



## OPINION OF THE EUROPEAN CENTRAL BANK

of 16 July 2012

on new measures strengthening supervision and enforcement in financial regulation

(CON/2012/52)

### **Introduction and legal basis**

On 18 May 2012, the European Central Bank (ECB) received a request from the Irish Department of Finance for an opinion on the proposed parliamentary committee stage amendments to the Central Bank (Supervision and Enforcement) Bill 2011 (hereinafter the 'draft law') on which the ECB had adopted Opinion CON/2011/69 on 9 September 2011<sup>1</sup>.

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>2</sup>, as the draft law relates to the Central Bank of Ireland (CBI) and contains 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 This opinion concerns certain amendments and supplements (hereinafter the 'draft amendments') to the draft law. The draft law is intended to provide the CBI with enhanced powers for the supervision of regulated financial service providers and the enforcement of financial services legislation. The publication of the draft law by the end of July 2011 was a structural benchmark of the EU-IMF Financial Support Programme for Ireland.
- 1.2 First, the draft amendments set out a regulatory regime for the services of debt management firms and bill payment firms which currently fall outside existing regulatory regimes, making these firms subject to the existing regulatory regime applicable to financial service providers.
- 1.3 Furthermore, the draft amendments will allow the CBI to obtain any information necessary for the performance of its duties relating to the proper and effective regulation of financial service

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<sup>1</sup> All ECB opinions are available on the ECB's website at [www.ecb.europa.eu](http://www.ecb.europa.eu).

<sup>2</sup> OJ L 189, 3.7.1998, p. 42.

## ECB-PUBLIC

providers, by requiring all regulated financial service providers to provide information if asked to do so.

- 1.4 Moreover, the draft amendments will provide for changes to the rules relating to the hearing of evidence, legal presumptions, legal professional privilege and the admissibility of expert evidence in the context of financial services legislation.
- 1.5 The draft amendments will also introduce a requirement that auditors of regulated financial service providers should give reasonable assurances that the firms in question are compliant with certain regulatory requirements relating to administrative or accounting procedures, internal control mechanisms and risk management, organisational structure, governance and oversight functions.
- 1.6 The CBI will also have the power to direct regulated firms to give compensation to customers. The purpose of this power is to ensure that customers are compensated quickly and with minimum inconvenience.
- 1.7 Finally, the draft amendments will further extend and enhance the CBI's powers to give directions and make regulations, including, significantly, to enable the CBI to adopt regulations discharging its European System of Central Banks (ESCB) obligations.

## 2. General observations

- 2.1 The ECB welcomes that the draft amendments address several specific issues raised by the ECB in Opinion CON/2011/69<sup>3</sup> on the draft law. Any other issues in that Opinion not addressed by the draft amendments still remain valid.
- 2.2 It is not yet clear how certain draft amendments will be incorporated into existing legislation, such as the provision giving the CBI the ability to apply for court orders to take action against persons or entities outside the CBI's current regulatory competence. The form of the draft law has also still not been finalised. The ECB notes in this respect that the draft amendments remain subject to further review, including by the Irish Attorney General, meaning that they may be subject to further revision.
- 2.3 This draft law is the second step in the legislative reform of the Irish central banking and financial regulatory regime<sup>4</sup>. The ECB notes the robust nature of the new measures and welcomes the draft law as substantially enhancing the supervisory and enforcement tools available to the CBI<sup>5</sup>. As regards the financing of these enhanced CBI powers, the ECB refers to the principle of financial independence under which a national central bank (NCB) must have sufficient means to perform its

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<sup>3</sup> See, for example, the proposed amendment to section 53(1) of the draft law to replace the expression 'overseas regulator' with 'Member State and third country authorities'.

<sup>4</sup> The first step was the Central Bank Reform Act 2010 which renamed the Central Bank and Financial Services Authority of Ireland, that became a single fully-integrated structure with a unitary board to replace the two-pillar structure of the previous Central Bank and Financial Services Authority of Ireland.

<sup>5</sup> See also paragraph 2.1 of Opinion CON/2009/50.

tasks related to the ESCB and its national tasks<sup>6</sup>. As pointed out in previous ECB opinions, when allocating specific non-ESCB related tasks to the NCBs, e.g. tasks in the area of financial supervision or consumer protection, an adequate amount of human and financial resources must also be allocated in order for these tasks to be carried out in a manner which will not affect the NCBs' operational capacity to perform their ESCB-related tasks<sup>7</sup>. The CBI should therefore possess sufficient human and financial resources to efficiently perform any additional tasks introduced by the draft law in addition to its current tasks, and should not be adversely affected in carrying out its ESCB-related tasks, from an operational or financial point of view, due to any additional tasks introduced by the draft law.

- 2.4 In particular, the ECB notes the expansion of the CBI's prerogatives in the area of consumer protection. Although consumer protection is not included in the NCB tasks specified in the Statute of the European System of Central Banks and of the European Central Bank, as pointed out on previous occasions, the ECB does not consider this task as interfering with the ESCB's objectives and tasks. In addition, measures designed to enhance investor and consumer protection contribute to safeguarding the soundness of the financial market and preserving confidence in the marketplace.
- 2.5 The ECB notes that various provisions of Union law relating to supervision and enforcement in financial regulation will shortly be introduced. As a general matter, the ECB underlines the importance of ensuring that the draft law fully complies and is consistent with the relevant provisions of Union law.

