III

(Preparatory acts)

EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 11 May 2018

on a proposal for a Council Directive laying down provisions for strengthening fiscal responsibility and the medium-term budgetary orientation in the Member States

(CON/2018/25)

(2018/C 261/01)

Introduction and legal basis

On 1 February 2018 the European Central Bank (ECB) received a request from the Council of the European Union for an opinion on a proposal for a Council Directive laying down provisions for strengthening fiscal responsibility and the medium-term budgetary orientation in the Member States [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 (TFEU) since the proposed directive is relevant to the primary objective of the European System of Central Banks of maintaining price stability, as referred to in Articles 127(1) and 282(2) of the TFEU and Article 2 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB'). The ECB is also competent to be consulted on the proposed directive under Article 126(14) of the TFEU, which is the legal basis of the proposed directive, according to which the Council of the European Union shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the ECB, adopt the appropriate provisions which shall then replace Protocol (No 12) on the excessive deficit procedure annexed to the TFEU and the Treaty on European Union. 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 financial and economic crisis has clearly demonstrated that ambitious reform to the economic governance framework is in the profound and overwhelming interest of the European Union, the Member States and, in particular, the euro area [2]. The Stability and Growth Pact (SGP), which is implemented and reinforced through secondary legislation in the form of Council Regulation (EC) No 1466/97 [3] and Council Regulation (EC)

(1) COM(2017) 824 final.

(2) See Opinions CON/2011/13 and CON/2012/18. All ECB opinions are published on the ECB's website at www.ecb.europa.eu

(3) Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (OJ L 209, 2.8.1997, p. 1).

No 1467/97 [1], created a more robust Union framework for economic and fiscal policy coordination and surveillance [2].

1.2. In line with the position expressed in the context of the adoption of the abovementioned legal acts, the ECB welcomes the proposed directive, which aims to integrate the substance of the Treaty on Stability, Coordination and Governance (TSCG) into the Union legal framework. The proposed directive follows up onto Article 16 of the TSCG, which called for incorporating the substance of the TSCG into the Union legal framework within five years from the date of entry into force of the TSCG, i.e. by 1 January 2018 [3]. The substance of the TSCG has been interpreted by the European Commission to correspond with the so-called 'fiscal compact [4]'. The ECB considers that several amendments to the proposed directive are necessary in order to further strengthen fiscal responsibility in the Member States, simplify the legal framework and ensure more effective implementation and enforcement of fiscal rules at Union and national level.

2. Specific observations

2.1. *Simplification of the current legal framework*

2.1.1. The proposed directive aims to simplify the legal framework and ensure a more effective and systematic monitoring of implementation and enforcement of fiscal rules at both Union and national level, as part of the overall Union economic governance framework. The proposed directive also aims to diminish the possible risks of duplications and conflicting actions inherent in the co-existence of intergovernmental arrangements alongside the mechanisms provided for under Union law. While the ECB welcomes, as stated in paragraph 1.2, the objectives of the proposed directive, it has concerns as to whether the proposed directive achieves these objectives.

2.1.2. As regards the TSCG, the proposed directive aims to integrate the fiscal compact into Union law. However the provisions of the proposed directive deviate substantially from those of the fiscal compact, which may lead to a weakening of the rules of the fiscal compact and increase uncertainly as a result of the coexistence of multiple fiscal frameworks. In particular, the fiscal compact rules are weakened due to the fact that the proposed directive does not contain any reference to the Member States' obligation under the fiscal compact to have their budgetary position in balance or in surplus, or to keep the structural deficit to an upper limit of 0,5 % of gross domestic product, which can become 1,0 % of gross domestic product in cases where the debt level is significantly below 60 % of gross domestic product and where there are low risks to sustainability. In the same vein, the fiscal compact contains the obligation to ensure rapid convergence towards the medium-term objective in line with the SGP. The ECB considers that these obligations need to be clearly reflected in the proposed directive.

(1) Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure (OJ L 209, 2.8.1997, p. 6).

