



OPINION OF THE EUROPEAN CENTRAL BANK
of 15 October 2008
at the request of the Irish Minister for Finance
on a draft Credit Institutions (Financial Support) Scheme 2008
(CON/2008/48)

Introduction and legal basis

On 10 October 2008 the European Central Bank (ECB) received a request from the Irish Minister for Finance (hereinafter the ‘Minister’) for an opinion on a draft Credit Institutions (Financial Support) Scheme 2008 (hereinafter the ‘draft scheme’) to be adopted by the Minister by means of a statutory instrument under the provisions of the Credit Institutions (Financial Support) Act 2008 (hereinafter the ‘Act’). On 13 October 2008 the ECB was informally provided by the Irish Department of Finance with an updated version of the draft scheme (hereinafter the ‘updated draft scheme’)¹. The scheme implements the more general rules contained in the recently adopted Act, on which the ECB has been consulted and issued its Opinion CON/2008/44 on 3 October 2008². In accordance with the Act, the Minister may not adopt the scheme until a resolution approving it has been passed by each House of the *Oireachtas* (National Parliament)³. The Minister requested the ECB’s opinion on the scheme as a matter of urgency, prior to its submission to the *Oireachtas*.

The ECB’s competence to deliver an opinion is based on Article 105(4) of the Treaty, in conjunction with 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 provisions⁴, as the scheme relates to a national central bank, the Central Bank and Financial Services Authority of Ireland (hereinafter the ‘Central Bank’), and contains 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 The draft scheme and the updated draft scheme are only referred to specifically in this opinion where a distinction needs to be made between them. Otherwise the legislative provisions to be adopted are referred to as the ‘scheme’.

² See ECB Opinion of 3 October 2008 at the request of the Irish Minister for Finance on a draft Credit Institutions (Financial Support) Bill 2008 (CON/2008/44).

³ See Section 6(5) of the Act.

⁴ OJ L 189, 3.7.1998, p. 42.

1. Purpose of the scheme

- 1.1 The primary objective of the scheme is to provide a legal basis for the Minister to stand as guarantor of the ‘covered liabilities’ of a ‘covered institution’ for the period of two years from 30 September 2008 to 29 September 2010, as a form of financial support provided under the Act⁵. In accordance with the Act, the scheme has been brought forward as the Minister is of the opinion that: (i) there is a serious threat to the stability of credit institutions in Ireland generally, or would be such a threat if he did not provide the financial support; (ii) the provision of the financial support is necessary, in the public interest, for maintaining the stability of the financial system in Ireland; and (iii) the provision of the financial support is necessary to remedy a serious disturbance in the economy of Ireland⁶.
- 1.2 The scheme further specifies the scope of the State’s guarantee by clarifying the means by which credit institutions are covered by the scheme and the types of liabilities of the covered institutions for which the State guarantee will be provided, as further discussed in paragraph 3 of this opinion. A covered institution will be under an obligation to pay a quarterly charge to the State for a guarantee, calculated on the basis of, *inter alia*, its risk profile⁷. The scheme confers extensive powers on the Minister, the Governor of the Central Bank and the Irish Financial Services Regulatory Authority (hereinafter the ‘Regulatory Authority’), as further discussed in paragraph 4 of this opinion.

2. General observations

- 2.1 The ECB notes that there is an ongoing discussion at both the international and European levels with a view to coordinating the many diverse actions of countries aimed at preserving confidence and stability in the international financial markets. In line with the common principles to guide the action of Member States agreed at the Ecofin meeting on 7 October 2008: (i) interventions should be timely and the support should in principle be temporary; (ii) the interests of taxpayers should be protected; (iii) existing shareholders should bear the due consequences of the intervention; (iv) the government should be in a position to bring about a change of management; (v) management should not retain undue benefits; (vi) governments may have, *inter alia*, the power to intervene with regard to remuneration; (vii) legitimate interests of competitors must be protected, in particular through the State aid rules, and negative spill-over effects should be avoided⁸. Moreover, the ECB notes that on 12 October 2008 the Heads of State of the euro area issued a ‘Declaration on a

⁵ See paragraph 9 of the Schedule to the scheme. The scheme does not concern other types of financial support which may be provided by the Minister under the Act, such as, for example, the Minister’s authority to purchase shares in a supported credit institution under Section 6(9) of the Act.

