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COVER NOTE

from: Mario DRAGHI, President of the European Central Bank
date of receipt: 27 November 2012
to: Mr Uwe CORSEPIUS, Secretary-General of the Council of the European Union

Subject: ECB Opinion on a proposal for a Council regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions and a proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) (CON/2012/96)

Delegations will find attached the above mentioned opinion.

Encl.:

OPINION OF THE EUROPEAN CENTRAL BANK

of 27 November 2012

on a proposal for a Council regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions and a proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority)

(CON/2012/96)

Introduction and legal basis

On 27 September 2012, the European Central Bank (ECB) received a request from the Council for an opinion on a proposal from the European Commission for a Council regulation conferring specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions¹ (hereinafter the ‘proposed SSM regulation’). On the same day, the ECB received a request from the Council for an opinion on a proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards its interaction with Council Regulation (EU) No.../... conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions² (hereinafter the ‘proposed EBA regulation’).

On 5 November 2012 the ECB received a request from the European Parliament based on Article 282(5) of the Treaty for an opinion on the proposed EBA regulation.

The ECB’s competence to deliver an opinion on the proposed SSM regulation is based on Article 127(6) of the Treaty on the Functioning of the European Union. The ECB’s competence to deliver an opinion on the proposed EBA regulation is based on Articles 127(4) and 282(5) of the Treaty, since the proposed EBA regulation contains provisions affecting the contribution of the European System of Central Banks (ESCB) to the smooth conduct of policies relating to the prudential supervision of credit institutions and the stability of the financial system, as referred to in Article 127(5) of the Treaty. The proposed EBA regulation takes account of the specific tasks conferred on the ECB in accordance with Article 127(6) of the Treaty and the proposed SSM regulation.

¹ COM(2012) 511 final.

² COM(2012) 512 final.

Since both texts relate to the conferral of specific supervisory tasks on the ECB and the establishment of the single supervisory mechanism (SSM), and despite the distinct legislative procedures applying to these texts, the ECB has adopted a single opinion on the two proposals. 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. General observations

- 1.1 The proposed SSM regulation responds to the request of the Heads of State and Government at the euro area summit on 29 June 2012 to present proposals for an SSM¹. The ECB broadly welcomes such proposals, which are in line with the main findings of the report by the President of the European Council of 26 June 2012² and the conclusions of the European Council of 29 June and 18 October 2012. The architecture of economic and monetary union needs to be substantially strengthened to break the adverse link between banks and sovereigns in some euro area Member States and to reverse the current process of financial market fragmentation in the euro area.
- 1.2 The establishment of the SSM should contribute to restoring confidence in the banking sector and to reviving interbank lending and cross-border credit flows through independent integrated supervision for all participating Member States, on the basis of a system that involves the ECB and national supervisors. The SSM will also contribute to effective application of the single rulebook for financial services and the harmonisation of supervisory procedures and practices, by removing national distortions and better reflecting the needs of an integrated currency area. In this context, the ECB stands ready to perform the new tasks relating to the prudential supervision of credit institutions provided for in the proposed SSM regulation. The ECB considers that Article 127(6) of the Treaty constitutes the appropriate legal basis for rapidly and effectively conferring specific supervisory tasks upon the ECB.

¹ Euro Area Summit Statement, 29 June 2012.

