



OPINION OF THE EUROPEAN CENTRAL BANK

of 11 December 2012

on financial legislation

(CON/2012/104)

Introduction and legal basis

On 5 November 2012, the European Central Bank (ECB) received a request from the Danish Financial Supervisory Authority (FSA) (*Finanstilsynet*) for an opinion on a draft law amending the Law on financial business, the Law on securities trading, the Law on payment services and electronic money, the Law on measures to prevent money laundering and financing of terrorism, the Law on equal treatment of men and women in connection with insurance, pension and similar financial services and various other laws (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 sixth indent 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 relates 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 draft law introduces a number of amendments to the financial legislation. These are intended to enhance the supervision of financial institutions, ensure effective enforcement in cases of breach of the financial legislation, and strengthen the financial sector overall. The draft law also provides for the establishment of a national Systemic Risk Board² to exercise macro-prudential oversight, and provides for the implementation in national law of certain European Union legislation.

1.2 *Enhancing financial supervision and ensuring efficient enforcement*

In order to enhance financial supervision and ensure efficient enforcement where there is a breach of the financial legislation, the draft law amends the financial legislation, inter alia, as set out below.

¹ OJ L 189, 3.7.1998, p. 42.

² See Section 1(30) of the draft law.

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- (a) The draft law extends the current reporting obligations laid down in section 75 of the Law on financial business to financial holding companies regarding matters of material significance to the continued operation of their subsidiaries³.
- (b) It allows the FSA to exchange confidential information with the public prosecutor and the police at an earlier stage than is currently possible, i.e. before it has been established that there are reasonable grounds for suspecting that a legal or natural person has committed an offence covered by the Criminal Code or the supervision legislation⁴.
- (c) It provides that the FSA may publish the outcomes of (i) cases referred by the FSA to the police for investigation, (ii) cases which conclude with the imposition of an administrative fine, and (iii) orders by the FSA that a financial institution shall correct misleading information which it has published about itself⁵.
- (d) It provides that the FSA may enter into agreements to perform, for payment, certain kinds of tasks for public authorities, state institutions and other similar bodies, if the performance of such tasks contributes to financial stability⁶.
- (e) It introduces a new approach to the enforcement of solvency requirements, including the possibility for the FSA to impose certain measures on financial institutions in order to enhance the capital position of such institutions⁷.

1.3 *Measures to strengthen the financial sector*

In order to strengthen the individual financial institutions and the financial sector overall, as well as facilitate further consolidation, the draft law also provides for the measures set out below.

- (a) The scope of loans raised by financial institutions which have been granted a licence to issue covered bonds is widened so that loans may also be used to strengthen these institutions' solvency ratios⁸.
- (b) New rules are established regarding mergers between savings banks, cooperative savings banks, mutual insurance companies and limited companies in order to facilitate consolidation of the financial sector⁹. In order to ensure the independence of the board of directors in savings bank trusts or cooperative savings bank trusts, the appointment of members of board of directors of such trusts¹⁰ is made more transparent.
- (c) The FSA is made responsible for supervising the procedures used by financial institutions to establish benchmark interest rates. The aim of this measure is to restore confidence in the

³ See new Section 75(4) of the Law on financial business, as inserted by Section 1(7) of the draft law.

⁴ See new wording of Section 354(6) of the Law on financial business, as inserted by Section 1(39) of the draft law.

⁵ See Section 1(43) and (46), Section 2(33), Section 3(4), Section 4(9), Section 5(6), Section 8(3), Section 11(5), Section 12(2), Section 13(2), Section 14(4) and Section 15(2) of the draft law.

⁶ See new Section 344(5) of the Law on financial business, as inserted by Section 1(33) of the draft law.

⁷ See new Section 225(2) of the Law on financial business, as inserted by Section 1(23) of the draft law.

⁸ See new wording of Section 152(b) of the Law on financial business, as inserted by Section 1(18) of the draft law.

⁹ See new wording of Section 205 of the Law on financial business, as inserted by Section 1(19) of the draft law.

¹⁰ See new wording of Section 209(2) of the Law on financial business, as inserted by Section 1(21) of the draft law.

Copenhagen Interbank Offered Rate (CIBOR) and ensure enhanced control over the setting of CIBOR and other relevant benchmark rates¹¹.

