



EUROPEAN CENTRAL BANK

EUROSYSTEM

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ECB-PUBLIC

OPINION OF THE EUROPEAN CENTRAL BANK

of 25 August 2017

on amendments to the financial market supervisory regime

(CON/2017/35)

Introduction and legal basis

On 26 July 2017 the European Central Bank (ECB) received a request from the Austrian Ministry of Finance for an opinion on a draft law regarding amendments to the financial market supervisory regime (hereinafter the 'draft law')¹.

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, on the third indent of Article 2(1) of Council Decision 98/415/EC², as the draft law relates to the Oesterreichische Nationalbank (OeNB), and the ECB's tasks pursuant to Article 127(6) of the Treaty concerning policies relating to the prudential supervision of credit institutions. 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. According to its explanatory memorandum, the draft law is intended to: (a) increase the transparency of Austrian financial market supervision; (b) improve the quality of supervision and the functioning of supervisory processes; (c) enhance the legal certainty for supervised firms and for other legal entities wanting to operate in the financial services area; and (d) relax organisational requirements for smaller credit institutions.
- 1.2. In order to increase the transparency of financial market supervision in Austria, the draft law requires the Austrian Financial Market Authority (FMA) to conduct public tender procedures regarding second level management posts, to establish a mandatory internal audit function within the FMA and to conduct public consultation procedures before issuing regulations, circulars and minimum standards. The draft law also requires the FMA to publish annual auditing areas on which to focus. Furthermore, the draft law increases the OeNB's cost transparency for performing tasks related to the supervision of credit institutions.
- 1.3. The draft law aims to increase the quality of supervision by: (a) strengthening the State

¹ Bundesgesetz, mit dem das Bankwesengesetz, das Einlagensicherungs- und Anlegerentschädigungsgesetz, das Finanzmarktaufsichtsbehördengesetz, das Kapitalmarktgesetz und das Versicherungsaufsichtsgesetz 2016 geändert werden.

² 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).

Commissioner's Office³; (b) improving the functioning of on-site audits and respective follow-up measures; (c) introducing an electronic prospectus approval process; and (d) clarifying the risk-based approach in the area of supervision of credit institutions. Furthermore, the draft law introduces the possibility for an accelerated, consensual termination of administrative proceedings. According to the draft law, a party may waive the right to appeal before a decision has been issued by the FMA in the context of an administrative procedure or an administrative fines procedure.

- 1.4. In order to improve legal certainty for supervised credit institutions, the draft law explicitly determines the legal framework for outsourcing of banking operations. While the outsourcing of banking operations is already permitted to a certain extent, the current legal regime does not set out the requirements and limits for such activities. The draft law's outsourcing provisions are based on outsourcing provisions contained in various areas of Union and national financial market regulation, including the 2009 Law on payment services (*Zahlungsdienstegesetz*), the 2007 Law on securities supervision (*Wertpapieraufsichtsgesetz*) and the Committee of European Banking Supervisor's Guidelines on Outsourcing⁴.
- 1.5. In the future, natural and legal persons may request from the FMA issuance of a legally binding advance ruling regarding the supervisory evaluation of circumstances that lie in the future at the time of the application, if there is a particular interest in obtaining such a ruling in view of the major regulatory impact. This includes the evaluation whether new business models trigger any licensing obligations.
- 1.6. Finally, the draft law aims to provide organisational relief to smaller credit institutions. To this end, only significant credit institutions are required to form supervisory board committees. Furthermore, it raises the threshold for the obligatory establishment of an in-house internal audit department. The rationale for this latter provision is to increase the ability of smaller credit institutions to outsource the internal audit function to external experts.

2. Observations

- 2.1 The ECB welcomes the draft law's aim to improve transparency, quality and legal certainty of banking supervision in Austria. The principles of due process and transparency are also principles guiding the work of the ECB within the Single Supervisory Mechanism (SSM), as set out in recital 58 of Council Regulation (EU) No 1024/2013⁵. The ECB recognises that the possibility to issue a legally binding advance ruling applies to the FMA without limiting the ECB's competence regarding

³ The State Commissioner and Deputy State Commissioner have to be invited by the credit institution to the general meetings, general assemblies, meetings of the supervisory board, meetings of the audit committees and meetings of executive committees of the supervisory board. Their role is to report to the FMA on issues of relevance to supervision in the meetings of the supervisory board and its committees, to promptly point out generally unsound circumstances within a credit institution and to raise objections to decisions of the supervisory board or its respective committees that breach supervisory law.

⁴ Available on the European Banking Authority's website at www.eba.europa.eu.

⁵ Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

the authorisation of credit institutions as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013 of the European Parliament and of the Council⁶.

- 2.2 In order to improve legal certainty for supervised credit institutions, the ECB also welcomes the introduction of explicit rules regulating the outsourcing of banking operations. In this context, this legal regime will also apply to significant credit institutions in Austria which are directly supervised by the ECB within the SSM framework. The ECB also understands that these rules apply to Austrian credit institutions, and do not have an impact on their subsidiaries in other Members States.
- 2.3 As regards the introduction of the possibility to accelerate the termination of administrative procedures and administrative fines procedures by the FMA, the ECB notes that this possibility only applies to the FMA without limiting the ECB's competence within the SSM framework.

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

Done at Frankfurt am Main, 25 August 2017.

[signed]

The President of the ECB

Mario DRAGHI

⁶ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).