EUROPEAN CENTRAL BANK

EUROSYSTEM

EN **ECB-PUBLIC**

OPINION OF THE EUROPEAN CENTRAL BANK

of 31 October 2016

on the reorganisation of the duties of the Federal Agency for Financial Market Stabilisation and the implementation of the EBA guidelines on sound remuneration policies

(CON/2016/53)

Introduction and legal basis

On 29 August 2016 the European Central Bank (ECB) received a request from the German Federal Ministry of Finance for an opinion on a draft law concerning the reorganisation of the duties of the Federal Agency for Financial Market Stabilisation (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[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

1.1 The draft law is aimed, inter alia, at introducing further legal clarity to the statutory subordination provisions. In particular, the draft law confers on the Federal Ministry of Finance the competence to issue regulations further specifying the features of structured debt and money market instruments that will be excluded from statutory subordination and will thus rank alongside operating liabilities such as corporate deposits and certain claims under derivative transactions[2].

1.2 The draft law contains several provisions to refine the implementation of certain aspects of Directive 2013/36/EU of the European Parliament and of the Council[3] and to implement the European Banking Authority (EBA) Guidelines[4] on prudential rules in relation to remuneration in credit institutions. Taking a stricter approach than envisaged by the EBA Guidelines, the draft law

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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).

2 See Section 46f (6) and (7) of the Law on banking.

3 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, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

4 EBA Guidelines on the remuneration benchmarking exercise of 16 July 2014 (EBA/GL/2014/08) and EBA Guidelines on sound remuneration policies under Articles 74(3) and 75(2) of Directive 2013/36/EU and disclosures under Article 450 of Regulation (EU) No 575/2013 of 27 June 2016 (EBA/GL/2015/22).

prohibits any payment of variable remuneration to members of the administrative or supervisory boards of credit institutions. Further, the draft law gives the Federal Ministry of Finance the competence to issue a regulation specifying (i) the requirements and the procedure for shareholder approval to raise the ratio between fixed and variable annual remuneration[5] and (ii) the calculation of the ratio between variable and fixed remuneration, especially with regard to discounting factors when determining the underlying cash value of the variable remuneration.

2. Specific observations

2.1 Measures to enhance legal clarity in the application of the bail-in tool

2.1.1 In the absence of a Union framework, the ECB supports the approach taken in the draft law to provide legal clarity by promoting the specification of the types of instruments that will be excluded from statutory subordination in the creditor hierarchy, which will be relevant for bail-in and resolution purposes. As set out in the provisions on statutory subordination adopted last year, certain structured debt instruments as well as money market instruments are exempt from such subordination due to their complexity and potential impact on financial stability. This exemption recognises the importance of having straightforward subordinated instruments, which carry a lower contagion risk to ensure that a bail-in can be achieved in an effective manner and that it is legally certain. So far, non-binding guidance has been issued by the national authorities on the treatment of certain types of structured debt instruments for purposes of statutory subordination[6]. The delegation of authority in the draft law enables the Ministry of Finance to issue legally binding rules and therefore promotes the legal clarity and certainty of instruments subject to and exempt from the statutory subordination arrangements.

2.1.2 National and Union laws offer several definitions of money market instruments[7]. However, these definitions were established for purposes other than to define subordinated instruments suitable for bail-in[8], and some are rather broad in nature[9]. The application of the bail-in tool requires a clear identification of subordinated instruments to eliminate or minimise any ambiguities that could complicate the identification of instruments subject to bail-in, to protect investors from being subject to unforeseen bail-in measures, and to improve legal certainty for affected creditors in bank insolvency proceedings. In view of the particular importance of the money markets for the implementation of Eurosystem monetary policy operations, the ECB would appreciate being

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5 See Article 94(1)(g)(ii) of Directive 2013/36/EU.

6 See Joint Paper of BaFin, Bundesbank and FMSA of 3 June 2016, 'Gemeinsame Auslegungshilfe zur insolvenzrechtlichen Behandlung bestimmter Verbindlichkeiten von CRR-Instituten nach § 46f Abs. 5-7 KWG n.F.'.

7 See for example § 1(11) sentence 2 of the Law on banking, which stipulates that money market instruments are 'all types of receivables that are normally traded on the money market, with the exception of payment instruments'. This shall include instruments with a maturity of up to twelve months (see BaFin Merkblatt für Finanzinstrumente of July 2013).

8 See § 194 of the Capital Investment Act (Kapitalanlagegesetzbuch) which sets out very detailed requirements as regards money market instruments, for investor protection purposes, which may be acquired by UCITS funds.

9 Union law definitions refer to 'instruments normally dealt in on the money market', which partly list generic examples like treasury and local authority bills, certificates of deposit, commercial papers, medium-term notes and bankers' acceptances, see for example recital 36 of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32).

consulted on any future draft legal act specifying particular money market and debt instruments that will be excluded from subordination in the creditor hierarchy in bank insolvency proceedings, as such legal definitions could have an impact on the wider development of the money markets.

2.2 Implementation of prudential rules on remuneration

The implementation measures regarding prudential rules for variable remuneration do not raise specific concerns as regards their substance. However, banking legislation adopted by the Member States after the establishment of the Single Supervisory Mechanism (SSM) should facilitate the exercise by the ECB of its responsibilities within the SSM including its capacity to enhance the consistency of the supervision of credit institutions across the SSM. Member States should refrain from setting obstacles both to uniform supervisory practice and to the exercise of supervisory discretion by the ECB within the SSM[10].

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

Done at Frankfurt am Main, 31 October 2016.

[signed]

The President of the ECB

Mario DRAGHI

10 Also see ECB Opinion of 2 September 2015 on bank resolution (CON/2015/31), paragraphs 3.1.2. to 3.1.8.