

OPINION OF THE EUROPEAN CENTRAL BANK
of 31 May 2019
on reform of the banking and financial market supervisory regime
(CON/2019/21)

Introduction and legal basis

On 15 April 2019 the European Central Bank (ECB) received a request from the Austrian Ministry of Finance (MoF) for an opinion on a draft law reforming the banking 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 (TFEU) and on the third, fourth and sixth indents of Article 2(1) of Council Decision 98/415/EC², as the draft law relates to the Oesterreichische Nationalbank (OeNB), the collection, compilation and distribution of monetary, financial and banking statistics, and the rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets, as well as the specific tasks conferred upon the ECB pursuant to Article 127(6) of the TFEU 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 The draft law proposes a reform of the structure of the banking and financial market supervisory regime in Austria. According to the explanatory memorandum, the draft law aims to make the national system of financial market supervision more efficient, accelerate and simplify decision-making processes, establish clear contacts for market participants and EU institutions, and increase the focus on service. It is intended to end the current split of competences between the Austrian Financial Market Authority (FMA) and the OeNB, and to concentrate the full extent of microprudential supervision in the FMA. The reform is proposed to take effect from 1 January 2020. The draft law does not purport to affect the OeNB’s current tasks in relation to macroprudential

¹ Bundesgesetz, mit dem das Alternative Investmentfonds Manager-Gesetz, das Bankwesengesetz, das Betriebliche Mitarbeiter- und Selbständigenvorsorgegesetz, das Bundesgesetz zur Schaffung einer Abbaueinheit, das E-Geldgesetz 2010, das Einlagensicherungs- und Anlegerentschädigungsgesetz, das Finanzkonglomeratengesetz, das Finanzmarktaufsichtsbehördengesetz, das Investmentfondsgesetz 2011, das Nationalbankgesetz 1984, das Sanierungs- und Abwicklungsgesetz, das Sparkassengesetz, STS-Verbriefungsvollzugsgesetz, das Versicherungsaufsichtsgesetz 2016, das Wertpapieraufsichtsgesetz 2018, das Zahlungsdienstegesetz 2018, das Zentrale Gegenparteien-Vollzugsgesetz sowie das Zentralverwahrer-Vollzugsgesetz 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).

supervision, the oversight of financial market stability and payment systems, and the collection of statistics.

- 1.2 The draft law transfers the OeNB's current competences in relation to microprudential banking supervision, in particular the conduct of on-site inspections and off-site analysis of individual banks, to the FMA. The same transfer of competences is envisaged with regard to the supervision of deposit guarantee schemes and the recovery and resolution of credit institutions. Furthermore, the task of providing expert opinions to the FMA, for example before granting a banking licence or approving a merger or demerger of credit institutions, is removed from the OeNB. Only the OeNB's competence to implement supervisory reporting will remain unchanged.
- 1.3 As a consequence of concentrating prudential supervisory tasks in the FMA, the OeNB's employees whose work relates to prudential banking supervision will, where possible, be transferred to the FMA. It is envisaged that employees of the OeNB recruited after 30 April 1998 will become employees of the FMA from 1 January 2020 and all of their existing rights and obligations will continue. OeNB internal staff rules applicable to such employees will continue to apply, while the right of the OeNB's General Council to amend those rules will be transferred to the FMA's Executive Board. Under Austrian labour law, employees may be transferred either by way of secondment or by assumption of their contracts by operation of law. Employees who joined the OeNB before 1 May 1998 are to be seconded to the FMA because assumption of their contracts would, according to the explanatory memorandum, represent a particular intrusion into the employment relationship. Although such seconded employees are to remain employees of the OeNB, they will be integrated into the FMA's operational services. Pursuant to the draft law, the FMA will reimburse the OeNB for the payroll costs of seconded staff.
- 1.4 The explanatory memorandum accompanying the draft law states that the OeNB's role regarding macroprudential supervision and financial market stability is to remain unchanged. The OeNB will remain competent to oversee financial market stability. It is intended that the OeNB will continue to monitor and analyse all circumstances that are relevant to financial market stability and inform the MoF and FMA thereof. In addition to this current competence, the OeNB shall in the future also focus on the development potential of the domestic financial market. The draft law provides for an increase in the number of OeNB's representatives on the Financial Market Stability Board (FMSB) from one to two. Pursuant to the draft law, the OeNB will submit to each of the MoF, the FMA, the National Council of the Austrian Parliament, the FMSB and the new FMA Advisory Board an annual report on the fundamental findings of its monitoring of developments in the financial markets and the potential impact of those findings on the national financial market. The OeNB will set up an internal organisational unit for the monitoring of developments in the financial markets. The OeNB will, however, no longer have its current competence to carry out on-site inspections for macroeconomic reasons, and will only have the ability to instruct the FMA to conduct such on-site inspections for reasons of financial market stability, for macroeconomic reasons, or in a crisis situation. The OeNB must state the reasons for the inspection and specify its intended scope. The FMA may either comply with the inspection instruction, or refuse it and state the reasons for the refusal. The FMA may only refuse to conduct an audit if it would compromise the audits included in the FMA's inspection programme or other FMA inspections, or if the data requested in the

