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(Resolutions, recommendations and opinions)

OPINIONS

EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 20 April 2009

on a proposal for a Council Regulation amending Regulation (EC) No 332/2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments

(CON/2009/37)

(2009/C 106/01)

Introduction and legal basis

On 17 April 2009 the European Central Bank (ECB) received a request from the Council of the European Union for an opinion on a proposal for a Council Regulation amending Regulation (EC) No 332/2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments ⁽¹⁾ (the proposed regulation ⁽²⁾).

The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community because the ECB administers assistance granted under this facility. 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. General observations

The ECB considers that, in the present financial circumstances, non-euro area Member States are more likely to make requests under the medium-term financial assistance facility than was previously envisaged, and their requests for assistance are likely to involve higher amounts than had been anticipated in 2002 when Regulation (EC) No 332/2002 entered into force and in December 2008 when it was amended. Therefore, the ECB is of the opinion that, in view of international economic and financial developments, the potential demand for assistance might exceed the current ceiling of EUR 25 billion, and welcomes the proposed increase in the ceiling to EUR 50 billion so as to enable the Community to accede to potential requests for financial assistance.

In this context, the ECB notes that the procedure foreseen in the proposed regulation must fully comply 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 and 104b(1) of the Treaty ⁽³⁾. In

⁽¹⁾ Regulation (EC) No 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments (OJ L 53, 23.2.2002, p. 1).

⁽²⁾ COM(2009) 169 final.

⁽³⁾ OJ L 332, 31.12.1993, p. 1.

particular, the ECB understands that the increase in the amount of assistance available to EUR 50 billion as envisaged in the proposed regulation will be exclusively financed from the Member States' budgets and that this will not include any bridge financing or refinancing by the European System of Central Banks. In this respect, it is expected that the Community's account at the ECB and the Member States' accounts at national central banks (NCBs) will be fully funded at all relevant times.

2. Specific observations

2.1. Proposed new Article 9a

The ECB fully understands the need to ensure the sound management of Community medium-term financial assistance. Nevertheless, the ECB notes that the proposed new Article 9a could be read to mean that the European Court of Auditors would have the competence to carry out financial audits on the ECB's and NCBs' accounts. The ECB accordingly suggests that, in recognition of the existing legal framework of Article 27 of the Statute of the European System of Central Banks and of the European Central Bank that applies to the ECB and NCBs, the proposed new Article 9a should expressly limit its scope to the Member States receiving Community medium-term financial assistance.

2.2. Requirement to consult the Commission

Article 2 of Regulation (EC) No 332/2002 requires a Member State that has not adopted the euro to consult the Commission if that Member State 'proposes to call upon sources of financing outside the Community which are subject to economic policy conditions'. It is suggested that the phrase 'economic policy conditions' should be amended to make clear that 'economic policy conditions' includes 'ex ante eligibility criteria' which would therefore unambiguously include the type of conditionality that will be used in new-style International Monetary Fund arrangements ⁽¹⁾.

2.3. Availability of Community medium-term financial assistance on a precautionary basis

It is noted that the proposed amended Articles 3(2) and 5(1) of Regulation (EC) No 332/2002 do not contain the references to 'back-up programme' that are contained in the current versions of those Articles. These omissions suggest a change in the scope of applicability of Community medium-term financial assistance in that such assistance would only be available for actual, as opposed to potential, balance of payments problems. In this regard, Article 119(1) of the Treaty expressly refers to assistance being available if a Member State is 'seriously threatened' with difficulties as regards its balance of payments. Article 3(1)(b) of Regulation (EC) No 332/2002 also refers to assistance being available if a Member State is 'seriously threatened' with (as opposed to actually experiencing) difficulties as regards its balance of payments. The references to a 'back-up programme' that are currently contained in Articles 3(2) and 5(1) of Regulation No 332/2002 essentially made provision for a framework within which precautionary assistance could be made available. The references to a 'back-up programme' could be helpfully reinserted into Articles 3(2) and 5(1).

2.4. Nature of the proposed new 'memorandum of understanding'

It would be desirable to enhance consistency in describing the 'memorandum of understanding' that would be required by the proposed new Article 3a. Specifically, recital 2 refers to this memorandum as being 'negotiated', whereas the proposed new Article 3a suggests that the memorandum will be more in the nature of a unilateral document that details 'the conditions laid down by the Council'. Since the wording of Article 3a essentially tracks that of Article 119(2) of the Treaty, it is suggested that recital 2 should be brought into line with the wording of the proposed new Article 3a.

⁽¹⁾ See 'IMF Overhauls Lending Framework', Press Release No 09/85, 24 March 2009, on the International Monetary Fund's website at (<http://www.imf.org>).