(2) The SGP was embedded into the legislative packages known as the 'Six-pack' (Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area (OJ L 306, 23.11.2011, p. 1); Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area (OJ L 306, 23.11.2011, p. 8); Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (OJ L 306, 23.11.2011, p. 12); Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances (OJ L 306, 23.11.2011, p. 25); Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure (OJ L 306, 23.11.2011, p. 33); and Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States (OJ L 306, 23.11.2011, p. 41)), which entered into force on 13 December 2011, and the 'Two-pack' (Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability (OJ L 140, 27.5.2013, p. 1); and Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area (OJ L 140, 27.5.2013, p. 11), which entered into force on 30 May 2013.

(3) Article 16 of the TSCG called for taking the necessary steps with the aim of incorporating the substance of the TSCG into the Union framework within five years from the date of entry into force of the TSCG, i.e. by 1 January 2018, on the basis of an assessment of the experience with its implementation. This is also in line with the Five Presidents' Report on 'Completing Europe's Economic and Monetary Union', Report by Jean-Claude Juncker, in close cooperation with Donald Tusk, Jeroen Dijsselbloem, Mario Draghi and Martin Schulz, 22 June 2015, available on the Commission's website at www.ec.europa.eu

(4) The 'fiscal compact' is set out under Title III of the TSCG.

2.1.3. In addition, the proposed directive will not replace the TSCG, as the TSCG contains provisions that exceed the scope of the proposed directive. However, since the TSCG will still be applicable for all Member States, with the exception of the Czech Republic and the United Kingdom, the proposed directive does not seem to diminish the risk of duplication and conflicting actions inherent in the coexistence of intergovernmental arrangements alongside the mechanisms provided for under Union law. The explanatory memorandum that accompanies the proposed directive states that the proposed directive should not affect the commitments of the TSCG's contracting parties made under Articles 7 and 13 of the TSCG. However, the proposed directive will affect the commitments of the Member States that are contracting parties to the TSCG under Article 3 of the TSCG, which contains the fiscal compact provisions, without repealing or replacing them (1). The alignment of the provisions of the proposed directive with Article 3 of the TSCG would ensure clarity as regards the coexistence of the TSCG alongside the proposed directive and contribute to the achievement of the objectives of the proposed directive.

2.1.4. Moreover, the ECB understands that most of the Member States that are contracting parties to the TSCG have already implemented the provisions of the fiscal compact into their national laws. In some cases, this implementation has been made at constitutional or an equivalent level. Considering that the fiscal compact contains provisions that are more stringent than those set out in the proposed directive, in particular with regard to the upper limit for the structural deficit of 0,5 % of gross domestic product, it is expected that these national laws will also contain more stringent fiscal requirements. Therefore, if Member States that have not yet fully transposed the fiscal compact into their national law decide to implement the fiscal compact provisions in a more lenient manner due to the proposed directive being adopted, or if some Member States choose to amend their national laws in that manner, this may result in unequal and disparate fiscal rules throughout the Union. This issue reinforces the ECB's suggestion, which is set out in paragraph 2.1.2, to clearly reflect in the proposed directive the obligations found in the fiscal compact. Ensuring that the provisions of the fiscal compact are reflected will provide legal clarity and equal treatment across the Union.

2.1.5. Finally, as far as the Union fiscal framework in general is concerned, it seems that the proposed directive contains provisions which are similar or related to provisions in the SGP, the 'Six-pack' or the 'Two-pack'. Some examples are the provisions establishing independent bodies found in the proposed directive and in Regulation (EU) No 473/2013, as well as the provisions on numerical fiscal rules and medium-term budgetary frameworks of Directive 2011/85/EU. The ECB is of the view that in these cases, the proposed directive would need to clarify how the provisions of the proposed directive would interact in practice with the already existing provisions in Union law and, if necessary, amend the relevant legal acts to ensure legal clarity.

