EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 7 January 2010

on certain measures concerning banking and financial regulation

(CON/2010/3)

Introduction and legal basis

On 8 December 2009 the European Central Bank (ECB) received a request from the French Ministry for Economic Affairs, Industry and Employment for an opinion on certain provisions of a banking and financial regulation draft law relating to the establishment of the Financial Regulation and Systemic Risk Council (hereinafter the 'FRSR'), the regime for covered bonds and an amendment to a provision of the French Monetary and Financial Code relating to the Banque de France (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 Banque de France and to rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets. In addition, the Eurosystem shall contribute to the smooth conduct of policies relating to the prudential supervision of credit institutions and the stability of the financial system under Article 127(5) of the Treaty. 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 FRSR will replace the panel of financial sector supervisory authorities[2]. It is composed of the Governor of the Banque de France, the President of the Prudential Supervisory Authority assisted by the Vice-president, the President of the Financial Market Authority and the President of the Accounting Standards Authority or their deputies[3]; the FRSR is chaired by the Minister for Finance or his representative.

In addition to playing a coordinating role, the FRSR is entrusted with tasks relating to macro-prudential supervision and financial stability and international and European standards that apply to

1 OJ L 189, 3.7.1998, p. 42.

2 Article L.631-2 of the French Monetary and Financial Code.

3 Article L.631-2 of the French Monetary and Financial Code as proposed by the draft law.

the financial sector. The FRSR's tasks are to: (i) foster cooperation and the exchange of information between the institutions represented by its members; (ii) examine French financial sector and market status reports from a macro-prudential point of view and evaluate systemic risks inherent in it, taking account of the opinions and recommendations of the European Systemic Risk Board (ESRB); (iii) facilitate cooperation on and coordination of work in relation to international and European standards applicable to the financial sector, and with the power to issue opinions or position statements when necessary[4]. The FRSR performs such tasks without prejudice to the remits of the institutions represented by its members. The FRSR meets at least three times a year, upon the proposal of one of its members. In the performance of its tasks, the FRSR may consult representatives of credit institutions, investment companies, insurance companies, mutual societies and welfare institutions[5].

1.2 The draft law defines a new category of covered bonds, 'home bonds', in addition to the mortgage bonds. Under the draft law, companies issuing home bonds and mortgage bonds, i.e. the housing finance companies or the mortgage companies, may subscribe to, acquire or hold their own bonds for the sole purpose of using them to collateralise Banque de France credit operations in accordance with the procedures and terms laid down by the Banque de France for its monetary policy and intraday credit operations, where the company is unable to cover all its liquidity requirements using other means at its disposal. The draft law provides for the conditions under which such transactions are to be conducted. Compliance with these conditions will be certified by a specific auditor, who will also have to draft a report for the Prudential Supervisory Authority[6].

1.3 The draft law amends a provision of the French Monetary and Financial Code[7] relating to the Banque de France, in order to allow the Banque de France to also disclose to insurance companies that are authorised to engage in credit insurance transactions in France information it holds on the financial situation of any enterprise. Such disclosure may only be made once the Banque de France has established how this information will be provided and established the disclosure obligations of the companies. Currently, the Banque de France may only disclose such information to other central banks and institutions that carry out duties similar to those of the Banque de France, and to credit and financial institutions. The ECB understands that access to information held by the Banque de France on the financial situations of enterprises is granted to insurance companies that are authorised to engage in credit insurance transactions in France, in order to allow them to better manage the inter-enterprise credit risk, and that this new provision is aimed at developing credit insurance for small and medium- sized enterprises.

4 Article L.631-2-1 of the French Monetary and Financial Code as proposed by the draft law.

5 Article L.631-2-2 of the French Monetary and Financial Code as proposed by the draft law.

6 Article L.515-32-1 of the French Monetary and Financial Code as proposed by the draft law.

7 Article L. 144-1 of the French Monetary and Financial Code.

2. Establishment of the FRSR

2.1 The establishment of national financial stability committees can enhance the ability of national central banks and supervisory authorities to contribute analytical support to the European Systemic Risk Board (ESRB). The tasks performed by these committees should complement the activities performed by the ESRB, therefore it is particularly important to develop appropriate synergies. However, it is necessary to avoid such national committees being entrusted with tasks and powers that potentially conflict with those of the ESRB, and which may undermine the effectiveness of the newly-established European macro-prudential supervisory body. Moreover, the legal frameworks of these committees should appropriately reflect the roles of central banks, should not constrain the independence of the governors of the central banks or unduly affect the quality and impartiality of their contributions as members of the ESRB. Lastly, in view of the importance of ensuring the effectiveness of macro-prudential supervisory arrangements at the EU level, it is essential to safeguard the ability of the ESRB to perform its tasks independently and to guarantee an authoritative and effective channel for transmitting the warnings and recommendations issued by the ESRB.

