



OPINION OF THE EUROPEAN CENTRAL BANK

of 5 November 2007

at the request of the Austrian Ministry of Finance

on a draft law amending the Law on banking, the Law on savings banks, the Law on the Financial Market Supervisory Authority and the Law on the Oesterreichische Nationalbank

(CON/2007/33)

Introduction and legal basis

On 8 October 2007, the European Central Bank (ECB) received a request from the Austrian Ministry of Finance for an opinion on a draft law amending the Law on banking, the Law on savings banks, the Law on the Financial Market Supervisory Authority and the Law on the Oesterreichische Nationalbank (*Bundesgesetz zur Reform der Finanzmarktaufsicht* – hereinafter the ‘draft law’).

The ECB’s competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community and the third, fourth 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 provisions¹, as the draft law contains provisions concerning the Oesterreichische Nationalbank (OeNB), the collection, compilation and distribution of banking statistics and rules applicable to financial institutions which 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 intended to further improve the supervisory system set up in 2001 and to strengthen the position of Austria as a financial centre through financial market supervision that is as effective and efficient as possible. Whilst the statement of reasons explains that the supervisory instruments of the Financial Market Authority (FMA) have been extended since the establishment of the FMA, the consulting authority stresses the need for a stronger network of individual bank and credit institution group supervision and macroeconomic analysis by the OeNB².

¹ OJ L 189, 3.7.1998, p. 42.

² See page 1 of the statement of reasons.

- 1.2 The draft law is intended to optimise financial market supervision of banking and to clarify the allocation of tasks between the FMA and the OeNB. In so doing, the OeNB's technical competence and experience in banking supervision, particularly regarding on-site inspections and analyses are intended to be used to a greater extent, which also makes it possible for both institutions to use their resources more efficiently³.
- 1.3 The draft law will transfer the responsibility for all on-site bank inspections to the OeNB. These inspections will take place on the basis of an inspection plan agreed between the two institutions, as well as on a request from the FMA. In addition, the OeNB may carry out on-site inspections in cases of macroeconomic necessity without a request from the FMA⁴. However, the FMA remains the competent authority for banking supervision.
- 1.4 The draft law also expressly regulates, for the first time, the OeNB's responsibilities for banking analysis and a jointly fed and used FMA/OeNB database to ensure the availability of a comprehensive, complete and uniform level of information at any time⁵.
- 1.5 Furthermore, the proposal provides for express legislative recognition of the OeNB's formal responsibility for contributing to financial stability by monitoring and assessing the financial system in Austria as a whole, and for reporting to the FMA and the Ministry of Finance thereon⁶.
- 1.6 Finally, the draft law is intended to enhance corporate governance requirements for credit institutions, including qualitative requirements for the supervisory boards of credit institutions⁷, and provides for the establishment of an auditing committee to control and inspect accounting, the annual accounts and auditing among others things⁸.

2. Financial stability and the prudential role of a central bank

2.1 General observations

- 2.1.1 Article 105(5) of the Treaty assigns to the European System of Central Banks 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.
- 2.1.2 In line with this Article, the ECB has consistently stated the following when consulted on draft national legislation reforming the institutional framework for prudential supervision in Member States: (i) central banks have traditionally been closely involved in the prudential supervision of credit institutions due to their pivotal role in the financial system, in particular regarding the

³ See page 1 of the statement of reasons.

⁴ Draft amendments to Article 70 of the Law on banking.

⁵ Draft amendments to Article 79 of the Law on banking.

⁶ New Article 44b of the Law on the OeNB.

⁷ New Article 28a of the Law on banking.

⁸ Draft amendment to Article 63a of the Law on banking.

implementation of monetary policy and ensuring the proper functioning of payment systems⁹; and (ii) the maintenance of a close involvement of national central banks (NCBs) in prudential supervision is an important condition for allowing the Eurosystem to contribute adequately – also through the availability of relevant statistics on financial institutions - to monitoring the risks to financial stability in the euro area¹⁰, in accordance with Article 105(5) of the Treaty, and to safeguarding a smooth coordination between the central banking functions exercised at the Eurosystem’s level and the supervisory functions carried out at national level¹¹.

