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(Resolutions, recommendations and opinions)

OPINIONS

EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 16 February 2011

on a proposal for a directive of the European Parliament and of the Council on deposit guarantee schemes (recast) and on a proposal for a directive amending Directive 97/9/EC of the European Parliament and of the Council on investor-compensation schemes

(CON/2011/12)

(2011/C 99/01)

Introduction and legal basis

On 22 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 on deposit guarantee schemes (recast) ⁽¹⁾ (hereinafter the 'proposed recast directive'). On 30 September 2010, the ECB received a request from the Council for an opinion on a proposal for a directive amending Directive 97/9/EC of the European Parliament and of the Council on investor-compensation schemes ⁽²⁾ (hereinafter the 'proposed amending 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 recast directive and the proposed amending directive contain 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 observations

1. The ECB welcomes the aim of the proposed recast directive to provide a comprehensive, more harmonised framework for deposit guarantee schemes (DGSs). The ECB appreciates that the proposed recast directive will incorporate many of the recommendations made in: (a) ECB Opinion CON/2008/70 ⁽³⁾ concerning an earlier proposal for amendments to Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit guarantee schemes ⁽⁴⁾; and (b) the Eurosystem's contribution to the public consultation of the European Commission on the review of

⁽¹⁾ COM(2010) 368 final.

⁽²⁾ COM(2010) 371 final.

⁽³⁾ ECB Opinion CON/2008/70 on amendments to the Directive on deposit guarantee schemes as regards the coverage level and the payment delay (OJ C 314, 9.12.2008, p. 1).

⁽⁴⁾ OJ L 135, 31.5.1994, p. 5. The amending proposals commented on in Opinion CON/2008/70 were adopted as Directive 2009/14/EC of the European Parliament and of the Council of 11 March 2009 amending Directive 94/19/EC on deposit guarantee schemes as regards the coverage level and the payout delay (OJ L 68, 13.3.2009, p. 3).

Directive 94/19/EC⁽⁵⁾. The ECB appreciates the incorporation in the proposed recast directive of its recommendations to: (a) further harmonise the eligibility criteria and coverage levels for deposit guarantees⁽⁶⁾; (b) strengthen the information requirements imposed on credit institutions concerning the scope of deposit protection granted through relevant DGSs⁽⁷⁾; and (c) introduce partial *ex ante* funding arrangements for all DGSs⁽⁸⁾. The ECB considers those elements of the DGS regulatory framework as crucial from a financial stability perspective.

2. The ECB also notes that the Report from the European Commission accompanying the proposed recast directive⁽⁹⁾ considers the development of further Union-level arrangements for the coordination of deposit guarantees after the specified target level for their funds is reached. At the same time, the recent Commission Communication on an EU framework for crisis management in the financial sector⁽¹⁰⁾ refers to the synergies which may be explored between DGSs and the newly established resolution funds for financial institutions. 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.

3. The ECB acknowledges that the proposed amending directive introducing the update of Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes⁽¹¹⁾ will enhance harmonisation of investor-compensation schemes in the Union. While the ECB does not provide detailed comments on this legislative instrument, it considers it important that the Union regulatory framework continues to be based on the assumption of different risk profiles of depositors and investors.

Specific observations on DGSs

Scope of coverage

4. The proposed recast directive will require all credit institutions to become members of DGSs offering deposit guarantees under harmonised conditions⁽¹²⁾ and to be funded, in principle, by individual *ex ante* contributions of DGS members. The ECB considers that such harmonised arrangements are necessary to ensure a level playing field in the context of the Union's single market for financial services. The Basel Committee on Banking Supervision (BCBS) also supports a possibly wide membership of DGSs⁽¹³⁾. At the same time, the ECB acknowledges the long-standing successful functioning in some Member States of mutual and voluntary schemes, which achieve deposit protection through arrangements other than pre-defined deposit guarantees, e.g., through mutual bail-out arrangements. The ECB understands that the proposed recast directive is not intended to limit the continuing capacity of the mutual and voluntary schemes to offer protection to their member institutions in a manner characteristic to such schemes, which would be provided in parallel to the deposit guarantees that clients of such member institutions will be offered in accordance with the proposed recast directive. In this context, the ECB welcomes the 10-year phase-in period for

