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**Subject: State aid NN 54/B/2008 (ex-CP 277/2008) – Spain
Corrigendum to the Guarantee scheme for credit institutions in Spain**

Sir,

I. PROCEDURE

1. On 14 October 2008, the Spanish authorities notified the Royal Decree-Law 7/2008 *de Medidas Urgentes en Materia Económico-Financiera en relación con el Plan de Acción Concertada de los Países de la Zona Euro* establishing a guarantee scheme for credit institutions in Spain.
2. On 15 October 2008, the Commission sent via electronic messaging a list of questions concerning the precise features of the measure.
3. By letter dated 12 November 2008, the Spanish authorities forwarded the draft implementing Ministerial Order.
4. On 14, 26, 27 November, 1, 3, 4, 5, 9, 10 and 11 December 2008, the Commission requested further information by electronic messaging. The Spanish authorities responded on 20, 25, 27 November, 2, 8, 9, 11 and 15 December 2008.

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5. On 15 December 2008, the Spanish authorities submitted a draft modification to the Ministerial Order EHA/3364/2008 dated 21 November 2008.
6. Already on 31 October 2008, the Spanish authorities forwarded a reasoned letter of the Governor of the Central Bank of Spain confirming the existence of an exceptional disturbance in the financial sector and the economy as a whole and the need for a guarantee scheme for new senior debt issuance.
7. By letter dated 17 December, registered on 18 December 2008, the Spanish authorities submitted a list of commitments, thus completing the notification.

II. DESCRIPTION

1. The objective of the measure

8. In response to the ongoing exceptional turbulence in world financial markets, Spain intends to bring forward a measure designed to preserve stability to the financial system and to remedy a serious disturbance to the economy in Spain. In particular, the measure aims at limiting the risks and re-establishing confidence in the financing mechanism of credit institutions and to increase lending to businesses and households.

2. The beneficiaries

9. The institutions eligible for the guarantee scheme are:

- a) credit institutions;
- b) consolidated groups of credit institutions (see point 12 below);
- c) pools of credit institutions. (see point 13 below).

Branches of foreign credit institutions are excluded from the scheme. Subsidiaries of foreign credit institutions are included, subject to the same requirements than Spanish credit institutions.

10. Moreover, the Spanish authorities undertake to grant guarantees only to those credit institutions being sufficiently capitalised in line with the national legislation¹.
11. In order to have access to the guarantee scheme, the credit institutions need to comply with the following criteria:
 - a) be registered in Spain;
 - b) have a share of at least 1/1000 of the credit market²;
 - c) having issued since 13 October 2003 (exactly five years before the entry into force of the

¹ Law (*Ley*) 36/2007 dated 16 November 2007, modifying Law 13/1985 dated 25 May 1985, and Royal Decree (*Real Decreto*) 216/2008 dated 15 February 2008.

² In particular, this refers to the epigraph "2.4 Loans and credits. Other sectors" ("*2.4. Préstamos y créditos. Otros sectores*") of the Statistic Bulletin of the Bank of Spain from September 2008.

Royal Decree-Law – see chapter 4 “Legal basis of the scheme”) instruments similar to the ones covered by the present guarantee scheme.

12. Consolidated groups of credit institutions shall prepare one single request. In order to comply with the condition mentioned under point 11 a) above, it is sufficient that one subsidiary is registered in Spain. Similarly, in order to comply with the condition mentioned above under point 11 c) above, it is sufficient that one subsidiary has issued these qualifying instruments. The condition mentioned under point 11 b) above is applicable to the group as a whole. The applying entity will be the Spanish deposit bank having the highest rating and the guarantee will exclusively cover its emissions. However, only the market share of those entities being registered in Spain will be taken into account as regards eligibility. As an exception, a credit institution belonging to a consolidated group and fulfilling the conditions mentioned above under 11 a) and c) will be able to apply separately for a guarantee, if it has a market share of at least 5/1000.
13. If Spanish credit institutions systematically transfer its liquidity management by contract to another entity, they will be able to group their application. The condition mentioned under 11 b) will be assessed at pool level, whereas condition 11 c) shall be fulfilled exclusively by the liquidity management entity. The liquidity management entity shall apply for the pool of credit institutions and will be the only one allowed to issue guaranteed emissions.
14. Credit institutions, consolidated groups and pools of credit institutions eligible for the guarantee are able to cumulate their market share with that of another credit institution not fulfilling the conditions mentioned under 11 b) or c) for reaching eligibility to the scheme, if there is a prior agreement between the parties. This measure will allow small credit institutions to participate in the guarantee scheme.

