



OPINION OF THE EUROPEAN CENTRAL BANK

of 17 July 2012

**on the strengthening of financial supervision and establishment of a financial stability committee
(CON/2012/55)**

Introduction and legal basis

On 14 May 2012, the European Central Bank (ECB) received a request from the German Federal Ministry of Finance for an opinion on a draft law on the strengthening of German financial supervision (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 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 provisions¹, as the draft law relates to the Deutsche Bundesbank 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 law

1.1 The draft law is aimed at further strengthening the institutional arrangements through which micro-prudential supervision of financial services operators and macro-prudential oversight of the financial system are exercised. It fosters smooth cooperation between the Federal Ministry of Finance, the Deutsche Bundesbank and the Federal Financial Supervisory Authority (hereinafter ‘BaFin’) with regard to the early identification of and reaction to systemic risks arising in the financial system, taking also into account Union level developments².

¹ OJ L 189, 3.7.1998, p. 42.

² Such developments contain in particular the establishment of the European System of Financial Supervision (ESFS) by a set of Union regulations adopted in December 2010; see Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board (OJ L 331, 15.12.2010, p. 1); Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority) (OJ L 331, 15.12.2010, p. 12), Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority) (OJ L 331, 15.12.2010, p. 48, and Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), (OJ L 331, 15.12.2010, p. 84) and Council Regulation (EU) No 1096/2010 of 17 November 2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board (OJ L 331, 15.12.2010, p. 162).

1.2 Article 1 of the draft law introduces the Law on financial stability oversight (hereinafter the ‘proposed Law on financial stability oversight’), which in particular concerns the establishment of a Financial Stability Committee and the strengthening of the financial stability (macro-prudential) role of the Deutsche Bundesbank.

1.2.1 *Establishment of a Financial Stability Committee*

The Financial Stability Committee (hereinafter the ‘Committee’) will be composed of: (a) three representatives from the Federal Ministry of Finance, including the Chair and the Vice-Chair of the Committee, (b) three Deutsche Bundesbank representatives, (c) three BaFin representatives, and (d) the Chair of the Management Board of the Financial Market Stabilisation Authority participating in the Committee without voting rights³. The Committee’s decisions are adopted by a simple majority of its members unless specified to the contrary⁴. The Committee will be responsible for, *inter alia*, advising on the handling of warnings and recommendations issued by the European Systemic Risk Board (ESRB) under Article 16 of Regulation (EU) No 1092/2010⁵ and for adopting its own non-binding warnings and recommendations concerning risks to financial stability, addressed to German public authorities⁶. The recipients of the Committee’s warnings and recommendations will be obliged to notify the Committee as regards the timeline for their implementation or to explain non-action. The warnings and recommendations may be made public after giving the recipient an opportunity to comment⁷.

1.2.2 *Strengthening the financial stability (macro-prudential) role of the Deutsche Bundesbank*

The Deutsche Bundesbank’s mandate will be complemented with the task of contributing to the stability of the financial system, in particular through: (a) analysing issues affecting financial stability and identifying arising risks, and (b) providing analytical support to the Committee, *inter alia*, through making proposals for the Committee’s warnings and recommendations and evaluating their implementation⁸. Moreover, the Committee may not adopt decisions concerning (a) the adoption and publication of its warnings and recommendations; or (b) the adoption of its annual reports submitted to the Parliament in the cases where the Deutsche Bundesbank representatives cast a block vote⁹. The Deutsche Bundesbank will also acquire the right to impose specified reporting requirements on the financial service providers falling within the sector ‘Financial corporations’ as defined in Regulation (EC) No 2223/96¹⁰. In addition, the Deutsche Bundesbank

3 Article 1, Section 2(3) of the draft law.

4 Article 1 first sentence of Section 2(5) of the draft law.

5 Article 1, Section 2(2) No 3 of the draft law.

6 Article 1 Section 3 of the draft law.

7 Article 1, Section 2(2) No 5, second sentence of Section 2(5), and Section 3 of the draft law.

8 Article 1, Section 1(1) of the draft law.

9 Article 1, third sentence of Section 2(5) of the draft law.

10 Article 1 Section 5 of the draft law; see Council Regulation (EC) No 2223/96 of 25 June 1996 on the European system of national and regional accounts in the Community (OJ L 310, 30.11.1996, p. 1).

and BaFin will be required to share all information relevant for the performance of their respective tasks¹¹.

