EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 23 June 2014

on measures accompanying the SSM Regulation

(CON/2014/43)

Introduction and legal basis

On 15 April 2014, the European Central Bank (ECB) received a request from the Austrian Ministry of Finance for an opinion on a draft law amending several legal acts including the Law on banking[1], the Law on financial conglomerates[2] and the Law on the Financial Market Authority[3] (hereinafter the 'draft law').

The ECB's competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union and the third and sixth indents of Article 2(1) of Council Decision 98/415/EC[4], as the draft law relates to the Oesterreichische Nationalbank (OeNB), to the prudential supervision of credit institutions and to rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

1. Purpose of the draft law

1.1 The draft law implements legal provisions on macroprudential tasks and tools, procedural and federal state liability issues relating to Council Regulation (EU) No 1024/2013[5] (hereinafter the 'SSM Regulation'), and aims to smoothly integrate the Austrian national banking supervisory system into the Single Supervisory Mechanism (SSM). Although the Austrian Financial Market Authority (FMA) is established as an integrated supervisory institution, supervising all significant financial service providers in Austria, the FMA shares responsibilities with the OeNB in connection with banking supervision. For instance, while the OeNB is tasked with fact-finding,

1 Bundesgesetz über das Bankwesen (Bankwesengesetz), BGBl 532/1993, as amended.

2 Bundesgesetz über die zusätzliche Beaufsichtigung der Kreditinstitute, Versicherungsunternehmen und Wertpapierfirmen eines Finanzkonglomerats (Finanzkonglomerategesetz), BGBl I 70/2004, as amended.

3 Bundesgesetz über die Errichtung und Organisation der Finanzmarktaufsichtsbehörde (Finanzmarktaufsichtsbehördengesetz), BGBl I 97/2001, as amended.

4 Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (OJ L 189, 3.7.1998, p. 42).

5 Council Regulation (EU) No 1024/2013 of October 15 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

including on-site and off-site analysis of banks, the FMA is tasked with decision-making and has therefore been designated as the competent authority in the area of banking supervision. The FMA is the national competent authority (NCA) within the SSM framework and the addressee of instructions issued by the ECB under Article 6(3) of the SSM Regulation.

1.2 In connection with the macroprudential tasks and tools under Article 5 of the SSM Regulation, the draft law obliges the FMA to notify the Austrian Financial Market Stability Board (FMSB) prior to proposing, to the ECB, the application of higher requirements for capital buffers under Article 5(2) and (3) of the SSM Regulation. The FMA is to give the FMSB the opportunity to make a recommendation within a reasonable period of time. If the FMA does not comply with this recommendation, it must provide reasons to the FMSB. A similar obligation to notify arises if the ECB informs the FMA of its intention to apply higher requirements for capital buffers in accordance with Article 5(2) of the SSM Regulation. Moreover, the FMA is to notify the FMSB if, under Article 5(4) of the SSM Regulation, the ECB raises objections to planned decisions by the FMA to apply higher requirements for capital buffers, including countercyclical buffer rates and any other measures aimed at addressing systemic or macroprudential risks.

1.3 The draft law clarifies the division of tasks within the SSM between the FMA and the OeNB, on the one hand, and the ECB on the other hand. To this end, the draft law provides that the FMA and the OeNB are only required to execute tasks, powers and duties assigned to them under the Law on banking to the extent that the execution of same is not reserved for the ECB under the SSM Regulation[6]. Furthermore, the draft law clarifies that the procedures outlined by the Law on banking shall not apply to the ECB in connection with the application of national legislation by the ECB in the area of banking supervision, as provided for by Article 4(3) of the SSM Regulation[7]. In order to effectively carry out the tasks and powers assigned to them within the scope of the SSM, the FMA and the OeNB must also coordinate their activities within the SSM and provide each other with all information, applications and requests without delay[8].

1.4. The draft law also sets out the partial discontinuation of the obligation on both the FMA and the OeNB to input data into a shared national supervisory database established by the OeNB under the Law on banking[9]. Within the scope of the SSM, the ECB will also operate a database for banking supervision purposes. According to the explanatory memorandum to the draft law, the data to be entered into the ECB database will overlap with the data to be entered into the national database. The Austrian Ministry of Finance considers that, with the commencement of the SSM, there will no longer be any need to input data into the national database if it has already been entered into the ECB database. Accordingly, the draft law provides that the FMA and the OeNB are no longer obliged to input overlapping data into the national database, provided that the data stored in the

6 See Article 1(74) of the draft law, which introduces Article 77d(1) to the Law on banking.
7 See Article 1(74) of the draft law, which introduces Article 77d(2) to the Law on banking.
8 See Article 1(74) of the draft law, which introduces Article 77d(3) to the Law on banking.
9 See Article 1(74) of the draft law, which introduces Article 77d(4) to the Law on banking.

