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EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 4 November 2009

on the composition of the Board of the Central Bank and Financial Services Authority of Ireland and the membership of the Irish Financial Services Regulatory Authority

(CON/2009/89)

Introduction and legal basis

On 20 October 2009 the European Central Bank (ECB) received a request from the Irish Minister for Finance (hereinafter the 'Minister') for an opinion on draft amendments to the Central Bank Act 1942, to be included in the draft National Asset Management Agency Bill 2009[1] (hereinafter the 'draft law').

The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community and the third 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[2], as the draft law relates to the Central Bank and Financial Services Authority of Ireland (hereinafter the 'Central Bank'). 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 purpose of the draft law is to amend certain provisions of the Central Bank Act 1942, as amended, to allow for the restructuring and creation of a common membership of the board (hereinafter the 'Board') of the Central Bank and of the Irish Financial Services Regulatory Authority (hereinafter the 'Regulatory Authority').

1.2 The purpose of the proposed inclusions at Section 18BA(1) and Section 33E(1A) is to ensure that the Act will not prevent a member of the Board from being a member of the Regulatory Authority and vice versa. Section 18B(2), which states that four members of the Regulatory Authority must be members of the Board, and Section 25(2) and part of Section 25(3), which refer to the vacation of office of those appointed directors who are members of the Board by virtue of being a member of the Regulatory Authority, are to be deleted in light of the fact that the boards will now be combined. The rationale for the inclusion of Section 18BA(2) is to simplify the quorum requirements, given that the Board of the Central Bank and the membership of the Regulatory Authority will be the same.

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1 The ECB was previously consulted on other, unrelated provisions of this Bill; see Opinion CON/2009/68. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

2 OJ L 189, 3.7.1998, p. 42.

1.3 The substitutions in Section 33E(1) and Section 33E(1)(c) increase the minimum and maximum membership of the Regulatory Authority (and those members that can be appointed by the Minister) so that the number will correspond with that of the Board. The inclusion at Section 33I(1A) allows the Minister to appoint the Governor of the Central Bank as Chairperson of the Regulatory Authority. The purpose of the amendments to Section 25(4)(b) (and inclusion of a new Section 25(4)(c)) and to paragraph 5(3)(b) of Schedule 3 (and the inclusion of a new paragraph 5(3)(c) in Schedule 3) is to add additional grounds on which the Minister can remove an appointed director of the Board or an appointed member of the Regulatory Authority.

2. General observations

2.1 *Reform of supervision in Ireland*

2.1.1 The ECB notes that the essential purpose of the draft law is to enable a common membership of the Central Bank's Board and the membership of the Regulatory Authority in the transitional phase before the dissolution of the Regulatory Authority. The ECB understands from the consulting authority that the intention is that the functions of the Regulatory Authority – other than in respect of consumer information, which are intended to be transferred to another agency – will be performed by a single unitary Central Bank of Ireland. The ECB further understands that the new structure, which will establish a single fully integrated institution in a reformed Central Bank of Ireland, will be accomplished by way of separate legislation yet to be published, which will be the subject of a separate opinion request.

2.1.2 The ECB welcomes the purpose of the draft law. In general, the ECB has consistently favoured the involvement of central banks in prudential supervision. Previous ECB opinions on draft national legislation reforming the institutional framework for prudential supervision in Member States have noted that central banks have traditionally been closely involved in the prudential supervision of credit institutions due to their pivotal role in the financial system, in particular regarding implementing monetary policy and ensuring the proper functioning of payment systems[3]. Furthermore, previous ECB opinions have noted that maintaining close involvement of national central banks (NCBs) in prudential supervision is an important condition for allowing the Eurosystem to contribute adequately to monitoring the risks to financial stability in the euro area, in accordance with Article 105(5) of the Treaty, and to safeguard smooth cooperation between the central bank functions exercised at Eurosystem level and the supervisory functions carried out at national level[4].

2.1.3 The ECB welcomes institutional frameworks in Member States that recognise the essential role of central banks in promoting the soundness and security of credit and financial institutions and the stability of the financial system as a whole. As such, the ECB welcomes the proposed restructuring

3 See Opinion CON/2003/23, paragraph 6.

4 See Opinion CON/2006/39, paragraph 2.3; Opinion CON/2006/15, paragraph 2.1.2; Opinion CON/2001/10, paragraph 4; and Opinion CON/2001/35, paragraph 5.

of the Central Bank in such a manner that the Central Bank will become fully and directly responsible for the supervision of credit and financial institutions.

2.2 *Central bank independence*

2.2.1 The ECB would point out that even during this transitional phase, the duration of which is not clear from the draft law, the Central Bank should continue to perform its tasks in a manner consistent with the Treaty and the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB'). In particular, under Article 108 of the Treaty, when exercising the powers and carrying out the tasks and duties conferred on it by the Treaty and the Statute of the ESCB, neither an NCB nor any member of its decision-making bodies may seek or take instructions from, *inter alia*, any government of a Member State or from any other body, which would include a statutory body such as the Regulatory Authority. Having particular regard to the unique structure of the Regulatory Authority as a constituent part of the Central Bank, the ECB considers that it is of critical importance, as required by Article 108 of the Treaty, that the Regulatory Authority should not seek to influence the Governor, in his capacity as the sole member of the Central Bank's decision-making body responsible for the performance of the Central Bank's ESCB-related tasks, during the transitional phase[5].

