



OPINION OF THE EUROPEAN CENTRAL BANK

of 14 September 2009

on money laundering and terrorist financing prevention provisions relating to the Banco de España
(CON/2009/70)

Introduction and legal basis

On 11 August 2009 the European Central Bank (ECB) received a request from the Spanish State Secretary for Economic Affairs for an opinion on a draft law on the prevention of money laundering and terrorist financing (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 on the third 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 provisions¹, as the draft law contains provisions relating to the Banco de España. 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

The draft law transposes Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing², Commission Directive 2006/70/EC of 1 August 2006 laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council as regards the definition of politically exposed person and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis³, and Regulation (EC) No 1781/2006 of the European Parliament and of the Council of 15 November 2006 on information on the payer accompanying transfers of funds⁴.

The preamble to the draft law explains that, with a view to reducing adaptation costs, the current Spanish provisions in this field are maintained to the extent that they are not contrary to Community legislation.

¹ OJ L 189, 3.7.1998, p. 42.

² OJ L 309, 25.11.2005, p. 15.

³ OJ L 214, 4.8.2006, p. 29.

⁴ OJ L 345, 8.12.2006, p. 1.

The draft law unifies the rules on money laundering and terrorist financing prevention, putting an end to the current separation that may be described as follows. On the one hand, money laundering prevention is governed by Law 19/1993 of 28 December 1993 on money laundering prevention measures, which created the *Comisión de Prevención del Blanqueo de Capitales e Infracciones Monetarias* (Commission for the prevention of money laundering and monetary offences) ('the Commission') within the State Secretariat for Economic Affairs. Law 19/1993 also created the Commission's Executive Service ('SEPBLAC'), which is the Spanish financial intelligence unit and is attached to the Banco de España. Royal Decree 925/1995 of 9 June 1995 implementing Law 19/1993 laid down detailed provisions on the SEPBLAC. The Banco de España appoints the SEPBLAC's director and pays its costs. On the other hand, terrorist financing prevention is governed by Law 12/2003 of 21 May 2003 on prevention and blocking of terrorist financing, which created the *Comisión de Vigilancia de Actividades de Financiación del Terrorismo* (Commission for the surveillance of terrorist financing). Law 12/2003 regulates the freezing or blocking of funds potentially linked to terrorism, but also reproduces the prevention of money laundering obligations of Law 19/1993, which is clearly not ideal.

A decision was therefore made to maintain the freezing and blocking provisions of Law 12/2003, as well as the Commission for the surveillance of terrorist financing's competence to order the freezing or blocking of funds when there are grounds to do so, and to regulate terrorist financing prevention together with money laundering prevention in the draft law.

The draft law also includes provisions regarding the Banco de España, on which the ECB is specifically consulted:

- (a) institutional organisation: the SEPBLAC depends organically and functionally on the Commission but has the following links with the Banco de España:
 - i. the SEPBLAC's director is appointed on the proposal of the Commission's president after having consulted the Banco de España;
 - ii. the Banco de España is in charge of the SEPBLAC's financial, budgetary and procurement regime and will sign an agreement to this end with the Commission;
 - iii. the Banco de España's employees assigned to the SEPBLAC keep their employment relationship with the Banco de España, are subject to the Banco de España's staff rules but are under the SEPBLAC's authority from a functional point of view;
 - iv. the SEPBLAC's budget is approved by the Commission and integrated on a separated basis into the Banco de España's budget for operating costs and investments. Expenses against this budget are paid by the Banco de España, which is reimbursed for them by drawing up an account to be submitted to the Directorate General of the Treasury and Financial Policy. The Directorate checks the account and reimburses the Banco de España. The account is balanced with the profits that the Banco de España transfers to the Treasury every year.

- (b) Banco de España's cooperation with the Commission and the SEPBLAC:
- i. the Banco de España reports to the Commission's Secretariat any possible breaches of the obligations contained in the draft law observed in the course of its supervisory and inspection activities;
 - ii. in relation to financial institutions subject to the Banco de España's supervision, the SEPBLAC may obtain the necessary information and cooperation from the Banco de España;
 - iii. the SEPBLAC has direct access to the statistical information on capital movements and economic transactions with foreign countries reported to the Banco de España in accordance with the regulations applicable to such movements and transactions.

2. General observations

The ECB welcomes Spain's transposition, albeit delayed, of the Community legislation on money laundering and terrorist financing prevention. The ECB understands that such delay: (i) has been due to lengthy discussions about the SEPBLAC's institutional setting and the merger of the current rules on the prevention of money laundering and terrorist financing; and (ii) is partially mitigated by Spain's current legal framework in both fields. The ECB also welcomes the enhanced clarity of the money laundering and terrorist financing prevention legal framework that the draft law will bring about.

3. Specific comments

3.1 The Banco de España's financial role

The ECB welcomes the economic and budgetary regime laid down in Article 43(3) and (4) of the draft law as a regime that is fully consistent with central bank financial independence. It considers, however, that before the SEPBLAC's budget is approved by the Commission, it should be agreed by the Banco de España as it will affect the financial independence of the Banco de España.

3.2 Liability

The SEPBLAC is staffed by Banco de España's employees who are subject to the Banco de España's staff rules. This poses no problems if the SEPBLAC is subject to the Banco de España's independent decision-making. However, if Spanish law provides for separate decision-making by the SEPBLAC, it is important to ensure that decisions adopted by it do not endanger the financial independence of the Banco de España. In similar situations concerning financial supervision being placed within an NCB, the ECB has suggested that the national legislation should enable the NCB to have ultimate control over any decision by the supervisory authorities that could affect its independence, in particular its financial independence⁵. As the staff members of SEPBLAC are

⁵ See ECB Convergence Report, May 2008, p. 22.

functionally dependent on the SEPBLAC and perform governmental functions, the ECB considers that the Banco de España should be statutorily freed from any liability for the actions and omissions of those staff while performing those functions.

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

Done at Frankfurt am Main, 14 September 2009.

[signed]

The President of the ECB

Jean-Claude TRICHET