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(Resolutions, recommendations and opinions)

OPINIONS

EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 28 January 2011

on a proposal for a directive of the European Parliament and of the Council amending Directives 98/78/EC, 2002/87/EC and 2006/48/EC as regards the supplementary supervision of financial entities in a financial conglomerate

(CON/2011/6)

(2011/C 62/01)

Introduction and legal basis

On 30 September 2010, 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 98/78/EC, 2002/87/EC and 2006/48/EC as regards the supplementary supervision of financial entities in a financial conglomerate ⁽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 European System of Central Banks' contribution to the smooth conduct of policies relating to 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 observation

1. The ECB welcomes the main aim of the proposed directive, which is to ensure the appropriate scope of supplementary supervision of financial conglomerates, by closing the gaps that have evolved between the Union's supplementary supervision regime ⁽²⁾ and the sectoral directives relating to banking and insurance services.

Specific observations*Treatment of mixed financial holding companies*

2. The ECB welcomes the references to a 'mixed financial holding company' in the provisions of the sectoral directives defining the scope of consolidated banking supervision and group insurance supervision ⁽³⁾. This will allow the application of sectoral consolidated/group supervision, in addition to supplementary supervision, of a financial holding company or an insurance holding company which, as a result of an expansion of activities to another financial sector, becomes a mixed financial holding company. The ECB considers that supervisory insights related to sectoral activities achieved through consolidated/group supervision could indeed be usefully complemented by the understanding of cross-sectoral risks achieved through supplementary supervision. At the same time, efficient supervisory practices should be developed, which on the one hand will allow for all relevant risks to be incorporated in the supervision, and, on the other hand, will eliminate potential overlaps in supervision and preserve a level playing field. The ECB recommends ⁽⁴⁾ giving the European Supervisory Authorities (ESA) powers to adopt, through the Joint Committee, common guidelines in this respect.

Treatment of asset management companies

3. The ECB welcomes the explicit inclusion of asset management companies in the threshold tests for the identification of financial conglomerates⁽⁵⁾. The ECB recommends⁽⁶⁾ allocating asset management companies to the sector within the financial conglomerate with which they have the closest connection, to be further specified in supervisory guidelines. This solution will be superior from the perspective of risk-based assessment than the allocation to the 'smallest financial sector' foreseen by the proposed directive. Moreover, the ECB recommends⁽⁷⁾, as a consequence of the explicit inclusion of asset management companies in the supplementary supervision regime, involving the European Securities and Markets Authority, alongside the other ESA, in the development of guidelines promoting convergence of supervisory practices concerning supplementary supervision⁽⁸⁾. In this respect, the wording should be similar to that contained in Directive 2010/78/EU⁽⁹⁾, i.e. 'the relevant ESA, through the Joint Committee'. The involvement of all relevant ESA in the development of such guidelines should ensure that contagion, concentration and complexity issues and conflicts of interest are effectively addressed across all sectors and all regulated entities of a financial conglomerate. In the same vein, as regards supplementary supervision of internal control mechanisms and risk management processes⁽¹⁰⁾, Directive 2002/87/EC should require consistency of the supplementary supervision with the monitoring by the competent authorities of compliance with prudential rules established under the UCITS Directive⁽¹¹⁾. Such consistency is already required between the supplementary supervision and supervisory practices under the relevant provisions of the Banking Directive⁽¹²⁾ and the Solvency II Directive⁽¹³⁾.

Reporting formats

4. The ECB recommends⁽¹⁴⁾ applying harmonised formats, frequencies and dates of reporting, on the basis of implementing technical standards developed by the relevant ESA, through the Joint Committee⁽¹⁵⁾, for the reporting of the capital adequacy requirements calculated for the relevant entities of a financial conglomerate⁽¹⁶⁾. Such harmonisation should follow the model already in place in the banking sector, on the basis of a 2009 amendment to the Banking Directive⁽¹⁷⁾. The ECB understands that the work on harmonisation of reporting formats will continue, inter alia in connection with the needs generated by the implementation of the Basel III capital framework into Union law. The Eurosystem has a strong interest in this area based on its financial stability role and will follow the progress of this work in cooperation with the Commission.

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

Done at Frankfurt am Main, 28 January 2011.

The President of the ECB

Jean-Claude TRICHET

⁽¹⁾ COM(2010) 433 final.

