

III

(Preparatory acts)

EUROPEAN CENTRAL BANK

EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 4 May 2011

on a proposal for a directive of the European Parliament and of the Council amending Directives 2003/71/EC and 2009/138/EC in respect of the powers of the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority

(CON/2011/42)

(2011/C 159/05)

Introduction and legal basis

On 2 March 2011 the European Central Bank (ECB) received a request from the Council for an opinion on a proposal for a directive of the European Parliament and of the Council amending Directives 2003/71/EC and 2009/138/EC in respect of the powers of the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority ⁽¹⁾ (hereinafter the 'proposed directive').

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 since the proposed directive contains provisions affecting the contribution by 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. 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.

General observations

1. In order for the recently established European System of Financial Supervision to work effectively, changes to Union legislation in the field of operation of the three European Supervisory Authorities (ESAs) ⁽²⁾ and of the European Systemic Risk Board (ESRB) ⁽³⁾ are necessary. In this respect, the

⁽¹⁾ COM(2011) 8 final.

⁽²⁾ 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, 15.12.2010, p. 12); Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ L 331, 15.12.2010, p. 48); Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84) (hereafter jointly referred to as 'the ESAs regulations').

⁽³⁾ See Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board (OJ L 331, 15.12.2010, p. 1) and Council Regulation (EU) No 1096/2010 of 17 November 2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board (OJ L 331, 15.12.2010, p. 162).

proposed directive amending legislation in the insurance and securities sectors — essentially Directive 2009/138/EC ⁽¹⁾ and to a more limited extent Directive 2003/71/EC ⁽²⁾ — complements the legal framework already adopted by Directive 2010/78/EU ⁽³⁾. This opinion should therefore be read in conjunction with ECB Opinion CON/2010/23 ⁽⁴⁾.

2. The opinion assesses the proposed directive from a financial stability perspective. The observations and drafting proposals contained in this opinion focus on aspects relevant to supervisory architecture reform, the involvement of the ECB, ESCB and of the ESRB and cooperation and information-sharing arrangements with the ESAs and national competent authorities. It also pays particular attention to the need to ensure where relevant consistent approaches across financial services sectors with a view to ensuring a level playing field and as a tool for supervisory convergence.

Specific observations

European Single Rulebook in the financial sector

3. The development of a European single rulebook for all financial institutions in the single market ⁽⁵⁾, which the ECB fully supports ⁽⁶⁾, requires (i) an appropriate identification of the relevant areas for delegated and implementing acts, (ii) adequate involvement of ESAs in the preparation of these acts taking into account their technical nature and the need to rely on the highly specialised expertise of supervisory authorities; and (iii) a consistent and coordinated approach across sectors in adopting these implementing measures.

ECB's advisory role regarding draft delegated and implementing acts

4. Having regard to the importance of the function to be played by delegated and implementing acts adopted under Articles 290 and 291 of the Treaty ⁽⁷⁾ as a substantial component of the single rulebook, the ECB makes the following observations with regard to the exercise of its own advisory role under Article 127(4) and Article 282(5) of the Treaty.

First, Commission draft delegated or implementing acts qualify as 'proposed Union acts' within the meaning of the first indent of Article 127(4) and Article 282(5) of the Treaty. Both delegated and implementing acts constitute legal acts of the Union. Significantly, the majority of the language versions of Article 282(5) of the Treaty refer to 'draft' Union legal acts on which the ECB is

⁽¹⁾ Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of insurance and reinsurance (Solvency II) (recast) (OJ L 335, 17.12.2009, p. 1).

⁽²⁾ Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (OJ L 345, 31.12.2003, p. 64).

⁽³⁾ Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Supervisory Authority (European Banking Authority), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority) (OJ L 331, 15.12.2010, p. 120).

⁽⁴⁾ Opinion CON/2010/23 of 18 March 2010 on a proposal for a Directive of the European Parliament and of the Council amending Directives 1998/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC, and 2009/65/EC in respect of the powers of the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority (OJ C 87, 1.4.2010, p. 1).

⁽⁵⁾ See, for instance, recital 22 of Regulation (EU) No 1093/2010 and recital 14 of Directive 2010/78/EU.

