EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 16 July 2010

on the transfer of prudential supervision tasks to the Austrian Financial Market Authority

(CON/2010/57)

Introduction and legal basis

On 2 June 2010, the European Central Bank (ECB) received a request from the Austrian Ministry of Finance for an opinion on a draft Federal law amending the Law on banking, securities supervision, pensions for employees and the self-employed, and severance payments (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 fourth 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 contains provisions concerning the Oesterreichische Nationalbank (OeNB) and relates to the collection, compilation and distribution of financial and banking statistics. 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 transposes several directives into Austrian legislation[2]. As mentioned in the consultation request, the draft law also includes an amendment to the Law on banking that does not relate to the transposition of directives. In line with Article 1(2) of Decision 98/415/EC, this opinion only covers such amendment.

1.2 The new Article 3(8) of the Law on banking transfers competences from the OeNB to the Austrian Financial Market Authority (FMA) as regards prudential supervision of credit institutions authorised to provide only investment, real estate investment, and severance and retirement fund business ('special purpose banks'). Concretely, the draft law is intended to transfer to the FMA the

1 OJ L 189, 3.7.1998, p. 42.

2 Directive 2009/111/EC of the European Parliament and of the Council of 16 September 2009 amending Directives 2006/48/EC, 2006/49/EC and 2007/64/EC as regards banks affiliated to central institutions, certain own funds items, large exposures, supervisory arrangements, and crisis management (OJ L 302, 17.11.2009, p. 97). Commission Directive 2009/27/EC of 7 April 2009 amending certain Annexes to Directive 2006/49/EC of the European Parliament and of the Council as regards technical provisions concerning risk management (OJ L 94, 8.4.2009, p. 97). Commission Directive 2009/83/EC of 27 July 2009 amending certain Annexes to Directive 2006/48/EC of the European Parliament and of the Council as regards technical provisions concerning risk management (OJ L 196, 28.7.2009, p. 14).

OeNB's responsibility for providing individual bank off-site analysis and on-site audits in connection with such special purpose institutions.

1.3 The explanatory memorandum explains the reasons for the transfer of prudential supervisory competences from the OeNB to the FMA as follows. The OeNB's common risk-based analysis approach to be applied to the abovementioned special purpose banks would not deliver meaningful results due to a lack of comparability with full service banks. Furthermore, the memorandum states that the OeNB's risk-based analysis approach would not be suited to the low balance sheet totals of special purpose banks. According to the memorandum, without the draft law the forthcoming implementation of Directive 2009/65/EC[3] would also lead to an OeNB non-systemic cross-border competency with regard to on-site inspections at foreign undertakings for collective investment in transferable securities, which are non-banks. Austrian law considers investment companies as credit institutions, whereas in other Member States they are not regarded as banks in accordance with Article 4(1) of Directive 2006/48[4]. While the UCITS IV-Directive has to be transposed into Austrian legislation by 1 July 2011, the transfer of supervisory competences will already take effect on 1 January 2011 for organisational reasons.

2. General observations

The appropriate time to consult the ECB

2.1 The ECB points out that, in cases of particular urgency which do not allow for a normal consultation period, the consulting authority may indicate urgency in the consultation request and ask for a shorter deadline for the ECB's opinion to be adopted. This does not prejudice the consulting authority's duty under Articles 127(4) and 282(5) of the Treaty to consult the ECB on national draft legislative provisions falling within its fields of competence. The second sentence of Article 4 of Decision 98/415/EC provides that the ECB must be consulted 'at an appropriate stage'. This implies that the consultation should take place at a point which 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. Article 3(4) of Decision 98/415/EC also obliges Member States to suspend the adoption process for draft legislative provisions, pending receipt of the ECB's opinion. The Ministry of Finance's consultation request on 2 June 2010 did not indicate any urgency and also did not set a deadline for the opinion, which in accordance with Article 3(1) of Decision 98/415/EC may not be less than one month. Notwithstanding this, the National Council adopted the draft law within less than one month and before this ECB opinion has been adopted[5].

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3 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).

4 Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) (OJ L 177, 30.6.2006, p. 1).

5 See Austrian Parliament's press release, 01/07.07.2010/Nr. 585.

2.2 The opportunity to adopt an opinion on a draft law allows the ECB to express its views on the substance of the proposed legislation, including considerations such as the importance that the ECB may attach to a particular legislative proposal and its potential impact on the Eurosystem. Therefore, the ECB reiterates its position that even cases of particular urgency do not relieve national authorities from their duty to consult it and to allow sufficient time to take into account its views in accordance with Decision 98/415/EC. With respect to the ongoing consultation, the process of adoption of the draft law should have been suspended. The ECB's comments on the consulted provisions do not eliminate the breach of the obligation to consult the ECB. Even though the Austrian National Council already adopted the draft law on 7 July 2010, the ECB considers that its comments are important for its application and interpretation and any future amendments. The ECB would appreciate the Ministry of Finance giving due consideration to the above observations by honouring its obligation to consult the ECB in the future, in accordance with Decision 98/415/EC.

