

EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

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

(CON/2009/17)

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Introduction and legal basis

On 22 October 2008 the European Central Bank (ECB) received a request from the Council of the European Union for an opinion 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 ⁽¹⁾ (hereinafter 'the proposed directive') ⁽²⁾.

The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community. 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

Reform of European supervisory arrangements in the financial sector

1. The ECB emphasises that the specific observations in this opinion are without prejudice to possible future contributions to the broader European debate on the reform of European supervisory arrangements ⁽³⁾, notably in the context of the recommendations by the high-level expert group set up by the Commission ⁽⁴⁾.

⁽¹⁾ COM(2008) 602 final of 1 October 2008. Available at www.eur-lex.europa.eu

⁽²⁾ This opinion is based on the version of 1 October 2008 on which the ECB was formally consulted. The proposed directive has been subject to further amendments in the Council working group.

⁽³⁾ See paragraph 8 of the Presidency conclusions, European Council, 15 - 16 October 2008, available on the Council's website at www.consilium.europa.eu and the Communication from the Commission, 'From financial crisis to recovery: A European framework for action', COM(2008) 706 final of 29 October 2008, available on the Commission's website at www.ec.europa.eu

⁽⁴⁾ The de Larosière Group report of 25 February 2009 is available at www.europa.eu

Legal instruments for consistent implementation of European banking legislation

2. The ECB has expressed the view on several occasions⁽¹⁾ that the current structure of Directives 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 (recast)⁽²⁾ and 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions (recast)⁽³⁾ should not be viewed as the final desirable outcome, but rather as one step in a long-term process towards establishing, in line with the principles and objectives developed under the Lamfalussy approach, a directly applicable set of Level 2 implementing measures for financial institutions within the European Union. Directive 2006/48/EC has limited recourse to comitology and limited scope for implementing measures⁽⁴⁾. The implementation of the Basel II Agreement⁽⁵⁾ provided a unique opportunity to revise Directive 2006/48/EC along these lines but this has not been seized. Much still remains therefore to be done in the banking field to reap the full benefits of the Lamfalussy regulatory approach. This process would require: (i) limiting Level 1 Community legal acts to framework principles reflecting basic political choices and substantive matters; and (ii) bringing the technical provisions together in one or several directly applicable Level 2 regulations which, with an increased recourse to comitology, would gradually emerge as the main body of technical rules applicable to financial institutions in the EU. In this regard, the ECB is of the view that most of the technical Annexes to Directives 2006/48/EC and 2006/49/EC should be adopted directly as Level 2 measures and, in so far as compatible with the necessary flexibility for national implementation, as Commission regulations.

3. The limited possible recourse to substantial and structured Level 2 implementing measures in the context of Directives 2006/48/EC and 2006/49/EC gives a more prominent role to guidelines at Level 3 of the Lamfalussy framework. In this respect, the ECB notes that the proposed directive introduces for the first time in Directive 2006/48/EC express references to guidelines and recommendations of the Committee of European Banking Supervisors (CEBS)⁽⁶⁾. The ECB fully acknowledges the benefits of these guidelines, the considerable work performed by the CEBS in converging supervisory standards and practices and the need to ensure Member State compliance. However, in view of their non-binding character, these guidelines do not guarantee harmonised application of Community legislation across Member States. In line with 'Better Regulation' principles⁽⁷⁾, explicit references to such non-binding guidelines in Community legislation should be avoided. The ECB recommends instead that the proposed directive specifies the areas in which the CEBS is requested to contribute to enhance convergence of supervisory practices. Moreover, in line with the Lamfalussy approach and the advice given in paragraph 2 and with a view to further contributing to the adoption of a harmonised legal framework at EU level, it might also be advisable in some instances that the Community legislator converts the substantive content of these Level 3 non-binding CEBS guidelines into binding Community legislation, either at Level 1 under the codecision procedure or in the form of

⁽¹⁾ See paragraph 6 of ECB Opinion CON/2004/7 of 20 February 2004 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 Council Directives 73/239/EEC, 85/611/EEC, 91/765/EEC, 93/6/EEC and 94/19/EC and Directives 2000/12/EC, 2002/83/EC and 2002/87/EC of the European Parliament and of the Council, in order to establish a new financial services committee organisational structure (COM(2003) 659 final), (OJ C 58, 6.3.2004, p. 23); paragraphs 6 to 10 of ECB Opinion CON/2005/4 of 17 February 2005 at the request of the Council of the European Union on a proposal for directives of the European Parliament and of the Council recasting Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions and Council Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investment firms and credit institutions (OJ C 52, 2.3.2005, p. 37) and paragraph 3.5 of ECB Opinion CON/2006/60 of 18 December 2006 on a proposal for a Directive amending certain Community directives as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of shareholdings in the financial sector (OJ C 27, 7.2.2007, p. 1).

⁽²⁾ OJ L 177, 30.6.2006, p. 1.

