



## OPINION OF THE EUROPEAN CENTRAL BANK

of 8 January 2010

on the merger of the banking and insurance licensing and supervisory authorities

(CON/2010/4)

### Introduction and legal basis

On 28 December 2009 the European Central Bank (ECB) received a request from the French Ministry for Economic Affairs, Industry and Employment for an opinion on a draft order merging the banking and insurance licensing and supervisory authorities (hereinafter the 'draft order').

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 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 provisions<sup>1</sup>, as the draft law relates to the Banque de France 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 order**

1.1 The draft order is mainly aimed<sup>2</sup> at merging the four banking and insurance licensing and supervisory authorities<sup>3</sup> and creating in France one new supervisory authority, the Prudential Control Authority (hereinafter the 'Authority'), endowed with the necessary powers for the exercise of its tasks. The Authority will become the single licensing and supervisory authority for the banking, payment services and investment services sector, as well as for the insurance sector<sup>4</sup>. Its

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

<sup>2</sup> On the basis of the authorisation granted to the French Government by Article 152(2) of Law No 2008-776 of 4 August 2008 on the modernisation of the economy (*Journal Officiel de la République française* No 0181 of 5 August 2008).

<sup>3</sup> The Insurance and Mutual Insurance Societies Supervisory Authority (*autorité de contrôle des assurances et des mutuelles*), the Insurance Companies Committee (*comité des entreprises d'assurance*), the Credit Institutions and Investment Firms Committee (*comité des établissements de crédit et des entreprises d'investissement*) and the Banking Commission (*commission bancaire*).

<sup>4</sup> Articles L.612-1 to L.612-3 of the French Monetary and Financial Code, as proposed by the draft order. The Authority will also be entrusted with other tasks, in particular concerning the control of the marketing of financial products in cooperation with the French Financial Market Authority (Articles L.612-30 to L.612-33 of the French Monetary and Financial Code, as proposed by the draft order).

objectives will include maintaining the stability of the financial system and protecting customers, insured parties and beneficiaries<sup>5</sup>.

- 1.2 The Authority consists of a college sitting in plenary session, in restricted session, in sectoral sub-colleges, and, where appropriate, in a specialist committee. It also includes a Sanctions Committee. Unless expressly provided otherwise, the powers conferred on the Authority are exercised by the college<sup>6</sup>. The college in plenary session is expressly entrusted with the tasks of: (i) considering national and international matters of a general scope common to the banking and insurance sectors and analysing risks within these sectors in the light of the economic situation, (ii) deliberating on control priorities, and (iii) adopting the Authority's organisational and functioning principles, budget and internal rules. Individual matters are considered by the college in restricted session, the banking sector sub-college, the insurance sector sub-college or if appropriate a specialist committee. As a rule, each sectoral sub-college will have the necessary authority to consider individual and general sector-specific matters; the restricted session is competent for individual matters concerning financial conglomerates and significant mergers and acquisitions involving entities belonging to both sectors. Moreover, taking into account their impact on financial stability, the scrutiny of matters concerning one of the two sectors may be attributed to the college by the president (plenary session for general matters or restricted session for individual matters)<sup>7</sup>.
- 1.3 The Authority will be closely connected to the Banque de France. The Governor of the Banque de France, or the Deputy-Governor he will designate to represent him, will be the president of the college of the Authority (plenary, restricted session and banking sector sub-college). The vice-president will chair the insurance sector sub college, in which the Governor of the Banque de France, or his designated deputy, will also be a member<sup>8</sup>. As the Authority's president, the Governor of the Banque de France will adopt the agenda for the college's different configurations<sup>9</sup>. For the purposes of fulfilling the tasks entrusted to the Authority, the Authority's president will

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<sup>5</sup> Article L.612-1 of the French Monetary and Financial Code, as proposed by the draft order. The draft order also provides that in performing its tasks, the Authority takes into account the objectives of financial stability throughout the European Economic Area (EEA) and convergent implementation of national and Community provisions having regard to the good practices and recommendations emanating from Community supervisory mechanisms. It cooperates with the competent authorities of other States. In particular, within the EEA, it participates in structures to supervise cross-border groups.

<sup>6</sup> Article L.612-4 of the French Monetary and Financial Code, as proposed by the draft order.

<sup>7</sup> Article L.612-11 of the French Monetary and Financial Code, as proposed by the draft order.

