EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 23 November 2012

on covered bonds (*Pfandbriefe*)

(CON/2012/92)

Introduction and legal basis

On 11 September 2012, the European Central Bank (ECB) received a request from the German Federal Ministry of Finance for an opinion on a draft law implementing Directive 2012/…/EU on access to the activity of credit institutions and the supervision of credit institutions and investment firms and adjusting supervision law to Regulation (EU) No …/2012 on the supervisory requirements for credit institutions and investment firms (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 sixth indent 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 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

The draft law is principally aimed at implementing the draft directive on access to the activity of credit institutions and the supervision of credit institutions and investment firms and adjusting supervision law to Regulation (EU) No …/2012 on the supervisory requirements for credit institutions and investment firms.

The draft law also updates the Law on covered bonds (*Pfandbriefe*), in particular as regards the provisions on the appointment, remuneration and accountability of a special administrator of a bank dealing in covered bonds (*Pfandbrief* bank) with limited business activities, who also caters for the due payments of Pfandbrief liabilities in accordance with the original maturities and, to that purpose, manages the liquidity (hereinafter 'cover pool administrator'). The draft law also addresses the relationship between the cover pool administrator and the insolvency administrator in charge of restructuring or liquidating the *non-covered bond related* assets and liabilities. Furthermore, transparency requirements are increased. Pursuant to the draft law, the competent court will in future be responsible for the appointment of the

1 OJ L 189, 3.7.1998, p. 42.

cover pool administrator and will make use of the expertise of the Financial Supervisory Agency (BaFin) in selecting the cover pool administrator. The provisions relating to the accountability of the cover pool administrator are adapted to reflect that of the Board of Directors of a public limited company (section 93 of the German Joint Stock Company Act); this aims to more appropriately mirror the cover pool administrator's managerial responsibility in relation to the continuation of the core business and to allow for an effective decision-making process in line with usual corporate governance requirements. The remuneration of the cover pool administrator and improved access to information by the cover pool administrator are also provided for.

With regard to potential insolvency proceedings in respect of the *Pfandbrief* bank with limited business activities, self-administration is promoted as a further instrument of preserving the *Pfandbrief* bank's operational integrity to the greatest extent possible.

Sentences 1 and 2 of Article 30(4) of the Law on covered bonds preclude the insolvency administrator from invoking a right of appeal under the Insolvency Code in order to challenge acts of the cover pool administrator. This aims to strengthen the confidence of commercial partners in the *Pfandbrief* bank with limited business activities. The insolvency administrator of the *Pfandbrief* bank must accept any consequences arising from a cover pool administrator's conduct in good faith, even if it has had a negative impact on the non-covered bond related insolvency estate.

Whereas Article 28 of the Law on covered bonds already provides for the publication of detailed information on the quality of cover assets, the draft law aims at increasing transparency on interest-rate and currency risks. In addition, information on the maturity breakdown of outstanding covered bonds is further enhanced in relation to residual maturities below two years. Moreover, information on the country of the debtor/guarantor is to be provided for substitute assets in the cover pool, which may comprise mainly marketable public sector debt, as well as average loan seasoning for loans in the cover pool. The breakdown in terms of size of the total debt claims in the information on the cover pool will also change slightly, with the introduction of a new information category of EUR 0.3 million to EUR 1 million. Finally, the share of cover assets eligible for Eurosystem monetary policy refinancing will also be published.

Article 12(3) of the Treaty establishing the European Stability Mechanism provides for the increasing introduction of collective action clauses. The corresponding provision in the Law on covered bonds clarifies in accordance with present practice the fact that bonds of State debtors with collective action clauses may be included in the cover pool.

2. General observations

As pointed out in the ECB's opinion on an amendment to the Law on covered bonds in 2010[2], the Law on covered bonds provides for an ailing *Pfandbrief* bank to retain its status as a fully licensed institution as concerns the *Pfandbrief* bank with limited business activities. This enables the *Pfandbrief* bank to continue to operate the cover pool, with the purpose of making appropriate separate settlements of

2 Opinion CON/2010/47.

covered bonds outside the scope of insolvency provisions and of ensuring the complete settlement of outstanding covered bonds. In this context, the ECB welcomes the draft law as it further clarifies the conditions for the cover pool administrator and thus strengthens the ongoing operability of the *Pfandbrief* bank with limited business activities.

3. Information disclosure

As regards the disclosure of information, the ECB welcomes the amendments to Section 28 of the Law on covered bonds and considers that the draft law is a further step towards increasing overall transparency in the Union's covered bond markets. Increased transparency enables investors to compare different covered bond programmes more easily, thus contributing to the long-term sustainable development of the covered bond market as the most important privately issued bond segment in Europe's capital markets.

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

Done at Frankfurt am Main, 23 November 2012.

[signed]

The President of the ECB

Mario DRAGHI