

I

(Resolutions, recommendations and opinions)

OPINIONS

EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 18 March 2010

on a 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

(CON/2010/23)

(2010/C 87/01)

Introduction and legal basis

On 25 November 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 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 ⁽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 Bank's (ESCB) contribution to the smooth conduct of policies relating to the prudential supervision of credit institutions and the stability of the financial system, as referred to in Article 127(5) of the Treaty.

The observations in this opinion must be read in conjunction with ECB Opinions CON/2009/88 ⁽²⁾ and CON/2010/5 ⁽³⁾, which have been adopted in the context of the on-going reform of European financial supervision ⁽⁴⁾.

In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

1. General observations

- 1.1. The ECB supports the objective of the proposed directive, which introduces in 11 financial sector directives amendments that are necessary to ensure the proper functioning of the European Supervisory Authorities (ESAs) and of the European Systemic Risk Board (ESRB).

1.2. The observations contained in this opinion and the drafting proposals focus mainly on issues that are of direct relevance to the ECB/ESCB and the ESRB and to their cooperation with the ESAs and national competent authorities. In this respect, it is of particular importance for the fulfilment of their respective tasks to remove any legal obstacles to information sharing that may exist between the ECB/ESCB, the ESRB, the three ESAs and the national supervisory authorities.

1.3. *Adoption of technical standards*

1.3.1. The proposed regulations establishing the ESAs (hereinafter the proposed ESAs regulation) provide for a uniform procedure for the adoption of technical standards ⁽⁵⁾. The draft technical standards will be developed by each of the ESAs in the form of regulations or decisions ⁽⁶⁾, and endorsed by the Commission. In this context, the proposed directive provides for several amendments to sectoral legislation, identifying the areas in which technical standards should be developed ⁽⁷⁾. As stressed in ECB Opinion CON/2010/5, the ECB fully supports the establishment of a European single rulebook applicable to all financial institutions in the single market and therefore the need for an effective instrument to establish harmonised binding technical standards in financial services ⁽⁸⁾.

1.3.2. As regards the implementing powers conferred on the Commission, the Treaty establishes a distinction between delegated acts (Article 290 of the Treaty) and implementing acts (Article 291 of the Treaty). As a result, regulations and decisions adopted by the Commission to endorse draft technical standards will fall under one of these two categories. In the context of EU financial services legislation, a common understanding should be reached among the Union institutions involved in the legislative process on an appropriate methodology to be adopted to incorporate the Commission legal acts endorsing such draft technical standards within the more general framework within which delegated and implementing powers operate under the Treaty.

1.3.3. To the extent that draft technical standards qualify as 'proposed Union acts' within the meaning of the first indent of Article 127(4) and Article 282(5) of the Treaty and fall within the ECB's fields of competence, the ECB should be consulted on the proposed delegated or implementing acts endorsing the draft technical standards. In the OLAF judgment ⁽⁹⁾, the Court of Justice clarified that the obligation to consult the ECB on proposed Union acts is intended 'essentially to ensure that the legislature adopts the act only when the body has been heard, which, by virtue of the specific functions that it exercises in the Community framework in the area concerned and by virtue of the high degree of expertise that it enjoys, is particularly well placed to play a useful role in the legislative process envisaged'. Having regard to the importance of the function to be played by technical standards as a substantial component of the Union financial services legislation in the future, the ECB will exercise its advisory role in line with the above principles.

2. **Specific observations**

2.1. *Directive 2003/71/EC* ⁽¹⁰⁾

The publication of all prospectuses in electronic form and their availability either directly on the future European Securities and Markets Authority (ESMA) website or through a hyperlink to the relevant websites will enhance transparency ⁽¹¹⁾. In this respect, the ECB strongly supports the idea of improving the availability and comparability of certain key information in the prospectuses, through the creation of 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 ⁽¹²⁾. Prospectuses contain key information that may be of relevance for the purposes of systemic risk analysis, the risk management of companies and the compilation of securities statistics; therefore it should be ensured that such information is readily available. In this context, the ECB stands ready to cooperate with the ESMA in contributing to the design and set-up of an electronic repository and related processes.