2.2 *Legislative recognition of the central bank’s financial stability role*

2.2.1 In keeping with the position taken by the ECB in previous opinions on draft national legislation proposing supervisory reforms, including the ECB opinion on the 2001 reform of the Austrian financial supervision framework¹², the ECB considers that central banks are in general in the best position to take on responsibility for financial stability, given their insight into money and financial market developments and their involvement in payment systems and monetary policy operations. This applies both to the normal conduct of business and in crisis situations¹³. The central banks’ remit on systemic stability means that they concentrate on the potential impact of macroeconomic shocks or disturbances and other factors influencing the stability of financial system as a whole¹⁴. Therefore, the ECB welcomes the express legislative recognition of the OeNB’s formal responsibility for contributing to financial stability by monitoring and assessing the financial system in Austria and reporting to the FMA and the Ministry of Finance, as a separate function from hands-on supervision and financial regulation, as provided for in the new Article 44b(1) of the Law on the OeNB. In this respect, the adequate access of central banks to information and data on prudential and financial stability, and cooperation between financial supervisory authorities and central banks, are essential for the accomplishment of their respective missions and conducive to reducing the prudential and statistical reporting burden imposed on institutions.

2.3 *Operational involvement of the OeNB in prudential supervision*

2.3.1 The ECB welcomes the fact that the proposed amendments to Articles 70 and 70a of the Law on banking are intended to give the OeNB the sole responsibility for conducting on-site inspections of the banking sector as part of the ongoing banking supervision in Austria, while at present the FMA is obliged to mandate the OeNB only concerning credit and market risk. According to the draft law

⁹ See, e.g. paragraph 6 of ECB Opinion CON/2003/23 of 24 October 2003 at the request of the Ministry of Finance of the Netherlands on a draft law on provisions concerning the merger of De Nederlandsche Bank and the Pensions and Insurance Supervisory Authority Foundation.

¹⁰ See, e.g. paragraph 4 of ECB Opinion CON/2001/10 of 25 May 2001 at the request of the Austrian Ministry of Finance on a draft law establishing and organising the financial market supervisory authority [title shortened].

¹¹ See, e.g. paragraph 5 of ECB Opinion CON/2001/35 of 8 November 2001 at the request of the German Ministry of Finance on a draft law establishing an integrated financial services supervision.

¹² See, e.g. paragraph 7 of ECB Opinion CON/2001/10.

¹³ See, e.g. paragraph 7 of ECB Opinion CON/2001/10.

¹⁴ See, e.g. paragraph 10 of ECB Opinion CON/2004/31 of 22 September 2004 at the request of Národná banka Slovenska on a draft law on supervision of the financial market and on amendments to certain laws.

the scope of the OeNB's on-site examination powers will cover all relevant risks, including in particular operational risks¹⁵. These new tasks also encompass the verification of credit institutions' compliance with money laundering obligations and following up on-site inspections of credit institutions. This will allow the OeNB to better contribute to supervisory activities and lead to a more efficient use of resources with positive consequences for the efficacy of the Austrian supervisory system. Moreover, the ECB welcomes the proposed amendments to Articles 21, 21d and 77a of the Law on banking, which further strengthen cooperation between the FMA and the OeNB in relation to banking supervision¹⁶.

