



EUROPEAN CENTRAL BANK

EUROSYSTEM

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ECB-PUBLIC

## OPINION OF THE EUROPEAN CENTRAL BANK

of 19 December 2014

on the disclosure of confidential information to a national parliamentary inquiry

(CON/2014/89)

### Introduction and legal basis

On 8 December 2014, the European Central Bank (ECB) received a request from the Minister for Finance for an opinion on the Central Bank (Amendment) Bill 2014 (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<sup>1</sup>, as the draft law relates to the Central Bank of Ireland (CBI) 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 Section 33AK of the Central Bank Act 1942 prohibits current and former CBI officials or other employees<sup>2</sup> from disclosing confidential information if such disclosure is prohibited by the Treaty, the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB') or the 'supervisory EU legal acts'<sup>3</sup>. This confidential information is specified as: (a) the business of any person or body whether corporate or incorporate that has come to the person's knowledge through the person's office or employment with the CBI, or (b) any matter arising in connection with the performance of the functions of the CBI or the exercise of its powers.

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<sup>1</sup> Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (OJ L 189, 3.7.1998, p. 42).

<sup>2</sup> According to section 33AK(1), this includes, inter alia, the Governor and every former Governor, other current and former officials, and 'every other officer or employee and every other former officer or employee of the [CBI]'.

<sup>3</sup> Section 33AK(10) defines 'supervisory EU legal acts' as including, amongst a number of Union legal acts, Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338) (hereinafter the 'CRD IV').

- 1.2 Subject to this provision, section 33AK also provides that the CBI may disclose confidential information in a number of different situations (hereinafter the 'disclosure gateways'). The draft law proposes to make an addition to this list of disclosure gateways when the disclosure is to a Joint Committee of the Houses of Parliament that is conducting a specific type of inquiry for which terms of reference resolution were passed by the Lower and Upper Houses of Parliament on 25 and 26 November 2014. In effect, this gateway solely relates to disclosures to the Joint Committee of Inquiry into the Banking Crisis.
- 1.3 The draft law provides that disclosure to the Joint Committee may only occur after the making of certain rules and standing orders (i.e. parliamentary rules) which impose a sanction on a member of either House of Parliament to whom confidential information is provided for failure to comply with the provisions on professional secrecy referred to in section 33AK(6) in respect of that information. This appears to refer to the provisions on professional secrecy in the supervisory EU legal acts.
- 1.4 According to the consulting authority, motions were passed in both Houses of Parliament to formally empower the Joint Committee to conduct an inquiry into the banking crisis on 26 November 2014. The Inquiry intends to begin calling witnesses before the Christmas recess.

## **2. Disclosure of confidential information to the Inquiry**

- 2.1 The ECB understands that once the draft law is enacted, section 33AK will effectively provide that the CBI may disclose confidential information to the Inquiry in certain circumstances, subject to the obligation on current and former CBI officials and other employees not to disclose confidential information concerning the matters referred to in paragraph 1.1 above, if such is prohibited by the Treaty, the Statute of the ESCB or the supervisory EU legal acts.

This proviso on disclosure does not clarify that, in accordance with Article 59(2) of the CRD IV, specific conditions, rather than prohibitions, also apply when disclosing confidential information relating to the prudential supervision of institutions to parliamentary enquiry committees in the relevant Member State: (a) the parliamentary enquiry committee must have a 'precise mandate' under national law; (b) the information must be 'strictly necessary' for fulfilling that mandate; (c) persons with access to the information are subject to professional secrecy requirements under national law at least equivalent to those referred to in Article 53(1) of the CRD IV; (d) where the information originates in another Member State, that it is not disclosed without the express agreement of the competent authorities which have disclosed it and, solely for the purposes for which those authorities gave their agreement; and (e) to the extent that the disclosure of information relating to prudential supervision involves processing of personal data, any processing by the parliamentary enquiry committee must comply with national law transposing Directive 95/46/EC of the European Parliament and of the Council<sup>4</sup>. These conditions have to be

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<sup>4</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

respected and implemented when disclosing confidential information to parliamentary enquiry committees.

Furthermore, under Directive 2014/59/EU of the European Parliament and of the Council<sup>5</sup> (the Bank Recovery and Resolution Directive, hereinafter the 'BRRD') the sharing of confidential information on resolution (actions, tools, plans etc.) with parliamentary enquiry committees is not wholly unrestricted. Article 84(5) of the BRRD provides that Member States may authorise the exchange of information with parliamentary enquiry committees in their Member State 'under appropriate conditions'. Member States should take into account the general purpose behind business secrecy in this context as expressed, for example, in recital 86 of the BRRD which states that '... therefore [it is] necessary to ensure that there are appropriate mechanisms for maintaining the confidentiality of such information, such as the content and details of recovery and resolution plans and the result of any assessment carried out in that context'. This is relevant in view of the fact that the bulk of the BRRD's provisions are to be implemented by Member States by 1 January 2015.

- 2.3 The ECB acknowledges that the disclosure gateway proposed by the draft law is subject to the condition that disclosure to the Inquiry may only occur after the making of parliamentary rules which subject a member of the Parliament to sanction in the event that the member is provided with confidential information and fails to comply with the provisions on professional secrecy in the supervisory EU legal acts<sup>6</sup>. Nevertheless, the particular elements of such professional secrecy requirements within the supervisory EU legal acts are not further elaborated and it is unclear as to how the parliamentary rules will clarify these obligations of professional secrecy for the members of Parliament.
- 2.4 Furthermore, section 33AK(6) only refers to the provisions on professional secrecy in the supervisory EU legal acts and does not refer to the obligations under Union law in general, including the Treaty, the Statute of the ESCB and the Rules of Procedure of the European Central Bank<sup>7</sup>. In this regard, the scope of section 33AK(6) should be broadened to comply with Article 37.2 of the Statute of the ESCB, according to which persons having access to data covered by Union legislation imposing an obligation of secrecy shall be subject to such legislation. To the extent that such Union legislation requires breaches of Union law, in particular breaches of professional secrecy obligations, to be subject to sanction in the Member States, any such sanctions should apply to members of Parliament having access to the confidential information.

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<sup>5</sup> Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

<sup>6</sup> See the amendment proposed by section 1(b) of the draft law and section 33AK(6) of the Act of 1942.

<sup>7</sup> Decision ECB/2004/2 of 19 February 2004 adopting the Rules of Procedure of the European Central Bank (OJ L 80, 18.3.2004, p. 33).

### 3. Source of the amendment

Subsection (6A) of section 33AK, as proposed to be inserted into the Central Bank Act 1942, is a provision addressed to members of Parliament rather than the CBI. It must be ensured that members of Parliament are bound by the parliamentary rules to be created under this provision, in accordance with the Irish legal system, and that members are aware of the content of such rules.

### 4. Parliamentary privilege

The ECB understands that, according to Article 15.13 of the Constitution of Ireland, the members of both Houses of Parliament are not, in respect of any utterance in either House, amenable to any court or any authority other than the House itself. Sufficient safeguards must be in place to ensure that the sanctions and protections proposed by the draft law are valid and enforceable in light of this constitutional requirement.

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

Done at Frankfurt am Main, 19 December 2014.

[signed]

*The President of the ECB*

Mario DRAGHI