⁽³⁾ OJ L 177, 30.6.2006, p. 201.

⁽⁴⁾ See Articles 150 and 151 of Directive 2006/48/EC and the amendments to these provisions in the proposed directive.

⁽⁵⁾ Basel Committee on Banking Supervision, 'International Convergence of Capital Measurement and Capital Standards: A Revised Framework', Bank for International Settlements (BIS), June 2004, available on the BIS's website at www.bis.org

⁽⁶⁾ See in this respect the new recitals 1 and 7, Article 42b, Article 63a(6) and the second subparagraph of Article 131a(2).

⁽⁷⁾ See in this respect the *Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of legislation within the Community institutions*, in particular Recommendations 12 and 17, pp. 38 and 54, available on the Europa website at www.europa.eu

Level 2 implementing measures which would be adopted by the Commission under its comitology powers and would apply uniformly across the Member States ⁽¹⁾.

4. The ECB understands that a number of the amendments proposed by the Commission to Directives 2006/48/EC and 2006/49/EC have been prompted by the recent financial turbulence and that restructuring these directives was not conceivable in the current context. In the ECB's view, however, a radical overhaul of these directives along the principles described above would greatly contribute to enhancing the transparency and legal certainty of Community banking legislation. The current market turmoil has also highlighted the importance of legal instruments that can be amended easily to adapt to changing circumstances, i.e. Level 2 implementing measures, leaving only the framework principles to the rigid Level 1 acts, as they tend to be more permanent. The ECB would urge the EU legislator, also in the light of the high-level expert group's findings, to consider the above recommendations.

Comitology

5. The Commission has recently proposed two draft implementing directives regarding technical provisions concerning risk management ⁽²⁾. The ECB notes that some of these technical provisions relate to securitisation and the methodologies employed by external credit assessment institutions. While the ECB does not have any particular observations on these specific provisions, it agrees with the Commission's views regarding the sequencing of Level 1 and Level 2 measures ⁽³⁾, that: (i) as a rule and for the sake of legal coherence and transparency, Level 2 measures should not precede Level 1 measures and thus risk preempting the discussion on their substance; and (ii) work on Level 1 and 2 measures should be carried out as much as possible in parallel. This would also facilitate the exercise by the ECB of its advisory role under Article 105(4) of the Treaty on proposed Community acts (including draft Level 2 implementing measures).

Specific observations

Inter-bank exposures and implementation of monetary policy (new proposed Article 113(3) and (4) of Directive 2006/48/EC)

6. The ECB broadly welcomes the objective of the proposed directive, which is to improve risk and liquidity management in credit institutions including with regard to inter-bank exposures ⁽⁴⁾. In particular, the ECB shares the Commission's view that inter-bank exposures pose a significant risk as banks, although regulated, can fail and that large inter-bank exposures require very prudent management ⁽⁵⁾.
7. The ECB notes that the proposed directive introduces an exemption for 'asset items constituting claims on and other exposures to institutions, provided that these exposures ... do not last longer than the following business day and are denominated in a currency of the Member State exercising this option, provided that such currency is not the euro' ⁽⁶⁾. The ECB is of the view that the above provision raises concerns in terms of the level playing field and that this provision should be amended to provide for equal treatment among Member States.

⁽¹⁾ The Lamfalussy Committee itself pointed out in 2001 that these interpretative recommendations and common standards 'regarding matters not covered by EU legislation — where necessary, could be adopted into Community Law through a Level 2 procedure' (see Final report of the Committee of Wise Men on the regulation of European securities markets, 15.2.2001, p. 37, available on the Europa website at www.europa.eu).

⁽²⁾ Draft Commission Directive amending certain Annexes to Directive 2006/48/EC of the European Parliament and of the Council as regards technical provisions concerning risk management and draft Commission Directive amending certain Annexes to Directive 2006/49/EC of the European Parliament and of the Council as regards technical provisions concerning risk management, available on the Commission's website at www.ec.europa.eu

⁽³⁾ Communication from the Commission — Review of the Lamfalussy process — Strengthening supervisory convergence, 20.11.2007, COM(2007) 727 final, available on the Commission's website at www.ec.europa.eu

⁽⁴⁾ See paragraphs 6.2.3 and 6.4.5 of the Explanatory Memorandum to the proposed directive, pp. 8 and 10.

⁽⁵⁾ See paragraph 6.2.3 of the Explanatory Memorandum to the proposed directive, p. 8.

⁽⁶⁾ Proposed Article 113(4)(f).

