

III

(Preparatory acts)

EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 25 April 2012

on a proposal for a regulation of the European Parliament and of the Council on European venture capital funds and on a proposal for a regulation of the European Parliament and of the Council on European social entrepreneurship funds

(CON/2012/32)

(2012/C 175/05)

Introduction and legal basis

On 20 January 2012, the European Central Bank (ECB) received a request from the Council of the European Union for an opinion on a proposal for a regulation of the European Parliament and of the Council on European venture capital funds ⁽¹⁾ (hereinafter the 'proposed European venture capital funds regulation') and on a proposal for a regulation of the European Parliament and of the Council on European social entrepreneurship funds ⁽²⁾ (hereinafter the 'proposed EuSEF regulation') (hereinafter referred collectively as the 'proposed regulations').

The ECB's competence to deliver an opinion on the proposed regulations is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union, since the proposed regulations contain provisions with a bearing on the integration of European financial markets and affecting the European System of Central Banks' contribution to the smooth conduct of policies by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system under Article 127(5) of the Treaty. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

General observations

1. The proposed European venture capital funds regulation aims at overcoming the funding shortfalls that European small and medium-sized enterprises (SMEs) encounter in their start-up phases. As a large part of the funding of these companies originates from small funds, with an average size of EUR 60 million in assets under management, the regulation aims at improving the ability to raise capital across the EU. It establishes specific European venture capital funds with common characteristics under a single regulatory framework. This would provide certainty and transparency towards all stakeholders, including investors, regulators and the companies eligible for investments. The introduction of a single market passport, by which a fund registered in one Member State could market units and shares in other Member States, would reduce the administrative burden and limit regulatory barriers.
2. This framework is complemented by the proposed EuSEF regulation, which aims to stimulate funding for social business through the establishment of a new category of European social entrepreneurship funds (hereinafter 'EuSEFs'). This would help investors identify and compare funds investing in social business and broaden the possibilities of marketing these funds to international investors.

⁽¹⁾ COM(2011) 860 final.

⁽²⁾ COM(2011) 862 final.

3. The Europe 2020 strategy ⁽¹⁾ restated the need to engage in targeted regulatory action to improve SMEs' access to financing, in particular by addressing barriers that hinder the flow of venture capital financing by means of dedicated investment funds. The European Council endorsed this approach calling for the removal of remaining regulatory obstacles to cross-border flows of venture capital ⁽²⁾. As a result, the Commission announced in April 2011 an initiative to ensure that venture capital funds established in any Member State can raise capital throughout the EU ⁽³⁾.
4. The ECB has already noted the difficulties recently encountered by many SMEs in accessing finance, more than for large firms, especially at times of market stress ⁽⁴⁾. In facilitating access to funding for rapidly expanding SMEs and streamlining the applicable regulatory requirements, the ECB trusts that the proposed new regimes would contribute significantly to the development of an innovative and sustainable economy. Overcoming the fragmentation of the funding for innovative and socially-focused SMEs and fostering the emergence of an integrated and fluid, EU-wide financial market which would encourage and facilitate cross-border investment in these sectors is crucial for the successful and timely delivery of the Europe 2020 strategy.
5. Therefore, the ECB welcomes the proposed regulations which will introduce uniform requirements for funds operating under a single, European designation and an identical substantive regulatory framework, while ensuring adequate supervision. In this regard, the ECB notes several features that would contribute to achieving an appropriate and balanced regulatory framework: the voluntary nature of the regime ⁽⁵⁾, the cross-border notification process between the competent authorities ⁽⁶⁾, the rules governing the behaviour of a qualifying manager and disclosure requirements ⁽⁷⁾, as well as the provisions designed to ensure the effective supervision of the use of the passport ⁽⁸⁾.

Specific observations

6. The ECB supports the Commission's objective of ensuring the consistency of the proposed regulations with the existing regime for alternative investment funds managers under Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on alternative investment fund managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 ⁽⁹⁾. In this respect, the ECB welcomes the reference in the proposed regulations to the threshold in Directive 2011/61/EU ⁽¹⁰⁾, which introduces a limit of EUR 500 million of capital funds that would delineate the European venture capital funds and EuSEF regimes from the framework established by Directive 2011/61/EU.
7. The ECB notes that the above threshold aims to distinguish alternative investment funds managers with activities which could have 'significant consequences for financial stability' from those which are unlikely to do so and that the proposed regimes will apply to systemically non-important funds ⁽¹¹⁾.

⁽¹⁾ Communication from the Commission on 'Europe 2020 — A strategy for smart, sustainable and inclusive growth', COM(2010) 2020 final.

⁽²⁾ Conclusions of the European Council of 4 February 2011, paragraph 22.