3. Description of the measure

15. The scheme provides for State guarantees covering new issuance of instruments referred to in point 17 below by credit institutions resident in Spain up to an amount of 100 billion € which can be increased, if the Spanish authorities consider it necessary given market conditions, up to 200 billion € distributed equally over the annual budget of 2008 and 2009.

Characteristics of the guarantee

16. The guarantee will be granted under the following conditions:
 - a) once the administrative procedures³ mentioned under point 7.2 of the Ministerial Order (see chapter 4 Legal basis of the scheme) are fulfilled, the guarantees will be granted irrevocably and unconditionally;

³ These procedures include that the issuing entity communicates to the Directorate General of the Treasury and Financial Policy the details of the emission, which will be assessed before the green light is given to the entity. After the emission, the entity will communicate it to the Directorate General of the Treasury and Financial Policy and the National Commission of the Securities Market and will apply for a quotation at a Spanish official secondary market. Then, the Directorate General of the Treasury and Financial Policy will verify that the characteristics of the emission correspond with the indicated ones. In the end, the National Commission of the Securities Market will admit the issued securities to trading.

- b) waiver of the *beneficium excussionis*⁴;
- c) the guarantee will cover the principal of the credit and the interest. In case the emissions are made in a foreign currency, the order of granting the guarantee will establish mechanisms to minimize the foreign currency risk the State might take;
- d) a market oriented premium will be charged for each guarantee (see points 23-25 below);
- e) the guarantor can be called for the guaranteed obligations on the date of the guarantee obligation including both the principal and the interest ordinary;
- f) the guarantee will have no legal force, if the characteristics of the underlying financial instruments are modified, unless the guarantor gives a previous written consent.

Financial instruments to be covered by the guarantee

17. The financial instruments to be guaranteed comprise emissions of notes (*pagarés*), bonds (*bonos*) and obligations (*obligaciones*) admitted to the official secondary markets in Spain. Spain confirmed that the securitization note, subordinated debt are not eligible instruments. The Royal Decree-Law (see chapter 4 Legal basis of the scheme) foresees to possibly extend these to other financial instruments, such as interbank deposits, in the framework of an aligned action of the governments belonging to the euro zone. However, the implementing Ministerial Order (see chapter 2.4 of the Ministerial Order), on which the notification is based upon, discards interbank deposits, as well as options, derivatives and other instruments for which the amount of risk might be difficult to assess by the guarantor.
18. The financial instruments can be issued through individual operations or emission programmes limited to new senior debt. Further, subordinated debt is excluded and the instruments must not be covered by other types of guarantees.
19. The maturity of the financial instruments will be of between three months and three years. In exceptional circumstances, instruments may be guaranteed with a maturity of 5 years, subject to a report from the Bank of Spain. The Spanish authorities commit to notify individually to the Commission the cases, in which the financial instruments have a maturity exceeding 3 years.
20. The interest rate can be fixed or variable and must be placed within the market yield of emissions and issuers with similar characteristics, as well as in line with prior emissions of the same issuer. The principal needs to be re-paid in one payment.
21. The minimum nominal value of each emission has to be at least of 10 million €

Guarantee premium

22. The State will receive income from granting the guarantees, in form of the fee charged. According to the Spanish authorities, the commission shall reflect the risk that the State assumes in each operation under current market conditions.

