III

(Preparatory acts)

EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 29 November 2012

on a proposal for a directive establishing a framework for recovery and resolution of credit institutions and investment firms

(CON/2012/99)

(2013/C 39/01)

Introduction and legal basis

On 10 July 2012, 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 establishing a framework for recovery and resolution of credit institutions and investment firms and amending Council Directives 77/91/EEC and 82/891/EEC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EU and Regulation (EU) No 1093/2010 [1] (hereinafter the 'proposed directive'). On 27 July 2012, the ECB received a request from the European Parliament for an opinion on the proposed directive.

The ECB's competence to deliver an opinion on the proposed directive is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union since the proposed directive contains provisions affecting the contribution by the European System of Central Banks (ESCB) to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system, the definition and implementation of the monetary policy of the Union and the promotion of the smooth operation of payment systems. 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

The ECB fully supports the development of a recovery and resolution framework and the removal of obstacles to effective crisis management at financial institutions. All financial institutions should be allowed to fail in an orderly manner, safeguarding the stability of the financial system as a whole and minimising public costs and economic disruption. The ECB supports in particular a Union resolution framework for credit institutions and investment firms to maintain financial stability in the Union and consequently guarantee the functioning of the single market also in times of crisis. For this purpose, the development of common support tools to manage the failure of financial institutions — such as recovery and resolution plans, as well as a bridge bank, bail-in, sale of business and asset separation tools — is crucial. The ECB welcomes that the proposal is in line with internationally agreed key attributes of effective resolution regimes for financial institutions [2], which call for the convergence of national resolution regimes with adequate tools and powers for effective resolution. The implementation of these key attributes allows timely intervention to ensure the continuity of essential functions.

[1] COM(2012) 280 final.

[2] See 'Key Attributes of Effective Resolution Regimes for Financial Institutions', October 2011, available on the Financial Stability Board's website (http://www.financialstabilityboard.org) and Basel Committee on Banking Supervision, 'Report and Recommendations of the Cross-border Bank Resolution Group', March 2010, available on the Bank for International Settlements' website (http://www.bis.org).

The ECB is of the view that the directive, a very important step towards an integrated resolution framework for the Union, should be adopted rapidly. At the same time, further steps will be required to create a single resolution mechanism, one of three banking union pillars. Accordingly, the ECB calls on the Commission to urgently present a separate proposal for an independent European Resolution Mechanism, including aspects of a common European Resolution Fund. This Fund would, as a minimum, be financed by the financial institutions. Consistency among these three pillars is crucial to the success of a financial market union.

SPECIFIC OBSERVATIONS

1. Definition of resolution

The proposed directive defines resolution as the restructuring of an institution in order to ensure the continuity of its essential functions, preserve financial stability and restore the viability of all or part of that institution ([1]). The ECB is of the view that resolution requires a clear hierarchy. In this context, institutions that are failing or likely to fail should in principle, subject to a decision by resolution authorities, be resolved using resolution tools when deemed necessary and in the public interest, including the prevention of systemic risk. If the resolution authority assesses there is no public interest concern, the institution should be liquidated under the insolvency proceedings normally applicable to such institutions under national law. Finally, restructuring in a going concern resolution should only be considered when justified by the public interest of preserving financial stability and where the orderly resolution of a credit institution would have seriously damaging effects on the stability of the financial system, with heightened risk of contagion across borders. The proposed directive should clarify that the aim of resolution is not to preserve the failing institution as such, but to ensure the continuity of its essential functions ([2]).

2. Conditions for resolution and assessment of the need for extraordinary financial public support

2.1. The proposed directive provides that one of the conditions for resolution action is that the competent authority or the resolution authority determines that the institution is failing or likely to fail ([3]). The ECB is of the view that the responsibilities for determining whether an institution is failing or likely to fail should be clearly allocated to the competent authority in the interest of prompt and efficient resolution action.

2.2. The proposed directive further provides that an institution's need for State aid is an indicator that it is failing or likely to fail. However, the same article of the proposed directive provides that two specific types of State aid do not constitute such an indicator ([4]). While supporting the proposed maximum duration of such State aid ([5]), the ECB notes that a considerable number of credit institutions and investment firms currently receiving State aid would be considered failing or likely to fail on the basis of the above indicator. The ECB considers that the determination of the circumstances in which an institution is failing or likely to fail should be based only on an assessment of the prudential situation of an institution. Thus, a particular need for State aid should not, in itself, establish an adequate objective criterion ([6]). Instead, the circumstances underlying the granting of State aid would be comprised in the assessment of the institution's prudential situation.

3. Involvement of central banks in recovery and resolution

3.1. Central banks have a responsibility for macro-prudential and financial stability, as well as expertise on financial markets. In this respect, they should be involved in the resolution process, contributing to the achievement of resolution objectives while minimising the risks of negative unintended effects on performance of central bank tasks and on the operation of payment and settlement systems. In

([1]) See Article 2(1) of the proposed directive.
([2]) See the ESCB contribution to the EC's public consultation on the technical details of a possible EU framework for bank recovery and resolution, May 2011, pp. 4 and 5. All ECB documents referred to are available on the ECB's website (http://www.ecb.europa.eu). See also the ECB's proposed Amendment 3.
([3]) See Article 27(1)(a) of the proposed directive.
([4]) See Article 27(2)(d)(i) and (ii) of the proposed directive.
([5]) See Article 27(2)(d), second paragraph, of the proposed directive.
([6]) See Article 27(2)(d) of the proposed directive read in conjunction with Article 2(26). See also proposed Amendments 2 and 8.

this context, central banks may play a role in the assessment of recovery and resolution plans from a financial stability perspective, such as the likelihood of triggers that could lead to disorderly deleveraging. Central banks may also be associated to the assessment of the potential action of the resolution authority, given that one of the main objectives is to avoid systemic disruptions ([1]). The ECB therefore deems it necessary that Member States ensure that, where the central bank is not itself the resolution authority, the competent authority and the resolution authority engage in an adequate exchange of information with the central bank ([2]).

3.2. The proposed directive provides that recovery plans drawn up and maintained by an institution for the restoration of its financial situation following significant deterioration shall not assume any access to or receipt of extraordinary public financial support. However, they shall include, where applicable, an analysis of how and when an institution may apply for the use of central bank facilities in stressed conditions and with available collateral ([3]). The ECB wishes to underline that this provision should 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 credit institutions, both in standard monetary policy operations as well as emergency liquidity assistance, within the limits imposed by the monetary financing prohibition under the Treaty ([4]).

3.3. The proposed directive requires each Member State to include in its resolution 'tool box' the power to establish and operate a bridge institution and an asset management vehicle. The proposed directive provides that a bridge institution will be wholly or partially owned by one or more public authorities and that an asset management vehicle will be wholly owned by one or more public authorities, which may include the resolution authority itself ([5]). Where a central bank acts as resolution authority ([6]), it should be clear, for the avoidance of doubt, that the central bank will in no event assume or finance any obligation of these entities. A central bank's role as owner of such an entity must remain consistent under all circumstances with the prohibition on monetary financing under Article 123 of the Treaty, as supplemented by Council Regulation (EC) No 3603/93 ([7]). This prohibits, inter alia, any financing by a central bank of the public sector's obligations vis-à-vis third parties. Moreover, this role must be performed without prejudice to central bank independence, in particular its financial and institutional independence.

3.4. The ECB notes that the proposed directive contains only minimal criteria which bridge institutions and asset management vehicles must satisfy to be established by the public authorities. The ECB would stress that transparent financing is one of the main issues affecting legitimacy and accountability for use of public funds, which the Eurosystem is interested in safeguarding. In this respect, the ECB welcomes that the proposed directive provides that resolution costs should in principle be borne by shareholders and creditors and where these funds are not sufficient, by financing arrangements ([8]). However, the ECB stresses that, in line with the prohibition on monetary financing, central banks may not finance these financing arrangements. In particular this affects the enumeration of alternative funding means ([9]) in the proposed directive ([10]).

([1]) See also the ESCB contribution to the EC's public consultation on the technical details of a possible EU framework for bank recovery and resolution, May 2011, p. 6, paragraph 9.
([2]) In this respect, Article 74(3)(b) of the proposed directive is a step in the right direction, but does not suffice to ensure the appropriate amount of information sharing and cooperation. See also proposed Amendments 4 and 23.
([3]) See Article 5(3) of the proposed directive; see also Article 9(2) of the proposed directive so far as concerns resolution plans.
([4]) See the ECB's Convergence Report, 2012, p. 29. See also proposed Amendment 1.
([5]) See Articles 34(2) and 36(2) of the proposed directive.
([6]) See ECB Opinion CON/2011/39.
([7]) Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions in Articles 104 and 104b(1) of the Treaty (OJ L 332, 31.12.1993, p. 1).
([8]) See Article 92(2) of the proposed directive.
([9]) See Article 96 of the proposed directive.
([10]) See ECB Opinion CON/2011/103, paragraph 4 and ECB Opinion CON/2010/83, paragraph 6.3.

