



OPINION OF THE EUROPEAN CENTRAL BANK
of 10 April 2013
on the Deposit Guarantee Fund
(CON/2013/25)

Introduction and legal basis

On 20 March 2013, the European Central Bank (ECB) received a request from the Spanish Secretary of State for Economic Affairs and Business Support for an opinion on a draft Royal Decree-Law amending Royal Decree-Law 21/2012 of 13 July 2012 on liquidity measures for the general government and the financial sector¹ (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 provisions², 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 *Role of the Deposit Guarantee Fund*

The draft law specifies the measures that the Deposit Guarantee Fund (DGF), in addition to its core role of protecting insured deposits, may take to facilitate the implementation of the Union financial assistance programme to recapitalise Spanish credit institutions. Pursuant to the draft law, the DGF may: (a) provide guarantees in the context of the financial assistance programme; (b) subscribe or purchase shares not listed on an official market and issued by nationalised credit institutions and credit institutions subject to restructuring or resolution processes in the context of the subordinated liability exercises and actions to manage subordinated debt and hybrid capital instruments; (c) subscribe shares or subordinated debt issued by the Spanish impaired assets scheme, i.e. the Asset Management Company for Assets Resulting from Bank Restructuring (the SAREB).

¹ *Boletín Oficial del Estado* No 168 of 14 July 2012.

² OJ L 189, 3.7.1998, p. 42.

1.2 *Maximum cost to the DGF*

The cost of such measures must be less than the cost the DGF would have incurred if, at the beginning of the relevant restructuring or resolution process, it would have paid the amounts covered by it.

1.3 *Extraordinary contribution to the DGF*

In order to bolster the assets of the DGF, the draft law provides that the annual contribution to be made by member institutions based on their deposits at 31 December 2012 be subject to an extraordinary, one-off increase of an additional 0.3 %, which will be paid in two instalments: two fifths of the total increase will be paid within 20 business days of 31 December 2013, while the remaining three fifths will be paid within a maximum period of seven years starting from 2014 and subject to a payment schedule to be adopted by the DGF's Steering Committee. Notwithstanding such payment schedule, the amount corresponding to the second instalment will be recorded as the DGF's assets on the date of payment of the first instalment.

1.4 *Exemptions*

Regarding the first instalment, the DGF's Steering Committee may, by a favourable vote of two thirds of its members, decide: (a) to exempt member institutions which are nationalised or subject to a restructuring or resolution process from paying all of the first instalment; (b) to grant an exemption of up to 50 % of that instalment to member institutions with a calculation base not exceeding EUR 5 billion; (c) to grant an exemption of up to 30 % of the amounts invested by 31 December 2013 by member institutions in the subscription or purchase of shares or subordinated debt instruments issued by the SAREB. For each member institution, the total of the deductions provided for in points (b) and (c) may not exceed 90 % of the amount that the institution should have paid in accordance with the deposits held at 31 December 2012.

2. Compatibility with Union legislation

2.1 The draft law specifies the financial support measures the DGF may take in addition to its core role of protecting insured deposits in line with Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes³. As previously pointed out, the ECB supports rules which provide that the available financial means of deposit guarantee schemes may be used to finance resolution, as this allows for synergies between such schemes and resolution financing, but considers it of the utmost importance that this does not compromise in any way the core function of deposit guarantee schemes in protecting insured deposits⁴. Furthermore, in seeking to achieve any of its statutory objectives, the DGF should choose the least costly measure. The

³ OJ L 135, 31.5.1994, p. 5. See the European Commission's proposal COM(2010) 368 final, which recasts Directive 94/19/EC.

⁴ See paragraph 8.2 of ECB Opinion CON/2012/99 of 29 November 2012 on a proposal for a directive establishing a framework for recovery and resolution of credit institutions and investment firms. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

ECB welcomes the rule requiring that costs of the DGF's involvement in restructuring should be lower than the costs of potential pay-outs of deposit guarantees and expects that this rule will be implemented in a transparent manner, allowing for verification of the compliance with this rule in practice.

- 2.2 To fulfil its core role of protecting insured deposits in the event of bank insolvency, the DGF needs to be able to rely on a highly liquid asset structure. The ECB views the envisaged purchase of equity shares in non-listed banks as conflicting with that prudential principle and would therefore caution against amending the investment rules applying to the DGF that allow such purchases. As the draft law is an amendment of the Fifth Additional Provision of RDL 21/2012, which specifically deals with the measures to be adopted in the context of the European financial assistance programme, the ECB understands that the envisaged purchases would take place in relation to the DGF's temporary involvement in the resolution of ailing banks. Moreover, the ECB points to the on-going review of Directive 94/19/EC⁵, which may introduce rules concerning deposit-guarantee scheme investment policies. This may result in the need to amend in the future Royal Decree-Law 21/2012, in particular with regard to the categories of securities in which the DGF is allowed to invest.
- 2.3 The arrangements introduced by the draft law may need to be assessed from the perspective of State aid rules.

3. Compatibility with financial-sector policy conditionality framework

- 3.1 The DGF's powers under the draft law need to respect the requirement under the Memorandum of Understanding on Financial-Sector Policy Conditionality⁶ (hereinafter the 'MoU') of minimising the taxpayer's burden. In this respect, the ECB understands that State resources will not be used to finance the DGF's new capabilities (see paragraph 1.3 above). The measures to be taken need to carefully weigh the benefits (i.e. the potential positive contribution to the value of the Fund for Orderly Bank Restructuring's shareholding in banks, as well as the mitigation of the potential risk of litigation by certain categories of creditors or shareholders of non-listed banks) against the costs, in particular the reduced tax revenue for the State resulting from lower financial results of the banks owing to the extraordinary contributions to the DGF. In addition, it should be assessed whether the DGF's limited funds would be best used for the benefit of retail investors or instead for other financial stability purposes, such as replenishing the DGF and thereby reinforcing market confidence in its ability to carry out its core role. Finally, due consideration needs to be given to the alternative that banks could rebuild their capital buffers instead of contributing funds to the DGS.

⁵ See COM(2010) 368 final.

⁶ Available on the Commission's website at www.ec.europa.eu.

3.2 Furthermore, the principles of burden sharing as agreed in the MoU need to be respected⁷. It is essential that the price paid by the DGF for the equity shares to be acquired from retail investors in the context of the subordinated liability exercises be fair. In the absence of a quoted price, the price needs to be the inferred market price, i.e. using the economic valuation of the banks only as a starting point, so that investors in listed banks would not be disadvantaged. In this respect, the ECB notes that the final version of the law expressly requires that (i) the purchase price be no higher than the market value of the shares; (ii) it should comply with Union rules on State aid; and (iii) the DGF is requested to commission an independent expert report to determine such market value.

4. Extraordinary contribution and exemptions

As regards banks that have directly invested in the SAREB, the business plan underlying the SAREB envisages a reasonable return to investors, therefore there is no need to exempt banks that decided on business grounds to invest in the SAREB from the extraordinary contributions to the DGS.

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

Done at Frankfurt am Main, 10 April 2013.

[signed]

The President of the ECB

Mario DRAGHI

⁷ MoU, Paragraph 17 states that 'Steps will be taken to minimise the cost to taxpayers of bank restructuring'. Paragraph 18 states that 'These amendments should also include provisions allowing that holders of hybrid capital instruments and subordinated debt fully participate in the SLEs'. Finally, paragraph 19 states the following: 'For non-viable banks, SLEs will also need to be used to the full extent to minimise the cost for the taxpayer'.