2.2. *Directive 2006/48/EC* ⁽¹³⁾

2.2.1. A number of amendments to sectoral directives under the proposed directive aim at further improving information gateways between relevant authorities at the Union and national level ⁽¹⁴⁾. The ECB welcomes these proposed amendments and more particularly those introduced to take account of the establishment of the ESRB ⁽¹⁵⁾. In addition, the ECB would suggest the two following amendments.

2.2.2. First, the proposed directive clarifies that competent authorities are entitled to share information with the European Banking Authority (EBA). The ECB recommends introducing an amendment to one provision of Directive 2006/48/EC with a view to removing any possible legal obstacle to the exchange of information between the EBA and the ESRB. The introduction of such an amendment would clarify that the EBA, in accordance with Directive 2006/48/EC and the relevant provisions of the proposed EBA regulation, is entitled to transmit to the ESRB all the information received from national authorities necessary for the fulfilment of the ESRB's tasks without prejudice to other applicable European rules, especially Article 15(4) of the proposed ESRB regulation.

2.2.3. Second, Directive 2006/48/EC entrusts colleges of supervisors with the exercise of certain tasks ⁽¹⁶⁾ (including in terms of exchange of information ⁽¹⁷⁾) and, in this context, the applicable confidentiality requirements ⁽¹⁸⁾ must not prevent competent authorities from exchanging confidential information within colleges of supervisors ⁽¹⁹⁾. In view of the potential importance of the information accessible within supervisory colleges, the ECB would recommend explicitly specifying that the ESAs may share confidential information related to the activities of the colleges of supervisors with the ESRB ⁽²⁰⁾, when this information is relevant for the fulfilment of its tasks ⁽²¹⁾ and based on reasoned requests from the ESRB. This clarification could be introduced either in Article 12 of the proposed ESAs regulations on colleges of supervisors or in the context of the relevant provisions on exchange of information in the sectoral directives dealing with colleges of supervisors.

3. **Drafting proposals**

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

Done at Frankfurt am Main, 18 March 2010.

The President of the ECB

Jean-Claude TRICHET

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- (¹) COM(2009) 576 final.
- (²) ECB Opinion CON/2009/88 of 26 October 2009 on a proposal for a regulation of the European Parliament and of the Council on Community macro-prudential oversight of the financial system and establishing a European Systemic Risk Board and a proposal for a Council decision entrusting the European Central Bank with specific tasks concerning the functioning of the European Systemic Risk Board (OJ C 270, 11.11.2009, p. 1). All ECB opinions are published on the ECB's website at <http://www.ecb.europa.eu>
- (³) ECB Opinion CON/2010/5 of 8 January 2010 on three proposals for regulations of the European Parliament and of the Council establishing a European Banking Authority, a European Insurance and Occupational Pensions Authority and a European Securities and Markets Authority (OJ C 13, 20.1.2010, p. 1).
- (⁴) On 23 September 2009, the European Commission adopted a package of legislative proposals comprising (i) a proposal for a regulation of the European Parliament and of the Council on Community macro-prudential oversight of the financial system and establishing a European Systemic Risk Board (COM(2009) 499 final) (hereinafter the proposed ESRB regulation); (ii) a proposal for a Council decision entrusting the European Central Bank with specific tasks concerning the functioning of the European Systemic Risk Board (COM(2009) 500 final); (iii) a proposal for a regulation of the European Parliament and of the Council establishing a European Banking Authority (COM(2009) 501 final) (hereinafter the proposed EBA regulation); (iv) a proposal for a regulation of the European Parliament and of the Council establishing a European Insurance and Occupational Pensions Authority (COM(2009) 502 final); and (v) a proposal for a regulation of the European Parliament and of the Council establishing a European Securities and Markets Authority (COM(2009) 503 final). Following the entry into force of the Treaty on 1 December 2009, the new legal basis for the proposed ESRB decision is Article 127(6) of the Treaty (ex Article 105(6) of the Treaty establishing the European Community), which results in the proposed ESRB decision now being converted into a proposed regulation.
- (⁵) See Article 7 of the proposed ESAs regulations.
- (⁶) Article 7(2) of the proposed ESAs regulations.
- (⁷) Recital 9 of the proposed directive.
- (⁸) See, for instance, recital 14 of the proposed EBA regulation.
- (⁹) Case C-11/00 Commission of the European Communities v European Central Bank [2003] ECR I-7147, in particular paragraphs 110 and 111.
- (¹⁰) 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).
- (¹¹) Under the proposed directive, ESMA must publish on its website the list of approved prospectuses, including, if applicable, a hyperlink to the prospectus published on the website of the competent authority of the home Member State, of the issuer or of the regulated market (Article 5(3) of the proposed directive introducing a new Article 14(4a) to Directive 2003/71/EC). The general approach agreed in the Council on other amendments to Directive 2003/71/EC also requires the publication of prospectuses in electronic form (see Article 1(13)(b) of the general approach on the Commission's proposal for a directive of the European Parliament and of the Council amending Directive 2003/71/EC and Directive 2004/109/EC (2009/0132 (COD), 17451/09)). Article 14(2), second subparagraph of Directive 2003/71/EC currently leaves the decision to require issuers to publish these prospectuses in an electronic form to the Member States.
- (¹²) ECB Opinion CON/2010/6 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, paragraph 1.2.
- (¹³) Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) (OJ L 177, 30.6.2006, p. 1).
- (¹⁴) See, as regards Directive 2006/48/EC, Articles 9(10), 9(11), 9(12), 9(25) and 9(27) of the proposed directive.
- (¹⁵) See, for instance, Article 9(12) of the proposed directive amending Article 49 of Directive 2006/48/EC.
- (¹⁶) Referred to in Article 129, Article 130(1) and Article 131a of Directive 2006/48/EC.
- (¹⁷) Article 131a(1)(a) of Directive 2006/48/EC.
- (¹⁸) Under Chapter 1, Section 2 of Directive 2006/48/EC.
- (¹⁹) Article 131a(1), third sub-paragraph of Directive 2006/48/EC.
- (²⁰) Including the colleges established under Article 42a(3) of Directive 2006/48/EC.
- (²¹) Access of the ESRB to information shared within colleges of supervisors would be in line with the views taken by the High-Level Group on Financial Supervision in the Union chaired by Jacques de Larosière in its report of 25 February 2009, paragraphs 180 and 186, pages 45 and 47, the Commission in its communication of 27 May 2009 on European financial supervision (COM(2009) 252 final, p. 15) and the ECOFIN Council in its conclusions of 9 June 2009, p. 13 which support ESRB access to this information.
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ANNEX

