



EUROPEAN CENTRAL BANK

EUROSYSTEM

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ECB-PUBLIC

OPINION OF THE EUROPEAN CENTRAL BANK

of 1 February 2016

on the recovery and resolution of credit institutions and investment firms

(CON/2016/5)

Introduction and legal basis

On 22 December 2015, the European Central Bank (ECB) received a request from the Cypriot Ministry of Finance for an opinion on three draft laws. The first relates to the resolution of credit institutions and investment firms (hereinafter the 'draft Law on resolution'). The second concerns a draft law on the business of credit and other institutions (hereinafter the 'draft Law on credit institutions') and the third relates to a draft law on a deposit guarantee scheme and the resolution of credit and other institutions (the 'draft Law on a deposit guarantee scheme') (hereinafter collectively referred to as the 'draft laws').

The ECB's competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union and the third and sixth indents of Article 2(1) of Council Decision 98/415/EC¹, as the draft laws relate to the Central Bank of Cyprus (CBC) and rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

1. Purpose of the draft laws

- 1.1 The purpose of the draft laws is to implement Directive 2014/59/EU of the European Parliament and of the Council² and some provisions of Directive 2014/49/EU of the European Parliament and of the Council³ into Cypriot law, which will provide a new framework for the recovery and resolution of certain types of entities active in financial markets, including credit institutions, investment firms, and financial holding companies established in Cyprus. Such an implementation will ensure that Cypriot law is consistent with existing Union legislation in this field. The draft laws regulate the procedures to be applied by the authorities in relation to the recovery and resolution of credit and financial institutions at both individual and group level.

¹ 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).

² Directive 2014/59/EU of the European Parliament and of 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/EEC, and Directives 2001/24/EC, 2002/47/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 of the Council (OJ L 173, 12.6.2014, p. 190).

³ Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (OJ L 173, 12.6.2014, p. 149).

- 1.2 Cyprus had already established a comprehensive framework of this type in 2013, on which framework and its subsequent amendments the ECB had been consulted⁴ prior to Directive 2014/59/EU and Directive 2014/49/EU being adopted. After Directive 2014/59/EU was adopted as the new European framework for the recovery and resolution of credit institutions and investment firms, it became necessary to replace some of the existing Cypriot legislation with a new framework that uniformly addresses all the issues associated with the potential failure of entities in the financial sector. Therefore, the draft laws propose to repeal two existing laws in this field, i.e. the Law on the resolution of credit and other institutions of 2013 and 2014⁵ and the Law on the establishment and operation of a deposit protection and resolution of credit and other institutions scheme⁶. According to the draft Law on resolution, all the resolution measures that are still in force, which were taken on the basis of the Law on the resolution of credit and other institutions of 2013 and 2014, will be considered as measures adopted on the basis of the draft Law on resolution upon its adoption, and will continue to be in force until they are completed, repealed or cancelled⁷.
- 1.3 The CBC is the competent authority for the supervision of credit institutions in Cyprus and was designated as the national resolution authority for those institutions under the above legislative framework. Pursuant to the draft Law on resolution the CBC will be also designated as the resolution authority for investment firms, which are supervised by the Cyprus Securities and Exchange Commission.
- 1.4 The tools available to the CBC include preparatory measures, early intervention measures and the possibility to write down or convert capital instruments. The resolution tools may be applied, *mutatis mutandis*, to both credit institutions and investment firms.
- Preparatory measures include recovery plans and group financial support agreements. Credit and financial institutions are required to draw up recovery plans, which are then reviewed and assessed by the CBC. The CBC may also require these recovery plans to be updated⁸. The resolution authority for each institution that is not part of a group subject to consolidated supervision is responsible for drawing up resolution plans for these institutions. These institutions, as well as the groups themselves, are subject to resolvability assessments by the resolution authority.
 - Early intervention measures include updating and implementing recovery plans, requesting that management be removed and special administration.
 - Capital write-down measures concern the power to write down or convert to equity the capital instruments of a distressed institution that would otherwise be non-viable, either outside of or as part of a resolution. These powers are vested in the CBC⁹.