4. **Involvement of national designated authorities in assessment of recovery plans**

The proposed directive provides that competent authorities review recovery plans to ensure, among other things, effective implementation in situations of financial stress and without causing any significant adverse effect on the financial system also if other institutions implemented recovery plans within the same time period ([1]). To ensure that any relevant systemic concerns are taken into consideration in such reviews, including the overall impact of simultaneous implementation of recovery plans, which may lead to procyclical or herding behaviour, the ECB deems it necessary that the competent authorities make the assessments in consultation with the competent national designated authorities where they are separate entities ([2]).

5. **Intra-group financial support**

The proposed directive provides that Member States will ensure that group entities may enter into intra-group financial support agreements ([3]). The ECB sees the merits of this requirement, in particular that such agreements, once authorised by the competent authorities, may be submitted for approval to the shareholders' meeting of every group entity proposing to enter into the agreement. The ECB notes, however, that the implementation of these voluntary agreements in national legal systems raises complex legal issues. Their take up will also depend on how successfully their provisions interact with national tax, insolvency and company legislation, for example in respect of the principle of group transactions being 'at arm's length' ([4]). To this end, the ECB considers that further reflections may be needed on whether additional provisions are warranted to ensure the legal certainty and enforceability of intra-group transactions that are approved and implemented according to these voluntary agreements.

6. **The bail-in tool and write-down powers**

6.1. The ECB welcomes the development of bail-in as a debt write-down or conversion mechanism to absorb losses of institutions that are failing or likely to fail. The bail-in mechanism should be designed to be in line with internationally agreed key attributes for effective resolution ([5]), in particular a power for the resolution authority, under a resolution regime, to bail in a wide range of liabilities in accordance with the creditor hierarchy that would apply in a liquidiation. The ECB supports the introduction of such a bail-in tool by the Member States from 1 January 2018 at the latest ([6]). This would also allow for further work on bail-in, namely on the possibility of introducing a minimum requirement for a targeted level of designated bail-in instruments while still maintaining the overall scope of bail-in. Moreover, the ECB intends to contribute to the further analysis of the practical implications of bail-in as a resolution tool, also regarding the feasibility of rapid execution, the ability to respect the 'seniority waterfall' in loss absorbency, the mechanics of conversion or write-down ([7]), as well as the possible impact on derivatives markets. In this context, the design of the bail-in and bridge bank tools should be analysed together, given the latter tool's ability to imitate much of the former tool's result.

6.2. The ECB considers that resolution measures should be adopted in justified circumstances and accompanied with appropriate conditions to limit moral hazard ([8]). As stated above, institutions

([1]) See Article 6(2)(b) of the proposed directive.
([2]) See proposed Amendment 5.
([3]) See Articles 16 to 22 of the proposed directive.
([4]) The requirement that intra-group transactions are at arm's length is a fundamental principle under the company laws of almost all Member States apart from Spain. See report of DBB law to the Directorate-General for the Internal Market and Services of 2008 on legal constraints on intra-group transfers, which highlighted this risk.
([5]) See 'Key Attributes of Effective Resolution Regimes for Financial Institutions', October 2011, available on the Financial Stability Board's website (http://www.financialstabilityboard.org).
([6]) See Article 115(1), third paragraph, of the proposed directive.
([7]) See the European System of Central Banks (ESCB) contribution, to the EC's public consultation on the technical details of a possible EU framework for bank recovery and resolution, p. 4.
([8]) See also the ESCB contribution to the EC's public consultation on the technical details of a possible EU framework for bank recovery and resolution, May 2011, p. 5.

that are failing or about to fail should in principle be liquidated under ordinary insolvency proceedings, and when considered necessary should be wound up using resolution tools. Against this backdrop, bail-in powers, as a resolution tool, should be used predominantly for the resolution of institutions that have reached a point of unviability. The ECB considers that the possibility for bail-in to maintain an institution that is failing or likely to fail as a going concern ([1]) should only be considered in exceptional and justified cases.

The ECB supports always combining the bail-in tool with a replacement of management and subsequent restructuring of the institution and its activities in a way that addresses the reasons for its failure ([2]).

6.3. The proposed directive provides that the European Banking Authority (EBA) reports to the Commission on the implementation of the requirement for institutions to maintain an aggregate amount of own funds and eligible liabilities expressed as a percentage of the total liabilities of the institution ([3]). The ECB calls for further work to be carried out to assess whether a minimum requirement bail-in should be expressed as a percentage of total liabilities or as a percentage of risk weighted assets. The latter has the merit of taking into account the riskiness of the assets of the institution. The ECB recommends that EBA carries out this assessment. The ECB further recommends that EBA provides an assessment to the Commission of the impact for institutions of this requirement and on whether it would be beneficial to introduce a requirement prohibiting or limiting that instruments eligible for bail-in are held within the banking sector.

6.4. The proposed directive provides that before resolution action is taken, resolution authorities exercise the write-down power ([4]). Hence, write-down of capital instruments is a resolution power ([5]), which appears to apply before an institution enters into resolution. The ECB supports that authorities have the power to write-down capital instruments before entering into resolution. With a view to the recapitalisation of institutions, the ECB recommends expressly clarifying this in the proposed directive, for the avoidance of doubt. A case study and simulation of the bail-in tool implementation by the Commission would also be desirable to clarify the interdependencies between the various stages of the bail-in process.

7. Financing of resolution and target size of the financing arrangements

7.1. An adequate resolution framework should ensure that the cost of resolution is borne, first and foremost, by the shareholders and creditors of an institution in resolution and the private sector at large. The ECB therefore welcomes that the resolution tools and powers in the proposed directive enable authorities to put the burden of resolution financing on the shareholders and creditors. Furthermore, the proposed directive introduces two additional sources of resolution financing: national financing arrangements and contributions to the deposit guarantee scheme (DGS) ([6]).

7.2. While acknowledging the benefit of additional resolution financing sources, the ECB is of the view that the ambitious proposal to set up a European system of financing arrangements will not solve important cross-border resolution issues, such as coordination and burden sharing. The existence of 27 national arrangements under control of their national authorities is further complicated by the proposed system of borrowing lacking clarity on important details, such as the rights and obligations of the lenders and borrowers.

([1]) 'Going concern' is used to describe the situation in which an institution continues to function in resolution without the prospect of liquidation in the foreseeable future. This is as opposed to a 'gone concern' in which the critical banking functions are preserved but in a different legal entity than the entity which went under resolution and being wound up.
([2]) See recital 46 of the proposed directive.
([3]) See Article 39(6) of the proposed directive.
([4]) See Article 51(1) of the proposed directive.
([5]) See Article 56(1)(f) of the proposed directive.
([6]) Article 96: insofar as financing arrangements will also borrow from the central bank, this could amount to monetary financing. See, in this respect, paragraph 3.4 and Amendment 29.

8. **The use of the deposit guarantee schemes in resolution financing**

8.1. The proposed directive provides that the deposit guarantee scheme (DGS) to which the institution is affiliated is liable up to the amount of losses that it would have had to bear under normal insolvency proceedings ([1]). The treatment of covered deposits in the transfer to the bridge bank may have a major impact on the involvement of the DGS. The degree to which a DGS participates to the resolution measures will affect *ceteris paribus* the level of financing required from the other two available sources — the financing arrangements and the unsecured creditors. This uncertainty among creditors may increase the risk for pre-emptive runs from creditors, clients and other counterparties which if realised would undermine the main objective of the regime.

8.2. The proposed directive allows Member States to provide that the available financial means of a DGS established in their territory may be used to finance resolution ([2]). While the ECB supports this provision, which allows for synergies between the DGS and resolution funding, it considers it of the utmost importance that this does not compromise in any way the core DGS function in protecting insured deposits. The ECB welcomes that the proposed directive gives priority to the repayment of depositors covered by the DGS where a DGS is requested to use its available financial means to finance resolution as well as, at the same time, the usual function of repayments of insured depositors, and the available means are insufficient to satisfy all these requests ([3]).

Against this backdrop, the ECB advocates that legal certainty is ensured by clearly defining the role of the DGS in resolution financing, regardless of which resolution tool is chosen and how the measures are applied.

The proposed directive requires Member States to ensure that, under the national law governing normal insolvency proceedings, the deposit guarantee schemes rank pari passu with unsecured nonpreferred claims ([4]). This approach seems to be inconsistent with allowing Member States to establish a preferential ranking of claims in respect of deposits covered by the DGS. Currently, six Member States — Bulgaria ([5]), Greece ([6]), Latvia ([7]), Hungary ([8]), Portugal ([9]) and Romania ([10]) — have granted priority ranking to claims that the DGS has acquired by subrogation after having paid out the amounts corresponding to covered deposits, thus further contributing to ensuring that sufficient funding is always available to the DGS.

