



## OPINION OF THE EUROPEAN CENTRAL BANK

of 12 September 2014

on the implementation of the European Bank Recovery and Resolution Directive

(CON/2014/67)

### **Introduction and legal basis**

On 25 July 2014, the European Central Bank (ECB) received a request from the German Federal Ministry of Finance (hereinafter the ‘Ministry of Finance’) for an opinion on the draft European Bank Recovery and Resolution Directive Implementation Act (hereinafter the ‘draft law’) which transposes Directive 2014/59/EU of the European Parliament and the Council<sup>1</sup> (hereinafter the ‘BRRD’) into German 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 on the third and sixth indents of Article 2(1) of Council Decision 98/415/EC<sup>2</sup>, as the draft law relates to the Deutsche Bundesbank and to rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets. For elements of the draft law the exclusive purpose of which is the transposition of Union law, the ECB’s competence to deliver an opinion is based on Article 25.1 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the ‘Statute of the ESCB’). 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**

The overall objective of the draft law is to create a framework for recovery and resolution planning of credit institutions and investment firms (hereinafter jointly referred to as ‘institutions’), and to provide an effective mechanism for their resolution, minimising risks to financial stability and costs for public budgets. To this end, the draft law implements the BRRD by putting in place a new Restructuring and Resolution Act covering the restructuring and resolution of institutions and financial groups and by

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<sup>1</sup> Directive 2014/59 of the European Parliament and the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EC, and Directives 2001/24/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and the Council (OJ L 173, 12.6.2014, p. 190).

<sup>2</sup> 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).

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providing for amendments to several legal acts, including the Act on a Restructuring Fund<sup>3</sup>, the Banking Act<sup>4</sup> and the Act on a Financial Market Stabilisation Fund<sup>5</sup>.

In addition, the draft law aims at reflecting changes in the distribution of competences in banking supervision due to the entry into force of Council Regulation (EU) No 1024/2013<sup>6</sup> and makes adjustments to existing legislation in this field.

In accordance with Article 25.1 of the Statute of the ESCB, the ECB may be consulted by the competent authorities of the Member States on the scope and implementation of Union legislation relating to the prudential supervision of credit institutions and to the stability of the financial system.

The key provisions of the draft law are set out below.

- (a) It designates the Federal Agency for Financial Market Stabilisation (FMSA) as the national resolution authority, while the Federal Financial Supervisory Authority (BaFin) retains its supervisory tasks as the national supervisory authority. It also facilitates the unobstructed flow of information between the FMSA and BaFin in the context of their cooperation, mutual assistance and consultation.
- (b) It requires institutions to draw up recovery plans. However, the supervisory authority may, with the agreement of the Deutsche Bundesbank, decide to subject institutions to simplified requirements or to exempt them from the obligation to draw up recovery plans altogether, subject to certain conditions relating to the institution's systemic relevance.
- (c) It empowers the supervisory authority to order early intervention measures in respect of institutions in breach or suspected breach of certain prudential requirements. Such measures should be appropriate and necessary in order to improve the institution's financial situation where this has been subject to rapid deterioration, and are not limited to those specifically listed in the draft law.
- (d) It provides that the resolution authority shall, in consultation with the supervisory authority, draw up resolution plans for all institutions, but may draw up simplified resolution plans for certain institutions taking into account their systemic relevance.
- (e) It lays down requirements and conditions under which institutions may enter into agreements to provide financial support to other group entities that meet the conditions for early intervention.
- (f) It sets out the conditions for the resolution of institutions, allowing both the supervisory and the resolution authority, following mutual consultation, to determine whether an institution is failing or likely to fail.

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<sup>3</sup> Act on a Restructuring Fund of 9 December 2010 (*Bundesgesetzblatt* I p. 1900, 1921) as amended by Article 3 of the Law of 20 December 2012 (*Bundesgesetzblatt* I S. 2777).

<sup>4</sup> Banking Act of 9 September 1998 (*Bundesgesetzblatt* I p. 2776) as amended by Article 1 of the Law of 15 July 2014 (*Bundesgesetzblatt* I p. 934).

<sup>5</sup> Act on a Financial Market Stabilisation Fund of 17 October 2008 (*Bundesgesetzblatt* I p. 1982) as amended by Article 6(7) of the Law of 28 August 2013 (*Bundesgesetzblatt* I p. 3395).

<sup>6</sup> Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

- (g) It confers wide-ranging resolution powers on the resolution authority and provides for resolution tools; in particular the sale of business tool, the bridge institution tool, the asset separation tool and the bail-in tool. However, the resolution authority may also take all other measures necessary to achieve the resolution objectives.
- (h) It extends the application deadline for new measures under the German Financial Market Stabilisation Fund (SoFFin) to the end of 2015 in order to cover the transitional period until the establishment of the Single Resolution Fund in 2016. Since the proposed Restructuring and Resolution Act is planned to enter into force on 1 January 2015, the bail-in tool will already apply during this transitional period and therefore provide for the possibility of shareholders and creditors being subject to bail-in before state aid is granted through SoFFin.
- (i) It adapts the national provisions on the definition of a competent authority and the distribution of supervisory competences in the light of Council Regulation (EU) No 1024/2013. However, the explanatory memorandum to the draft law states that it makes no change to the existing distribution of competences between BaFin and the Deutsche Bundesbank.