⁴ According to the Spanish authorities, the waiver of the *beneficium excussionis* (embodied in Article 1.830 of the Spanish Civil Code) is a common clause to State guarantees. The *beneficium excussionis* refers to the right or benefit of the guarantor not to be compelled to pay as long as the principal has enough property.

23. For the liabilities covered by the State guarantee, Spain devised a fee structure, which is based on the "Recommendations on government guarantees on bank debt" of the European Central Bank (hereinafter "ECB recommendations" of 20 October 2008. The commissions will be paid for each operation at the moment of their emission:
1. Emissions with a maturity of a year or less: a fixed annual guarantee premium of 50 basis points calculated on the nominal value;
 2. Emissions exceeding a maturity of a year: a fixed annual fee of 50 basis points plus the variable fee corresponding to the relevant Credit Default Swap (CDS). The variable fee will be calculated as follows:
 - a) For credit institutions with representative CDS, it will be the lower of the following two values:
 - the median value of the 5 year CDS spread for the credit institution calculated during the period between 1 January 2007 and 31 August 2008.
 - the median value of the 5 year CDS spread during the same period as above, depending on the relevant rating category of the bank concerned based on a representative sample of large banks in the euro zone. The median will be of 36,5 bp annually, if the credit institutions have a rating of double A and 44,8 bp if they are rated simple A.
 - b) For credit institutions with a rating, but without a representative CDS spread:
 - the median value of the 5 year CDS spread during the same period as above, depending on the relevant rating category. The median will be of 36,5 bp annually for credit institutions having a rating of double A and 44,8 bp, if they are rated simple A.
 - c) For other credit institutions:
 - the median value of the 5 year CDS spread for the lowest rating category during the same period as above. The lowest rating category is to be considered simple A, for which the median will be 44,8 bp plus an annual add-on fee of 10 bp.
24. The present commissions may be modified by the Directorate General of the Treasury and Fiscal Policy in an aligned action between the Member States of the euro zone.
25. The guarantees will be granted by the Minister of Economic Affairs and Finance according to the General Budget Law.

Applications

26. Credit institutions wishing to obtain a guarantee for their instruments have to apply at the Directorate General of the Treasury and Financial Policy. The applications for the year 2008 should be submitted before the 3 December 2008. A supplementary window will be opened between the 24 and the 29 December at 14:00. The deadline for 2009 will be established by the Directorate General of the Treasury and Financial Policy. With the exceptions mentioned above under points 12 and 13, not more than one application can be presented per credit institution, consolidated group or pool of credit institutions.

27. The applications shall contain the following information:
- a) identification of the credit institution;
 - b) amount of the guarantee asked for;
 - c) credit market share (see footnote 1). In case of being a consolidated group or a pool of credit institutions, the total market share of the group/pool and the individual ones per credit institution need to be mentioned;
 - d) a list of the emissions placed since 13 October 2003 for the securities that figure in the guarantee (plus indication of the International Securities Identification Number (ISIN) code, amount of the emission, term and interest rate).

Criteria for granting the guarantee

28. The Minister for Economic Affairs and Finance will allocate for each eligible credit institution, consolidated group or pool the maximum amount that can be guaranteed in direct proportion to its market share defined in the above mentioned epigraph 2.4 of the Statistic Bulletin from the Bank of Spain of September 2008. Nevertheless, in line with Article 118 of the Law 47/2003 of 26 November 2003, it will be possible to limit the amount to reduce the risk involved with granting the guarantee, in particular as it regards the solvency requirements as mentioned under point 11. The Minister for Economic Affairs and Finance is able to ask for the reports considered necessary for verifying the fulfilment of the established criteria.