⁽⁶⁾ See, for instance, paragraph 2 of Opinion CON/2009/17 of 5 March 2009 at the request of the Council of the European Union on a proposal for a Directive of the European Parliament and of the Council amending Directives 2006/48/EC and 2006/49/EC as regards banks affiliated to central institutions, certain own funds items, large exposures, supervisory arrangements, and crisis management (OJ C 93, 22.4.2009, p. 3), paragraph 2 of Opinion CON/2010/5 of 8 January 2010 on three proposals for regulations of the European Parliament and of the Council establishing a European Banking Authority, a European Insurance and Occupational Pensions Authority and a European Securities and Markets Authority (OJ C 13, 20.1.2010, p. 1) and paragraph 1.3.1 of Opinion CON/2010/23.

⁽⁷⁾ Articles 290 and 291 of the Treaty belong to Part Six, Chapter 2, Section 1 entitled 'The legal acts of the Union'.

required to be consulted ⁽¹⁾. Therefore, the scope of the duty to consult the ECB cannot be confined only to those draft acts based on a Commission proposal.

Second, in the OLAF judgment ⁽²⁾, the Court of Justice clarified that the obligation to consult the ECB is intended 'essentially to ensure that the legislature adopts the act only when the body has been heard, which, by virtue of the specific functions that it exercises in the Community framework in the area concerned and by virtue of the high degree of expertise that it enjoys, is particularly well placed to play a useful role in the legislative process envisaged'.

Against this backdrop, in order to deploy the full benefits of the exercise by the ECB of its advisory role, the ECB should be consulted in due time on any draft Union acts, including draft delegated and implementing acts, falling within its fields of competence. The ECB will exercise its advisory role taking into utmost account the timelines for adopting these acts.

Information-sharing arrangements

5. In the context of the general amendments common to most sectoral legislation and necessary for the new authorities to operate, the ECB stresses the importance of ensuring that appropriate gateways for the exchange of information are included in the relevant legislation applicable to the financial sector. The ECB suggests therefore amending Directive 2009/138/EC consistently with the corresponding provisions of Directive 2006/48/EC ⁽³⁾ according to which competent authorities and EIOPA are not prevented from transmitting information to central banks of the ESCB, including the ECB, where appropriate, to other national authorities responsible for overseeing payment systems and to the ESRB when this information is relevant to their respective tasks ⁽⁴⁾. Appropriate information sharing arrangements should also be established for emergency situations.

Convergence across financial services sectors

6. While acknowledging the limited objectives of the proposed directive, the ECB is of the view that the Union legislative framework should be consistent, where appropriate, across the financial services sectors, namely to avoid regulatory arbitrage. For instance, the ECB suggests promoting cross-sectoral convergence in the following:
 - 6.1. *Treatment of financial holdings in the calculation of own funds*: when determining own funds, the ECB is of the view that coherence in the treatment of 'participations' in the same sector and across financial services sectors could be increased in order to prevent any regulatory arbitrage between legal entities and/or between entities within a financial conglomerate ⁽⁵⁾. The ECB recommends in particular further aligning the definition of participation in insurance undertakings and credit institutions in Directive 2006/48/EC ⁽⁶⁾ and Directive 2009/138/EC ⁽⁷⁾ and the methods to be used at the group level to deal

⁽¹⁾ Article 282(5) of the Treaty refers to draft Union acts in the following language versions: Bulgarian ('проект на акт на Съюза'); Spanish ('proyecto de acto de la Unión'); Danish ('udkast'); German ('Entwurf für Rechtsakte der Union'); Estonian ('ettepanekute'); Greek ('σχέδιο πράξης της Ένωσης'); French ('projet d'acte de l'Union'); Italian ('progetto di atto dell'Unione'); Latvian ('projektiem'); Lithuanian ('Sajungos aktų projektų'); Dutch ('ontwerp van een handeling van de Unie'); Portuguese ('projectos de acto da União'); Romanian ('proiect de act al Uniunii'); Slovak ('navrhovaných aktov Únie'); Slovenian ('osnutki aktov Unije'); Finnish ('esityksistä'); Swedish ('utkast'). The Irish version reads 'gníomh Aontais arna bheartu', which corresponds to the concept of 'planned' Union acts.

