



**E U R O P E A N   C E N T R A L   B A N K**

**OPINION OF THE EUROPEAN CENTRAL BANK**

**of 19 November 2003**

**at the request of the Irish Department of Finance on a draft Central Bank and Financial Services Authority of Ireland Bill (No. 2) 2003**

**(CON/2003/24)**

1. On 24 September 2003 the European Central Bank (ECB) received a request from the Irish Department of Finance for an opinion on the draft Central Bank and Financial Services Authority of Ireland Bill (No. 2) 2003 (the 'No. 2 Bill').
2. The ECB's competence to deliver an opinion is based on the second indent of Article 105(4) of the Treaty, the second indent of Article 4(a) of the Statute and Article 2 of Council Decision 98/415/EC of 29 June 1998 on consultation of the ECB by national authorities regarding draft legislative provisions<sup>1</sup>. The ECB is competent to deliver an opinion as the No. 2 Bill contains provisions concerning a national central bank and rules which materially influence the stability of financial institutions. In accordance with the first sentence of Article 17.5 of the ECB's Rules of Procedure, this opinion has been adopted by the ECB's Governing Council.
3. The No. 2 Bill is to a large extent follows on from issues arising as a result of the first Central Bank and Financial Services Authority of Ireland Act 2003, enacted earlier this year (the 'No. 1 Act'), which established a new Irish Financial Services Regulatory Authority (IFRSA) as a constituent, but autonomous, part of the newly restructured Central Bank and Financial Services Authority of Ireland. Specifically the No. 2 Bill contains seven main elements. First, the establishment of a Financial Services Ombudsman to deal with consumer complaints about financial institutions. Second, the establishment of consumer and industry panels for the IFRSA to consult with interested parties. Third, new reporting and auditing obligations for financial institutions. Fourth, IFRSA powers to impose penalties on financial institutions. Fifth, regulatory requirements for informal money transmission services. Sixth, regulatory requirements for certain firms providing home loans. Seventh, miscellaneous amendments to financial services legislation. The ECB would like to confine its comments on the No. 2 Bill to a number of discrete points, as set out in this opinion.
4. As part of the follow-up to the No. 1 Act, the ECB would like to highlight a technical, drafting point in connection with one specific provision which the ECB considers to be important. It is recalled that in the ECB's Opinion of 5 June 2002 at the request of the Department of Finance on a draft Central Bank and Financial Services Authority of Ireland Bill, 2002 (CON/2002/16), the ECB noted

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<sup>1</sup> OJ L 189, 3.7.1998, p. 42.

that the IFSRA is under an obligation to consult and obtain the approval of the Governor of the Central Bank and Financial Services Authority of Ireland (the ‘Governor’) over matters relating to the stability of the financial system, including the issue, revocation and suspension of a licence or authorisation. As noted in the ECB Opinion, this provision is fundamental in the ECB’s view and should be made the most of in practice to allow for the continued close involvement of central banking functions in supervision matters, as was previously the case within the Central Bank of Ireland. Indeed, this involvement is seen as a necessary condition to allow the Eurosystem to contribute adequately to monitoring the risks to financial stability in the euro area. In addition, this provision also safeguards smooth coordination between the central banking functions exercised at a Eurosystem level and the supervisory functions carried out at national level.

5. The ECB notes, however, that the final wording of the new Section 33C(9) of the Central Bank Act, 1942 (as introduced by the No. 1 Act) now provides that where the IFSRA considers it prudent in the circumstances, it may send a report to the Irish Minister for Finance on any matter relating to the financial stability of the Irish State’s financial system, and that the IFSRA may ‘otherwise’ act on such a matter only with the agreement of the Governor. This minor change in the wording may inadvertently infer that the IFSRA is only under an obligation to obtain the Governor’s approval on matters relating to the stability of the financial system in circumstances where it has not reported on such matters to the Minister for Finance. The ECB understands that this interpretation does not represent the intention of the drafters, as it was intended to ensure that the IFSRA may only act on any matter relating to the financial stability of the Irish State’s financial system with the agreement of the Governor. The ECB would therefore appreciate it if, as part of the current opportunity to ‘tidy up’ afforded by the No. 2 Bill, this provision could be re-drafted to reflect the true underlying intention in a clearer manner.
6. Another related issue concerns the potential jurisdiction of the new Financial Services Appeals Tribunal (the ‘Appeals Tribunal’) over IFSRA decisions taken with the agreement of the Governor and relating to the financial stability of the Irish State’s financial system (e.g. decisions to revoke or suspend a license). Under the No. 1 Act the Appeals Tribunal has jurisdiction to, *inter alia*, hear and determine appeals made by affected persons against ‘appealable decisions’ of the IFSRA. After finishing the hearing of an appeal the Appeals Tribunal may affirm, vary or set aside an appealable decision, or alternatively substitute any appropriate decision that the IFSRA could have lawfully made in relation to the matter concerned. The No. 2 Bill defines an ‘appealable decision’ as a decision of the IFSRA that a provision of a designated enactment or designated statutory instrument declares to be an appealable decision. As noted in the footnotes to the explanatory memorandum accompanying the No. 2 Bill, separate legislation is being prepared to substitute the Appeals Tribunal for the courts in relation to appeals against supervisory decisions of the IFSRA, including notably decisions to refuse, withdraw or restrict a license or authorisation, with a full right of appeal from the Appeals Tribunal’s decision to the courts. The ECB considers that a non-judicial administrative review of any such IFSRA decision taken with the Governor’s agreement would be