8. Furthermore, the ECB calls for caution when designing measures on limits to inter-bank exposures as the proposed measures should avoid impairing the smooth flow of liquidity within the inter-bank market. From a monetary policy implementation perspective, constraining the smooth flow of liquidity within the inter-bank market, in particular at very short maturities that are overnight or up to one week would not be desirable, either in normal circumstances or in the current financial market turmoil. Indeed, in normal times the trading activities of Eurosystem counterparties are instrumental in redistributing short-term liquidity in the market and therefore they should not be constrained, as this would be detrimental to the smooth steering of the short-term money market rates towards the minimum bid rate on the Eurosystem's main refinancing operations.
9. In connection with the above, the ECB underlines that borrowing with short maturity does not entail a risk of a similar magnitude compared to borrowing with a longer maturity. Furthermore, credit quality also varies across counterparties. With regard to the proposed limit on inter-bank exposures of 25 % of the credit institution's own funds or the amount of EUR 150 million ⁽¹⁾, regardless of their maturity, internal quantitative analysis by the ECB suggests that a non-negligible share of banks would have been constrained in their overnight lending activities in a substantial number of transactions if the limit had been in place before the start of the financial market turmoil in August 2007. This constitutes a substantial and undesirable change when compared to the current EU legal framework, which allows Member States to fully or partially exempt 'claims on and other exposures to institutions, with a maturity of one year or less' from the application of rules on large exposures ⁽²⁾. From a monetary policy implementation perspective, the ECB is of the view that the above proposed limit would constrain the smooth flow of liquidity within the inter-bank market and could be detrimental to the smooth functioning of the euro money market. In this context, while the ECB stresses that credit institutions should have in place mitigation measures and monitoring tools in line with the requirements set out in Annex V to Directive 2006/48/EC to address potential risks associated with very short-term inter-bank exposures, it would however welcome the introduction of an exemption for claims with a very short maturity, e.g. one week or less, from the application of the large exposures regime. In addition, it would welcome an EU-wide analysis of the money market and — based on this analysis — the possible introduction of certain measures such as an exemption for claims with a maturity of over a week.

Liquidity issues (new proposed Annexes V and XI and Article 41)

10. In the ECB's view, the amendments to Directive 2006/48/EC regarding liquidity risk ⁽³⁾, which implement the work conducted by the Basel Committee on Banking Supervision (BCBS) ⁽⁴⁾ and the CEBS ⁽⁵⁾, are a necessary and welcome step in view of the importance of liquidity risk management revealed by the current market turmoil. In this respect, considering also possible future work by the Commission, it is important to provide further guidance on key aspects such as the definition and setting of risk tolerance ⁽⁶⁾ and the adequacy of liquidity buffers ⁽⁷⁾. Taking into account their financial stability tasks, it is necessary to ensure that central banks have appropriate access to the information related to banks' contingency funding plans.

⁽¹⁾ See the second subparagraph of proposed Article 111(1).

⁽²⁾ New Article 113(3)(i).

⁽³⁾ See the new Annex V.

⁽⁴⁾ See *Principles for Sound Liquidity Risk Management and Supervision*, Basel Committee on Banking Supervision, September 2008, available on the BIS' website at www.bis.org

⁽⁵⁾ See the *First part of the CEBS' technical advice on liquidity risk management — Survey of the current regulatory frameworks adopted by the EEA regulators*, 15.8.2007 and the *Second part of the CEBS's technical advice to the European Commission on liquidity risk management — Analysis of specific issues listed by the Commission and challenges not currently addressed in the EEA*, 18.9.2008, CEBS 2008 147, available on the CEBS' website at www.c-ebs.org

⁽⁶⁾ See the new point 14a of Annex V.

⁽⁷⁾ See new points 14 and 18 of Annex V and new point 1(e) of Annex XI.

11. The ECB notes that, in its recent technical advice to the Commission on liquidity risk management ⁽¹⁾, the CEBS recommends that the supervisors of cross-border groups should coordinate their work closely, notably through enhanced exchanges of information, and in particular within the colleges of supervisors, to better understand groups' liquidity risk profiles and to avoid unnecessary duplication of requirements. When appropriate, the CEBS suggests that supervisors should actively consider delegating to home country supervisors tasks relating to the supervision of branches' liquidity. Having regard to the on-going work on liquidity risk management and liquidity concessions practices ⁽²⁾, the ECB notes that one consequence of economic and monetary union is that only the home Member State should be responsible for supervising the liquidity of credit institution branches within the euro area. In the context of a future review of Directive 2006/48/EC, the home and host Member States which have adopted the euro could be distinguished from the Member States which have not done so. Where the competent authorities of the home and host Member States have a different currency, the branch could be subject to the liquidity conditions of the host Member State. However, within the euro area, this distinction has lost its relevance for branches since they share the same balance sheet as the head office, in the same currency, and they do not need any specific own funds or capital. Furthermore, deposit-guarantee schemes introduced and officially recognised in one Member State must cover the depositors at branches set up by credit institutions in other Member States.

12. The ECB also recommends amending Article 41 of Directive 2006/48/EC applying to the responsibility for the measures resulting from the implementation of monetary policy with a view to taking account of the existence of the European System of Central Banks (ESCB).