⁽²⁾ Case C-11/00 *Commission of the European Communities v European Central Bank* [2003] ECR I-7147, in particular paragraphs 110 and 111.

⁽³⁾ See Article 49 and Article 130(1) of Directive 2006/48/EC.

⁽⁴⁾ See, for instance, paragraphs 13 to 15 of Opinion CON/2009/17 and paragraph 2.2 of Opinion CON/2010/23.

⁽⁵⁾ Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council (OJ L 35, 11.2.2003, p. 1).

⁽⁶⁾ Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (OJ L 177, 30.6.2006, p. 1). In particular Article 4(10) and Article 57.

⁽⁷⁾ See Article 92(1)(b) as amended by the proposed directive, in conjunction with the third subparagraph of Article 212(2).

with the double gearing stemming from cross-sector participations ⁽¹⁾. The Sub-Committee on Financial Conglomerates established by the ESAs regulations ⁽²⁾ could play a meaningful role in fostering cross-sectoral convergence.

- 6.2. *Addressing financial stability*: any pro-cyclicality effects stemming from the implementation of the Solvency II regulatory framework, and, where relevant, the contribution of countercyclical mechanisms to financial stability, including with regard to the illiquidity premium, referred to in the proposed directive, could be further assessed.
- 6.3. *Remuneration policies and schemes*: in accordance with the objectives of the Commission recommendation ⁽³⁾, the ECB generally welcomes the on-going work on remuneration policies and schemes in the context of the Solvency II implementation measures ⁽⁴⁾; the internationally agreed high-level principles of remuneration policies developed for banks and corresponding implementation standards ⁽⁵⁾ should apply to the insurance sector ⁽⁶⁾, also taking into account its specificities, where relevant.
- 6.4. *Credit assessments*: under the proposed directive, EIOPA will be entrusted with certain tasks relating to the (i) assessment of the eligibility of external credit assessment institutions (ECAIs) and (ii) the allocation of their credit assessments to an objective scale of credit quality steps ⁽⁷⁾, in respect of which the Commission will have to adopt detailed criteria under the form of delegated acts ⁽⁸⁾. While the ECB in principle supports these new tasks entrusted to EIOPA and acknowledges the specificities of each of the financial services sectors, the ECB also notes that the eligibility of ECAIs is already addressed in the context of Directive 2006/48/EC ⁽⁹⁾ and Regulation (EC) No 1060/2009 ⁽¹⁰⁾. Against this backdrop and in view of the cross-sectoral nature of these issues, the ECB therefore suggests, prior to any legislative action, an assessment involving the three ESAs with a view to ensuring consistency and synergies between the relevant Union sectoral legislation, including also possible implementing measures.
- 6.5. *Determination of 'exceptional fall in financial markets'*: in case of non-compliance with the Solvency Capital Requirement, an insurance or reinsurance undertaking is requested by the supervisory authority to take the necessary measures within a maximum period of nine months ⁽¹¹⁾. In the event of exceptional fall in financial markets, the supervisory authority may extend this period by an appropriate period of time 'taking into account all relevant factors' ⁽¹²⁾. Under the proposed directive, EIOPA would identify and declare the existence of an event of exceptional fall in financial markets, in respect of which the Commission would adopt delegated acts specifying the procedures to be followed by EIOPA for the determination of the existence of such events and 'the factors' to be taken into account, including the maximum 'appropriate period of time' ⁽¹³⁾. The ECB supports the proposed role conferred upon EIOPA

⁽¹⁾ I.e., for instance, the differences in the definitions of 'durable link', 'significant influence' with regard to the concept of 'participation' or concerning the thresholds for deduction — which vary from 20% in the insurance legislation to 10% in banking legislation.

⁽²⁾ See Article 57(1) of the ESAs regulations.

⁽³⁾ See in particular recital 8 and paragraphs 1.1 and 2.1 of Commission Recommendation of 30 April 2009 on remuneration policies in the financial services sector (OJ L 120, 15.5.2009, p. 22).

