OPINION OF THE EUROPEAN CENTRAL BANK
of 24 November 2017
on pay and pension provisions
(CON/2017/49)

Introduction and legal basis

On 10 November 2017 the European Central Bank (ECB) received a request from the Irish Minister for Public Expenditure and Reform for an opinion on the Public Service Pay and Pensions Bill 2017 (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 indent of Article 2(1) of Council Decision 98/415/EC[1], as the draft law relates to the Central Bank of Ireland (CBI). 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 further restores the basic salaries of public servants, including both employees and officer holders of the CBI, which were reduced under the Financial Emergency Measures in the Public Interest (FEMPI) Acts of 2009, 2011 and 2013. Moreover, it provides for the restoration of pensions payable to public service pensioners, including current and former employees and office holders of the CBI, through the phased further amendment of the public service pension reduction. It also converts the pension-related deduction into a permanent additional superannuation contribution for all public servants, including employees and office holders of the CBI, who are members of a public service pension scheme or receive a gratuity in lieu of a public service pension scheme.

1.2 Part 1 of the draft law (Preliminary and General) repeals the Financial Emergency Measures in the Public Interest Act 2009 (hereinafter the '2009 Act') on 1 January 2018 and clarifies that the repeal of certain sections of that Act will come into operation on 1 January 2019. Part 1 of the draft law also defines what is meant by the terms 'covered public servant' and 'non-covered public servant'. Where a recognised trade union or staff association has not notified the Workplace Relations Commission, in writing, of its assent to be bound by the terms of the Public Service Stability Agreement 2018-2020, then public servants who are members (and in certain limited cases public servants who are not members) of that trade union or staff association are considered 'non-

1 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).

covered public servants' for the purposes of the draft law. This distinction is relevant due to the difference in the extent of the pay restoration applied to the respective categories of public servant.

1.3 Part 2 of the draft law (Remuneration – Public Servants Generally) clarifies the amount and timing of incremental increases to the annualised amount of the basic salary of covered and non-covered public servants respectively, starting from 1 January 2018 and continuing to 2021. It also provides for the completion of pay restoration by Ministerial order, which must be completed on or before July 2021 for public servants with a basic salary of less than EUR 150 000, and must be completed on or before July 2022 for public servants with a basic salary of more than EUR 150 000. The draft law also provides the Minister for Public Expenditure and Reform with powers to correct anomalies that may result from the draft law, by increasing the basic salary applicable. Finally, the draft law provides that until 31 December 2021, no increment will be awarded to a non-covered public servant, and the operation of the pay scale that applies in respect of a non-covered public servant will be suspended. A public servant is defined, by reference to the meaning in the 2009 Act, as a person who is employed by, or who holds any office or other position in, a public service body. The CBI is explicitly defined as coming within the meaning of 'public service body'. It follows, therefore, that the 2009 Act and the draft law apply to both employees and office holders of the CBI.

1.4 Part 3 of the draft law (Public Service Pension Reduction) eliminates or lowers the public service pension reduction by amending the Financial Emergency Measures in the Public Interest (Amendment) Act 2010 (hereinafter the '2010 Act'). This is achieved by incrementally increasing the exemption threshold for pensioners who retired on or before 29 February 2012 depending on the annualised amount of their respective public service pensions. Likewise, the public service pension reduction liability is reduced for public servants who retired after 29 February 2012, by decreasing the band-specific reduction rates. Public service pensions are defined under the 2010 Act as including pensions payable to or in respect of a public servant or former public servant under a public service pension scheme. Public servants are defined for this purpose as persons who are employed by, or who hold any office or other position in a public service body, including the CBI, and include an office holder. Both current and former employees and office holders of the CBI therefore come within the scope of application of the 2010 Act, and thus also the draft law. The Financial Emergency Measures in the Public Interest (Amendment) Act 2011 (hereinafter the '2011 Act') amended the 2010 Act by introducing a provision pursuant to which the 2010 Act applies in respect of employees and office holders of the CBI only with its consent, given in writing to the Minister for Public Expenditure and Reform by the CBI's Governor, and with the consent of the Minister for Finance.

