

I

(Resolutions, recommendations and opinions)

OPINIONS

EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 11 January 2010

on a proposal for a directive of the European Parliament and of the Council amending

Directives 2003/71/EC and 2004/109/EC

(CON/2010/6)

(2010/C 19/01)

Introduction and legal basis

On 14 October 2009 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 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market ⁽¹⁾ (hereinafter the 'proposed directive').

The ECB's competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union since the proposed directive contains provisions affecting the European System of Central Banks' contribution to the smooth conduct of policies relating to the stability of the financial system, as referred to in Article 127(5) of the Treaty. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

Any observations contained in this Opinion are without prejudice to the ECB Opinion on the proposal for a directive of the European Parliament and of the Council amending Directives 1998/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC, and 2009/65/EC in respect of the powers of the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority ⁽²⁾.

1. General observations

1.1. The ECB welcomes the aim of strengthening investor protection, by making information in prospectuses simpler and easier to read. In particular for less standardised securities, such as asset-backed securities, and for other types of securities backed by collateral, in particular covered bonds, a well-defined summary including key information on the securities as well as on the parties involved, and a comprehensive liability regime concerning the information in the summary, would be useful to investors and regulators. This will ensure comparability not only between asset classes but also between securities within asset classes.

⁽¹⁾ COM(2009) 0491 final.

⁽²⁾ COM(2009) 0576 final.

1.2. In this regard, the ECB very much welcomes the current dialogue between the ECB, the competent authorities and the industry on the possibility of creating a standard for reference data on securities and issuers, with the aim of making such data available to policymakers, regulators and the financial markets through an international public infrastructure. Such an infrastructure would provide all interested parties with the high quality data required to produce more timely and reliable analyses of increasingly complex financial markets, especially in times of turbulence ⁽¹⁾.

2. Specific observations

Disclosure of central banks' lending operations under EU legislation

2.1. Directive 2003/71/EC ⁽²⁾, Directive 2004/109/EC ⁽³⁾ and other EU legislation ⁽⁴⁾ contain various disclosure requirements for the benefit of the markets and the protection of investors. Some of these directives provide for exceptions to disclosure rules. In particular, according to Article 8(2) of Directive 2003/71/EC: 'The competent authority of the home Member State may authorise the omission from the prospectus of certain information provided for in this Directive or in the implementing measures referred to in Article 7(1), if it considers that: (a) disclosure of such information would be contrary to the public interest'. No similar exception is provided for in Directive 2004/109/EC.

2.2. A clear legal framework should be put in place in order to facilitate the smooth and rapid conduct of central banks' lending or other liquidity facilities, including in crisis situations, as highlighted by the recent financial crisis. In this regard, information on central banks' lending or other liquidity facilities provided to a particular credit institution, including emergency liquidity assistance, needs to be kept confidential in order to contribute to the stability of the financial system as a whole and maintain public confidence in a period of crisis. The abovementioned exception under Article 8(2)(a) of Directive 2003/71/EC could conceivably be used as a legal basis for the non-disclosure of some information on central banks' operations, including emergency liquidity assistance. However, an exception to the disclosure obligations should be made explicit in all relevant EU legislation. Furthermore, the smooth functioning of the financial system requires a plain exception, as an assessment of the need for disclosure on a case by case basis could create a deadlock in a situation where swift action is required. For these reasons, proposals for amendments of Directives 2003/71/EC and 2004/109/EC are made in the Annex and corresponding amendments should be inserted in all relevant EU legislation providing for disclosure requirements.

2.3. The ECB stands ready to further cooperate with the Commission on this issue.

3. Drafting proposals

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

Done at Frankfurt am Main, 11 January 2010.

The President of the ECB

Jean-Claude TRICHET

⁽¹⁾ See 'Remarks on the future of European financial regulation and supervision', keynote address by Jean-Claude TRICHET, President of the ECB, at the Committee of European Securities Regulators, Paris, 23 February 2009, available at <http://www.ecb.europa.eu>

⁽²⁾ Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, OJ L 345, 31.12.2003, p. 64.

⁽³⁾ Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, OJ L 390, 31.12.2004, p. 38.

⁽⁴⁾ Namely Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies, OJ L 222, 14.8.1978, p. 11; Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54(3)(g) of the Treaty on consolidated accounts, OJ L 193, 18.7.1983, p. 1; 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.

