



OPINION OF THE EUROPEAN CENTRAL BANK

of 23 October 2008

at the request of the Banca d'Italia on behalf of the Italian Ministry for Economic Affairs and Finance on two Decree-Laws containing urgent measures to guarantee the stability of the banking system and the continuity of the provision of credit

(CON/2008/58)

Introduction and legal basis

On 16 October 2008 the European Central Bank (ECB) received a request from the Banca d'Italia on behalf of the Italian Ministry for Economic Affairs and Finance (hereinafter the 'MEF') for an opinion on Decree-Law No 155 of 9 October 2008 containing urgent measures to guarantee the stability of the banking system and the continuity of the provision of credit to businesses and consumers, presented to the Parliament on the same date for discussion and conversion into law¹, and Decree-Law No 157 of 13 October 2008 containing further urgent measures to guarantee the stability of the banking system, presented to the Parliament on the same date for discussion and conversion into law², (hereinafter jointly the 'Decree-Laws').

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 provisions³, as the Decree-Laws relate to the Banca d'Italia 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 Decree-Laws

1.1 Objectives and nature of the Decree-Laws

In the context of the current international crisis of the financial markets and in the framework of the coordinated approach of the euro area Member States and in particular in the light of the conclusions of the Ecofin meeting of 7 October 2008, the Italian Government urgently adopted two Decree-Laws aimed at guaranteeing the stability of the financial markets and of the banking system and the continuity of the credit flows to businesses and consumers. As mentioned in the explanatory

¹ *Atto Camera* No 1762.

² *Atto Camera* No 1774.

³ OJ L 189, 3.7.1998, p. 42.

memorandum to Decree-Law No 155/2008, the national legal basis is found in Article 47 of the Italian Constitution which provides, *inter alia*, that the Republic encourages and protects savings in all its forms and regulates, coordinates and controls the provision of credit. In accordance with, Article 77 of the Italian Constitution, the Decree-Laws were adopted on an urgent basis and immediately published in the *Gazzetta ufficiale della Repubblica italiana*, entering into force on their respective dates of publication⁴. Thereafter, the Decree-Laws were presented to the Parliament for discussion and conversion into law within 60 days of publication, with the possibility of amendments to the original texts.

1.2 *Main features of Decree-Law No 155/2008*

Under Decree-Law No 155/2008⁵, the MEF is authorized to subscribe or guarantee the subscription of capital raisings of banks incorporated in Italy, provided that: (i) the Banca d'Italia has ascertained the capital inadequacy of the concerned bank; (ii) a stabilisation and reinforcement plan having a minimum duration of 36 months has been presented by the bank and assessed as adequate by the Banca d'Italia; and (iii) the Banca d'Italia has assessed as adequate the dividend policy approved by the bank for the period of duration of the guarantee. As long as the MEF continues to hold equity in the bank, any substantial change in the bank's stabilisation and reinforcement plan is subject to prior approval by the MEF in consultation with the Banca d'Italia. For the entire holding period, the equity held by the MEF will be in the form of preferred shares, which are privileged over all other categories of shares as regards the distribution of dividends.

Moreover, Decree-Law No 155/2008⁶ provides for an extraordinary administration procedure in the case of illiquidity of solvent banks, whose 'serious crisis situation' poses a threat to the stability of the financial system. In such case, the management of the bank involved is replaced by temporary commissioners appointed by the MEF, which is allowed to subscribe to the capital raising of banks under extraordinary administration, even where such procedure is still pending.

Furthermore, it is foreseen that in order to deal with serious liquidity crises (i.e. 'emergency liquidity assistance' (ELA)), the MEF may issue a guarantee for any refinancing provided by the Banca d'Italia to banks incorporated in Italy as well as to branches of foreign banks in Italy⁷.

Finally, in addition to the guarantee currently provided under the Italian deposit guarantee scheme, which covers up to €103,291.38 per bank account, the MEF is entitled to complement the deposit guarantee scheme by providing a State guarantee in favour of depositors with Italian banks for a period of 36 months from the entry into force of Decree-Law No 155/2008⁸.

⁴ Decree Law No 155/2008, published in the *Gazzetta ufficiale della Repubblica italiana* No 237 of 9 October 2008, p. 3 and Decree Law No 157/2008, published in the *Gazzetta ufficiale della Repubblica italiana* No 240 of 13 October 2008, p. 4.

⁵ See Article 1 of Decree Law No 155/2008.

⁶ See Article 2 of Decree Law No 155/2008.