1.5 Part 4 of the draft law (Additional Superannuation Contribution) introduces a permanent additional superannuation contribution for all public servants who are members of a public service pension scheme or receive a gratuity in lieu of a public service pension scheme. This replaces the pension-related deduction which was introduced by the 2009 Act to deduct certain amounts from the salaries of persons in the public service who are members of an occupational pension scheme or pension arrangement. Part 4 outlines details of the contributions payable by covered and non-covered public servants respectively for 2019, 2020, 2021 and subsequent years. The draft law empowers the Minister for Public Expenditure and Reform to make regulations for the purposes of

the calculation, making, collection, disposal and recovery of the contribution, and provides that the contributions must be paid into, or disposed of for the benefit of the Exchequer in accordance with the directions of the Minister for Public Expenditure and Reform or otherwise paid or disposed of as that Minister may direct. For the purposes of Part 4 of the draft law, public servants are defined by reference to the meaning in the 2009 Act, as persons who are employed by, or who hold any office or other position in a public service body, including the CBI, and include an office holder. A public service pension scheme is defined as a pre-existing public service pension scheme, the single public service pension scheme, or any other pension scheme or arrangement certified by the Minister for Public Expenditure and Reform as being such a scheme. By virtue of these definitions, employees and office holders of the CBI come within the scope of application of the 2009 Act, and thus also the draft law. However, the draft law sets out that Part 4 will apply to the officers and employees of the CBI only to the extent provided for by written consent from the CBI's Governor to the Minister for Public Expenditure and Reform, and with the consent of the Minister for Finance.

2. Central bank independence

2.1 Currently, the CBI enjoys statutory autonomy in determining its staff policy, including remuneration, with the CBI's officers and employees subject to individual employment contracts and to collective bargaining agreements entered into between the CBI and staff representative groups. The measures provided for in the draft law, as is the case of the 2009 Act and the 2010 Act, represent a departure from that regime insofar as the provisions proposed are to be imposed unilaterally.

2.2 As the draft law applies to and directly affects the CBI's decision-making bodies and its employees, it should be examined from the perspective of central bank independence requirements under Article 130 of the Treaty, in particular institutional and financial independence, as well as that of the personal independence of the members of the CBI's decision-making bodies. It is worth noting that the draft law continues the phased reversal of the provisions of the five FEMPI Acts introduced between 2009 and 2013, further to the Financial Emergency Measures in the Public Interest (Amendment) Act 2015, on which the ECB has already opined[2], by reversing the remuneration and pension reductions for public servants and by replacing the pension-related deduction with an additional superannuation contribution.

2.3 The principle of central bank independence as enshrined in Article 130 of the Treaty prohibits third parties, including the governments of the Member States, from issuing instructions to the national central banks (NCBs). In addition, the principle of central bank independence means that third parties may not influence, directly or indirectly, an NCB in the performance of its tasks or as regards its ability to fulfil its mandate: both operationally in terms of manpower, and in terms of appropriate financial resources[3].

2 See Opinions CON/2009/15, CON/2012/6, CON/2013/46 and CON/2015/44. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

3 See, for example, the ECB's Convergence Report 2016, p. 28, and paragraph 6 of Opinion CON/2012/89.

Financial independence

2.4 Member States may not impair an NCB's ability to employ and retain the qualified staff necessary for the NCB to perform independently the tasks conferred on it by the Treaty and the Statute of the European System of Central Banks and of the European Central Bank (hereinafter referred to as the 'Statute of the ESCB'). Furthermore, an NCB may not be put into a position where it has limited control or no control over its staff, or where the government of a Member State can influence its policy on staff matters. To protect autonomy in staff matters, the ECB has consistently recommended in previous opinions and in its convergence reports that any amendment to legislation on remuneration for members of an NCB's decision making bodies and its employees should be decided in close and effective cooperation with the NCB, taking due account of its views, to ensure the ongoing ability of the NCB to independently carry out its tasks. Autonomy in staff matters extends to issues relating to staff pensions[4]. Further, amendments that lead to reductions in the remuneration for an NCB's staff should not interfere with that NCB's powers to administer its own financial resources, including the funds resulting from any reduction in salaries that it pays[5].

2.5 Given that the CBI's employees are employed under the conditions (including conditions as to remuneration and allowances) set by the Central Bank Commission[6], legislative provisions affecting the remuneration of members of the CBI's decision-making bodies and employees should be drafted in close and effective cooperation with the CBI in order to protect the CBI's autonomy in staff matters[7].

2.6 As regards the provisions on the public service pension reduction applicable to the CBI's officers and employees, the ECB notes that Section 1A of the 2010 Act, as inserted by the 2011 Act, required the Minister for Public Expenditure and Reform to obtain the written consent of the CBI's Governor in respect of reductions to pensions of former CBI employees and office holders, and that this consent was granted.