inspection instruction are already accessible to the OeNB or can immediately be made accessible. If the OeNB considers that there is an imminent risk, the FMA may not refuse the inspection instruction and must comply with it immediately³.

- 1.5 The draft law requires the OeNB and the FMA to continue exchanging reporting data, statistical information and all other data and information necessary to accomplish their respective tasks in a suitable and efficient manner. For this purpose the FMA and the OeNB are required to conclude a bilateral memorandum of understanding which must be published and set out details of their collaboration and the information flow between them. Further memoranda of understanding will regulate the conduct of on-site inspections by the FMA if instructed by the OeNB, as well as the transfer of employees from the OeNB to the FMA and vice versa. More extensive information obligations are to be established in times of crisis in order to ensure effective collaboration.
- 1.6 The draft law provides for a number of changes to the FMA's governance structure. Among other things, the FMA will establish a Financial Market Advisory Board, whose role will be to advise the FMA on financial market matters, monitor and analyse international trends on the financial markets, and propose supervisory priorities. The Financial Market Advisory Board will have powers to adopt and publish opinions and recommendations. Its members will be appointed by the MoF for a five-year term and will perform their duties in an honorary capacity. Members will be nominated by various ministries, the Austrian Chamber of Commerce, the Vienna Stock Exchange, the OeNB and the Oesterreichische Kontrollbank. The business of the Financial Market Advisory Board will be administered by the FMA, and its rules of procedure will be established by the MoF.
- 1.7 The draft law proposes an increase in the amount of profits to be distributed by the OeNB to its sole shareholder, the Austrian Federation, from 90 to 95 per cent. The explanatory memorandum explains that the increase is due to the transfer of competence for on-site inspections and microprudential analysis to the FMA. Currently, the OeNB's costs of carrying out prudential supervisory tasks are partly refunded to it by the FMA, up to a statutory maximum annually of EUR 11 million, and the balance is borne by the OeNB (in 2018, for example, the balance amounted to EUR 42.6 million). The impact assessment of the draft law calculates that from 2020 annual costs previously incurred by the OeNB in carrying out prudential supervisory tasks in the amount of EUR 39.6 million will no longer be incurred once the competences are transferred – taking into account synergy effects and increased savings potential. Accordingly, the MoF concludes that these cost savings would become available for annual distribution to the Austrian Federation, in addition to the share of the profit that is currently distributed. According to the impact assessment, the MoF expects an increase in profit distribution of EUR 38.5 million per year from 2020 until 2023.
- 1.8 As the Austrian authorities do not intend to increase the supervisory fees to be paid by supervised entities, the increased costs incurred by the FMA due to the transfer of prudential supervisory tasks from the OeNB to the FMA will need to be funded by the Austrian Federation. According to the MoF's calculations, these costs will amount to EUR 33 million annually. Moreover, due to an

³ See the proposed amendment to Section 70 paragraph 1c of the Law on banking (*Bankwesengesetz*), contained in the draft law.

extended regulatory role of the FMA, it is expected that the annual costs of the MoF itself will increase by EUR 4.5 million.

- 1.9 The draft law clarifies the significant contribution of the OeNB to financial education and literacy. In particular, it provides that the OeNB will send the MoF an annual report on fundamental findings on the status of financial education in Austria.
- 1.10 Lastly, the explanatory memorandum to the draft law envisages a stronger separation between regulation and supervision than currently exists, thereby strengthening the role of the MoF in the field of regulation. For this purpose, three new departments with 30 new staff will be established in the division of the MoF that deals with financial markets.