⁷ See Article 3 of Decree Law No 155/2008.

⁸ See Article 4 of Decree Law No 155/2008.

1.3 *Main features of Decree-Law No 157/2008*

In order to restore the market for banks' medium-term financing, it is provided in Decree-Law No 157/2008⁹ that the MEF is authorized until 31 December 2009 (i) to provide a State guarantee, at market conditions, for liabilities of Italian banks with a maturity up to 5 years and issued after the entry into force of Decree-Law No 157/2008; (ii) to enter into temporary swap arrangements between government bonds and financial instruments held by Italian banks or liabilities of Italian banks with maturity up to 5 years and issued after the entry into force of this Decree-Law. Charges to be applied to banks under these arrangements will be determined according to prevailing market conditions. Finally, the MEF is authorized until 31 December 2009 (iii) to provide a State guarantee, at market conditions, with regard to the operations by Italian banks in order to obtain the temporary availability of securities eligible for refinancing operations with the Eurosystem. In all the abovementioned cases, the guarantee requires an assessment by the Banca d'Italia of the capital adequacy of the concerned bank.

2. General Observations

- 2.1 The ECB notes that there is an ongoing discussion at both the international and European levels with a view to coordinating actions of countries aimed at preserving confidence in and the stability of the international financial markets. More specifically, the ECB notes that on 12 October 2008 the Heads of States of the euro area issued a 'Declaration on a concerted European action plan of the euro area countries' ('the Declaration')¹⁰, in which they confirmed their commitment to act together in a decisive and comprehensive way in order to restore confidence and the proper functioning of the financial system, with the aim of restoring appropriate and efficient financing conditions for the economy. They agreed on common principles to be followed by the EU and euro area governments, central banks and supervisors to avoid national measures adversely affecting the functioning of the single market and the other Member States. Such coordinated approach includes initiatives aimed at ensuring appropriate liquidity; facilitating the funding of banks through various means; providing additional capital resources to financial institutions; and recapitalisation of distressed banks. These principles were also endorsed by the European Council on 16 October 2008 for all Member States. Against this background, the ECB highlights that all the initiatives put in place by national governments to restore confidence in financial markets should be aimed at implementing such common principles, in the spirit of close cooperation with other Member States and EU institutions.
- 2.2 The ECB wishes to draw the consulting authority's attention to the recent ECB opinions issued at the request of other Member States, whereby the ECB has commented on legislative proposals sharing some of the features of the Italian scheme¹¹. It is the ECB's intention to facilitate

⁹ See Article 1 of Decree Law No 157/2008.

¹⁰ See the Declaration of 12 October 2008, available on the French Presidency's website at www.ue2008.fr.

¹¹ See, for example, ECB Opinion CON/2008/44 of 3 October 2008 at the request of the Irish Minister for Finance on a draft Credit Institutions (Financial Support) Bill 2008, ECB Opinion CON/2008/46 of 8 October 2008 at the request of the Belgian Ministry of Finance on a preliminary draft law on measures promoting financial stability and in particular establishing a State guarantee for the provision of credit in the context of financial stability, ECB Opinion CON/2008/48

coordination of the various national efforts addressing the current financial situation, *inter alia*, through the timely adoption and publication of ECB opinions on such draft national legislation.

- 2.3 Moreover, the ECB reiterates the importance of ensuring that the proposed arrangements will be applied in full compliance with the relevant Community law provisions, including EU financial services legislation, the single market principles and State-aid principles, in compliance with the criteria set out in the recently adopted Commission's guidance¹².
- 2.4 The ECB understands that implementing rules will expand on the details of the Decree-Laws¹³. Consequently, the ECB expects to be consulted on any proposed implementing legislation to be adopted in connection with the Decree-Laws on matters within the ECB's competence¹⁴.

3. The relationship with the single monetary policy of the euro area

- 3.1 The ECB notes that, in line with the Declaration, Member States must act in a coordinated manner to avoid significant differences in national implementation from 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 notes 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 the measures contained in Decree-Law No 157/2008.
- 3.2 First, the ECB notes that the MEF may issue a State guarantee until 31 December 2009 covering new liabilities of Italian banks with a maturity up to 5 years. The ECB thus understands that the scheme seeks to implement Article 8 of the Declaration which states, *inter alia*, that the euro area

