



EUROPEAN CENTRAL BANK

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OPINION OF THE EUROPEAN CENTRAL BANK

of 26 May 2017

on the Commission for the monitoring of alternative dispute resolution procedures and the reserve funds of banking foundations

(CON/2017/19)

Introduction and legal basis

On 25 April 2017, the European Central Bank (ECB) received a request from the Banco de España, on behalf of the Secretary of State for Economy and Business Support, for an opinion on a Royal Decree creating and regulating the monitoring, control and evaluation commission for the out-of-court procedure established in Royal Decree-Law 1/2017, of 20 January 2017, on urgent consumer protection measures concerning floor clauses¹ (hereinafter the 'draft royal decree').

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 the third and sixth indents of Article 2(1) of Council Decision 98/415/EC², as the draft royal decree relates to the Banco de España, rules applicable to financial institutions that materially influence the stability of financial institutions and markets and the tasks conferred on the ECB pursuant to Article 127(6) of the Treaty concerning the prudential supervision of credit institutions. 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 royal decree

1.1. *Commission for the monitoring, control and evaluation of the compliance by credit institutions with Royal Decree-Law 1/2017 (floor clauses)*

1.1.1. The draft royal decree establishes a Commission that will monitor, control and assess compliance by credit institutions with the provisions of Royal Decree-Law 1/2017. Royal Decree-Law 1/2017 instituted an out-of-court procedure to settle consumer claims and facilitate the reimbursement of funds unduly paid by consumers to credit institutions following the application of certain floor clauses contained in mortgage loans. Floor clauses lacking transparency were declared void on a retroactive basis by the rulings of the Spanish Supreme Court of 9 May 2013 in judgment no. STS

¹ Royal Decree-Law 1/2017, of 20 January 2017, on urgent consumer protection measures concerning floor clauses, BOE no. 18, 21.01.2017, p. 5379.

² Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (OJ L 189, 3.7.1998, p. 42).

1916/2013 and the Court of Justice of the European Union of 21 December 2016 in Joined Cases C-154/15, C-307/15 and C-308/15 *Gutiérrez Naranjo*³.

- 1.1.2. The Commission will formally depend on the Ministry of Economy, and will therefore form part of the legal personality of the Spanish State. The Commission will be composed of eight members, comprising the Vice Governor of the Banco de España as chair together with seven other members from different government ministries (including the Ministries of Economy, Justice and Health) and organisations representative of social interests (including consumers, advocates and the judiciary).
- 1.1.3. The Banco de España will also appoint a Secretary, as well as technical experts if needed, and will be generally responsible for preparing the documents and steering the operation of the Commission.
- 1.1.4. The Commission will monitor whether credit institutions are properly implementing the provisions of Royal Decree-Law 1/2017. Credit institutions must inform their clients of the existence of the out-of-court procedure for claiming the excess amounts paid by them due to the existence of floor clauses in their mortgage contracts. To this effect, credit institutions will send the Commission, on a monthly basis, information as to how many claims have been received from clients, how many have been settled, and for what amount, and other compensatory measures agreed. The Ministry of Justice will also provide statistics regarding the number of court procedures related to floor clauses.
- 1.1.5. The establishment of the Commission will be achieved without increasing public expenditure. Therefore, each institution participating in the Commission will bear the cost of the staff and resources dedicated to the Commission, with costs to be charged to that institution's ordinary budget.

1.2. *Amendment of reserve fund for banking foundations*

Under Law 26/2013 of 27 December on savings and banking foundations banking foundations that hold a highly significant stake, amounting to at least 30 %, in a credit institution are subject to significant obligations. These include, for example, the obligation to prepare a stake management protocol and an annual financial plan for submission to the Banco de España. Likewise, holding controlling stakes (at least 50 % or effective control) in a credit institution is costly because of the obligation to prepare, further to the financial plan, an investment diversification and risk management plan and to create a reserve fund to provide for possible capital shortfalls of the controlled credit institution.

The draft royal decree reduces from 50 % to 30 % the mandatory percentage that banking foundations must transfer to the reserve fund out of the dividends received in cash from credit institutions. It also extends from five to eight years the time frame for banking foundations to build up their reserve funds. Banking foundations are given a three-month period to update their financial plan.

³ *Gutiérrez Naranjo*, Joined Cases C-154/15, C-307/15 and C-308/15, ECLI:EU:C:2016:980.