⁽³⁾ Communication from the Commission on the 'Single Market Act — Twelve levers to boost growth and strengthen confidence — Working together to create new growth', COM(2011) 206 final, in particular point 2.1.

⁽⁴⁾ ECB Opinion CON/2012/21 of 22 March 2012 on: (i) a proposal for a directive on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council; (ii) a proposal for a regulation on markets in financial instruments and amending Regulation (EMIR) on OTC derivatives, central counterparties and trade repositories; (iii) a proposal for a directive on criminal sanctions for insider dealing and market manipulation; and (iv) a proposal for a regulation on insider dealing and market manipulation; (market abuse), paragraph 8. Not yet published in the Official Journal. The English version is available on the ECB's website at: <http://www.ecb.europa.eu>

⁽⁵⁾ Article 4 of the proposed European venture capital funds regulation and Article 4 of the proposed EuSEF regulation.

⁽⁶⁾ Articles 15 and 20(3) of the proposed European venture capital funds regulation and Articles 16 and 21(3) of the proposed EuSEF regulation.

⁽⁷⁾ Articles 7 to 12 of the proposed European venture capital funds regulation and Articles 7 to 13 of the proposed EuSEF regulation.

⁽⁸⁾ Articles 13 to 22 of the proposed European venture capital funds regulation/Articles 14 to 23 of the proposed EuSEF regulation.

⁽⁹⁾ OJ L 174, 1.7.2011, p. 1. Commission staff working paper — Impact assessment accompanying the proposal for a regulation of the European Parliament and of the Council on European venture capital funds, SEC(2011) 1515, p. 37.

⁽¹⁰⁾ Article 3(2)(b) of Directive 2011/61/EU.

⁽¹¹⁾ Recital 17 of Directive 2011/61/EU.

8. The scope of the proposed regulations is also conditioned by the requirement for all qualifying venture capital and social entrepreneurship funds to be unleveraged, to ensure that qualifying funds do not contribute to the development of systemic risks and that they concentrate on supporting qualifying portfolio companies ⁽¹⁾. Therefore, whilst the concept of leverage is fundamental to the business model implemented by many alternative investment fund managers ⁽²⁾, the ECB considers it appropriate to make explicit the exclusion of any possible leverage in the case of the proposed European venture capital funds and EuSEF regimes ⁽³⁾.

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

Done at Frankfurt am Main, 25 April 2012.

The President of the ECB

Mario DRAGHI

⁽¹⁾ Recital 13 of the proposed European venture capital funds regulation and recital 13 of the proposed EuSEF regulation.

⁽²⁾ Paragraph 11 of ECB Opinion CON/2009/81 of 16 October 2009 on a proposal for a directive of the European Parliament and of the Council on alternative investment fund managers and amending Directives 2004/39/EC and 2009/.../EC (OJ C 272, 13.11.2009, p. 1).

⁽³⁾ Article 5(2) of the proposed European venture capital funds regulation and Article 5(2) of the proposed EuSEF regulation.

ANNEX

Drafting proposals ⁽¹⁾

Text proposed by the Commission	Amendments proposed by the ECB ⁽¹⁾
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Amendment 1

Article 5(2) of the proposed European Venture Capital Funds regulation

<p>'2. The venture capital fund manager shall not borrow, issue debt obligations, provide guarantees, at the level of the qualifying venture capital fund, nor employ at the level of the qualifying venture capital fund any method by which the exposure of the fund will be increased, whether through borrowing of cash or securities, the engagement into derivative positions or by any other means.'</p>	<p>'2. The venture capital fund manager shall not borrow, issue debt obligations, provide guarantees, at the level of the qualifying venture capital fund, nor employ at the level of the qualifying venture capital fund any method by which the exposure of the fund will be increased, whether through borrowing of cash or securities, the engagement into derivative positions contracts or by any other means.'</p>
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Explanation

Engagement into derivative positions may also serve hedging purposes, in which case it would reduce risk exposure rather than increase it. Thus, while the ECB notes that the proposed wording is derived from the corresponding definition of Article 4(1)(v) of Directive 2011/61/EU, it suggests replacing the term 'derivative positions' with 'derivative contracts', in line with the wording in other current or proposed financial EU legislation, e.g. Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps ⁽²⁾, 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 and repealing Council Directive 93/22/EEC ⁽³⁾ and the proposals for regulations of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories ⁽⁴⁾ and on prudential requirements for credit institutions and investment firms ⁽⁵⁾.