4 See Opinions CON/2013/10 and CON/2014/60. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

5 Law on the resolution of credit and other institutions 2013 and 2014 (L.17(I)/2013, L.38(I)/2013, L.97(I)/2013 and L.90(I)/2014).

6 Law on the establishment and operation of a deposit protection and resolution of credit and other institutions scheme (L.16(I) 2013).

7 Article 115(1) of the draft Law on resolution.

8 See Article 23A of the draft Law on credit institutions.

9 Article 30(1) of the draft Law on resolution and Article 32D of the draft Law on credit institutions.

- Regarding resolution measures, institutions that are failing or likely to fail and meet the other resolution conditions are put into resolution whereby: (a) their shares, ownership instruments, assets, rights or liabilities may be transferred to a purchaser; (b) their shares or other ownership instruments may be transferred to a bridge institution; (c) their assets, rights, or liabilities may be transferred to an asset management vehicle company; and/or (d) they may be subject to bail-in¹⁰. Subject to Regulation (EU) No 806/2014 of the European Parliament and of the Council¹¹ the CBC's decision to place an institution into resolution or take other resolution action is subject to the prior approval of the Minister for Finance in cases where the decision has a direct fiscal impact or systemic implications¹². The CBC may require institutions to pay all operating expenditures and costs incurred during the performance of its responsibilities and powers, such as administrative and operating expenditures, the costs of legal and consultancy services and any outsourcing costs¹³.
- 1.5 A resolution fund will be available in order to achieve resolution objectives. Under the draft Law on a deposit guarantee scheme, there will be a fund for the resolution of credit and other institutions (hereinafter the 'resolution fund'), which is one of the funds managed under the scheme for deposit guarantee and resolution of credit and other institutions operating in Cyprus (hereinafter the 'DGS')¹⁴. From 1 January 2016, the contributions that credit institutions established in Cyprus make to the resolution fund have been transferred to the Union's single resolution fund in accordance with the provisions of the Agreement on transfer and mutualisation of contributions to the single resolution fund¹⁵. The DGS, which is a separate legal entity, administers the resolution fund, the deposit guarantee fund for credit institutions and the deposit guarantee fund for credit cooperatives. The funds are managed by an independent commission of five members that includes the CBC Governor, who chairs the Commission, two CBC employees and two employees from the Ministry of Finance¹⁶. The funds are financed by: (a) ordinary ex ante and extraordinary ex post contributions levied on institutions licensed in Cyprus; (b) loans or other types of financial support from credit institutions, financial institutions or other third parties, in the event that the amounts collected are not sufficient to cover losses and resolution costs; and (c) proceeds from sanctions and the liquidation of assets.

¹⁰ Article 42 of the draft Law on resolution.

¹¹ Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, p. 1).

¹² Article 4 of the draft Law on resolution.

¹³ Article 8 of the draft Law on resolution.

¹⁴ Pursuant to Article 4(1)(b) of the draft Law on a deposit guarantee scheme, one of the DGS' objectives is 'financing through the Resolution Fund, the adoption of resolution measures as provided in this Law and the Law on resolution of credit and other institutions'. The Cypriot DGS was set up under the Law on the establishment and operation of a deposit protection and resolution of credit and other institutions scheme (L.16(I)/2013) and other related laws and regulations. For a summary description of the DGS see paragraph 1.4 of Opinion CON/2013/10. The draft Law on a deposit guarantee scheme aims to amend that legal framework in order to implement Directive 2014/59/EU and Directive 2014/49/EU in Cyprus.

¹⁵ Article 11(2) of the draft Law on a deposit guarantee scheme. The Agreement can be found on the Council's website at www.consilium.europa.eu.

¹⁶ Article 6(2) and Part III of the draft Law on a deposit guarantee scheme.