⁽²⁾ Currently consisting 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 (OJ L 35, 11.2.2003, p. 1) and Directive 98/78/EC of the European Parliament and of the Council of 27 October 1998 on the supplementary supervision of insurance and reinsurance undertakings in an insurance or reinsurance group (OJ L 330, 5.12.1998, p. 1).

⁽³⁾ See amendments to Article 1 and Articles 2(2), 3(1), 4(2) and 10(2) and in Annexes I and II to Directive 98/78/EC introduced by Article 1 and Annex I of the proposed directive; see amendments to Articles 4, 71, 72, 84, 105, 125 to 127, 129 and 141 to 143 of 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 (recast) (OJ L 177, 30.6.2006, p. 1), introduced by Article 3 of the proposed directive.

⁽⁴⁾ See proposed amendment 3 in the Annex to this opinion.

⁽⁵⁾ See Articles 2(5) and 3(2), third subparagraph, of Directive 2002/87/EC, as introduced by Article 2(1) and (2) of the proposed directive.

⁽⁶⁾ See proposed amendment 1 in the Annex to this opinion.

⁽⁷⁾ See proposed amendment 2 in the Annex to this opinion.

- (⁸) See Articles 3(8), 7(5), 8(5), 9(6) and 11(5) of Directive 2002/87/EC, as introduced by Articles 2(2) and (4) to (7) of the proposed directive.
- (⁹) 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).
- (¹⁰) See Article 9 of Directive 2002/87/EC.
- (¹¹) Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32). Supervisory monitoring of asset management companies is referred to in Article 21(1) and Article 102(4)(a) of the UCITS Directive; it focuses on ensuring compliance with: (i) prudential rules required to be introduced by Article 12 with respect to asset management companies, and (ii) further rules set by Articles 17 and 18 with respect to offering of asset management services through branches and the provision of cross-border services.
- (¹²) Directive 2006/48/EC.
- (¹³) 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).
- (¹⁴) See proposed amendments 4 and 6 in the Annex to this opinion.
- (¹⁵) See Article 21a(2) of Directive 2002/87/EC, as introduced by Article 2(15) of Directive 2010/78/EU.
- (¹⁶) See Article 6(2) of Directive 2002/87/EC.
- (¹⁷) See Article 74(2), second subparagraph of Directive 2006/48/EC, as introduced by Article 1(14) of Directive 2009/111/EC of the European Parliament and of the Council of 16 September 2009 amending Directives 2006/48/EC, 2006/49/EC and 2007/64/EC as regards banks affiliated to central institutions, certain own funds items, large exposures, supervisory arrangements, and crisis management (OJ L 302, 17.11.2009, p. 97).
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ANNEX

Drafting proposals

Text proposed by the Commission	Amendments proposed by the ECB ⁽¹⁾
Amendment 1	
Article 2(2)(a)	
<p>(a) The following third subparagraph is added to paragraph 2:</p> <p>“Asset management companies within the meaning of Article 30 are added to the sector they belong to within the group; if they do not belong exclusively to one sector within the group, they are added to the smallest financial sector.”</p>	<p>(a) The following third subparagraph is added to paragraph 2:</p> <p>“Asset management companies within the meaning of Article 30 are added to the sector they belong to within the group; if they do not belong exclusively to one sector within the group, they are added to the smallest financial sector with which they have the closest connection.”</p>

Explanation

The present solution allocating asset management companies to the smallest sector in the financial conglomerate is not sufficiently risk-based. It should be replaced by the criterion of the ‘closest connection’, to be further specified through ESA common guidelines issued under Article 3(8) of Directive 2002/87/EC (see amendment 2).

Amendment 2

Article 2(2)(f)

<p>(f) The following paragraph 8 is added:</p> <p>“8. The European Banking Authority and the European Insurance and Occupational Pensions Authority shall issue common guidelines aimed at the convergence of supervisory practices with regard to the application of paragraphs 2, 3, 3a, 4 and 5 of this Article.”</p>	<p>(f) The following paragraph 8 is added:</p> <p>“8. The European Banking Authority, and the European Insurance and Occupational Pensions Authority relevant ESA, through the Joint Committee, shall issue common guidelines aimed at the convergence of supervisory practices with regard to the application of paragraphs 2, 3, 3a, 4 and 5 of this Article.”</p>
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Explanation

As a result of the explicit inclusion of asset management companies in the threshold tests for the identification of financial conglomerates, the European Securities and Markets Authority should be involved, alongside the other ESA, in the development of guidelines promoting convergence of supervisory practices concerning the supplementary supervision of financial conglomerates. The involvement of all relevant ESA in the development of such guidelines should ensure that contagion, concentration and complexity issues and conflicts of interest are effectively addressed across all sectors and all regulated entities of a financial conglomerate. The wording used in this respect (‘the relevant ESA, through the Joint Committee’) is similar to the model established by Directive 2010/78/EU. This amendment is linked to amendment 5.

