EUROPEAN CENTRAL BANK

EUROSYSTEM

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OPINION OF THE EUROPEAN CENTRAL BANK

of 13 November 2015

on measures accompanying the Single Resolution Mechanism Regulation

(CON/2015/47)

Introduction and legal basis

On 6 October 2015 the European Central Bank (ECB) received a request from the Austrian Ministry of Finance (the 'MoF') for an opinion on a draft law (hereinafter the 'draft law') adapting national banking laws, including the Law on recovery, the Law on banking, the Financial Market Authority Act, the Deposit Guarantee and Investor Compensation Act and the National Bank Act 1984, to comply with the Single Resolution Mechanism (SRM) and Union provisions on the Single Resolution Fund.

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 on the third and sixth indents of Article 2(1) of Council Decision 98/415/EC[1], as the draft law relates to the Oesterreichische Nationalbank (OeNB) and 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 purpose of the draft law is to clarify the scope of application of the national banking recovery and resolution regime in light of Regulation (EU) No 806/2014 of the European Parliament and of the Council[2] (hereinafter the 'SRM Regulation').

1.2 The draft law provides that the national resolution authority may exercise its powers under the Law on recovery and resolution only to the extent that these powers are not being transferred to the Single Resolution Board (SRB) in connection with the SRM Regulation. In this context, the draft law clarifies that the OeNB may be involved in those SRM-related tasks for which the national resolution authority could to date seek its involvement. In order to ensure the effective fulfilment of their relevant tasks under the SRM Regulation the draft law provides that the Austrian Financial Market Authority (hereinafter the 'FMA'), also acting as a resolution authority, and the OeNB must

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 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, p. 1).

collaborate closely.

1.3 As regards the Law on recovery and resolution, the draft law introduces general investigative rights for the national resolution authority within its area of responsibility. These investigative powers comprise the right to: (a) obtain information from institutions and undertakings; (b) inspect the accounts, written documents and data storage media belonging to institutions and undertakings; (c) require institutions and undertakings to produce interim accounts, make disclosures and configure their audit reports in a particular format; and (d) carry out on-site inspections at the premises of institutions and undertakings, or commission such inspections to be carried out by third parties. According to the draft law, the national resolution authority must mandate the OeNB to conduct such on-site inspections.

1.4 The draft law[3] limits the federal government's power to seek reimbursement from the OeNB's and the FMA's executive bodies and employees with regard to any damages it has paid to third parties. Pursuant to the Law on the FMA, the FMA as well as its employees and executive bodies are not liable towards the injured party. If the Federal State compensates an injured party for damage incurred it is entitled to seek reimbursement from the FMA's executive bodies and employees under the provisions of the Law on the liability of public bodies (hereinafter the 'AHG'). Although the Federal State may have recourse, under the AHG, against the FMA's and OENB's executive bodies and employees, if they have acted with gross negligence or intentionally[4], the draft law limits such recourse to intentional breaches of the respective executive bodies and employees when carrying out tasks laid down in the Law on recovery and resolution, the SRM Regulation or in delegated legal acts pursuant to Directive 2014/59/EU of the European Parliament and of the Council[5] or the SRM Regulation. The ECB understands that this restriction of the federal government's power to seek reimbursement has no impact on the Federal State's liability for damages caused by the FMA's executive bodies and employees in the enforcement of the federal acts specified under Article 2 of the Financial Market Authority Act, including the Law on recovery and resolution.

1.5 The draft law also excludes Federal State liability for damages caused by the OeNB and the FMA, including their executive bodies and employees, when: (a) acting on an instruction from the SRB, (b) preparing or implementing decisions for the SRB, or (c) collaborating with, exchanging information with or otherwise supporting the SRB[6]. The MoF argues that this statutory exclusion of liability is justifiable in view of the transfer of tasks to the SRB and the SRB's liability pursuant to Article 87 of the SRM Regulation. The draft law's explanatory memorandum explicitly refers to a similar exclusion of liability for damages caused by the FMA and the OeNB in connection with their work under the SSM Regulation. In the SSM context, the national legal framework excludes

3 See Article 2(23) of the draft law.

4 See Article 3(2) of the Law on the liability of public bodies.

5 Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

6 See Art 3 no 11 and Art 4 no 1 of the draft law.

Federal State liability in respect of damage caused by acts of the FMA and the OeNB, including its executive bodies and employees, when implementing or fulfilling an instruction from the ECB, preparing or executing ECB decisions, and when cooperating with, exchanging information with and providing other support to the ECB[7].

