



OPINION OF THE EUROPEAN CENTRAL BANK

of 9 September 2011

on new measures strengthening supervision and enforcement in financial regulation

(CON/2011/69)

Introduction and legal basis

On 1 August 2011, the European Central Bank (ECB) received a request from the Irish Ministry of Finance for an opinion on the Central Bank (Supervision and Enforcement) Bill 2011 (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 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

The draft law is intended to enhance the CBI's powers to (a) supervise regulated financial service providers, and (b) enforce financial services legislation. The introduction of this legislation is one of the financial sector reform actions under the EU/IMF Programme of financial support for Ireland².

- 1.1 The draft law is intended to empower the CBI to require a financial service provider or a related undertaking to provide the CBI with an independent expert report paid for by the financial service provider or a related undertaking. The report may be required for the proper and effective regulation of financial service providers and may relate to any matter on which the CBI may require information or documents under financial services legislation.

¹ OJ L 189, 3.7.1998, p. 42.

² See the Memorandum of Understanding on Specific Economic Policy Conditionality (First Update) of 17 May 2011, page 28, and the Memorandum of Understanding on Specific Economic Policy Conditionality (Second Update) of 28 July 2011, page 8, available on the Department of Finance's website at www.finance.gov.ie.

- 1.2 The draft law will - with limited exceptions - replace the CBI's powers to appoint investigative officers with a single consolidated 'authorised officer' regime which the CBI may use to obtain information from all regulated financial service providers and various other categories or persons³. An authorised officer may be an officer or employee of the CBI or other suitably qualified person and may be appointed by the CBI for the purpose of obtaining any information necessary for the CBI's performance of its functions under financial services legislation relating to the proper and effective regulation of financial service providers.
- 1.3 The draft law will introduce whistleblowing protection in the financial services area. Persons who make good faith disclosures regarding the possible or actual contravention of financial services legislation to the CBI, or an officer or employee of the CBI or an authorised officer, will be protected from civil liability and penalisation (as defined in section 32 of the draft law) by their employer. The draft law will also require persons who perform a pre-approval controlled function within regulated financial service providers, i.e. a senior role or a role related to regulatory compliance, to disclose to the CBI such possible or actual contraventions of financial services legislation which they believe or know might be of material assistance to the CBI. Additionally, to protect the whistleblower's personal data, Section 34(5) of the draft law provides that the CBI may not divulge the whistleblower's identity except (i) with the whistleblower's consent, or (ii) if this is necessary to ensure proper investigation of the matters to which the disclosure relates.
- 1.4 The draft law extends the CBI's powers to give directions to all regulated service providers or related undertakings, in particular where they are acting or failing to act in a particular manner.
- 1.5 The draft law will empower the CBI to make wide-ranging regulations, following prior consultation with the Ministry, for the proper and effective regulation of financial service providers. It will also provide additional powers to the CBI to enforce financial services legislation and will increase the maximum levels of financial sanctions which can be imposed on regulated financial service providers by the CBI for contraventions of financial services legislation.

2. General observations

- 2.1 The ECB understands that this draft law is the second step in the legislative reform of the Irish central banking and financial regulatory regime⁴. In particular, it will provide the CBI with powers, such as powers related to third party reports, authorised officers and directions, which would extend beyond the regulated financial service provider to include related undertakings. These powers therefore will enhance the ability of the CBI to have a complete understanding of the whole group of which the regulated entity is a member when assessing the risks to which the regulated

³ See section 21 of the draft law for the list of persons to whom the powers of an authorised officer can apply.

⁴ The first was the Central Bank Reform Act 2010, renaming the Central Bank and Financial Services Authority of Ireland the Central Bank 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.

business is subject. In this regard, the ECB welcomes the draft law as enhancing the supervisory and enforcement tools available to the CBI⁵.

- 2.2 The ECB understands that further legislation will be introduced to consolidate all legislation relating to the CBI. The ECB reaffirms its previous opinions⁶ on the consolidation of Ireland's Central Bank Acts and notes that such further consolidating legislation should be the subject of a separate consultation of the ECB.