3. **Drafting proposals**

Where the above advice would lead to changes in the proposed regulation, drafting proposals are set out in the Annex.

Done at Frankfurt am Main, 20 April 2009.

The President of the ECB
Jean-Claude TRICHET

ANNEX

Drafting proposals

Text proposed by the Commission	Amendments proposed by the ECB
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Amendment 1

Recital 2 of the proposed regulation

<p>'In the light of recent experience gained in the functioning of medium-term financial assistance, the respective tasks and responsibilities of the Commission and the Member States concerned with the implementation of the Regulation should be clarified. In addition, the conditions for granting the financial assistance should be spelled out in a memorandum of understanding to be negotiated between the Commission and the Member State concerned.'</p>	<p>'In the light of recent experience gained in the functioning of medium-term financial assistance, the respective tasks and responsibilities of the Commission and the Member States concerned with the implementation of the Regulation should be clarified. In addition, the conditions for granting the financial assistance should be spelled out presented in a memorandum of understanding to be negotiated between the Commission and the Member State concerned.'</p>
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Justification — See paragraph 2.4 of the opinion

Amendment 2

Recital 4 of the proposed regulation

<p>'Sound management of the Community financial assistance received is of paramount importance. Therefore, the possibility for the European Court of Auditors and the European Anti-Fraud Office to carry out controls when they deem necessary is provided for by the existing loan agreements and should be laid down in this Regulation.'</p>	<p>'Sound management of the Community financial assistance received is of paramount importance. Therefore, the possibility without prejudice to Article 27 of the Statute of the European System of Central Banks and of the European Central Bank for the European Court of Auditors and the European Anti-Fraud Office to carry out controls in the Member State receiving Community medium-term financial assistance when they deem necessary is provided for by the existing loan agreements and should be laid down in this Regulation.'</p>
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Justification — See paragraph 2.1 of the opinion

Amendment 3

Article 2 of Regulation (EC) No 332/2002

<p>'Where a Member State which has not adopted the euro proposes to call upon sources of financing outside the Community which are subject to economic policy considerations, it shall first consult the Commission.'</p>	<p>'Where a Member State which has not adopted the euro proposes to call upon sources of financing outside the Community which are subject to economic policy considerations, including pre-set qualification criteria, it shall first consult the Commission.'</p>
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Justification — See paragraph 2.2 of the opinion

Amendment 4

Article 1(2) of the proposed regulation

<p>'The Member State concerned shall discuss with the Commission an assessment of its financial needs and submit a draft adjustment programme.'</p>	<p>'The Member State concerned shall discuss with the Commission an assessment of its financial needs and submit a draft adjustment or back-up programme.'</p>
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Justification — See paragraph 2.3 of the opinion

Text proposed by the Commission

Amendments proposed by the ECB

Amendment 5

Article 1(4) of the proposed regulation

'1. The Commission shall take the necessary measures to verify at regular intervals, in collaboration with the Economic and Financial Committee that the economic policy of the Member State in receipt of a Community loan accords with the adjustment programme and with any other conditions laid down by the Council pursuant to Article 3. To this end, the Member State shall place all the necessary information at the disposal of the Commission and cooperate in full with the latter.'

'1. The Commission shall take the necessary measures to verify at regular intervals, in collaboration with the Economic and Financial Committee that the economic policy of the Member State in receipt of a Community loan accords with the adjustment **or back-up** programme and with any other conditions laid down by the Council pursuant to Article 3 **and Article 3a**. To this end, the Member State shall place all the necessary information at the disposal of the Commission **and cooperate in full with the latter**.'

Justification — See paragraph 2.3 of the opinion

Amendment 6

Article 1(6) of the proposed regulation

The European Court of Auditors shall have the right to carry out any financial controls or audits that it considers necessary in relation to the management of this assistance. The Commission, including the European Anti-Fraud Office, shall have the right to send its own officials or duly authorised representatives to carry out technical or financial controls or audits that it considers necessary in relation to the management of the Community medium-term financial assistance.'

'**Without prejudice to Article 27 of the Statute of the European System of Central Banks and of the European Central Bank**, the European Court of Auditors shall have the right to carry out any financial controls or audits **in the Member State receiving Community medium-term financial assistance** that it considers necessary in relation to the management of this assistance. The Commission, including the European Anti-Fraud Office, shall **thus** have the right to send its own officials or duly authorised representatives to carry out technical or financial controls or audits that it considers necessary **in Member States receiving** Community medium-term financial assistance in relation to ~~the management of the~~ **that** assistance.'

Justification — See paragraph 2.1 of the opinion