Conditions attached to the granting of a guarantee

29. Participation in the guarantee scheme is voluntary. The order to grant a guarantee to a credit institution, consolidated group or pool will be communicated to each party concerned. The guarantees which affect the 2008 budget will be granted before the 31 December 2008. The corresponding emissions to be effected 15 December 2009⁵ (notwithstanding, the issuance window covered by the present decision ends on 30 June 2009 - see commitment under point 33. The guarantee will not be effective until the corresponding emission has been realized. The deadline for guarantees granted in 2009 will be established by the Directorate General for the Treasury and Financial Policy.
30. If the guarantee is activated, the Directorate General of the Treasury and Financial Policy will communicate it to the Bank of Spain and adopt the appropriate measures mentioned in the Law 26/1988 dated 29 July 1988 about Discipline and Intervention of Credit Institutions.

4. Legal basis of the scheme

31. The scheme is based on Royal Decree-Law (*Real Decreto-Ley*) 7/2008 adopted on 13 October 2008, and the implementing provision regarding Article 1 of the Royal Decree-

⁵ This date is a proposed modification to the Ministerial Order EHA/3364/2008, as put forward by the Spanish authorities on 15 December 2008. The new Ministerial Order is scheduled to be signed on 23 December 2008 and published on 24 December 2008. If the new Ministerial Order differs materially from the information as provided by the Spanish authorities, then the present Commission Decision may have to be revoked in line with Article 9 of the Council Regulation (EC) No 659/1999 of March 1999 (OJ L 83, 27.3.1999, p. 1).

Law: the Ministerial Order EHA/3364/2008 adopted on 21 November 2008 and published on 24 November 2008, as well as the proposed modification, which will be adopted on 23 December 2008 (see footnote number 5). The recapitalisation measure, foreseen in Article 2 of the Royal Decree-Law, was not developed in the present Ministerial Order. Furthermore, Law 30/1992 dated 26 November 1992⁶ and the Law 47/2003 dated 26 November 2003⁷ apply.

5. Duration of the schemes, monitoring and reports

32. The scheme entered into force with the adoption of the Royal Decree-Law 7/2008 on 13 October 2008 and is valid until the 15 December 2009.
33. However, the Spanish authorities undertake to notify to the Commission a prolongation of the scheme, if it has to be prolonged after the 1 July 2009. The Commission will therefore re-assess the compatibility of the scheme at that moment and, if the extraordinary conditions justifying the adoption of the present scheme persist, authorize the prolongation of the scheme for an additional period. Therefore, any issuance after 1 July 2009 will not be covered by this authorisation.
34. The Spanish authorities undertake to review the scheme and to submit every six months a report on its operation to the Commission. The reports should contain the information specified in the relevant rules on standardised reports⁸.

6. Restructuring of defaulting financial institutions

35. In case of the activation of the guarantee, the Spanish authorities undertake to notify to the Commission a restructuring plan for the beneficiary of the guarantee within six months following the activation of the guarantee.
36. In case of activation of the guarantee, the State would be an original creditor and as such – according to Articles 1.838 and 1.839 of the Civil Code and the General Budget Law (see footnote 7) – would claim from the relevant credit institution the recovery of all the costs involved with the activation of the guarantee.

III. POSITION OF SPAIN

37. The Spanish authorities note that the emergency situation has been introduced in circumstances of unique and unprecedented financial threat to the stability of the Spanish financial sector and consequently to the entire Spanish economy. The uncertainty regarding

⁶ Law on the Legal System applicable to Public Administrations and General Administrative Proceedings (*Ley 20/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común*)

⁷ General Budget Law (*Ley 47/2003, de 26 de noviembre, General Presupuestaria*).

⁸ Annex III A and B (standardised reporting format for existing State aid) to Commission Regulation (EC) No 749/2004 of 21 April 2004 adopting provisions for the implementation of Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p.1).

the credit risk has disrupted interbank lending and caused severe liquidity restrictions affecting the economy as a whole.