1.4 *Establishment of a national Systemic Risk Board*

The draft law provides for the establishment of a national macro-prudential Systemic Risk Board competent to adopt and communicate observations, warnings and recommendations to the relevant public authorities, the government and the public regarding systemic risks in the financial area¹². These warnings and recommendations will primarily be addressed to the FSA, but those relating to legislation will be addressed to the Government. The Systemic Risk Board may be consulted on warnings and recommendations issued by the European Systemic Risk Board (ESRB)¹³.

The Systemic Risk Board will comprise two representatives from Danmarks Nationalbank, two from the FSA, one from each of the three economic ministries, and three independent experts nominated by the Ministry of Business Affairs and Growth following consultation with Danmarks Nationalbank¹⁴. The Governor of the Board of Danmarks Nationalbank will chair the Systemic Risk Board¹⁵.

The Systemic Risk Board's decisions will be adopted by simple majority. However, representatives from the FSA and the ministries have no voting rights with regard to decisions on observations, recommendations and warnings to be addressed to the Government¹⁶. These observations, recommendations and warnings are to be made public unless the Systemic Risk Board takes the view that confidentiality is necessary to safeguard financial stability¹⁷. The recipients of a warning or a recommendation shall be obliged within three months of receipt to publicly notify the Board as regards the measures which will be taken or explain any non-action¹⁸.

The FSA, the relevant ministries and Danmarks Nationalbank shall be obliged to exchange relevant information and documentation on request of the Systemic Risk Board, including confidential statistical information obtained by Danmarks Nationalbank, if the Board assesses that such information is necessary for it to fulfil its tasks¹⁹.

2. General observations

- 2.1 The ECB welcomes the proposed amendments to the Danish financial legislation, which provide for enhanced supervision and enforcement and the overall strengthening of the financial sector.
- 2.2 Taking into account the need for appropriate action to address the possible systemic impact of failing cross-border institutions, the ECB highlights that the domestic legal framework for crisis

11 See new Section 343(s) and (t) of the Law on financial business, as inserted by Section 1(31) of the draft law.

12 See new Section 343(s) of the Law on financial business, as inserted by Section 1(30) of the draft law.

13 See new Section 343(s)(3) of the Law on financial business.

14 See new Section 343(s)(1) of the Law on financial business.

15 See new Section 343(s)(1) of the Law on financial business.

16 See new Section 343(s)(5) of the Law on financial business.

17 See new Section 343(s)(6) of the Law on financial business.

18 See new Section 343(s)(7) and (8) of the Law on financial business.

19 See new Section 343(s)(9) of the Law on financial business.

management may need to be further adapted to reflect future regulatory initiatives at Union level²⁰. In particular, the ECB urges that any initiatives undertaken by the competent national authorities to restore confidence in the financial markets be coordinated with other Member States and the Union institutions in a spirit of close cooperation, with a view to implementing common principles.

3. Enhancing financial supervision and ensuring efficient enforcement

3.1 The financial crisis has shown the importance of having effective and efficient supervision and enforcement mechanisms in place with regard to the financial system. The ECB welcomes measures that strengthen the powers of competent authorities to intervene when the stability of either individual financial institutions or the financial system as a whole is at risk. In this context, the draft law enhances the FSA's capacity to respond in a timely and effective manner to difficulties that solvent financial institutions face by imposing early intervention measures upon them in order to enhance their capital position.

3.2 The ECB also notes the proposed measures to facilitate information-sharing and cooperation between competent authorities and the increased openness regarding the work of the FSA which aims to bring about greater transparency as well as efficient supervision and enforcement in the financial area. When considering measures aimed at achieving increased openness and information-sharing, it is however necessary to ensure that confidential information is adequately protected²¹.

4. Measures to strengthen the financial sector

The ECB supports the measures proposed to strengthen the solvency ratio via loans raised by financial institutions which have been granted a licence to issue covered bonds. Widening the scope for loans raised gives financial institutions greater flexibility and may thus contribute to maintaining a well-functioning mortgage-credit sector. However, the ECB notes that where junior covered bonds are used in the cover pool this should only be within the same banking group²².

