



EUROPEAN CENTRAL BANK

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OPINION OF THE EUROPEAN CENTRAL BANK

of 11 May 2018

on administrative sanctions and criminal offences in connection with the provision of false or misleading information to the Central Bank of Ireland

(CON/2018/24)

Introduction and legal basis

On 4 April 2018 the European Central Bank (ECB) received a request from the Chairman of the Oireachtas (the Irish National Parliament) Joint Committee on Finance, Public Expenditure and Reform and Taoiseach (the Irish Prime Minister), for an opinion on the Central Bank Bill 2018 (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 indent of Article 2(1) of Council Decision 98/415/EC¹, as the draft law relates to the Central Bank of Ireland (CBI) and to the tasks conferred upon the ECB concerning the prudential supervision of credit institutions pursuant to Articles 127(6) of the Treaty. 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 confers on the CBI the powers to conduct inquiries into the suspected provision of false or misleading information to the CBI. It furthermore sets out the administrative sanctions that may be imposed by the CBI in such circumstances. In order to achieve this, the draft law extends the scope of application of certain existing provisions of Irish law, which set out the powers of the CBI for the enforcement of designated legislative acts (enactments and statutory instruments)², to three categories of additional addressees, including both natural and legal persons.
- 1.2 First, the draft law extends the scope of application of existing enforcement powers to persons who are either (i) under an express or implied duty to provide information to the CBI pursuant to a legislative enactment or to a European act, or at law, or in equity, or (ii) indirectly under that duty, whether by being obliged to co-operate in providing that information, or to procure the provision of that information, or otherwise. The draft law does not further define these persons. Thus, this provision of the draft law must be read together with other legislative enactments, such as those

¹ 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).

² Part IIIC of the Central Bank Act 1942, as amended.

which oblige credit institutions to report information for supervisory purposes³ or those which oblige credit institutions to report to the CBI on lending to related parties⁴.

- 1.3 Second, the draft law extends the scope of application of the existing enforcement powers to natural persons performing functions that may be described as ‘controlled functions’ by the CBI. These include those natural persons holding a managerial function in a regulated financial service provider, such as a credit institution, financial holding company, mixed-financial holding company or mixed-activity holding company⁵.
- 1.4 Third, the draft law extends the scope of application of the existing provisions on enforcement to persons who could potentially be the subject of an obligation to provide the CBI with information, records or forecasts, plans, accounts, explanations, answers to questions, or other documents requested by the CBI under its information-gathering power, regardless of whether such obligation has already been imposed on them. These persons include regulated financial service providers, such as credit institutions, and natural persons who are or have been an officer, employee or agent of such financial service providers⁶.
- 1.5 With regard to the nature of the CBI's enforcement powers, the existing provisions allow the CBI to (i) hold an inquiry into the conduct of a regulated financial service provider, such as a credit institution, or a person concerned in its management; (ii) make a finding as to whether the financial service provider or person concerned is committing or has committed the prescribed contravention to which the inquiry relates; and (iii) impose on the financial service provider or person concerned in its management one or more sanctions. These sanctions can include a monetary penalty to be paid to the CBI; suspension or revocation of the authorisation of a financial services provider in respect of any one or more of its activities; the submission of a proposal to the ECB to suspend or withdraw the authorisation of a financial service provider, i.e. a credit institution authorised by the ECB under Council Regulation (EU) No 1024/2013⁷ in respect of any one or more of its activities; and, if the financial service provider is a natural person, a direction disqualifying the person from being concerned in the management of a regulated financial service provider.
- 1.6 The draft law also creates a criminal offence of providing false or misleading information to the CBI. A person who commits an offence is liable on summary conviction to a class A fine or imprisonment of a term not exceeding 12 months (or both), or, on conviction on indictment, to a fine not exceeding EUR 250 000 or imprisonment for a term not exceeding 5 years (or both).
- 1.7 Finally, the draft law amends the Criminal Justice Act 2011 to include the offence of contravening the above new provisions.

3 See for example the fourth subparagraph of Article 99(5); the fourth subparagraph of Article 99(6); the third subparagraph of Article 101(4); the third subparagraph of Article 394(4); and the fourth subparagraph of Article 415(3) and the third subparagraph of Article 430(2) of 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).