38. The Spanish authorities stress that the Spanish credit institutions are solid thanks to their high solvency, extensive resources and the supervision of the Bank of Spain. The measure was elaborated in the framework of the aligned action agreed at the Economic and Financial Affairs Council of the European Union of 7 October 2008.
39. Conforming to this aligned action the Spanish authorities developed a timely and temporary measure respecting the rules of the internal market.
40. The Spanish authorities accept that the guarantee scheme contains State aid elements.
41. The Spanish authorities argued to have introduced a market share of 1/1000 of the credit market as an indicator of the significance of the activity of the credit institutions in Spain in line with paragraph 18 of the Commission Communication on the financial crisis⁹. Further, the condition that credit institutions must have issued similar instruments during the last 5 years is introduced as safeguard to avoid abuses, i.e. credit institutions changing their financial policy to benefit from the guarantee and, thus, distort the market. The objective of these conditions is to limit the risk the State would have to assume, as well as the administrative burden.
42. However, the Spanish authorities commit to monitor the functioning of the guarantee scheme as to the fulfilment of its objectives. In this context, the Spanish authorities are committed to modify, after previous notification to the Commission, those rules of the present scheme, including the eligibility criteria, that turn out to be inefficient or unjustifiably restrictive for the new guarantees, if any, to be granted under the 2009 budget.
43. Moreover, they commit themselves to monitor that the beneficiary financial institutions do not pursue an aggressive commercial conduct. This means in particular that the beneficiaries refrain from marketing actions referring to their entity using the condition of being a beneficiary of a State guarantee. Nevertheless, they are able to use this circumstance to inform about the specified guaranteed emissions. Furthermore, the benefiting entities should commit not to expand their activities in a significant manner in relation to the integrity of the credit institutions and to their activities that would have taken place in the absence of the guarantee scheme.
44. The Spanish authorities commit to establish the monitoring measures of the conditions mentioned in the commitment under point 43 above and to take appropriate measures, in case this commitment is not fulfilled.
45. The Spanish authorities undertake to notify the eventual setting up of the recapitalisation measure mentioned in Article 2 of the Royal Decree-Law 7/2008.

⁹ 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", OJ C 270, 25.10.2008, p. 8.

46. The Spanish authorities commit to control that the credit institutions benefiting from the State guarantees maintain the credit policy towards businesses and households they pursued under normal circumstances in the guaranteed instruments' market.
47. A letter sent by the Spanish Central bank on 31 October 2008 confirms that the notified measures are urgently required to prevent harmful spill-over effects on the Spanish financial system and the economy as a whole.

IV. ASSESSMENT

1. State aid character of the schemes

48. As set out in Article 87(1) of the EC Treaty, any aid granted by a Member State or through State resources in any form whatsoever, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, insofar as it affects trade among Member States, incompatible with the common market.
49. The guarantee is granted by the State and the measure therefore may involve State resources if the guarantee is activated. The measure is selective, as only certain debts of certain credit institutions will be guaranteed. The guarantee on the newly issued debt allows the beneficiaries to get the required liquidity, whereas it would not obtain this financing on the market, or at least at a higher price. This gives an economic advantage to the beneficiaries and strengthens their position compared to that of their competitors. Therefore, the measure threatens to distort competition and to affect trade between Member States, as Spanish banks are present in other Member States.
50. In particular, the Commission is convinced, that in the current circumstances of financial crisis no private investor would have granted such a significant guarantee on the senior debt of participating banks at this price. Spain did not provide sufficient element contradicting this view of the market situation which has been previously stated by the Commission¹⁰.
51. The measure therefore constitutes State aid within the meaning of Article 87(1) of the EC Treaty.

2. Compatibility with the common market

Application of Article 87(3)(b) EC Treaty

52. The Spanish authorities intend to provide aid under a guarantee scheme to assist credit institutions established in Spain having problems accessing liquidity, as a result of the international financial crisis. As the scheme is neither targeting firms in difficulty, which would be assessed under the rescue and restructuring guidelines¹¹, nor is it limited to small

¹⁰ Cf. Commission Decision of 10 October 2008 in case NN 51/2008 Guarantee scheme for banks in Denmark, point 32.

¹¹ Community Guidelines on State aid for rescuing and restructuring firms in difficulty, OJ 2004 C 244, page 2.

and medium sized enterprises, it can only be examined directly under the Treaty rules and, in particular, under Article 87(3)(b) EC.