2. Conferral of new tasks on the Banco de España

- 2.1 The draft royal decree confers on the Banco de España the new task of providing a Secretary and technical experts, if needed, to support the operation of the Commission and facilitate the completion of the tasks attributed to it. Furthermore, the Vice Governor of the Banco de España is appointed chair of the Commission. The Banco de España must finance the staff and material resources allocated to the Commission out of its ordinary budget.

In the context of a proposed conferral of new tasks on a national central bank (NCB) in the European System of Central Banks (ESCB), it is necessary to assess whether such a conferral is in line with Article 123 of the Treaty. For the purposes of the prohibition of monetary financing, Article 1(1)(b)(ii) of Council Regulation (EC) No 3603/93⁴ considers 'any financing of the public sector's obligations vis-à-vis third parties' to be a type of credit facility of the Eurosystem NCBs in favour of governments that is accordingly prohibited pursuant to Article 123 of the Treaty.

- 2.2 One of the objectives of the prohibition of monetary financing, which may not be circumvented, is to ensure that Member States maintain a sound budgetary policy. Consequently, the task of financing out-of-court procedures, which is normally the responsibility of the Member States and is to be met from their budgetary sources rather than from those of the NCBs, must not be entrusted to NCBs by law. In order to decide what constitutes a form of financing of the public sector's obligations vis-à-vis third parties, assessment of whether the task to be undertaken by an NCB is a central bank task or a government task needs to be carried out on a case-by-case basis. In other words, sufficient safeguards must be in place to ensure that circumventions of the objectives of the prohibition of monetary financing do not take place.
- 2.3 As part of its discretion in the exercise of its duty, on the basis of Article 271(d) of the Treaty and Article 35.6 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB'), to ensure that NCBs fulfil their obligations under the Treaties, the Governing Council has endorsed safeguards to that effect in the form of criteria for determining what may be seen as falling within the scope of a public sector's obligation within the meaning of Article 1(1)(b)(ii) of Regulation (EC) No 3603/93 or, in other words, constitute a government task, as follows:

First, central bank tasks are in particular those tasks that are related to the tasks that have been conferred upon the ECB and the NCBs by the Treaty and the Statute of the ESCB. These tasks are mainly defined in Article 127(2), (5) and (6) and Article 128(1) of the Treaty, as well as Article 22 and Article 25.1 of the Statute of the ESCB.

Second, because Article 14.4 of the Statute of the ESCB allows NCBs to perform 'functions other than those specified in this Statute', new tasks, i.e. those that are not related to tasks that have been conferred upon the ECB and the NCBs, are not precluded per se. However, new tasks that are undertaken by an NCB and which are atypical of NCB tasks or which are clearly discharged on

⁴ Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b(1) of the Treaty (OJ L 332, 31.12.1993, p. 1).

behalf of and in the exclusive interest of the government or of other public sector entities should be considered government tasks.

Third, an important criterion for qualifying a new task as atypical of an NCB task or as being clearly discharged on behalf of and in the exclusive interest of the government or other public sector entities is its impact on the institutional, financial and personal independence of that NCB.

In particular, the following aspects should be taken into account:

- (a) Whether performance of the new task either does not complement existing central bank tasks or in fact creates conflicts of interest with those tasks that are not adequately addressed. If a conflict of interest arises between existing and new tasks, sufficient safeguards to mitigate that conflict should be in place. The complementarity between a new task and existing central bank tasks should not be interpreted broadly, in order to avoid it leading to the creation of an infinite chain of ancillary tasks. Such complementarity should also be examined in relation to the financing of those tasks.
- (b) Whether in the absence of new financial resources the performance of the new task is disproportionate to the NCB's financial or organisational capacity and may have a negative impact on the capacity to perform properly the existing central bank tasks.
- (c) Whether performance of the new task fits into the institutional set-up of the NCB in light of central bank independence and accountability considerations.
- (d) Whether performance of the new task entails substantial financial risks.
- (e) Whether performance of the new task exposes the members of the NCB decision-making bodies to disproportionate political risks that may also have an impact on their personal independence and, in particular, on the guarantee of term of office set out in Article 14.2 of the Statute of the ESCB.

2.4 On the basis of the criteria set out above, the following paragraphs assess whether the Banco de España's new tasks are in line with the prohibition of monetary financing.

