EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 9 July 2013

on branches of non-EEA credit institutions

(CON/2013/49)

Introduction and legal basis

On 24 June 2013, the European Central Bank (ECB) received a request from the Irish Minister for Finance for an opinion on an amendment to the Central Bank (Supervision and Enforcement) Bill 2011 (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 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 relates to the Central Bank of Ireland (CBI) and to the 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 draft law amends the Central Bank Act 1971, which provides for the licensing and supervision of banks by the CBI, by introducing a new section 9A, pursuant to which the CBI may authorise a branch of a credit institution located outside the European Economic Area (EEA) (hereinafter a 'section 9A branch') to carry on banking business in Ireland. Such authorisation is to be provided on condition that the CBI is satisfied that the credit institution in question is subject to authorisation and supervisory rules in the country in which its head office is located, which are broadly equivalent to those applicable in Ireland. In addition, the CBI is to be satisfied that depositors with a section 9A branch will be able to avail of protection broadly equivalent to that provided under Irish law.

1.2 A section 9A branch is not to be treated in any respect more favourably than branches of credit institutions whose head offices are located within the EEA. Furthermore, a section 9A branch will continue to be subject to prudential regulation in the country in which its head office is located, while the CBI will be responsible for regulating its conduct of business in Ireland.

1 OJ L 189, 3.7.1998, p. 42.

2. Non-compliance with the consultation obligation

Scope of the consultation

2.1 The ECB received the consultation request on 24 June 2013. The consultation request indicated that the draft law was to have reached committee stage and been discussed in Seanad Éireann, the upper house of the Irish Parliament, on 27 June. The ECB understands that the final stages in Seanad Éireann of the 2011 Bill took place on 2 July and that, on that occasion, the draft law was amended and further related amendments were made to the Central Bank (Supervision and Enforcement) Bill 2011. This opinion is limited to the version of the draft law which was sent for consultation.

2.2 Article 2(1) of Decision 98/415/EC provides that national authorities shall consult the ECB on any draft legislative provision within its field of competence pursuant to the Treaty. Article 2(1) of Decision 98/415/EC contains a non-exhaustive list of matters which fall within the ECB's field of competence, and on which the ECB must be consulted by national authorities. In the event that a provision which has been submitted to the ECB for its opinion is substantively amended prior to the adoption by the ECB of its opinion, or where further draft legislative provisions are proposed, an updated version of all legislative provisions in question should be submitted to the ECB for its opinion.

Appropriate time to consult the ECB

2.3 Article 4 of Decision 98/415/EC provides that the ECB must be consulted 'at an appropriate stage' in the legislative process. It follows from this that the consultation should take place at a point in the legislative process that affords the ECB sufficient time to examine the draft legislative provisions in question and adopt its opinion. Following from the wording of Article 3(4) of Decision 98/415/EC, Member States are obliged to suspend the process for adoption of the draft legislative provisions pending receipt of the ECB's opinion in order to allow the relevant national authorities to meaningfully deliberate the ECB's opinion prior to adoption of the provisions in question. In this respect, the ECB stresses that the fact that the enactment of a particular draft law is urgent does not relieve national authorities of their obligation to consult the ECB and to allow sufficient time for its views to be taken into account in accordance with Decision 98/415/EC. The Irish Government should have postponed adoption of the draft law until such time as would have allowed for a proper consultation with the ECB, as well as due consideration of the ECB's Opinion. The ECB would appreciate it if the consulting authority would honour its obligation to consult the ECB in a timely manner in the future.

3. General observations

Union law

3.1 Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013

on prudential requirements for credit institutions and investment firms[2] (hereinafter 'CRR') and Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms[3] (hereinafter 'CRDIV') do not directly govern access to the market by branches of credit institutions having their head offices in third countries; this is consistent with the legal basis of CRR and CRDIV, i.e. Article 53 of the Treaty, relating to the freedom of establishment[4]. CRR and CRDIV provide only for safeguards; Article 47 of CRDIV provides that 'Member States shall not apply to branches of credit institutions having their head office in a third country … provisions which result in more favourable treatment than that accorded to branches of credit institutions having their head office in the Union'. Recital 23 of CRDIV provides that rules governing branches of third-country credit institutions should be analogous in all Member States. Subject to these safeguards, the power to authorise branches of third-country credit institutions to operate within the Union, and the specific conditions under which they are to operate, are left to the Member States. Under the draft law, Ireland uses this power and sets outs such conditions.

Irish law

3.2 Section 7(1) of the Central Bank Act 1971, as amended, provides that a licence is required for the purposes of carrying on banking business in Ireland. Under Irish law, such licences are currently only granted where the registered office and the head office of a credit institution are both located in Ireland.

3.3 Under the draft law, section 9A branches will be exempt from the requirement to hold a licence.

4. Specific observations

4.1 Under the draft law, the CBI is to be satisfied that a section 9A branch is subject to authorisation and supervisory rules broadly equivalent to those in force in Ireland. Furthermore, the CBI is to be satisfied that depositors with the branch are able to avail of protection broadly equivalent to that provided under Irish law. The ECB notes that the use of the word 'broadly' in each case leaves a margin of discretion to the CBI and introduces, therefore, a possible lack of certainty under the law. In addition, the authorisation and supervisory rules in respect of section 9A branches, and the protection of their depositors as referred to above, could be slightly more or less favourable than the rules applied to other, i.e. EEA, credit institutions. This would seem to be incompatible with Article 47 of CRDIV, which provides that Member States are not to apply provisions that result in more favourable treatment for branches of third-country credit institutions compared with branches of credit institutions having their head office in the Union. This provision is also reflected in the draft law.

2 OJ L 176, 27.6.2013, p. 1.

3 OJ L 176, 27.6.2006, p. 338.

4 Union legal acts in the financial services sector, including CRR and CRDIV, apply throughout the EEA on the basis of the Agreement on the European Economic Area (OJ L 1, 3.1.1994, p. 3).

4.2 It is not clear from the draft law how the CBI is to establish what protection is available to depositors of section 9A branches in the third country in which the institution concerned is located. Furthermore, the draft law does not indicate how or whether the existence of protection in a third-country jurisdiction is to be monitored. If, for example, the protection granted to depositors of a section 9A branch were to fall below the requisite level, it is not clear how this would be ascertained, and whether the authorisation granted to the branch of the institution concerned would be withdrawn by the CBI in that event.

4.3 For the purposes of legal certainty and clarity, the ECB also recommends substituting references to the country in which the credit institution is 'located' with references to the country in which the credit institution is 'established'.

4.4 The establishment of branches of third country credit institutions might create financial stability implications. The ECB understands that further amendments to the draft law and to the Central Bank (Supervision and Enforcement) Bill 2011 have been made, which are intended to underpin the power of the CBI to withdraw the authorisation of branches operating in Ireland of credit institutions established in non-EEA countries in certain circumstances.

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

Done at Frankfurt am Main, 9 July 2013.

[signed]

The President of the ECB

Mario DRAGHI