⁽⁵⁾ See 'The Eurosystem's stance on the Commission's consultation document on the review of Directive 94/19/EC on deposit guarantee schemes', August 2009 (hereinafter the '2009 Eurosystem's contribution'), available on the ECB's website at <http://www.ecb.europa.eu>

⁽⁶⁾ See p. 4 of the 2009 Eurosystem's contribution.

⁽⁷⁾ See p. 7 of the 2009 Eurosystem's contribution.

⁽⁸⁾ See p. 12 of the 2009 Eurosystem's contribution.

⁽⁹⁾ See Report from the Commission to the European Parliament and to the Council 'Review of Directive 94/19/EC on deposit guarantee schemes' of 12.7.2010, COM(2010) 369 final, p. 4.

⁽¹⁰⁾ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of Regions and the European Central Bank, 'An EU framework for crisis management in the financial sector' of 20.10.2010, COM(2010) 579 final (hereinafter the 'Commission Communication on crisis management'), Section 5.2, p. 15; see also the last sentence of recital 22 of the proposed recast directive and Section 7.4, p. 8 of the explanatory memorandum to the proposed recast directive.

⁽¹¹⁾ OJ L 84, 26.3.1997, p. 22.

⁽¹²⁾ See Article 3(1) of the proposed recast directive.

⁽¹³⁾ See BCBS, 'Core Principles for Effective Deposit Insurance Systems. A proposed methodology for compliance assessment', consultative document of 25 November 2010 issued for comment by 8 December 2010 (hereinafter, the 'BCBS Consultative Document'), p. 15 ('Principle 8 — Compulsory membership'), available at the BCBS's website at <http://www.bis.org>

achieving the target level of *ex ante* funding set in the proposed recast directive with a view to alleviating the strain put on credit institutions not previously obliged to pay DGS contributions⁽¹⁴⁾.

5. The ECB recommends⁽¹⁵⁾ that the exclusion of deposits held by public authorities from the regime of the proposed recast directive should use the more precise original language of Directive 94/19/EC, and hence should refer to 'government and central administrative authorities' and 'provincial, regional, local and municipal authorities'⁽¹⁶⁾.

Repayment period

6. The ECB welcomes the principle of further reducing the repayment periods for guaranteed deposits⁽¹⁷⁾. Nevertheless, achieving the proposed reduction to 7 days may prove difficult since it is to be introduced shortly after the original reduction to 20 working days, which was to be implemented by the Member States until the end of 2010⁽¹⁸⁾. The ECB recommends⁽¹⁹⁾ that the proposed recast directive is amended to the effect that the Commission will (i) prepare a review: on the implementation of the original reduction to 20 working days; and (ii) based on the results of the review, formulate proposals as regards a possible additional reduction or reductions of the repayment period.

Financing

7. According to the proposed recast directive, a DGS must achieve *ex ante* funding at the level defined as a percentage of eligible deposits within a 10-year phase-in period⁽²⁰⁾. The ECB welcomes the introduction of a explicit target level of *ex ante* funding, which considerably enhances financial stability and the level playing field by shifting the burden of DGS financing to the member credit institutions, i.e. to entities controlling the risks that DGSs insure. The ECB understands that the level of *ex ante* financing is the subject of a debate conducted as part of the Union legislative process. The ECB recommends⁽²¹⁾ that such *ex ante* financing level be defined by reference to 'covered deposits', i.e. eligible deposits not exceeding the coverage level⁽²²⁾, considering that covered deposits reflect the level of DGS liabilities more adequately than eligible deposits.
8. As regards calculating individual contributions of DGS members, the ECB welcomes in principle the proposed model of partial risk-based contributions, with provisions ensuring comparability of various asset classes⁽²³⁾. This model, following recommendations of the Commission's Joint Research Centre⁽²⁴⁾, is aimed at keeping the calculation sufficiently simple to allow comparability of individual contributions, while applying a number of relevant core (risk-based) and supplementary (not risk-based) indicators. The ECB recommends⁽²⁵⁾ that the proposed recast directive provides for detailed elements of the calculation methodology to be further specified through technical standards and guidelines developed by the European Banking Authority (EBA), based on verified empirical data and promoting equal treatment.
9. If *ex ante* funding is insufficient to reimburse depositors, the proposed recast directive sets out three steps for additional *ex post* funding. The ECB has the following observations in this respect:

⁽¹⁴⁾ See the second subparagraph of Article 20(1) in connection with the third subparagraph of Article 9(1), and Article 2(1)(h) of the proposed recast directive; see also Section 7.4, p. 7 of the explanatory memorandum to the recast directive; see also recital 16 of the proposed recast directive and Section 7.5, p. 8 of the explanatory memorandum to the proposed recast directive.

⁽¹⁵⁾ See proposed amendment 2 in the Annex to this Opinion.

⁽¹⁶⁾ See points 3 and 4 of Annex I to Directive 94/19/EC.

⁽¹⁷⁾ See the first subparagraph of Article 7(1) of the proposed recast directive.

⁽¹⁸⁾ See Article 10 of Directive 94/19/EC, as amended by Article 1(6)(a) in connection with the second subparagraph of Article 2(1) of Directive 2009/14/EC.

⁽¹⁹⁾ See proposed amendment 3 in the Annex to this Opinion.

⁽²⁰⁾ See footnote 14.

⁽²¹⁾ See proposed amendment 1 in the Annex to this Opinion.

⁽²²⁾ Article 2(1)(c) of the proposed recast directive.

⁽²³⁾ See Article 11 and Annexes I and II of the proposed recast directive.

⁽²⁴⁾ European Commission Joint Research Centre (June 2009), 'Possible Models for risk-based contributions to EU deposit guarantee schemes'.

⁽²⁵⁾ See proposed amendment 4 in the Annex to this Opinion.

- 9.1. As a first step, DGS members will be required to pay extraordinary contributions, of up to 0,5 % of eligible deposits⁽²⁶⁾. The ECB welcomes this solution, which engages the financial sector itself in meeting extraordinary demands, hence limiting moral hazard incentives inherent in DGS arrangements and providing the grounds for effective peer pressure.
- 9.2. As a second step, a mutual borrowing scheme may be activated, allowing any DGS functioning in a Member State to lend out to another such DGS up to 0,5 % of its eligible deposits and to be repaid with interest within five years⁽²⁷⁾. The ECB notes that the activation of cross-border borrowing arrangements between DGSs might lead to cases where a lending DGS is later faced with having to cover its own repayment needs or where the borrowing DGS has a wider range of functions than the lending DGS, e.g., where it has the powers to recapitalise or give loans to a failing credit institution in its Member State. Hence, the ECB welcomes the limitations introduced by the proposed recast directive, including the restriction that the borrowed funds may only be used for payment of depositor claims⁽²⁸⁾. The ECB understands that at the present stage of the legislative discussion on the proposed recast directive, the borrowing arrangements between DGSs would be on a voluntary basis. Further elements that should be considered in the regulation of this issue include: (i) the minimum prerequisites for activating the borrowing arrangements related to the exhaustion of other financing sources by the borrowing DGS; and (ii) the conditions under which the loan may be extended, including repayment safeguards for the lending DGS. At the same time, whether the DGS should use their funds for crisis management purposes, outside the narrow boundaries of reimbursing depositors, is subject to wider debate⁽²⁹⁾. The ECB considers that this question should be addressed by the legislative work initiated by the Commission Communication on crisis resolution.
- 9.3. As a third step, the DGS should have alternative funding arrangements in place as a last resort. However, the ECB notes that as far as potential central bank involvement is concerned, funding arrangements for DGSs must comply with the monetary financing prohibition laid down in the Treaty, and in particular with the prohibition of national central banks providing overdraft facilities or any other type of credit facility within the meaning of Article 123 of the Treaty, as further defined through the secondary Union legislation and established ECB guidance⁽³⁰⁾.
10. The ECB understands that it is being considered whether the original proposal to impose limits as regards the accumulated amount of deposits and investments of a DGS related to a single body⁽³¹⁾ could be withdrawn. The ECB considers that any such potential investment limits need to be assessed, *inter alia*, in the context of the impact they may have on markets for the instruments of the specific asset classes. In this respect, specific considerations may apply in relation to DGS investments in instruments issued by the public sector entities of the Member States.
11. Finally, the ECB supports from a financial integration perspective the provision of the proposed recast directive under which credit institutions ceasing to be a member of a scheme and joining another scheme will have their contributions for the last six months reimbursed or transferred to the new scheme⁽³²⁾. This provision may facilitate the reorganisation of cross-border credit institutions. Nevertheless, to avoid any potential abuse, the arrangement should be limited to the transfer of the paid contributions to the new scheme (excluding the possibility of reimbursement) and should not include extraordinary contributions paid to cover the original DGS's insufficient resources⁽³³⁾.