The draft law is planned to enter into force on 1 January 2015, with the exception of a number of provisions planned to enter into force on the day following its publication.

## **2. General observations**

- 2.1 The ECB welcomes the draft law, as it strengthens the tools and procedures available to the national authorities for effective preventive measures, early intervention in institutions and, if necessary, effective resolution of institutions, in line with the common framework of intervention powers and rules laid down in the BRRD.
- 2.2 The resolution tools and procedures will, in particular, help resolve failing banks while preserving financial stability, and help shield the public budget from resolution costs. The Ministry of Finance envisages that the provisions relating to the bail-in tool will enter into force on 1 January 2015<sup>7</sup>, and thus prior to the BRRD's transposition deadline of 1 January 2016. The Ministry of Finance thus seeks to ensure, in a timely fashion, that shareholders and creditors instead of public budgets will bear losses resulting from resolution.
- 2.3 The ECB notes that the draft law provides for cooperation between the competent authority and the FMSA in performing their respective tasks, each keeping in mind the impact of its performance on that of the other.

## **3. Specific observations**

### *3.1 Separation between supervision and resolution functions*

The explanatory memorandum to the draft law states that the FMSA as resolution authority will be incorporated into BaFin as supervisory authority as an 'agency-within-an-agency' at a later stage. The

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<sup>7</sup> See Article 8 of the draft law and Part 4 Chapter 2 Section 1 of the proposed Restructuring and Resolution Act.

draft law does not cover the detailed arrangements relating to this process, which will be decided on separately.

The BRRD ‘exceptionally’ allows one authority to carry out both resolution and supervisory functions on the condition that adequate structural arrangements are put in place in order to ensure operational independence and to avoid conflicts of interest between that authority’s resolution function and its other functions. For example, the BRRD envisages structural separation being achieved by keeping the reporting lines for staff involved in carrying out resolution tasks separate from those used by staff involved in supervision activities<sup>8</sup>.

Since it is important to ensure the operational independence of the resolution function and to avoid conflicts of interests between the resolution function and other functions, the ECB would appreciate being consulted on any future draft legal act that sets out detailed arrangements regarding the relationship between the FMSA and BaFin following the FMSA’s integration into the latter authority.

The draft law allows for the unobstructed flow of information between the two authorities in the framework of their cooperation, mutual assistance and consultation<sup>9</sup>. Such exchange of information is also possible between the two authorities and the Deutsche Bundesbank, insofar as the latter is involved in the supervision of institutions. The ECB welcomes that this provision ensures that under a future regime ensuring the separation of resolution and supervision functions within the framework of one authority, the resolution function will have equal access to any necessary information available to the supervisory function, and vice versa.

### 3.2 *Early intervention, intra-group financial support and recovery plans*

Section 36(4) of the proposed Restructuring and Resolution Act grants the Ministry of Finance the power to further specify, by way of a regulation, certain conditions that could trigger the use of early intervention measures and to sub-delegate this power to the resolution authority. Such sub-delegation to the resolution authority in the field of early intervention powers seems inappropriate given that the early intervention powers lie with the supervisory authority, which would therefore appear best placed to specify the relevant trigger conditions. The explanatory memorandum to the draft law states that the purpose of this provision is to provide for the ability to implement guidelines issued by the European Banking Authority (EBA) into German law. The EBA’s power to issue such guidelines in order to promote the consistent application of the trigger for early intervention measures is provided for in Article 27(4) of the BRRD. The ECB suggests that the question of which authority should be responsible for the implementation of these EBA guidelines should be reconsidered, and that a provision setting out the purpose of implementing them should be included in the legislative text itself and not only in the explanatory memorandum. The same concerns regarding an inappropriate empowerment of the resolution authority in areas where the supervisory authority is primarily competent arise with respect to the conditions on which intra-group financial support may be authorised<sup>10</sup>.

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<sup>8</sup> See Article 3(3) of the BRRD.

<sup>9</sup> See Section 6(1) of the proposed Restructuring and Resolution Act.

<sup>10</sup> See Section 30(2) of the proposed Restructuring and Resolution Act.

In addition, the ECB would like to emphasise that the competence to issue regulations delegated to the Ministry of Finance or another authority regarding early intervention and recovery plans is without prejudice to the ECB's powers under Article 4(1)(i) and Article 4(3) of Council Regulation (EU) No 1024/2013 to implement EBA guidelines and potentially issue further provisions concerning significant institutions in these areas.