2.4.1 New tasks related to those conferred upon the ECB and the NCBs by the Treaty and the Statute of the ESCB

The monitoring of credit institutions' compliance with out-of-court procedures is not among any of the central banking tasks listed in Article 127(2) or (5) of the Treaty or otherwise conferred upon the NCBs by the Statute of the ESCB. Furthermore, this new task does not have a prudential supervisory dimension, as it does not concern the analysis of how the solvency of credit institutions is affected by the out-of-court procedure. Against this backdrop, the new task conferred on the Banco de España under the draft royal decree is not among those conferred upon the ECB and the NCBs by the Treaty and the Statute of the ESCB. Consequently, the conferral of this task on the Banco de España must be closely scrutinised to assess whether it constitutes a government task and whether the related funding gives rise to monetary financing concerns.

2.4.2 Tasks which are atypical of NCB tasks

Under the Spanish banking law,⁵ the Banco de España has a mandate concerning the protection of clients of credit institutions, particularly in respect of market conduct and transparency. It also has the task, as the competent authority, of dealing with complaints submitted by such clients concerning alleged infringements of transparency and disclosure regulations or good banking practice. However, the new task conferred on the Banco de España in relation to the work of the Commission under the draft royal decree is of a distinct nature. Royal Decree-Law 1/2017 instituted a specific out-of-court procedure, designed to operate prior to and, if successful, in lieu of, court proceedings. The purpose of this procedure is to settle consumer claims and thus avoid the creation of a backlog in the courts resulting from a large amount of legal claims being made against credit institutions due to the high number of potential individuals affected by the retroactive annulment of floor clauses in mortgage contracts. Against this backdrop, it is necessary to analyse whether the new task proposed to be conferred on the Banco de España relating to the monitoring of credit institutions' compliance with an out-of-court procedure concerning unfair or abusive terms in consumer contracts is a typical task among other NCBs of the European System of Central Banks (ESCB). While the majority of NCBs of the ESCB do not appear ever to have been assigned tasks of this nature, the ECB has identified a number of Member States where NCBs are or have been involved in alternative dispute resolution mechanisms available to the clients of credit institutions. Some Member States have conferred on NCBs the responsibility for directly operating such alternative dispute resolution systems for consumers⁶. Of greater relevance to the specific tasks proposed to be conferred on the Banco de España is the fact that various roles within external bodies conferred with the task of operating such alternative dispute resolution systems have been assigned to several NCBs. These roles include the NCB having responsibility for appointing members of the dispute resolution body's governing bodies, providing the secretariat and staff to the dispute resolution body and operating the dispute resolution body⁷.

⁵ Law 10/2014, of 26 June 2014 on the regulation, supervision and solvency of credit institutions, BOE no. 156, 27.06.2017, p. 49412. In particular, see Article 5.

⁶ The following examples may be given. In Italy, Article 128-bis of Legislative Decree No. 385 of 1 September 1993, as amended, created the *Arbitro bancario finanziario* (ABF, Banking and Financial Ombudsman) to deal with disputes arising in connection with banking services and transactions and, in general, fairness in client-intermediary relations, including in respect of consumer credit and payment services. Banca d'Italia hosts the ABF's technical secretariat and supplies its staff. In Cyprus, the Payment Services Laws 2009-2010 (no longer in force) entrusted the Central Bank of Cyprus with the task of operating an out-of-court settlement procedure with regard to payment services. In Lithuania, Article 22(1)(2) of the Law on Consumer Protection confers on Lietuvos bankas the task of settling disputes between consumers and financial institutions, including credit institutions. In Hungary, Article 4(10) of the Act on the Magyar Nemzeti Bank confers on the Magyar Nemzeti Bank (NMB) the task of achieving out-of-court settlement of disputes between consumers and supervised entities relating to the use of banking services or loan contracts via the Financial Arbitration Board, an independent body operated by NMB.