### **3. Legal instruments**

Part 6 of the draft law will be amended to empower the CBI to adopt regulations enabling it to discharge its ESCB obligations and transpose into Irish law any ECB legal instrument that does not have direct effect but which is required to bind third parties, including ECB Guidelines. The ECB welcomes this provision as at present the method for implementing these types of legal instruments is through contracts. By giving the CBI the power to adopt regulations to discharge its ESCB obligations, in addition to the contractual approach, the enforceability of these legal instruments is reinforced.

### **4. Judicial and procedural amendments**

The draft amendments provide for changes to the rules relating to the hearing of evidence, legal presumptions, legal professional privilege, the admissibility of expert evidence and statements and copies of documents for jurors. These rules will apply to the CBI's performance of its duties under financial services legislation and to proceedings under financial services legislation. The ECB understands that

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<sup>6</sup> See the ECB's Convergence Report, May 2010, p. 21, paragraph 3.1.5 of Opinion CON/2009/93, paragraph 3.2.1 of Opinion CON/2011/46 and paragraph 3 of Opinion CON/2011/69.

<sup>7</sup> See, for example, paragraph 3 of Opinion CON/2007/8 and paragraph 3.3 of Opinion CON/2011/76.

these provisions will assist the CBI in enforcing financial services legislation and will contribute to more effective application of the legislation.

## 5. Winding-Up Directives

The ECB would welcome a clarification of the draft amendment to Part 5 of the draft law<sup>8</sup> which introduces additional wording after section 39 of the draft law. This wording provides that if the CBI gives a direction in relation to a credit institution or insurance undertaking<sup>9</sup> with the intention of restoring or preserving the financial position of such institution or undertaking, the CBI will declare in the direction that it is made with that intention, in accordance with the Winding-Up Directives<sup>10</sup>.

In the ECB's view, if the direction is to qualify as a 'reorganisation measure' in accordance with the Winding-Up Directives, the direction would not only have to be intended to preserve or restore the financial situation of the institution but it would also have to satisfy the second part of the definition of a reorganisation measure set out in those Directives, as it could affect the pre-existing rights of third parties<sup>11</sup>. It would be helpful if the draft amendments to this part of the draft law and the corresponding amendments to the implementing regulations for the Winding-Up Directives<sup>12</sup> clarified this point in more detail. The ECB understands that not all directions the CBI may give to an institution would impact on its shareholders or creditors.

## 6. CBI governance

The draft law will be amended to provide that a high-level official or significant shareholder of a regulated financial service provider cannot be a member of the Commission of the CBI. Further, individuals will be ineligible to be members of the Commission where (a) they have been adjudged bankrupt, or (b) have entered into a composition with their creditors, or (c) have been convicted of an offence for which they have been sentenced to a term of imprisonment. Lastly, the Commission may appoint an Audit Committee from among its appointed members that includes at least one expert member of the Committee who is not a member of the Commission. The ECB understands that these amendments aim to ensure that the CBI's auditing, financial reporting, control systems, legal structure and independence are adequate to ensure the integrity of operations and minimise the risk of misuse of resources or misreporting of data. The ECB welcomes these amendments as they will help to ensure good corporate governance in the CBI.

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<sup>8</sup> Part 5 of the draft law 'Bank's power to give directions'.

<sup>9</sup> Section 37 of the draft law.

<sup>10</sup> Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions (OJ L 125, 5.5.2001, p. 15) and Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding up of insurance undertakings (OJ L 110, 20.4.2001, p. 28).

<sup>11</sup> See Article 2 of Directive 2001/24/EC and Article 2(c) of Directive 2001/17/EC. In the case of the latter definition, the reorganisation measure would have to affect the pre-existing rights of parties other than the insurance undertaking itself.

<sup>12</sup> The draft amendments also include a corresponding amendment to the European Communities (reorganisation and winding up of credit institutions) Regulations 2011 to add directions given by the CBI under Part V of the draft law to the list of reorganisation measures defined in those regulations.

**7. Customer redress**

The draft law will also be amended to provide for a procedure for customer redress including a provision allowing the CBI to direct a firm to review transactions and to issue a further direction to make redress to consumers affected by errors identified. The ECB understands that the power to allow the CBI to direct regulated firms to redress customers will be a means of ensuring that customers are compensated quickly and with minimum inconvenience, and that it would be used where the loss or damage as a result of an occurrence is widespread within a particular firm or across a particular industry. The ECB welcomes this provision insofar as the adoption of measures aimed to strengthen investor and consumer protection would contribute to safeguarding the stability of the financial system. However, the ECB would welcome clarification in the draft law to address how such a provision is to interact with other provisions of national and Union law relating to customer redress.

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

Done at Frankfurt am Main, 16 July 2012.

[signed]

*The President of the ECB*

Mario DRAGHI