 the Irish Government announced that it has decided to put in place with immediate effect a guarantee arrangement to safeguard all deposits (retail, commercial, institutional and interbank), covered bonds, senior debt and dated subordinated debt (lower tier II), with six explicitly named Irish credit institutions and such specific subsidiaries as may be approved by the Government following consultation with the Central Bank and the Financial Regulator. According to the announcement, this guarantee arrangement will cover all existing aforementioned facilities with these institutions on 29 September 2008 and any new facilities issued thereafter, and will expire on 28 September 2010.
- 2.2 The draft law is scheduled to be adopted under an accelerated parliamentary procedure, with the ECB consultation requested on an urgent basis. Many of the provisions of the draft law are general in nature and will be implemented by means of secondary legislation to be adopted by the Minister<sup>10</sup>. This implementing legislation would, in the ECB's understanding, contain draft legislative provisions that would flesh out the details of the draft law<sup>11</sup>. Consequently, the ECB expects to be consulted on any proposed implementing legislation to be adopted under the draft law that materially influences the stability of financial institutions and markets.
- 2.3 As a general matter, the ECB wishes to underline the importance it attaches to ensuring that the draft law and subsequent implementing legislation fully comply with the relevant provisions of Community law, in particular as regards competition (including in the area of cross-border bank mergers and acquisitions) and State aid rules, as well as EU financial services legislation and the

---

<sup>5</sup> See Section 4 of the draft law.

<sup>6</sup> See Section 6(3) of the draft law.

<sup>7</sup> See Section 7(1) of the draft law.

<sup>8</sup> See Section 7(7) of the draft law.

<sup>9</sup> See Section 7(11) of the draft law.

<sup>10</sup> See Section 5 of the draft law.

<sup>11</sup> See definition of the 'draft legislative provisions' under Article 1(1) of Council Decision 98/415/EC together with the sixth indent of Article 2(1) of this Council Decision.

single market principles. In this regard the ECB wants to point out that the measures announced by the Irish Government raise concerns as their restriction to specifically named banks under the concept of safeguarding the Irish financial system appears to provide preferential treatment to these banks. The ECB understands that the Commission will assess and express its opinion on the compatibility of specific measures included in the draft law with Community law. The ECB expects that the Commission's opinion will be appropriately taken into account and reflected in the Irish legislative and regulatory framework adopted under the draft law.

- 2.4 As a further general comment, the ECB notes that the Irish authorities have opted for an individual response to the current financial situation and not sought to consult their EU partners. In view of the similarities of the causes and consequences of the current financial distress across EU Member States and the potential interdependencies of policy responses, it would have been advisable to properly consult other EU authorities on the envisaged legislative plans.
- 2.5 A further point relates to the risks to the Government's budgetary position arising from any financial support to Irish credit institutions. While the ECB appreciates that any guarantees provided by the Minister under the draft law would be contingent in nature, given that the financial exposure of the Irish State under such guarantees is potentially very large, the Irish Government could be obliged to make significant payments in case these guarantees are called over the next two years. At a point in time when the Irish budgetary position is deteriorating and may risk exceeding the 3 % of GDP reference value for public deficits, as specified under Community law<sup>12</sup>, this is a cause for concern, even when the provision of financial support would, under the draft law, as far as possible ultimately have to be recouped from the credit institution or subsidiary in question.

### **3. Central bank independence and the monetary financing prohibition**

- 3.1 The draft law provides that the Minister may use the financial support powers in the public interest, provided that, in the Minister's assessment, made after consulting the Governor of the Central Bank and the Regulatory Authority, the statutory conditions for the exercise of such powers are met. In the exercise of the financial support powers, the Minister may further consult with the Governor of the Central Bank and the Regulatory Authority<sup>13</sup>. Other provisions directly affecting the Governor and the Central Bank include, inter alia: (i) the possibility for the supported credit institution or subsidiary to receive financial support as regards its borrowings, liabilities and obligations vis-à-vis the Central Bank<sup>14</sup>; (ii) the possibility for the Minister to require the supported credit institution to comply with the requirements 'imposed by the Central Bank or equivalent authority'<sup>15</sup>; and (iii) the consultative role which the Governor and the Central Bank are to have in the exercise of the Minister's powers in relation to mergers and acquisitions in the banking sector<sup>16</sup>.