ECB database is accessible by both the FMA and the OeNB at any time.

1.5 The SSM Regulation provides for the ECB's participation in supplementary supervision of a financial conglomerate in relation to the credit institutions included therein[10]. Accordingly, Article 4 of the draft law clarifies that the scope of the tasks and powers assigned to the FMA by the Law on financial conglomerates[11] is to be confined within the scope of the SSM Regulation. The FMA is only required to carry out the tasks, powers and duties that are assigned to it under the Law on financial conglomerates to the extent that the execution of same is not reserved to the ECB under the SSM Regulation.

1.6 The draft law restricts federal state liability for damage caused by the FMA when cooperating with, exchanging information with and supporting the ECB in relation to the SSM Regulation. This also applies to the FMA's involvement in the ECB's decision-making process and in the ECB's preparations under the SSM Regulation. In the Austrian Ministry of Finance's opinion, as expressed in the explanatory memorandum to the draft law, the transfer of special tasks to the ECB under Article 127(6) of the Treaty and under the SSM Regulation represents an objective reason for the express exemption from liability for damage caused by national authorities, to the extent that this may arise at all, as well as the fact that the ECB has a specific liability under Article 340 of the Treaty. The ECB notes that, in accordance with the wording of draft Article 3(6) of the Law on the Financial Market Authority (as introduced by Article 5 of the draft law and as amended by a draft bill tabled in Parliament on 3 June 2014[12]), a claim for compensation is to be excluded in respect of damage caused by acts of the FMA, including its executive bodies and employees, when implementing or fulfilling an instruction of the ECB, preparing or executing decisions of the ECB, and when cooperating with, exchanging information with and providing other support for the ECB. For the OeNB, its executive bodies and employees, an identical exemption from liability has been included in draft Article 79(7) of the Law on banking, as introduced by Article 1(114) of the draft law. The ECB understands that according to Article 3 of the Law on the Financial Market Authority, the Austrian Federation is currently liable, pursuant to the provisions of the Law on public liability[13], for damage caused by bodies within the FMA and by FMA employees when enforcing, inter alia, the Law on banking and the Law on financial conglomerates. Such liability only exists in relation to supervised institutions and third parties, e.g. depositors may not claim any compensation from the Austrian Federation[14]. However, federal state liability is not limited to intent or gross negligence. The Austrian Federation is entitled to claim reimbursement from those persons acting as agents of the FMA in committing or causing a violation of the law with intent or gross negligence, provided it has indemnified the injured person under the provisions of the Law on

10 See Article 4(1)(h) of the SSM Regulation.

11 See Article 12a of the Law on financial conglomerates.

12 Regierungsvorlage 162 der Beilagen zu den Stenographischen Protokollen des Nationalrates XXV. GP.

13 Bundesgesetz über die Haftung der Gebietskörperschaften und der sonstigen Körperschaften und Anstalten des öffentlichen Rechts für in Vollziehung der Gesetze zugefügte Schäden (Amtshaftungsgesetz), BGBl 20/1949, as amended.

14 See Article 3(1) of the Law on the Financial Market Authority.

public liability[15].

2. General observations

The ECB takes note that the draft law aims to smoothly integrate the Austrian national banking supervisory structure into the SSM and to ensure that no legal obstacles arise under national law in relation to the performance by the ECB, with the assistance of the NCA, of its banking supervisory tasks under the SSM Regulation[16]. The ECB understands that the rules are not intended to narrow or amend the scope of the SSM Regulation, which is directly applicable.

3. Macroprudential tasks and tools

3.1 Article 1(31) of the draft law which, inter alia, inserts a new Article 24b(3) into the Law on banking, contains two incorrect references. The reference to Article 5(4) seems erroneous; reference should be made to Article 5(1) of the SSM Regulation as only this provision provides the ECB with the right to object to an intended national macroprudential decision under Article 5(1) of the SSM Regulation. Furthermore, the second reference to Article 23c appears to be in error and should be replaced by Article '23d'.

