EUROPEAN CENTRAL BANK

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OPINION OF THE EUROPEAN CENTRAL BANK

of 7 September 2016

on the role of the Financial Supervisory Authority's representative on the European Central Bank's Supervisory Board, and on supervision fees

(CON/2016/43)

Introduction and legal basis

On 22 June 2016 the European Central Bank (ECB) received a request from the Finnish Ministry of Finance for an opinion on a draft Government Bill amending the Law on the Financial Supervisory Authority (hereinafter the 'draft law on the FIN-FSA') and the Law on the supervision fees of the Financial Supervisory Authority (hereinafter the 'draft law on supervision fees' and together with the draft law on the FIN-FSA, the 'draft laws').

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 laws relate to the tasks conferred on the ECB concerning policies relating to the prudential supervision of credit institutions and Suomen Pankki. 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 on the FIN-FSA aims to adapt existing legislation to recent changes in the supervisory framework, in particular the division of supervisory tasks between the Finnish Financial Supervisory Authority (FIN-FSA) and the ECB under the Single Supervisory Mechanism (SSM), and to specify the tasks and responsibilities within the FIN-FSA for SSM-related issues.

1.2 The draft law on the FIN-FSA proposes that the FIN-FSA's maximum number of Board members be increased from five to six, three of whom will continue to be appointed based on proposals from Suomen Pankki, the Ministry of Finance and the Ministry of Social Affairs and Health, respectively. The Parliamentary Supervisory Council, which currently appoints the two remaining members of the Board, will in the future have the right to appoint three members of the Board. As noted in the motivations for the draft law, the amendment of the Law on the Financial Supervisory Authority is

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).

necessary to ensure that the FIN-FSA's Board has sufficient expertise to carry out all of its tasks, including macroprudential and insurance supervision.

1.3 The draft law on the FIN-FSA explicitly assigns to the FIN-FSA's Board the task of appointing the FIN-FSA's representative on the ECB Supervisory Board, and his or her alternate in the event of the representative's absence. The motivations for the draft laws state that although the FIN-FSA's Board has appointed the Director General of the FIN-FSA[2] as the FIN-FSA's representative on the ECB Supervisory Board, the Board could, in principle, appoint someone else as FIN-FSA's representative.

1.4 Under the draft law on the FIN-FSA, the FIN-FSA's representative on the ECB Supervisory Board is required to submit for the FIN-FSA Board's consideration any matters to be considered by the ECB Supervisory Board concerning: (1) the financing of ECB banking supervision; (2) supervisory decisions or capitalisations relating to the business activities of significant credit institutions; (3) regulations and guidelines relating to the activities of significant credit institutions; (4) restrictions on the management activities of significant credit institutions; and (5) matters which in other ways have a significant bearing on the activity of the FIN-FSA and which are fundamental from a financial market perspective. The FIN-FSA's representative may handle a matter that arises at an ECB Supervisory Board meeting without consulting the FIN-FSA's Board, if this is necessary due to the urgent nature of the matter. In such cases, the FIN-FSA's Board must be informed of the matter ex post. Furthermore, the representative must make the FIN-FSA's Board aware of any information obtained that relates to the ECB Supervisory Board's activities on matters and initiatives affecting the development of the financial market and financial legislation[3].

According to the motivations for the draft laws, the reason for requiring the FIN-FSA's representative on the ECB Supervisory Board to submit the abovementioned matters for the FIN-FSA Board's consideration is not in order for the FIN-FSA's Board to make a binding decision on ECB Supervisory Board matters, as the FIN-FSA's Board is not authorised to decide on a matter on which the ECB's Governing Council decides. The motivations for the draft laws state that this provision will apply to decisions which concern the FIN-FSA's supervised entities and to decisions which could have a significant impact on the structure of European financial markets or financial stability. In this respect, the motivations for the draft laws clarify that at least those matters that affect credit institutions operating or based in Finland will be considered significant from the point of view of the FIN-FSA, and that it is necessary to limit the ECB Supervisory Board matters to be submitted for consideration by the FIN-FSA's Board, in view of the large number of matters dealt with by the ECB Supervisory Board.

The motivations for the draft laws acknowledge that according to Council Regulation (EU) No 1024/2013[4], the members of the ECB Supervisory Board must act independently, objectively

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2 The Director General, who is the chief executive officer of the FIN-FSA, is currently appointed for a period of five years by the Parliamentary Supervisory Council based on a proposal from the FIN-FSA's Board. The Director General is not a member of the FIN-FSA's Board.