3. **Additional CBI powers in supervisory and enforcement matters**

As regards the financing of the additional and enhanced CBI powers in supervisory and enforcement matters introduced by the draft law, the ECB refers to the principle of financial independence under which a national central bank must have sufficient means to perform its tasks related to the European System of Central Banks (ESCB) and its national tasks⁷. The CBI should, therefore, dispose of sufficient human and financial resources to efficiently perform any additional tasks introduced by the draft law, as well as its current tasks, and should not be adversely affected in carrying out its ESCB-related tasks, from an operational or financial point of view, as a result of any additional tasks introduced by the draft law.

3.1 *Independent expert report*

Part 2 of the draft law will empower the CBI in certain circumstances to require a financial service provider or a related undertaking to report to it. While section 9 of the draft law provides (i) that the substance of such report may relate to any matter on which the CBI could require information or documents under financial services legislation, and (ii) that the report may be required for the proper and effective regulation of financial service providers, section 10 provides that the CBI must have regard to certain matters before requesting a report under section 9. For example, the CBI must have regard to whether it might use other more appropriate powers instead of requesting a report and to the degree of relevant knowledge and expertise available to the financial service provider or related undertaking, as well as the cost implications of providing such report. Although the draft law does not specify precisely when a report may be requested, the ECB acknowledges the need for flexibility in this regard and understands that the scope of section 9 should be read against the provisions in section 10.

Section 11(1) of the draft law provides that the person appointed to report (hereinafter the 'reviewer') will be either (i) nominated by the financial service provider or related undertaking being reviewed (hereinafter the 'reviewee') and approved by the CBI, or (ii) nominated by the CBI if the reviewee makes no nomination. Section 11(2) provides that the reviewer may be employed or

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

⁶ See, for example, paragraph 17 of Opinion CON/2002/16, paragraph 9 of Opinion CON/2003/24, paragraph 2.1 of Opinion CON/2010/30 and paragraph 2 of Opinion CON/2010/48.

⁷ See the ECB's Convergence Report, May 2010, p. 21, and paragraph 3.1.5 of Opinion CON/2009/93 and paragraph 3.2.1 of CON/2011/46.

otherwise engaged by the reviewee. The ECB welcomes the provisions of section 11(3) aimed at ensuring the independence and impartiality of the reviewer vis-à-vis the reviewee as a precondition for its appointment and for drafting the report. The ECB stresses the importance of the adequate application of such provisions by the reviewee and by the CBI, through thorough scrutiny of the absence of conflict of interests and fulfilment of all the other conditions set forth by the draft law.

3.2 *Authorised officers*

Part 3 of the draft law provides for the appointment in certain circumstances by the CBI of an authorised officer in respect of a regulated financial service provider or related undertaking and various other categories or persons⁸, for the purposes of obtaining information necessary for the CBI's performance of its regulatory and supervisory functions. According to section 25 of the draft law, an authorised officer is provided with a wide range of powers including in relation to inspections, interviews, searches and document production. Section 30 provides that where a person subject to an authorised officer's powers fails or refuses to comply with that authorised officer in the exercise of their powers, the authorised officer may certify the failure or refusal to the High Court. The High Court may then make an order or direction as it sees fit, following hearings of any witnesses against or on behalf of the person concerned and any statement in defence.

The ECB notes that the draft law does not address the question of possible interplay between the function of a reviewer appointed under Part 2 to report to the CBI, and that of an authorised officer appointed under Part 3 to obtain information for the CBI. The draft law does not provide in what circumstances a reviewer as opposed to an authorised officer, and vice versa, would be appointed. Similarly, there are no provisions in the draft law to deal with the potential situation where both a reviewer and an authorised officer are performing tasks for the CBI in relation to a regulated financial service provider or related undertaking at the same time. The ECB appreciates that the reviewer and the authorised officer have different functions, with the reviewer performing specific, stipulated tasks for the CBI, whilst the authorised officer will be largely gathering information for the CBI. Although it could be helpful to clarify the respective positions of each as regards the other in such circumstances, the ECB understands the difficulty in providing precise dividing lines in the draft law between the use and position of authorised officers and reviewers, respectively, and that the choice of measure will depend on the circumstances in each case, and therefore suggests that this point is addressed by the CBI when implementing the draft law.