Exchange of information and cooperation between central banks and supervisory authorities (new proposed Article 42a(2), Article 49 and Article 130(1) of Directive 2006/48/EC)

13. The ECB supports the clarification of the existing coordination and information sharing obligations between financial stability authorities in an emergency situation, including adverse developments in financial markets. The clarification of the existing obligations is particularly welcome as regards the sharing of information on specific banking groups between supervisory authorities and central banks.

14. The ECB notes that, whereas Directive 2006/48/EC provides that supervisory authorities should not be prevented from transmitting information to central banks, including the ECB ⁽³⁾, for the purposes of their tasks ⁽⁴⁾, the proposed directive provides that, in an emergency situation as referred to in Directive 2006/48/EC ⁽⁵⁾, Member States must allow supervisory authorities to communicate information to central banks in the Community. In both 'normal times' and emergency situations, the proposed directive provides that this communication of information applies when the information is relevant for the exercise of central banks' tasks. The ECB welcomes these amendments, and in particular the introduction in Directive 2006/48/EC of an express reference to the non-exhaustive list of central banks' tasks, including the conduct of monetary policy, the oversight of payments and securities settlement systems, and the safeguarding of financial stability, for which this communication of information would be relevant. The ECB also makes the two following observations. First, while the

⁽¹⁾ *Second part of the CEBS's technical advice to the European Commission on liquidity risk management — Analysis of specific issues listed by the Commission and challenges not currently addressed in the EEA*, 18.9.2008, CEBS 2008 147, Recommendation 29, pp. 11 and 64-66, available on the CEBS' website at www.c-eps.org

⁽²⁾ See the CEBS's Executive summary regarding work on delegation, 3.9.2008, available on the CEBS' website at www.c-eps.org

⁽³⁾ Article 4(23) of Directive 2006/48/EC.

⁽⁴⁾ See Article 49(a) of Directive 2006/48/EC and the new Article 49(a).

⁽⁵⁾ New Article 130(1).

above list of tasks refers to the 'oversight of payment and securities settlement systems' ⁽¹⁾, it would be appropriate to add a reference to 'clearing systems' and to consistently use the following wording: 'payment, clearing and securities settlement systems' throughout Directive 2006/48/EC. Second, the reference to 'statutory' tasks implies that these tasks have been conferred by statute. Since, in some cases, functions such as the central bank's financial stability task may not be statutorily defined, the word 'statutory' should be deleted.

15. The ECB understands that the proposed amendments do not intend to modify the current framework for information sharing between supervisory authorities and central banks in normal situations but seek to further improve information sharing among these authorities when an emergency situation arises. The ECB considers that some scope for further convergence of the nature of these obligations might be desirable to avoid an undesirable asymmetry in the information available to central banks in normal circumstances and in emergency situations ⁽²⁾. The experience of the Eurosystem central banks suggests that there are significant information-related synergies between the central banking and the prudential supervisory functions. This confirms the need to strengthen the interplay between central banks' financial stability assessments and the prudential supervision of individual financial institutions ⁽³⁾. In practice, as already pointed out in previous opinions ⁽⁴⁾, the supervision of individual institutions should benefit from the outcome of the central banks' financial stability assessments which in turn should rely also on input coming from supervisors. As an example, supervisory authorities should regularly communicate under normal circumstances with other supervisors and central banks, both within and across borders, to facilitate effective cooperation in the supervision and oversight of liquidity risk management. This communication should occur regularly during normal times, but the nature and frequency of the information sharing should be adapted appropriately during times of stress ⁽⁵⁾.

Colleges of supervisors (new proposed Articles 42a, 129 and 131a)

16. The ECB welcomes the proposed strengthening of the legal underpinnings of the colleges of supervisors ⁽⁶⁾. This is a step towards achieving supervisory convergence and would ensure consistency across Member States. In particular, the ECB considers that the use of supervisory colleges would enhance cooperation in the day-to-day supervision of cross-border banks, financial stability risk assessment and the coordination of the management of crisis situations.

The Community dimension of the mandate of national supervisory authorities

17. The ECB fully supports the objective reaffirmed on several occasions by the Ecofin of enhancing the Community dimension in the mandate of national supervisors, as reflected in the proposed

⁽¹⁾ See also the second subparagraph of Article 46(2) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1).

⁽²⁾ Compare the first paragraph of Article 49 of Directive 2006/48/EC with the proposed new last paragraph of the same Article under the proposed directive.

⁽³⁾ *Report of the Financial Stability Forum on Enhancing Market and Institutional Resilience*, 7.4.2008, Recommendation V.8, pp. 42-43 specifying that 'Supervisors and central banks should improve cooperation and the exchange of information including in the assessment of financial stability risks. The exchange of information should be rapid during periods of market strain'. Available on the Financial Stability Forum's website at www.fsforum.org

⁽⁴⁾ See, for instance, paragraph 2.4.1 of ECB Opinion CON/2007/33 of 5 November 2007 at the request of the Austrian Ministry of Finance on a draft law amending the Law on banking, the Law on savings banks, the Law on the Financial Market Supervisory Authority and the Law on the Oesterreichische Nationalbank and paragraph 2.4.1 of ECB Opinion CON/2006/15 of 9 March 2006 at the request of the Polish Minister for Finance on a draft law on the supervision of financial institutions. All ECB opinions are available on the ECB's website at www.ecb.europa.eu

⁽⁵⁾ See Principle 17 on pp. 14-36 of the *Principles for Sound Liquidity Risk Management and Supervision*, available on the BIS website at www.bis.org The other aspects relating to liquidity are addressed in paragraphs 11 and 12 of this opinion.