2.2 The ECB welcomes the emphasis in the draft law on the complementary nature of the FRSR and ESRB tasks, and particularly since it expressly provides that the FRSR will take account of the ESRB's opinions and recommendations when performing its macro-prudential supervision and financial stability related tasks, moreover the scope of latter being expressly limited to the French financial sector and markets. The ECB draws attention to the importance of clarifying the FRSR's organisational rules at an early stage to ensure that the role of the central bank is appropriately reflected and that the independence of the Governor of the Banque de France, as well as the quality and impartiality of his contribution as a future member of the ESRB, is not affected.

2.3 The Memorandum of Understanding on cooperation between Financial Supervisory Authorities, Central banks and Finance Ministries of the European Union on cross-border financial stability (MoU) that entered into force on 1 June 2008[8] provides for the establishment in each Member State of a domestic standing group, i.e. a national level group consisting of the financial supervisory authorities, central banks and finance ministries, with the objective of enhancing preparedness under normal market conditions and facilitating the management and resolution of financial crises. Following the conclusion of the MoU, the French authorities designated the panel of financial sector supervisory authorities as the national domestic standing group (part of its general mandate, laid down in 2005, is to facilitate exchanges of information and the coordination of the control of financial groups). For legal certainty purposes, the related tasks, i.e. 'enhance preparedness under normal market conditions and facilitate the management and resolution of a financial crisis', could be included in the list of tasks entrusted to the FRSR, as detailed in the draft law.

8 See Council conclusions of 9 October 2007.

3. Using home bonds as collateral for the Banque de France's monetary policy and intraday credit operations

With respect to the provisions of the draft law for the use of home bonds as collateral with the Banque de France, 'in accordance with the procedures and terms laid down by [the Banque de France] for its monetary policy and intraday credit operations,' the ECB reiterates that it remains at the sole discretion of the Eurosystem to determine the conditions of eligibility for the use of covered bonds or other assets as collateral and the acceptance of specific assets as collateral for monetary policy and intraday credit operations. Moreover, the draft law should expressly clarify that the procedures and terms laid down by the Banque de France for its monetary policy and intraday credit operations provide for the consistent implementation of the guidelines of the ECB's Governing Council. The draft law could for instance refer to 'the procedures and terms laid down by [the Banque de France] for its monetary policy and intraday credit operations pursuant to the guidelines of the ECB's Governing Council'.

4. Disclosure of information held by the Banque de France on the financial situations of enterprises

With regard to the possibility for the Banque de France to disclose information it holds on the financial situation of any enterprise[9], the ECB stresses the need to ensure that the financial independence of the Banque de France is not endangered as the result of any liability that might arise from the disclosure of such information.

5. The appropriate time to consult the ECB

5.1 In cases of particular urgency that do not allow for a normal consultation period, the consulting authority may indicate urgency in the consultation request and ask for a shorter time limit for the ECB's opinion to be adopted. This does not prejudice the national authorities' duty under Article 127(4) and 282(5) of the Treaty to consult the ECB on national draft legislative provisions falling within its fields of competence in due course of the national legislative process. The second sentence of Article 4 of Decision 98/415/EC states that the ECB must be consulted 'at an appropriate stage' in the legislative process. This implies 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 and to adopt its opinion in all required language versions, and which also enables the relevant national authorities to take the ECB's opinion into consideration before the provisions are adopted. In this respect, as noted by the Court of Justice, the obligation to consult the ECB under the Treaty is intended 'essentially to ensure that the legislature adopts the act only when the body has been heard which, by virtue of the specific functions that it exercises in the [Union]

9 To be extended under the draft law to insurance companies that are authorised to engage in credit insurance transactions in France.

framework in the area concerned and by virtue of the high degree of expertise that it enjoys, is particularly well placed to play a useful role in the legislative process envisaged'[10]. Given that the consulting authority set the ECB an extremely short time limit within which to submit its opinion and that the only reason given was that the consulting authority had established a very tight timetable, the ECB considers that the minimum consultation period of one month provided for in Article 3(1) of Decision 98/415/EC applies.

5.2 According to Article 3(4) of Decision 98/415/EC, Member States are obliged to suspend the process for the adoption of draft legislative provision pending submission of the ECB's opinion. This means that the adopting authority must have a real opportunity to consider the ECB's opinion in a meaningful manner prior to taking its decision on the substance. The ECB also emphasises that, in accordance with Article 4 of Decision 98/415/EC, the opinion received from the ECB has to be brought to the knowledge of the adopting authority if the latter is an authority other than that which has prepared the legislative provisions concerned.

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

Done at Frankfurt am Main, 7 January 2010.

[signed]

The President of the ECB

Jean-Claude TRICHET

10 Case C-11/00 *Commission of the European Communities* v *European Central Bank* [2003] ECR I-7147, paragraphs 110 and 111.