2.2.2 In this regard, the ECB was consulted and issued an opinion in 2002 on the establishment of the Regulatory Authority as a constituent part of the Central Bank[6]. On that occasion, the ECB raised certain concerns regarding the Central Bank's independence and made suggestions designed to eliminate any legal risks associated with the independent discharge of the Central Bank's ESCB-related tasks.

2.2.3 In particular, it was considered that one safeguard to ensure that supervisory tasks did not prevail over the central banking perspective would be to ensure that the composition of the Central Bank's Board was not such that as many as half of the Board's directors hold their positions by virtue of being members of the Regulatory Authority. Given the new provisions in Section 18B of the draft law, the ECB would once again raise the concern that the pursuit of supervisory tasks might prevail over the central banking perspective during the transitional phase[7].

2.2.4 In its 2002 opinion, the ECB expressed concern that the potential exposure of the Central Bank to liabilities resulting from funding and budgetary decisions for the Regulatory Authority could also be seen as a threat to the Central Bank's financial independence. Moreover, in order to eliminate any legal risks associated with the independent discharge of the Central Bank's ESCB-related tasks, one of the solutions suggested by the ECB was that the Governor could be granted an explicit right to oppose any funding, budgetary and staffing decisions which might have implications for the Central Bank's independence or which might be deemed otherwise incompatible with the exercise

5 See Opinion CON/2002/16, paragraph 6.

6 Opinion CON/2002/16.

7 See Opinion CON/2002/16, paragraph 5.

by the Governor of the Central Bank's ESCB-related functions. The ECB's 2002 opinion also noted that there might be potential for a conflict of interest within the Central Bank's Board between the financial interests of the Regulatory Authority and the independence of the Central Bank in view of the particular composition of the Board. It remained unclear from a legal perspective whether the Governor would enjoy a sufficient degree of control over any decision by the Central Bank to fund the Regulatory Authority so as to be able to fully protect the Central Bank's institutional and financial independence[8].

2.2.5 The concerns expressed in the ECB's 2002 opinion were addressed by a number of additional statutory safeguards regarding funding, budgetary and staffing matters, which were not present in the draft legislation on which the ECB was consulted[9]. While these additional statutory safeguards undoubtedly represented an improvement as compared to the safeguards contained in the draft legislation on which the ECB was consulted, so far as funding and budgetary matters were concerned, these additional safeguards fell short of the solutions suggested by the ECB in order to eliminate any legal risks associated with the independent discharge of the Central Bank's ESCB-related tasks[10].

2.2.6 The ECB would again raise the concerns expressed in its 2002 opinion in view of the provisions proposed during the transitional phase now being envisaged under the draft law. In this context, the ECB recommends clarifying in the draft law that the Governor has the sole right to determine any funding and budgetary decisions pertaining not only to the Central Bank's ESCB-related tasks and their implementation, but also to the Regulatory Authority, which may have implications for the Central Bank's independence or which may be deemed otherwise incompatible with the exercise by the Governor of the Central Bank's ESCB-related functions.

2.2.7 The ECB notes that the draft law will remove the category of directors appointed to the Board of the Central Bank by virtue of their membership of the Regulatory Authority. However to reduce the legal risks to the independence of the Central Bank, it is important that the intent of the draft law to provide for full common membership of the Regulatory Authority and of the Board is implemented in full.

2.2.8 As regards personal independence, the same rules for security of tenure of office of the Governor apply to other members of NCB decision-making bodies who are involved in the performance of ESCB-related tasks[11]. Nevertheless, the ECB notes that the amendments proposed to

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8 See Opinion CON/2002/16, paragraphs 7-8.

9 See Sections 6D(3)(a), 33L(3)(b), 33L(4) and 33N(4) and paragraphs 2(2) and 3(3) of Schedule 1 of the Central Bank Act 1942, as amended. These safeguards are in addition to a number of statutory safeguards already reflected in the draft legislation on which the ECB was consulted and/or otherwise reflected in the final legislation adopted. See Sections 5A(4), 18B(5), 33C(1)(b), 33C(7)-(8), 33D(1)-(2), 33N(3) and 33N(5) of the Central Bank Act 1942, as amended.

10 Moreover, one of the additional statutory safeguards introduced at that time would now be removed under the draft law, namely that where the Board is considering budgetary, funding or staffing issues relating to the Regulatory Authority, there is no quorum unless there are present sufficient members of the Board to ensure that: (a) if there is an even number of members present, at least half of them are not members of the Regulatory Authority; and (b) if there is an uneven number of members present, the majority of them are not members of the Regulatory Authority.

11 See Opinions CON/2006/44, CON/2004/16, CON/2006/32, CON/2004/35 and CON/2007/6.

Section 25(4)(b) (and inclusion of a new Section 25(4)(c)) and to paragraph 5(3)(b) of Schedule 3 (and the inclusion of a new paragraph 5(3)(c) in Schedule 3), which provide two additional grounds on which the Minister can remove an appointed director from the Board or an appointed member from the Regulatory Authority, do not affect the Governor, who is solely responsible for the performance of ESCB-related tasks, or the Director General when carrying out the Governor's sole responsibility in this respect. Those two Board members are official directors of the Board rather than appointed directors, and accordingly the additional grounds for removal of appointed directors do not apply to them.

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

Done at Frankfurt am Main, 4 November 2009.

[signed]

The President of the ECB

Jean-Claude TRICHET