1.6 The draft law provides for the adaptation of national provisions on recovery and resolution to the SRM Regulation, including rules on the establishment of a Single Resolution Fund (SRF). In this context, the draft law also sets out how national contributions are to be charged and transferred to the SRF. The draft law thus aligns the Austrian legal framework with the Intergovernmental Agreement on the Transfer and Mutualisation of Contributions to the Single Resolution Fund, Commission Delegated Regulation (EU) 2015/63[8] and Council Implementing Regulation (EU) 2015/81[9].

2. General observations

2.1 The ECB takes note that the draft law aims to align the Austrian national banking supervisory structure with the SRM regime and to ensure that no legal obstacles arise under national law in relation to the performance by the SRB, with the assistance of the national resolution authority, of its banking recovery and resolution tasks under the SRM Regulation. The ECB understands that the rules are not intended to narrow or amend the scope of the SRM Regulation, which is directly applicable.

2.2 The ECB notes that the draft provision requiring the national resolution authority to assign on-site inspections to the OeNB in a resolution context is not a genuinely new task conferred on the OeNB. Although the respective provision introduces general investigative powers for the national resolution authority, including the right to order on-site inspections, which shall be conducted by the OeNB, the Law on recovery and resolution already provides that the OeNB has resolution-related tasks similar to those assigned to it under section 79 of the Law on banking.

3. Specific observations

3.1 The ECB understands that the draft law aims to clarify the involvement of the OeNB in SRM-related tasks. According to the explanatory memorandum, the SRM-related tasks may be allocated to the OeNB regarding those subjects for which its involvement can be sought by the national resolution authority. However, the wording of the amended section 3(5) of the Law on recovery and resolution seems ambiguous regarding the scope of involvement of the OeNB in SRM-related tasks. This provision might be interpreted as determining different areas of involvement of the OeNB in an

7 See paragraph 1.6 of Opinion CON/2014/43.

8 *Commission* Delegated Regulation EU 2015/63 of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to ex ante contributions to resolution financing arrangements (OJ L 11, 17.1.2015, p. 1).

9 Council Implementing Regulation (EU) 2015/81 of 19 December 2014 specifying uniform conditions of application of Regulation (EU) 806/2014 of the European Parliament and of the Council with regard to ex ante contributions to the Single Resolution Fund (OJ L 15, 22.1.2015, p.1).

SRM context compared to its tasks under the national recovery and resolution regime. This is because the explicitly mentioned list of subjects where the OeNB may not be involved in an SRM context differs from the exemptions that apply in the national context. The ECB recommends amending the draft law in order to align the OeNB's involvement in SRM-related matters with what is expressed in the explanatory memorandum.

3.2 Pursuant to Article 87(3) of the SRM Regulation, the SRB shall, in respect of non-contractual liability, make good any damage caused by it or by its staff in the performance of their duties, in particular their resolution functions, including acts and omissions in support of foreign resolution proceedings. Pursuant to Article 87(4) of the SRM Regulation, the SRB shall compensate a national resolution authority for the damages which it has been ordered to pay by a national court, or which it has, in agreement with the SRB, undertaken to pay pursuant to an amicable settlement, which are the consequences of an act or omission committed by that national resolution authority in the course of any resolution under the SRM Regulation of the entities and groups referred to in Article 7(4)(b) and 5 of the SRM Regulation. However, that obligation shall not apply where that act or omission constituted an infringement of the SRM Regulation, of another provision of Union law, of a decision of the SRB, of the Council, or of the Commission, committed intentionally or with manifest and serious error of judgement. The wording of draft Article 3(7) of the Law on the FMA and draft Article 79(8) of the Law on banking could be understood as effectively placing liability for damage caused by the acts and omissions of the FMA and the OeNB occurring within the SRM framework exclusively and categorically on the SRB in all cases. This could lead to an unclear legal situation with the potential of negatively impacting on the efficient and effective functioning of the SRM, in particular having regard to the direct applicability of the SRM Regulation. Therefore, it would be advisable to amend the draft law in order to ensure that the proposed exemptions from the national liability framework are in compliance with Union law and are without prejudice to the allocation of liability under the SRM framework[10].

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

Done at Frankfurt am Main, 13 November 2015.

[signed]

The President of the ECB

Mario DRAGHI

10 See paragraph 5.2 of Opinion CON/2014/43. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.