Drafting proposals ⁽¹⁾

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

Recital 15 of the proposed directive

<p>'(15) The new supervisory architecture established by the ESFS will require national supervisory authorities to cooperate closely with the European Supervisory Authorities. Amendments to the relevant legislation should ensure that there are no legal obstacles to the information sharing obligations included in the Regulations proposed by the Commission establishing the European Supervisory Authorities.'</p>	<p>'(15) The new supervisory architecture set up with the established by of the ESFS and the ESRB will require national supervisory authorities and the European Supervisory Authorities to cooperate closely with each other and with the ESRBthe European Supervisory Authorities. Amendments to the relevant legislation should ensure that there are no legal obstacles to the information sharing obligations included in the Regulations proposed by the Commission establishing the European Supervisory Authorities and the ESRB.'</p>
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Explanation:

Sectoral legislation needs to be amended in order to reflect the establishment of the ESAs and the ESRB. Reference could also be made in recital 5 of the proposed directive to the two proposals adopted by the Commission relating to the ESRB as part of the legislative package on European financial supervision.

Amendment 2

Article 1(1) of the proposed directive
(Amendment to Directive 98/26/EC ⁽²⁾ — Article 6(3))

<p>'3. The Member State referred to in paragraph 2 shall immediately notify other Member States and the European Securities and Markets Authority established by Regulation .../... of the European Parliament and of the Council and shall communicate to the latter all information essential to achieve its tasks.'</p>	<p>'3. The Member State referred to in paragraph 2 shall immediately notify decisions taken in accordance with paragraph 1 to other Member States, the Commission, the European Central Bank, central banks of the Member States and the European Securities and Markets Authority established by Regulation .../... of the European Parliament and of the Council and shall communicate to the latter all information essential to achieve its tasks. The Commission shall, upon receipt of such information, immediately notify all designated systems and system operators of decisions taken in accordance with paragraph 1.</p>
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Explanation:

The proposed amendment of Article 6(3) of Directive 98/26/EC is a very significant improvement in terms of the consequences resulting from the commencement of insolvency proceedings in respect of irrevocability and the finality of execution for transfer orders. However, such consequences are important for all overseers of payment, clearing and settlement systems and other critical infrastructure. Therefore, the distribution list for notifications of such proceedings must be enlarged to include not only the Commission and the ESMA but also the national central banks (NCBs) and the ECB, together the ESCB, as they have exclusive statutory tasks in the area of oversight of payment, clearing and settlement systems.