⁽⁴⁾ See Commission working document (DG Internal Market and Services), Consultation paper on the UCITS depository function and on the UCITS managers' remuneration, 14.12.2010, p. 26 (available at: http://ec.europa.eu/internal_market/consultations/docs/2010/ucits/consultation_paper_en.pdf).

⁽⁵⁾ See in particular Article 22 of and Annex V to Directive 2006/48/EC and CEBS Guidelines on Remuneration Policies and Practices, 10 December 2010, available at: <http://eba.europa.eu/cebs/media/Publications/Standards%20and%20Guidelines/2010/Remuneration/Guidelines.pdf>

⁽⁶⁾ See CEIOPS' Advice for Level 2 Implementing Measures on Solvency II: Remuneration Issues, CEIOPS-DOC-51/09, https://eiopa.europa.eu/fileadmin/tx_dam/files/consultations/consultationpapers/CP59/CEIOPS-DOC-51-09%20L2-Advice-Remuneration-Issues.pdf

⁽⁷⁾ See Article 2(20) of the proposed directive — new proposed Article 109a(1)(a) of Directive 2009/138/EC.

⁽⁸⁾ See recital 18 and Article 2(21) of the proposed directive — new proposed subparagraph (n) of Article 111(1) of Directive 2009/138/EC.

⁽⁹⁾ See Articles 81 to 83 of Directive 2006/48/EC as well as its Annex VI, Part 2.

⁽¹⁰⁾ Regulation (EC) No 1060/2009 of 16 September 2009 of the European Parliament and of the Council on credit rating agencies (OJ L 302, 17.11.2009, p. 1).

⁽¹¹⁾ Article 138 of Directive 2009/138/EC.

⁽¹²⁾ Article 138(4) of Directive 2009/138/EC.

⁽¹³⁾ Articles 2(30) and 2(31) of the proposed directive.

to ensure the consistency of approaches across Member States. For the same reason, consulting the ESRB and introducing qualitative and quantitative criteria, methods and requirements to determine such events might also be appropriate.

Further clarification should be provided of the interplay between the declarations by EIOPA of events of exceptional fall in financial markets, declarations by the Council of emergency situations within the meaning of the ESAs regulations ⁽¹⁾ and also measures taken by supervisory authorities in exceptional circumstances in case of further deterioration of the financial situation of the undertaking concerned ⁽²⁾.

Transitional provisions

7. While the ECB understands the needs for transitional requirements ⁽³⁾, it might be appropriate to reduce substantially in some instances the 10 year maximum periods foreseen for the adoption of certain transitional provisions to provide the appropriate incentives for timely application of the Solvency II reform ⁽⁴⁾. As an example and in view of the importance of a consistent approach to ensure quality reporting, the application of the methods and assumptions to be used in the valuation of assets and liabilities should take place within a reasonable timeframe.

Where the ECB recommends that the proposed directive is amended, specific drafting proposals are set out in the Annex accompanied by explanatory text to this effect.

Done at Frankfurt am Main, 4 May 2011.

The President of the ECB
Jean-Claude TRICHET

⁽¹⁾ Article 18 of the ESAs regulations.

⁽²⁾ Article 138(5) of Directive 2009/138/EC.

⁽³⁾ Under the proposed directive, the maximum periods for the transitional provisions are set out in Directive 2009/138/EC. However, the actual time periods selected in any delegated act may be shorter (see also recital 30 of the proposed directive).

⁽⁴⁾ Article 75 of Directive 2009/138/EC — see Articles 308a(5) and 308b(e) of the proposed directive.