3 See Section 10a of the draft law on the FIN-FSA.

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

and in the interest of the Union as a whole. This means that decisions must be taken independently of external (political and industry) influences. The motivations for the draft laws also point out that the FIN-FSA's Board is part of the FIN-FSA and not an external body and that the FIN-FSA is represented on the ECB Supervisory Board as an organisation. In addition, the motivations for the draft laws state that the requirement of independence laid down in Council Regulation (EU) No 1024/2013 does not prevent the FIN-FSA's Board from discussing a matter that is pending before the ECB Supervisory Board at one of the FIN-FSA Board's meetings and, if necessary, taking a position on significant matters of principle.

According to the motivations for the draft laws, Council Regulation (EU) No 1024/2013 aims to ensure the operational independence and objectivity of the SSM and the ECB Supervisory Board as a whole, without interfering with the internal organisation of national supervisory authorities, such as the status of the person representing the national supervisory authority on the ECB Supervisory Board, in the decision-making system of the national supervisory authority. Council Regulation (EU) No 1024/2013 does not include any provisions on the operational organisation or internal division of responsibilities of national supervisory authorities. Decisions on the organisation and internal responsibilities of national supervisory authorities are left to the sole discretion of each Member State. The motivations for the draft laws also argue that the role of the FIN-FSA's representative on the ECB Supervisory Board differs from the role of Suomen Pankki's Governor on the ECB's Governing Council. On the basis of the Treaty, the Governor of Suomen Pankki is explicitly mentioned as being a member of the ECB's Governing Council and exercises his or her voting rights on a personal basis. By contrast, the FIN-FSA is represented as an organisation on the ECB Supervisory Board, and the exercise of voting rights is not confined to a specific person under Union law.

1.5 The purpose of the draft Law on supervision fees is to take into account structural changes in the Finnish financial market and their impact, *inter alia,* on the financing of supervisory activities. The fees for branches of credit institutions established in the European economic area are amended by introducing higher fees for those branches that are categorised as significant (with a market share of 2-10 % of deposits) or very significant (with a market share of 10 % or more of deposits). In addition, fixed supervision fees are increased by 7 %, while the proportional fees are decreased by 5 % in order to achieve a more equitable distribution of the burden of paying the fees. These changes aim to maintain the current funding structure, with 95 % of the FIN-FSA's operating costs being funded by supervision fees and the remaining 5 % by Suomen Pankki.

2. Specific observations

2.1 *Appointment of FIN-FSA's representative on the ECB Supervisory Board*

The ECB notes the clarification in the draft law on the FIN-FSA that the FIN-FSA's Board will appoint the FIN-FSA's representative to the ECB Supervisory Board, and his or her alternate in the event of the absence of the representative. In this respect, the ECB points out that Article 26(1) of Council Regulation (EU) No 1024/2013 provides that the ECB Supervisory Board must include one representative of the national competent authority (NCA) in each participating Member State, which

includes one representative of the FIN-FSA. However, the procedure and conditions for appointing the representative of the FIN-FSA to the ECB Supervisory Board remain a matter of national law.

2.2 *Consideration by FIN-FSA's Board of ECB Supervisory Board matters*

2.2.1 The ECB notes that pursuant to Section 10a of the draft law on the FIN-FSA, the FIN-FSA's representative on the ECB Supervisory Board must submit for the FIN-FSA Board's consideration certain matters to be considered by the ECB Supervisory Board. Furthermore, the respective member of the ECB Supervisory Board may not deal with such matters without the FIN-FSA's Board first having discussed them, unless the matters concerned are urgent. In this respect, the ECB highlights Article 19 of Council Regulation (EU) No 1024/2013, which provides that the members of the ECB Supervisory Board must act independently and objectively in the interest of the Union as a whole and must neither seek nor take instructions from the institutions or bodies of the Union, from any government of a Member State or from any other public or private body. The governments of the Member States and any other bodies must respect that independence. In addition, Article 26(1) of Council Regulation (EU) No 1024/2013 states that all members of the ECB Supervisory Board must act in the interest of the Union as a whole[5].