Views on the impact of granting preferential ranking are highly divergent, as it is believed that preferential ranking of depositors may have an impact on the funding costs available to banks and that greater efforts will be made by other creditors to secure their claims. On the other hand, this would be somewhat mitigated to the extent that priority claims extend to guaranteed deposits only. Furthermore, a legal regime that establishes priority ranking of guaranteed depositors should facilitate the use of resolution measures provided for in the proposed directive (e.g. sale of business tool,

([1]) See Article 99(1) of the proposed directive.
([2]) See Article 99(5) of the proposed directive.
([3]) Article 99(8) of the proposed directive.
([4]) See Article 99(2) of the proposed directive.
([5]) Preferred creditor status is established for DGS by Article 94(1) of the Law on bank insolvency (*Darjaven vestnik* No 92, 27.9.2002).
([6]) Depositor preferred creditor status is established by Article 4(16) of Law 3746/2009 transposing Directive 2005/14/EC on insurance against civil liability in respect of the use of motor vehicles and Directive 2005/68/EC on reinsurance and other provisions (FEK A 27, 16.2.2009). Article 13a(4) establishes the DGS' status.
([7]) Law of 5 October 1995 on credit institutions (LV 163(446), 24.10.1995). Article 192(1) introduced preferential ranking for guaranteed depositors on 21 May 1998.
([8]) Law CXII of 1996 on credit institutions and financial undertakings (*Magyar Közlöny* 1996/109, 12.12.1996), and more specifically Chapter XV of the Law on the details of the deposit guarantee scheme. The preferential status of all, and not only guaranteed, deposit claims is established by Article 183(1) of the Law.
([9]) See Article 166-A of consolidated version of Decree-Law No 298/92 of 31 December 1992 on the legal framework of credit institutions and financial undertakings (D.R. No 30, I, 10.2.2012).
([10]) Government Ordinance No 10/2004 on the proceedings for judicial reorganisation and bankruptcy of credit institutions, as further amended and supplemented, in particular by Article 38, gives a preferential right, after expenses related to the bankruptcy proceedings have been settled to claims arising from guaranteed deposits, including the claims of the DGS arising from repayments to the guaranteed depositors (*Monitorul Oficial al României*, Part One, No 84, 30.1.2004).

bridge institution tool). From a financial stability perspective, the priority claim in respect of the covered deposits is also supported as it reduces the risks of bank runs, potential losses of the insured depositors in a liquidation phase, as well as the excessive depletion of the DGS ([1]).

9. **Disclosure of marketing materials**

The proposed directive provides that any public disclosure of the marketing of an institution under resolution that is selling part or all if its business under the sale of business tool may be delayed ([2]). The ECB considers that disclosure of price sensitive information relating to publicly traded financial instruments may also need to be delayed during the application of other resolution tools. The relevant provisions in the proposed directive ([3]) should be expanded to a general rule during application of any resolution tool where the interest of the institution may justify a delay in the disclosure of price sensitive information.

10. **Further harmonisation of recovery and resolution rules**

10.1. The ECB supports the development of a recovery and resolution framework also for non-bank financial institutions with systemic importance, for instance insurance companies and market infrastructures ([4]). This should be coordinated with international initiatives.

10.2. Efforts to further minimally harmonise insolvency laws across Member States should be continued. The current diversity in insolvency laws, for example the ranking of creditor claims, impacts considerably on the implementation of resolution tools, and in particular the realisation of assets and liabilities held by resolution vehicles.

Done at Frankfurt am Main, 29 November 2012.

The President of the ECB

Mario DRAGHI

([1]) See ECB Opinion CON/2011/83.

([2]) See Article 33(2) of the proposed directive.

([3]) See Article 12(3) of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (OJ L 96, 12.4.2003, p. 16).

([4]) See, in this respect, the Commission's Consultation on a possible recovery and resolution framework for financial institutions other than banks of 5 October 2012, available on the European Commission's website (http://ec.europa.eu/internal_market/consultations/2012/nonbanks/consultation-document_en.pdf).

ANNEX

Drafting proposals

Text proposed by the Commission	Amendments proposed by the ECB [1]
Amendment 1	
Recital 21	
'Recovery and resolution plans should not assume access to extraordinary public financial support or expose taxpayers to the risk of loss. Access to liquidity facilities provided by central banks, including emergency liquidity facilities, should not be considered as extraordinary public financial support provided that the institution is solvent at the moment of the liquidity provision, and such liquidity provision is not part of a larger aid package; that the facility is fully secured by collateral to which haircuts are applied, in function of its quality and market value, that the central bank charges a penal interest rate to the beneficiary; and that the measure is taken at the central bank's own initiative and, in particular, is not backed by any counter-guarantee of the State.'	'Recovery and resolution plans should not assume access to extraordinary public financial support, ~~or~~ expose taxpayers to the risk of loss~~.~~ **or assume a**~~A~~ccess to ~~liquidity facilities provided by central banks, including emergency liquidity facilities~~ **central bank liquidity**~~, should not be considered as extraordinary public financial support provided that the institution is solvent at the moment of the liquidity provision, and such liquidity provision is not part of a larger aid package; that the facility is fully secured by collateral to which haircuts are applied, in function of its quality and market value, that the central bank charges a penal interest rate to the beneficiary; and that the measure is taken at the central bank's own initiative and, in particular, is not backed by any counter-guarantee of the State~~.'
Explanation	
Central banks provide liquidity to eligible counterparties participating in TARGET2 or monetary policy operations [2] with a view to the smooth operation of payment systems and monetary policy. In addition, central banks may provide liquidity support in exceptional circumstances and on a case-by-case basis to temporarily illiquid but solvent credit institutions [3]. The proposed amendment aims at ensuring that recovery and resolution plans do not assume the availability of central bank liquidity support. Central banks decide independently and at their full discretion on the provision of central bank liquidity to solvent credit institutions within the limits imposed by the monetary financing prohibition in the Treaty [4].	
Amendment 2	
Recital 24	
'The resolution framework should provide for timely entry into resolution before a financial institution is balance-sheet insolvent and before all equity has been fully wiped out. Resolution should be initiated when a firm is no longer viable or likely to be no longer viable and other measures have proved insufficient to prevent failure. The fact that an institution does not meet the requirements for authorisation should not justify per-se the entry into resolution, especially if the institution is still or likely to be still viable. An institution should be considered as failing or likely to fail when it is or is to be in breach of the capital requirements for continuing authorisation because it has incurred or is likely to incur in losses that are to deplete all or substantially all of its own funds, when the assets of the institution are or are to be less than its liabilities, when the institution is or is to be unable to pay its obligations as they fall due, or when the institution requires extraordinary public financial support. The need for emergency liquidity assistance from a central bank should not in itself be a condition that sufficiently demonstrates that an institution is or will be, in the near-term, unable to pay its liabilities as they fall due. In order to preserve financial stability, in particular in case of a systemic liquidity shortage, State guarantees on liquidity facilities provided by central banks or State guarantees on newly issued liabilities should not	'The resolution framework should provide for timely entry into resolution before a financial institution is balance-sheet insolvent and before all equity has been fully wiped out. Resolution should be initiated when a firm is no longer viable or likely to be no longer viable and other measures have proved insufficient to prevent failure. The fact that an institution does not meet the requirements for authorisation should not justify per-se the entry into resolution, especially if the institution is still or likely to be still viable. An institution should be considered as failing or likely to fail when it is or is to be in breach of the capital requirements for continuing authorisation because it has incurred or is likely to incur in losses that are to deplete all or substantially all of its own funds, when the assets of the institution are or are to be less than its liabilities, when the institution is or is to be unable to pay its obligations as they fall due.~~, or when the institution requires extraordinary public financial support. The need for emergency liquidity assistance from a central bank should not in itself be a condition that sufficiently demonstrates that an institution is or will be, in the near-term, unable to pay its liabilities as they fall due. In order to preserve financial stability, in particular in case of a systemic liquidity shortage, State guarantees on liquidity facilities provided by central banks or State guarantees on~~

Text proposed by the Commission	Amendments proposed by the ECB [1]
trigger the resolution framework provided that a number of conditions are met. In particular the State guarantee measures should to be approved under the State aid framework and should not be part of a larger aid package, and the use of the guarantee measures should be strictly limited in time. In both instances, the bank needs to be solvent.'	~~newly issued liabilities should not trigger the resolution framework provided that a number of conditions are met. In particular the State guarantee measures should to be approved under the State aid framework, and should not be part of a larger aid package, and the use of the guarantees measures should be strictly limited in time. In both instances, the bank needs to be solvent.~~'

Explanation

The proposed amendment aims at clarifying that the determination of the circumstances in which an institution is failing or likely to fail should be based on an assessment of the institution's prudential situation by the competent authorities. Assessment of the need for State aid would involve the competition authorities. See also explanation to Amendment 10.

