



**OPINION OF THE EUROPEAN CENTRAL BANK**  
**of 6 August 2014**  
**on resolution of credit institutions and investment firms**  
**(CON/2014/62)**

**Introduction and legal basis**

On 2 June 2014 the European Central Bank (ECB) received a request from the Hungarian Ministry for the National Economy (hereinafter the ‘consulting authority’) for an opinion on a draft law establishing a resolution framework for credit institutions and investment firms (hereinafter the ‘draft law’). Given the advanced stage of the legislative process, the consulting authority asked for the adoption of the ECB’s opinion on an urgent basis.

On 20 June 2014 the consulting authority notified the ECB that the version of the draft law which had been submitted to Parliament for adoption was substantially different from the version sent to the ECB. The ECB has therefore adopted its opinion based on the version of the draft law available on the website of the Hungarian Parliament<sup>1</sup>.

The ECB’s competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union and the sixth indent of Article 2(1) of Council Decision 98/415/EC<sup>2</sup>, as the draft decree relates to rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

**1 Purpose of the draft law**

- 1.1 According to the explanatory memorandum, the draft law aims to transposing Directive 2014/59/EU of the European Parliament and of the Council<sup>3</sup> (hereinafter the ‘BRRD’) by providing early intervention tools and resolution tools for the Magyar Nemzeti Bank (MNB) as the resolution authority designated to manage failing or likely to fail credit institutions and investment firms, in order to allow the MNB to ensure the continuity of the credit institutions’ and investment firms’

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<sup>1</sup> Draft law No T/262, submitted to the Hungarian Parliament on 12 June 2014.

<sup>2</sup> Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (OJ L 189, 3.7.1998, p. 42).

<sup>3</sup> Directive 2014/59/EU of the European Parliament and the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190.)

fundamental financial and economic functions while minimising the impact on the financial system. The draft law also aims to maintain the stability of the financial markets, and to minimise the cost to taxpayers of any potential resolution via the establishment of a resolution fund funded by levies on credit institutions and investment firms.

- 1.2 To facilitate the above aims, the draft law also amends several Hungarian legal acts, including the Law on the Magyar Nemzeti Bank<sup>4</sup>.
- 1.3 The draft law is planned to enter into force three days after its publication, with the exception of a number of provisions which will only enter into force sixty days after its adoption.

## 2 General observations

### 2.1 *Appropriate time to consult the ECB*

The ECB received the request from the consulting authority for an urgent consultation on the draft law on 2 June 2014. It requested the ECB's opinion by 25 June 2014. On 20 June 2014 it informed the ECB of substantial changes to the draft law.

The draft law was adopted on 4 July 2014 before the ECB could adopt this opinion<sup>5</sup>. As a consequence, there was no possibility for the Hungarian legislator to take the ECB's views into account before adopting the draft law. This made the request for an urgent ECB opinion obsolete. Furthermore, the draft law was enacted with substantial amendments which were not sent to the ECB for consultation.

With regard to the consultation on the draft law, the Hungarian authorities have not complied with their duty to consult the ECB. The adoption of this opinion in no way divests the Hungarian authorities of their duty to consult in compliance with this obligation, since this duty is important for the application and interpretation of the enacted law and any possible future amendments.

The ECB reiterates that even cases of particular urgency do not relieve national authorities from their duty under Articles 127(4) and 282(5) of the Treaty to consult the ECB and to allow sufficient time to take its views into account, in accordance with Decision 98/415/EC. Any significant amendments to the draft law, as in the case of the provisions subject to this consultation, have to be submitted to the ECB in order to allow it to issue its opinion based on the most recent text. In cases of particular urgency which do not allow for a normal consultation period, the consulting authority may indicate urgency in the consultation request and ask for a shorter deadline for the ECB's opinion to be adopted, thereby indicating the estimated course of the legislative process. However, the second sentence of Article 4 of Decision 98/415/EC provides that the ECB must be consulted 'at an appropriate stage' in the legislative process. This implies that the consultation should take place at a point in the legislative process which gives the ECB sufficient time to examine the draft legislative provisions and to adopt its opinion in all required language versions, and which also

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<sup>4</sup> Law CXXXIX of 2013 on the Magyar Nemzeti Bank.