2.2.2 The ECB considers that the principle of independence under Article 19 of Council Regulation (EU) No 1024/2013 prohibits, inter alia, any national body, including the FIN-FSA's Board, from giving instructions to members of the ECB Supervisory Board. The draft laws are not clear on whether, after having considered any matter that the FIN-FSA's representative on the ECB Supervisory Board submits for its consideration, the FIN-FSA's Board might give instructions to the FIN-FSA's representative on the ECB Supervisory Board. However, the ECB notes that the proposed provisions could be interpreted in such a way. In any case, a member of the ECB Supervisory Board would not be able to act independently if he or she had to bring, prior to any discussion at the ECB Supervisory Board, certain matters before a decision-making body of the NCA, if that decision-making body were allowed, or required, to take a position on those matters. Under such circumstances, the representative on the ECB Supervisory Board might be reluctant to deviate from the position of the decision-making body of the NCA by following his or her own assessment. Thus, national legislative provisions should not aim to enable the FIN-FSA's Board to unduly influence the person appointed by it as a representative on the ECB Supervisory Board in a manner that would breach the ECB Supervisory Board representative's independence in any way.

2.2.3 The ECB also notes that, based on the motivations for the draft laws, the reason for requiring the FIN-FSA's representative on the ECB Supervisory Board to submit certain specified matters for the FIN-FSA Board's consideration is not in order for the FIN-FSA's Board to make a binding decision on ECB Supervisory Board matters, as the FIN-FSA's Board is not authorised to decide on a matter on which the ECB's Governing Council decides.

However, as previously noted, this provision is designed to ensure that the FIN-FSA's Board may exercise substantial influence over the FIN-FSA's representative on the ECB Supervisory Board.

5 See also Article 13b.1 of Decision ECB/2004/2 of the European Central Bank of 19 February 2004 adopting the Rules of Procedure of the European Central Bank (OJ L 80, 18.3.2004, p.33) and Article 4 of the Code of Conduct for the Members of the Supervisory Board of the European Central Bank (OJ C 93, 20.3.2015, p. 2).

In this regard, the ECB emphasises that when the ECB is the competent authority for a supervisory decision, any national law provisions concerning the decision-making of the NCA may not influence the ECB's decision-making. The ECB Supervisory Board is an internal body of the ECB. Although an NCA appoints a representative to the ECB Supervisory Board, that representative should not be subject to any national law provisions on the governance or decision-making of the NCA when it comes to his or her actions as a member of the ECB Supervisory Board to the extent that such provisions are incompatible with the status of the representative on the ECB Supervisory Board as defined by Union law. Council Regulation (EU) No 1024/2013 does not assign the role of the NCA's representative to a specific person, but allows the NCA to freely appoint its representative. This fact has no bearing on the conclusion that, once the representative has been appointed, he or she should not be subject to national law requirements which could hinder his or her independence and objectivity whilst acting in his or her capacity as a representative on the ECB Supervisory Board, which is an internal ECB body.

2.2.4 Because Council Regulation (EU) No 1024/2013 specifically requires that the members of the ECB Supervisory Board act independently, the application of any national law provisions conflicting with that independence requirement should be considered to be inconsistent with Union law. Article 19 of Council Regulation (EU) No 1024/2013 requires that the members of the ECB Supervisory Board 'shall act independently'. It should be emphasised that this provision does not specify any exceptions to this independence requirement. The requirement applies to all members of the ECB Supervisory Board, including those appointed by the NCAs. By definition, a member of the ECB Supervisory Board could not 'act independently' if the member is unduly influenced by a decision-making body of the NCA, or is unable to take a position in ECB Supervisory Board meetings on an issue without the approval of a decision-making body of the NCA. This does not exclude the possibility for a member of the ECB Supervisory Board to seek, where appropriate, at his or her own initiative and discretion, the views of others when preparing for discussions in ECB Supervisory Board meetings.

2.2.5 It should also be noted that the planning and execution of the tasks conferred on the ECB under Council Regulation (EU) No 1024/2013 must be fully undertaken by the ECB Supervisory Board, which prepares the draft decisions on supervisory issues to be sent to the ECB's Governing Council for approval. In this respect, the ECB Supervisory Board is not intended to function as an inter-governmental body, but rather as an internal body of a Union institution, whose members are required to act objectively in the interest of the Union as a whole. In this context, it should be noted that the members of the FIN-FSA's Board are not subject to a similar requirement to act objectively in the interest of the Union as a whole. In addition, the position of a member of the FIN-FSA's Board is only a part-time position and the members of the FIN-FSA's Board may have other full-time positions, for example, in government offices. Any undue influence on the NCA's representative on the ECB Supervisory Board by an internal body of the NCA would erode the requirement under Council Regulation (EU) No 1024/2013 that the ECB Supervisory Board members must act independently and objectively in the interest of the Union as a whole, as this could mean that supervision would be driven by national rather than European interests.