inconsistent with the independent discharge of the Governor's ESCB-related task of contributing to the stability of the Irish State's financial system.

7. The ECB welcomes the proposed amendment to Section 103 of the Irish Companies Act 1963 requiring the Irish Registrar of Companies to enter in the companies register particulars of any provision of a floating charge that has the effect of prohibiting or restricting a company from issuing further securities that rank equally with that charge. Mortgage-backed promissory notes secured by floating charges over pools of mortgage assets held by a number of Irish counterparties to ESCB credit operations are currently eligible as 'tier two' assets for the collateralisation of ESCB credit operations. During the subsistence of the security, a negative pledge prohibits these counterparties from creating or permitting any encumbrance whatsoever over the charged property. Consistent with standard market practices, this negative pledge is registered with the Registrar of Companies in the case of companies, or in the public file maintained by the Central Bank and Financial Services Authority of Ireland in the case of building societies. The legal security of the floating charge should be further enhanced by making the standard market practice of registering negative pledges contained in floating charges mandatory. In particular, this reform should reinforce the view that registration constitutes notice of the negative pledge restriction contained in the floating charge, and that a fixed charge granted to a party which had notice of the existence of the negative pledge would not therefore have priority over that floating charge.
8. The ECB notes the extension in the No. 2 Bill of the authorisation currently applying to *bureaux de change* to persons engaged in money transmission business, defined to include the service of transmitting money by means of a clearing network from persons within the Irish State to other persons (whether such persons are within the State or elsewhere). The ECB understands that such money transmission businesses may resemble features of payment and settlement arrangements which should fall within the oversight competence attributed to the Governor, who is responsible for promoting the efficient and effective operation of payment and settlement systems. The ECB would welcome a legislative clarification of this point.
9. Finally, as also noted in the abovementioned ECB Opinion of 5 June 2002, the ECB notes that the No. 2 Bill restates and reorders existing Irish legislation relating to the Irish central bank's functions and powers. While the ECB welcomes the partial consolidation of Ireland's central bank statutes, and most particularly the Central Bank Act, 1942, the ECB notes that the provisions of Irish law relating to the basic structure of Ireland's central bank and the performance of its ESCB-related tasks is still contained in a number of different laws including the surviving provisions of the original Central Bank Act, 1942, a number of provisions in the Central Bank Acts, 1971 and 1989, the surviving provisions of the Central Bank Act, 1998, a number of provisions of the Economic and Monetary Union Act, 1998 (as amended by the Finance Act, 2002), the No. 1 Act, as well as a number of additional laws concerning currency matters. The lack of a consolidated central bank statute creates a structure for Ireland's central bank that is somewhat lacking in transparency. The twin goals of clarity and transparency would suggest that at the first suitable opportunity the Irish

Government should undertake a consolidation exercise. In addition, a full consolidation of Ireland's central bank statutes would greatly assist the ECB in fulfilling its ongoing task of responding to consultations from the Irish authorities on draft legislation within the ECB's field of competence. In this context it is noted that Ireland's central bank statutes are the only central bank statutes in the Eurosystem which have not been consolidated.

10. The ECB confirms that it has no objection to the competent national authorities making this opinion publicly available at their discretion. This opinion will be published on the ECB's website six months after the date of its adoption.

Done at Frankfurt am Main on 19 November 2003.

*The President of the ECB*

[signed]

Jean-Claude TRICHET