² *Towards a genuine economic and monetary union.*

- 1.3 The ECB supports the conclusions of the Interim Report by the President of the European Council on economic and monetary union and an integrated financial framework¹. It notes in this respect that the European Council calls for the rapid adoption of the provisions relating to the harmonisation of national resolution frameworks² and deposit guarantee frameworks³ in the legislative proposals and the proposals on bank capital requirements by the end of 2012⁴ which would underpin the implementation of the SSM. In addition, the Interim Report pointed out that an integrated financial framework cannot be envisaged separately from steps towards a more integrated fiscal and economic frameworks and also stressed the need for further progress towards a single resolution mechanism. The ECB is of the opinion that such a single resolution mechanism – focused on a European Resolution Authority – is indeed a necessary complement to the SSM to achieve a well-functioning financial market union. Therefore such a mechanism should be established, or at least there should be clear deadlines for its establishment, when the ECB assumes its supervisory responsibility in full – i.e. at the end of the transitional period referred to below.
- 1.4 From the ECB's perspective, the proposed SSM regulation should comply with the following main principles. First, the ECB, within the SSM, should be able to carry out the tasks assigned to it effectively and rigorously without any risk to its reputation. Second, the ECB should remain independent in carrying out all its tasks. Third, there should be a strict separation between the ECB's new tasks concerning supervision and its monetary policy tasks assigned by the Treaty. Fourth, the ECB should be able to have full recourse to the knowledge, expertise and operational resources of national supervisory authorities. Fifth, the SSM should operate in a manner fully consistent with the principles underpinning the single market in financial services and in full adherence to the single rulebook for financial services. In this regard, the ECB also welcomes the possibility to involve non-euro area Member States in the SSM to ensure greater harmonisation of supervisory practices within the European Union, thus strengthening the internal market. Sixth, the ECB is ready to comply with the highest standards of accountability for the supervisory tasks.

¹ Interim Report by the President of the European Council, *Towards a genuine economic and monetary union*, 12 October 2012.

² Proposal for a directive of the European Parliament and of the Council establishing a framework for recovery and resolution of credit institutions and investment firms and amending Council Directives 77/91/EEC and 82/891/EC and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/55/EC and Regulation (EU) No 1093/2010 - COM(2012) 280 final.

³ Proposal for a directive of the European Parliament and of the Council on Deposit Guarantee Schemes - COM(2010) 368 final.

⁴ 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; and proposal for a regulation of the European Parliament and of the Council on prudential requirements for credit institutions and investment firms ('the proposed CRR') - COM(2011) 452 final.

ECB-PUBLIC

- 1.5 First, to enable the SSM to conduct effective supervision, the proposed SSM regulation entrusts the ECB with specific supervisory tasks associated with the necessary corresponding supervisory and investigatory powers and direct access to information. This is essential to ensure that the SSM performs its tasks effectively. The ECB welcomes the inclusion of all credit institutions. This is important to preserve a level playing field among banks and prevent segmentation in the banking system. Lastly, the proposed conferral of macro-prudential supervisory powers on the ECB is welcome since the ECB will be able to coordinate the use of macro- and micro-prudential policies. The ECB also notes that the proposed SSM regulation provides that, in the performance of its supervisory tasks, the ECB should promote the safety and soundness of credit institutions and the stability of the financial system¹, which implies that its responsibilities have also a macro-prudential nature. The ECB is of the view that the proposed SSM regulation should enable the activation of the macro-prudential instruments provided by Union law, either at the initiative of the ECB or the national authorities. In particular, given their responsibility for financial stability, and close proximity and knowledge of national economies and financial systems², the national authorities should have sufficient tools at their disposal to address macro-prudential risks related to the particular situation of participating Member States, without prejudice to the possibility for the SSM to also act to contain such risks in an effective manner. In view of the importance of a functional separation between macro- and micro-prudential supervision and the Governing Council responsibility for financial stability, specific procedures should be foreseen within the SSM framework for the involvement of the Governing Council with regard to the decisions of the ECB on macro-prudential policy measures.
- 1.6 Second, the ECB has to perform the tasks conferred on it by the proposed SSM regulation without prejudice to the objectives of the ESCB as provided in Article 127 of the Treaty³. The ECB will ensure that its activities within the SSM neither affect the ESCB's performance of any of its tasks under the Treaty and the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB') nor compromise its institutional setting. Under the Treaty and the Statute⁴, the ECB enjoys full independence⁵ in exercising its tasks, which includes any supervisory tasks conferred on it by virtue of Article 127(6) of the Treaty. In this respect, the Treaty's requirement of ECB independence applies to it as a whole institution, and thus includes its bodies, such as the supervisory board and its members when performing tasks under the proposed SSM regulation. Furthermore, the ECB's independence also encompasses the operational independence of supervisors,

¹ Article 1 of the proposed SSM regulation.