3.3 *Whistleblowing*

Part 4 of the draft law introduces whistleblowing protection for persons who make good faith disclosures to the CBI or a CBI officer or employee or an authorised officer regarding the possible or actual contravention of financial services legislation⁹. The ECB understands that this

⁸ See section 21 of the draft law for the list of persons to whom the powers of an authorised officer can apply.

⁹ 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, COM(2011) 453 final also introduces a provision

introduction of specific protection for whistleblowers in the financial services sector is to address a recognised lack of protection for good faith disclosures in respect of a potential or actual offence under or contravention of financial services legislation. The ECB understands that the CBI could use any of the information disclosed to it under Part 4 to more efficiently avail of its other powers under the draft law and under other relevant laws to contribute to the more effective application of the financial services legislation¹⁰. On this basis, the ECB welcomes the introduction of such protection for whistleblowers.

3.4 *Directions*

The ECB understands that the CBI's power to give directions is not new and that the intention of the draft law¹¹ is rather to clarify and consolidate its precise scope¹² by providing for a new power which applies to all regulated financial service providers and their related undertakings. In this regard, the ECB welcomes the intention of clarification and consolidation.

3.5 *Regulations*

Part 6 of the draft law will empower the CBI to make wide-ranging regulations, following prior consultation with the Ministry, for the proper and effective regulation of financial service providers. Such regulations would allow the CBI to effectively perform the new supervisory responsibilities related to all financial services providers and financial markets. As pointed out on previous occasions¹³, and without prejudice to the Governing Council's powers under Article 14.4 of the Statute of the European System of Central Banks (hereinafter the 'Statute of the ESCB'), the ECB does not consider that this new task would interfere with the ESCB's objectives and tasks. Nonetheless, pursuant to the last sentence of Article 14.4 of the Statute of the ESCB, this new task would have to be performed on the responsibility and liability of the CBI and would not be regarded as being part of ESCB functions.

Section 41 of the draft law provides that, prior to making any such regulations, the CBI must (i) consult with the Ministry, and (ii) provide the Ministry with a draft of the proposed regulations. The ECB would welcome elaboration in the draft law of the precise procedural rules for such consultation, for example in terms of timing. Such procedural rules should not impact on the CBI's independence of decision-making or action or its need to act quickly in times of crisis. In this regard, it should be clear that, by giving the Ministry the opportunity to comment on a draft regulation, the CBI will have fulfilled *ipso facto* its obligation to consult the Ministry under section 41, and that there is no obligation to obtain the Ministry's consent before making any such regulation.

regarding whistleblowing (Article 70).

10 See in this respect the Commission Communication on reinforcing sanctioning regimes in the financial services sector (COM (2010) 716 final), 8 December 2010, page 15.

11 Part 5 of the draft law.

12 For example under section 21 of the Central Bank Act 1971 and under section 18 of the Insurance Act 1989.

13 See for example Opinion CON/2006/38, Opinion CON/2006/47, Opinion CON/2007/8 and Opinion CON/2007/29.

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3.6 *Cooperation with foreign authorities*

The ECB welcomes the provision in section 53 on cooperation with foreign authorities to enhance the effectiveness of international supervision. The ECB notes, however, that a reference to Member State and third country authorities would be more consistent with Union language and for this reason preferable to ‘overseas regulator’. In this regard, the provision should address (i) cooperation with Member State authorities and the duty to cooperate to comply with any Treaty obligation and the Union banking directives, and (ii) cooperation with third country authorities, by setting out the conditions for such international cooperation which are not applicable in the Union context.

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

Done at Frankfurt am Main, 9 September 2011.

[signed]

The Vice-President of the ECB

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