⁶ See paragraph 1 of the Schedule to the scheme.

⁷ The charge is to be credited to a designated account to be maintained at the Central Bank as a reserve for any payments to be made under the scheme (see paragraphs 15A-21 of the Schedule to the draft scheme (paragraphs 16-23 of the Schedule to the updated draft scheme), together with the Annex (Guarantee Charging Model) to the Schedule).

⁸ See the press release of the 2894th Council meeting (13784/08), available on the Council website, www.consilium.europa.eu.

concerted European action plan of the euro area countries⁹, in which they confirmed their commitment to act together in a decisive and comprehensive way in order to restore confidence and proper functioning of the financial system, aiming at restoring appropriate and efficient financing conditions for the economy. They agreed on common principles to be followed by the EU and euro area governments, central banks and supervisors to avoid national measures adversely affecting the functioning of the single market and the other Member States. Against this background, the ECB highlights that all the initiatives put in place by national governments to restore the confidence in financial markets should be aimed at implementing such common principles, in the spirit of close cooperation with other Member States and EU institutions.

- 2.2 The ECB underlines that the recommendations expressed in this opinion in relation to the scheme should be taken together with the recommendations expressed by the ECB in relation to the draft Act in its Opinion CON/2008/44¹⁰. The ECB wishes to draw the consulting authority's attention to the recent ECB opinions issued at the request of other Member States, whereby the ECB has commented on legislative proposals sharing some of the features of the scheme¹¹. It is the ECB's intention to facilitate coordination of the various national efforts addressing the current financial situation, inter alia through timely adoption and publication of ECB opinions on such draft national legislation.

3. Scope of the financial support provided

3.1 *Selection of covered credit institutions*

Under the scheme on which the ECB was originally consulted, the institutions covered are those credit institutions and subsidiaries which the Minister, following a recommendation from the Governor of the Central Bank, specifies by order under the Act as requiring financial support¹². A credit institution joins the scheme by executing a guarantee acceptance deed in the form to be specified by the Minister and, if required by the Minister, its parent or any other group company also executing such a guarantee acceptance deed¹³. A subsidiary of any parent credit institution which is not regulated by the Regulatory Authority may qualify as a 'covered institution', but in the case of a covered institution which is a subsidiary of any non-Irish parent credit institution, the only liabilities covered would be those which relate to the subsidiary's own business¹⁴.

- 3.2 In the context of the above provisions, the ECB notes that on 30 September 2008 the Irish Government announced that it had decided to put in place a two-year guarantee arrangement to

⁹ See the declaration of 12 October 2008, available on the website of the French Presidency at www.ue2008.fr.

¹⁰ See in particular paragraphs 2.3 and 3.2 of Opinion CON/2008/44, as reiterated in paragraphs 3.4 and 3.7 of this opinion.

¹¹ See, e.g. ECB Opinion CON/2008/46 of 8 October 2008 at the request of the Belgian Ministry of Finance on a preliminary draft law on measures promoting financial stability and in particular establishing a State guarantee for the provision of credit in the context of financial stability. All ECB opinions are available on the ECB website at www.ecb.europa.eu/ecb/legal/opinions/html/index.en.html.

¹² See paragraph 3 of the Schedule to the scheme.

¹³ See paragraph 5 of the Schedule to the updated draft scheme.

¹⁴ See paragraph 12 of the Schedule to the updated draft scheme.

safeguard liabilities with six explicitly named Irish credit institutions and such specific subsidiaries as may be approved by the Government following consultation with the Central Bank and the Regulatory Authority¹⁵. The ECB notes that on 9 October 2008 the Minister announced that the two-year scheme would also be available to five explicitly named ‘banking subsidiaries’ in Ireland ‘with a significant and broad-based footprint in the domestic economy’¹⁶. Against this background, the ECB has the following comments.

