



OPINION OF THE EUROPEAN CENTRAL BANK
of 11 November 2014
on the resolution of credit institutions and investment firms
(CON/2014/80)

Introduction and legal basis

On 2 October 2014, the European Central Bank (ECB) received a request from the Magyar Nemzeti Bank (MNB) for an opinion on a draft decree establishing certain specific criteria for the purposes of assessing whether a credit institution or an investment firm qualifies as failing or likely to fail (hereinafter the ‘draft decree’).

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/EC¹, 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 decree

- 1.1 The Hungarian Parliament has recently adopted Law XXXVII of 2014² on the resolution of credit institutions and investment firms (hereinafter the ‘Law on resolution’) in order to transpose Directive 2014/59/EU of the European Parliament and of the Council³ (hereinafter the ‘BRRD’) into Hungarian law. The ECB considered the Law on resolution, in its draft form, in Opinion CON/2014/62⁴. This law provides for early intervention and resolution tools for use by the MNB as the resolution authority designated to manage credit institutions and investment firms that are failing or likely to fail.
- 1.2 Article 32 of the BRRD sets out conditions for resolution which were transposed into Hungarian law by Article 17 of the Law on resolution. The Law on resolution⁵ also empowers the Governor of

¹ 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).

² Published in *Magyar Közlöny* 2014/98.

³ Directive 2014/59/EU of the European Parliament and of 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.)

⁴ All ECB’s opinions are available on its website at: www.ecb.europa.eu.

⁵ See Article 145(2)(d) and (e) of the Law on resolution.

the MNB to adopt criteria applicable to the procedure for the resolution of credit institutions and investment firms. Accordingly, in order to facilitate an assessment of whether the conditions set out in Article 17(2)(a) to (c) of the Law on resolution are met, the draft decree:

- sets out the quantitative criteria for establishing if there has been an infringement of the requirements, for assessing whether a credit institutions or investment firm is failing or likely to fail;
- sets out certain percentages applicable to the capital requirements of credit institutions and investment firms as an upper limit at which an institution may or will be deemed to be failing;
- sets out detailed rules on the criteria the MNB will take into account when deciding whether a credit institution or an investment firm is likely to fail.

1.3 The draft decree is expected to enter into force on 1 January 2015. According to the explanatory memorandum attached to the draft decree, the MNB intends to review the provisions of the draft decree following the European Banking Authority's adoption of guidelines on the interpretation of the different circumstances in which an institution will be deemed to be failing or likely to fail, as foreseen in Article 32(6) of the BRRD.

2. Observations

2.1 In accordance with Article 1(2) of Council Decision 98/415/EC, this opinion only addresses issues that go beyond the mere transposition of the BRRD into Hungarian law.

2.2 Supervisory decisions deeming an institution to be failing or likely to fail should be taken on a case-by-case basis, after an assessment of all pertinent circumstances of the individual situation⁶. Any such decision should therefore include discretionary elements, which cannot be determined ex ante. This is reflected in Article 32(4)(a) of the BRRD, which involves the consideration of whether the infringement or likely infringement of requirements for continuing authorisation justifies the withdrawal of the authorisation, and refers to the depletion of all or significant amounts of own funds without setting fixed thresholds. That said, a reference to thresholds relating to own funds requirements, below which an institution may be deemed to be failing, could provide guiding principles for the institutions involved, and may limit the scope for supervisory forbearance. Therefore, also with reference to Article 145(2)(d) and (e) of the Law on resolution, which, in the understanding of the ECB, empowers the Governor of the MNB to adopt a set of quantitative criteria instead of binding thresholds, such thresholds in the draft decree should be merely indicative.

2.3 When laying down the abovementioned criteria, it is important that a thorough impact analysis is carried out as regards the actual level of inadequacy that would cause a specific institution to fail. The explanatory memorandum attached to the draft decree does not contain any information about

⁶ As an example for assessing other circumstances, see Article 3 and Article 4(2) of the draft decree.

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whether the MNB has carried out such an impact assessment. If such an impact analysis has not been carried out, the ECB would recommend that such an assessment be performed before the adoption of the draft decree, to make sure that the percentage prescribed in Article 4(1)(b) do not need to be recalibrated in order to ensure an effective resolution regime.

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

Done at Frankfurt am Main, 11 November 2014.

[signed]

The President of the ECB

Mario DRAGHI