- 1.6 In accordance with the ‘no creditor worse off’ principle, shareholders or creditors that have incurred greater losses in a resolution than they would have incurred in a winding-up under normal insolvency proceedings are entitled to the payment of the difference from the resolution fund¹⁷. The CBC is required to undertake a separate independent assessment for this purpose as soon as possible after the resolution action is taken¹⁸.
- 1.7 Procedural requirements ensure that resolution measures are properly notified and that the authorities involved in resolution and their staff are subject to a confidentiality regime. The CBC, as resolution authority, and other competent authorities are required to cooperate with each other. Additionally, all competent authorities involved in a resolution are required to provide one another, upon request, with all the relevant information to carry out their tasks. The CBC is authorised to impose administrative measures and administrative sanctions for violation of the draft Law on resolution and measures taken thereunder¹⁹.
- 1.8 The liability of the CBC Governor, the Minister of Finance, the members of the CBC Board of Directors and CBC staff is limited to actions conducted in bad faith, gross negligence and wilful misconduct²⁰. The liability of the Board of Directors members and senior managers of entities that results from the application of resolution tools, e.g. a bridge institution or asset management company, as well as the liability of any other person authorised to act for the CBC under the draft Law on resolution, is also limited to gross negligence, bad faith and wilful misconduct²¹.

2. General observations

- 2.1 The ECB welcomes the draft laws, as they strengthen the tools and procedures available to the CBC to carry out effective preventive measures, early intervention and effective resolution in line with the common framework of intervention powers, rules and procedures laid down in Directive 2014/59/EU.
- 2.2 The ECB stresses, however, that it does not opine on whether the draft laws effectively implement Directive 2014/59/EU and Directive 2014/49/EU into Cypriot law. The ECB focuses instead on those provisions that may impact on the roles and tasks of the CBC as a central bank and as a member of the European System of Central Banks (ESCB), as well as those provisions that may impact the specific tasks conferred on the ECB by Council Regulation (EU) No 1024/2013²².
- 2.3 The ECB underlines that it has developed guidance, set out in paragraphs 2.5.1 to 2.5.3, on the basis of which it may decide whether a new task conferred on an ESCB national central bank (NCB) is to be considered a central banking task or a governmental task for the purposes of assessing such a conferral against the prohibition of monetary financing under Article 123 of the

17 Article 77 of the draft Law on resolution.

18 Article 76(1) (a) of the draft Law on resolution.

19 Article 108 of the draft Law on resolution.

20 Article 111 of the draft Law on resolution.

21 Article 112 of the draft Law on resolution. This limitation of liability continues to apply after the end of such an appointment or the accomplishment of such a task.

22 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).

Treaty²³. This guidance applies to genuinely new tasks that either did not exist in the past or did not form an integral part of the central banking tasks previously assigned to the NCB. The tasks currently discharged by an NCB as central banking tasks are not reviewed and re-categorised, but may be reassessed if they are subject to substantive legislative amendments.

2.4 In this regard, the ECB notes that the CBC has had extensive powers to take specific resolution measures in relation to credit institutions since 2013²⁴. The ECB also notes that the draft Law on a deposit guarantee scheme does not confer new tasks on CBC in connection with the operation of the deposit guarantee fund for credit institutions and the deposit guarantee fund for credit cooperatives. The draft Law on resolution extends the existing powers and responsibilities of the CBC as the resolution authority for credit institutions, and complements the CBC's responsibilities by also designating it as the resolution authority for investment firms. Whilst the CBC has powerful tools to intervene in distressed financial institutions, such as credit institutions and credit cooperatives, which pose a risk to financial stability, principally in the form of a special administration regime, the draft Law on resolution extends the resolution tools, such as the bail-in, bridge institution and asset management vehicle tools, to investment firms. The draft Law on resolution should therefore be assessed in the light of the prohibition of monetary financing.

2.5 The concrete assessment of whether the CBC's task of acting as a resolution authority for investment firms is to be considered a central banking task or a governmental task is then undertaken in paragraph 3.4 of this opinion.

2.5.1 *General considerations*

First, the principle of financial independence requires that the Member States may not put their NCBs in a position where they have insufficient financial resources to carry out their ESCB- or Eurosystem-related tasks.