of 15 October 2008 at the request of the Irish Minister for Finance on a draft Credit Institutions (Financial Support) Scheme 2008, ECB Opinion CON/2008/50 of 17 October 2008 at the request of the Belgian Ministry of Finance on a draft royal decree adopted under Article 117*bis* of the Law of 2 August 2002 on the supervision of the financial sector and on financial services; ECB Opinion CON/2008/52 of 17 October 2008 at the request of the Spanish State Secretary for Economic Affairs on a Royal Decree-Law creating a Fund for the acquisition of financial assets and on a Royal Decree-Law adopting urgent financial and economic measures in relation to the concerted European action plan of the euro area countries, ECB Opinion CON/2008/54 of 17 October 2008 at the request of the Danish Ministry of Economic and Business Affairs on a proposed Law on financial stability, ECB Opinion CON/2008/56 of 21 October 2008 at the request of the Banque de France on a draft amending finance law for the financing of the economy, and ECB Opinion CON/2008/57 of 21 October 2008 at the request of the German Ministry of Finance on a Law on the implementation of a package of measures to stabilise the financial market and an order on its implementation. All ECB opinions are available on the ECB website at www.ecb.europa.eu/ecb/legal/opinions/html/index.en.html.

¹² See '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' of 13 October 2008, which specifies that 'The eligibility criteria of financial institutions ... must be objective, taking due account of their role in the relevant banking system and the overall economy, and non-discriminatory so as to avoid undue distortive effects on neighbouring markets and the internal market as a whole. In application of the principle of non discrimination on the grounds of nationality, all institutions incorporated in the Member State concerned, including subsidiaries, and with significant activities in that Member State should be covered by the scheme'; the document is available on the Commission's website at www.ec.europa.eu.

¹³ See e.g. the 'general administrative measures' to be adopted by the MEF under Article 5, paragraph 1 of Decree-Law No 155/2008. See also the 'general administrative measures' to be adopted by the MEF under Article 2, paragraph 1 of Decree-Law No 157/2008.

¹⁴ 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.

governments ‘would make available ... a Government guarantee ... of new medium term (up to 5 years) bank senior debt issuance’. The ECB also understands that the Decree-Law applies to all banks’ liabilities. It is the ECB’s view that the extension of the State guarantee to cover all interbank deposits should be avoided. It could entail a substantial distortion in the various national segments of the euro area money market by potentially increasing short-term debt issuance activity across Member States and thereby impairing the implementation of the single monetary policy, which is an exclusive competence of the Eurosystem under Article 105(2) of the Treaty. In this context, it is crucial to ensure the coordination of the price determination of such guarantees within the euro area and the EU, as a level playing field is of essence. The ECB should be involved in such coordination, and would welcome the explicit provision for this in subsequent legislation.

- 3.3 Second, the MEF may enter into temporary swap arrangements between government bonds and financial instruments held by Italian banks or liabilities of Italian banks. Although such measures should restore confidence in the Italian banking system, it is important that such operations will be conducted at market prices, as mentioned in Decree-Law No 157/2008. In this respect, the ECB recalls the importance of such transactions and their price determination being conducted within the euro area in a coordinated manner between euro area governments.
- 3.4 Finally, the ECB welcomes the fact that the stabilisation measures provided for by Decree-Law No 157/2008 are made on the basis of the Banca d’Italia’s evaluation of the banks’ capital adequacy.

4. Emergency liquidity assistance and the prohibition on monetary financing

- 4.1 One of the specific tools available to central banks in a crisis situation is the provision of emergency liquidity assistance to individual banks. This provision of liquidity assistance by central banks consists in giving support in exceptional circumstances and on a case-by-case basis to temporarily illiquid but solvent credit institutions¹⁵. The extension of emergency liquidity assistance falls within the Banca d’Italia’s task of contributing to the stability of the financial system.
- 4.2 It is the ECB’s view that ‘national legislation foreseeing the financing by NCBs [national central banks] of credit institutions other than in connection with central banking tasks (such as monetary policy, payment systems or temporary liquidity support operations), in particular to support insolvent credit and/or other financial institutions, is incompatible with the monetary financing prohibition’¹⁶. In this respect, the ECB is of the view that a clarification, which states that a central

¹⁵ See the ECB Financial Stability Review, December 2006, pp.171-172 and the ECB’s Annual Report 1999, p. 98; see also 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, paragraph 4.10 (footnote 16) and ECB Opinion CON/2008/46, paragraph 3.1.