2.3.2 Pursuant to the new paragraph 4b of Article 79 of the Law on banking in connection with Articles 18 and 19 of the Law on the Financial Market Supervisory Authority (FMABG), the direct costs incurred by the OeNB for on-site inspections and microeconomic analyses of banks will ultimately be borne – up to a cap, the exact level of which has not been indicated in the draft law received by the ECB – by the supervised entities (while the charges are collected by the FMA). The OeNB, and ultimately the Government via the OeNB's results, would have to bear out of its own budget any OeNB costs which exceed the cap or are not directly related to the OeNB's banking supervisory tasks. In the statement of reasons, it is explained that this cap is necessary to prevent the supervised entities having to bear an unreasonable share of the costs incurred by the FMA and the OeNB in the execution of their banking supervisory tasks. In this respect, the ECB notes that the OeNB has specific nomination rights in relation to the appointment of members of the FMA's Executive Board and Supervisory Board (Articles 5 and 8 of the FMABG), providing the OeNB with influence over the organisation and management of the FMA. Nevertheless, if there is a wish to expose the OeNB to part of the costs for on-site inspections conducted for reasons other than financial stability (in particular, if the cap is set at a level not reflecting the costs incurred for those inspections), it must be ensured that the OeNB has sufficient financial resources to carry out its Eurosystem tasks under Article 105(5) of the Treaty. Finally, the ECB notes that, according to the draft Article 26(b) of the FMABG, the costs of banking supervisory tasks borne by the OeNB for 2008 will be refunded in 2010.

2.3.3 First, the ECB notes that, in principle, the OeNB may conduct on-site inspections only at the request of the FMA. In general, on-site inspections are to be conducted in line with an annual inspection plan to be agreed between the FMA and the OeNB (new paragraph 1b of Article 70 of the Law on banking). The ECB understands that the two institutions will draw up a plan that takes into account priorities and resources available, without prejudice to the fulfilment of their supervisory mandates, and that the FMA would deviate from that plan and request additional on-site inspections from the OeNB only to the extent necessary.

2.3.4 Second, the ECB welcomes the proposed introduction of paragraph 1c into Article 70 of the Law on banking pursuant to which the OeNB may conduct on-site inspections of credit institutions on

¹⁵ See paragraph 10 of ECB Opinion CON/2001/10.

¹⁶ See paragraph 8 of ECB Opinion CON/2001/10.

its own initiative if it considers them necessary for macroeconomic reasons. However, according to the wording of the draft law, the OeNB would only be able to carry out on-site inspections without a request from the FMA ‘if the inspections in the inspection programme under paragraph 1b or other FMA inspection requests are not affected’. In view of the OeNB’s overall responsibility for contributing to the stability of the financial system in Austria, the ECB considers it crucial that the OeNB should be able to give priority to conducting on-site inspections for financial stability reasons, irrespective of other ongoing or planned inspections that may be requested by the FMA. Therefore the proposed new paragraph 1c of Article 70 of the Law on banking should be amended accordingly.

2.3.5 Third, the ECB notes that, for the extension of the initial scope of an inspection as deemed necessary by the OeNB, the procedure provided for by Article 70 of the Law on banking requires a request to be made to the FMA. In this respect, the ECB recommends that the OeNB should be able to extend inspections without requesting the authorisation of the FMA, where this is justified on financial stability grounds. Such an extension might also be critical for the successful completion of an on-site inspection.

2.4 *Information-sharing between the OeNB and the FMA*

2.4.1 As emphasised in previous ECB opinions¹⁷, central bank access to prudential information and cooperation between financial supervisory authorities and central banks are essential for the conduct of macro-prudential monitoring, the oversight of payment systems and the safeguarding of other market infrastructures, which are in turn essential for the smooth conduct of monetary policy. In particular, from a financial stability perspective, a central bank would inevitably need to be involved in the event of any crisis in financial markets. In that context, the ready availability of relevant information and the ability to interpret it are crucial. The Consolidated Banking Directive 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 tasks¹⁸. Therefore the legislation of virtually all Member States that have adopted supervisory models based on an independent financial supervisory authority include provisions authorising the exchange of information between central banks and supervisory authorities¹⁹.

¹⁷ See, e.g. paragraph 9 of ECB Opinion CON/2001/10.

¹⁸ Article 49 of 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).