2.7 As regards the provisions on the additional superannuation contribution, the proposed contributions may be subject to regulations of the Minister for Public Expenditure and Reform for the purposes of calculating, making, collecting, disposing of and recovering the contribution, and must be paid into, or disposed of for the benefit of the Exchequer. Thus, the additional superannuation contribution under the draft law would be payable by the CBI's officers and employees to the Exchequer. In this regard, the draft law does not appear to reflect the distinctive features of the CBI's superannuation scheme[8], which is not connected to other State public service pension schemes. In particular, the CBI is required to establish a trust fund for holding contributions made to the scheme and for the payment of superannuation benefits under the scheme[9]. The ECB understands that the CBI is required to transmit all contributions collected from the members of the scheme to the trustees, and

4 See the ECB's Convergence Report 2016, p. 28 and the reference to ECB opinions made there.

5 See Opinions CON/2015/8 and CON/2015/57.

6 See section 6D of the Central Bank of Ireland Act 1942, as inserted by section 14 of the Central Bank Reform Act 2010.

7 See also Opinion CON/2012/89 and paragraph 2.6 of Opinion CON/2013/41.

8 Under Section 33AG(2) of the Central Bank Act 1942, the CBI may establish and operate one or more superannuation schemes under which superannuation benefits are payable on the retirement or death of persons. However, such a scheme does not take effect until it has been approved by the Minister for Finance.

9 See Section 33AG(4) of the Central Bank Act 1942.

is required to pay to the trustees any monies which the CBI, after consulting an actuary, deems appropriate for adequately funding the CBI's superannuation scheme over time[10]. The ECB understands that the Exchequer plays no role in financing the CBI's trust fund, and all pension benefits for the CBI's officers and employees are paid out of this trust fund. Thus, if such contributions are payable by the CBI's officers and employees to the Exchequer, this may be regarded as a form of taxation on the CBI's officers and employees and may raise concerns with regard to the CBI's financial independence.

2.8 The ECB notes that the draft law requires the Minister for Public Expenditure and Reform to obtain the written consent of the CBI's Governor in respect of the application of Part 4 of the draft law to the officers and employees of the CBI. Thus, the consent of the CBI's Governor must be obtained before the Minister can impose the obligation on the CBI's officers and employees to pay the additional superannuation contribution. This wording would allow the Governor, on behalf of the CBI, to take into account the particularities of the CBI's own legal framework and special legal regime and any other relevant considerations, in particular obligations arising under the Treaty, in formulating the form and extent of the Governor's consent or dissent to the application of this Part of the draft law. Moreover, assuming that the Governor's consent has been given, the consent should also be required in the future if there is a change to the additional superannuation contribution to ensure the ongoing ability of the CBI to perform independently the tasks conferred on it by the Treaty, the Statute of the ESCB and national legislation.

Personal independence of members of the CBI's decision-making bodies

2.9 Finally, Member States may not seek to influence the members of an NCB's decision-making bodies by amending national legislation affecting their remuneration. Such legislation, as a matter of principle, should apply only in respect of future appointments[11]. The draft law applies not only to the CBI's decision-making bodies but also more generally to all public servants in Ireland who come within its scope and, as such, does not seek directly or indirectly to influence the CBI's decision-making bodies in the performance of their tasks. The provisions will therefore be considered compatible with the principle of personal independence, as long as the abovementioned requirements in respect of the principle of financial independence are taken into account[12].

3. Staffing of banking supervisory tasks

The ECB notes that concerns have been raised by the International Monetary Fund regarding difficulties experienced by the CBI's banking supervisory functions in recruiting and retaining experienced staff[13]. The CBI performs these functions in accordance with national law and in the context of its role as a national competent authority within the Single Supervisory Mechanism, within which the ECB carries out its tasks concerning the prudential supervision of credit institutions[14]. As noted in the Basel Core

10 See Section 33AG(2) and (3) of the Central Bank Act 1942; Section 6 of Statutory Instrument No 99/2008 - Central Bank and Financial Services Authority of Ireland Superannuation Scheme 2008; and Central Bank of Ireland Annual Report 2016, p. 116.

11 See, for example, the ECB's Convergence Report 2016, p. 23.

12 See also paragraph 3.2.10 of Opinion CON/2010/80.

Principles for Effective Banking Supervision, the supervisor should have adequate resources for the conduct of effective supervision, including a budget that provides for staff in sufficient numbers and with skills commensurate with the risk profile and systemic importance of the banks and banking groups supervised and salary scales that allow it to attract and retain qualified staff[15].

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

Done at Frankfurt am Main, 24 November 2017.

[signed]

The President of the ECB

Mario DRAGHI

13 See IMF Country Report 16/318, Ireland Financial Sector Assessment Program Technical Note – Banking Supervision and Update on the Assessment of Observance of the Basel Core Principles (FSAP 2016), September 2016.

14 See Council Regulation (EU) No 1024/2013 of 15 October 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.

15 See Basel Committee on Banking Supervision, Core Principles for Effective Banking Supervision, Basel, September 2012, Principle 2 ('Independence, accountability, resourcing and legal protection for supervisors'), p. 23.