⁽⁶⁾ See the new Article 131a.

directive, considering that financial stability issues should be assessed at cross-border level⁽¹⁾. In this context, the ECB welcomes the provisions regarding the consideration of the potential impact of a decision on the stability of the financial systems in all other Member States concerned. For consistency reasons, the ECB suggests always referring to the 'potential impact' of a decision instead of its 'effect'⁽²⁾. The ECB is also of the view that, for the practical implementation of the abovementioned provisions, consultation mechanisms with other concerned Member States similar to those contained in other financial sector directives may be considered where the colleges cannot be used for this purpose⁽³⁾.

Securitisation (new proposed Article 122a)

18. The objectives of the proposed measures on capital requirements and risk management for securitisation⁽⁴⁾ include in particular: (i) the duty for sponsors and/or originators to maintain a 'material net economic interest'⁽⁵⁾ in securitisation transactions; (ii) the requirements for credit institutions to better understand the risks taken as investors in securitisations; (iii) the enhancement of disclosure practices by credit institutions as originators or sponsors; and (iv) the strengthening of supervisory practices by competent authorities in relation to securitisation. The ECB overall supports the introduction of these proposed amendments which aim at aligning incentives among participants in the securitisation market⁽⁶⁾. At the same time, the ECB stresses the need to avail of a broad, liquid and well-functioning secondary securitisation market, in particular with regard to the eligibility of asset-backed securities as collateral for monetary policy operations.

First, if this proposed directive remains a Level 1 act, despite the advice given in paragraphs 2 to 4 of this opinion, the ECB highlights the need to (i) clarify the scope of application of the above provisions; (ii) to define 'material net economic interest'; and (iii) to use terms consistently to increase convergence in their implementation and to avoid regulatory arbitrage. Due diligence requirements differentiating between credit institutions' trading and non-trading books, commensurate with the respective investment horizons, should also be considered to avoid potentially negative repercussions on market-making activities.

Second, the ECB notes that, while retention of a material economic interest may, in theory, be a powerful device for aligning incentives, its practical implementation may present challenges⁽⁷⁾. Therefore, the ECB welcomes the Commission's intention of reporting to the European Parliament and the Council on the application and effectiveness of the proposed provisions in light of market developments, also taking into consideration the need to restore the functioning of the securitisation markets. Furthermore, the ECB takes note of the recital proposed by the Council concerning the measures to address the potential misalignment of securitisation structures and the need to ensure consistency and coherence in all relevant financial sector regulation⁽⁸⁾.

⁽¹⁾ See Ecofin conclusions of 7 October 2008, p. 17, available on the European Council's website at www.consilium.europa.eu

⁽²⁾ Compare recital 6 of the proposed directive with the new Article 40(3) and the third sentence of the new point 1a of Annex XI.

⁽³⁾ See, for instance, Article 132(3) of Directive 2006/48/EC and Article 12(2) of 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).

⁽⁴⁾ See the new Article 122a.

⁽⁵⁾ As referred to in the new Article 122a(1).

⁽⁶⁾ The ECB is aware that this new Article of the proposed directive has been subject to further amendments in the Council working group.

⁽⁷⁾ See the analysis presented in the ECB report on *The incentive structure of the 'originate and distribute model'*, December 2008, available on the ECB's website at www.ecb.europa.eu

⁽⁸⁾ See the proposed recital 15, last sentence of the general approach agreed by the Council on 19 November 2008 (available at: <http://register.consilium.europa.eu/pdf/en/08/st16/st16216.en08.pdf>) which also provides that the Commission intends to bring forward the appropriate legislative proposals, after duly considering the impact of the proposed measures.

Third, the ECB would see merits in a general review of the securitisation terminology used both in Directive 2006/48/EC and in the proposed directive to align it more closely with the usual legal terminology and to ensure increased legal certainty ⁽¹⁾.

Lastly, the interaction of the requirement of maintaining a material net economic interest with accounting requirements needs to be investigated ⁽²⁾. In this context, the ECB sees merit in the development of guidance by the International Accounting Standards Board (IASB) on International Financial Reporting Standards (IFRS) 39 ⁽³⁾ and the IASB's Standing Interpretation Committee's (SIC) issue No 12 ⁽⁴⁾ in order to address the potential impact of the securitisation-related provisions of the proposed directive on derecognition and consolidation rules.