2. Observations

2.1 *Distribution of the OeNB's profits*

- 2.1.1 In order to ensure financial independence, the national central banks (NCBs) must always have sufficient resources to carry out their tasks related to the European System of Central Banks (ESCB), as well as their national tasks⁴. Member States may not put their NCBs in a position where they have insufficient financial resources and inadequate net equity to carry out their tasks⁵. An NCB's overall independence would be jeopardised if it could not autonomously avail itself of sufficient financial resources to fulfil its mandate.
- 2.1.2 In accordance with the current national law, certain amounts must be deducted from the OeNB's operating profit prior to profit appropriation: namely, earnings from assets in which the pension reserve has been invested; interest credited to the temporary reserve account for loans extended by the OeNB under the European Recovery Programme; and earnings from assets in which the Fund for the Promotion of Scientific Research and Teaching set up by the OeNB has invested. Furthermore, before making any profit appropriation, up to 10 per cent of the annual profit that remains after deducting the amounts referred to above must be transferred, if necessary, to the OeNB's pension reserve until it reaches the level at which it is adequately funded – according to actuarial calculations – in order to meet the current pension claims of the beneficiaries. If, however, the pension reserve is significantly overfunded, the excess must be released and accounted for in the profit and loss account. After accounting for the deductions from the operating profit as referred to above, the OeNB is obliged under the current national law to distribute 90 per cent of the balance of the profit to the Austrian Federation. Further, after such distribution, a dividend of up to 10 per cent of the share capital of the Austrian Federation in the OeNB must be paid out to the Austrian Federation, by decision of a general meeting of the OeNB. The profit then remaining (the 'remaining profit') is required to be appropriated in accordance with a decision of a general meeting of the OeNB. The ECB understands that the draft law provides for an increase, from 90 to 95 per cent, of the proportion of the OeNB's profit – after the deductions from operating profit as referred

⁴ See, e.g., paragraph 3.5 of Opinion CON/2016/45. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

⁵ See, e.g., paragraph 3.1.1 of Opinion CON/2016/4 (with specific reference to Austria).

to above, and before payment of the dividend – that is to be distributed in future to the Austrian Federation.

- 2.1.3 An NCB's statute may prescribe how its profits are to be allocated⁶. Profits may be distributed to the State budget only after any accumulated losses from previous years have been covered⁷ and after financial provisions deemed necessary to safeguard the real value of the NCB's capital and assets have been created⁸. Member States may not hamper NCBs in building up their reserve capital to a level which is necessary for a member of the ESCB to fulfil its tasks⁹. The ECB stresses the importance of the OeNB's ability to independently create and adequately build up reserves and provisions. Under Austrian law¹⁰, the OeNB is obliged to prepare its balance sheet and its profit and loss account in conformity with the rules established by the Governing Council of the ECB under Article 26.4 of the Statute of the ESCB and of the ECB. Consequently, the OeNB has adopted the ESCB's accounting rules¹¹ and applies them in their entirety to its financial statements. However, the remaining profit is the only means by which the OeNB can increase its reserve serving as a general risk provision. Hence the proposed increase of the proportion of the OeNB's profit to be distributed to the Austrian Federation limits the OeNB's ability to adequately build up this reserve.
- 2.1.4 In any event, any amendment to the profit distribution rules of an NCB should only be initiated and decided in close cooperation with that NCB, since the NCB is in the best position to assess its required level of reserve capital¹². With a view to ensuring financial independence, the ECB requests that a decision by the consulting authority on the intended amendment to the profit distribution rules of the OeNB be taken only in cooperation with the OeNB.
- 2.1.5 Furthermore, the ECB understands that the increased profit distribution to be made by the OeNB is intended to compensate the Austrian Federation for the increased supervisory costs that the latter will incur, both within the MoF and at the FMA. However, as 90 per cent of the remaining profits are already distributed to the Austrian Federation under the current regime, the cost savings envisaged at the level of the OeNB would, in any event, lead to an increase in profit and in the corporate income tax charge. Thus, the proposed increase in the profit distribution percentage would not be necessary to achieve an increased profit distribution by the OeNB.

2.2 *The OeNB's role regarding financial market stability and macroprudential supervision*

- 2.2.1 Consistently with Article 127(5) of the TFEU, the ECB has repeatedly noted the important role of

⁶ See ECB Convergence Report 2018, p. 27. In the absence of such provisions, decisions on the allocation of profits should be taken by the NCB's decision-making bodies on professional grounds, and should not be subject to the discretion of third parties, unless there is an express safeguard clause stating that this is without prejudice to the financial means necessary for carrying out the NCB's ESCB-related tasks as well as national tasks (see, e.g., paragraph 2.3 of Opinion CON/2017/17).

⁷ See paragraph 4.3 of Opinion CON 2009/85 and paragraph 3.2.5 of Opinion CON/2017/17.