Second, central banking tasks comprise in particular those tasks that are related to the tasks listed in Article 127(2), (5) and (6) of the Treaty.

Third, new tasks conferred on an NCB that are atypical of an NCB's tasks, or which are clearly discharged on behalf of and in the exclusive interest of the government or of other public entities, should be considered as governmental tasks. In that context, a distinction should be drawn between the liquidity- and solvency-related tasks of NCBs. Whereas for the purposes of the prohibition of monetary financing, solvency support is a governmental task; liquidity-related tasks that have the ultimate objective of financing the economy are central banking tasks.

2.5.2 *Specific considerations*

Resolution tasks can be considered central banking tasks, provided that they do not undermine an NCB's independence in accordance with Article 130 of the Treaty. However, the discharge of these tasks by central banks may not extend to the financing of resolution funds or other resolution financial arrangements as these are governmental tasks²⁵. This is without prejudice to the possibility that: (a) central banks may provide short-term financing to deposit guarantee schemes

²³ See paragraph 2.3 of Opinion CON/2015/22.

²⁴ See Opinion CON/2013/10.

²⁵ See paragraph 2.3.2 of Opinion CON/2015/22.

under certain conditions; and (b) NCBs may provide emergency liquidity assistance to solvent credit institutions.

An important criterion for qualifying a new task as a governmental task is therefore the impact of the task on the institutional, financial and personal independence of the NCB. In particular, the following should be taken into account.

First, it should be assessed whether the performance of the new task creates inadequately addressed conflicts of interests with existing central banking tasks, and does not necessarily complement those existing central banking tasks. If a conflict of interest arises between existing and new tasks, there should be sufficient mitigation in place to adequately address that conflict. Complementarity between the new task and existing central banking tasks should not, however, be interpreted extensively, so as to lead to the creation of an indefinite chain of ancillary tasks. Complementarity should also be examined from the point of view of the financing of those tasks.

Second, it should be assessed whether without new financial resources the performance of the new task is disproportionate to the financial or organisational capacity of the NCB and may negatively impact on its capacity to properly perform existing central banking tasks.

Third, it should be assessed whether the performance of the new task fits into the institutional set-up of the NCB in the light of central bank independence and accountability considerations.

Fourth, it should be assessed whether the performance of the new task harbours substantial financial risks.

Fifth, it should be assessed whether the performance of the new task exposes the members of the NCB's decision-making bodies to political risks which are disproportionate and may also impact on their personal independence and, in particular, the guarantee of the term of office under Article 14.2 of the Statute of the European System of Central Banks and of the European Central Bank.

- 2.5.3 Any final assessment on the qualification of a task given to an NCB as either falling within the scope of a central banking task or a governmental task will be guided by the objective of ensuring the consistent application of the prohibition of monetary financing within the Eurosystem and the ESCB to the extent that it applies to its members.

3. Specific Observations

3.1 *Role of Minister for Finance in decision making on resolution*

The draft Law on resolution provides that subject to Regulation (EU) No 806/2014, the CBC's decision to place an institution into resolution or take other resolution action is subject to the prior approval of the Minister for Finance in cases where the decision has a direct fiscal impact or systemic implications²⁶. The draft Law on resolution also stipulates that the CBC Board of Directors shall have the authority to exercise the responsibilities and powers of the resolution authority in

²⁶ See footnote 12.

accordance with this Law and Regulation (EU) No 806/2014²⁷. The ECB understands therefore that the Minister's prior approval may only be required before the resolution authority takes a resolution action which has a direct fiscal impact or systemic implications and not when the Single Resolution Board takes a resolution decision in accordance with Regulation (EU) No 806/2014. Accordingly, national ministerial approval should in no event delay or hinder effective resolution action by the Single Resolution Board.

