



OPINION OF THE EUROPEAN CENTRAL BANK

of 15 April 2009

**on certain amendments to the Law on banks
in connection with the financial markets crisis**

(CON/2009/34)

Introduction and legal basis

On 8 April 2009 the European Central Bank (ECB) received a request from the Czech Ministry of Finance for an opinion on a draft law amending Law No 21/1992 Coll. on banks (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 sixth 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 relates 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 draft law

The draft law is a preventive measure in response to the turbulent situation on the financial markets in connection with the global financial crisis. The main purpose of the draft law is to establish a legal framework which would facilitate increasing a distressed bank's capital or the transfer of its business or liabilities to a sound institution. The proposed changes include: (i) a state-owned special purpose bank, i.e. a bridge bank, may be established for the purpose of acquiring and operating the business of a distressed bank. This is considered necessary in the event that at the relevant time there would be no bank on the market willing to take over the business of a distressed bank; (ii) special rules are laid down for the increase of a bank's capital in the event that the purpose of such increase is to comply with regulatory capital requirements. The objective is to ensure the fastest possible supply of real money to a distressed bank while maintaining maximum transparency and fairness when increasing a bank's capital under such circumstances; (iii) Česká národní banka (CNB), the integrated financial market supervisor, is provided with a special regulatory instrument (a measure of general application) for a limited period in the event the banking or financial system is threatened. By means of this measure it would be possible to mitigate certain regulatory requirements, prohibit certain types of operations or increase reporting frequency;

¹ OJ L 189, 3.7.1998, p. 42.

(iv) the applicable regime governing the takeover of a debt based on an agreement with the debtor is, in the context of conservatorship, modified so that the consent of creditors to the takeover of a distressed bank's obligations by another bank will not be necessary. Given its importance, such transaction will be subject to the prior consent of CNB, which will be given only if the person taking over the debts ensures the proper and smooth continuation of the relationships with clients relating to the debts taken over; and (v) the purchase price for the sale of the business of a bank under conservatorship must be based on a valuation prepared by a CNB-appointed valuator. To this end, basic valuation principles and procedures are provided for in the draft law.

2. General observations

- 2.1 The ECB has issued a number of opinions at the request of the competent Member State authorities on national measures adopted in response to the global financial crisis². The ECB invites the Ministry of Finance to take into account the relevant observations made in its recent opinions on similar draft legislative provisions in other Member States, some of which are repeated again below.
- 2.2 The ECB also draws attention to the guidance provided by the Ecofin Council to the Member States in the conclusions of its Meeting of 7 October 2008³ as well as the Declaration issued by the Heads of State of the euro area on 12 October 2008 (hereinafter the 'Declaration')⁴. In particular, the ECB stresses 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 implement the common principles in question, in a spirit of close cooperation with other Member States and the Community institutions⁵. 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 2008⁶.
- 2.3 With these general observations in mind, and against the background of the guidance previously given by the ECB and the Community institutions in this regard, the ECB has the following observations on the draft law.

² All ECB opinions are available on the ECB's website at www.ecb.europa.eu.

³ 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.

⁴ 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.

⁵ See ECB Opinion CON/2009/12 of 9 February 2009 at the request of the Cypriot Ministry of Finance on a draft law amending the Laws of 2002 and 2004 on the management of revenues and expenditure and on the accounting system of the Republic and other related matters.

⁶ See Brussels European Council of 15 to 16 October 2008, paragraph 3 of the Presidency Conclusions.

3. Specific observations

Valuation

3.1 Article 29b(1) of the draft law provides that where the business of a bank placed into conservatorship is being sold, the purchase price must be based on a valuation drawn up according to the situation on the date the contract comes into effect. Article 29b(2) and (3) of the draft law set out certain requirements concerning such valuation. In particular, the valuation is to be drawn up impartially, thoroughly, without unnecessary delay, with due professional care and in accordance with generally accepted procedures in the field of valuation of businesses and other property⁷. Finally, Article 29c(8) of the draft law states that when a part of the business of a bank placed into conservatorship is being sold, the provisions of Articles 29b and 29c will apply *mutatis mutandis*. In this context, insofar as public measures of relief for impaired assets may be implemented within the framework of Articles 29b and 29c of the draft law, the ECB would like to draw attention to the Eurosystem's Guiding principles for bank asset support schemes of 25 February 2009⁸ and the Commission Communication of 25 February 2009 on the treatment of impaired assets in the Community banking sector⁹, which provide important guidance, *inter alia*, as regards valuation.

The temporary nature of state involvement

3.2 Article 16(5) of the draft law provides for the establishment of a bridge bank. Under this provision, a bank's business may be transferred to a State owned joint-stock company that fulfils the statutory minimum capital requirements¹⁰. If CNB grants its prior consent to the sale of the business, it will concurrently issue a licence to the bridge bank that is identical in scope to the licence held by the bank transferring the business. According to the explanatory memorandum to the draft law, the acquisition and operation of a distressed bank's business by a bridge bank would, as rule, be temporary and would cater for situations where, at the relevant time, there would be no bank on the market willing to take over the distressed bank's business. The ECB welcomes the introduction in the draft law of the possibility to address a crisis situation through the transfer of a distressed bank's business to a bridge bank. Such reorganisation mechanism is in line with similar procedures introduced in other countries to rescue distressed banks. However, in this context, the ECB reiterates the importance of ensuring that the State's involvement is limited in time to the extent deemed necessary for the success of the reorganisation measure.

Prohibition or restriction on transfers of funds

3.3 The ECB understands that the draft law introduces the possibility for CNB to prohibit or restrict certain permitted activities, the execution of certain transactions, the transfer of funds or other transactions of a bank or a foreign bank branch by a measure of general application issued in

⁷ See Article 29b(2).

⁸ Available on the ECB's website at www.ecb.europa.eu.

⁹ Available on the Commission's website at ec.europa.eu.

¹⁰ According to the explanatory memorandum to the draft law, a bridge bank may acquire a business by means of a contract made directly with the concerned bank (through a decision of its General Meeting) or from the conservator during the period of conservatorship of the bank.

accordance with Article 26bb. The ECB notes that prohibiting or restricting the transfer of funds or other transactions of foreign bank branches could impair the possibility for foreign banks to manage their liquidity. Therefore, the ECB recommends that the draft law require CNB to coordinate its actions with the home authorities of the foreign branches concerned. Moreover, should such measures concern branches of Member State banks, Community law obligations, requiring in particular the provision of information to the Commission and the concerned Member States, should be duly complied with.

Role of the central bank

3.4 The ECB expects that CNB's involvement in the procedures provided for in the draft law will not go beyond the proper performance of its existing tasks and that it will comply fully with the prohibition on monetary financing laid down in Article 101(1) of the Treaty, read in conjunction with Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 [now 101] and 104b(1) [now 103(1)] of the Treaty.

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

Done at Frankfurt am Main, 15 April 2009.

[signed]

The President of the ECB

Jean-Claude TRICHET