53. Article 87(3)(b) EC enables the Commission to declare aid compatible with the common market, if it has the effect "to remedy a serious disturbance in the economy of a Member State". The Commission recalls that the Court of First Instance has stressed that Article 87(3)(b) EC needs to be applied restrictively and must tackle a disturbance in the entire economy of a Member State¹².
54. The Spanish authorities submitted a letter from the Central Bank of Spain confirming that credit institutions in Spain encounter serious difficulties in the current exceptional market situation and that the measures to assist the credit institutions are urgently required to prevent harmful spill-over effects on the financial system or the economy as a whole.
55. The Commission considers that the present scheme concerns the entire Spanish banking sector. The Commission does not dispute Spain's arguments that there is a clear international market-failure, where even healthy banks are having trouble getting access to liquidity, which shall be overcome by the scheme. The Commission is also of view that this shortage of liquidity will not only create difficulties for the banking sector, but will affect also other sectors depending on liquidity for their expenditures and investments and, thus, the whole Spanish economy.

Conditions for compatibility under Article 87(3)(b)

56. In line with the Commission Communication on the application of State aid rules to measures taken in relation to credit institutions, in the context of the current global financial crisis, in order for any aid or scheme to be compatible under Article 87(3)(b) EC, it must comply with general criteria for compatibility under Article 87(3) EC, viewed in the light of the general objectives of the Treaty and in particular Articles 3(1)(g) and Article 4(2), which imply compliance with the following conditions¹³:

a) Appropriateness: The aid has to be well targeted to its objective, i.e. in this case to remedy a serious disturbance in the entire economy. This would not be the case if the disturbance would also disappear in the absence of the measure or if the measure is not appropriate to remedy the disturbance.

b) Necessity: The aid measure must in its amount and form be necessary to achieve the objective. That implies that it must be of the minimum amount necessary to reach the objective, and take the form most appropriate to remedy the disturbance. In other words, if a

¹² Cf. Principle in Joined Cases T-132/96 and T-143/96 Freistaat Sachsen and Volkswagen AG Commission [1999] ECR II-3663, paragraph 167; confirmed in Commission Decision in case C 47/1996, *Crédit Lyonnais*, OJ 1998 L 221/28, point 10.1; Commission Decision in Case C 28/2002 *Bankgesellschaft Berlin*, OJ 2005 L 116, page 1, points 153 and Commission Decision in Case C 50/2006 *BAWAG*, not yet published, points 166. See Commission Decision of 5 December 2007 in Case NN 70/2007, *Northern Rock*, OJ C 43 of 16.2.2008, p. 1; Commission Decision of 30 April 2008 in case NN 25/2008, *Rescue aid to WestLB*, OJ C 189 of 26.7.2008, p.3; Commission Decision of 4 June 2008 in Case C9/2008 *SachsenLB*, not yet published.

¹³ Cf. Commission Decision of 10 October 2008 in case NN 51/2008, *Guarantee scheme for banks in Denmark*, point 41.

lesser amount of aid or a measure in a less distortive form (e.g. a temporary and limited guarantee instead of a capital injection) were sufficient to remedy a serious disturbance in the entire economy, the measures in question would not be necessary. This is confirmed by settled case law of the Court of Justice¹⁴.

c) Proportionality: The positive effect of the measures must be properly balanced against the distortions of competition, in order for the distortions to be limited to the minimum necessary to reach the measures' objectives. This follows from Article 3(1)(g) EC and Article 4(1) and (2) EC, which provide that the Community shall ensure the proper functioning of an internal market with free competition. Therefore, Article 87(1) EC prohibits all selective public measures that are capable of distorting trade between Member States. Any derogation under Article 87(3)(b) EC, which authorises State aid, must ensure that the aid must be limited to the amount necessary to achieve its stated objective.