¹⁹ See, e.g. Belgium: Article 56 of the Statute of the Nationale Bank van België/Banque Nationale de Belgique; Article 35 of the Law of 22 February 1998 establishing the Organic Statute of the Nationale Bank van België/Banque Nationale de Belgique; Article 74 of the Law of 2 August 2002 on the supervision of the financial sector and on financial services; Denmark: Article 354(5) of the Law on financial services; Article 22 of the Law on deposit guarantees and investors; Article 20 of the Law on Danmarks Nationalbank; Estonia: Section 2(5) of the Law on Eesti Pank; Sections 48(2), 54(2) of the Law on the Financial Supervision Authority; Ireland: Sections 33C(1)(c) and 33C(8) of the Central Bank Act 1942; Latvia: Article 6 of the Law on Latvijas Banka; Article 10 of the Law on the Financial and Capital Market Commission; Luxembourg: Article 33(2) of the Law of 23 December 1998 concerning monetary status and the Banque centrale du Luxembourg; Article 16, third paragraph of the Law of 23 December 1998 on the establishment of a commission for the supervision of the financial sector; Hungary: Article 44 of Law No LVIII of 2001 on the Magyar

2.4.2 Against this background, the ECB welcomes the proposed introduction of paragraph 4a into Article 79 of the Law on banking and the new Article 44b of the Law on the OeNB. Pursuant to paragraph 4a, the FMA has to enter all relevant information on credit institutions which it collects in the course of its banking supervisory work in a central database operated by, and fully accessible to, the OeNB. The OeNB will be able to use these data for the preparation of analyses in relation to specific credit institutions and macroeconomic analyses and for its financial stability responsibilities, as the statement of reasons expressly recognises. However, the ECB does not see any valid reason for limiting the information the FMA has to feed into the database to information relevant to on-site inspections and the analytical tasks of the OeNB, as the statement of reasons suggests. Such a limitation would increase the risk of impediments to an efficient flow of information between the FMA and the OeNB, which the statement of reasons indicates is a key objective of the reform of the financial market supervision. Instead, all information on the banking sector within the FMA's control should be shared with the OeNB on an ongoing basis via that database.

2.4.3 Pursuant to the new Article 44b of the Law on the OeNB, the FMA has to provide all information on entities in the financial sector and pension funds to the OeNB at the latter's request, provided that the information is relevant to financial stability in Austria. Given that the traditional borders between the banking, securities and insurance sectors of the financial market are becoming increasingly blurred, and given the risks that this development entails, the ECB welcomes the extension of the OeNB's right to information. However, the automatic insertion of all relevant information into the database by the FMA, possibly by linking any FMA databases containing relevant information with the new shared database (without prejudice to applicable data protection law), and thus without the need for a specific request by the OeNB, might reduce the risk of gaps in the information flow and avoid unnecessary administrative procedures between the FMA and the OeNB.

3. Specific issues

3.1 Strengthening the corporate governance of credit institutions

The ECB welcomes the enhanced corporate governance requirements for the appointment of the chair to the supervisory boards of credit institutions. In particular, the ECB welcomes: (i) the cooling-off period of two years if a person has previously served as a member of the management board – '*Geschäftsleiter*' – before that person may be appointed as chair; (ii) the stricter 'fit and proper' requirements – (new Article 28a of the Law on banking); (iii) the strengthening of credit institutions' internal audit function (amended Article 42(3) of the Law on banking); and (iv) the mandatory installation of an audit committee for credit institutions of particular relevance to the

Nemzeti Bank; Malta: Section 38A of the Central Bank of Malta Act; Section 18 of the Malta Financial Services Act; Austria: Articles 79 to 80 of the Law on banking; Finland: Section 26 of the Law on Suomen Pankki, No 214/1998.

financial market (new paragraph 4 of Article 63a of the Law on banking).

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

Done at Frankfurt am Main, 5 November 2007.

[*signed*]

The President of the ECB

Jean-Claude TRICHET