- 1.3 Article 2 of the draft law amends the Law on the Federal Financial Supervisory Authority (hereinafter the ‘Law on BaFin’)¹² by: (a) replacing members of BaFin’s Supervisory Board appointed by the supervised entities with independent experts¹³, and (b) enhancing BaFin’s consumer protection function by establishing a Consumer Advisory Board, appointed by the Federal Ministry of Finance, to advise BaFin in the performance of its supervisory tasks from a consumer perspective¹⁴.

2. General observations

- 2.1 The ECB has assessed the draft law taking into account its previous opinions on national financial stability committees, and the present state of development of Union legislation concerning the exercise of macro-prudential oversight. The ECB understands that the ESRB will assess the follow-up to its Recommendation ESRB/2011/3 of 22 December 2011 on the macro-prudential mandate of national authorities¹⁵.
- 2.2 As a result of advanced legislative proposals at Union level, Member States may be required to designate an authority for the exercise of specific binding macro-prudential powers in relation to supervised entities within their jurisdiction¹⁶. The adoption of such Union legislation may require future adjustments to the macro-prudential framework laid down under the draft law.

3. The Deutsche Bundesbank’s role in the Committee

3.1 *Performance by the central bank of macro-prudential oversight tasks*

The ECB supports that the proposed institutional framework for macro-prudential oversight recognises the essential role played by the central bank¹⁷. It also welcomes the adequate representation of the Deutsche Bundesbank in the Committee, the performance by the Deutsche Bundesbank of analytical tasks in support of the Committee and the fact that Deutsche Bundesbank’s consent will effectively be required for the adoption and publication of Committee warnings and recommendations.

¹¹ Article 1, Section 4 of the draft law.

¹² *Finanzdienstleistungsaufsichtsgesetz* as published in the announcement of 22 April 2002, *Bundesgesetzblatt I*, p. 1782, as amended.

¹³ The Board will consist of six people with expertise in the area of finance and insurance, instead of ten representatives of the supervised companies. Article 2, Section 5 of the draft law, amending Section 7 of the Law on BaFin.

¹⁴ Article 2 Section 6 of the draft law, inserting Section 8a in the Law on BaFin.

¹⁵ OJ C 41, 14.2.2012, p. 1, Section 2(4)(2).

¹⁶ See in this respect the relevant provisions of the proposed regulation of the European Parliament and of the Council on prudential requirements for credit institutions and investment firms (COM (2011) 452). See the Council’s general approach of 21 May 2012, available on the Council’s website at www.consilium.europa.eu.

¹⁷ See e.g. paragraph 5 of Opinion CON/2004/16, paragraph 2.3 of Opinion CON/2010/10 and paragraph 5.1 of Opinion CON/2012/44. See also recital 24 of Regulation (EU) No 1092/2010.

3.2 At the same time, the performance of these new tasks should not affect: (a) the Deutsche Bundesbank's institutional, functional and financial independence, or (b) the performance by the ESCB of its tasks under the Treaty and the Statute of the European System of Central Banks and of the European Central Bank¹⁸. In this respect, the ECB welcomes the express confirmation in the draft law¹⁹ that: (i) the assignment to the Deutsche Bundesbank of the new macro-prudential tasks should not affect its present competences, and (ii) the central bank independence principle defined in the Law on Deutsche Bundesbank²⁰ should apply also to the exercise of such new tasks. Similarly, the ECB expects that the performance by the Deutsche Bundesbank of the tasks laid down in the draft law will comply with the prohibition of monetary financing under Article 123(1) of the Treaty, read in conjunction with Council Regulation 3603/93/EC²¹. In particular, the Deutsche Bundesbank's new tasks performed in support of the Committee should not give rise to any form of overdraft facility or any type of credit facility provided for the public sector.

3.3 *Central bank access to macro-prudential information*

The Deutsche Bundesbank should have the competence to require and obtain in a timely fashion all national data and information relevant for the exercise of its newly assigned macro-prudential tasks. Hence, the ECB welcomes the arrangements introduced by the draft law under which: (a) BaFin and the Deutsche Bundesbank should communicate all relevant information to one another whereby data stored at the other body may be retrieved automatically²², and (b) the Deutsche Bundesbank is entitled to collect information from financial corporations on the basis of a statutory instrument issued by the Federal Ministry of Finance in consultation with the Deutsche Bundesbank, should the data available from BaFin and other authorities be insufficient for the fulfilment of the Deutsche Bundesbank's tasks defined in the proposed Law on financial stability oversight²³. The ECB understands that the draft law²⁴ ensures that the confidentiality obligations imposed on the staff of the Deutsche Bundesbank and BaFin should not prevent effective information sharing amongst these institutions²⁵, also as regards sharing of disaggregated supervisory or statistical information.