3.2 *Topping up the funds managed under the DGS*

The draft Law on a deposit guarantee scheme provides that the funds can be financed through loans and other forms of financial support in the event that ordinary ex ante and extraordinary ex post contributions are not immediately accessible or sufficient²⁸. However, the draft Law on a deposit guarantee scheme does not further specify: (a) the financial institutions or the third parties that are allowed to provide financial support; (b) the nature of eligible financial support arrangements; or (c) the terms and conditions of any such arrangements. As the ECB has repeatedly stated in the past, in line with the prohibition of monetary financing, an NCB may not finance any resolution fund. Where an NCB acts as resolution authority, it should in no event assume or finance any obligation of either a bridge institution or asset management vehicle²⁹. In the same vein, any national legislation that provides for a deposit guarantee scheme to be financed by an ESCB NCB would only be compatible with the prohibition of monetary financing under Article 123 of the Treaty where certain restrictive conditions are met, i.e. such financing is short-term, it addresses urgent situations, systemic stability issues are at stake and decisions are made at the NCB's discretion³⁰. The ECB expects these conditions to be fulfilled with regard to any potential involvement by the CBC in the alternative funding arrangements of the DGS.

3.3 *Structural arrangements within the CBC to ensure operational independence and avoid conflicts of interests*

In observance of the principle of organisational autonomy, the CBC is expected to implement measures to ensure operational independence between the tasks related to crisis management and its other tasks as well as to establish mechanisms for cooperation and coordination between the different structures and authorities involved.

3.4 *Conferral of new resolution tasks on the CBC*

In addition to expanding the CBC's existing resolution powers in respect of credit institutions in line with Directive 2014/59/EU, the draft Law on resolution designates the CBC as the resolution authority for investment firms, broadening its existing responsibilities so as to include the power to propose placing investment firms into resolution and to take resolution measures in respect of such entities. In the light of the guidance set out in paragraphs 2.5.1 to 2.5.3, it must be assessed

²⁷ Article 4(1) of the draft Law on resolution.

²⁸ See Article 15(b) of the draft Law on a deposit guarantee scheme. In the case of a group resolution, Article 13(2) of that draft law provides that the DGS may enter into loan agreements, or receive other forms of support from institutions or other third parties, or guarantee any loans entered into through financial arrangements at group level.

²⁹ See the ECB's 2014 Convergence Report, p. 30.

³⁰ See the ECB's 2014 Convergence Report, p. 30. See also paragraph 3.2 of Opinion CON/2015/40; paragraph 4.1 of Opinion CON/2015/17; paragraph 2.2 of Opinion CON/2014/86; and paragraph 3.1.3 of Opinion CON/2011/76.

whether the CBC's new tasks and responsibilities in this field could constitute a breach of the prohibition of monetary financing.

3.4.1 *Principle of financial independence*

The principle of financial independence requires NCBs to have sufficient means to carry out not only their ESCB-related tasks from an operational and financial point of view, but also their national tasks³¹. In this respect the ECB notes that the provisions of the draft laws authorise the CBC in its capacity as a resolution authority to require institutions to pay all the operating expenditures and costs incurred during the performance of its responsibilities and powers in order to safeguard the CBC's financial independence³².

3.4.2 *Links to tasks listed in Article 127(2), (5) and (6) of the Treaty*

Administrative resolution tasks are considered tasks related to those referred to in Article 127(5) of the Treaty, based on the understanding that administrative resolution tasks and supervisory tasks complement each other. In the case of the extension of CBC's responsibility to resolution tasks in respect of investment firms, such new tasks may also be considered related to tasks under Article 127(5) of the Treaty by analogy with the complementarity of the CBC's resolution tasks in respect of credit institutions and credit cooperative institutions with that of its existing supervisory and financial stability tasks.

3.4.3 *Atypical tasks*

A number of Member States have conferred on their NCBs a significant role in the resolution of credit and financial institutions, whether as the resolution authority or as a competent authority, in the decision-making process for resolution. The ECB has generally welcomed the allocation of such tasks to NCBs provided they do not interfere financially and operationally with the performance of the NCB's ESCB-related tasks³³. The new resolution tasks of the CBC in respect of investment firms can therefore be regarded as being tasks not atypical of a central bank, particularly if, as in the case of the CBC, it already had tools to intervene in distressed financial institutions that pose a risk to financial stability.