Amendment 2

Article 6 of the proposed European Venture Capital Funds regulation

<p>'Venture capital fund managers shall market the units and shares of qualifying venture capital funds exclusively to investors which are considered to be professional clients in accordance with Section I of Annex II of Directive 2004/39/EC or may, on request, be treated as professional clients in accordance with Section II of Annex II of Directive 2004/39/EC, or to other investors where:'</p>	<p>'Venture capital fund managers shall market the units and shares of qualifying venture capital funds exclusively to investors which are considered to be professional clients in accordance with Section I of Annex II of Directive 2004/39/EC, unless they are treated on request as non-professional clients, or may, on request, be treated as professional clients in accordance with Section II of Annex II of Directive 2004/39/EC, or to other investors where all the following conditions are met:'</p>
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Explanation

Article 6 of the proposed European Venture Capital Funds regulation refers to 'professional clients in accordance with Section I of Annex II of Directive 2004/39/EC'. It is not clear what regime would be applicable to professional clients that are treated, on request, as non-professional clients under the same provision. To avoid confusion, the proposed amendment would align the concept of 'professional clients' in the proposed regulation with the definition in Annex II of Directive 2004/39/EC.

Furthermore, the regulation permits the marketing of European Venture Capital Funds to other investors, who must 'have the knowledge, experience and capacity to take on the risks these funds carry' ⁽⁶⁾. While the ECB considers that these criteria offer the necessary investor protection, it suggests ensuring that they are all made mandatory.

⁽¹⁾ The amendments to the proposed European Venture Capital Funds regulation apply, with the necessary changes, to the equivalent provisions in the proposed EuSEF regulation.

Text proposed by the Commission	Amendments proposed by the ECB (1)
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Amendment 3

Article 10a of the proposed European Venture Capital Funds regulation (new)

No current text	<p>'Article 10a</p> <p>Depository</p> <p>1. For each European venture capital fund it manages, the venture capital fund manager shall ensure that a single depository is appointed in accordance with this Article.</p> <p>2. The depository shall be an institution as defined in Article 21 of Directive 2011/61/EU.</p> <p>3. In order to ensure consistent application of paragraph 1, ESMA shall develop draft regulatory technical standards to specify the conditions for performing the European venture capital fund depository function. ESMA shall submit the draft regulatory technical standards to the Commission within six months following entry into force of this Regulation. Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.'</p>
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Explanation

In order to strengthen investor protection, the ECB suggests providing specifically for the appointment of a depository, in line with the framework adopted in Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings of collective investment in transferable securities (UCITS) (7) and Directive 2011/61/EU (8). However, the simplified scheme proposed here aims to ensure that any resulting obligations are proportionate to the nature and the size of the funds.

Amendment 4

Article 21(1) of the proposed European Venture Capital Funds regulation

'1. Competent authorities and ESMA shall cooperate with each other whenever necessary for the purpose of carrying out their respective duties under this Regulation.'	'1. Competent authorities, and ESMA shall cooperate with each other whenever necessary for the purpose of carrying out their respective duties under this Regulation and, as appropriate, with the European Systemic Risk Board. '
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Explanation

The ECB suggests, to be consistent with Article 50 of Directive 2011/61/EU, that cooperation between ESMA and competent authorities should also involve the ESRB, as appropriate.

Amendment 5

Article 22(2) of the proposed European venture capital funds regulation

'2. The competent authorities of the Member States or ESMA shall not be prevented from exchanging information in accordance with this Regulation or other Union law applicable to venture capital fund managers and qualifying venture capital funds.'	'2. The competent authorities of the Member States or ESMA shall not be prevented from exchanging information in accordance with this Regulation or other Union law applicable to venture capital fund managers and qualifying venture capital funds, whenever necessary, for the purpose of carrying out their duties under this Regulation or of exercising their powers under this Regulation or under national law. The competent authorities shall communicate information to the central banks, including the European Central Bank, and to the European Systemic Risk Board, where this information is relevant to the exercise of their tasks. '
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Text proposed by the Commission	Amendments proposed by the ECB ⁽¹⁾
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Explanation

This would ensure that central banks, including the ECB, as well as the ESRB, appropriately receive information relevant to the exercise of their tasks.

⁽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.

⁽²⁾ Article 1(b) and (c) and Article 2(1)(b)(iii) (OJ L 86, 24.3.2012, p. 24).

⁽³⁾ OJ L 145, 30.4.2004, p. 1. Article 2(1)(i) and Article 4(1).

⁽⁴⁾ COM(2010) 484 final. Article 1(1).

⁽⁵⁾ COM(2011) 452 final. Articles 211(1), 240(3), 250(1)(d), 256(1), 273(4), 321(1) and (2) and 335(4).

⁽⁶⁾ Recital 14 of the proposed European Venture Capital Funds regulation.

⁽⁷⁾ OJ L 302, 17.11.2009, p. 32. Articles 22 to 26 and 32 to 36.

⁽⁸⁾ Article 21.