ANNEX

Drafting proposals

| Text proposed by the Commission | Amendments proposed by the ECB ⁽¹⁾ |
|---|--|
| <p>Amendment 1</p> <p>Article 2(1)(e)(i) of Directive 2003/71/EC</p> | |
| <p>'(e) "qualified investors" means:</p> <p>(i) Persons or entities that are considered to be or treated on request as professional clients in accordance with Annex II to Directive 2004/39/EC, or recognised as eligible counterparties in accordance with Article 24 of Directive 2004/39/EC.'</p> | <p>'(e) "qualified investors" means:</p> <p>(i) Persons or entities that are considered to be or treated on request as professional clients in accordance with Annex II to Directive 2004/39/EC, or recognised as eligible counterparties in accordance with Article 24 of Directive 2004/39/EC. Persons or entities that are treated on request as non-professional clients, in accordance with Annex II to Directive 2004/39/EC, shall not be considered as qualified investors.'</p> |
| <p>Explanation:</p> <p><i>The definition of qualified investor in Directive 2003/71/EC explicitly includes the ECB and the central banks (Article 2(1)(e)(ii)); as a consequence, the obligation to publish a prospectus does not apply when an offer of securities is solely addressed to them (Article 3(2)(a)). Under the proposed directive there is no longer an explicit reference to the ECB and the central banks as qualified investors, but the proposed new definition of 'qualified investors' includes 'persons or entities that are considered to be or treated on request as professional clients in accordance with Annex II to Directive 2004/39/EC, or recognised as eligible counterparties in accordance with Article 24 of Directive 2004/39/EC'. The ECB and the central banks are both considered as professional clients and recognised as eligible counterparties, so the ECB understands that they would normally continue to be considered qualified investors. However, it is not clear in the proposed directive what regime will be applicable to professional clients which are treated on request as non-professionals, in accordance with Annex II to Directive 2004/39/EC. For the sake of clarity, the proposed amendment would align the list of professional clients and eligible counterparties under Directive 2004/39/EC with the list of qualified investors under Directive 2003/71/EC, in accordance with the purpose of the Commission amendment (see recital 6 of the proposed directive).</i></p> | |
| <p>Amendment 2</p> <p>Article 8(2a) of Directive 2003/71/EC (new)</p> | |
| <p>No text</p> | <p>'2a. There shall be no requirement for the prospectus and any supplements thereto to contain information about central bank lending or other liquidity facilities (including the provision of emergency liquidity assistance) provided to a particular credit institution by an ESCB central bank.'</p> |
| <p>Explanation:</p> <p><i>Central bank lending operations (including the provision of emergency liquidity assistance) for the benefit of a particular credit institution need to be kept confidential, in order to contribute to the stability of the financial system and thus not to increase unnecessarily stress in the system. The smooth functioning of the financial system requires a plain exception, as an assessment of the need for disclosure on a case by case basis could create a deadlock in a situation where swift action is required.</i></p> | |
| <p>Amendment 3</p> <p>Article 8(4) of Directive 2004/109/EC (new)</p> | |
| <p>No text</p> | <p>'4. There shall be no requirement for the information provided in accordance with Articles 4, 5 and 6 to contain information about central bank lending or other liquidity facilities (including the provision of emergency liquidity assistance) provided to a particular credit institution by an ESCB central bank.'</p> |

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| Text proposed by the Commission | Amendments proposed by the ECB ⁽¹⁾ |
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Explanation:

Central bank lending operations (including the provision of emergency liquidity assistance) for the benefit of a particular credit institution need to be kept confidential, in order to contribute to the stability of the financial system and thus not to increase unnecessarily stress in the system. The smooth functioning of the financial system requires a plain exception, as an assessment of the need for disclosure on a case by case basis could create a deadlock in a situation where swift action is required.

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| Current text | Amendments proposed by the ECB ⁽¹⁾ |
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Amendment 4

Article 11(1) of Directive 2004/109/EC

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| <p>'1. Articles 9 and 10(c) shall not apply to shares provided to or by the members of the ESCB in carrying out their functions as monetary authorities, including shares provided to or by members of the ESCB under a pledge or repurchase or similar agreement for liquidity granted for monetary policy purposes or within a payment system.'</p> | <p>'1. Articles 9 and 10(c) shall not apply to shares provided to or by the members of the ESCB in carrying out their functions as monetary authorities, including shares provided to or by members of the ESCB under a pledge or repurchase or similar agreement for liquidity granted for monetary policy purposes or within a payment system or in the context of other central bank lending or liquidity facilities (including the provision of emergency liquidity assistance).'</p> |
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Explanation:

Central bank lending operations (including the provision of emergency liquidity assistance) for the benefit of a particular credit institution need to be kept confidential, in order to contribute to the stability of the financial system and thus not to increase unnecessarily stress in the system. The smooth functioning of the financial system requires a plain exception, as an assessment of the need for disclosure on a case by case basis could create a deadlock in a situation where swift action is required.

⁽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.