



OPINION OF THE EUROPEAN CENTRAL BANK
of 24 January 2012
on measures for the stabilisation of the financial market
(CON/2012/2)

Introduction and legal basis

On 23 December 2011, the European Central Bank (ECB) received a request from the German Federal Ministry of Finance for an opinion on a Second draft law implementing a package of measures for the stabilisation of the financial market (hereinafter the ‘draft law’).

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 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

- 1.1 The draft law is based on the Law of 17 October 2008 on financial market stabilisation² and its extensions on, *inter alia*, nationalisation of credit institutions and bad banks schemes³; some of the provisions have subsequently been phased out.
- 1.2 The recent government debt crisis in several countries has impaired confidence in the financial markets and led to refinancing problems. Moreover, the high interconnectedness in the European Union financial system has led to a rapidly rising risk of significant contagion, potentially threatening the financial stability of the Union as a whole and adversely impacting the real economy in Europe and beyond⁴. In the Communiqué of Finance Ministers and Central Bank Governors of the G-20 of 22 September 2011⁵, a commitment was expressed to take all necessary actions to preserve the stability of banking systems and financial markets and restore confidence.

¹ OJ L 189, 3.7.1998, p. 42.

² [2008] Bundesgesetzblatt I p. 1982, as amended.

³ The ECB provided its opinion on the underlying legal act in Opinion CON/2008/57 and on extensions in Opinions CON/2009/24, CON/2009/54 and CON/2010/83. All ECB opinions are published on the ECB’s website at www.ecb.europa.eu.

⁴ See also the European System Risk Board’s (ESRB) press release of 21 September 2011.

⁵ Available on the G-20’s website at www.g20.org.

The current legal framework enables banks under stress to be recovered in an orderly procedure or resolved. Furthermore, for the banking supervisor to transfer systemically relevant parts of a bank to another private bank or temporarily to a state owned bridge bank, there needs to be a threat to the existence of the bank affecting financial stability.

- 1.3 Pursuant to the draft law, several measures provided for under the Law on the financial market stabilisation fund may be temporarily reintroduced to counter a possible threat to the financial system in a timely and efficient manner, if private law solutions for strengthening the capital base fail. The draft law enables new applications for stabilisation measures, using the instruments which expired in late 2010, subject to State aid clearance. These measures will apply until 31 December 2012. The SPV model, i.e. the assumption of guarantees for securities outsourced to special purpose vehicles (SPVs), is extended to cover also securities other than structured securities. Under the draft law, €400 billion will be available for funding guarantees for liabilities with a maturity of up to five years (or seven for covered bonds), and €70 billion (plus €10 billion subject to approval by the German Parliamentary Budget Committee) for credit empowerments. Furthermore, the conditions related to the use of stabilisation measures are improved.
- 1.4 The German Federal Financial Supervisory Authority (BaFin) may order an institution to increase its own funds in order to prevent an imminent threat to the orderly functioning of the financial markets or to avoid a threat to financial market stability. BaFin may do so, in particular, in case of an ESRB recommendation, related decisions or recommendations of the European Council or coordinated action by the European Supervisory Authorities, i.e. not only where there is a threat to an individual institution. This power is temporary and will expire on 31 December 2012. BaFin may also request an institution to submit a plan on how it intends to meet the increased capital requirements. If such plan touches upon the competence of the Financial Market Stabilisation Fund (hereinafter the 'Fund'), BaFin will assess the plan in agreement with the Financial Market Stabilisation Authority's steering committee. BaFin may ask for an improved version of the plan. In that context, the institution also needs to assess the possibility of applying for stabilisation measures if there are no alternative measures at hand. If the plan fails, BaFin can appoint a special representative to develop a capital measures plan and ensure its implementation. If necessary, BaFin may use its other instruments to ensure the institution's compliance with the capital requirements.
- 1.5 Additionally, the draft law inter alia: (a) clarifies the legal framework applying to the Fund, providing that governing committee members are appointed on the basis of a public law contract; (b) strengthens legal and expert supervision by the Ministry of Finance over the Financial Market Stabilisation Authority; and (c) amends certain provisions of the Law on financial market stabilisation acceleration⁶ and the Financial Market Stabilisation Fund Order⁷ to facilitate their application.