In addition, it is important that the Commission, with immediate effect, forwards notifications on the commencement of insolvency procedures to the relevant entities covered by the scope of Directive 98/26/EC, thereby ensuring that no transfer orders are executed by such entities where they are or should have been aware of the commencement of insolvency proceedings.

Finally, the reference in the proposed directive to the obligation for the Member State to provide all necessary information to the ESMA should be deleted since it is suggested that the Commission should be entrusted with the notification tasks. Moreover, Member States can only provide information relating to the decisions referred to in Article 6 of Directive 98/26/EC and not all information necessary for ESMA tasks. There is also a minor editorial amendment to the first sentence of Article 6(3) clarifying the exact scope of the notification obligation.

⁽¹⁾ The proposed directive was adopted before the entry into force of the Treaty. Treaty citations in the texts proposed by the Commission will need to be adapted.

Text proposed by the Commission	Amendments proposed by the ECB ⁽¹⁾
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Amendment 3

Article 1(2) of the proposed directive
(Amendment to Directive 98/26/EC — the first subparagraph of Article 10(1))

<p>'Member States shall specify the systems, and the respective system operators, which are to be included in the scope of this Directive and shall notify them to the European Securities and Markets Authority and inform it of the authorities chosen in accordance with Article 6(2). The European Securities and Markets Authority shall publish that information on its website.'</p>	<p>'Member States shall specify the systems, and the respective system operators, which are to be included in the scope of this Directive and shall notify them to the European Securities and Markets Authority Commission and inform it of the authorities chosen in accordance with Article 6(2). The Commission European Securities and Markets Authority shall publish that information on its website.'</p>
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Explanation:

The Commission has established the list of notified systems since the adoption of Directive 98/26/EC and this practice is well established. Therefore, taking into account the basic ESCB task to promote the smooth operation of payment systems and oversight functions of the ECB/NCBs concerning payment, clearing and settlement systems, the ECB considers that the Commission should continue to perform this task.

Amendment 4

(Amendment to Directive 2002/87/EC ⁽³⁾ — last subparagraph of Article 12(1) (new))

<p>The competent authorities may also exchange with the following authorities such information as may be needed for the performance of their respective tasks, regarding regulated entities in a financial conglomerate, in line with the provisions laid down in the sectoral rules: central banks, the European System of Central Banks and the European Central Bank.'</p> <p>(No amendment in the proposed directive)</p>	<p>The competent authorities may also exchange with central banks (including the ECB and the national central banks of the European System of Central Banks), the European Supervisory Authorities and the European Systemic Risk Board the following authorities such information as may be needed for the performance of their respective tasks, regarding regulated entities in a financial conglomerate, in line with the provisions laid down in the sectoral rules: central banks, the European System of Central Banks and the European Central Bank.</p>
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Explanation:

Obstacles to the sharing of information between competent authorities and central banks, ESAs and the ESRB in the context of Directive 2002/87/EC should be removed.

Amendment 5

(Amendment to Directive 2003/41/EC ⁽⁴⁾ — Article 20a (new))

<p>No text.</p>	<p>'Article 20a Professional secrecy and cooperation between authorities</p> <p>1. The obligation of professional secrecy shall apply to all persons who work or have worked for a competent authority. Information covered by professional secrecy may not be disclosed to any other person or authority except in accordance with provisions laid down by law.</p> <p>2. Competent authorities of Member States shall cooperate with each other whenever necessary for the purpose of carrying out their duties and making use of their powers. Competent authorities shall render assistance to competent authorities of other Member States.</p> <p>3. Paragraph 1 shall not prevent the competent authorities from exchanging confidential information or from transmitting confidential information to the European Insurance and Occupational Pensions Authority (EIOPA) or the European Systemic Risk</p>
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Text proposed by the Commission	Amendments proposed by the ECB (1)
	Board (ESRB). Information exchanged between competent authorities and the EIOPA or the ESRB shall be covered by the obligation of professional secrecy.'