- 3.3 *First*, the ECB notes that the original proposal whereby the Governor of the Central Bank would be entrusted with the authority to ‘make recommendations’ to the Minister as regards the credit institutions to be covered by the scheme has been modified by the updated draft scheme to the effect that the Minister would instead take a decision to designate those systemically important credit institutions which the Minister specifies require financial support. Given that the purpose of the scheme is to maintain the stability of the Irish financial system, the original proposal to confer this particular role on the Governor would have complemented the Governor’s financial stability role under the Act¹⁷ and, more generally, the Central Bank’s statutes¹⁸. The Governor’s financial stability role at domestic level also facilitates the discharge of his responsibilities as a member of the ECB’s Governing Council to contribute to the stability of the wider European and global financial systems under Article 105(5) of the Treaty. The ECB would have a preference to revert to the original proposal and in any case ensure a proper involvement of the Governor when taking any decision under the scheme with a bearing on financial stability, including all decisions by the Minister to revoke the guarantee in whole or in part in relation to a credit institution.
- 3.4 *Second*, the ECB reiterates the stance taken in its previous opinion, according to which arrangements which may be seen as providing preferential treatment to specified credit institutions should be avoided¹⁹. In this respect, the ECB appreciates the provision of the scheme stating that it is introduced by the Minister having regard to the objective of ensuring compliance with the requirements of EU State aid and competition law²⁰, as well as the statements made in the explanatory memorandum to the effect that the scheme is designed to ensure that the covered institutions will not be unfairly advantaged by making undue use of their guaranteed status to engage in a heightened level of activities which create market distortions and facilitate abnormal

¹⁵ See the 30 September 2008 press release, available on the Department for Finance’s website at www.finance.gov.ie. Cf. paragraph 19 of ECB Opinion CON/2008/44.

¹⁶ See the 9 October 2008 press release, available on the Department for Finance’s website at www.finance.gov.ie.

¹⁷ See the list of the Governor’s relevant powers in paragraph 3.1 of ECB Opinion CON/2008/44.

¹⁸ The financial stability powers of the Governor under the Central Bank Acts include: (i) expressing agreement to actions by the Regulatory Authority on any matter relating to the financial stability of Ireland’s financial system, including (but not limited to) the issue, revocation and suspension of a license or other authority; (ii) authorising investigations and on-site inspections of licensed credit institutions; (iii) the issuance of guidance as to policies and principles that the Regulatory Authority is required to implement in performing the Central Bank’s functions; and (iv) requesting the Regulatory Authority’s advice, information and assistance. See Sections 33C(1)(c), 33C(8), 33C(9), 33C(9A), 33C(9B) and 33D(1)-(2) of the Central Bank Act 1942; Section 17A of the Central Bank Act 1971; Section 41 of the Central Bank Act 1989.

¹⁹ See paragraph 2.3 of ECB Opinion CON/2008/44.

²⁰ See paragraph 2, fourth bullet point, of the Schedule to the draft scheme (paragraph 2.5 of the Schedule to the updated draft scheme).

balance sheet growth²¹. In this regard, the ECB underlines the importance of establishing appropriate safeguards such as for example limits to marketing of financial products or limits to expansion of activities on the basis of the state guarantees²².

- 3.5 The ECB understands that the Commission has confirmed the compatibility of the guarantee arrangement proposed by the Irish Government with Community State aid rules²³. The ECB reiterates the importance of ensuring that the further regulatory practice under the proposed arrangements will be conducted in full compliance with the relevant Community law provisions, in particular as regards competition and State aid rules, as well as EU financial services legislation and the single market principles²⁴.