Amendment 3

Article 2

'For the purposes of this Directive the following definitions apply:	'For the purposes of this Directive the following definitions apply:
(1) "resolution" means the restructuring of an institution in order to ensure the continuity of its essential functions, preserve financial stability and restore the viability of all or part of that institution;	(1) "resolution" means the restructuring of an institution in order to ensure the continuity of its essential functions, preserve financial stability, and restore the viability of **that institution in part or, exceptionally and in justified cases, in whole**;
[…]'	[…]
	(84) "national designated authority" means a designated authority within the meaning of the relevant acts of Union law.'

Explanation

The proposed amendment aims at underlining that failing or unviable institutions should in principle be liquidated under ordinary insolvency proceedings. If deemed necessary, they should be resolved using resolution tools and only as a last resort restructured as a going concern. The ECB stresses the importance of requiring going concern restructuring to be always accompanied by measures reducing moral hazard. For example, shareholders and unsecured creditors should assume losses and the management should be replaced, to achieve consistency with the main policy objective ([5]). Where these funds are insufficient, financing arrangements should be used. The ECB stresses that transparent financing is one of the main issues affecting legitimacy and accountability in the use of public funds, which the Eurosystem is interested in safeguarding. The ECB stresses that central banks may not finance these arrangements, in line with the prohibition on monetary financing ([6]).

The term 'national designated authority' is used in proposed Amendment 5 so it needs to be defined.

Amendment 4

Article 3(5a) (new)

No current text	'**Where the resolution authority designated in accordance with paragraph 1 is not the central bank, any decision of the resolution authority pursuant to this Directive shall be communicated to the central bank without delay.**'

Explanation

The proposed directive provides that resolution authorities may be authorities competent for supervision for the purposes of Directives 2006/48/EC and 2006/49/EC, central banks, competent ministries or other public administrative authorities ([7]). Central banks have a clearly defined financial stability mandate ([8]), justifying the communication of relevant information to the relevant central bank if the resolution authority is another public administrative authority.

Text proposed by the Commission	Amendments proposed by the ECB [1]
Amendment 5	
Article 6(2)	
'The competent authorities shall review those plans and assess the extent to which each plan satisfies the requirements set out in Article 5 and the following criteria:'	'The competent authorities, **in consultation with the national designated authorities**, shall review those plans and assess the extent to which each plan satisfies the requirements set out in Article 5 and the following criteria:'

Explanation

The proposed directive provides for review of the recovery plans by the competent authorities to ensure that they can be implemented effectively in situations of financial stress and without adverse effects on the financial system also if other institutions implement recovery plans within the same time period. To ensure that such systemic concerns are fully taken into consideration, the relevant national designated authorities should be involved where they are separate from the competent authorities. See also proposed Amendment 3 for a definition of this term.

Amendment 6	
Article 9(2)	
'The resolution plan shall take into consideration a range of scenarios including that the event of failure may be idiosyncratic or may occur at a time of broader financial instability or system wide events. The resolution plan shall not assume any extraordinary public financial support besides the use of the financing arrangements established in accordance with Article 91.'	'The resolution plan shall take into consideration a range of scenarios including that the event of failure may be idiosyncratic or may occur at a time of broader financial instability or system wide events. The resolution plan shall not assume any extraordinary public financial support **or any central bank emergency liquidity assistance** besides the use of the financing arrangements established in accordance with Article 91.'

Explanation

The proposed amendment underlines that central banks decide independently and at their full discretion on the provision of central bank liquidity, including emergency liquidity assistance, to solvent credit institutions within the limits imposed by the monetary financing prohibition ([9]). See also explanation to Amendment 7.

Amendment 7	
Article 13(1)	
'Member States shall ensure that resolution authorities, in consultation with competent authorities, assess the extent to which institutions and groups are resolvable without the assumption of extraordinary public financial support besides the use of the financing arrangements established in accordance with Article 91. An institution or group shall be deemed resolvable if it is feasible and credible for the resolution authority to either liquidate it under normal insolvency proceedings or to resolve it by applying the different resolution tools and powers to the institution and group without giving rise to significant adverse consequences for the financial systems, including in circumstances of broader financial instability or system wide events, of the Member State in which the institution is situated, having regard to the economy or financial stability in that same or other Member State or the Union and with a view to ensure the continuity of	'Member States shall ensure that resolution authorities, in consultation with competent authorities, assess the extent to which institutions and groups are resolvable without the assumption of extraordinary public financial support **or central bank emergency liquidity assistance** besides the use of the financing arrangements established in accordance with Article 91. An institution or group shall be deemed resolvable if it is feasible and credible for the resolution authority to either liquidate it under normal insolvency proceedings or to resolve it by applying the different resolution tools and powers to the institution and group without giving rise to significant adverse consequences for the financial systems, including in circumstances of broader financial instability or system wide events, of the Member State in which the institution is situated, having regard to the economy or financial stability in that same or other Member State or the

Text proposed by the Commission	Amendments proposed by the ECB [1]
critical functions carried out by the institution nor group either because they can be easily separated in a timely manner or by other means.'	Union and with a view to ensure the continuity of critical functions carried out by the institution nor group either because they can be easily separated in a timely manner or by other means.'

Explanation

The proposed amendment underlines that central banks decide independently and at their full discretion on the provision of central bank liquidity, including emergency liquidity assistance, to solvent credit institutions within the limits imposed by the monetary financing prohibition ([10]). *See also explanation to Amendment 6.*

Amendment 8

Article 26(2)(e)

'to protect depositors covered by Directive 94/19/EC and investors covered by Directive 97/9/EC;'	'to protect depositors ~~covered by~~ **as defined in Article 1 of** Directive 94/19/EC and investors covered by Directive 97/9/EC;'

Explanation

The ECB considers that the depositor base of credit institutions is a source of funding which should be reinforced. To this end, the resolution objective in Article 26(2)(e) should be extended to all deposits as defined in Article 1 of Directive 94/19/EC, without a limit of EUR 100 000.

Amendment 9

Article 27(1)(a)

'Member States shall ensure that resolution authorities shall take a resolution action in relation to an institution referred to in Article 1(a) only if all of the following conditions are met:	'Member States shall ensure that resolution authorities shall take a resolution action in relation to an institution referred to in Article 1(a) only if all of the following conditions are met:
(a) the competent authority or resolution authority determines that the institution is failing or likely to fail;	(a) the competent authority ~~or resolution authority~~ determines that the institution is failing or likely to fail;
(b) having regard to timing and other relevant circumstances, there is no reasonable prospect that any alternative private sector or supervisory action, other than a resolution action taken in respect of the institution, would prevent the failure of the institution within a reasonable timeframe;	(b) having regard to timing and other relevant circumstances, there is no reasonable prospect that any alternative private sector or supervisory action, other than a resolution action taken in respect of the institution, would prevent the failure of the institution within a reasonable timeframe;
(c) a resolution action is necessary in the public interest pursuant to paragraph 3.'	(c) a resolution action is necessary in the public interest pursuant to paragraph 3.'

Explanation

The proposed directive provides that resolution authorities will take a resolution action if the competent authority or resolution authority determines that the institution is failing or likely to fail. An institution is deemed failing or likely to fail if it does not meet certain prudential criteria. The ECB considers that the competent authority alone should make this determination due to its role as prudential supervisor and regulator. Competent authorities are best placed to determine whether any of the circumstances set out under Article 27(2) of the proposed directive arise; for example, whether the institution is in breach of the capital requirements for

Text proposed by the Commission	Amendments proposed by the ECB [1]

continuing authorisation. Moreover, this amendment seeks to ensure consistency with Article 74(1) of the proposed directive, which obliges the management body of an institution to notify the competent authority where they consider that the institution is failing or likely to fail.