¹⁶ See the ECB’s Convergence Report May 2006, p. 68; the Convergence Report December 2006, p. 30; the Convergence Report May 2007, p. 22 and the Convergence Report May 2008, p. 24, all of which are available on the ECB’s website at www.ecb.europa.eu. Cf. paragraph 4.10 of the ECB Opinion CON/2008/42, paragraph 4.2 of the ECB Opinion CON/2008/46 and paragraph 3.3. of the ECB Opinion CON/2008/54.

bank extension of financial support to an insolvent financial institution must be considered as a form of prohibited monetary financing, should be explicitly contained in the Decree-Law No 155/2008. In the same vein, it would be advisable to introduce into the same Decree-Law a direct reference to the prohibition on monetary financing as defined in Community law or alternatively to Article 101 of the Treaty.

- 4.3 Under Article 3.2 of Decree-Law No 155/2008, the MEF may issue a guarantee for any refinancing provided by the Banca d'Italia to the banks incorporated in Italy as well as to branches of foreign banks in Italy, to address serious liquidity crisis¹⁷. In line with its previous opinions¹⁸, the ECB understands that such refinancing refers exclusively to 'emergency liquidity assistance' and considers that providing such emergency liquidity assistance on the basis of the guarantee provided by the State should be an autonomous decision that the Banca d'Italia must be in a position to take in complete independence. To this effect, the Decree-Law should stipulate that the same degree of independence is granted to the Banca d'Italia as regards the provision of emergency liquidity assistance as with respect to the performance of its ESCB-related tasks¹⁹. It follows that central bank lending to a solvent credit institution on the basis of a State guarantee is, in principle, possible, provided that the central bank's compliance with the monetary financing prohibition under Article 101 of the Treaty is ensured. Specific criteria for such compliance must be respected as noted by the ECB in recent opinions issued with respect to other EU jurisdictions which have legislated in response to the current market turmoil²⁰.

5. Recapitalisation of banks

The ECB notes that Article 1 of Decree-Law No 155/2008 refers to certain conditions for the underwriting of shares, to be ascertained by the Banca d'Italia, including the adequacy of the bank's stabilisation and reinforcement plan presented in connection with the approval of the capital increase and the dividend policy of the bank. It further specifies that the shares held by the MEF have a privilege in the distribution of dividends over all other categories of shares. The ECB recalls the principle contained in the Declaration that financial institutions to which Member States make available additional capital resources should be obliged to accept additional restrictions, notably to preclude possible abuse of such arrangements at the expense of non-beneficiaries.

¹⁷ Article 3(2) of the Decree-Law No 155/2008.

¹⁸ See paragraphs 4.9-4.11 of the ECB Opinion CON/2008/42, paragraphs 3.1-3.4 of the ECB Opinion CON/2008/46; and paragraphs 3.1-3.3 of the ECB Opinion CON/2008/54.

¹⁹ Alternatively, a reference to the same level of independence as provided for in Article 108 of the Treaty could be considered. Cf. paragraph 4.11 of the ECB Opinion CON/2008/42; paragraph 4.2 of the ECB Opinion CON/2008/46.

²⁰ See paragraph 4.3 of ECB Opinion CON/2008/46 and paragraph 3.9 of the ECB Opinion CON/2008/48. These ECB opinions specified the following criteria under which a central bank may engage in lending to a solvent credit institution on the basis of collateral in the form of a State guarantee: (i) the central bank needs to independently exercise full discretion regarding the decision whether to extend emergency liquidity assistance; (ii) it should be ensured that the credit provided by the central bank is as short term as possible; (iii) there must be systemic stability aspects at stake; (iv) there must be no doubts as to the legal validity and enforceability of the State guarantee under applicable national law; and (v) there must be no doubts as to the economic adequacy of the State guarantee, which should cover both principal and interest on the loans, thus fully preserving the financial independence of the central bank.

6. Deposit guarantee scheme

The ECB notes that Article 4 of Decree-Law No 155/2008 states that the MEF may provide a State guarantee as a ‘complement to and in addition to’ the existing depositor guarantee scheme in favour of depositors with Italian banks for a period of 36 months from the entry into force of the same Decree-Law. The ECB notes that, should such additional guarantee be activated, the existing funding mechanism of the deposit guarantee scheme should be used to the extent possible; moreover, in line with past opinions, the ECB also notes that appropriate safeguards should be established to ensure that the beneficiary institution(s) will not be unfairly advantaged by making undue use of their guaranteed status. Finally, the ECB underlines that it is crucial to ensure the coordination of such guarantee within the euro area and the EU.

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

Done at Frankfurt am Main, 23 October 2008.

[signed]

The President of the ECB

Jean-Claude TRICHET