Additional legal and technical observations

19. When referring to the ECB, the ESCB and national central banks of the ESCB, the ECB recommends using wording consistent with the provisions of the Treaty and the Statute of the European System of Central Banks (hereinafter the 'ESCB Statute') to avoid further consolidating outdated concepts and to facilitate the reading of the Directive.

20. Directive 2006/48/EC is characterised by a number of serial or circular references which affect its comprehensibility and clarity ⁽⁵⁾. Moreover, a number of references are not worded 'in such a way that the central element of the provision to which reference is to be made can be understood without consulting that provision' ⁽⁶⁾. This unfortunate practice is further pursued in the proposed directive ⁽⁷⁾. The ECB recommends, also for the sake of legal certainty and transparency, redrafting these provisions so that it is possible to read and understand them without consulting various other provisions of Directive 2006/48/EC.

21. Directive 2006/48/EC refers to 'other public authorities responsible for overseeing payment systems' ⁽⁸⁾. The ECB has consistently noted on several occasions that Article 105(2) of the Treaty and Article 3.1 of the ESCB Statute provide the legal basis for the Eurosystem's oversight activities and that, in

⁽¹⁾ For an overview of national laws applicable to securitisation in 15 Member States, see the report by the European Financial Markets Lawyers Group (EFMLG) on legal obstacles to cross-border securitisations in the EU, 7.5.2007, available on the EFMLG's website at www.efmlg.org

⁽²⁾ ECB report on EU Banking Structures, p. 24.

⁽³⁾ 'Financial Instruments: Recognition and Measurement', released in December 2003.

⁽⁴⁾ 'Consolidation — Special Purpose Entities'.

⁽⁵⁾ See the *Joint Practical Guide* and in particular Recommendation 16, available on the Europa website at www.europa.eu

⁽⁶⁾ Recommendation 16.7 of the *Joint Practical Guide*, available on the Europa website at www.europa.eu

⁽⁷⁾ See, for instance, the first sentence of Article 129(2), of Directive 2006/48/EC and the new Article 129(1)(b).

⁽⁸⁾ Article 49(b) of Directive 2006/48/EC.

addition, the Eurosystem's oversight competence results from Article 22 of the ESCB Statute ⁽¹⁾. The ECB considers that Article 105(2) of the Treaty and Article 3.1 of the ESCB Statute exclude interference in the Eurosystem's oversight competence by any Community or national body other than a central bank acting within the framework of the ESCB/Eurosystem ⁽²⁾. Against this backdrop, in line with the position taken for other Community legislation ⁽³⁾, the ECB recommends deleting the above reference ⁽⁴⁾.

22. Clearing, settlement and custody activities generate a specific type of exposure which should not be treated in a similar way to exposures arising from usual inter-banking lending activities. The main reasons are that these exposures are of a very short-term maturity as they are usually no longer than overnight and that they are beyond the control of the institutions concerned, these exposures being mainly the result of client activity. Although adequate mitigation and monitoring measures should be in place to address potential risks associated with these activities, the ECB supports the exemption to this effect introduced in the proposed directive ⁽⁵⁾. Drafting proposals are set out in the Annex to clarify this exemption further.

Drafting proposals

Where the above advice would lead to changes in the proposed directive, drafting proposals are set out in the Annex.

Done at Frankfurt am Main, 5 March 2009.

The President of the ECB

Jean-Claude TRICHET

⁽¹⁾ See, for instance, paragraph 7 of ECB Opinion CON/99/19 of 20 January 2000 at the request of the Luxembourg Ministry of the Treasury and the Budget on a draft legislative proposal implementing Directive 98/26/EC on settlement finality in payment and securities settlement systems in the law of 5 April 1993, as amended, relating to the financial sector and complementing the law of 23 December 1998 creating a commission in charge of the prudential supervision of the financial sector and, more recently, paragraph 7.2 of ECB Opinion CON/2006/23 of 22 May 2006 at the request of the Central Bank of Malta concerning a draft law amending the Central Bank of Malta Act.

⁽²⁾ The ECB also noted in recent opinions on draft national laws of Member States outside the euro area that the Eurosystem central banks perform oversight of payment systems in line with the common oversight policy defined by the Governing Council, which will also apply to other central banks after adoption of the euro by the Member State in question (see, for instance, paragraphs 13 to 16 of ECB Opinion CON/2005/24 of 15 July 2005 at the request of the Ministry of Finance of the Czech Republic on a draft law on the integration of financial market supervisors and, more recently, paragraphs 3.9 and 3.10 of ECB Opinion CON/2008/83 of 2 December 2008 at the request of the Hungarian Ministry of Finance on a draft law amending the Law on the Magyar Nemzeti Bank. In addition, other Member States outside the euro area have amended their respective laws. At present, in the UK, the Bank of England undertakes oversight of payment systems on a non-statutory basis. Part 5 of the Banking Bill currently before the British parliament (available on the UK Parliament's website at www.parliament.uk, p. 87) would formalise the Bank of England's role in the oversight of payment systems.