<sup>8</sup> On the composition of colleges and commissions, see Articles L.612-5 et seq. of the French Monetary and Financial Code, as proposed by the draft order. In particular, to take account of the strong specificities of the insurance profession, the vice-president of the college in plenary session must have professional experience in the insurance field and will as a rule chair the insurance sector sub-college; the president may also delegate to him the presidency of the college or of one of its configurations or committees. Four members of the college in plenary session are the Accounting Standard Authority's president, a member of the Council of State, a member of the Court of Cassation and a council member of the Court of Auditors. Three members, among which the vice-president will be chosen, will be appointed on account of their expertise in the fields of client protection, quantitative and actuarial expertise or any other fields under the Authority's responsibility. Four members will be appointed based on their expertise in the fields of insurance, mutual insurance, pensions and reinsurance, whereas four other members will be appointed based on their expertise in the fields of banking operations, payment services or investment services. The Sanctions Committee is competent to order a disciplinary sanction once disciplinary proceedings have been initiated by one of the college configurations; its composition is completely different from that of the college.

<sup>9</sup> Article L.612-11 of the French Monetary and Financial Code, as proposed by the draft order.

have standing to bring proceedings before any court<sup>10</sup>. The Authority's staff will consist of the Banque de France staff and civil servants assigned to the Banque de France<sup>11</sup>. The Authority's budget will be annexed to the Banque de France's budget. The Authority will receive financial resources from the Banque de France, within the limit of the proceeds of the contribution for supervision costs<sup>12</sup>, the balance of which will be carried forward each year, and additional contributions that the Banque de France may allocate to the Authority<sup>13</sup>.

- 1.4 Pursuant to the draft order, the Authority is an independent administrative authority<sup>14</sup>. Moreover, the draft order ensures the functional independence of the Authority, which means that the necessary resources for the performance of its tasks will be managed in an autonomous manner. A secretary-general will be appointed by decree of the Minister for Economic Affairs, following a proposal from the Authority's president. The Secretary-General will organise and direct the Authority's departments. Following a proposal from the Secretary-General, the Authority's college will adopt departmental organisation principles, determine the ethical rules applying to staff and establish the general framework for staff recruitment and employment in accordance with the provisions applying to statutory staff and to civil servants<sup>15</sup>. The Authority will adopt its budget, following a proposal from the Secretary-General. The college will set up an internal audit committee responsible for checking, in particular, the proper use of the Authority's resources<sup>16</sup>.

## **2. General observations**

- 2.1 In line with Article 127(5) of the Treaty, which provides that the European System of Central Banks (ESCB) must contribute 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, the ECB has stressed the importance of having the central banks closely involved in prudential supervision<sup>17</sup>. Against this background, the ECB welcomes that the draft order ensures that the Banque de France will be closely involved in the Authority, in particular through its Governor, or designated Deputy-Governor, acting as the Authority's president.
- 2.2 Furthermore, the nature and scope of systemic risk is widening due to the closer links between credit institutions, insurance companies, investment firms and pension funds. Traditional boundaries between the banking, insurance and securities segments of the financial system are increasingly blurred, as demonstrated by the emergence of hybrid financial products, the increased

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10 Article L. 612-15 of the French Monetary and Financial Code, as proposed by the draft order.

11 Article L.612-18 of the French Monetary and Financial Code, as proposed by the draft order.

12 This contribution will have to be paid to the Banque de France by the persons supervised by the Authority in accordance with Article L.612-20 of the French Monetary and Financial Code, as proposed by the draft order.

13 Article L.612-17 of the French Monetary and Financial Code, as proposed by the draft order.

14 Article L.612-1 of the French Monetary and Financial Code, as proposed by the draft order.

15 Article L. 612-19 of the French Monetary and Financial Code, as proposed by the draft order.

16 Article L. 612-17 of the French Monetary and Financial Code, as proposed by the draft order.

17 See 'The role of central banks in prudential supervision', ECB, 22.3.2001, available on the ECB's website at [www.ecb.europa.eu](http://www.ecb.europa.eu).

use of risk transfer instruments, such as credit derivatives, between the sectors, and the growing role of financial conglomerates<sup>18</sup>. The integration of micro-prudential supervisory tools under the draft order acknowledges the growing importance of financial groups that combine different types of financial services. This should help to address specific prudential concerns concerning such groups and to ensure an overall level playing field between competing intermediaries. This should also facilitate a more effective assessment of risks in the financial system as a whole.

- 2.3 Closely involving ESCB national central banks (NCB) in prudential supervision may support their contribution to the macro-prudential oversight of the financial sector. In this respect, the financial crisis demonstrates the need to strengthen supervision and regulation of the financial system as a whole. With respect to the insurance sector in particular, experience has shown that insurance companies are important for systemic financial stability because of their size, their interconnectedness with the financial sector and the economic function of insurance products. In view of the systemic relevance of the insurance sector for financial stability, insurance is part of the macro-prudential oversight to be exercised by the proposed European Systemic Risk Board (ESRB). In the context of the establishment of the ESRB, which will be responsible for the conduct of macro-prudential oversight in the EU<sup>19</sup>, the framework established by the draft order is likely to enhance the ability of the Banque de France to contribute analytical support to the ESRB, in particular through its Governor acting as a member with voting rights<sup>20</sup>. In this respect, the involvement of the Banque de France in the Authority, in particular through its Governor or Deputy-Governor acting as the Authority's president, is positive. The ECB understands that the proposed framework will allow the Governor of the Banque de France to perform, independent of any external influence, his duties as the Governor and as a member of the ECB's decision-making bodies as required by the Treaty.

