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OPINION OF THE EUROPEAN CENTRAL BANK

of 14 December 2012

on asset management companies

(CON/2012/108)

Introduction and legal basis

On 14 November 2012, 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 (hereinafter the 'draft law') on the legal regime for asset management companies (AMCs).

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 on the third and sixth indents 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 the Banco de España and to rules applicable to financial institutions that 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 and contents of the draft law

1.1 Legal framework

The draft law implements Law 9/2012 of 14 November 2012 on restructuring and resolution of credit institutions², as regards the legal framework for AMCs in general and for the Asset Management Company for Assets Resulting from Bank Restructuring (hereinafter the 'SAREB').

1.2 AMCs' objectives

Article 3 of the draft law provides that AMCs must pursue the following objectives: (i) help restore the financial system by acquiring impaired assets harmful to the credit institutions' balance sheets so that the associated risks are transferred to the AMCs; (ii) minimise public financial support; (iii) pay the debts and obligations incurred in the course of conducting their activities; (iv) minimise potential market distortions resulting from their actions; (v) dispose of the acquired assets in such a way that their value is optimised.

¹ OJ L 189, 3.7.1998, p. 42.

² BOE 275, 15.11.2012.

1.3 *Roles of the Fund for Orderly Bank Restructuring and the Banco de España*

The Fund for Orderly Bank Restructuring (hereinafter the 'FROB') defines the categories of assets to be transferred on the basis of pre-determined qualitative and quantitative criteria. The Banco de España may extend the criteria, define them more precisely and resolve doubts as to the inclusion of an asset in the defined categories. Once the valuation adjustments have been made and the transfer value determined by the Banco de España, the FROB orders the definitive transfer of the assets. The price to be paid for the assets is subject to valuation adjustments and criteria, taking into account whether the assets are listed on an active market and whether they are real estate assets, credit rights or equity instruments. The Banco de España determines the final transfer value on the basis of valuation reports by independent experts in accordance with the valuation criteria set out in the draft law. The transfer value is expressed for each category of assets as a percentage of the book value after applying the required valuation adjustments.

1.4 *Regime applicable to the SAREB*

The draft law also lays down the regime applicable to the SAREB and its separate capital structures, the Bank Asset Funds, to which it may transfer its assets in order to facilitate the divestment procedure.

The SAREB will be incorporated for a maximum period of 15 years as a public limited company with special features deriving from its unique corporate purpose and the public interest nature of its activities. Its only purpose is the holding, direct or indirect management, acquisition and disposal of assets to be transferred to it by credit institutions receiving public support. These institutions receive debt securities issued by the SAREB with a State guarantee as payment for the assets transferred.

The assets to be transferred will include foreclosed assets with a net book value over EUR 100 000 after applying the required adjustments, loans to real estate developers with a net book value over EUR 250 000 after applying the required adjustments, and controlling corporate holdings linked to the real estate sector. The SAREB will have a maximum financial limit of EUR 90 billion.

Public participation in the SAREB will be below 50%, and it will have to meet certain corporate governance requirements. One-third of its Board will be composed of independent members and it will be obliged to establish committees on audit, remuneration, appointments, management, risks, investments and assets and liabilities. The board members of the SAREB will be obliged to meet strict requirements with regard to their professionalism, integrity and relevant experience.

The SAREB will prepare a six-monthly activity report; an independent expert will prepare an annual compliance report on the SAREB; and an external Monitoring Commission will be set up, and may agree to include permanent observers. The Monitoring Commission will oversee compliance with the SAREB's general objectives, including, *inter alia*, helping restore the financial system by receiving the relevant assets so that, from the valuation date, there is an effective transfer of the risks associated with these assets. In this role, the Monitoring Commission will receive the SAREB's activity and compliance reports and may request, and have full access to, information from the SAREB relating to its business plan and deviations from it; policies on divestment and amortisation of guaranteed debt; its economic and financial

situation or forecast; and any other information regarding assets, budget, accounts, organisation or procedures³. Regarding the obligation to give the Monitoring Commission full access to the requested information, the SAREB is subject to a penalty regime under Law 26/1988 of 29 July 1988 on discipline and intervention of credit institutions⁴. In order to facilitate the performance of the Monitoring Commission's functions, the Banco de España and, where appropriate, the National Securities Market Commission, must inform the Monitoring Commission of the main conclusions arising from their supervision of the SAREB⁵.