3.4.4 *Discharge of tasks on behalf of and in the exclusive interest of the Government or of other public entities*

Whilst the CBC is designated as the sole resolution authority and takes resolution measures acting as an administrative authority in the exercise of public functions in its own name, and not on behalf of any other authority, it is required, before placing a credit or financial institution into resolution or taking other resolution action to obtain the prior approval of the Minister for Finance where the decision has a direct fiscal impact or systemic implications. This provision implements Article 3(6) of Directive 2014/59/EU and ensures that the CBC has ultimate control over any decision related to a resolution matter that could affect the CBC's financial independence. There is no indication that

31 See the ECB's Convergence Report, 2014, p. 25.

32 See Article 8 of the draft Law on resolution.

33 See paragraphs 2.1, 2.3 and paragraph 3.2.4 of Opinion CON/2015/22, paragraph 4.1 of Opinion CON/2014/60, paragraph 2.1 of Opinion CON/2013/73, paragraph 2.3 of Opinion CON/2011/72, paragraph 2.2 of Opinion CON/2011/83, and paragraph 2.2 of Opinion CON/2011/39.

in discharging its resolution function the CBC acts exclusively in the interest of another public entity.

3.4.5 *Extent to which conflict of interests with existing tasks are addressed*

Pursuant to existing law and the draft Law on resolution³⁴, the CBC will adopt and publish all the relevant internal rules in order to ensure that there is no conflict of interest and that the operational and organisational independence of the department carrying out resolution functions from the CBC's other tasks is respected. The ECB expects the CBC's internal rules to adequately address potential conflicts of interest between the resolution function and the CBC's other tasks, particularly in connection with the resolution of credit institutions. With regard to the CBC's resolution functions in respect of investment firms, conflicts of interest should be avoided when the Cyprus Securities and Exchange Commission is the supervisory authority for investment firms.

3.4.6 *Extent to which the performance of tasks is proportionate to the CBC's financial and operational capacity and its ability to perform its ESCB-related tasks*

The conferral of these tasks on the CBC raises questions concerning the operational capacity of the CBC. The CBC will need to ensure that there are the necessary resources, including adequate staff and skills, which are essential for the performance of its new functions as the resolution authority for investment firms. The CBC should ensure that its capacity to perform its ESCB-related tasks and existing supervisory functions will not be affected by the assumption of these new tasks.

3.4.7 *Extent to which the performance of tasks involves substantial financial risks*

The draft Law on resolution provides that the liability of the CBC's Governor, the Minister of Finance, the members of the CBC Board of Directors and CBC staff is limited to actions conducted in bad faith, gross negligence and to wilful misconduct.³⁵ The draft Law on resolution, however, does not set out the CBC's liability regime. This could result in financial risks for the CBC due to potential liability issues. The ECB considers that it would be useful to align the CBC's liability regime with the liability regime relating to these individuals under the draft Law on resolution.

3.4.8 *Conclusion*

The ECB considers that there are grounds for regarding the CBC's expanded resolution tasks as central banking tasks, in the sense that they complement the CBC's existing supervisory and resolution functions. The fact that the CBC may require institutions to pay all the operating expenditures and costs incurred during the performance of its responsibilities safeguards the CBC's financial independence. However, the CBC will need to ensure that the extension of its tasks to cover the resolution of investment firms will not affect its capacity to perform its ESCB-related and supervisory tasks and that there are adequate resources and staff for the performance of its new responsibilities. In addition, the CBC's liability regime should be aligned with the liability regime of the Governor, the Minister of Finance, the members of the CBC Board of Directors and CBC staff in order to limit potential liability issues that could present financial risks for the CBC.

³⁴ Article 6(3)(b) of the draft Law on resolution.

³⁵ Article 111 of the draft Law on resolution.

3.5 *Cooperation and exchange of information between the resolution authority and other relevant authorities, including the Cyprus Securities and Exchange Commission.*

The draft Law on resolution provides for cooperation and the exchange of information between the CBC and the competent supervisory authorities, including the Cyprus Securities and Exchange Commission, in order to perform their respective tasks, each keeping in mind the impact of their performance on the other³⁶. The ECB welcomes these provisions as they will enable the relevant authorities to perform their statutory tasks in a coordinated fashion.