Assessment of the conditions for compatibility under Article 87(3)(b)

57. First, as regards *appropriateness* and as stated above, the objective of the scheme is to provide additional liquidity to the banking sector and promote lending to businesses and households. The measure is a response to the international market failure, where even healthy banks are having difficulties to get access to liquidity due to the loss of confidence in lending money to each other. The scheme provides a temporary substitute to the interbank lending in Spain.
58. As regards coherence, the scheme is opened to any credit institutions fulfilling the objective conditions detailed in point 10 and following. As regards to the anti abuse provision (see point 41), based on the information provided by the Spanish authorities, the Commission has no ground to contest it. As regards to the criteria detailed in point 13, the Spanish authorities justified that these criteria are aimed at favouring the pooling of application in order to diminish the administrative workload. The Commission has no grounds to object this approach. As a consequence, the Commission considers that all solvent credit institutions in Spain, including subsidiaries, having a systemic importance in Spain can have access to this measure. In any case, the Spanish authorities committed to monitor the functioning of the scheme and to eventually modify access to the scheme for the guarantees to be granted under the 2009 budget, if necessary (see point 44), which will be subject to the Commission's authorization .
59. To ensure that the credit reaches also businesses and households, the Spanish authorities committed to control that beneficiaries pursue their lending policy towards them.

¹⁴ Cf. Case 730/79, Philip Morris [1980] ECR 2671. This line of authority has recently been reaffirmed by the Court of Justice in. Case C-390/06, Nuova Agricast v Ministero delle Attività Produttive of 15 April 2008, where the Court held that, "As is clear from Case 730/79 [...], aid which improves the financial situation of the recipient undertaking without being necessary for the attainment of the objectives specified in Article 87(3) EC cannot be considered compatible with the common market [...]."

60. Thus, the Commission considers that the guarantee scheme is an appropriate measure to remedy a serious disturbance of the Spanish economy¹⁵.
61. Second, as regards *necessity*, the Commission must examine, if the measure is limited to the minimum necessary in scope and time, having regard to the current exceptional circumstances.
62. As regards the material scope, the Commission does not dispute that the guarantee scheme is needed to restore the confidence of lenders¹⁶. A guarantee on retail deposits would not be sufficient, as it would only avoid bank runs, but not restore the confidence of institutional lenders. Moreover, the Commission notes positively that Spain is limiting the guarantee to three financial instruments (see points 17-21 above) that are currently experiencing great difficulties and that subordinated debt and interbank deposits are excluded. Further, existing debt is not covered, but only newly issued debt that is short and medium term. Finally, the scope of the measure is ring fenced due to the maximum budget (see point 15), which cannot be allocated to few eligible credit institutions, because of its allocation method (see point 28).
63. In addition, the maturity of the financial instruments guaranteed is limited: Any guarantee to instruments exceeding the maturity of 3 years (and not exceeding 5 years) will be, according to the commitment given by the Spanish authorities, individually notified to the Commission (see point 19). In general, the Commission is of the view that the duration of a guarantee should be as short as possible. In this regard, the Commission notes positively an additional safeguard in the present scheme in so far as, in application of the commitment mentioned in point 33, it has a limited issuance period of six months. Therefore, due to the limitation of the budget allocated for this measure and the short window of emission, the Commission considers that the temporal scope of this measure is in line with point 24 of the Commission Communication on financial crisis.
64. The Commission further notes that the measure will be temporary in nature (see point 32) and any prolongation of the scheme will be notified to the Commission in due time. This includes also the emission of instruments (see points 32 and 34 and footnote 5). Thus, the guarantee scheme is also limited to the minimum necessary in scope and time.
65. As regards *proportionality*, the distortions of competition seem minimised by various safeguards.
66. The distortion of competition is minimised through a market orientated commission as mentioned in point 23. The Commission notes that the commission is equivalent and even

¹⁵ See Commission Decision of 10 October 2008 in case NN 51/2008 *Guarantee scheme for banks in Denmark*, point 42; Commission Decision of 13 October 2008 in case N 507/2008 *Financial Support Measures to the Banking Industry in the UK*, point 56 and Commission Decision of 13 October 2008 in case NN 48/2008 *Guarantee scheme for banks in Ireland*, point 59.