Transfer of supervisory competences

2.3 Article 127(5) of the Treaty assigns to the Eurosystem the task of contributing to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system. In line with this Article, the ECB has consistently stated that maintaining a close involvement of national central banks in prudential supervision is a condition for the Eurosystem to contribute adequately to monitoring the risks to financial stability in the euro area[6]. The ECB notes that the OeNB's broad role in the field of prudential supervision will – subject to the ECB's observations in paragraph 3.1 and 3.2 – not substantially diminish as a result of the adoption of the draft law, since the supervisory tasks to be transferred only apply to companies not regarded as credit institutions according to Article 49 of Directive 2006/48/EC. The ECB understands that, without the draft law, the OeNB would be responsible for conducting on-site audits at branches of foreign investment companies in accordance with Article 101(4) of Directive 2009/65/EC, whereby the competent authorities of one Member State may request the cooperation of the competent authorities of another Member State in a supervisory activity or for an on-the-spot verification or in an investigation on the territory of the latter within the framework of their powers pursuant to this Directive, although the national competent authority to supervise UCITS is and will continue to be the FMA.

3. Information-sharing between the OeNB and the FMA

3.1 As emphasised in previous ECB opinions[7], central bank access to prudential information and cooperation between financial supervisory authorities and central banks are essential to macro-prudential monitoring, the oversight of payment systems and the safeguarding of other market infrastructures, which are in turn indispensable for the smooth conduct of monetary policy and conducive to reducing the prudential reporting burden imposed on institutions. In particular, from a

6 See 'The role of central banks in prudential supervision', published on the ECB's website at www.ecb.europa.eu; also see ECB Opinion CON/2001/10. All ECB opinions are available on the ECB's website.

7 See, e.g. paragraph 2.4 of ECB Opinion CON/2007/33 or paragraph 9 of ECB Opinion CON/2001/10.

financial stability perspective, a central bank would inevitably need to be involved in the event of any financial market crisis. In that context, the availability of relevant information and the ability to interpret it are crucial. Directive 2006/48/EC provides that, subject to confidentiality and professional secrecy requirements, information may be shared between supervisory authorities and central banks and vice versa, for the purposes of the exercise of their respective tasks. Therefore the legislation of virtually all Member States that have adopted supervisory models based on an independent financial supervisory authority authorises the exchange of information between central banks and supervisory authorities[8].

3.2 Against this background, the ECB notes that as a consequence of this draft law the OeNB would no longer be authorised to evaluate individual special purpose bank analysis data in light of the individual and overall economic situation, especially for the purpose of performing its duties in connection with financial stability. This follows from the provision by the draft law that only the first to third and last sentences of Article 79(4a) of the Law on banking will apply to special purpose banks. Accordingly, the FMA must share all relevant information arising from its banking supervision activities in the joint database for banking supervision analysis. Relevant information includes data pursuant to Article 77(4), banking supervision data pursuant to Article 14 of the Law on financial conglomerates, reports from State Commissioners, the results of investigations and other observations regarding specific institutions within the FMA's area of responsibility. Furthermore, information available to both institutions is to be stored in the database by the OeNB. The OeNB is also permitted to perform statistical evaluations of the data with the objective of generating results which are not related to specific persons. However, according to the draft law, the eighth sentence of Article 79(4a), which currently authorises the OeNB to evaluate individual special purpose bank analysis data for the purpose of its financial stability duties, would no longer apply to special purpose banks. Taking into account the importance of central bank access to prudential information, the ECB considers essential the OeNB's continued access for macro-prudential monitoring to all available prudential information, including special purpose banks, as far as this access is needed in the course of its respective duties. Provided the eighth sentence of Article 79(4a) of the Law on banking is retained, this problem will not arise. Otherwise, such access in case of need should be explicitly provided. Furthermore, according to Article 3 of the Commission proposal for a regulation establishing the European Systemic Risk Board (ESRB)[9], this institution will be responsible for the macro-prudential oversight of the financial system within the Union to prevent or mitigate systemic risks within the financial system, to avoid episodes of widespread financial distress, contribute to a smooth functioning of the internal market and ensure a sustainable contribution of the financial sector to economic growth. Therefore, the OeNB will need continued access to evaluate individual special purpose bank analysis data for financial stability.

8 See the examples stated in footnote 19 of ECB Opinion CON/2007/33.

9 Proposal for a regulation of the European Parliament and of the Council on Community macro prudential oversight of the financial system and establishing a European Systemic Risk Board, COM (2009) final, 23.9.2009.

3.3 The ECB welcomes that the OeNB will continue to perform statistical evaluations of supervisory analysis data regarding UCITS, real estate investment funds and severance and retirement funds. The ECB also notes that the draft law does not affect the statistical reporting obligations of special purpose banks to the OeNB on the activity of the funds they manage[10].

4. Specific issues

The ECB supports legislation that clearly and explicitly assigns competences to the respective supervisory authorities. However, while the draft law specifically transfers the on-site inspection responsibility, it does not confer on the FMA the responsibility for individual bank analysis. Instead, the draft law merely suggests that certain provisions of Article 79(4a), including the fourth sentence empowering the OeNB to conduct off-site analysis, will no longer apply to special purpose banks. The draft law does not provide that the FMA will assume this responsibility in the future. This could imply that conducting individual bank analysis is no longer required for special purpose banks The ECB understands that this is not intended. Accordingly, for reasons of legal clarity, the ECB recommends expressly conferring on the FMA the responsibility of comprehensively evaluating special purpose banks on an ongoing basis (individual off-site bank analysis).

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

Done at Frankfurt am Main, 16 July 2010.

[signed]

The President of the ECB

Jean-Claude TRICHET

10 These include among other reporting obligations under Regulation ECB/2007/8 of 27 July 2007 concerning statistics on the assets and liabilities of investment funds (OJ L 211, 14.8.2007, p. 8).