² See European Central Bank Opinion CON/2012/5 of 25 January 2012 on a proposal for a Directive on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms and a proposal for a Regulation on prudential requirements for credit institutions and investment firms (OJ C 105, 11.4.2012, p. 1).

³ See Articles 127(1) and 282(2) of the Treaty and Article 2 of the Statute of the ESCB.

⁴ See Article 130 and Article 282(3) of the Treaty and Article 7 of the Statute of the ESCB.

⁵ The concept of central bank independence includes functional, institutional, personal and financial independence (see, for example, the ECB's Convergence Report 2012, p. 21).

ECB-PUBLIC

as referred to in the recently adopted Basel Committee on Banking Supervision's Core Principles for Effective Banking Supervision¹ (hereinafter the 'Core Principles').

- 1.7 Another related aspect of the Core Principles to ensure the effectiveness of the supervision is adequate legal protection of supervisors for the exercise of their function to protect the general interest. In this regard, the ECB notes a normative trend and case-law in several Member States and at global level that tends towards limiting supervisors' liability. The ECB considers that the liability of the ECB, the national competent authorities and their respective officials should only be incurred in cases of intentional misconduct or gross negligence. First, this limitation would reflect the common principles in national banking supervisory legislation in an increasing number of Member States as well as in various important financial centres of the world, that tend to limit supervisory liability. Second, it would be consistent with the case-law of the Court of Justice of the European Union finding liability only in case of qualified unlawfulness. Third, this provision would align the Union with the global consensus achieved with the Core Principles, according to which supervisory laws must protect the supervisor and its staff against lawsuits for actions taken and/or omissions made while discharging their duties in good faith and for the costs of defending such actions and/or omissions, so as to further enhance the position of the supervisory authority vis-à-vis the supervised entities². Fourth, such global consensus is based on the complexity of supervisory tasks. Supervisory authorities are under an obligation to protect the plurality of interests in a well-functioning banking system and the financial system as a whole. Furthermore, supervisory authorities need to operate, in particular in crisis times, under tight time constraints. Fifth, clarifying the liability regime within a SSM operating in a multi-jurisdictional environment would contribute to: (i) a harmonised liability regime within the SSM; (ii) preserving the integrity of the SSM's capacity to act, since a too stringent and diversified liability regime within the SSM's complex structure could weaken a SSM supervisory authority's resolve to take the necessary action; and (iii) limiting speculative legal proceedings based on alleged liability for an action or omission of an SSM authority.
- 1.8 Third, it is essential to strictly separate monetary policy and supervisory tasks conferred on the ECB, to prevent potential conflicts of interest and ensure autonomous decision-making for the performance of these tasks, while ensuring compliance with the ESCB institutional framework. To that end, appropriate governance structures are needed to ensure separation between these tasks, at the same time allowing the overall structure to benefit from synergies. In this respect, it should be ensured that, under the proposed SSM regulation and within the context of the Treaty framework, the new supervisory board will constitute the centre of gravity of the ECB's supervisory function. Besides the heads of supervision of the competent authorities in the participating Member States, the supervisory board should also include as observers representatives of national central banks that perform supervisory activities ancillary to those of the national competent authorities when foreseen by statutory provisions. Furthermore, the supervisory board should have to the largest extent possible the

¹ Adopted on September 2012. Available on the Bank for International Settlement's website at www.bis.org.

² Principle 2, paragraph 9 of the Core Principles.

