EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 8 November 2001

at the request of the German Ministry of Finance
on a draft law establishing an integrated financial services supervision
(*Gesetz über die integrierte Finanzdienstleistungsaufsicht*)

(CON/2001/35)

1. On 21 August 2001 the European Central Bank (ECB) received a request from the Federal Ministry of Finance for an opinion on a draft law establishing an integrated financial services supervision (*Gesetz über die integrierte Finanzdienstleistungsaufsicht* -hereinafter referred to as the "draft Law").

2. The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community (hereinafter referred to as the "Treaty"), and 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 provisions[1], as the draft Law contains provisions concerning a national central bank as well as rules applicable to financial institutions which could 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, this opinion has been adopted by the Governing Council of the ECB.

3. The objective of the draft Law is to create a new Federal Authority for Financial Services Supervision (*Bundesanstalt für Finanzdienstleistungsaufsicht* - BAF) with responsibility for the supervision of credit institutions, insurance companies, investment firms and other financial institutions. This new supervisory authority is the result of a merger between the existing sectoral authorities, namely, the Federal Banking Supervisory Office (*Bundesaufsichtsamt für das Kreditwesen* - BAKred), the Federal Insurance Supervisory Office (*Bundesaufsichtsamt für das Versicherungswesen* - BAV) and the Federal Securities Supervisory Office (*Bundesaufsichtsamt für den Wertpapierhandel* - BAWe). The regulatory and supervisory powers of the new integrated supervisory authority will cover the entire range of financial

1 OJ L 189, 3.7.1998, p. 42.

intermediaries. As explained in the explanatory memorandum to the draft Law, this development is a response to substantial changes taking place in the financial markets, which required adaptation of the former institutional structure of three separate supervisory bodies. According to the explanatory memorandum, the substantive law relating to the supervision of credit institutions, insurance companies, investment firms and other financial institutions will not be affected by the draft Law, as the provisions deal mainly with organisational matters. The cooperation between the supervisory authorities and the Deutsche Bundesbank, which up until now has not been laid down by law in detail, will be governed by specific provisions in the Banking Act (*Gesetz über das Kreditwesen*). This applies in particular to cooperation concerning the day-to-day supervision of credit and financial institutions to be carried out by the Deutsche Bundesbank.

4. The ECB notes that the explanatory memorandum accompanying the draft Law points out several benefits resulting from the merger of the three sectoral authorities into a new financial regulatory and supervisory authority in the Federal Republic of Germany. Those benefits involve namely strengthening the efficiency of supervision of the financial system as a whole, achieving synergy in central supervisory tasks and making regulation and supervision more cost-effective. As a complement to such objectives, the ECB suggests integrating and modernising the underlying substantive law relating to financial regulation and supervision.

5. The ECB welcomes the draft Law in so far as the involvement of the Deutsche Bundesbank in the field of prudential supervision will be laid down in more detail. By virtue of the draft Law, a clear legal basis for coordination and cooperation between the BAF and the Deutsche Bundesbank will be established, encompassing matters relating to the stability of the German financial system, to the development of supervisory practice as well as to aspects of day-to-day supervision of credit and financial services institutions. This is in line with the ECB's view that maintaining the close involvement of national central banks in prudential supervision is a mandatory condition to allow the Eurosystem to contribute adequately to monitoring the risks to financial stability in the euro area. This is of particular importance in a context in which the nature and scope of these risks are affected by the introduction of the single currency and the related enhanced integration of financial markets. In addition, it safeguards smooth coordination between the central banking functions exercised at the Eurosystem's level and the supervisory functions carried out at national level. Against this background, the ECB would like to put forward some specific comments on the provisions of the draft Law.