2. General observations

The draft law implements provisions which have been adopted in the context of the Memorandum of Understanding on Financial-Sector Policy Conditionality for Spain⁶. The ECB welcomes this implementation as an important tool to facilitate the ongoing process of restructuring and recapitalising the Spanish banking sector.

3. Eligibility of SAREB debt securities as collateral in Eurosystem credit operations

The ECB notes that participating banks will receive debt securities issued by the SAREB and guaranteed by Spain. Overall, the issuance of government guaranteed securities should improve the liquidity position of Spanish banks. These securities are structured to meet the conditions set out in Guideline ECB/2011/14 of 20 September 2011 on monetary policy instruments and procedures of the Eurosystem⁷. The ECB would expect that as such the debt securities would be marketable, which could also contribute to increasing the possibility of Spanish banks to refinance themselves in the market. As such, the SAREB scheme is expected to improve the overall funding situation of the Spanish banks. The ECB emphasises that it is the prerogative of the Eurosystem to decide on the basis of any information it may consider relevant within the legal framework laid down in and according to Article 18.1 of the Statute of the European System of Central Banks and of the European Central Bank, whether collateral fulfils the criteria of its collateral framework.

4. ECB's role as observer in the Monitoring Commission

The Eurosystem has an interest in the successful functioning of the SAREB, insofar as the SAREB's State-guaranteed debt securities may be eligible collateral in Eurosystem credit operations. The timely disposal of assets by the SAREB will facilitate the further deleveraging of participating banks' balance sheets, thereby potentially reducing their reliance on Eurosystem credit operations. More generally, by

³ Article 27 of the draft law.

⁴ BOE 182, 30.7.1998.

⁵ Seventh Additional Provision, paragraph 9, of Law 9/2012.

⁶ Available on the European Commission's website at <http://ec.europa.eu>. See paragraphs 9, 21 and 22.

⁷ OJ L 331, 14.12.2011, p. 1.

facilitating the transfer of non-performing assets into a separate institution, asset removal schemes such as the SAREB assist participating banks in restructuring their balance sheets, which should, in turn, improve their financial soundness. By facilitating banking sector restructuring and recovery, albeit by transferring risk from the banking sector to the State, such schemes should positively contribute to banks' ability to extend credit and support economic recovery. In addition, the value of the distressed assets may be better recovered when consolidated and managed by independent specialists.

The ECB is ready to nominate a permanent observer to hold a seat in the Monitoring Commission in accordance with the Eurosystem's contribution, under Article 127(5) of the Treaty, to the smooth conduct of policies pursued by the competent authorities relating to the stability of the financial system. In this respect, the type of information and reporting the SAREB will be required to provide to the Monitoring Commission will need to be further developed and clarified, as the Monitoring Commission can only effectively fulfil its mandate with appropriate reporting from the SAREB.

5. Prohibition on monetary financing

In order to avoid monetary financing concerns, the SAREB should not qualify as a public undertaking within the meaning of Council Regulation 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 Treaty⁸.

6. Scope and capacity of the SAREB

The limitations with respect to the scope and capacity of the SAREB are reasonable and consistent with its viability.

7. Pricing

The methodology applied to derive the prices of assets to be acquired by the SAREB appears appropriate and considered, and should lead to conservative prices, which in turn should minimise the risks to the vehicle in this respect.

8. Vendor financing

The establishment of financing arrangements would greatly facilitate asset disposals by the SAREB. As the SAREB is not a bank, it cannot extend credit to potential buyers to facilitate asset purchases, but will be competing with banks which offer such financing to buyers of foreclosed and distressed assets. The terms of such financing arrangements should be competitive when compared with the terms offered by Spanish banks.

⁸ OJ L 332, 31.12.1993, p. 1.

9. Dividend payments and application of excess cash holdings by the SAREB

The draft law should be complemented by additional arrangements to ensure the timely redemption of State-guaranteed bonds. This may be accomplished by imposing limitations on the payment of dividends by the SAREB and ensuring that all cash held by the SAREB beyond that required for short-term operating and capital expenses and other liquidity needs is applied to the early repayment of the SAREB's State-guaranteed bonds. These arrangements should not affect the pace of deleveraging – i.e. the pace at which assets will have to be disposed of – which will depend on the business plan approved by the SAREB's Board.

10. Potential conflicts of interest

Insofar as the SAREB's capital comes from certain Spanish credit institutions, care will need to be taken to avoid potential conflicts of interest that might arise as these institutions may also have significant interests in the Spanish real estate sector.

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

Done at Frankfurt am Main, 14 December 2012

[signed]

The Vice-President of the ECB

Vítor CONSTÂNCIO