### 3.3 *Resolution planning*

Section 40(2) and (3) of the proposed Restructuring and Resolution Act provide that resolution plans may not assume any access to or receipt of extraordinary public financial support that goes beyond the provision of funds as provided for in the Act on the Restructuring Fund, nor any emergency liquidity assistance provided by a central bank or any liquidity assistance provided by a central bank that is based on non-standardised collateral, maturities or interest rates, but shall include an analysis of how and when a distressed institution may apply for the use of central bank facilities. While acknowledging that these provisions are in line with the requirements of the BRRD, the ECB emphasises that they do not in any way affect the competence of central banks to decide independently and at their full discretion on the provision of central bank liquidity to solvent institutions, both through standard monetary policy operations and in emergency liquidity assistance, within the limits imposed by the monetary financing prohibition under the Treaty<sup>11</sup>.

### 3.4 *Conditions for resolution*

The ECB notes that the Ministry of Finance has made use of the possibility provided for in the BRRD to allow both the supervisory authority or the resolution authority, following mutual consultation, to determine whether an institution is failing or likely to fail<sup>12</sup>.

### 3.5 *Amendments to the Banking Act*

#### 3.5.1 *Definition of competent authority*

By inserting a new Section 1(5) into the Banking Act, the draft law introduces a new definition of 'competent authority' in the light of Council Regulation (EU) No 1024/2013<sup>13</sup>. However, subparagraph 1 of the new Section 1(5), which outlines the scope of the ECB's competence, only includes the ECB's tasks under Article 4(1) of Council Regulation (EU) No 1024/2013 and omits those conferred on it under Article 4(2). This provision therefore requires amendment in order to fully reflect the tasks conferred on the ECB by Council Regulation (EU) No 1024/2013.

#### 3.5.2 *Distribution of national competences within the Single Supervisory Mechanism*

The ECB understands that the existing distribution of competences and tasks between BaFin and the Deutsche Bundesbank provided for in Section 7(1) of the Banking Act will continue to apply within the framework of the Single Supervisory Mechanism (SSM) where the national authorities will cooperate with and assist the ECB under Council Regulation (EU) No 1024/2013<sup>14</sup>. The ECB notes, however, that

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<sup>11</sup> See paragraph 3.2 of Opinion CON/2012/99. All ECB opinions are available on the ECB website at [www.ecb.europa.eu](http://www.ecb.europa.eu).

<sup>12</sup> See Section 62(2) of the proposed Restructuring and Resolution Act.

<sup>13</sup> See Article 2 (2) of the draft law.

<sup>14</sup> See the explanatory memorandum to the draft law relating to the new Section 7(1a) of the Banking Act.

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the proposed wording of the new Section 7(1a) of the Banking Act is ambiguous in this respect, as it only refers to BaFin's direct support of the ECB within the framework of the SSM, without reflecting the Deutsche Bundesbank's competence in relation to the ongoing monitoring of institutions. In accordance with Article 2(9) of Regulation (EU) No 468/2014 of the European Central Bank<sup>15</sup>, the ECB will interact and cooperate directly with the Deutsche Bundesbank in its field of supervisory responsibility. For the sake of legal certainty and since the close involvement of national central banks in prudential supervision is a condition for the Eurosystem to contribute effectively to monitoring the risks to financial stability in the euro area, the ECB therefore suggests that the proposed Section 7(1a) of the Banking Act should clarify that the competences laid down in Section 7(1) of the Banking Act also apply with regard to significant credit institutions subject to the ECB's direct supervision pursuant to Council Regulation (EU) No 1024/2013. Cooperation and the distribution of tasks within the SSM need to be clearly regulated to ensure efficient cooperation and timely exchange of relevant information among the authorities involved in banking supervision. This will support the effective performance of their tasks and thereby contribute to the smooth functioning of the SSM.

### *3.5.3 Notifications by significant institutions*

The draft law amends Sections 24 and 24a of the Banking Act and requires institutions under the ECB's direct supervision to submit notifications directly to the ECB and provide copies of such notifications to the Deutsche Bundesbank and BaFin at the same time. The explanatory memorandum to the draft law justifies this amendment on the basis of the need to bring the provisions in line with Article 95(1) of Regulation (EU) No 468/2014. While it is correct that Article 95(1) requires, as a general rule, that significant institutions should address notifications directly to the ECB, the Regulation also contains exceptions to this rule. For example, notifications relating to the suitability of members of the management bodies of significant institutions must be made to national supervisory authority and not to the ECB<sup>16</sup>. Moreover, it should also be noted that the provisions of Regulation (EU) No 468/2014 generally also oblige the receiving authority to inform the other relevant authority. The ECB therefore sees a need for the national law to accurately reflect the provisions laid down in Regulation (EU) No 468/2014 for the sake of legal clarity and to avoid any duplication or additional burden on institutions.

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

Done at Frankfurt am Main, 12 September 2014.

[signed]

*The President of the ECB*

Mario DRAGHI

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<sup>15</sup> Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (OJ L 141, 14.05.2014, p. 1).

<sup>16</sup> Articles 93 and 94 of Regulation (EU) No. 648/2014.