



OPINION OF THE EUROPEAN CENTRAL BANK
of 27 July 2018
on the reciprocal implementation of macroprudential tools in Luxembourg
(CON/2018/34)

Introduction and legal basis

On 14 May 2018, the European Central Bank (ECB) received a request from the Luxembourg Ministry of Finance for an opinion on a draft law which seeks to implement Directive (EU) 2017/2399 of the European Parliament and of the Council¹ as regards the ranking of unsecured debt instruments in insolvency hierarchy and to amend various provisions of the amended law of 5 April 1993 relating to the financial sector (hereinafter the 'draft law').

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 and the third and sixth indents of Article 2(1) of Council Decision 98/415/EC², as the draft law relates to the Banque centrale du Luxembourg (BCL) and rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets. 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 main purpose of the draft law is to implement Directive (EU) 2017/2399 into Luxembourg law. For this purpose, the draft law seeks to amend the Law of 18 December 2015 relating to the failure of credit institutions and certain investment undertakings³.
- 1.2 The draft law also amends the Law of 5 April 1993 in order to empower the Commission de Surveillance du Secteur Financier (the Luxembourg Financial Sector Supervisory Commission – CSSF), acting as a macroprudential authority, to recognise and apply to credit institutions and investment firms (hereinafter 'CRR institutions') established in Luxembourg, or a subgroup of such CRR institutions, the measures that other Member States may apply according to Article 458 of

¹ Directive (EU) 2017/2399 of the European Parliament and of the Council of 12 December 2017 amending Directive 2014/59/EU as regards the ranking of unsecured debt instruments in insolvency hierarchy (OJ L 345, 27.12.2017, p. 96).

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).

³ Law of 18 December 2015 on the measures concerning the resolution, reorganisation winding up of credit institutions and certain investment firms as well as the schemes of deposit protection and investor's compensation.

Regulation (EU) No 575/2013 of the European Parliament and of the Council⁴. The draft law further provides that, in accordance with Article 458(6) of the CRR, the CSSF must notify the relevant authorities, where necessary, of the recognition in Luxembourg of such measures. Article 458(6) provides that where Member States recognise the measures set in accordance with Article 458, they must notify the Council, the Commission, the European Banking Authority (EBA), the European Systemic Risk Board (ESRB) and the Member State authorised to apply the measures. According to the explanatory memorandum accompanying the draft law, the wording of this provision of the draft law is based on Article 59-11 of the Law of 5 April 1993 on the financial sector, according to which, pursuant to Article 134 of Directive 2013/36/EU of the European Parliament and of the Council⁵ (hereinafter the 'CRD'), the CSSF may recognise the systemic risk buffer rate set by another Member States in accordance with Article 133 of the CRD and may apply that buffer rate to CRR institutions authorised in Luxembourg for the exposures located in the Member State that sets that buffer rate. The explanatory memorandum also states that according to recommendation C.1 of Recommendation ESRB/2015/2 of the European Systemic Risk Board⁶, the relevant authorities should reciprocate the macroprudential policy measures adopted by other relevant authorities and recommended for reciprocation by the ESRB. According to the explanatory memorandum, the European macroprudential monitoring framework requires that reciprocity applies not only to branches of CRR institutions in accordance with Article 458(5) of the CRR⁷, subject to the notification duty set out in Article 458(6), but also to CRR institutions and subgroups of such institutions established in Luxembourg.

2. General observation

- 2.1 This opinion does not address the question of whether the draft law, if adopted as proposed, would represent an effective means of implementing Directive (EU) 2017/2399, the CRR or Recommendation ESRB/2015/2 in Luxembourg. This opinion will focus on those aspects of the draft law that may impact on the role and tasks of the BCL as a central bank and on macroprudential matters.

⁴ Article 458(2) of 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) (hereinafter the 'CRR') authorises the designated macroprudential authority of a Member State to adopt stricter national measures where it identifies changes in the intensity of macroprudential or systemic risk in the financial system with the potential to have serious negative consequences to the financial system and the real economy in a specific Member State.

⁵ 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).

⁶ Recommendation ESRB/2015/2 of the European Systemic Risk Board of 15 December 2015 on the assessment of cross-border effects of and voluntary reciprocity for macroprudential policy measures (OJ C 97, 12.3.2016, p. 9), the consolidated text of which can be found on www.eur-lex.europa.eu or www.esrb.europa.eu. The concept of 'reciprocity' is defined in this Recommendation as 'an arrangement, whereby the relevant authority in one jurisdiction applies the same, or equivalent, macroprudential measure, as is set by the activating relevant authority in another jurisdiction, to any financial institutions under its jurisdiction, when they are exposed to the same risk in the latter jurisdiction'.

⁷ Article 458(5) of the CRR provides that other Member States may recognise the measures set in accordance with Article 458 of the CRR and apply them to domestically authorised branches located in the Member State authorised to apply the measures.

- 2.2 The ECB notes, in this respect, that the CSSF, when acting as a macroprudential authority, including for the proposed new macroprudential measures, takes its decisions after consultation with the BCL to reach a common position and after seeking the opinion of the Luxembourg Systemic Risk Committee⁸.
- 2.3. As emphasised in a previous opinion⁹, in view of its existing task of supervising market liquidity¹⁰ and its general mandate to contribute to financial stability¹¹, the BCL should, in principle, play a leading role in macroprudential oversight. However, the legal framework governing the Systemic Risk Committee endows the BCL with an insufficient role as regards countercyclical capital buffers, buffers for systemically important institutions, systemic risk buffers and other macroprudential measures described under Article 458 of the CRR, as the BCL merely acts as the secretariat of the committee and is a party to the loose cooperation arrangement described above. The ECB therefore reiterates its recommendation to bolster the BCL's role in macroprudential policy, including in the context of the reciprocal implementation of macroprudential measures adopted by other Member States.

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

Done at Frankfurt am Main, 27 July 2018.

[signed]

The President of the ECB

Mario DRAGHI

⁸ See Article 59-12 of the Law of 5 April 1993 on the financial sector, as amended.

⁹ See paragraphs 5.2 and 5.3 of Opinion CON/2014/46. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

¹⁰ See Article 2(4) of the Organic Law.

¹¹ See Article 2(6) of the Organic Law.