18 See, e.g. paragraph 4 of Opinion CON/2009/88, paragraph 2.2.4 of Opinion CON/2010/7 and paragraph 2.9 of Opinion CON/2010/10.

19 Article 1, Section 1(2) of the draft law.

20 *Gesetz über die Deutsche Bundesbank*, as published in the announcement of 22 October 1992, *Bundesgesetzblatt I*, p. 1782, as amended, Section 12.

21 Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b(1) of the Treaty (OJ L 332, 31.12.1993, p. 1).

22 Article 1, Section 4(2) of the draft law.

23 Article 1, Section 5 of the draft law; information that may be collected by the Deutsche Bundesbank may cover all data that allow deep insight into the status and the development of the economic conditions for the financial corporations and into their on-going business operations, e.g. balance sheet and off-balance sheet figures collected and the firm and group level, as well information on group structures, bilateral relations, risk management practices and solvency and liquidity status.

24 Article 1, last sentence of Section 4(2) of the draft law.

25 Section 32 of the Law on Bundesbank and Section 11 of the Law on BaFin.

4. Cross-border cooperation

4.1 *General cooperation and information-sharing arrangements*

National provisions establishing national financial stability committees should be consistent with the Union law provisions that regulate the exchange of supervisory and statistical information²⁶ and that establish the ESRB as a Union body responsible for macro-prudential oversight of the financial system within the Union²⁷. While the ECB understands that the members of the Committee are already bound by such Union law provisions, Section 2 of the proposed Law on financial stability oversight should expressly mandate the Committee to cooperate with the ESRB and, where needed, with the macro-prudential authorities of the other Member States, in particular as regards exchange of information²⁸. To this end, the ECB further understands that confidentiality obligations established by the draft law for staff involved in Committee work²⁹ do not limit the possibility for the Committee to engage in cross-border cooperation and information-sharing since Section 6 of the proposed Law on financial stability oversight refers to exclusions from the confidentiality rules under Section 9(1) of the Law on Banking as applicable to cross-border sharing of all types of information obtained by the Committee³⁰.

4.2 *Cooperation concerning warnings and recommendations*

National financial stability committee actions should not conflict with but rather complement ESRB actions taken at Union level³¹. Hence, the ECB recommends that Section 3 of the proposed Law on financial stability oversight states that the Committee closely liaises with the ESRB and informs the ESRB of all actions taken to address systemic risks at national level³², and further, that it informs the ESRB prior to the issuance or the publication of its warnings and recommendations addressed to German authorities, if significant cross-border effects are to be expected. Provision of such advance information on Committee warnings and recommendations is necessary, given their

²⁶ See paragraph 3.2 of Opinion CON/2008/39 and paragraph 2.2.6 of Opinion CON/2010/7; see, e.g., 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 (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 (OJ L 145, 30.4.2004, p. 1), Article 49 of Directive 2006/48/EC 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, and paragraph 5.3 of Opinion CON/2012/44; see also Article 57(aa) 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 ('CRD IV'), Council general approach of 21 May 2012.

²⁷ See Article 3(1) of Regulation EU (No) 1092/2010.

²⁸ See paragraph 5.3 of opinion CON/2012/44. See also Article 57(aa) of 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, Council general approach of 21 May 2012.

²⁹ Article 1 Section 2(6) and Section 6 of the draft law.

³⁰ Article 1 Section 6 of the draft law.

³¹ See paragraph 2.2.2 of Opinion CON/2010/7 and paragraph 2.11 of Opinion CON/2010/10.

³² See Section B4 of Recommendation ESRB/2011/3.

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potential overlap in substance with analogous ESRB instruments, the need to avoid conflicting policy messages produced at Union and national level, and the need to ensure the effectiveness of the ESRB's warnings and recommendations³³.

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

Done at Frankfurt am Main, 17 July 2012.

[signed]

The President of the ECB

Mario DRAGHI

³³ See paragraph 2.2.2 of Opinion CON/2010/7 and paragraph 2.11 of Opinion CON/2010/10.