---

12 See Article 1 of the Protocol on the excessive deficit procedure, annexed to the Treaty.

13 See Section 2(2) of the draft law.

14 See Section 6(2) of the draft law.

15 See Section 6(7) of the draft law.

16 See Section 6(a) and Section 7(1)(a) of the draft law.

- 3.2 The ECB notes that the draft law specifies that nothing in its provisions prevents the performance by the Central Bank or the Regulatory Authority of its functions in relation to any credit institution<sup>17</sup>. The ECB recommends that this provision is made more precise by including three additional stipulations, specifying that nothing in the draft law shall prejudice the: (i) performance by the Governor of his powers and functions with respect to the stability of the State's financial system under the Central Bank Act 1942; (ii) performance of any other functions and powers conferred on the Governor by the Treaty and the ESCB Statute; and (iii) compliance by the Central Bank with the prohibition of monetary financing under Article 101 of the Treaty<sup>18</sup>. In addition to reinforcing the Governor's financial stability role at a national level, these clarifications would help to specify that the advice of the Governor is sought with due respect paid to the responsibilities and tasks assigned to the Governor and the Central Bank within the ECB and the Eurosystem, including the independence required of the Governor and the Central Bank under the Treaty and the ESCB Statute<sup>19</sup>.
- 3.3 The draft law contains a provision exempting charges created by a credit institution in favour of the Minister, any agent of the Minister or the Central Bank from company law requirements relating to the registration of charges with the Irish Companies Registration Office<sup>20</sup>. In the Central Bank's Eurosystem credit operations, the Central Bank mobilises much collateral, including mortgage and other loan portfolios of bank counterparties, by means of a floating charge technique. Careful consideration would therefore need to be given to the implications of this provision in connection with the collateralisation of the Central Bank's Eurosystem credit operations. The Central Bank's current practice of disclosing its floating charges, together with any negative pledges contained therein, through public registration with the Companies Registration Office ensures that parties dealing with the Central Bank's bank counterparties have notice of any floating charge or negative pledge. This in turn ensures that in any winding-up or a receivership of such a company or counterparty the Central Bank would, subject to the claims of certain preferential creditors (if any), take priority over all other claims, including claims based on charges created subsequent to the creation of the floating charge. The ECB would like to stress that the financial interests of the Central Bank and the Eurosystem have to be preserved, and would therefore recommend that this provision be amended accordingly.

---

17 See Section 2(3) of the draft law.

18 For example, 'State guarantees ... used as collateral in connection with emergency liquidity assistance' are subject to 'the requirement that the supported credit institution remains solvent.' See paragraph 4.11 of ECB Opinion CON/2008/42 of 10 September 2008 at the request of the Banque centrale du Luxembourg on amendments to the draft law improving the legislative framework for Luxembourg as a financial centre and amending the Law of 23 December 1998 on monetary status and on the Banque centrale du Luxembourg.

19 See Article 108 of the Treaty and Article 7 of the ESCB Statute.

20 See Section 6(17) of the draft law.

#### **4. Banking mergers and acquisitions and financial stability**

4.1 The ECB has already taken the view in previous opinions on draft national legislation that ‘it is appropriate to maintain a clear distinction between procedures leading to antitrust and banking supervision decisions’<sup>21</sup> and that draft national laws should reflect in these circumstances ‘the principle of allocating powers to authorities in accordance with their respective objectives’<sup>22</sup>. In the present case, the above dual competence of the Minister for these banking mergers and the mere consultative or advisory role conferred on the Governor and the Financial Regulator<sup>23</sup> as well as on the Competition Authority<sup>24</sup>, would conflict with these principles.

4.2 Moreover, the ECB has pointed out in previous opinions the need to find a balance between ‘the potentially conflicting objectives of market competition and financial stability by introducing safeguards similar to those which apply under Community law’<sup>25</sup>. While acknowledging that ‘cases might occur in which a banking merger would be necessary on stability grounds, although it raises concerns for its effects on competition’<sup>26</sup>, the ECB stressed that these cases should remain ‘exceptional’ and should ‘not unduly restrain competition’<sup>27</sup>. In such circumstances, the ECB suggested for instance that the national competition authority may be entitled to authorise concentrations on request of the [central bank] based on stability grounds<sup>28</sup>. The ECB would recommend that the prerogatives of the Minister under the draft law be applied in accordance with the principle of proportionality and with appropriate safeguards.

---

21 See paragraph 8 of ECB Opinion CON/2005/58 of 23 December 2005 at the request of the Italian Ministry of Economy and Finance on an amendment to the draft law on the protection of savings concerning the Banca d’Italia.

22 See paragraph 4 of ECB Opinion CON/2007/17 of 18 June 2007 at the request of the Italian Ministry of Economic Affairs and Finance on a draft law on the regulation and supervision of markets and the functioning of the competent independent authorities.

23 Section 7(1)(a) of the draft law.

24 Section 7(7) of the draft law.

25 See paragraph 3(3), last sentence of ECB Opinion CON/2006/51 of 3 November 2006 at the request of the Italian Ministry of Economic Affairs and Finance on a draft legislative decree exercising powers delegated under the Law on the protection of savings.

26 See paragraph 8, second sentence of ECB Opinion CON/2005/58 of 23 December 2005 at the request of the Italian Ministry of Economy and Finance on an amendment to the draft law on the protection of savings concerning the Banca d’Italia.

27 See paragraph 3(3), second sentence of ECB Opinion CON/2006/51 of 3 November 2006 at the request of the Italian Ministry of Economic Affairs and Finance on a draft legislative decree exercising powers delegated under the Law on the protection of savings.

28 See paragraph 8, last sentence of ECB Opinion CON/2005/58 of 23 December 2005 at the request of the Italian Ministry of Economy and Finance on an amendment to the draft law on the protection of savings concerning the Banca d’Italia.

4.3 Finally, the ECB notes that measures which are adopted with the aim of safeguarding financial stability should involve cooperation with the relevant authorities of the Member States involved, in line with the applicable Community legislation and the arrangements in place, such as the Memorandum of Understanding on cooperation between the financial supervisory authorities, central banks and finance ministries of the European Union on cross-border financial stability<sup>29</sup>.

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

Done at Frankfurt am Main, 3 October 2008.

[signed]

*The President of the ECB*

Jean-Claude TRICHET

---

<sup>29</sup> As published on the ECB website, [www.ecb.europa.eu](http://www.ecb.europa.eu).