



EUROPEAN CENTRAL BANK

EUROSYSTEM

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ECB-PUBLIC

OPINION OF THE EUROPEAN CENTRAL BANK

of 16 October 2015

on recovery and resolution of credit institutions and investment firms

(CON/2015/35)

Introduction and legal basis

On 29 July 2015 the European Central Bank (ECB) received a request from the Italian Ministry of Finance (MoF) for an opinion on two legislative decrees on the recovery and resolution of credit institutions and investment firms (hereinafter jointly the 'draft legislative decrees').

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 on the third and sixth indents of Article 2(1) of Council Decision 98/415/EC¹, as the draft legislative decrees relate to the Banca d'Italia and to rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets. For elements of the draft legislative decrees the exclusive purpose of which is the transposition of Union law, the ECB's competence to deliver an opinion is based on Article 25.1 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB'). 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 The purpose of the draft legislative decrees is to implement Directive 2014/59/EU of the European Parliament and of the Council² into Italian law, thereby aligning the Italian legal framework for the recovery and resolution of certain types of entities active in financial markets, including credit institutions, investment firms, and financial holding companies that have their head office in Italy, with the existing Union legislation in this field.
- 1.2 The draft legislative decrees regulate plans and procedures for the recovery and resolution of entities falling within their scope and the status and the powers of the supervisory and resolution authorities in relation to banking and financial institutions at both individual and group level.

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 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).

- 1.3 Directive 2014/59/EU would be transposed by means of two legislative decrees. The first decree³ defines the status and powers of the relevant national authorities as well as the forms of cooperation and exchange of information among them, resolution plans, resolution tools and procedures, the establishment of resolution funds, safeguards, the right of appeal against decisions regarding crisis prevention or crisis management measures and administrative penalties. The second decree⁴ would amend the Consolidated Law on Banking⁵ and the Consolidated Law on Finance⁶ by laying down rules for recovery plans at individual and group level, agreements for group financial support, and early intervention measures, including the removal of senior management and the appointment of a temporary administrator of a credit institution. Early intervention measures are to be coordinated with the compulsory administrative liquidation procedure to avoid any unwarranted overlap. Moreover, recovery and resolution measures applicable to credit institutions are extended to investment firms established in Italy.
- 1.4 Under the draft legislative decrees, the Banca d'Italia is designated as a resolution authority within the meaning of Directive 2014/59/EU (with the National Committee for Companies and Stock Exchange, [Commissione Nazionale per le Società e la Borsa, CONSOB] entitled to make certain proposals within its remit in the case of investment firms). In observance of the principle of organisational autonomy, the Banca d'Italia is expected to implement appropriate measures to ensure operational independence between the tasks related to crisis management and other tasks conferred upon it and establish mechanisms for cooperation and coordination between the different structures involved.
- 1.5 The draft legislative decrees provide for crisis management tools. The Consolidated Law on Banking has already enabled the Banca d'Italia to take extraordinary measures. For example, the Banca d'Italia, acting alone, may prohibit credit institutions from carrying out new operations or require credit institutions to close branches. By contrast, the power to place credit institutions into special administration, possibly preceded by provisional management, or into compulsory administrative liquidation, was vested in the MoF, acting on a proposal of the Banca d'Italia. The draft legislative decrees amend the Consolidated Law on Banking so as to introduce recovery plans, group financing agreements and early intervention measures. The write-down and conversion of capital instruments, resolution tools and the establishment and use of resolution funds are also introduced by the draft legislative decrees. Finally, resolution tools would be made applicable, *mutatis mutandis*, to investment firms.

³ Draft legislative decree implementing Directive 2014/59/UE 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 (hereinafter the 'Implementation Decree').

⁴ Draft Legislative Decree amending Legislative Decree No 385 of 1^o September 1993 ('Consolidated Law on Banking') and Legislative Decree No 58 of 24 February 1998 ('Consolidated Law on Finance') in implementation of Directive 2014/59/UE 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 (hereinafter the 'Amending Decree').