2.2.6 Furthermore, the ECB considers that the national law provisions requiring the NCA's representative on the ECB Supervisory Board to submit matters for consideration by an internal body of the NCA would probably constitute an obstacle to the effective discharge of the ECB Supervisory Board's responsibilities, thereby undermining the effective performance by the ECB of its supervisory tasks. The members of the ECB Supervisory Board must, where necessary, be able to take swift positions on the contents of the draft decisions prepared or adjust the procedures for processing matters without having to obtain verification or confirmation of the position of a decision-making body in the NCA.

2.2.7 In the light of the above, the ECB considers that the provisions of the draft law on the FIN-FSA imposing an obligation on the FIN-FSA's representative on the ECB Supervisory Board to submit ECB Supervisory Board matters for the consideration of the FIN-FSA Board should be removed.

2.3 *Provision of information regarding ECB Supervisory Board matters to FIN-FSA Board*

2.3.1 The ECB notes that the motivations for the draft laws argue that the FIN-FSA's Board cannot fulfil its legal, governance and other tasks unless it receives sufficient advance information on matters to be discussed at meetings of the ECB Supervisory Board. In this respect, the ECB understands that, based on existing legislation, the FIN-FSA's Board decides, among other things, on the overall strategy of the FIN-FSA, sets specific operational objectives, directs and supervises compliance with the strategy and achievement of the objectives, and reports to the Parliamentary Supervisory Council on the achievement of the FIN-FSA's objectives. The ECB understands that the FIN-FSA's Board also decides on the principles to be observed by the FIN-FSA in international cooperation, is responsible for taking certain supervisory decisions, such as decisions on administrative sanctions, and considers certain decisions within the Director-General's competence. The ECB understands that the FIN-FSA Board's responsibilities related to the administration of the FIN-FSA include, among other things, considering the annual budget of the FIN-FSA and submitting it for confirmation by Suomen Pankki's Board.

2.3.2 Article 27(1) of Council Regulation (EU) No 1024/2013 makes the members of the Supervisory Board subject to the professional secrecy requirements set out in Article 37 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB') and in the relevant acts of Union law[6]. Members of the ECB Supervisory Board and other participants in ECB Supervisory Board meetings are required to take all necessary measures to ensure that the professional secrecy obligations in Article 37 of the Statute of the ESCB are respected by persons having access to the members' information[7]. In addition, it should be noted that documents drawn up by the ECB Supervisory Board are ECB documents, and therefore they must be classified and handled in accordance with Decision ECB/2004/2[8]. In particular, the proceedings of the ECB Supervisory Board are confidential. Consequently, without prejudice to the duty of cooperation in good faith between the ECB and the NCAs and the obligation to exchange information provided by Article 6(2) of Council Regulation (EU) No 1024/2013the SSM Regulation,

6 See also Article 23a of Decision ECB/2004/2.

7 See Article 14.2 of the Code of Conduct for the Members of the Supervisory Board of the European Central Bank.

8 See Article 23a in conjunction with Article 23.3 of Decision ECB/2004/2.

any sharing of information by members of the ECB Supervisory Board must strictly comply with professional secrecy obligations and the ECB's confidentiality rules. Therefore, the sharing of information by a member of the ECB Supervisory Board when seeking the views of others as referred to by para 2.2.4 shall be subject to professional secrecy obligations of those other persons. However, in this respect, national law imposing an obligation on the ECB Supervisory Board members to share ECB documents with any person, including the NCAs, is incompatible with the ECB's independence in deciding how to handle ECB documents, including documents of the ECB Supervisory Board.

2.3.3 In addition, the ECB considers that a requirement to provide information to the FIN-FSA's Board before the ECB Supervisory Board considers a particular matter would interfere with the independence of FIN-FSA's representative on the ECB Supervisory Board, making the representative susceptible to attempts to unduly influence him or her in connection with his or her duties as a member of the ECB Supervisory Board.

2.4 *Supervision fees*

According to the draft law on supervision fees, the future funding of the FIN-FSA would be guaranteed in a situation where one or more significant credit institution operating as a subsidiary might be transformed into a branch. However, the motivations for the draft laws recognise that in such a situation, the FIN-FSA would have to levy supervision fees almost up to the maximum amount permitted by law. In this regard, the ECB would like to point out that, when considering FIN-FSA's resources, the SSM's need for NCA staff on joint supervisory teams and inspection teams and the more intense supervision expected for less significant institutions, should also be taken into account.

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

Done at Frankfurt am Main, 7 September 2016.

[signed]

The President of the ECB

Mario DRAGHI