3.6 *Types of liabilities covered by the guarantee*

Under the scheme ‘covered liabilities’ are defined as those liabilities of covered institutions existing on 30 September 2008 or at any time thereafter up to and including 29 September 2010 in respect of: (i) all retail and corporate deposits (to the extent not covered by existing deposit protection schemes in Ireland or any other jurisdiction); (ii) interbank deposits; (iii) senior unsecured debt; (iv) covered bonds; and (v) dated subordinated debt (Lower Tier 2)²⁵. In the case of a covered institution which is a subsidiary of any non-Irish parent credit institution, the only covered liabilities would be those which relate to the subsidiary’s own business and in respect of which there is no recourse to any other entity (and would not include liabilities which, in the absence of the guarantee, would normally be those of other members of the covered institution’s group)²⁶.

- 3.7 As a further comment as regards the scope of coverage of the State guarantee, the ECB notes that, in line with the declaration made by the euro area Heads of State mentioned before, Member States have to act in coordinated manner to avoid that significant differences in national implementation could have a counter-productive effect, creating distortions in global banking markets. The euro area Heads of State also acknowledged the need to work in cooperation with the ECB so as to ensure consistency with the management of liquidity by the Eurosystem and compatibility with the operational framework of the Eurosystem. Against this background, the ECB notes that uncoordinated decisions to guarantee interbank deposits in some Member States should be avoided as they may involve a fragmentation of the euro area money market. The extension of the guarantee

21 See the Explanatory Memorandum Relating to a Scheme Dated X day of October 2008, pp. 2-4.

22 See in particular the safeguards introduced by paragraph 36 of the updated draft scheme.

23 See the Commission press release IP/08/1497 of 13 October 2008. The non-confidential version of the Commission’s decision will be made available under Case NN 48/2008. The Commission took account, in particular of the provision of the updated draft scheme stating that the Minister may review and vary the scheme at no later than six-month intervals, and the results of such review will be provided to the Commission (see paragraph 8 of the Schedule to the updated draft scheme). See also ‘Communication from the Commission – The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis’ of 13 October 2008, available at the Commission’s website at www.ec.europa.eu.

24 Cf. paragraph 2.3 of ECB Opinion CON/2008/44.

25 See paragraph 10 of the Schedule to the scheme.

26 See paragraph 12 of the Schedule to the updated draft scheme.

to cover interbank deposits, as is the case under the scheme²⁷, could entail a substantial distortion in the various national segments of the euro area money market by potentially increasing short-term debt issuance activity across Member States and therefore impairing the implementation of the single monetary policy, which is a competence of the Eurosystem under Article 105(2) of the Treaty. The ECB also notes that the summit declaration states that the euro area Governments would make available a Government guarantee of new medium term (up to 5 years) bank senior debt issuance, whereas the scheme proposes to cover senior unsecured debt and asset covered securities, without limitation as to maturity, and dated subordinated debt (Lower Tier 2)²⁸.

- 3.8 The draft scheme on which the ECB was formally consulted indicates that it remains to be clarified whether the covered liabilities would exclude any inter-group lending and any debt due to the ECB²⁹. The exclusion of debts due to the ECB from the liabilities covered by the guarantee under the scheme would be incongruous, however. Under the Act the borrowings, liabilities and obligations of any credit institution or subsidiary in respect of which the Minister may provide financial support include borrowings, liabilities and obligations to the Central Bank³⁰. This would imply that the following liabilities to the Central Bank would be covered liabilities under the scheme: (i) deposits made by the Central Bank with covered Irish credit institutions as part of the Central Bank's investment operations; and (ii) senior unsecured debt securities and covered bonds issued by Irish credit institutions covered by the scheme and held by the Central Bank as collateral in the Central Bank's Eurosystem monetary policy and intra-day credit operations³¹. By contrast, deposits made by the ECB with these same Irish credit institutions as part of the ECB's investment operations would not be covered liabilities under the scheme. As a practical matter, this would, in all probability, provide a strong incentive to the ECB to refrain from making deposits with such Irish credit institutions in the future, since the ECB could no longer rely on the normal credit ratings attributed to exposures with these Irish banks, which would be based on the presence of the Minister's guarantee³².
- 3.9 The ECB further understands that because of the abovementioned inclusion of covered institutions' liabilities towards the Central Bank within the scope of the State guarantees provided under the scheme³³, the Central Bank may find itself in a situation where it is lending to a credit institution against collateral which may, at least partially, take the form of a guarantee provided by the State.