ECB-PUBLIC

necessary tools and expertise to perform its tasks effectively, while respecting the ultimate statutory responsibilities of the ECB's decision-making bodies. In this context, the framework for the functioning of the supervisory board should ensure an equal treatment with regard to the participation of representatives of the national competent authorities of all the participating Member States, including the Member States which have established a close cooperation with the ECB. Lastly, taking also account of the experience of the various national central banks already performing supervision, the ECB will establish appropriate internal rules and procedures to ensure adequate separation within the functions supporting these tasks.

1.9 Fourth, it is essential for the SSM to be able to leverage the expertise and resources of national supervisors in performing the new supervisory tasks. In-depth qualitative information and consolidated knowledge of credit institutions is essential, as well as reliable quantitative information. Through appropriate decentralisation procedures, while preserving the unity of the supervisory system and avoiding duplication, the SSM will be able to benefit from the closer proximity of national supervisors to the supervised entities and at the same time ensure the necessary continuity and consistency of supervision across participating Member States. In this context, the proposed SSM regulation could better clarify the practical modalities for decentralisation of supervisory tasks within the SSM, namely by specifying certain basic organisational principles. In particular, it should specify that the ECB should have recourse to national competent authorities for the performance of supervisory tasks, in particular regarding credit institutions of lesser economic, financial or prudential relevance, without prejudice to the ECB's right to provide guidance and instructions, or assume the tasks of national authorities when duly required. Moreover, the proposed SSM regulation should provide the basis for an appropriate framework for an efficient allocation of supervisory tasks within the SSM, including notification procedures for the supervisory decisions adopted by national competent authorities. Therefore, besides the specific rules that should be included in the proposed SSM regulation, the ECB, in consultation with the national competent authorities participating in the SSM, should further specify the criteria and mechanisms for decentralisation within the SSM in the detailed rules required for implementing this framework. In particular, these rules should enable credit institutions, as addressees of supervisory measures, to clearly identify the relevant authority as their contact. In addition, both the ECB and the national competent authorities, in accordance with their organisational autonomy, must be able to determine the resources needed to implement their tasks within the SSM. Lastly, it will be important to ensure that the ECB's final responsibility for supervision within the SSM is matched by control powers over the SSM as a whole and the supervised entities, as well as by very close cooperation arrangements with the national competent authorities, including specific rules in emergency situations and adequate information flows. Therefore, there should be efficient arrangements for information flows within the SSM to also prevent any duplication of reporting obligations for credit institutions.

1.10 Fifth, the proposed SSM and EBA regulations must ensure that the new framework will be consistent with the single market. The following two main elements may contribute to achieving this aim. First, the proposed SSM regulation should allow Member States wishing to join the SSM to engage in

ECB-PUBLIC

appropriate close cooperation mechanisms and to participate fully in the activities of the supervisory board on an equal footing with euro area Member States, i.e. with the same rights and obligations. Second, the conferral on the ECB of tasks concerning the prudential supervision of credit institutions for euro area Member States creates a new institutional framework which may require adjustments to the governance of the European Banking Authority (EBA). The proposed EBA regulation should provide for the necessary adjustments to the governance structure and powers of the EBA, in particular by providing equal treatment among the national supervisory authorities and the ECB, while safeguarding the ECB's independence. The ECB will continue to participate in the EBA's Board of Supervisors under the conditions set out in Regulation (EU) No 1093/2010¹. Moreover, in consideration of its new central role in the SSM, the ECB will contribute to ensuring that the national competent authorities participating in the SSM assume mutually consistent positions in the EBA's decision-making bodies on issues falling within the scope of the ECB's supervisory tasks, including with the development of specific rules in this area as appropriate, without prejudice to the supervisory tasks remaining with national competent authorities. Lastly, appropriate arrangements might be developed in order to ensure smooth cooperation of the SSM with the non-participating Member States.