Amendment 10

Article 27(2)

'For the purposes of point (a) of paragraph 1, an institution is deemed failing or likely to fail in one or more of the following circumstances:	'For the purposes of point (a) of paragraph 1, an institution is deemed failing or likely to fail in one or more of the following circumstances:
[…]	[…]
(d) the institution requires extraordinary public financial support except when, in order to preserve financial stability, it requires any of the following:	~~(d) the institution requires extraordinary public financial support except when, in order to preserve financial stability, it requires any of the following:~~
(i) a State guarantee to back liquidity facilities provided by central banks according to the banks' standard conditions (the facility is fully secured by collateral to which haircuts are applied, in function of its quality and market value, and the central bank charges a penal interest rate to the beneficiary);	~~(i) a State guarantee to back liquidity facilities provided as collateral for liquidity facilities provided by central banks according to the banks' standard conditions set out by within the ESCB (the facility is fully secured by collateral to which haircuts are applied, in function of its quality and market value, and the central bank charges a penal interest rate to the beneficiary);~~
(ii) a State guarantee on newly issued liabilities in order to remedy a serious disturbance in the economy of a Member State.	~~(ii) a State guarantee on newly issued liabilities in order to remedy a serious disturbance in the economy of a Member State.~~
In both cases mentioned in points (i) and (ii), the guarantee measures shall be confined to solvent financial institutions, shall not be part of a larger aid package, shall be conditional to approval under State aid rules, and shall be used for a maximum duration of three months.'	~~In both cases mentioned in points (i) and (ii), the guarantee measures shall be which is confined to solvent financial institutions, shall is not be part of a larger aid package, shall be conditional to approval under State aid rules, and shall be used for a maximum duration of three months.~~'

Explanation

The proposed directive requires the resolution tools to be applied before any public sector injection of capital or equivalent extraordinary public financial support to an institution ([11]). While fully supporting this, the ECB is of the view that the responsibilities of the authorities involved should be clearly defined in the interest of quick and efficient resolution action. The proposed amendment aims at clarifying that the determination of the circumstances in which an institution is failing or likely to fail should be based on an assessment by the competent authorities. The ECB considers it unclear how a need for State aid is determined. Moreover, extraordinary public financial support has been defined as State aid that is provided not only in order to restore the viability, liquidity or solvency of an institution, but also to preserve its viability, liquidity or solvency ([12]). Extraordinary public financial support provided to preserve a financially sound institution should not in itself constitute a circumstance under which the institution should be deemed failing or likely to fail. Furthermore, the ECB considers that the determination of the circumstances in which an institution is failing or likely to fail should be based only on an assessment of its prudential situation, and should not involve an assessment of the need for State aid. In this respect, the provision that an institution is 'deemed failing or likely to fail' whenever 'the institution requires extraordinary public financial sector support', i.e. State aid, does not, in itself, establish an appropriate objective criterion.

See also proposed Amendment 2.

Amendment 11

Article 29

'1. Member States shall ensure that, when applying the resolution tools and exercising the resolution powers,	'1. Member States shall ensure that, when applying the resolution tools and exercising the resolution powers,

Text proposed by the Commission	Amendments proposed by the ECB [1]
resolution authorities take all appropriate measures to ensure that the resolution action is taken in accordance with the following principles:	resolution authorities take all appropriate measures to ensure that the resolution action is taken in accordance with the following principles:
(a) the shareholders of the institution under resolution bear first losses;	(a) the shareholders of the institution under resolution bear first losses;
(b) creditors of the institution under resolution bear losses after the shareholders in accordance with the order of priority of their claims pursuant to this Directive;	(b) creditors of the institution under resolution bear losses after the shareholders in accordance with the order of priority of their claims pursuant to this Directive;
(c) senior management of the institution under resolution is replaced;	(c) senior management of the institution under resolution is replaced;
(d) senior managers of the institution under resolution bear losses that are commensurate under civil or criminal law with their individual responsibility for the failure of the institution;	(d) senior managers of the institution under resolution bear losses that are commensurate under civil or criminal law with their individual responsibility for the failure of the institution;
(e) except where otherwise provided in this Directive, creditors of the same class are treated in an equitable manner;	(e) except where otherwise provided in this Directive, creditors of the same class are treated in an equitable manner;
(f) no creditor incurs greater losses that would be incurred if the institution would have been wound down under normal insolvency proceedings.	(f) no creditor incurs greater losses that would be incurred if the institution would have been wound down under normal insolvency proceedings;
	(g) claims of depositors with deposits that are guaranteed in accordance with Directive 94/19/EC are adequately protected on insolvency of the credit institution.
2. Where an institution is a group entity, resolution authorities shall apply resolution tools and exercise resolution powers in a way that minimises the impact on affiliated institutions and on the group as a whole and minimises the adverse effect on financial stability in the Union and, in particular, in the countries where the group operates.	2. **In order to give effect to paragraph (1)(g), Member States shall ensure that:**
	(i) claims of depositors with deposits that are guaranteed in accordance with Directive 94/19/EC are granted a preferential claim so as to have a higher priority ranking over the claims of ordinary unsecured, non-preferred creditors in the event of insolvency of the credit institution;
	(ii) the deposit guarantee scheme subrogating to the rights of depositors with deposits that are guaranteed in accordance with Directive 94/19/EC is granted a preferential claim corresponding to the higher priority ranking of depositors pursuant to point (i), but only as concerns payments made to depositors up to the amount of their guaranteed deposits under the scheme.
3. When applying the resolution tools and exercising the resolution powers, Member States shall ensure that they comply with the Union State aid framework, where applicable.'	**3.** Where an institution is a group entity, resolution authorities shall apply resolution tools and exercise resolution powers in a way that minimises the impact on affiliated institutions and on the group as a whole and minimises the adverse effect on financial stability in the Union and, in particular, in the countries where the group operates.

Text proposed by the Commission	Amendments proposed by the ECB [1]
	4. When applying the resolution tools and exercising the resolution powers, Member States shall ensure that they comply with the Union State aid framework, where applicable.'

Explanation

Currently, six Member States, including Bulgaria [13], *Greece* [14], *Latvia* [15], *Hungary* [16], *Portugal* [17] *and Romania* [18], *have granted priority ranking to claims that the DGS has acquired by subrogation after having paid out the amounts corresponding to covered deposits, thus further contributing to ensuring that sufficient funding is always available to the DGS.*

Views on the impact of granting preferential ranking are highly divergent, as it is believed that preferential ranking of depositors may have an impact on the funding costs available to banks and that greater efforts will be made by other creditors to secure their claims. On the other hand, this would be somewhat mitigated to the extent that priority claims extend to guaranteed deposits only. Furthermore, a legal regime that establishes priority ranking of guaranteed depositors should facilitate the use of resolution measures provided for in the proposed directive (e.g., sale of business tool, bridge institution tool). From a financial stability perspective, the priority claim in respect of the covered deposits is also supported as it reduces the risks of bank runs, potential losses of the insured depositors in a liquidation phase, as well as the excessive depletion of the DGS [19].

Amendment 12

Article 30(2)

'Without prejudice to the Union State aid framework, where applicable, the valuation required by paragraph 1 shall be based on prudent and realistic assumptions, including as to rates of default and severity of losses, and its objective shall be to assess the market value of the assets and liabilities of the institution that is failing or is likely to fail so that any losses that could be derived are recognised at the moment the resolution tools are exercised. However, where the market for a specific asset or liability is not functioning properly the valuation may reflect the long term economic value of those assets or liabilities. Valuation shall not assume the provision of extraordinary public support to the institution, regardless of whether it is actually provided.'	'Without prejudice to the Union State aid framework, where applicable, the valuation required by paragraph 1 shall be based on prudent and realistic assumptions, including as to rates of default and severity of losses, and its objective shall be to assess the market value of the assets and liabilities of the institution that is failing or is likely to fail so that any losses that could be derived are recognised at the moment the resolution tools are exercised. However, where the market for a specific asset or liability is not functioning properly the valuation may reflect the long term economic value of those assets or liabilities. Valuation shall not assume the **actual or expected** provision of extraordinary public **financial** support **or central bank emergency liquidity assistance** to the institution, regardless of whether it is actually provided.'

Explanation

In addition to standard monetary policy and intraday credit operations, central banks may provide liquidity support in exceptional circumstances and on a case-by-case basis to temporarily illiquid but solvent credit institutions [20]. *The proposed amendment aims at clarifying that the value of assets should neither be unduly inflated by the prospect of extraordinary public financial support nor by the prospect of exceptional central bank emergency liquidity assistance. See also Amendment 21.*

Amendment 13

Article 31(7)

'Member States shall not be prevented from conferring upon resolution authorities additional powers exercisable where an institution meets the conditions for resolution, provided that those additional powers do not pose obstacles to effective group resolution and that they are consistent with the resolution objectives and the general principles governing resolution set out in Articles 26 and 29.'	'Member States shall not be prevented from conferring upon resolution authorities additional powers exercisable where an institution meets the conditions for resolution, provided that those additional powers do not pose obstacles to effective group resolution and that they are consistent with the resolution objectives and the general principles governing resolution set out in Articles 26 and 29.

Text proposed by the Commission	Amendments proposed by the ECB [1]
	Using State resources for mandatory recapitalisation of an institution that meets the conditions for resolution shall be limited to exceptional circumstances and only if it fully satisfies the resolution objectives in Article 26(2)(b) and the abovementioned conditions.'

Explanation

Member States have the discretion to introduce other resolution tools and powers to supplement the tool box in the proposed directive ([21]). *This discretion is unlimited to any specific power and would thus allow the possibility for national authorities to make mandatory recapitalisation of an institution that meets the conditions for resolution, an additional resolution power provided they respect the resolution objectives and general principles* ([22]). *The proposed amendment aims at preventing Member States from providing public funds for the recapitalisation of an institution that meets the conditions for resolution.Shareholders and creditors should recapitalise such institutions under the provisions regarding the bail-in tool after a decision has been taken to put the institution into resolution, and under the provisions regarding write down of capital instruments before any resolution action is taken. The proposed directive provides that winding up should always be considered before a decision is taken to maintain the institution as a going concern* ([23]).