### **3. Central bank independence and monetary financing**

- 3.1 Member States must ensure that NCBs have sufficient financial resources to carry out their ESCB-related tasks. In this respect, the ECB understands that the functions to be performed by the Governor of the Banque de France, or the Deputy Governor as the case may be, will be conducted in a manner that is fully compatible with the Banque de France's institutional and financial independence and with the Governor's personal independence, which is designed to safeguard the proper performance of their tasks under the Treaty and the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB').

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<sup>18</sup> See, e.g. paragraph 5 of Opinion CON/2004/16 of 11 May 2004 at the request of the Italian Ministry of Economic Affairs and Finance on a draft law on the protection of savings.

<sup>19</sup> See Opinion CON/2009/88 of 26 October 2009 on a 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 and a proposal for a Council decision entrusting the European Central Bank with specific tasks concerning the functioning of the European Systemic Risk Board.

<sup>20</sup> Input will also be provided by a high level representative of the Authority to the General Board of the ESRB.

- 3.2 Situations where financial supervisory authorities are placed within an NCB do not pose problems from the perspective of the financial independence of central banks if such authorities are subject to the NCB's independent decision-making<sup>21</sup>. The draft order provides that the Authority is an independent administrative authority<sup>22</sup>; however, the Authority will not have legal personality and the ECB understands that, as was the case for the Banking Commission, the State and not the Banque de France will be liable for the activities of the Authority and that Banque de France's finances will thus not be burdened by a liability for the Authority's decisions.
- 3.3 Moreover, the ECB expects that care will be taken to ensure that the Banque de France, in view of the possible appointment of its staff members to the Authority, has sufficient financial and personnel resources both in terms of quantity and quality to continue to carry out all its tasks, and in particular, that its capacity to carry out ESCB-related tasks will not be affected.
- 3.4 The ECB notes that the draft order contains a provision according to which the duties of a college member may be terminated by reasoned decree of the Minister for Economic Affairs under the conditions it provides<sup>23</sup>. The draft order, as submitted to the ECB, does not specify clearly that this provision does not apply to the Governor of the Banque de France as the Authority's president. The ECB suggests clarifying the draft order in this respect<sup>24</sup>.
- 3.5 The ECB notes that it is important to safeguard compliance with the prohibition of monetary financing under Article 123 of the Treaty, which is essentially designed to prevent central bank financing of the public sector. The Authority will be primarily financed by the proceeds of the contribution for supervision costs, which, in principle, would alleviate monetary financing concerns. Moreover, the draft order also provides that the Banque de France may allocate additional contributions to the Authority<sup>25</sup>. The provision of such financial resources by the Banque de France to the Authority under the draft order does not appear to present monetary financing concerns insofar as the Banque de France will be financing the performance of a legitimate financial supervisory task under French law. This particular task will also facilitate the performance by the Banque de France of its ESCB-related task under Article 127(5) of the Treaty to contribute to the smooth conduct of policies pursued by the Authority relating to the prudential supervision of credit institutions and the stability of the financial system. In this respect, it is crucial that the Banque de France is in a position to make a meaningful contribution to the conduct of supervisory and stability-related policies by the Authority. The ECB considers that the role envisaged for the Banque de France under the draft order goes in the right direction as the Governor is the president

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21 The ECB's Convergence Report 2008, p. 21 and 22.

22 Article L.612-1 of the French Monetary and Financial Code, as proposed by the draft order.

23 Article L.612-5, I., sixth paragraph, of the French Monetary and Financial Code, as proposed by the draft order.

24 The draft order could for example expressly state that the provision only applies to members mentioned in paragraphs 3° to 8° as in the case of the third paragraph of the same Article; that would exclude the president of the Authority, mentioned in paragraph 1°.

25 Article L.612-17 of the French Monetary and Financial Code, as proposed by the draft order.

of the Authority's college<sup>26</sup>. Also, the Banque de France's provision of staff to the Authority should serve to enhance the Banque de France's contribution to the Authority's supervisory and stability-related policies<sup>27</sup>.