<sup>5</sup> Law XXXVII of 2014, published in Magyar Közlöny 98/2014 on 18 July 2014.

enables the relevant national authorities to take the ECB's opinion into consideration before the provisions are adopted. Article 3(4) of Decision 98/415/EC also obliges Member States to suspend the adoption process for draft legislative provisions, pending receipt of the ECB's opinion.

The ECB would appreciate the consulting authority honouring its obligation to consult the ECB in line with the provisions of Decision 98/415/EC in the future.

## 2.2 *Independence of the MNB*

The ECB welcomes the new resolution tasks allocated to the MNB under the draft law, which are broadly consistent with its financial stability role. The ECB understands that these tasks will not interfere with the performance of its ESCB-related tasks under the Treaty or reduce the funds available to carry them out<sup>6</sup>. The ECB reiterates that, in view of the MNB's new role as resolution authority and in line with the principle of financial independence, appropriate resources will have to be made available to ensure that it is able to perform these new tasks<sup>7</sup>. In order to be compatible with the Treaty, any involvement on the part of the MNB or the members of its decision-making bodies in measures to strengthen financial stability must safeguard the MNB's functional, institutional and financial independence and the personal independence of the members of its decision-making bodies, and the proper performance of their tasks from an operational and financial point of view under the Treaty and the Statute of the European System of Central Banks and of the European Central Bank.

## 3. **Specific observations**

### 3.1 *Funding and replenishment of the resolution fund*

The ECB welcomes the fact that the initial capitalisation of the resolution fund will be achieved through the imposition of an ex ante levy on the financial services industry, as this will protect public funds and reduce moral hazard. This is considered to be broadly in line with the countercyclical approach taken in the BRRD of building up funds before a crisis. As funds accumulated ex ante may prove insufficient in a crisis situation, the ECB welcomes the provisions of the draft law<sup>8</sup> requiring the banking sector to repay any funds provided by the State during a resolution, if these are not recovered during the resolution process. This concept of extraordinary ex post levies, which is enshrined in the BRRD, promotes additional market discipline and is aimed at addressing moral hazard risk<sup>9</sup>. The ECB also welcomes the provision of the draft law<sup>10</sup> stating that the MNB may not under any circumstances finance the resolution fund, which is in line with

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<sup>6</sup> See paragraph 4 of Opinion CON/2014/31, paragraph 3.3 of Opinion CON/2013/10, paragraph 2.3 of Opinion CON/2012/52, paragraph 3 of Opinion CON/2011/69, and paragraph 3.2.3 of Opinion CON/2010/33. All ECB opinions are published on the ECB's website at [www.ecb.europa.eu](http://www.ecb.europa.eu).

<sup>7</sup> See paragraph 3.1.2 of Opinion CON/2013/56.

<sup>8</sup> See Articles 127, 132 and 140 of the draft law.

<sup>9</sup> See further paragraph 6.3 of Opinion CON/2010/83.

<sup>10</sup> See Article 132(3) of the draft law.

the prohibition of monetary financing<sup>11</sup>. The ECB understands that this provision applies to all of the MNB's activities related to the resolution fund, including the management of the account of the resolution fund pursuant to Article 134 of the draft law.

### 3.2 *Cooperation with the ECB*

Hungary is not a participating Member State under Council Regulation (EU) No 1024/2013 of 15 October 2013<sup>12</sup>, i.e. it is not a Member State whose currency is the euro or a Member State whose currency is not the euro which has established close cooperation in accordance with Article 7 of Regulation (EU) No 1024/2013. While there is no reference in the draft law to the MNB as the competent authority of a non-participating Member State cooperating with the ECB in the performance of supervisory tasks under Union law, such cooperation is essential and should be carried out in accordance with Article 3(6) of Regulation (EU) No 1024/2013.