⁸ See ECB Convergence Report 2018, p. 27.

⁹ See paragraph 3.3 of Opinion CON/2009/26 and paragraph 2.1 of Opinion CON/2012/69.

¹⁰ See section 67 paragraph 2 of the Law on the National Bank.

¹¹ Guideline (EU) 2016/2249 of the European Central Bank of 3 November 2016 on the legal framework for accounting and financial reporting in the European System of Central Banks (ECB/2016/34) (OJ L 347, 20.12.2016).

¹² See ECB Convergence Report 2018, p. 27, paragraph 3.3 of Opinion CON/2009/53 and paragraph 3.6. of Opinion CON/2009/83.

NCBs in prudential supervision to allow the Eurosystem to contribute adequately to monitoring the risks to financial stability in the euro area¹³. At the same time, the draft law does not seek to affect the OeNB's existing role regarding macroprudential supervision, the oversight of financial market stability and payment systems, supervisory reporting, and the collection of statistics. While the draft law withdraws the OeNB's current competence to carry out on-site inspections, it authorises the OeNB to instruct the FMA to conduct on-site inspections for reasons of financial market stability, or macroeconomic reasons, or in a crisis situation, and the FMA must comply with the OeNB's inspection instruction immediately if the OeNB considers that there is an imminent risk. It is for the Austrian authorities to assess whether the withdrawal of the OeNB's current competence for carrying out on-site inspections for macroeconomic reasons complies with Austrian constitutional principles. Underlining the OeNB's role regarding oversight of financial market stability, the draft law increases the number of the OeNB's representatives in the FMSB from one to two. In addition, the OeNB is to nominate two of the six members of the FMA's Supervisory Board and one member of the FMA's Financial Market Advisory Board. All of these mechanisms should help to ensure that the transfer of prudential supervisory tasks from the OeNB to the FMA does not jeopardise the OeNB's ability to safeguard financial stability and prevent or mitigate systemic risks. In order to safeguard the OeNB's remaining tasks and functions, in particular macroprudential supervision and oversight of financial market stability, the ECB additionally recommends that the OeNB is provided with access to all relevant information necessary for its ongoing tasks¹⁴.

2.3 *The FMA's tasks within the Single Supervisory Mechanism*

2.3.1 Pursuant to Article 127(6) of the TFEU and Articles 4 and 6 of Council Regulation (EU) No 1024/2013¹⁵, the ECB is responsible for the effective and consistent functioning of the SSM, and the ECB and the NCAs are each subject to a duty of cooperation, and an obligation to exchange information. Where appropriate, and without prejudice to the responsibility and accountability of the ECB for the tasks conferred on it by Regulation (EU) No 1024/2013, the NCAs are responsible for providing assistance to the ECB, on the terms set out in Regulation (EU) No 468/2014 of the European Central Bank (ECB/2014/17)¹⁶, with the preparation and implementation of any acts relating to the tasks conferred on the ECB under Article 4 of Regulation (EU) No 1024/2013¹⁷ related to all credit institutions, including assistance in verification activities¹⁸.

13 See paragraph 2 of Opinion CON/2013/56.

14 See paragraphs II.b) to e) of the OeNB's opinion on the draft law, dated 7 May 2019, which is published on the Austrian Parliament's website at www.parlament.gv.at.

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

16 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 (SSM Framework Regulation) (OJ L 141, 14.5.2014, p. 1).

17 See paragraph 2.2 of Opinion CON/2018/6 and paragraph 2.4 of Opinion CON/2016/43.

18 Without prejudice to certain provisions of Regulation (EU) No 1024/2013, NCAs shall carry out and be responsible for certain tasks and adopting all relevant supervisory decisions with regard to certain less significant credit institutions or financial holding companies. Wherever the ECB is assisted by NCAs for the purpose of exercising the tasks conferred on it by Regulation (EU) No 1024/2013, the ECB and the NCAs shall comply with the provisions set out in the relevant Union acts in relation to the allocation of responsibilities and cooperation between competent authorities from different Member States.