⁽²⁶⁾ See Article 9(3) of the proposed recast directive.

⁽²⁷⁾ See Article 10 of the proposed recast directive.

⁽²⁸⁾ See Article 10(1)(d) of the proposed recast directive.

⁽²⁹⁾ See the BCBS Consultative Document, p. 33.

⁽³⁰⁾ See p. 11 of the 2009 Eurosystem's contribution.

⁽³¹⁾ Article 9(2) of the proposed recast directive.

⁽³²⁾ See Article 12(3) of the proposed recast directive.

⁽³³⁾ See proposed amendment 5 in the Annex to this Opinion.

Supervision

12. The ECB welcomes that the supervision of DGSs by Member States will be enhanced by stress tests and that these will be subject to peer reviews executed by the EBA and the European Forum of Deposit Insurers⁽³⁴⁾. The fact that the EBA will receive information from DGSs and competent authorities, especially as regards the financing of DGSs and cross-border lending between DGSs, may help to ensure a level playing field and address some of the concerns discussed above related to such cross-border borrowing arrangements.

Drafting proposals

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

Done at Frankfurt am Main, 16 February 2011.

The President of the ECB

Jean-Claude TRICHET

⁽³⁴⁾ See Article 3(6) of the proposed recast directive.

ANNEX

Drafting proposals

Text proposed by the Commission	Amendments proposed by the ECB (1)
Proposed ECB amendments to the proposed Directive of the European Parliament and of the Council on Deposit Guarantee Schemes (recast)	

Amendment 1

Article 2(1)(h) of the proposed recast directive

'(h) "target level" means 1,5 % of eligible deposits for the coverage of which a Deposit Guarantee Scheme is responsible;'	'(h) "target level" means 1,5 % of eligible covered deposits for the coverage of which a Deposit Guarantee Scheme is responsible;'
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Explanation

The ex ante financing level should be defined by reference to 'covered deposits', i.e. eligible deposits not exceeding the coverage level, considering that covered deposits reflect the level of DGS liabilities more accurately than eligible deposits.

Amendment 2

Article 4(1)(j) of the proposed recast directive

'(j) deposits by authorities;'	'(j) deposits by government and central administration authorities, and provincial, regional, local and municipal authorities;'
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Explanation

The exclusion of the deposits of public authorities should be formulated using the more precise language, originally used in this respect in Directive 94/19/EC.