⁽³⁾ See paragraph 14 of ECB Opinion CON/2001/25 of 13 September 2001 at the request of the Council of the European Union on a proposal for a Directive of the European Parliament and of the Council 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 2001/12/EC of the European Parliament and of the Council (OJ C 271, 26.9.2001, p. 10).

⁽⁴⁾ Including in recital 26 of Directive 2006/48/EC.

⁽⁵⁾ New Article 106(2)(c).

ANNEX

Drafting proposals

Text proposed by the Commission	Amendments proposed by the ECB (1)
Amendment 1	
Recital 6 of the proposed directive	
(6) The mandates of competent authorities should take into account a Community dimension. Competent authorities should therefore take into account the effect of their decisions on the stability of the financial system in all other Member States.	(6) The mandates of competent authorities should take into account a Community dimension. Competent authorities should therefore take into account the effect the potential impact of their decisions on the stability of the financial system in all other Member States.
<i>Justification — See paragraph 17 of the opinion</i>	
Amendment 2	
Amendment to Directive 2006/48/EC, Article 4(23)	
<p>Article 4</p> <p>23. 'central banks' include the European Central Bank unless otherwise indicated;</p> <p>(No amendment in the proposed directive)</p>	<p>Article 4</p> <p>23. 'central banks' include the national central banks of the European System of Central Banks and the European Central Bank unless otherwise indicated;</p>
<i>Justification — See paragraph 19 of the opinion</i>	
Amendment 3	
Amendment to Directive 2006/48/EC, Article 41	
<p>Article 41</p> <p>Host Member States shall, pending further coordination, retain responsibility in cooperation with the competent authorities of the home Member State for the supervision of the liquidity of the branches of the credit institution.</p> <p>Without prejudice to the measures necessary for the reinforcement of the European Monetary System, host Member States shall retain complete responsibility for the measures resulting from the implementation of their monetary policies.</p> <p>(No amendment in the proposed directive)</p>	<p>Article 41</p> <p>Host Member States shall, pending further coordination, retain responsibility in cooperation with the competent authorities of the home Member State for the supervision of the liquidity of the branches of the credit institution.</p> <p>Without prejudice to the measures necessary for the reinforcement of the European Monetary System The European System of Central Banks and, where applicable, host Member States shall retain complete responsibility for the measures resulting from the implementation of their monetary policies.</p>
<i>Justification — See paragraphs 11 and 12 of the opinion</i>	
Amendment 4	
<p>Article 1(4) of the proposed directive</p> <p>Amendment to Directive 2006/48/EC, Article 42a(2)</p>	
<p>Article 42a</p> <p>2. The competent authorities of the home Member State shall communicate to the competent authorities of a host Member State where a systemically relevant branch is established the information referred to in Article 132(1)(c) and (d) and carry out the tasks referred to in Article 129(1)(c) in cooperation with the competent authorities of the host Member State.</p>	<p>Article 42a</p> <p>2. The competent authorities of the home Member State shall communicate to the competent authorities of a host Member State where a systemically relevant branch is established the information referred to in Article 132(1)(c) and (d) and carry out the tasks referred to in Article 129(1)(c) in cooperation with the competent authorities of the host Member State.</p>

Text proposed by the Commission	Amendments proposed by the ECB (1)
<p>If a competent authority of a home Member State becomes aware of an emergency situation within a credit institution as referred to in Article 130(1), it shall alert as soon as practicable the authorities referred to in the fourth paragraph of Article 49 and in Article 50.</p>	<p>If a competent authority of a home Member State becomes aware of an emergency situation within a credit institution as referred to in Article 130(1), it shall alert as soon as practicable the central banks of the European System of Central Banks and the authorities referred to in the fourth paragraph of Article 49 and in Article 50.</p>

Justification — See paragraph 19 of the opinion

Amendment 5

Article 1(6) of the proposed directive

Amendment to Directive 2006/48/EC, Article 49

Article 49	Article 49
<p>This Section shall not prevent a competent authority from transmitting information to the following for the purpose of their tasks:</p> <p>(a) central banks and other bodies with a similar function in their capacity as monetary authorities when this information is relevant for the exercise of their respective statutory tasks, including the conduct of monetary policy, the oversight of payments and securities settlement systems, and the safeguarding of financial stability; and</p> <p>(b) where appropriate, to other public authorities responsible for overseeing payment systems.</p> <p>This Section shall not prevent such authorities or bodies from communicating to the competent authorities such information as they may need for the purposes of Article 45.</p> <p>...</p> <p>In an emergency situation as referred to in Article 130(1), Member States shall allow competent authorities to communicate information to central banks in the Community when this information is relevant for the exercise of their respective statutory tasks, including the conduct of monetary policy, the oversight of payments and securities settlement systems, and the safeguarding of financial stability.</p>	<p>This Section shall not prevent a competent authority from transmitting information to the following for the purpose of their tasks:</p> <p>(a) central banks and other bodies with a similar function in their capacity as monetary authorities when this information is relevant for the exercise of their respective statutory tasks, including the conduct of monetary policy, the oversight of payments, clearing and securities settlement systems, and the safeguarding of financial stability; and</p> <p>(b) where appropriate, to other public authorities responsible for overseeing payment systems.</p> <p>This Section shall not prevent such central banks authorities or bodies from communicating to the competent authorities such information as they may need for the purposes of Article 45.</p> <p>...</p> <p>In an emergency situation as referred to in Article 130(1), Member States shall allow competent authorities to communicate information to the central banks in the Community of the European System of Central Banks when this information is relevant for the exercise of their respective statutory tasks, including the conduct of monetary policy, the oversight of payments, clearing and securities settlement systems, and the safeguarding of financial stability.</p>