²⁷ See paragraph 10, second bullet point of the draft scheme and paragraph 10.2 of the Schedule to the updated draft scheme.

²⁸ See paragraph 10, third, fourth and fifth bullet points of the draft scheme and paragraph 10.3-10.5 of the Schedule to the updated draft scheme.

²⁹ See paragraph 10 of the Schedule to the draft scheme.

³⁰ See Section 6(2) of the Act.

³¹ Any secured lending by the Central Bank to covered institutions, e.g. as part of the Central Bank's Eurosystem credit or emergency lending operations would not appear to be covered by the scheme.

³² If the intention behind this proposal was to exclude obligations arising out of Eurosystem monetary policy and intraday credit operations, care would need to be taken that such an exclusion did not also require a reappraisal of the eligibility of senior unsecured debt securities and covered bonds issued by Irish credit institutions covered by the scheme in connection with the collateralisation of Eurosystem credit operations.

³³ See Section 6(2) of the Act.

Such central bank lending to a solvent credit institution on the basis of a State guarantee is, in principle, possible, provided that the Central Bank's compliance with the monetary financing prohibition under Article 101 of the Treaty is ensured. Specific criteria for such compliance must be respected as noted by the ECB in a recent opinion issued with respect to another EU jurisdiction which has legislated in response to the current market turmoil³⁴. In this opinion, the ECB underlines its earlier recommendation that nothing in the legal framework governing the provision of financial support by the Irish authorities should prejudice the Central Bank's compliance with the prohibition on monetary financing under Article 101 of the Treaty³⁵.

- 3.10 Finally, as regards the payment of the claims in respect of covered liabilities, the ECB highlights that in general the existing funding mechanism of the deposit-guarantee scheme should be used to the extent possible. In this respect, in fact, the ECB notes that the scheme covers all retail and corporate deposits to the extent they are not covered by existing protection schemes in the State or any other jurisdiction³⁶. However, the ECB notes that the relationship between the scheme and the existing deposit guarantee scheme as regards the treatment of claims and the reimbursement of deposits should be further clarified.

4. Allocation of supervisory powers related to provision of financial support

- 4.1 The scheme confers extensive powers on the Minister, the Governor of the Central Bank and the Regulatory Authority, which are divided as follows.
- (i) The Minister has the power to: (i) impose specific obligations on covered institutions which are subsidiaries of non-Irish parent credit institutions to ensure that the scheme is not used for the benefit of any entity other than the relevant covered institution³⁷; (ii) in consultation with the relevant overseas regulator (subject to the requirements of the Treaty and the ESCB Statute), require certain obligations of the scheme to apply to the parent of a covered institution or any member of its group³⁸; (iii) receive confirmations from covered institutions regarding compliance with relevant regulatory standards³⁹ and (through covered institutions' auditors) with the conditions of the scheme⁴⁰; (iv) direct, following consultation with the

³⁴ See paragraph 4.3 of ECB Opinion CON/2008/46. This opinion specified the following criteria under which a central bank may engage in lending to a solvent credit institution on basis of a collateral in the form of a State guarantee: (i) the central bank needs to independently exercise full discretion regarding the decision whether to extend emergency liquidity assistance; (ii) it should be ensured that the credit provided by the central bank is as short term as possible; (iii) there must be systemic stability aspects at stake; (iv) there must be no doubts as to the legal validity and enforceability of the State guarantee under applicable national law; and (v) there must be no doubts as to the economic adequacy of the State guarantee, which should cover both principal and interest on the loans, thus fully preserving the financial independence of the central bank.

³⁵ See paragraph 3.2(iii) of ECB Opinion CON/2008/44.