Amendment 3

Article 2(2a) (new)

[No text.]	<p>(2a) The following paragraph 6 is added to Article 5:</p> <p>“6. The relevant ESA, through the Joint Committee, shall issue common guidelines aimed at developing supervisory practices allowing for supplementary supervision of financial holding companies to appropriately complement the group supervision under Directive 98/78/EC or, as appropriate, consolidated supervision under Directive 2006/48/EC, and which will allow all</p>
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Text proposed by the Commission	Amendments proposed by the ECB (1)
	<p>relevant risks to be incorporated in the supervision, while eliminating potential overlaps and preserving a level playing field”</p>

Explanation

Efficient supervisory practices should be developed to allow parallel application of sectoral consolidated/group supervision and supplementary supervision in relation to a mixed financial holding company. The relevant ESA, acting through the Joint Committee, should be given powers to adopt common guidelines in this respect.

Amendment 4

Article 2(2b) (new)

[No text.]	<p>‘(2b) The following sixth subparagraph is added in Article 6(2):</p> <p>“From [1 January 2013], the Member States shall require uniform formats, frequencies and dates for reporting of the calculations referred to in this Article, in accordance with the technical standards established in line with Article 21a(1)(d).”</p>
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Explanation

Similar to the Banking Directive, the reporting of the calculated capital adequacy requirements under Directive 2002/87/EC should follow harmonised formats, frequencies and dates of reporting. This amendment is linked to amendment 6.

Amendment 5

Article 2(4) to (7) and (10)