Amendment 3

Article 7(1) of the proposed recast directive

'1. Deposit Guarantee Schemes shall be in a position to repay unavailable deposits within 7 days of the date on which the competent authorities make a determination as referred to in Article 2(1)(e)(i) or a judicial authority makes a ruling as referred to in Article 2(1)(e)(ii).'	'1. Deposit Guarantee Schemes shall be in a position to repay unavailable deposits within 7 20 working days of the date on which the competent authorities make a determination as referred to in Article 2(1)(e)(i) or a judicial authority makes a ruling as referred to in Article 2(1)(e)(ii). By [1 April 2012], the Commission shall submit to the European Parliament and to the Council a report, based on a consultation: (a) reviewing the implementation of the reduction of the repayment period to 20 working days; and (b) based on the results of such review, assessing the feasibility of any additional reduction or reductions of the repayment period.'
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Explanation

Achieving the proposed reduction to 7 days may prove difficult since it is to be introduced shortly after the original reduction to 20 working days, for which the implementation deadline was the end of 2010. The proposed recast directive should foresee that the Commission will review the implementation of the original reduction to 20 working days and propose the time frame for the additional reduction or reductions of the repayment period, based on the results of such review.

Text proposed by the Commission	Amendments proposed by the ECB ⁽¹⁾
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Amendment 4

Article 11(3) to (5) of the proposed recast directive

<p>3. Paragraph 2 shall not apply to Deposit Guarantee Schemes referred to in Article 1(2).</p> <p>4. In order to ensure specify the elements of definitions and methods under Annex II Part A, powers are delegated to the Commission. These draft regulatory standards shall be adopted in accordance with Articles 7 to 7d of [EBA Regulation]. The European Banking Authority may develop draft regulatory standards for submission to the Commission.</p> <p>5. By 31 December 2012, the European Banking Authority shall issue guidelines on the application of Annex II Part B pursuant to [Article 8 of the EBA Regulation].'</p>	<p>3. Paragraph 2 shall not apply to Deposit Guarantee Schemes referred to in Article 1(23).</p> <p>4. Powers are delegated to the Commission to adopt regulatory technical standards in order to ensure specifying the elements of definitions and methods for the calculation of core risk indicators under Annex II Part A, powers are delegated to the Commission. These draft regulatory technical standards shall be adopted in accordance with Articles 710 to 7d14 of [EBA Regulation] (EU) No 1093/2010. The European Banking Authority may develop draft regulatory standards for submission to the Commission.</p> <p>The Commission shall in particular take into account that the calculation methods for the risk-weighted contributions should be based on verified empirical data and should promote equal treatment.</p> <p>5. By [31 December 20112] the European Banking Authority (EBA) shall issue guidelines on the application of supplementary risk indicators under Annex II Part B pursuant to {Article 8 of the EBA Regulation (EU) No 1093/2010}.'</p>
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Explanation

The proposed calculation method for risk-weighted contributions to DGS is the subject of a debate. Assigning the EBA with the development of guidelines and technical standards in this respect will allow for an adequate method to be elaborated, based on verified technical data, while promoting equal treatment.

Amendment 5

Article 12(3) of the proposed recast directive

<p>3. If a credit institution ceases to be member of a scheme and joins another scheme, the contributions paid during the 6 months preceding the withdrawal of membership shall be reimbursed or transferred to the other scheme. This shall not apply if a credit institution has been excluded from a scheme pursuant to Article 3(3).'</p>	<p>3. If a credit institution ceases to be member of a scheme and joins another scheme, the contributions, excluding any extraordinary contributions referred to in Article 9(3), which were paid by such a credit institution during the 6 months preceding the withdrawal of membership, shall be reimbursed or transferred to the other scheme. This shall not apply if a credit institution has been excluded from a scheme pursuant to Article 3(3).'</p>
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Explanation

To avoid any potential abuse of this provision, the transfer of the contributions to a new scheme should not relate to extraordinary contributions paid to cover the original DGS's insufficient resources, while the reimbursement of the paid contributions should be excluded.

⁽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.