2.2. *Medium-term objective*

2.2.1. The proposed directive stipulates that Member States should set up a framework of binding and permanent numerical fiscal rules specific to them. This framework should establish a medium-term objective in terms of structural balance, in order to ensure that the ratio of government debt to gross domestic product at market prices does not exceed the reference value set out in Article 1 of Protocol (No 12) on the excessive deficit procedure (2), or approaches the reference value at a satisfactory pace. The ECB understands that this medium-term objective does not refer to the medium-term objective defined under the SGP, and in particular under Regulation (EC) No 1466/97, and that the intention of the Commission is to create an obligation for Member States to enshrine, in their fiscal frameworks, a medium-term objective that may be different from the medium-term objective set out in the SGP. The ECB considers that the proposed directive needs to define, in a clear and comprehensive manner, how this new medium-term objective in terms of structural balance is defined, and, as noted in paragraph 2.1.2, how it reflects the upper limit for the structural deficit of 0,5 % of gross domestic product found in the fiscal compact. Supplying such a definition would ensure that Member States have clarity as regards their obligations and that there are uniform and harmonised fiscal rules across the Union.

2.2.2. The fiscal compact also contains an obligation for the contracting parties to ensure rapid convergence towards their respective medium-term objective in line with the SGP, with the time frame for such convergence taking into consideration country-specific sustainability. The ECB notes that an obligation requiring rapid convergence should be inserted into the proposed directive. It considers that convergence towards the medium-term objective referred to in the proposed directive should be further specified, with the rules in the SGP seen as a minimum convergence pace.

(1) This is a matter to be decided by the contracting parties to the TSCG.
(2) Annexed to the TFEU.

2.2.3. Finally, the ECB welcomes the obligation on Member States to include in their fiscal planning a medium-term growth path of government expenditure, which would be net of discretionary revenue measures, and which would be of a binding and permanent character. In contrast to the expenditure rules referred to in the fiscal compact, which replicate the SGP, the expenditure rule in the proposed directive provides for fixed multiannual expenditure targets to be applied for the duration of the legislative term as soon as new governments take office. These targets must be respected by annual budgets throughout that period. While such a fixed rule might support fiscal discipline and create additional fiscal space in times of economic expansion, more clarity would be needed on how to enforce this rule over the medium term. Moreover, the proposed directive needs to clarify whether Member States would need to adjust their annual expenditure targets in the event of the economy developing differently from the assumptions made by the Member States when they set their multiannual expenditure targets.

2.3. *Automatic correction mechanism*

2.3.1. The ECB welcomes the introduction of the automatic correction mechanism, in line with Article 3(1)(e) of the TSCG, which goes beyond the procedure for the correction of deviations provided under Article 6(2) of Regulation (EC) No 1466/97. This tool will enable Member States to correct deviations from the medium-term objective and the adjustment path towards it, and to compensate for deviations from the government expenditure path referred to in the proposed directive ([1]).

2.3.2. The ECB has nevertheless identified a number of elements of this mechanism that could be further revised in order to ensure that the mechanism is applied in a more effective manner by Member States. In particular, while the proposed directive states that the correction mechanism would be automatically activated in the event of a 'significant observed deviation', it does not define this term or contain any guidance as to its scope. The ECB suggests defining the term 'significant observed deviation' in the proposed directive in order to bring legal clarity to the applicability of the correction mechanism.

2.4. *Independent bodies*

2.4.1. The ECB supports the provisions of the proposed directive, which aim to strengthen the role of independent bodies by assigning them a mandate that goes beyond their existing tasks under Regulation (EU) No 473/2013. Notably, the ECB welcomes the anchoring of the 'comply-or-justify principle' in Union legislation, as this would reinforce the role of the independent bodies in the fiscal surveillance process. However, Regulation (EU) No 473/2013 already provides for the establishment of these independent bodies and assigns to them a number of related tasks. The proposed directive should, therefore, not duplicate existing provisions of Union law, but rather only expand the tasks attributed to these independent bodies in order to ensure that they are able to cover the scope of the proposed directive.

Where the ECB recommends that the proposed directive is amended, specific drafting proposals are set out in a separate technical working document accompanied by an explanatory text to this effect. The technical working document is available in English on the ECB's website.

Done at Frankfurt am Main, 11 May 2018.

The President of the ECB

Mario DRAGHI

([1]) See Article 3(2)(b) of the proposed directive.