⁶ [2008] *Bundesgesetzblatt* I p. 1982, 1986, as amended.

⁷ [2008] *Bundesanzeiger* No 123 p. 1, as amended.

2. General observations

- 2.1 In line with its previous opinions⁸, the ECB emphasises that when adopting measures to deal with the financial crisis, Member States should act in a coordinated manner. In this respect, the ECB welcomes that the draft law proposes a requirement to observe, *inter alia*, decisions of the European Council and the Council of the European Union, recommendations of the European Banking Authority and requirements of the European Commission, in particular with regard to compatibility with Articles 107 and 108 of the Treaty⁹.
- 2.2. Concerning Commission requirements in the context of Articles 107 and 108 of the Treaty, the ECB understands that the pricing terms and conditions for the stabilisation measures provided for in the draft law¹⁰ will respect the guidelines and conditions set at Union level¹¹. In this respect, the ECB understands that in accordance with the Law on financial market stabilisation¹², all stabilisation measures, including recapitalisation measures will be subject to the Union framework, although this is not explicitly mentioned in the provision regarding recapitalisation in the Financial Market Stabilisation Fund Order¹³.

3. Increased capital requirements

- 3.1 The ECB notes that the draft law¹⁴ allows BaFin to require an institution to meet increased capital requirements for a limited period of time, to avert an imminent disruption of the functioning of the financial market or a risk to financial market stability.
- 3.2 With respect to the capital requirements and in order to preserve financial stability within the Union, the ECB strongly supports the development of a single European rulebook for all financial institutions, as put forward by the Commission in its recent proposals¹⁵. Nonetheless, the ECB also supports that national authorities adjust certain prudential requirements and impose stricter prudential requirements for macro-prudential purposes at national level to address financial stability concerns stemming from the structural features of a national financial system or systemic risks in a comprehensive and effective manner.

⁸ Opinions CON/2008/57, CON/2009/24, CON/2009/54 and CON/2010/83.

⁹ Article 1 no. 5 of the draft law, amending Section 4(1) no 5 of the Law on the financial market stabilisation fund.

¹⁰ See the amendment to Section 4(1) of the Law on the financial market stabilisation fund.

¹¹ See notably the 'Communication from the Commission on the application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis' (OJ C 356, 6.12.2011, p.7).

¹² Section 4(1) of the Law on the financial market stabilisation fund.

¹³ See Section 3(2) of the Financial Market Stabilisation Fund Order, relating to recapitalisation, which unlike the amended Section 2(2) of the Financial Market Stabilisation Fund Order, relating to guarantees, does not contain an explicit reference to the Union framework.

¹⁴ Article 2(1) of the draft law, amending Section 10(1b) of the Law on Banking.

¹⁵ See, for example, the proposals of 20 July 2011 for a Directive of the European Parliament and of the Council on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms and amending Directive 2002/87/EC of the European Parliament and of the Council on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate (COM (2011) 453 final) and for a Regulation on prudential requirements for credit institutions and investment firms (COM(2011) 452 final).

3.3 With a view to maintaining transparency and ensuring the consistency of measures adopted within the Union, the ECB recommends that the possible application of more stringent requirements by national authorities be subject to safeguards. In this respect, the ECB welcomes that the draft law acknowledges the importance of a coordinated procedure at Union level to strengthen confidence in the resilience of the European banking sector and avert an imminent risk to financial market stability in Europe. The ECB understands that this reference to coordination is meant to require *ex ante* coordination at Union level, which the ECB supports. Furthermore, the ECB appreciates that the draft law explicitly clarifies that BaFin will take into account the standards agreed upon by the competent European authorities, when it decides on the amount and the composition of the capital required.

4. Qualifying holdings

In view of the general obligation imposed under Directive 2006/48/EC¹⁶ for any natural or legal person to notify the competent authorities of a decision to acquire a qualifying holding, the ECB understands that this obligation would also apply to the Fund and would recommend amending the draft law accordingly¹⁷.

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

Done at Frankfurt am Main, 24 January 2012.

[signed]

The President of the ECB

Mario DRAGHI

¹⁶ Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (OJ L 177, 30.6.2006, p. 1).

¹⁷ See Article 2c of the Law on banking.