ANNEX

Drafting proposals

Text proposed by the Commission	Amendments proposed by the ECB ⁽¹⁾
<p>Amendment 1</p> <p>Article 2 of the proposed directive</p> <p>Amendment to Directive 2009/138/EC, Article 70</p>	
<p>[No amendment in the proposed directive]</p>	<p><i>'Article 70</i></p> <p>Transmission of information to central banks, and monetary authorities, payment systems overseers and the European Systemic Risk Board</p> <p>Without prejudice to this Section, a supervisory authority may transmit information intended for the performance of their tasks to the following:</p> <ol style="list-style-type: none"> 1. central banks of the European System of Central Banks and other bodies with a similar function in their capacity as monetary authorities where this information is relevant to their respective statutory tasks, including the conduct of monetary policy and related liquidity provision, oversight of payments, clearing and securities settlement systems and safeguarding the stability of the financial system; 2. where appropriate, other national public authorities responsible for overseeing payment systems.; and 3. the European Systemic Risk Board (ESRB), where that information is relevant to its tasks. <p>Such authorities or bodies may also communicate to the supervisory authorities such information as they may need for the purposes of Article 67. Information received in this context shall be subject to the provisions on professional secrecy laid down in this Section.</p> <p>In an emergency situation, including a situation as defined in Article 18 of Regulation (EU) No 1094/2010, Member States shall allow the competent authorities to communicate, without delay, information to the national central banks of the European System of Central Banks where that information is relevant to their statutory tasks including the conduct of monetary policy and related liquidity provision, oversight of payments, clearing and securities settlement systems and safeguarding the stability of the financial system, and to the ESRB, where such information is relevant to its tasks.'</p>
<p><i>Explanation</i></p>	
<p><i>The amendment aims at aligning the above provisions on exchange of information with the terminology used in the other financial sector directives, also in an emergency situation, and ensuring the ESRB's access to information from supervisory authorities (see also paragraph 5 of the opinion).</i></p>	
<p>Amendment 2</p> <p>Article 2(30)(a) of the proposed directive</p> <p>Amendment to Article 138(4) of Directive 2009/138/EC</p>	
<p>In the event of an exceptional fall in financial markets, as determined by EIOPA in accordance with this paragraph, the supervisory authority may extend the period set out in</p>	<p>In the event of an exceptional fall in financial markets, as determined by EIOPA in consultation with the ESRB in accordance with this paragraph, the supervisory authority</p>

Text proposed by the Commission	Amendments proposed by the ECB ⁽¹⁾
the second sub-paragraph of paragraph 3 by an appropriate period of time taking into account all relevant factors.'	may extend the period set out in the second sub-paragraph of paragraph 3 by an appropriate period of time taking into account all relevant factors.'

Explanation

In view of the possible cross-sectoral systemic implications of such an event, the ESRB should be consulted where appropriate on the determination of the existence of an exceptional fall in financial markets (see paragraph 6.5 of the opinion).

Amendment 3

Article 2(31) of the proposed directive

Amendment to Article 143 of Directive 2009/138/EC

'1. The Commission shall adopt delegated acts, in accordance with Article 301a and subject to the conditions of Article 301b and 301c, specifying the procedures to be followed by EIOPA when determining the existence of an exceptional fall in financial markets, and the factors to be taken into account for the purpose of the application of Article 138(4) including the maximum appropriate period of time, expressed in total number of months, which shall be the same for all insurance and reinsurance undertakings as referred to in the first subparagraph of Article 138(4).'	'1. The Commission shall adopt delegated acts, in accordance with Article 301a and subject to the conditions of Article 301b and 301c, specifying the procedures to be followed by EIOPA when determining the existence of an exceptional fall in financial markets, and the factors to be taken into account for the purpose of the application of Article 138(4) including the methods, qualitative and quantitative criteria and requirements , the maximum appropriate period of time, expressed in total number of months, which shall be the same for all insurance and reinsurance undertakings as referred to in the first subparagraph of Article 138(4).'
---	--

Explanation

The purpose of the amendment is to ensure an objective assessment of the determination of the existence of an exceptional fall in financial markets (see paragraph 6.5 of the opinion).

Amendment 4

Article 2(61) of the proposed directive

Amendment to Article 259 of Directive 2009/138/EC (new paragraph 4)

	The following paragraph 4 is added: '4. EIOPA shall draw up within [XXX] years following [XXX] a report assessing any pro-cyclicality effects stemming from the implementation of the Solvency II regulatory framework, and, where relevant, the contribution of countercyclical mechanisms to financial stability, including with regard to the illiquidity premium referred to in Article 77a.'
--	---

Explanation

See paragraph 6.2 of the opinion.

⁽¹⁾ Bold in the body of the text indicates where the ECB proposes inserting new text. Strikethrough in the body of the text indicates where the ECB proposes deleting text.