3.6 *Resolution planning*

The draft Law on resolution stipulates that when the CBC evaluates resolution plans for specific institutions, it must not assume that extraordinary public financial support will be granted, other than the use of resources from the resolution fund. There shall be no assumption that general central bank emergency liquidity assistance or specific central bank liquidity assistance provided under non-standard collateralisation, tenor and interest rates terms will be granted³⁷. While this appears to be in line with the requirements of Directive 2014/59/EU, the ECB emphasises that these provisions do not in any way affect the competence of central banks to decide independently and in their full discretion on the provision of central bank liquidity to solvent institutions, both through standard monetary policy operations and emergency liquidity assistance, within the limits imposed by the prohibition of monetary financing under the Treaty³⁸.

3.7 *Establishment of a bridge institution*

Pursuant to the draft Law on resolution, the CBC approves a bridge institution's (or asset management vehicle company's) memorandum of association and articles of association, the appointment of the members of its management and supervisory bodies, their remuneration and any conferral of delegations, and may impose restrictions on its activity to ensure compliance with applicable legislation on State aid. In this respect, the ECB underlines that under Regulation (EU) No 1024/2013's provisions on the ECB's responsibilities with regard to the authorisation of a credit institution to be established in a participating Member State³⁹, the ECB is the only authority with the power to grant the banking licence necessary for the bridge institution to have access to the activity of credit institutions, irrespective of the context and the size of the institution which is being created. Additionally, if the bridge institution is not able to comply with the requirements for authorisation from the intended start of its operations, then the resolution authority shall request a temporary exemption from some or all of these requirements. As the competent authority, the ECB will assess the request and if it decides to grant such an authorisation, it will indicate the period for which the bridge institution is waived from complying with the relevant requirements⁴⁰.

³⁶ See Article 84, Article 85(4) to (5) and Article 89 of the draft Law on resolution.

³⁷ Articles 10(3)(b) and 18(1)(a) of the draft Law on resolution.

³⁸ See paragraph 3.2 of Opinion CON/2012/99 and paragraph 3.3 of Opinion CON/2014/67.

³⁹ See Articles 4 and 14 of Regulation (EU) No 1024/2013.

⁴⁰ See Article 41(1) of Directive 2014/59/EU.

3.8 *Determination of failing or likely to fail*

The draft Law on resolution stipulates that the CBC, acting as resolution authority, will have to be consulted on the determination of whether an institution is failing or likely to fail in the event of the national competent authority (NCA) making a determination in line with the first alternative listed in Article 32(1)(a) of Directive 2014/59/EU⁴¹. Directive 2014/59/EU assigns the failing or likely to fail assessment, as a rule, to the respective supervisory authority, i.e. the ECB or NCAs, in line with the distribution of competences under Regulation (EU) No 1024/2013. Additionally, pursuant to Article 9(1)(2), Article 4(1)(e) and Article 4(3) of Regulation (EU) No 1024/2013 and Article 104(1)(b) of Directive 2013/36/EU of the European Parliament and of the Council⁴², the ECB shall have all the powers of the competent and designated authorities under the applicable Union law to ensure compliance with these Union law requirements by significant institutions⁴³. According to Article 18(1), read in conjunction with Article 7(2), (4)(b) and (5) of Regulation (EU) No 806/2014, it is the ECB, after consulting the Single Resolution Board (SRB), which shall make the failure or likely to fail assessment for credit institutions falling within the competence of the SRB for the adoption of a resolution scheme from 1 January 2016.

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

Done at Frankfurt am Main, 1 February 2016.

[signed]

The President of the ECB

Mario DRAGHI

⁴¹ See Article 42(1)(a) of the draft Law on resolution.

⁴² Directive 2013/36/EU of 26 June 2013 of the European Parliament and of the Council on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 138).

⁴³ See paragraph 3.3 of Opinion CON/2015/19.