3.2 In addition to the FMA (in its role as NCA), the FMSB is also involved in the application of macroprudential tasks and tools pursuant to Article 5 of the SSM Regulation. The ECB understands that the FMSB has been established within the Austrian Ministry of Finance to promote financial market stability, reduce systemic threat and lower systemic and pro-cyclical risks[17]. While the FMSB is involved in macroprudential oversight issues under the SSM Regulation due to the FMSB's national tasks, the ECB also highlights the tight time frame under Article 5(4) of the SSM Regulation. If the ECB intends to apply higher national capital buffers and duly notifies the FMA ten working days prior to taking such action, the FMA may provide a reasoned written objection to the ECB within five working days. The ECB takes note of the amendment made by the draft law to Article 24b(2) of the Law on banking according to which the FMSB is to provide its recommendation to the FMA 'in compliance with the time limit indicated in Article 5(4) of Regulation (EU) No 1024/2013'. The ECB understands that the time limit for the FMA's response to the ECB's notification under Article 5(2) of the SSM Regulation will not be delayed by the FMA's consultation with the FMSB.

15 See Article 3(3) of the Law on the Financial Market Authority.

16 See Article 6 of the SSM Regulation.

17 See Article 13 of the Law on the Financial Market Authority.

4. Procedural issues

It is essential for the smooth functioning of the SSM that there is full cooperation between the ECB and the NCAs and that they exchange all information that may have an impact on their respective tasks, in particular all information that the NCAs avail of regarding procedures that may have an impact on the safety and soundness of a supervised entity or that interact with the supervisory procedures in relation to such entities[18]. Against this background, the ECB welcomes that the consulting authority aims to clarify the extent of the NCA's competence under the SSM Regulation. The ECB also supports the fact that the draft law excludes the ECB from the application of procedural laws when applying national legislation exercising Member State options under Union law[19]. Due to the dual banking supervisory structure in Austria, it is important to ensure that the FMA and the OeNB coordinate their activities within the SSM and provide each other with all information, applications and requests without delay.

5. Restrictions on federal state liability

5.1 The ECB understands that it is in principle a matter for Austrian national law to determine the scope of the federal state liability of the FMA and the OeNB for damage caused by their acts and omissions, including the acts and omissions of their executive bodies and employees. The ECB recognises that the liability of NCAs is not harmonised across the Union and that different supervisory liability regimes may presently exist at national level. The ECB, itself, is liable for the acts of its servants pursuant to Article 340 of the Treaty. Moreover, existing decisions of the Court of Justice of the European Union (CJEU) appear to provide scope for a restriction of national liability where the NCA is merely required to implement a binding instruction of a Union institution without any margin of discretion[20]. On the other hand, NCAs may be liable for their actions within the SSM framework where an available margin of discretion is in fact exercised[21]. Accordingly, the Union legislator has clarified in recital 61 of the SSM Regulation that the ECB's liability in relation to actions undertaken within the SSM framework 'should be without prejudice to the liability of national competent authorities to make good any damage caused by them or by their servants in the performance of their duties in accordance with national legislation'.

5.2 The wording of draft Article 3(6) of the Law on the Financial Market Authority and draft Article 79(7) of the Law on banking could be understood as effectively placing liability for damage caused by the acts and omissions of the FMA and the OeNB, including their executive bodies and employees, occurring within the SSM framework, exclusively and categorically on the ECB in all

18 See recital 11 of Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17) (OJ L 141, 14.5.2014, p. 1).

19 See, for example, Article 4(3) of the SSM Regulation.

20 See, for example, Case 175/84 *Krohn v Commission* [1986] ECR 753, paragraph 23.

21 See Case T-146/01 *DLD Trading v Council* [2003] ECR II-6005, paragraphs 79 to 80.

cases. This could lead to an unclear legal situation with the potential of negatively impacting on the efficient and effective functioning of the SSM, in particular having regard to the direct applicability of the SSM Regulation. Therefore, it would be advisable to amend the part of Article 5 of the draft law that introduces the new Article 3(6) to the Law on the Financial Market Authority, as well as draft Article 79(7) of the Law on banking, in order to ensure that the proposed exemptions from the national liability framework are in compliance with Union law and are without prejudice to the allocation of liability under the SSM framework.

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

Done at Frankfurt am Main, 23 June 2014.

[signed]

The President of the ECB

Mario DRAGHI