Amendment 14

Articles 32(10) and 32(10a) (new)

'10. For the purposes of exercising the rights to provide services or to establish itself in another Member State in accordance with Directive 2006/48/EC or Directive 2004/39/EC, the purchaser shall be considered to be a continuation of the institution under resolution, and may continue to exercise any such right that was exercised by the institution under resolution in respect of the assets, rights or liabilities transferred, including the rights of membership and access to payment, clearing and settlement systems.'	'10. For the purposes of exercising the rights to provide services or to establish itself in another Member State in accordance with Directive 2006/48/EC or Directive 2004/39/EC, the purchaser shall be considered to be a continuation of the institution under resolution, and may continue to exercise any such right that was exercised by the institution under resolution in respect of the assets, rights or liabilities transferred.~~,including~~ **10a. Member States shall ensure that the purchaser referred to in paragraph 1 may continue to exercise** the rights of membership and access to payment, clearing and settlement systems **of the institution under resolution, provided that it meets the regulatory criteria for participation in such systems**.'

Explanation

The proposed amendment aims at ensuring that payment, clearing and settlement system operators maintain the right to assess the participants in their systems against their standards for participation in the system. While acknowledging the importance of the continuity of the business transferred to a purchaser, the ECB stresses that this interest should be balanced with the interest of sound payment, clearing and settlement systems and financial stability. In particular, an operator of a system as defined in Article 2(a) of Directive 98/26/EC ([24]) *should be able to refuse access to a purchaser that does not qualify as an institution under Article 2(b). See also Amendment 15.*

Amendment 15

Articles 34(8) and 34(8a) (new)

'8. For the purposes of exercising the rights to provide services or to establish itself in another Member State in accordance with Directive 2006/48/EC or Directive 2004/39/EC, a bridge institution shall be considered to be a continuation of the institution under resolution, and	'8. For the purposes of exercising the rights to provide services or to establish itself in another Member State in accordance with Directive 2006/48/EC or Directive 2004/39/EC, a bridge institution shall be considered to be a continuation of the institution under resolution, and

Text proposed by the Commission	Amendments proposed by the ECB [1]
may continue to exercise any such right that was exercised by the institution under resolution in respect of the assets, rights or liabilities transferred, including the rights of membership and access to payment, clearing and settlement systems.'	may continue to exercise any such right that was exercised by the institution under resolution in respect of the assets, rights or liabilities transferred.,~~including~~
	8a. Member States shall ensure that the bridge institution may continue to exercise the rights of membership and access to payment, clearing and settlement systems **of the institution under resolution, provided that it meets the regulatory criteria for participation in such systems**.'

Explanation

See explanation for proposed Amendment 14.

Amendment 16

Article 36(2)

'For the purposes of the asset separation tool, an asset management vehicle shall be a legal entity that is wholly owned by one or more public authorities, which may include the resolution authority.'	'For the purposes of the asset separation tool, an asset management vehicle shall be a legal entity that is wholly owned by one or more public authorities, which may include the resolution authority. **The asset management vehicle shall not be an institution authorised in accordance with Directive 2006/48/EC or Directive 2004/39/EC.**'

Explanation

The proposed amendment aims at clarifying the difference between asset management vehicles and bridge institutions.

Amendment 17

Article 38(2)

'Resolution authorities shall not exercise the write down and conversion powers in relation to the following liabilities:	'Resolution authorities shall not exercise the write down and conversion powers in relation to the following liabilities:
[…]	[…]
(e) a liability to any one of the following:	(e) a liability to any one of the following:
[…]	[…]
(iii) tax and social security authorities, provided that those liabilities are preferred under the applicable insolvency law.	(iii) tax and social security authorities, provided that those liabilities are preferred under the applicable insolvency law;.
Points (a) and (b) of paragraph 2 shall not prevent resolution authorities, where appropriate, from exercising those powers in relation to any part of a secured liability or a liability for which collateral has been pledged that exceeds the value of the assets, pledge, lien or collateral against which it is secured. Member States may exempt from this provision covered bonds as defined in Article 22(4) of Council Directive 86/611/EEC.	Points (a) and (b) of paragraph 2 shall not prevent resolution authorities, where appropriate, from exercising those powers in relation to any part of a secured liability or a liability for which collateral has been pledged that exceeds the value of the assets, pledge, lien or collateral against which it is secured. Member States may exempt from this provision covered bonds as defined in Article 22(4) of Council Directive 86/611/EEC. **This power shall not apply in respect of any secured liability to central banks that are members of the ESCB.**
[…]'	[…]'

Text proposed by the Commission	Amendments proposed by the ECB [1]

Explanation

The proposed amendment aims at ensuring that all liabilities to the members of the ESCB are explicitly excluded from the application of the bail in tool. Members of the ESCB should not be subject to the bail-in tool as they are public bodies whose basic tasks require them to have exposures to institutions.

Amendment 18

Article 39(6)

'Resolution authorities shall inform EBA of the minimum amount they have determined for each institution under their jurisdiction. EBA shall report to the Commission by 1 January 2018 at the latest on the implementation of the requirement under paragraph 1. In particular EBA shall report to the Commission whether there are divergences regarding the implementation at national level of that requirement.'	'Resolution authorities shall inform EBA of the minimum amount they have determined for each institution under their jurisdiction. EBA shall **assess the impact on institutions and** report to the Commission by 1 January 2018 at the latest on the implementation of the requirement under paragraph 1. In particular EBA shall report to the Commission whether there are divergences regarding the implementation at national level of that requirement.'

Explanation

The ECB recommends that EBA, when reporting to the Commission on the implementation of the requirement for institutions to maintain an aggregate amount of own funds and eligible liabilities expressed as a percentage of the total liabilities of the institution, provides an assessment to the Commission of the impact for institutions of this requirement.

Amendment 19

Article 61(2)

'Any suspension under paragraph 1 shall not apply to eligible deposits within the meaning of Directive 94/19/EC.'	'Any suspension under paragraph 1 shall not apply to: **(a)** eligible deposits within the meaning of Directive 94/19/EC; **(b) eligible claims within the meaning of Directive 97/9/EC**; **(c) transfer orders as defined in Article 2(i) of Directive 98/26/EC and entered into the system pursuant to Article 3 of Directive 98/26/EC**; **(d) collateral security as defined in Article 2(m) of Directive 98/26/EC**.'

Explanation

The ECB supports the proposed power for resolution authorities to suspend certain obligations ([25]). The ECB further supports that these powers do not apply to eligible deposits. It proposes that these powers should also not apply to claims eligible for compensation under an investor compensation scheme within the meaning of Directive 97/9/EC. The ECB further notes that Directive 98/26/EC protects settlement finality in payment and securities settlement systems and the enforceability of collateral, including all means provided by a participant to other participants in payment and securities settlement systems to secure rights and obligations in connection with that system with the aim of reducing systemic risk ([26]). In this respect, the ECB notes that this protection applies to central counterparties, as central counterparties should be notified as a system pursuant to Directive 98/26/EC ([27]). In addition, the Directive 98/26/EC covers collateral security provided in connection with operations of the central banks of the Member States, including monetary policy operations ([28]). The proposed amendment aims at ensuring that Directive 98/26/EC remains applicable. See also proposed Amendment 20.

Amendment 20

Article 62(2)

'Resolution authorities shall not exercise the power set out in paragraph 1 in relation to any security interest of	'Resolution authorities shall not exercise the power set out in paragraph 1 in relation to ~~any security interest of a~~

Text proposed by the Commission	Amendments proposed by the ECB [1]
a central counterparty over assets pledged by way of margin or collateral by the institution under resolution.'	~~central counterparty over assets pledged by way of margin or collateral by the institution under resolution~~ **collateral security as defined in Article 2(m) of Directive 98/26/EC**.'

Explanation

See the explanation for proposed Amendment 19.

Amendment 21

Article 66(3)(c)

'The valuation shall be in accordance with the provisions and the methodology laid down in Article 30(1) to (5), and shall:	'The valuation shall be in accordance with the provisions and the methodology laid down in Article 30(1) to (5), and shall:
(a) assume that the institution in connection to which the partial transfer, write down or conversion has been made would have entered normal insolvency proceedings immediately after the transfer, write down or conversion has been effected;	(a) assume that the institution in connection to which the partial transfer, write down or conversion has been made would have entered normal insolvency proceedings immediately after the transfer, write down or conversion has been effected;
(b) assume that the partial transfer, or transfers, of rights, assets or liabilities, or the write down or the conversion had not been made;	(b) assume that the partial transfer, or transfers, of rights, assets or liabilities, or the write down or the conversion had not been made;
(c) disregard any provision of extraordinary public support to the institution.'	(c) disregard any **actual or expected** provision of extraordinary public support to the institution **and central bank emergency liquidity assistance**.'