Justification — See paragraphs 14, 19 and 21 of the opinion

Amendment 6

Article 1(16)(a) of the proposed directive

Amendment to Directive 2006/48/EC, Article 106(2)(c)

Article 106	Article 106
<p>2. Exposures shall not include any of the following:</p> <p>...</p> <p>(c) in the case of the provision of money transmission or securities clearing and settlement services to clients, delayed receipts in funding and other exposures arising from client activity, which do not last longer than the following business day.</p>	<p>2. Exposures shall not include any of the following:</p> <p>...</p> <p>(c) in the case of the provision of money transmission or securities financial instruments clearing, and settlement and custody services to clients, delayed receipts in funding and other exposures arising from client activity, which do not last longer than the following business day.</p>

Text proposed by the Commission

Amendments proposed by the ECB (1)

*Justification — See paragraph 22 of the opinion***Amendment 7**

Article 1(21)(d) of the proposed directive
Amendment to Directive 2006/48/EC, Article 113(4)

Article 113

4. Member States may fully or partially exempt the following exposures from the application of Article 111(1):

...

(f) asset items constituting claims on and other exposures to institutions, provided that these exposures do not constitute such institutions' own funds, do not last longer than the following business day and are denominated in a currency of the Member State exercising this option, provided that such currency is not the euro.

Article 113

4. Member States may fully or partially exempt the following exposures from the application of Article 111(1):

...

(f) asset items constituting claims on and other exposures to institutions, provided that these exposures do not constitute such institutions' own funds **and** do not last longer than ~~the following~~ **seven** business days ~~and are denominated in a currency of the Member State exercising this option, provided that such currency is not the euro.~~

*Justification — See paragraphs 6 to 9 of the opinion***Amendment 8**

Article 1(29) of the proposed directive
Amendment to Directive 2006/48/EC, Article 130(1)

Article 130

1. Where an emergency situation, including adverse developments in financial markets, arises, which potentially jeopardises the stability of the financial system in any of the Member States where entities of a group have been authorised or where systemically relevant branches as referred to in Article 42a are established, the consolidating supervisor shall, subject to Chapter 1, Section 2, alert as soon as is practicable, the authorities referred to in the fourth subparagraph of Article 49 and in Article 50, and shall communicate all information that is essential for the pursuance of their tasks. ~~This obligation~~ shall apply to all competent authorities under Articles 125 and 126 and to the competent authority identified under Article 129(1).

If the authority referred to in the fourth subparagraph of Article 49 becomes aware of a situation described in the first subparagraph of this paragraph, it shall alert as soon as is practicable the competent authorities referred to in Articles 125 and 126.

Article 130

1. Where an emergency situation, including adverse developments in financial markets, arises, which potentially jeopardises the stability of the financial system in any of the Member States where entities of a group have been authorised or where systemically relevant branches as referred to in Article 42a are established, the consolidating supervisor shall, subject to Chapter 1, Section 2, alert as soon as is practicable the **central banks of the European System of Central Banks** and the authorities referred to ~~in the fourth subparagraph of Article 49 and in Article 50,~~ and shall communicate all information that is essential for the pursuance of their tasks. **These obligations** shall apply to all competent authorities under Articles 125 and 126 and to the competent authority identified under Article 129(1).

If a **central bank of the European System of Central Banks** ~~the authority referred to in the fourth subparagraph of Article 49~~ becomes aware of a situation described in the first subparagraph of this paragraph, it shall alert as soon as is practicable the competent authorities referred to in Articles 125 and 126.

Text proposed by the Commission	Amendments proposed by the ECB ⁽¹⁾
Where possible, the competent authority and the authority referred to in the fourth subparagraph of Article 49 shall use existing defined channels of communication.	Where possible, the competent authorities and the central banks of the European System of Central Banks authority referred to in the fourth subparagraph of Article 49 shall use existing defined channels of communication.
<i>Justification — See paragraph 19 of the opinion</i>	
<p>⁽¹⁾ Strikethrough in the body of the text indicates where the ECB proposes deleting text. Bold in the body of the text indicates where the ECB proposes inserting new text.</p>	