³⁶ See paragraph 10, first bullet point of the Schedule to the draft scheme (paragraph 10.1 of the Schedule to the updated draft scheme).

³⁷ See paragraph 11 of the Schedule to the draft scheme (paragraph 12 of the Schedule to the updated draft scheme).

³⁸ See paragraph 50 of the Schedule to the scheme.

³⁹ For example, the Irish Bankers' Federation Code of Practice on Mortgage Arrears and the Regulatory Authority's Consumer Protection Code (see paragraph 24 of the Schedule to the draft scheme (paragraph 26 of the Schedule to the updated draft scheme)).

⁴⁰ See paragraph 25 of the Schedule to the draft scheme (paragraph 27 of the Schedule to the updated draft scheme).

Governor and the Regulatory Authority, a covered institution to submit a restructuring plan to ensure compliance with the objectives of the scheme⁴¹; (v) direct a covered institution to appoint non-executive directors to its board from a panel approved by the Minister and admit observers appointed by the Minister to observe the meetings of the internal committees of the covered institution⁴²; (vi) direct a covered institution to take specified steps to restructure its executive management responsibilities, strengthen its management capacity and improve its corporate governance⁴³; (vii) impose sanctions on the covered institution, if in the opinion of the Minister it is in material breach of its obligations under the scheme⁴⁴; (viii) following consultation with the Governor and the Regulatory Authority, prevent a covered institution from acquiring shares in any other credit or financial institution, establishing any subsidiaries or entering into or acquiring any new business where this would increase the State's liability under the guarantee⁴⁵; (ix) following consultation with the Governor and the Regulatory Authority, make rules governing the payment of dividends by a particular covered institution⁴⁶; (x) establish an independent oversight committee to impose controls on the executive remuneration of covered institutions⁴⁷; and (xi) in the event of any default of a covered institution which creates a liability on the State, direct the covered institution concerning its business and corporate structures⁴⁸.

- (ii) The Governor of the Central Bank has powers to: (i) together with the Regulatory Authority, set regulatory requirements for the covered institutions⁴⁹; (ii) together with the Regulatory Authority and following the consultation with the Minister, require a covered institution to conduct its affairs in a manner that progressively reduces the risk to the State under its Guarantee⁵⁰. Further, the Governor may be consulted by the Minister regarding institutions to be covered under the scheme⁵¹. The Governor is also consulted by the Minister before the Minister exercises any functions under the scheme which relate to the Governor's statutory

41 See paragraph 26 of the Schedule to the draft scheme (paragraph 28 of the Schedule to the updated draft scheme).

42 See paragraph 30 of the Schedule to the draft scheme (paragraph 32 of the Schedule to the updated draft scheme).

43 See paragraph 34 of the Schedule to the scheme. A similar power may be exercised by the Regulatory Authority.

44 See paragraph 35 of the Schedule to the scheme. Acting in this capacity, the Minister may increase the charge payable by the institution, impose additional conditions or revoke the institution's guarantee.

45 See paragraph 36 of the Schedule to the draft scheme (paragraph 38 of the Schedule to the updated draft scheme).

46 See paragraph 41 of the Schedule to the draft scheme (paragraph 42 of the Schedule to the updated draft scheme). The rules concerning payment of dividends should take into account the objective of achieving or maintaining required capital ratios.

47 See paragraphs 46-49 of the Schedule to the scheme.

48 See paragraph 53 of the Schedule to the draft scheme (paragraph 53.4 of the Schedule to the updated draft scheme), which also provides that any restructuring plan drawn up for a covered institution in such a case should be notified to the European Commission and should comply with EU State aid and competition law.

49 See paragraph 4 of the Schedule to the scheme.

50 See paragraph 37 of the Schedule to the scheme. The Governor may in particular require a covered institution to: (i) appropriately manage its balance sheet in a manner consistent with the purposes of the Act and the need to avoid significant distortion of financial flows; (ii) put in place improved structures to ensure long-term stability of funding; (iii) take steps to restructure its executive management responsibilities and strengthen its management capacity and corporate governance; (iv) improve liquidity, solvency and capital ratios in circumstances where this is required; and (v) take measures to minimise any risk of recourse to the guarantee.