### 3.3 *Operational separation of the MNB's supervisory and resolution functions*

In view of the MNB carrying out both resolution and supervisory functions, the ECB notes that, while the draft law states the principle that the resolution function will be operationally independent from the MNB's other functions, it does not specify any particular arrangements that are to be put in place in order to safeguard this independence. The BRRD 'exceptionally' allows an authority to carry out both resolution and supervisory functions on the condition that adequate structural arrangements are put in place to ensure operational independence and to avoid conflicts of interest between the resolution function and the authority's other functions. By way of example, the BRRD envisages structural separation being achieved through separate reporting lines for staff involved in carrying out resolution tasks from those involved in supervision activity. The ECB recommends introducing the requirements for adequate structural separation as laid down in the BRRD<sup>13</sup>, in order to ensure the operational independence of the resolution function within the MNB. That separation should not, however, prevent the resolution function from having access to any necessary information which is available to the supervisory function.

### 3.4 *Independent valuation*

The MNB is required to determine the value of the assets and liabilities of the institution that will undergo resolution by means of an independent valuation. Article 23(8) of the draft law provides that the MNB, acting in its resolution capacity, has to approve the independent valuation by issuing an order. The order can only be overturned as part of a legal challenge to the decision ordering the resolution of the institution. The ECB considers that it should be made clear that the valuation report is an integral part of the decision ordering the resolution and thus should not require separate approval. It is important that upon ordering a valuation report the MNB does not take any action

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<sup>11</sup> See the ECB's June 2014 Convergence Report, p. 38. See also paragraph 4 of Opinion CON/2011/103, paragraph 4.3 of Opinion CON/2011/93, paragraph 3.6 of Opinion CON/2011/39 and paragraph 3.2 of Opinion CON/2008/59.

<sup>12</sup> Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

<sup>13</sup> Pursuant to the third indent of Article 288 of the Treaty, national authorities are free to choose the form and methods of implementing a directive.

during or after the preparation of the report that could cast doubt on the independence of the entity which prepared it.

### 3.5 *Legal remedies*

Article 116 of the draft law grants affected parties the right to appeal against an MNB decision ordering a resolution or exercising resolution powers. However, the ECB notes that Article 116(4) of the draft law imposes a number of restrictions on the rights of appellants. The consulting authority is invited to consider whether these restrictions are necessary to ensure the expeditious determination of such appeals, and consistent with the need to preserve a balance between the property rights of affected parties and the public interest in a prompt resolution being affected by the resolution authority. What is critical is that the filing of the appeal does not suspend the resolution process.

### 3.6 *Sale of business tool*

Article 36(2) of the draft law appears to allow the MNB in its capacity as resolution authority to require an institution to search for a buyer of its business, or even take over from the institution's management in conducting such a search, although the competent authorities have not yet placed the institution into resolution<sup>14</sup>. In this context the ECB notes that Article 36(2) of the draft law is not fully in line with Article 27(2) of the BRRD. This provision of the BRRD sets out that if the conditions for early intervention are met, the resolution authority may require the institution to contact potential purchasers in order to prepare for its resolution. In contrast, the draft law makes the power to require the institution to contact potential purchasers conditional on the unsuccessful use of intervention measures. Furthermore, the BRRD also grants resolution authorities the power to decide on the timing for the potential application of the sale of business tool, without linking it to the unsuccessful application of intervention measures. With a view to the above, Article 36(2) of the law would benefit from being brought in line with the provisions set out in Article 27(2) of the BRRD.

### 3.7 *Depositor preference rules*

The ECB considers that a depositor preference as set out in Article 108 of the BRRD, i.e. 'super priority' for covered deposits in the ranking of creditors in insolvency, and 'simple priority' for all eligible deposits held by natural persons, and by micro, small and medium-sized enterprises in the ranking of creditors in insolvency, should be fully and clearly introduced into Hungarian law. The ECB understands that Article 154 read in conjunction with Article 160(6) of the draft law introduces some form of preference, which, however, does not clearly and fully reflect Article 108 of the BRRD, because the distinction between covered and eligible deposits is not reflected adequately, thereby allowing for multiple interpretations of these provisions of the draft law. The

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<sup>14</sup> In this connection see also the conditions for a resolution to commence and the procedure to be followed set out in Article 17 of the draft law.

**ECB-PUBLIC**

ECB points out that it is necessary to fully and clearly implement the depositor preference in Hungarian legislation by the 31 December 2014 transposition deadline set by the BRRD.

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

Done at Frankfurt am Main, 6. August 2014.

[signed]

*The President of the ECB*

Mario DRAGHI