Explanation:

The provision on professional secrecy and cooperation between competent authorities is usually provided for in the financial sector directives and should also be included in Directive 2003/41/EC. Sharing of confidential information by competent authorities with EIOPA and the ESRB might be necessary for the performance of their respective tasks and any legal obstacles to the transmission of such information should be removed.

Amendment 6

Article 6(11)(b) of the proposed directive
(Amendment to Directive 2004/39/EC (2) — Article 58(5))

<p>'5. Articles 54, 58 and 63 shall not prevent a competent authority from transmitting to the European Securities and Markets Authority, the European Systemic Risk Board established by Regulation .../... of the European Parliament and of the Council, to central banks, the European System of Central Banks and the European Central Bank, in their capacity as monetary authorities, and, where appropriate, to other public authorities responsible for overseeing payment and settlement systems, confidential information intended for the performance of their tasks; likewise such authorities or bodies shall not be prevented from communicating to the competent authorities such information as they may need for the purpose of performing their functions provided for in this Directive.'</p>	<p>'5. Articles 54, 58 and 63 shall not prevent a competent authority from transmitting to the European Securities and Markets Authority, the European Systemic Risk Board established by Regulation .../... of the European Parliament and of the Council, and to central banks, including the national central banks of the European System of Central Banks and the European Central Bank, in their capacity as monetary authorities, and, where appropriate, to other public authorities responsible for overseeing payment and settlement systems, confidential information when this information is intended for the performance of their tasks, including the conduct of monetary policy and related liquidity provision, the oversight of payment, clearing and settlement systems, and the safeguarding of the stability of the financial system; likewise such authorities or bodies shall not be prevented from communicating to the competent authorities such information as they may need for the purpose of performing their functions provided for in this Directive.'</p>
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Explanation:

The proposed amendment aims at ensuring consistency with corresponding provisions already present in the other sectoral directives and, in particular, Directive 2006/48/EC.

Amendment 7

Article 9(10) of the proposed directive
(Amendment to Directive 2006/48/EC — Article 44(2))

<p>'2. Paragraph 1 shall not prevent the competent authorities of the various Member States from exchanging information or transmitting information to the European Banking Authority in accordance with this Directive and with other Directives applicable to credit institutions. That information shall be subject to the conditions of professional secrecy set out in paragraph 1.'</p>	<p>'2. Paragraph 1 shall not prevent the competent authorities of the various Member States from exchanging information or transmitting information to the European Banking Authority in accordance with this Directive, and with other Directives applicable to credit institutions and Articles [12], 20 and 21 of Regulation .../... [EBA]. That information shall be subject to the conditions of professional secrecy set out in paragraph 1.'</p>
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Explanation:

Article 44(2) of Directive 2006/48/EC as amended by the proposed directive already clarifies that competent authorities may share information with the EBA. This clarification correlates to the proposed amendment of Article 49 of Directive 2006/48/EC which authorises competent authorities to transmit information to the ESRB, in particular in cases provided in Article 130(1) of Directive 2006/48/EC.

Text proposed by the Commission

Amendments proposed by the ECB ⁽¹⁾

The proposed amendment introduces in Article 44(2) of Directive 2006/48/EC an express reference to Articles 20 and 21 of the proposed EBA regulation. Article 20 of Regulation .../... [EBA] relates to the collection of information from competent authorities by the EBA. Under Article 21 of the same regulation, the EBA must cooperate with the ESRB and provide the ESRB with regular and up-to-date information for the achievement of its tasks, as specified in Article 15 of Regulation .../... [ESRB].

Under a combined reading of the amended Article 44(2) of Directive 2006/48/EC, of these two articles of the proposed EBA regulation and of the proposed ESRB regulation, it is clarified that the EBA is entitled to further transmit to the ESRB all the information received from competent authorities which is necessary for the fulfillment of the ESRB's tasks.

Should Article 12 of Regulation .../... [EBA] relating to the college of supervisors be amended as proposed in paragraph 2.2.3 of this opinion, this article should be also expressly mentioned in Article 44(2) of Directive 2006/48/EC in order to make it clear that the EBA may share information obtained from the colleges of supervisors with the ESRB.

(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) 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).

(3) Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council (OJ L 35, 11.2.2003, p. 1).

(4) Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision (OJ L 235, 23.9.2003, p. 10).

(5) Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1).