51 See paragraph 3 of the Schedule to the updated draft scheme.

responsibilities⁵², as well as with respect to the exercise of certain more specific powers of the Minister under the scheme⁵³. The Governor monitors, together with the Regulatory Authority's Chief Executive, the operation of the scheme and reports regularly to the Minister thereon⁵⁴.

- (iii) The Regulatory Authority, apart from the abovementioned functions performed jointly with the Governor: (i) receives (on behalf of the Minister) from the covered institutions reports, addressing their key supervisory parameters⁵⁵ and submits to the Minister reports on the compliance by covered institutions with the terms and conditions of the scheme⁵⁶; (ii) after consultation with the Minister, may require a covered institution to establish appropriate funding structures⁵⁷; (iii) if so directed by the Minister, may require any report or other information to be provided by a covered institution to be audited by an independent auditor⁵⁸; (iv) is consulted by the covered institutions towards developing a code of practice for effective risk management, in furtherance of the purposes of the Act⁵⁹; (v) may, following consultation with the Minister, require changes in the composition of a covered institution's board in order to achieve an appropriate balance between executive and non-executive directors⁶⁰; and (vi) may, after consultation with the Minister, require changes in the specific elements of the commercial conduct of the covered institution⁶¹.

- 4.2 On the one hand, the ECB welcomes those provisions of the draft scheme that allow the Governor to be involved in the exercise of the Minister's powers under the Act and the scheme for purposes of maintaining the stability of the Irish financial system. Moreover, the ECB welcomes the express safeguards introduced under the draft scheme as regards the role of the Governor, in particular the clarifications that: (i) nothing in the scheme shall prejudice the independence of the Governor⁶²; (ii) the Governor's authority to disclose information concerning a covered institution or its subsidiaries to the Minister and the Regulatory Authority is subject to the confidentiality

52 See paragraph 51 of the Schedule to the scheme.

53 See consultation powers given to the Governor under paragraphs 13, 26, 36, 39 and 41 of the Schedule to the draft scheme (the Schedule to the updated draft scheme provides for such consultation powers in four cases, referred to in paragraphs 13, 28, 38 and 42).

54 See paragraph 52 of the Schedule to the scheme.

55 See paragraph 22 of the Schedule to the draft scheme (paragraph 24 of the Schedule to the updated draft scheme). The parameters in question include, inter alia, liquidity requirements, capital ratios, asset quality, risk exposures and funding costs.

56 See paragraph 23 of the Schedule to the draft scheme (paragraph 25 of the Schedule to the updated draft scheme).

57 See paragraph 40 of the Schedule to the updated draft scheme.

58 See paragraphs 25 and 27 of the Schedule to the draft scheme (paragraphs 27 and 29 of the Schedule to the updated draft scheme).

59 See paragraphs 29 of the Schedule to the draft scheme (paragraph 31 of the Schedule to the updated draft scheme).

60 See paragraph 33 of the Schedule to the scheme.

61 See paragraphs 38, 40, 43 and 44 of the Schedule to the draft scheme (paragraphs 36, 39, 41 and 44 of the Schedule to the updated draft scheme). The elements of commercial conduct to be regulated by the Regulatory Authority under these provisions include: (i) targets on loan/deposit ratios, wholesale funding/total liabilities, deposit growth and maximum loans-to-value on new loans; (ii) limitations on exposures to any sector, customer or connected customers; (iii) liquidity, solvency and capital ratios; (iv) restrictions in relation to market share and balance sheet growth introduced to minimise any potential competitive distortion that may otherwise arise; (v) directions for the covered institution to cease passing on the costs of the guarantee to its customers in an unwarranted manner.