⁷ In Bulgaria the Sectoral Reconciliation Commission for Financial Services (SRCFS) is an alternative dispute resolution body in charge of the resolution of national and cross-border disputes between consumers and traders in the field of financial services. The Българска народна банка (Bulgarian National Bank) is assigned the task, pursuant to Articles 183a and 183b of the Law on Consumer Protection, of designating the chairperson and deputy chairperson of the SRCFS. In Portugal, pursuant to Law 58/2012, of 9 November, on Extraordinary Regime, the Banco de Portugal is represented in, and provides the secretariat of, the Assessment Committee, which monitors an out-of-court procedure for household clients facing severe financial constraints in respect of arrears on housing loan agreements. In Romania the Banca Națională a României appoints one of the five members of the Committee which coordinates the general activity of the Alternative Dispute Resolution Centre for Banking, a legal entity which provides out-of-court resolution of consumer banking disputes.

The out-of-court procedures to which NCBs contribute concern payment systems, consumer claims regarding the provision of financial services, transparency in contractual and pre-contractual documentation, consumer loan contracts and the restructuring of debts of distressed household clients.

However, these examples do not involve the NCBs being conferred with tasks relating to an out-of-court alternative dispute resolution procedure specifically relating to unfair or abusive contract clauses under Council Directive 93/13/EEC⁸. The ECB understands that, in view of its responsibility for the secretariat of the Commission, the Banco de España may have to review the decisions taken by credit institutions in order to assess the degree of compliance with Royal Decree-Law 1/2017. In this respect, it may be argued that the particular task conferred on the Banco de España is atypical for a central bank.

2.4.3 Tasks clearly discharged on behalf of and in the exclusive interest of the government

The draft royal decree attributes responsibility for monitoring the out-of-court procedure to the Commission, which is established within the Ministry of Economy and will therefore share in the legal personality of the Spanish State. Furthermore, the preamble of Royal Decree-Law 1/2017 specifically states that one of its objectives is to avoid an increase in litigation in the civil courts, and the associated high costs of the administration of justice. The ECB understands in this context that the out-of-court procedure and the creation of the Commission are intended to alleviate the work involved in the administration of justice, which is a government task. Therefore, the new tasks conferred on the Banco de España that facilitate the completion of the tasks attributed to the Commission are performed exclusively in the interest of the State.

2.4.4 Impact of the tasks on the independence of the Banco de España

The issue of how the new tasks conferred upon the Banco de España by the draft royal decree may impact on its institutional and financial independence and on the personal independence of the members of its decision-making bodies should also be considered.

2.4.4.1 Extent to which the performance of the new tasks creates conflicts of interest with existing central bank tasks

Given that the responsibility for monitoring the out-of-court procedure rests with the Commission, the underlying objectives of the Commission's mandate are not to be pursued by the Banco de España as such. Therefore, carrying out the new tasks under the draft royal decree is unlikely to create conflicts of interest with other central bank tasks conducted by the Banco de España.

2.4.4.2 Extent to which the performance of the new tasks is disproportionate to the Banco de España's financial or organisational capacity

The principle of financial independence requires that Member States may not put their NCBs in a position where they have insufficient financial resources to carry out not only their ESCB-related tasks but also their national tasks, from both an operational and financial perspective.

⁸ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29).

Furthermore, when allocating specific new tasks to NCBs, each NCB concerned should be able to avail itself of additional financial resources so that these tasks may be carried out in a manner that will not affect the NCB's operational or financial capacity, including sufficient human resources, to perform its ESCB tasks. At this early stage, it is difficult to predict what additional resources the Banco de España will have to assign to the Commission. However, at present the draft royal decree only establishes minimum requirements for the Commission's operation, which means that the preparatory work needed in order to set up the Commission will fall under the responsibilities of the Secretary appointed to the Commission by the Banco de España. Moreover, the Banco de España is likely to have to dedicate additional human, technical and financial resources to collect, process and analyse the relevant data so as to enable the Commission to monitor the relevant credit institutions' compliance with the requirements of the out-of-court procedure. The processing of the information submitted by credit institutions pursuant to the draft royal decree may therefore impose a burden additional to the existing central bank tasks performed by the Banco de España. In any case, it may be expected that performing the conferred task will involve a substantial amount of work for the Banco de España. In this respect, the draft royal decree does not provide for the Banco de España to be reimbursed the costs of carrying out this additional burden. It also explicitly provides that the establishment of the Commission will not increase public spending. Accordingly, the Banco de España will have to finance the personnel and material resources assigned to the Commission out of its ordinary budget.