4 Section 7 of the Central Bank of Ireland Code of Practice on Lending to Related Parties, 2013.

5 Section 20 of the Central Bank Act 2010 and Statutory Instrument No 437 of 2011, Central Bank Reform Act 2010 (sections 20 and 22) Regulations 2011, as amended.

6 Section 21 of the Central Bank (Supervision and Enforcement) Act 2013.

7 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).

2. General observations

- 2.1 The draft law complements the CBI's existing tasks, in particular in the field of supervision of financial service providers (including credit institutions), and, hence, does not confer genuinely new tasks on the CBI in this area. For example, in respect of credit institutions and investment firms, the CBI's enforcement regime already⁸ applies to an institution which fails to report information or provides incomplete or inaccurate information contrary to various obligations arising from Regulation (EU) No 575/2013⁹. It is an offence for a person to provide the CBI with false, misleading or inaccurate information in relation to any requirement arising from those provisions¹⁰.
- 2.2 Pursuant to the provisions of Council Regulation (EU) No 1024/2013¹¹, the ECB has various supervisory and investigatory powers for the exclusive purpose of carrying out the tasks conferred upon the ECB in respect of the prudential supervision of credit institutions, including in Ireland. To the extent necessary to carry out the tasks conferred on the ECB by Council Regulation (EU) No 1024/2013, the ECB may require, by way of instructions, the CBI to make use of its powers under, and in accordance with, the conditions set out in Irish law, where this Regulation does not confer such powers on the ECB. Moreover, in the cases provided for by Council Regulation (EU) No 1024/2013, the ECB may require the CBI to open proceedings with a view to ensuring that appropriate penalties are imposed. In such cases, the CBI may only open proceedings at the request of the ECB but may ask the ECB to issue such request. The ECB and the CBI cooperate closely in the exercise of their respective supervisory and investigatory powers and in respect of the imposition of penalties¹².
- 2.3 The draft law would increase the CBI's powers to take enforcement measures against those who provide false or misleading information to it and would allow such enforcement measures to be applied to a broad range of addressees, including credit institutions and natural persons who are or have been an officer or employee or agent of those credit institutions. Thus, for the purpose of carrying out the tasks conferred upon the ECB in respect of the prudential supervision of credit institutions, the ECB may require, by way of instructions, the CBI to make use of these new powers under Irish law.
- 2.4 Finally, it is not fully clear how the provisions of the draft law will interact with existing provisions that either: (i) set out the administrative sanctions that can be imposed by the CBI; or (ii) make the

⁸ Regulation 55 of Statutory Instrument No 158/2014 European Union (Capital Requirements) Regulations 2014. This statutory instrument seeks to implement 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).

⁹ 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).

¹⁰ Regulations 147 and 148 of Statutory Instrument No 158/2014; and Regulations 5 and 6 of Statutory Instrument No 159/2014 European Union (Capital Requirements) (No 2) Regulations 2014.

¹¹ See Articles 9-18 of Council Regulation (EU) No 1024/2013.

¹² See Article 9(1) and (2) and Article 18(5) of Council Regulation (EU) No 1024/2013. See also Article 134 of Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities, OJ L 141, 14.05.2014, p. 1.

provision of false or misleading information to the CBI a criminal offence¹³. It may be useful to further examine whether there are specific gaps in the CBI's powers to sanction financial service providers and their senior managers. In that respect, the ECB notes that the CBI has already provided comments¹⁴ to the Law Reform Commission in the context of its Issues Paper on 'Regulatory Enforcement and Corporate Offences'¹⁵. The work of the Law Reform Commission and the comments of the CBI may also be of use in order to ensure that the draft law is targeted and effective and ensures the overall coherence of the regulatory and enforcement framework available to the CBI.

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

Done at Frankfurt am Main, 11 May 2018.

[signed]

The President of the ECB

Mario DRAGHI

¹³ See for example, sections 18 and 32 of the Central Bank (Supervision and Enforcement) Act 2013, section 271 of the Central Bank Act 1997, as amended, and section 33BA(9) of the Central Bank Act 1942, as amended.

¹⁴ Central Bank of Ireland, Response to the Law Reform Commission Issues Paper 'Regulatory Enforcement and Corporate Offences', December 2017.

¹⁵ Law Reform Commission, Issues Paper: Regulatory Enforcement of Corporate Offences, 27 January 2016, LRC IP 8-2016.