

SJ-0693/17
LV/MMEN/rj
D(2017)44064

08 NOV. 2017

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LEGAL OPINION

Subject: Addendum to the ECB Guidance to banks on non-performing loans – Legal effects – Competence of the ECB to adopt such Addendum

I. Introduction

1. By letter of 24 October 2017, received at the Legal Service on the following day,¹ Mr. Antonio Tajani, President of the European Parliament, requested the opinion of the Legal Service on the legal effects of the draft document entitled “*Addendum to the ECB Guidance to banks on non-performing loans: Prudential provisioning backstop for non-performing exposures*” (hereinafter: the ‘Addendum’).²
2. In this regard, President Tajani asks whether the Addendum “*amounts to establishing rules of general scope applicable to banks, and in the affirmative whether the European Central Bank has competence to adopt such rules*”.

II. Background

A. The relevant elements of the applicable legal framework

a) The ECB’s supervisory powers within the Single Supervisory Mechanism

3. For present purposes, it should be recalled from the outset that, as part of the establishment of a EU banking union, Council Regulation (EU) No 1024/2013³ created a Single Supervisory Mechanism (‘SSM’) for credit institutions (banks), in the context of which specific supervisory

¹ Attached as [Annex 1](#) to this Opinion.

² Attached as [Annex 2](#) to this Opinion. The full text of the draft Addendum is available on the ECB’s Banking supervision website, at the following address (last accessed on 31 October 2017):
https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/npl2/ssm.npl_addendum_draft_2017_10.en.pdf

³ 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 of 29.10.2013, p. 63 (hereinafter: the ‘SSM Regulation’).

tasks were conferred on the European Central Bank ('ECB') pursuant to Article 127(6) TFEU. In this regard, it is important to note that, while the SSM is composed of the ECB and national competent authorities, the ECB is tasked with supervising directly 'significant entities' i.e. banks meeting certain criteria in terms of size, importance of the economy, or volume of cross-border or that are in receipt of direct public financial assistance (Article 6(1) and (4) of the SSM Regulation).

4. The ECB's supervisory tasks are set out in Article 4(1) of the SSM Regulation and include *inter alia* the tasks to ensure compliance with prudential requirements laid down in EU legislation (and, where applicable, in national legislation transposing or implementing such EU legislation) as regards own funds (Article 4(1)(b)), as well as with requirements relating "to risk management processes [...] and effective internal capital adequacy assessment processes, including Internal Ratings Based models" (Article 4(1)(e)). In this regard, the ECB is also given the task "to carry out supervisory reviews in order to determine whether the arrangements, strategies, processes and mechanisms put in place by credit institutions and the own funds held by those institutions ensure a sound management and coverage of their risks" and, on the basis of that supervisory review "to impose on credit institutions specific additional own funds requirements [...] and other measures" specifically made available by relevant EU legislation (Article 4(1)(f)).
5. Article 16 of the SSM Regulation provides the ECB with the supervisory powers necessary to carry out the tasks enumerated in Article 4(1). The ECB is entitled to make use of those supervisory powers in any of the circumstances referred to in Article 16(1), namely when a bank does not meet the statutory requirements laid down in relevant EU legislation (and, where applicable, in national legislation transposing or implementing such EU legislation) (Article 16(1)(a)); or when the ECB has evidence that the credit institution concerned is likely to breach such requirements "within the next 12 months" (Article 16(1)(b)); or, finally, when the ECB comes to the conclusion "in the framework of a supervisory review in accordance with point (f) of Article 4(1), that the arrangements, strategies, processes and mechanisms implemented by the credit institution and the own funds and liquidity held by it do not ensure a sound management and coverage of its risks" (Article 16(1)(c)).
6. In accordance with Article 16(2)(b), the ECB's supervisory powers include, in particular, the power "to require [credit] institutions to apply a specific provisioning policy or treatment of assets in terms of own funds requirements".

b) The EU rules on the supervisory framework and prudential requirements for the banking sector

7. Prudential requirements are, in substance, the rules concerning the amount of capital and liquidity that banks and other financial institutions must hold in order to withstand economic shocks. The legal framework currently in force at the EU level governing, *inter alia*, the access to the activity, the supervisory and prudential requirements for banks is composed of two main legislative instruments, which taken together are commonly known as the 'CRD IV package': Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 (the 'Capital Requirements Regulation' or 'CRR')⁴ and Directive 2013/36/EU of the European Parliament and of the Council, also of 26 June 2013 (the 'Capital Requirements Directive' or

⁴ 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.