2.4.4.3 Extent to which performance of the new tasks fits into the Banco de España's institutional set-up, in light of central bank independence and accountability considerations

While the Banco de España has a role in appointing the Secretary and steering the operation of the Commission, the latter is part of the Ministry of Economy, Industry and Competitiveness. If the technical experts appointed to the Commission are to be assigned to the Commission, to work on a full-time basis and performing governmental functions, the ECB considers that the Banco de España should be free from any liability for the actions and omissions of those staff members while performing those functions⁹.

2.4.4.4 Extent to which the performance of tasks entails significant financial risks

The Banco de España appears not to be exposed to significant financial risks in the performance of the new tasks conferred upon it, as it is understood that liability for the Commission's actions will rest with the Commission, and therefore ultimately with the Spanish State, and not with the Banco de España.

⁹ See, in this regard, paragraph 3.2 of Opinion CON/2009/70.

2.4.4.5 Extent to which the performance of the new tasks exposes members of the Banco de España's decision-making bodies to disproportionate political risks and has an impact on their personal independence

Due consideration should be given to safeguarding the personal independence of the members of the Banco de España's decision-making bodies¹⁰. This is a significant issue both in relation to their participation in collegiate bodies such as the Commission, which remains part of the Ministry of Economy, Industry and Competitiveness and, to an even greater extent, in relation to the fact that the chair of the Commission is to be assigned to the Vice Governor of the Banco de España.

2.4.5 Conclusion regarding the compatibility of the draft royal decree with the prohibition of monetary financing

As the Commission is performing a State task by providing the resources necessary to enable the Commission to function, the Banco de España is taking over a government task. As the ECB has consistently held in the past, national laws requiring an NCB to finance bodies that are independent of the NCB and operate as an extension of the government are incompatible with the prohibition of monetary financing. In this respect, the prominent role assigned to the Banco de España within the Commission raises concerns. In order to ensure compliance with the prohibition of monetary financing, a new task entrusted to an NCB must be adequately remunerated if it is linked to a government task and performed in the government's interest¹¹. Therefore, the ECB strongly recommends that further consideration should be given to the role attributed to the Banco de España within the Commission, and that in any case the Banco de España be fully and adequately reimbursed for any costs incurred in relation to the performance of its new tasks with respect to the Commission in order to ensure compliance with the prohibition of monetary financing.

3. Amendment of the reserve fund of banking foundations

- 3.1. The ECB is of the opinion that reducing the mandatory percentage which the banking foundations must transfer to the reserve fund out of dividends from 50 % to 30 % and extending from five to eight years the period that foundations are granted to comply with their reserve fund target changes the structure of the incentives laid down in Law 26/2013 on savings banks and banking foundations¹², and is contrary to the spirit of the original savings bank reform. The rationale behind the original reform of the savings bank sector was to set incentives to reduce controlling stakes of banking foundations in banks by imposing additional costs on banking foundations. Amending those provisions significantly reduces the incentives for banking foundations to divest their controlling stakes in credit institutions. The reform of the saving bank sector banks is one of the key pillars of the financial assistance programme in Spain and the amendments appear to unduly weaken its importance. The ECB considers that the economic rationale of the measure is not sufficiently explained in the draft royal decree, which merely mentions the 'current situation of

¹⁰ See paragraph 5 of Opinion CON/2012/106 and paragraph 3.5 of Opinion CON/2010/94. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

¹¹ See, in this regard, the ECB's 2016 Convergence Report, p. 30.

¹² Law 26/2013 on savings banks and banking foundations, BOE no. 311, 28.12.2013, p. 105878.

financial markets' without providing further explanation as to the substantive reasons for the amendment or how the measure will help banking foundations, or the credit institutions they control, in the current situation of the markets. Currently Spain is enjoying very strong and broad-based economic growth, from which the financial sector is benefiting. Therefore it is not obvious what it is meant by the 'current situation of financial markets' and how this has been used to derive the extension of the horizon and the reduction of the percentage to be transferred for setting up the reserve fund.

- 3.2. The ECB also considers that this reduction could have an impact on the level playing field, as it would put banking foundations that have already chosen to disinvest their controlling stakes in credit institutions in a disadvantaged position. Therefore, the ECB recommends that further consideration should be given to the proposed amendment of the reserve fund for banking foundations.

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

Done at Frankfurt am Main, 26 May 2017.

[signed]

The President of the ECB

Mario DRAGHI