The ECB welcomes initiatives to restore confidence in benchmark interest rates and emphasises that proposals to reform such benchmark interest rates should be coordinated at Union level to ensure consistency and a level playing field. In this regard, the ECB notes the Eurosystem's response to the European Commission's public consultation on the regulation of indices, published on 14 November 2012²³. While the Eurosystem's recommendations focus on the strengthening of governance relating to Euribor calculations, they may also serve as guidelines for the regulation and supervision of other systemically important indices. Such guidelines would include ensuring that the membership of the boards of the rate-setting bodies and the relevant steering committees

20 See the proposal for a directive of the European Parliament and of the Council on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms and amending Directive 2002/87/EC of the European Parliament and of the Council on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate (COM(2011) 453 final) and the proposal for a regulation of the European Parliament and of the Council on prudential requirements for credit institutions and investment firms (COM(2011) 452 final).

21 See Opinion CON/2011/5, paragraph 3.10.

22 See Opinion CON/2012/5.

23 See the Eurosystem's response of 14 November 2012 to the European Commission's public consultation on the regulation of indices, available on the ECB's website www.ecb.europa.eu.

are sufficiently diverse to reflect the public nature of the rates, that entities independent of the rate-setting bodies perform substantive checks of the rates, and that the banks' rate-submission processes are subject to mandatory audits.

5. Establishment of a national Systemic Risk Board

- 5.1 The ECB welcomes the proposed amendments, which provide for the establishment of a national Systemic Risk Board as a national macro-prudential authority²⁴. It supports the proposed institutional framework for national macro-prudential oversight in which Danmarks Nationalbank is represented and acts as chair. The ECB understands that pursuant to the explanatory memorandum of the draft law Danmarks Nationalbank's central bank independence will not be affected by its involvement in the Systemic Risk Board²⁵. In this respect, the ECB notes that the secretariat services for the Systemic Risk Board will be provided by Danmarks Nationalbank in conjunction with other authorities. The ECB recommends that measures are taken to ensure that the increased use of resources by Danmarks Nationalbank does not affect its financial independence²⁶.
- 5.2 The draft law provides that the Systemic Risk Board and Danmarks Nationalbank may exchange information insofar as the Systemic Risk Board needs this information to carry out its tasks. The ECB notes that national provisions establishing national macro-prudential authorities should be consistent with Union law provisions which regulate the exchange of supervisory and statistical information²⁷ and establish the ESRB as a Union body responsible for macro-prudential oversight of the financial system within the Union²⁸. In this context, the ECB is of the view that the draft law should expressly mandate the Systemic Risk Board to exchange information with other macro-prudential authorities, central banks and the ESRB, particularly on actions taken to address systemic risks at national level²⁹.

²⁴ See Opinion CON/2012/55.

²⁵ See paragraph 2.6.3 of the explanatory memorandum of the draft law.

²⁶ See the ECB's Convergence Report, May 2012, p. 25. All ECB documents are available on the ECB's website at www.ecb.europa.eu.

²⁷ See paragraph 2.2.6 of Opinion CON/2010/7. See Article 12 of Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC, 93/22/EEC, 98/78/EC and 2000/12/EC (OJ L 35, 11.2.2003, p. 1), Article 58(5) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1), 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 (OJ L 177, 30.6.2006, p. 1), Article 70 of the Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1) and Article 1(4) of Regulation (EU) No 1092/2010; see also Article 57(a) of the proposal for a directive of the European Parliament and of the Council on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms and amending Directive 2002/87/EC of the European Parliament and of the Council on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate (COM(2011) 453 final).

²⁸ See Article 3(1) of Regulation EU (No) 1092/2010.

²⁹ See Opinion CON/2012/55, paragraph 4.1. See also Article 57(a) of the proposal for a directive of the European Parliament and of the Council on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms and amending Directive 2002/87/EC of the European Parliament and of the Council on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate (COM(2011) 453 final).

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5.3 Lastly, actions taken by national macro-prudential authorities should not conflict with but rather complement ESRB actions taken at Union level³⁰. The ECB recommends that the draft law ensures that the Systemic Risk Board liaises closely with the ESRB and informs it of all actions taken to address systemic risks at national level and that it also ensures that, if significant cross-border effects are anticipated, the Systemic Risk Board notifies the ESRB of this prior to the issuance or the publication of its warnings and recommendations.

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

Done at Frankfurt am Main, 11 December 2012.

[signed]

The President of the ECB

Mario DRAGHI

³⁰ See Opinion CON/2012/55, paragraph 4.2.