62 See paragraph 51 of the Schedule to the scheme.

requirements imposed on the Governor by the Treaty and the ESCB Statute⁶³; and (iii) the Governor's monitoring and regular reporting to the Minister regarding the operation of the scheme is without prejudice to the Governor's responsibility for the performance of functions conferred on the Governor and the Central Bank under the Treaty and the ESCB Statute⁶⁴. These provisions satisfactorily incorporate, as far as the draft scheme is concerned, the recommendations made in this respect in the recent ECB opinion on the Act⁶⁵.

- 4.3 On the other hand, the ECB notes that the division of responsibilities to be performed in the implementation of the scheme by the Minister, the Governor and the Regulatory Authority provides the Minister with substantive powers to review, direct or otherwise influence the conduct of the credit institutions concerned. The ECB appreciates that the Minister must protect the financial interests of the Irish taxpayer⁶⁶. However, the ECB would also wish to draw attention in this context to the principle of operational independence of banking supervisors, which are to pursue supervisory objectives free from political pressure, which is an internationally recognised supervisory standard specified in the Basel Core Principles for Effective Banking Supervision⁶⁷. In line with its previous opinions⁶⁸, the ECB recommends that the allocation of powers related to the operation of the scheme be reconsidered, with a view to assigning to the Regulatory Authority and/or the Governor those powers under the scheme that are closely connected with the performance of supervisory tasks.
- 4.4 As a general remark, the ECB notes that the powers conferred under the scheme could be defined in a more coherent way. For example, in the updated draft scheme there appears to be an overlap between the two separate references to the functions of requiring the covered institution to 'put in place improved structures to ensure long-term stability of funding'⁶⁹ or to 'restructure its executive management responsibilities, strengthen its management capacity and improve its corporate governance'⁷⁰. Also, a greater consistency in the method of allocating the various powers under the

⁶³ See paragraph 28 of the Schedule to the draft scheme (paragraph 30 of the Schedule to the updated draft scheme).

⁶⁴ See paragraph 52 of the Schedule to the scheme.

⁶⁵ See paragraph 3.2 (i)-(ii) of ECB Opinion CON/2008/44.

⁶⁶ See paragraph 2, first and fourth bullet point of the Schedule to the draft scheme (paragraph 2.6 of the Schedule to the updated draft scheme).

⁶⁷ See the Basel Committee on Banking Supervision, 'Core Principles for Effective Banking Supervision', September 1997, principle I, document available on the Bank for International Settlements website, www.bis.org.

⁶⁸ See, e.g. paragraph 3.2.1 of ECB Opinion CON/2006/15 of 9 March 2006 at the request of the Polish Minister of Finance on a draft law on the supervision of financial institutions.

⁶⁹ Under paragraph 37.2 of the updated draft scheme 'the Governor and the Regulatory Authority, after consultation with the Minister' may direct the covered institution to '[p]ut in place improved structures to ensure long-term stability of funding', while under paragraph 40 of the Schedule to the updated draft scheme states that 'Unless it has already done so, a covered institution shall take steps to establish such funding structures as the Regulatory Authority, in consultation with the Minister, thinks appropriate having regard to the purposes of the Act of 2008, within such period as the Minister may direct'.

⁷⁰ Under paragraph 34 of the Schedule to the updated draft scheme, this power is assigned to 'the Minister or the Regulatory Authority or both', whereas under paragraph 37.3 of the Schedule to the updated draft scheme the power is attributed to 'the Governor and the Regulatory Authority, after the consultation with the Minister'.

draft scheme could be ensured⁷¹. The ECB recommends that a more coherent delineation of the powers of the respective supervisory authorities is introduced.

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

Done at Frankfurt am Main, 15 October 2008.

[signed]

The Vice-President of the ECB

Lucas D. PAPADEMOS

⁷¹ For example, paragraph 42 of the updated draft scheme provides that the power to limit the payment of dividends by the covered institution is to be exercised by the Minister after consulting the Governor and the Regulatory Authority, while the similar power under paragraph 43 of the updated draft scheme to prohibit the covered institution from engaging in buy-backs or redemptions of its ordinary shares is to be exercised by the Regulatory Authority after consulting the Minister.