Explanation

See explanation in proposed Amendment 12.

Amendment 22

Article 72

'*Partial transfers: protection of trading, clearing and settlement systems*	'*~~Partial transfers:~~ **P**Protection of trading, clearing and settlement systems*
1. Member States shall ensure that transfer, cancellation or modification shall not affect the operation of systems and rules of systems covered by Directive 98/26/EC, where resolution authority:	1. Member States shall ensure that ~~transfer, cancellation or modification~~ **the application of a resolution tool** shall not affect the ~~operation of systems and rules of systems covered by~~ **application of** Directive 98/26/EC, ~~where resolution authority:~~
(a) transfers some but not all of the property, rights or liabilities of an institution to another entity;	~~(a) transfers some but not all of the property, rights or liabilities of an institution to another entity;~~
(b) uses powers under Article 57 to cancel or amend the terms of a contract to which the institution under resolution is a party or to substitute a recipient as a party.	~~(b) uses powers under Article 57 to cancel or amend the terms of a contract to which the institution under resolution is a party or to substitute a recipient as a party~~.
2. In particular, such a transfer, cancellation or amendment may not revoke a transfer order in contravention of Article 5 of Directive 98/26/EC; and may not modify or negate the enforceability of transfer orders and netting as required by Articles 3 and 5 of Directive 98/26/EC, the use of funds, securities or credit	2. In particular, ~~such~~ a transfer, cancellation or amendment may not revoke a transfer order in contravention of Article 5 of Directive 98/26/EC; and may not modify or negate the enforceability of transfer orders and netting as required by Articles 3 and 5 of Directive 98/26/EC, the use of funds, securities or credit facilities

Text proposed by the Commission	Amendments proposed by the ECB [1]
facilities as required by Article 4 of Directive 98/26/EC or protection of collateral security as required by Article 9 of Directive 98/26/EC.'	as required by Article 4 of Directive 98/26/EC or protection of collateral security as required by Article 9 of Directive 98/26/EC.'

Explanation

The reduction of systemic risk requires in particular settlement finality and the enforceability of collateral security. Thus, Directive 98/26/EC must be treated as lex specialis that is not affected by the proposed directive.

Amendment 23

Article 74(3)

'Where a competent authority assesses that the conditions referred to in points (a) and (b) of Article 27(1) are met in relation to an institution, it shall communicate that assessment without delay to the following authorities:	'Where a competent authority assesses that the conditions referred to in points (a) and (b) of Article 27(1) are met in relation to an institution, it shall communicate that assessment without delay to the following authorities:
(a) the resolution authority for that institution, if different;	(a) the resolution authority for that institution, if different;
(b) the central bank, if different;	(b) the central bank, if different;
(c) where applicable, the group level resolution authority;	(c) where applicable, the group level resolution authority;
(d) competent ministries;	(d) competent ministries;
(e) where the institution is subject to supervision on consolidated basis under section 1 of Chapter 4, Title V of Directive 2006/48/EC, the consolidating supervisor.'	(e) where the institution is subject to supervision on consolidated basis under section 1 of Chapter 4, Title V of Directive 2006/48/EC, the consolidating supervisor;
	(f) where the institution is an institution as defined in Article 2(b) of Directive 98/26/EC, the Commission, the ECB, ESMA, EIOPA, EBA and the operators of the systems to which it participates;
	(g) where the institution is considered systemically important, the ESRB and macro-prudential authorities.'

Explanation

Experience in the functioning of financial infrastructures during the crisis has shown, amongst other things, gaps in notification procedures ([29]) *for systems as defined in Article 2(a) of Directive 98/26/EC. The proposed amendment aims at ensuring that the ECB, the European Supervisory Agencies, the Commission and, where relevant, the ESRB and macro-prudential authorities, as relevant stakeholders for the purposes of Directive 98/26/EC, are notified that points (a) and (b) of Article 27(1) of the proposed directive are met. Such notification would serve as an early warning that insolvency proceedings may be initiated with respect to a participant in a designated system. Central banks have a responsibility for macro-prudential and financial stability, as well as financial market expertise. In this respect, they should be involved in the resolution process, contributing to the achievement of resolution objectives while minimising the risks of negative unintended effects on performance of central bank tasks and on the operation of payment and settlement systems. To this extent, central banks may play an important role in assessing recovery and resolution plans and in the assessment triggering the use of resolution powers. Central banks may also be involved in assessing the potential action of the resolution authority, given that one of the main objectives is to avoid systemic disruptions* ([30]). *The ECB therefore deems it necessary for Member States to ensure that, where the central bank is not itself the resolution authority, the competent authority and the resolution authority adequately exchange information with the central bank.. In this respect, this article is a step in the right direction but further information sharing and cooperation is required.*

Amendment 24

Article 76(1)

'1. The requirements of professional secrecy shall be binding in respect of the following persons:	'1. The requirements of professional secrecy shall be binding in respect of the following persons:

Text proposed by the Commission	Amendments proposed by the ECB [1]
(a) resolution authorities;	(a) resolution authorities;
(b) competent authorities and EBA;	(b) competent authorities and EBA;
(c) competent ministries;	(c) competent ministries;
(d) employees or former employees of the authorities referred to in points (a) and (b);	(d) employees or former employees of the authorities referred to in points (a) and (b);
(e) special managers appointed under Article 24;	(e) special managers appointed under Article 24;
(f) potential acquirers that are contacted by the competent authorities or solicited by the resolution authorities, irrespective of whether that contact or solicitation was made as preparation for the use of the sale of business tool, and irrespective of whether the solicitation resulted in an acquisition;	(f) potential acquirers that are contacted by the competent authorities or solicited by the resolution authorities, irrespective of whether that contact or solicitation was made as preparation for the use of the sale of business tool, and irrespective of whether the solicitation resulted in an acquisition;
(g) auditors, accountants, legal and professional advisors, valuers and other experts engaged by the resolution authorities or by the potential acquirers referred to in point (f);	(g) auditors, accountants, legal and professional advisors, valuers and other experts engaged by the resolution authorities or by the potential acquirers referred to in point (f);
(h) bodies which administer the deposit guarantee schemes;	(h) bodies which administer the deposit guarantee schemes;
(i) central banks and other authorities involved in the resolution process;	(i) central banks and other authorities involved in the resolution process;
(j) any other persons who provide or have provided services to the resolution authorities.'	(j) **the management appointed by the resolution authority to a bridge institution, asset management or other resolution vehicle**;
	(k) any other persons who provide or have provided services to the resolution authorities.'

Explanation

The ECB considers that the management of any resolution entities set up by application of the resolution tools should also be subject to the same requirements of professional secrecy. Management is defined in Article 2(24).

Amendment 25

Article 80(8)

'Group level resolution authorities may not establish resolution colleges if other groups or colleges perform the same functions and carry out the same tasks specified in this Article and comply with all the conditions and procedures established in this Section. In this case all references to resolution colleges in this Directive shall also be understood as reference to those other groups or colleges.'	'Group level resolution authorities ~~may~~ **shall** not **be required to** establish resolution colleges if other groups or colleges perform the same functions and carry out the same tasks specified in this Article and comply with all the conditions and procedures established in this Section. In this case all references to resolution colleges in this Directive shall also be understood as reference to those other groups or colleges.'

Text proposed by the Commission	Amendments proposed by the ECB [1]

Explanation

The proposed amendment aims at clarifying that group level resolution authorities will not be required to establish resolution colleges.

Amendment 26

Article 86(1)

'EBA shall refuse, after consulting the national resolution authorities concerned, to recognise pursuant to Article 85(2) third country resolution proceedings if it considers:	'EBA shall refuse, after consulting the national resolution authorities concerned, to recognise pursuant to Article 85(2) third country resolution proceedings if it considers:
(a) that the third country resolution proceeding would have an adverse effect on financial stability in the Member State in which the resolution authority is based or considers that the proceeding may have an adverse effect on the financial stability of another Member State;	(a) that the third country resolution proceeding would have an adverse effect on financial stability in the Member State in which the resolution authority is based or considers that the proceeding may have an adverse effect on the financial stability of another Member State;
(b) that independent resolution action under Article 87 in relation to a domestic branch is necessary to achieve one or more of the resolution objectives;	(b) that independent resolution action under Article 87 in relation to a domestic branch is necessary to achieve one or more of the resolution objectives.
(c) that creditors, including in particular depositors located or payable in a Member State, would not receive equal treatment with third country creditors under the third country resolution proceedings.'	**EBA may refuse, after consulting the national resolution authorities concerned, to recognise pursuant to Article 85(2) third country resolution proceedings if it considers**; ~~(c)~~ that creditors, including in particular depositors located or payable in a Member State, would not receive equal treatment with third country creditors under the third country resolution proceedings.'