6. First, the institutional set-up for coordination and cooperation between the BAF and the Deutsche Bundesbank. First, the ECB welcomes the institutionalisation of the financial markets regulation forum (*Forum für Finanzmarktaufsicht)*, under Article 3 of Section 1 of the draft Law, which already exists on the basis of an agreement between the federal supervisory offices and the Deutsche Bundesbank. The forum comprises the BAF and the Deutsche Bundesbank and will coordinate their respective work in regulatory and supervisory matters, including those

matters that might have a bearing on financial market stability. The ECB understands that the scope of the work of the forum may include additionally crisis situations and suggests that this could be clarified in the draft Law. The ECB deems that the establishment of this forum duly acknowledges the role of the BAF and the Deutsche Bundesbank as the authorities jointly responsible for stability of the financial system. In this respect, the ECB considers, in line with the ECB's opinion on the proposed amendments to the Act on the Deutsche Bundesbank (*Gesetz über die Deutsche Bundesbank*)[2], and on the basis of the reasons expressed therein, that the draft Law could be supplemented by clarifying that the Deutsche Bundesbank has responsibility for contributing to the overall stability of the financial system. Therefore, the definition of such a role by means of a specific provision in the Banking Act or the Act on the Deutsche Bundesbank would be welcome. Furthermore, the ECB takes note of the establishment of an advisory committee (*Fachbeirat*) in Article 8 of Section 1 of the draft Law. It will be composed of 20 members to be elected by the Ministry of Finance with appropriate representation from the financial, credit and insurance industries, the Deutsche Bundesbank and consumer protection associations. The ECB understands that the purpose of the Advisory Committee will be to advise the BAF on its activities and to give recommendations on how to develop supervisory practices. However, as far as banking supervision issues are concerned, the ECB suggests that the Deutsche Bundesbank should not play an advisory role within the Committee. Instead, the BAF and the Deutsche Bundesbank, as the responsible entities in the field of banking supervision, should both be given advice by the Committee. Finally, the ECB takes note of the establishment of an administrative council (*Verwaltungsrat*) in Article 7 of Section 1 of the draft Law, which will supervise the activities of the Executive Board of the BAF and support it in the conduct of its activities. The Deutsche Bundesbank will be represented in this Administrative Council, although without voting rights. This will ensure that, as an integral part of the institutional framework for prudential supervision and financial stability, the Deutsche Bundesbank will be informed where necessary of the activities of the BAF.

7. Secondly, cooperation and exchange of information between the BAF and the Deutsche Bundesbank on an ongoing basis. The ECB considers that, notwithstanding the abovementioned mechanisms for institutional cooperation, interaction between the overall supervisory competences of the BAF and the central banking functions of the Deutsche Bundesbank could be further enhanced in the draft Law. First, the ECB suggests including in the draft Law the basic principle that smooth interaction between the BAF, as a fully integrated supervisory institution, and the Deutsche Bundesbank should entail the obligation to cooperate closely *in all fields of common interest* However, the current draft Law limits such obligation to cooperate to the matters laid down in Article 7 of the Banking Act (see Article 9 of Section 2 of the draft Law). Furthermore, the ECB understands that there are no legal impediments to access to

2 ECB opinion of 2 August 2001 on a draft Seventh Law amending the Deutsche Bundesbank Act (CON/2001/17).

information and information sharing on all matters relating to financial stability on an ongoing basis between the BAF and the Deutsche Bundesbank. However, the ECB notes that, in accordance with Article 11 of Section 1 of the draft Law, the current sectoral confidentiality rules will continue to apply in the new framework. In this context, the ECB would welcome a new provision expressly removing possible legal obstacles to information sharing between the BAF and the Deutsche Bundesbank without being limited to the matters covered by Article 9 of the Banking Act (see Article 12 of Section 2 of the draft Law). Given the enhanced integration of financial services and the establishment of the new supervisory authority with cross-sectoral responsibilities, it may be considered necessary for access to supervisory information by the Deutsche Bundesbank to include all the sectors which may be deemed relevant for overall stability of the financial system. The central bank should have the means to assess possible systemic implications stemming from cross-sectoral linkages and from the behaviour of complex financial groups for the money and capital markets as well as for payment and settlement systems. This would also be in line with the recent European Commission's proposal for a directive on the supervision of financial conglomerates[3], which purports to lift the legal obstacles for supervisory information sharing regarding financial conglomerates with central banks. Lastly, it may be noted that information sharing may entail a cross-border dimension, since it may be necessary to provide other national central banks of the Eurosystem and the ECB with information on Eurosystem-related tasks. Including a new provision reflecting this aspect in the draft Law would also be welcome.

