EUROPEAN CENTRAL BANK

EUROSYSTEM

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OPINION OF THE EUROPEAN CENTRAL BANK

of 9 January 2015

on applications to operate as a run-off company

(CON/2015/1)

Introduction and legal basis

On 21 November 2014 the European Central Bank (ECB) received a request from the Austrian Ministry of Finance for an opinion on a draft federal law on the reorganisation and winding up of credit institutions (hereinafter the 'draft law')[1], which transposes Directive 2014/59/EU of the European Parliament and the Council[2] (hereinafter the 'BRRD') into Austrian 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 (TFEU) and on the sixth indent of Article 2(1) of Council Decision 98/415/EC[3], as the draft law relates 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 overall objective of the draft law is to create a framework for recovery and resolution planning of credit institutions and investment firms (hereinafter jointly referred to as 'institutions'), and to provide an effective mechanism for their resolution, minimising risks to financial stability and the cost to the public budget. To this end, the draft law implements the BRRD and provides for amendments to the Law on Banking[4], the Financial Market Supervisory Authority Act[5], the Insolvency Ordinance[6], the Takeover Act[7] and the Securities Supervision Act 2007[8]. The draft law

1 Bundesgesetz über die Sanierung und Abwicklung von Banken, BGBl I Nr 98/2014.

2 Directive 2014/59/EU of the European Parliament and the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EC, and Directives 2001/24/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and the Council (OJ L 173, 12.6.2014, p. 190).

3 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).

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

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

6 Bundesgesetz über das Insolvenzverfahren (Insolvenzordnung), RGBl Nr 337/1914, as amended.

7 Bundesgesetz betreffend Übernahmeangebote (Übernahmegesetz), BGBl I Nr 127/1998, as amended.

8 Bundesgesetz über die Beaufsichtigung von Wertpapierdienstleistungen (Wertpapieraufsichtsgesetz 2007), BGBl I Nr 60/2007, as amended.

will replace the Banking Intervention and Restructuring Act[9].

1.2 The consultation request from the Austrian authorities focuses on one specific issue going beyond the implementation of the BRRD. Section 162 of the draft law permits institutions to apply to operate as a run-off company under certain conditions. The Austrian Financial Market Authority (FMA) may approve such an application if the institution (a) is no longer active on the market or no longer conducts transactions with third parties, (b) does not take in any deposits or other repayable funds from the public, (c) has put in place processes to ensure that contractual counterparties from its remaining business are kept up to date with information regarding the run-off process and receive appropriate support, and (d) has been carrying out its business prior to 31 December 2014 in accordance with a winding-up or restructuring plan approved by the European Commission under the State aid rules of the TFEU. These prerequisites must be confirmed by the institution's auditor. The task of a run-off company is to manage its remaining assets and liabilities in order to ensure an orderly and optimal realisation of proceeds, in other words, portfolio liquidation.

1.3 When the FMA's approval decision enters into force, the institution's license to carry out banking transactions expires and it thereafter operates as a run-off company. A run-off company must liquidate its portfolio pursuant to a run-off plan. The management must submit annual reports on the progress of the company's asset realisation to its supervisory board and to the resolution authority. Furthermore, a run-off company may not receive funds from the public, provide securities services or conduct investment activities. However, transactions conducted on the run-off company's own account using financial instruments with the aim of hedging interest rate, foreign exchange, credit or liquidity risks in connection with its run-off are permitted, unless associated with market making activities or granting third parties access to trading systems (section 84(4) of the draft law).

1.4 As section 162 of the draft law only applies to institutions that have been operating under a liquidation or restructuring plan approved by the European Commission under the State aid rules prior to 31 December 2014, i.e. prior to the main deadline for implementation of the BRRD, it should be regarded as a transitional rule. It establishes a run-off scenario similar to a specific measure made available under Article 42 of the BRRD, namely the operation of an asset management vehicle under the asset separation tool. According to the explanatory memorandum accompanying the draft law, run-off companies will not be subject to the other, more general, provisions of the draft law. The difference between the regime put in place by the draft law and that of the BRRD is that under the draft law the institution itself applies to operate as a run-off company, while under the BRRD it is the authorities that must determine whether a bank is failing or likely to fail and take appropriate steps.

2. General observations

In accordance with Article 1(2) of Decision 98/415/EC, this opinion only addresses issues that go

9 Bankeninterventions- und -restrukturierungsgesetz, BGBl I Nr 160/2013, as amended. See Opinion CON/2013/26 on crisis planning and early intervention for credit institutions. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

beyond the mere transposition of the BRRD into Austrian law.

3. Specific observations

3.1 The ECB welcomes the clarification contained in section 3(10) of the draft law, which provides that the FMA may only carry out the tasks, powers and duties assigned to it under the draft law to the extent that the competence to do so is not granted to the ECB under Council Regulation (EU) No 1024/2013[10].

3.2 The ECB notes that section 162 of the draft law should be interpreted in a way that avoids conflict with the ECB's exclusive competence to withdraw the authorisation of credit institutions pursuant to Article 4(1)(a) of Regulation (EU) No 1024/2013, as upon the entry into force of an FMA approval under that section the institution's original authorisation is terminated. Therefore, given the ECB's exclusive competence to withdraw an authorisation and the limitation on the FMA's powers contained in section 3(10) of the draft law, the ECB must be involved in any decision of the FMA to approve an application under section 162 of the draft law.

3.3 Section 84(9) of the draft law requires a run-off company to pass a resolution for winding-up once it has fully liquidated its portfolio. In order to avoid any misunderstanding, the ECB recommends making it clear that the provision concerns a resolution for winding-up under the relevant provision of Austrian company law, such as section 84 of the Law on limited liability companies[11] or section 203 of the Stock Corporation Act[12].

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

Done at Frankfurt am Main, 9 January 2015.

[signed]

The President of the ECB

Mario DRAGHI

10 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).

11 Gesetz über Gesellschaften mit beschränkter Haftung (GmbH-Gesetz), RGBl Nr 58/1906, as amended.

12 Bundesgesetz über Aktiengesellschaften (Aktiengesetz), BGBl Nr 98/1965, as amended.