¹⁶ See Commission Decisions mentioned in footnote 14 in cases NN 51/2008 (point 47) and N 507/2008 (point 59), Commission Decision of 29.10.2008 in case N 533/2008 *Support measures for the banking industry in Sweden* (point 41), Commission Decision of 14.11.2008 in case N 567/2008 *Guarantee scheme for banks' funding in Finland* (point 37).

higher¹⁷ than the ECB's recommendations, which aim at the establishment of an appropriate framework for premiums on guarantees issued in the euro zone. This can be considered proportionate and consistent with the recent practice of the Commission¹⁸. The Commission's assessment of the current fee level is without prejudice to the position it may take, if the guarantee period is prolonged. The Spanish authorities will inform the Commission of any change of conditions, including the premium.

67. Also, the scheme includes behavioural constraints (see point 43), which help to ensure that participating banks do not expand their activities under the scheme and, thus, do not receive more support than necessary for re-establishing their long term viability¹⁹. The fulfilment of these constraints will be monitored by the Spanish authorities.
68. In particular, the Commission notes that in this case the remuneration for the provision of the State guarantee and other terms are equivalent and even higher than the ECB recommendation and similar to those of existing guarantee schemes²⁰, which reduces the likelihood of undue displacement of capital flows. Finally the scheme has a capped budget. Therefore, the Commission is of the view that the scheme contains sufficient safeguards to minimise the risk of distortion of competition through undue displacement of capital flows between Member States. Pursuant to footnote 18 in the Communication from the Commission on the recapitalisation of financial institutions in the current financial crisis²¹, the Commission therefore concludes that the balance sheet growth restrictions are not necessary in this case.
69. Furthermore, the Commission acknowledges, that the Spanish authorities have committed to provide a restructuring plan within six months after the activation of the guarantee for any institution that causes the guarantee to be activated²².
70. The Spanish authorities committed to revise the scheme and to present every six months reports on the operation of the scheme to the Commission.
71. The scheme is approved until 30 June 2009. As mentioned in points 34 and 35, the Commission will therefore re-assess the compatibility of the scheme at that moment and, if the extraordinary conditions justifying the adoption of the present scheme persist, authorize the prolongation of the scheme for an additional period.
72. On the basis of the above, the guarantee scheme for credit institutions in Spain can be considered compatible with the common market.

¹⁷ The add-on fee of 10 bp for other credit institutions of the lowest rating category.

¹⁸ A similar approach is taken in Commission Decision of 27 October 2008 in case NN 512/20085 *Guarantee scheme for banks in Germany*, point 66; in the Commission Decision of 13 October 2008 in case N 507/2008 *Financial Support Measures to the Banking Industry in the UK*, point 61 and in Commission Decision of 14. November 2008 *Guarantee scheme for banks 'funding in Finland*, point 41.

¹⁹ A similar principle is imposed by point 44 of the Community Guidelines on State aid for Rescue and Restructuring Firms in Difficulty, OJ C 244, 1.10.2004, p. 2.

²⁰ In particular, see N 520a/2008 *Urgent measures to guarantee the stability of the Italian banking system*, and N557/2008 *Aid scheme for the Austrian financial sector*.

²¹ See http://ec.europa.eu/competition/state_aid/legislation/recapitalisation_communication.pdf.

²² This is a cornerstone of the aforementioned Rescue and Restructuring Guidelines.

73. This decision replaces the decision NN54/B/2008 adopted on 23 December 2008.

V. DECISION

The Commission concludes that the notified measures is compatible with the Common market and has accordingly decided not to raise objections against the notified scheme, since it fulfils the conditions to be considered compatible with the EC Treaty.

If this letter contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
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Yours faithfully,

For the Commission

Neelie Kroes
Member of the Commission