8. Thirdly, the operational involvement of the Deutsche Bundesbank in the field of prudential supervision. The ECB welcomes Article 9 of Section 2 of the draft Law, proposing a new Article 7(1) of the Banking Act. The new provision maintains the general principle contained already in the present version of the Banking Act, whereby the BAF and the Deutsche Bundesbank cooperate as regards the supervision of credit and financial institutions as defined by the Banking Act. Furthermore, it clarifies further the extent of operational involvement by the Deutsche Bundesbank. The ECB understands that the main function of the Deutsche Bundesbank in this process will be the day-to-day supervision of these institutions (c.f. the second sentence of Article 7(1) of the proposal for a Banking Act in Article 9 of Section 2 of the draft law). Moreover, the BAF will generally base its supervisory activities on the assessments established by the Deutsche Bundesbank (c.f. the fourth sentence of Article 7(2) of the proposal for a Banking Act). Therefore, the new legal framework will benefit from a continuation and even expansion of the current involvement of the Deutsche Bundesbank in day-to-day supervision. This is particularly significant in respect of the participation of the Deutsche Bundesbank in the inspection of capital adequacy and risk management of the supervised institutions. Moreover, this should ensure that the Deutsche Bundesbank is in a position to

3 Article 9(1) of the proposal for adirective of the European Parliament and of the Council on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and the Council, COM (2001) 213 final.

further contribute to the new supervisory activities arising from the new legal framework under the Basel Capital Accord and Community provisions on capital adequacy. In this context, the ECB welcomes also Article 44 of the proposal for a Banking Act, (see Article 46 of Section 2 of the draft Law) which now expressly provides that the Deutsche Bundesbank may carry out special audits. As regards the aforementioned proposed fourth sentence of Article 7(2) of the Banking Act, according to which the BAF will generally base its supervisory activities on the assessments established by the Deutsche Bundesbank, the ECB points to the importance that the formulation of this provision does not give rise to uncertainties as regards the exclusive responsibility of the BAF for the supervisory measures taken in fulfilment of its tasks under the Banking Act.

9. Fourthly, the advisory role of the Deutsche Bundesbank on specific regulatory matters. The ECB welcomes the new second sentence of Article 7(2) of the proposal for a Banking Act (csee Section 2, Article 9 of the draft Law), and the proposed Article 35(6) of the Securities Trading Act (see Article 26 of Section 4 of the draft Law), in so far as they provide the Deutsche Bundesbank with the right to be consulted by the BAF on guidelines (*Richtlinien*) issued under the Banking Act and also under the Securities Trading Act (*Wertpapierhandelsgesetz*), to the extent that the Acts do not already oblige the BAF to act in agreement with the Deutsche Bundesbank. These provisions further strengthen cooperation as regards the regulatory framework for prudential supervision. However, bearing in mind the far-reaching impact of the aforementioned guidelines issued under the Banking Act for the work of the Deutsche Bundesbank in this area and for its personnel and equipment, these guidelines should only be adopted in agreement with the Deutsche Bundesbank. The ECB would suggest, in view of its financial stability role, providing the Deutsche Bundesbank with an advisory role vis-à-vis the BAF for all legal acts falling within its field of competence. This advisory role would be not limited to legal acts falling strictly under the banking or securities fields.

10. Fifthly, the ECB would welcome including in the draft Law, as part of its transitional provisions, a provision stipulating that the BAF will engage in those legal or non-legally binding commitments to cooperation and information sharing undertaken by former supervisory authorities vis-à-vis other supervisory authorities and the central banks of the Member States.

Done at Frankfurt am Main on 8 November 2001.

The President of the ECB

[signed]

Willem F. DUISENBERG