Explanation

While acknowledging that third country resolution proceedings should not have an adverse effect on financial stability in the Member State or on resolution objectives, the ECB proposes the possibility for EBA to refuse third country resolution proceedings if creditors would not receive equal treatment.

Amendment 27

Article 96

'Member States shall ensure that financing arrangements under their jurisdiction are enabled to contract borrowings or other forms of support from financial institutions, the central bank, or other third parties, in the event that the amounts raised in accordance with Article 94 are not sufficient to cover the losses, costs or other expenses incurred by the use of the financing arrangements, and the extraordinary contributions provided for in Article 95 are not immediately accessible.'	'Member States shall ensure that financing arrangements under their jurisdiction are enabled to contract borrowings or other forms of support from financial institutions, ~~the central bank~~, or other third parties, in the event that the amounts raised in accordance with Article 94 are not sufficient to cover the losses, costs or other expenses incurred by the use of the financing arrangements, and the extraordinary contributions provided for in Article 95 are not immediately accessible.'

Explanation

The proposed amendment aims at clarifying that financing arrangements should not depend on borrowings or other forms of ESCB support ([31]). The monetary financing prohibition in the Treaty imposes legal constraints on central bank liquidity support operations for credit institutions. Moreover, central banks decide independently and at their full discretion on the provision of central bank liquidity, including emergency liquidity assistance, to solvent credit institutions within the limits imposed by the monetary financing prohibition ([32]).

Text proposed by the Commission	Amendments proposed by the ECB [1]
Amendment 28	
Article 98(3)	
'The modalities referred to in paragraph 2 may include:	'The modalities referred to in paragraph 2 may include:
(a) contributions from the national financing arrangements of the institutions that are part of the group,	(a) contributions from the national financing arrangements of the institutions that are part of the group,
(b) borrowings or other forms of support from financial institutions or the Central Bank.'	(b) borrowings or other forms of support from financial institutions ~~or the Central Bank~~.'
Explanation	
See explanation to proposed Amendment 27.	
Amendment 29	
Article 98(5)	
'For the purpose of this Article, Member States shall ensure that the group financing arrangements are allowed, under the conditions laid down in Article 96, to contract borrowings or other forms of support, from financial institutions, the Central Bank or other third parties, for the total amount needed to finance the resolution of the group in accordance with the financing plan referred to in paragraph 2 of this Article.'	'For the purpose of this Article, Member States shall ensure that the group financing arrangements are allowed, under the conditions laid down in Article 96, to contract borrowings or other forms of support, from financial institutions, ~~the Central Bank~~ or other third parties, for the total amount needed to finance the resolution of the group in accordance with the financing plan referred to in paragraph 2 of this Article.'
Explanation	
See explanation to proposed Amendment 27.	
Amendment 30	
Article 99	
'1. Member States shall ensure that, where the resolution authorities take resolution action, and provided that this action ensures that depositors continue having access to their deposits, the deposit guarantee scheme to which the institution is affiliated is liable, up to the amount of covered deposits, for the amount of losses that it would have had to bear if the institution had been wound up under normal insolvency proceedings.	'1. Member States shall ensure that, where the resolution authorities take resolution action **in respect of a credit institution**, ~~and provided that this action ensures that depositors continue having access to their deposits~~, the deposit guarantee scheme to which the institution is affiliated ~~is liable~~ **contributes to the funding of the resolution action and that action ensures that depositors continue to have access to their deposits. The deposit guarantee scheme shall be liable** for ~~the amount of~~ losses up to the amount of **the** covered deposits **but shall not be asked to pay more** than it would have had to bear if the institution had been wound up under normal insolvency proceedings.
2. Member States shall ensure that, under the national law governing normal insolvency proceedings, the deposit guarantee schemes rank pari passu with unsecured nonpreferred claims.	~~2. Member States shall ensure that, under the national law governing normal insolvency proceedings, the deposit guarantee schemes rank pari passu with unsecured nonpreferred claims.~~

Text proposed by the Commission	Amendments proposed by the ECB [1]
3. Member States shall ensure that the determination of the amount by which the deposit guarantee scheme is liable in accordance with paragraph 1 of this Article complies with the conditions established in Article 30(2).	~~3.~~ **2.** Member States shall ensure that the determination of the amount by which the deposit guarantee scheme is liable in accordance with paragraph 1 of this Article complies with the conditions established in Article 30(2).
4. The contribution from the deposit guarantee scheme for the purpose of paragraph 1 shall be made in cash.	~~4.~~ **3.** The contribution from the deposit guarantee scheme for the purpose of paragraph 1 shall be made in cash.
[…]'	[…].'

Explanation

The proposed amendment aims at clarifying the legal basis under which the DGS is liable for the amount of its loss in case the institution had been wound up instead of placed under resolution. Second, under Directive 94/19/EC, only credit institutions may be affliated to a DGS.

The proposed deletion of Article 99(2) relates to the proposal to establish a depositor preference rule. See also proposed Amendment 11.

(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) The ESCB provides intraday credit to credit institutions and investment firms established in the European Economic Area as well as to a limited range of other eligible entities. See in particular Annex III to Guideline ECB/2007/2 of 26 April 2007 on a Trans-European Automated Real-time Gross settlement Express Transfer system (TARGET2), (OJ L 237, 8.9.2007, p. 1). Furthermore, the ESCB provides liquidity in the context of monetary policy. See Chapters 3 and 4 of Annex I to Guideline ECB/2011/14 of 20 September 2011 on monetary policy instruments and procedures of the Eurosystem (OJ L 331, 14.12.2011, p. 1).
(3) See the ECB's Annual Report 1999, p. 98 and the ECB's Financial Stability Review December 2006, p. 172.
(4) See the ECB's Convergence Report 2012, p. 29.
(5) See the ESCB contribution to the EC's public consultation on the technical details of a possible EU framework for bank recovery and resolution, May 2011, pp. 4 and 5.
(6) See ECB Opinion CON/2010/83, paragraph 6.3 and Opinion CON/2011/103, paragraph 4.
(7) See Article 3(3) of the proposed directive.
(8) See in relation to the ESCB Article 127(5) of the Treaty and Article 3.3 of the Statute of the European System of Central Banks and of the European Central Bank.
(9) Article 123 of the Treaty. See also ECB's Convergence Report 2012, p. 29.
(10) See footnote 9.
(11) Recital 35 of the proposed directive.
(12) See in this respect also the Communication from the Commission — The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition (OJ C 10, 15.1.2009, p. 2).
(13) Preferred creditor status is established for DGS by Article 94(1) of the Law on bank insolvency (*Darjaven vestnik* No 92, 27.9.2002).
(14) Depositor preferred creditor status is established by Article 4(16) of Law 3746/2009 transposing Directive 2005/14/EC on insurance against civil liability in respect of the use of motor vehicles and Directive 2005/68/EC on reinsurance and other provisions (FEK A 27, 16.2.2009). Article 13a(4) establishes the DGS' status.
(15) Law of 5 October 1995 on credit institutions (LV 163(446), 24.10.1995). Article 192(1) introduced preferential ranking for guaranteed depositors on 21 May 1998.
(16) Law CXII of 1996 on credit institutions and financial undertakings (*Magyar Közlöny* 1996/109, 12.12.1996), and more specifically Chapter XV of the Law on the details of the deposit guarantee scheme. The preferential status of all, and not only guaranteed, deposit claims is established by Article 183(1) of the Law.
(17) See Article 166-A of consolidated version of Decree-Law No 298/92 of 31 December 1992 on the legal framework of credit institutions and financial undertakings (D.R. No 30, I, 10.2.2012).
(18) Government Ordinance No 10/2004 on the proceedings for judicial reorganisation and bankruptcy of credit institutions, as further amended and supplemented, in particular by Article 38, gives a preferential right, after expenses related to the bankruptcy proceedings have been settled to claims arising from guaranteed deposits, including the claims of the DGS arising from repayments to the guaranteed depositors (*Monitorul Oficial al României*, Part One, No 84, 30.1.2004).
(19) See ECB Opinion CON/2011/83.
(20) See ECB's Annual Report 1999, p. 98 and ECB Financial Stability Review, December 2006, p. 172.
(21) See Article 31(7) of the proposed directive.
(22) See Articles 26 and 29 of the proposed directive.
(23) See recital 28 of the proposed directive.
(24) Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ L 166, 11.6.1998, p. 45).
(25) See also the ESCB contribution to the EC's public consultation on the technical details of a possible EU framework for bank recovery and resolution, May 2011.
(26) See recital 9.
(27) See Article 17(4) of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1).

([28]) See recital 10.
([29]) See ECB 'Report on the lessons learned from the financial crisis with regard to the functioning of European financial market infrastructures' of May 2010.
([30]) See also the ESCB contribution to the EC's public consultation on the technical details of a possible EU framework for bank recovery and resolution, May 2011, p. 6, paragraph 9.
([31]) See Opinion CON/2011/103.
([32]) See footnote 9.