<p>(4) The following paragraph 5 is added to Article 7:</p> <p>“5. The European Banking Authority and the European Insurance and Occupational Pensions Authority shall issue common guidelines aimed at the convergence of supervisory practices with regard to the application of supplementary supervision of risk concentration as provided for in paragraphs 1 to 4. They shall issue specific common guidelines on the application of paragraphs 1 to 4 to participations of the financial conglomerate in cases where national company law provisions obstruct the application of Article 14(2).”</p> <p>(5) The following paragraph 5 is added to Article 8:</p> <p>“5. The European Banking Authority and the European Insurance and Occupational Pensions Authority shall issue common guidelines aimed at the convergence of supervisory practices with regard to the application of supplementary supervision of intra-group transactions as provided for in paragraphs 1 to 4. They shall issue specific common guidelines on the application of paragraphs 1 to 4 to participations of the financial conglomerate in cases where national company law provisions obstruct the application of Article 14(2).”</p>	<p>(4) The following paragraph 5 is added to Article 7:</p> <p>“5. The European Banking Authority, and the European Insurance and Occupational Pensions Authority relevant ESA, through the Joint Committee, shall issue common guidelines aimed at the convergence of supervisory practices with regard to the application of supplementary supervision of risk concentration as provided for in paragraphs 1 to 4. They shall issue specific common guidelines on the application of paragraphs 1 to 4 to participations of the financial conglomerate in cases where national company law provisions obstruct the application of Article 14(2).”</p> <p>(5) The following paragraph 5 is added to Article 8:</p> <p>“5. The European Banking Authority, and the European Insurance and Occupational Pensions Authority relevant ESA, through the Joint Committee, shall issue common guidelines aimed at the convergence of supervisory practices with regard to the application of supplementary supervision of intra-group transactions as provided for in paragraphs 1 to 4. They shall issue specific common guidelines on the application of paragraphs 1 to 4 to participations of the financial conglomerate in cases where national company law provisions obstruct the application of Article 14(2).”</p>
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Text proposed by the Commission	Amendments proposed by the ECB (1)
<p>(6) The following paragraph 6 is added to Article 9:</p> <p>“6. Competent authorities shall align the application of the supplementary supervision of internal control mechanisms and risk management processes as provided for in this Article with the supervisory review processes as provided for by Article 124 of Directive 2006/48/EC and Article 36 of Directive 2009/138/EC. To this end, the European Banking Authority and the European Insurance and Occupational Pensions Authority shall issue common guidelines aimed at the convergence of supervisory practices with regard to the application of supplementary supervision of internal control mechanisms and risk management processes as provided for in this Article, as well as on the consistency with the supervisory review processes as provided for by Article 124 of Directive 2006/48/EC and Article 36 of Directive 2009/138/EC. They shall issue specific common guidelines for the application of this Article to participations of the financial conglomerate, in cases where national company law provisions obstruct the application of Article 14(2).”</p>	<p>(6) The following paragraph 6 is added to Article 9:</p> <p>“6. Competent authorities shall align the application of the supplementary supervision of internal control mechanisms and risk management processes as provided for in this Article with the supervisory review processes as provided for by Article 124 of Directive 2006/48/EC and Article 36 of Directive 2009/138/EC, and with the monitoring by the competent authorities of compliance with prudential rules established under Article 12 of Directive 2009/65/EC. To this end, the European Banking Authority, and the European Insurance and Occupational Pensions Authority relevant ESA, through the Joint Committee, shall issue common guidelines aimed at the convergence of supervisory practices with regard to the application of supplementary supervision of internal control mechanisms and risk management processes as provided for in this Article, as well as on the consistency with the supervisory review processes as provided for by Article 124 of Directive 2006/48/EC and Article 36 of Directive 2009/138/EC, and with the monitoring by the competent authorities of compliance with prudential rules established under Article 12 of Directive 2009/65/EC. They shall issue specific common guidelines for the application of this Article to participations of the financial conglomerate, in cases where national company law provisions obstruct the application of Article 14(2).”</p>
<p>(7) The following paragraphs 4 and 5 are added to Article 11:</p> <p>“[...]”</p> <p>5. The European Banking Authority and the European Insurance and Occupational Pensions Authority shall issue common guidelines aimed at the consistency of supervisory coordination arrangements according to Article 131a of Directive 2006/48/EC and Article 248(4) of Directive 2009/138/EC.”</p> <p>[...]</p>	<p>(7) The following paragraphs 4 and 5 are added to Article 11:</p> <p>“[...]”</p> <p>5. The European Banking Authority, and the European Insurance and Occupational Pensions Authority relevant ESA, through the Joint Committee, shall issue common guidelines aimed at the consistency of supervisory coordination arrangements according to Article 131a of Directive 2006/48/EC and Article 248(4) of Directive 2009/138/EC.”</p> <p>[...]</p>
<p>(10) The following Article 21b is inserted:</p> <p>“Article 21b</p> <p>Common Guidelines</p> <p>The European Banking Authority and the European Insurance and Occupational Pensions Authority shall issue the common guidelines referred to in Article 3(3), Article 7(5), Article 8(5), Article 9(6) and Article 11(5) in accordance with the procedure laid down in Article 42 of the Regulation (EU) No .../... establishing the European Banking Authority, and in Article 42 of the Regulation (EU) No .../... establishing the European Insurance and Occupational Pensions Authority, following cooperation within the Joint Committee of the European Supervisory Authorities.”</p>	<p>(10) The following Article 21b is inserted:</p> <p>“Article 21b</p> <p>Common Guidelines</p> <p>The European Banking Authority, and the European Insurance and Occupational Pensions Authority relevant ESA, through the Joint Committee, shall issue the common guidelines referred to in Article 3(3), Article 7(5), Article 8(5), Article 9(6) and Article 11(5) in accordance with the procedure laid down in Article 4256 of the Regulation (EU) No: 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (the European Banking Authority), amending Decision No 716/2009/EC and repealing Commission</p>

Text proposed by the Commission	Amendments proposed by the ECB ⁽¹⁾
	<p>Decision 2009/78/EC, and in Article 4256 of the 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, and in Article 56 of 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, following cooperation within the Joint Committee of the European Supervisory Authorities.”</p>

Explanation

See the explanation under amendment 2, to which this amendment is linked. Moreover, as regards supplementary supervision of internal control mechanisms and risk management processes, the proposed amendment to Article 9(6) of Directive 2002/87/EC should require consistency of the supplementary supervision with the monitoring by the competent authorities of compliance with prudential rules established under the UCITS Directive. Such consistency is already required between the supplementary supervision and the supervisory practices under the relevant provisions of the Banking Directive and the Solvency II Directive.

Amendment 6

Article 2(9a) (new)

[No text.]	<p>(9a) The following point (d) is added to the first subparagraph of Article 21a(1):</p> <p>“(d) Article 6(2) in order to ensure uniform formats (with associated instructions), frequencies and dates of reporting.”</p>
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Explanation

See the explanation under amendment 4, to which this amendment is linked.

⁽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.