- 2.3.2 Taking into account the responsibilities of the FMA within the framework of the SSM, the ECB notes that Article 4(4) of Directive 2013/36/EU of the European Parliament and of the Council¹⁹ requires Member States to ensure that the competent authorities have the expertise, resources, operational capacity, powers and independence necessary to carry out the functions relating to prudential supervision, investigations and penalties set out in that Directive and in Regulation (EU) No 575/2013 of the European Parliament and of the Council²⁰. According to the recommendation of Basel Core Principles for Effective Banking Supervision the supervisor is to have adequate resources for the conduct of effective supervision and oversight²¹.
- 2.3.3 The ECB recommends that the Austrian authorities clarify in the draft law that the Financial Market Advisory Board, which includes industry representatives and representatives of supervised entities in matters of banking supervision, will not obtain any confidential information, and that any such information shared in the SSM will not be provided to the Financial Market Advisory Board. Regarding the operational independence of the FMA, the ECB highlights Article 19 of Council Regulation (EU) No 1024/2013, which provides that the members of the ECB's Supervisory Board must act independently and objectively in the interest of the Union as a whole and must neither seek nor take instructions from the institutions or bodies of the Union, from any government of a Member State or from any other public or private body.
- 2.3.4 Furthermore, the OeNB's Governor, acting in his or her personal capacity, participates in decisions adopted by the ECB's Governing Council on supervisory matters relating to the SSM, mainly based on complete draft decisions proposed by the ECB's Supervisory Board pursuant to the non-objection procedure specified under Article 26(8) of Council Regulation (EU) No 1024/2013. As for all his or her tasks, concerning SSM matters, the Governor needs to have the necessary resources as well as access to relevant information and data. In this respect, attention should be paid to the OeNB's ability to employ and retain qualified staff necessary in view of its autonomy in staff matters deriving from its financial independence²².
- 2.4 *The OeNB's role regarding financial education*
- 2.4.1 Regarding the prohibition on monetary financing under Article 123 of the TFEU, as supplemented by Council Regulation (EC) No 3603/93, the ECB notes that, inter alia, any financing by a central bank of the public sector's obligations vis-à-vis third parties is prohibited. Accordingly, national legislation may not require an NCB to finance either the performance of functions by other public sector bodies, or the public sector's obligations vis-à-vis third parties. This prohibition applies in the

¹⁹ 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).

²⁰ 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).

²¹ According to the Basel Core Principles for Effective Banking Supervision, the head of a supervisory authority is also to be appointed for a minimum term and removed from office during that term only for reasons specified in law, or if not physically or mentally capable of carrying out the role, or if found guilty of misconduct. See Basel Committee on Banking Supervision, Core Principles for Effective Banking Supervision (September 2012), Principle 2, Effective Criteria 2 and 6, available on the website of the Bank for International Settlements at www.bis.org.

²² See ECB Convergence Report May 2018, p. 28.

case of conferral of new tasks upon NCBs²³. However, the ECB understands that the OeNB already provides financial education to the Austrian population, promotes a general understanding of economic interrelationships, and organises a wide range of educational opportunities²⁴. Hence, the draft law only serves to clarify the OeNB's role in connection with financial literacy, by explicitly providing that it will also contribute to the development of financial training in Austria, including by submitting to the MoF an annual report on fundamental findings on the status of financial education in Austria²⁵. On that basis, the ECB considers that the draft law does not confer a new task on the OeNB in the context of providing financial education.

2.4.2 As previously noted by the ECB, financial education is not among central banking tasks listed in the Treaties²⁶. Nevertheless, the tasks carried out by the OeNB in the area of financial education could be considered as complementary to the macroprudential- and financial market stability-related tasks that it currently performs. Furthermore, they do not appear to be atypical for NCBs of the ESCB²⁷. However, ensuring the provision of general financial education forms part of the educational policies of the State. In this respect, these tasks will be administered, at least in part, on behalf of and in the interest of the government.

2.4.3 Regarding financial independence, the ECB reiterates that an NCB needs to have available to it sufficient financial resources to fulfil its mandate, i.e. to perform its ESCB-related tasks and its national tasks. The consulting authority must take into consideration that the OeNB should have sufficient resources available for the performance of its tasks. The ECB understands that the OeNB will be in a position to carry out these tasks without a negative impact on its core central banking tasks.

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

Done at Frankfurt am Main, 31 May 2019.

[signed]

The President of the ECB

Mario DRAGHI

²³ See ECB Convergence Report 2018, p. 30.

²⁴ For example, the OeNB provides tailor-made offers regarding financial education on its financial education online platform. According to its website, the OeNB is constantly striving to expand and improve these opportunities.

²⁵ See the proposed amendment to section 44b paragraph 5 of the Law on the National Bank (*Nationalbankgesetz*), as included in the draft law.

²⁶ See paragraph 3.4 of Opinion CON/2017/43 and paragraph 4.2 of Opinion CON/2018/2.

²⁷ See paragraph 3.2 of Opinion CON/2017/43.