



OPINION OF THE EUROPEAN CENTRAL BANK

of 2 December 2008

at the request of the Spanish State Secretary for Economic Affairs

on a draft royal decree on the arrangements for paying the Banco de España's profits to the Treasury

(CON/2008/82)

Introduction and legal basis

On 5 November 2008 the European Central Bank (ECB) received a request from the Spanish State Secretary for Economic Affairs for an opinion on a draft Royal decree on the arrangements for paying the Banco de España's profits to the Treasury (hereinafter the 'draft decree').

The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community and 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 decree relates 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 decree

The draft decree is intended to improve the operation and legal certainty of the current payment scheme by deferring the first payment of the Banco de España's profits to December and giving the scheme unlimited validity now that the ECB's transitional period regarding the provisions on monetary income distribution² is over.

2. General observations

Spain has consulted the ECB on the arrangements for paying the Banco de España's profits to the Treasury on three previous occasions³. The technical modifications proposed in the draft decree do not affect the substance of the current scheme. The payment schedule for profits accrued to the Banco de España, recorded in its accounts and paid to the Treasury is proposed as follows:

¹ OJ L 189, 3.7.1998, p. 42.

² Decision ECB/2001/16 of 6 December 2001 on the allocation of monetary income of the national central banks of participating Member Status from the financial year 2002 (OJ L 337, 20.12.2001, p. 55).

³ ECB Opinions CON/2005/30 of 11 August 2005, CON/2002/14 of 25 April 2002 and CON/99/16 of 28 October 1999. Available on the ECB's website at www.ecb.europa.eu.

- on the first working day of December of each year, 70% of the profits accrued and recorded until 30 September of the same financial year, while the foreseen development of the results until year-end is also taken into consideration;
- on the first working day in March in the next year, 90% of the profits accrued and recorded until 31 December of the preceding financial year, less the instalment paid in December;
- the remaining profits following approval by the Council of Ministers of the Banco de España's annual accounts for the financial year. The Council of Ministers, on a proposal from the Banco de España, may also authorise the exclusion of certain profits from the interim distribution rules.

3. Specific observations

3.1 Deferral to December of the first payment of profits to the Treasury

The ECB welcomes the proposed deferral, from November to December, of the first payment of the Banco de España's profits to the Treasury. It will bring the estimation of year-end results closer to the end of the year.

3.2 Financial independence

The distribution of provisional profits before the end of the year entails the need to carefully consider the Banco de España's role in the decision-making process for profit distribution. The concept of financial independence should be assessed from the perspective of whether any third party is able to exercise either direct or indirect influence not only over the tasks of a national central bank (NCB) but also over its ability, understood both operationally in terms of manpower⁴, and financially in terms of appropriate financial resources, to fulfil its mandate. The NCBs must also, at all times, have sufficient financial means to carry out their other functions, i.e. to perform their national tasks, to meet their international obligations and properly cover their administrative and operational expenses. It should be noted that Articles 28.1 and 30.4 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'ESCB Statute) provide for further calls on the NCBs to make further contributions to the capital of the ECB and to make further transfers of foreign reserves. The principle of financial independence requires that compliance with these provisions leaves an NCB's ability to perform its functions unimpaired. With regard to profit allocation, an NCB's statutes may prescribe how profits are to be allocated. In the absence of such provisions, the decision on allocation of profits should be taken by the NCB's decision-making bodies on professional grounds, and should not be subject to the discretion of third parties unless there is an express safeguard clause stating that this is without prejudice to the financial means necessary for carrying out the NCB's tasks related to the European System of Central Banks (ESCB). In this regard, the ECB notes that under Article 1 of the draft decree, and also under Royal Decree 1198/2005, the Banco de España adopts the prepayment

⁴ See ECB Opinion CON/2008/9 of 21 February 2008 at the request of the German Ministry of Finance on a draft law amending the Law on the Deutsche Bundesbank; also ECB Opinion CON/2008/10 of 21 February 2008 at the request of the Italian Ministry of Economic Affairs and Finance on some provisions of the Law on the State annual and pluriannual budget (2008 Budget law).

agreement and the estimation of year-end results and proposes which part of its profits should be excluded from payment to the Treasury. The ECB understands that these rules grant the Banco de España the right to create provisions, thereby enabling it to build up financial reserves that should help to guarantee the availability of appropriate independent financial means to meet its obligations. Moreover, the ECB understands that the application of such rules, and the level of the provision, has ensured such availability of independent financial means, and the ECB considers it important that it continues to do so. Furthermore, regarding Article 1(2) of the draft decree and the Banco de España's proposal to exclude some profits from provisional payment, the ECB considers that the authorisation of such exclusion by the Council of Ministers should be limited and should avoid any exercise of discretion in this context.

3.3 *Monetary financing*

Given the primacy of Community law, it is important to note that the application of the ESCB Statute may not be conditional on the provisions of national law. In particular, the draft decree must comply with the monetary financing prohibition laid down in Article 101(1) of the Treaty and 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 Treaty⁵. This Regulation prohibits overdraft facilities or any other type of credit facility with the ECB or the NCBs of Member States in favour of Community institutions or bodies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States, and the purchase directly from these public sector entities by the ECB or NCBs of debt instruments.

In order to comply with the monetary financing prohibition, it is of crucial importance that the distribution of profits by instalments does not imply advances on future or provisional profits but is rather the result only of profits that are fully realised, accounted for and audited, which in turn requires due calculation of profits and losses. In this context, it appears necessary to have formal approval of the profit and loss account for the considered period before the distribution of profits. Although a ceiling of 70 % of profits for the first payment provides some safeguard, it could theoretically not be sufficient if, for instance, heavy losses at year-end exceeded 30 % of the profits realised in the first nine months of the financial year⁶. In this regard, the risk of insufficient coverage of losses at year-end is reduced by deferring the first payment from November to December. In this context, the ECB understands that the Governing Council of the Banco de España will assess the amount to be deducted from the first payment on the basis of information known in December related to the profits for the greater part of the year (11 months out of 12). The Governing Council of the Banco de España should apply this arrangement prudently to ensure that

⁵ OJ L 332, 31.12.1998, p. 1.

⁶ In paragraph 6(ii) of CON/99/16 the ECB stated that the draft 'would better satisfy this concern by providing for a formal approval by the Governing Council of Banco de España of the profits and loss account which serves as a basis for the calculation of the advance pay outs, and the pay out be conditioned to an assessment by that body that expected economic developments for the final quarter of the year would not give rise to such a risk.'

it does not result in any advance profit distribution to the Treasury, since that would constitute credit to the public sector, and thus be contrary to the monetary financing prohibition.

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

Done at Frankfurt am Main, 2 December 2008.

[signed]

The President of the ECB

Jean-Claude TRICHET