- 3.6. The ECB notes that national legislation requiring an NCB to take over the liabilities of a previously independent public body as a result of a national reorganisation of certain tasks and duties without insulating the NCB from financial obligations resulting from the prior activities of such previously independent public bodies is incompatible with the monetary financing prohibition<sup>28</sup>. The draft order provides that 'all assets, rights and obligations of the Insurance and Mutual Insurance Societies Supervisory Authority ... are transferred by force of law and full ownership to the Banque de France on behalf of the [Authority]'<sup>29</sup>. However, the draft order also specifies that 'the Authority shall take over the respective rights and obligations of [the four merged banking and insurance licensing and supervisory authorities]'<sup>30</sup>. Based on this provision, and on the fact that the Authority is an independent administrative authority separate from the Banque de France, the ECB understands that, under French law, Banque de France will not be liable for any activities of the Insurance and Mutual Insurance Societies Supervisory Authority undertaken prior to the coming into force of the draft order.

#### **4. Ethical rules applying to the Authority's staff**

The draft order provides that Authority staff are subject to the ethical rules adopted by the Authority's college and that, if necessary, because of their involvement in the Banque de France duties, staff members could be subject to the Banque de France's ethical rules<sup>31</sup>. The draft order provides that the Authority's college determines the ethical rules applying to staff and establishes the general framework for staff recruitment and employment in accordance with the provisions applying to the Banque de France staff and to civil servants<sup>32</sup>. It is not clear from the above provisions whether the ethical rules applying to the Authority staff are determined in accordance with the Banque de France's ethical rules. The ECB recommends stating this explicitly in the draft order and expects that the ethical rules adopted by the Authority will not materially deviate from those applicable to the Banque de France's staff.

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<sup>26</sup> An enhancement of the Banque de France's role in the composition of the college or in the nomination process of its members could be beneficial, for instance by making the Banque de France's representation in the Authority's college stronger.

<sup>27</sup> Taken in isolation, the provision of staff might not have been sufficient to overcome monetary financing concerns.

<sup>28</sup> The ECB's Convergence Report 2008, p. 23 and 24. See also paragraphs 8 to 12 of Opinion CON/2005/24 of 15 July 2005 at the request of the Ministry of Finance of the Czech Republic on a draft law on the integration of financial market supervisors and paragraph 4(2)(d) of Opinion CON/2008/16 of 4 April 2008 at the request of the Finnish Ministry of Finance on a draft government proposal for a law on the Financial and Insurance Supervisory Authority and certain related draft laws.

<sup>29</sup> Article 24-III(4) of the draft order.

<sup>30</sup> Article 24-III of the draft order.

<sup>31</sup> Article L.612-18-III of the French Monetary and Financial Code, as proposed by the draft order.

<sup>32</sup> Article L.612-19 of the French Monetary and Financial Code, as proposed by the draft order.

## **5. Audit of the Authority's accounts**

As the Banque de France's annual accounts are audited by independent external auditors under Article 27.1 of the Statute of the ESCB, the ECB understands that the auditors' mandate will be extended to the audit of the Authority's accounts, as they will not be distinct from the Banque de France's accounts and as they will be held by the NCB.

## **6. The appropriate time to consult the ECB**

- 6.1 In cases of particular urgency that do not allow for a normal consultation period, the consulting authority may indicate urgency in the consultation request and ask for a shorter time limit for the ECB's opinion to be adopted. This does not prejudice the national authorities' 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 in due course of the national legislative process. The second sentence of Article 4 of Decision 98/415/EC states that the ECB must be consulted 'at an appropriate stage' in the legislative process. This implies that the consultation should take place at a point in the legislative process that affords the ECB sufficient time to examine the draft legislative provisions and to adopt its opinion in the required language versions and which also enables the relevant national authorities to take the ECB's opinion into consideration before the provisions are adopted. In this respect, as noted by the Court of Justice, the obligation to consult the ECB under the Treaty is intended 'essentially to ensure that the legislature adopts the act only when the body has been heard which, by virtue of the specific functions that it exercises in the [Union] framework in the area concerned and by virtue of the high degree of expertise that it enjoys, is particularly well placed to play a useful role in the legislative process envisaged.'<sup>33</sup> Given that the consulting authority set the ECB a short time limit within which to submit its opinion and that the only reason given was the tight timetable established by the consulting authority, the ECB considers that the minimum consultation period of one month provided for in Article 3(1) of Decision 98/415/EC applies.
- 6.2 According to Article 3(4) of Decision 98/415/EC, Member States are obliged to suspend the process for the adoption of draft legislative provision pending submission of the ECB's opinion. This means that the adopting authority must have a real opportunity to consider the ECB's opinion in a meaningful manner prior to taking its decision on the substance.

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<sup>33</sup> Case C-11/00 *Commission of the European Communities v European Central Bank* [2003] ECR I-7147, paragraphs 110 and 111.

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

Done at Frankfurt am Main, 8 January 2010.

[signed]

*The President of the ECB*

Jean-Claude TRICHET