- 1.11 Sixth, democratic accountability is the indispensable counterbalance to independence. The ECB is already subject to accountability and reporting obligations which should be fully maintained for its existing tasks. The ECB notes that similar obligations will be established under the proposed SSM regulation with a view to its new supervisory tasks. Building on those statutory obligations, separate and adequate forms of accountability should be designed, also in accordance with the Core Principles. These accountability mechanisms should reflect the following considerations. First, they should respect the ECB's independence. Second, accountability should take place at the level at which decisions are taken and implemented. Accountability mechanisms should therefore be designed primarily at the European level, without prejudice to existing accountability arrangements of national supervisors, which also apply to their respective supervisory tasks not entrusted to the SSM, and occasional exchanges of views of the Chair or members of the supervisory board with national parliaments, as appropriate. Third, robust mechanisms should be in place to safeguard the confidentiality of supervisory information.

¹ Article 40(1)(d) of Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 31.12.2010, p. 12).

2. Transitional provisions

The ECB stresses the importance of reaching an agreement on the above proposals by the end of 2012 to maintain the envisaged timetable, namely the entry into force of the proposed SSM regulation on 1 January 2013, gradual operational implementation in the course of 2013, and full implementation by 1 January 2014. A mandatory sequence is crucial to allow the ECB to launch the necessary preparatory arrangements, establish the organisation of the cooperation between the ECB and national competent authorities under a decentralised framework, commit the adequate resources and be internally ready to assume the supervisory tasks in line with an agreed phasing-in regulatory schedule. In this context, the ECB supports the Commission proposal that the ECB may request during the transitional period all relevant information for the ECB to carry out a comprehensive assessment of the credit institutions of participating Member States (including an asset quality review). This should support a smooth transition towards the start of operational supervision by the SSM. The ECB considers the timetable proposed by the Commission to be ambitious but feasible.

3. Implementation of the reform

As mentioned above, the proposed SSM regulation should provide the ECB with the necessary powers to perform the tasks conferred on it effectively. The ECB enjoys regulatory powers under Article 132 of the Treaty and Article 34.1 of the Statute of the ESCB and of the ECB which will enable it to implement these tasks in compliance with the Union acquis and forthcoming Union legislation, in particular the single rulebook for financial services (including the comply or explain procedures as regards the EBA guidelines or recommendations). However, following the adoption of the proposed SSM regulation and the implementation of the reforms, further enhancements would contribute to facilitating the exercise by the ECB of its supervisory tasks. First, the proposed SSM regulation should enable the ECB to adopt regulations to specify further the arrangements and procedures for national competent authorities to impose sanctions. It should be also ensured that the ECB has the power to adopt the precautionary measures available under national law to competent authorities. Second, the main prudential tools provided for in Union banking legislation should be increasingly underpinned, where appropriate, by directly applicable Union law, as is already the case, for instance, with the provisions of the proposed CRR. A directly applicable single rulebook would contribute both to the effectiveness of the SSM and to the functioning of the single market. Third, in accordance with Article 25.1 of the Statute of the ESCB, the ECB stands ready to contribute to further harmonisation of national legislation by providing advice to the participating Member States on the national implementation of Union directives relating to the prudential supervision of credit institutions and the stability of the financial system for matters relating to the tasks conferred on the ECB under the proposed regulation.

4. Future amendments to the proposed SSM regulation

The proposed SSM regulation provides for a report on its application by 31 December 2015, potentially leading to adjustments to its text that would require the use of the procedure in Article 127(6) of the Treaty. To ensure that the proposed SSM regulation can in the future be technically adjusted in a timely and flexible manner to new circumstances, the ECB recommends that the European Council considers having recourse to Article 48 of the Treaty on European Union. Under such Article 48, the European Council may either authorise the Council to act by qualified majority¹ for future technical amendments to the proposed SSM regulation, or for such amendments to be adopted under the ordinary legislative procedure². Such a simplified amendment procedure for the SSM regulation would allow future developments in Union banking and prudential supervision legislation affecting the SSM to be taken into account.

Done at Frankfurt am Main, 27 November 2012.

The President of the ECB

Mario DRAGHI

¹ Article 48(7), first subparagraph.

² Article 48(7), second subparagraph.