⁵ Legislative Decree No 385 of 1 September 1993.

⁶ Legislative Decree No 58 of 24 February 1998.

- 1.6 The tools made available to the Banca d'Italia comprise preparatory measures, early intervention measures, the write-down or conversion of capital instruments and resolution measures.
- 1.7 Preparatory measures include recovery plans and group financial support agreements. Recovery plans are drawn up by the obliged credit and financial institutions and reviewed and assessed by the Banca d'Italia, which may also require these recovery plans to be updated. Any decisions taken by an institution to implement any measures envisaged in the recovery plan it has drawn up must be notified to the Banca d'Italia. Regarding group financial support agreements, the submission of the draft agreement to the extraordinary meeting of shareholders is subject to the prior authorisation of the Banca d'Italia. The decision providing financial support may be challenged by the Banca d'Italia in order to prevent or limit its implementation.
- 1.8 Early intervention measures include the implementation of recovery plans, a request for the removal of management and supervisory bodies, special administration and other extraordinary measures. Regarding the implementation of recovery plans, the Banca d'Italia may request obliged institutions to update the recovery plan and require its full or partial implementation. Regarding the request for the removal of management and supervisory bodies, the Banca d'Italia may request that senior managers and members of management and supervisory bodies of the institution are removed and replaced. The appointment of newly appointed senior managers and members is subject to the prior approval of the Banca d'Italia. Regarding special administration, the Banca d'Italia may remove the management and supervisory bodies of the institution and appoint special commissioners and a supervisory committee instead (special administration may be preceded by the interim measure of provisional management in particularly urgent cases). In principle, the special commissioners have the same powers as the management bodies of the institution but the Banca d'Italia may limit their powers and tasks. The special commissioners and the members of the supervisory committee may be removed or replaced by the Banca d'Italia at any time. Moreover the Banca d'Italia may appoint commissioners to work temporarily with the management body of the institution. Regarding other extraordinary measures, the Banca d'Italia may prohibit a credit institution from carrying out new operations or opening new branches.
- 1.9 The power to write down or convert relevant capital instruments is vested in the Banca d'Italia.
- 1.10 Regarding resolution measures, institutions which are failing or likely to fail may be placed into resolution and thus: (a) have their shares, ownership instruments, assets, rights or liabilities transferred to a purchaser under the sale of business tool; (b) have their shares or other ownership instruments transferred to a bridge institution under the bridge institution tool; (c) have their assets, rights, or liabilities transferred to an asset management vehicle company under the asset separation tool; (d) be subject to the bail-in tool. The Banca d'Italia's decision to place a distressed bank into resolution and any changes to the resolution programme are subject to the prior approval of the Minister of Economy and Finance, whereas the implementation of the measures outlined in the resolution programme is the sole responsibility of the Banca d'Italia. The Banca d'Italia implements the resolution programme by appointing special commissioners, and sending specific orders to the relevant bodies of the institution. The allowances due to special commissioners and members of the supervisory committee are set by the Banca d'Italia and either paid by the entity under resolution or advanced by the Banca d'Italia and then recovered

out of the price paid in exchange for the transfer of shares and other equities, from the institution under resolution or from the surplus, if any, of the bridge institution or the asset management vehicle company. Claims for such allowances enjoy general priority and, in case of insolvency, are treated as preferential claims in liquidation proceedings⁷.

- 1.11 Resolution funds for the purpose of achieving resolution objectives may be established within the Banca d'Italia⁸. The management of such funds may be delegated to recognised deposit guarantee schemes. The Banca d'Italia may also decide to establish resolution funds within other entities, including recognised deposit guarantee schemes. In this case the Banca d'Italia assesses whether their statutes are compliant with the rules laid down in the relevant provisions of the draft legislative decrees and approves them.
- 1.12 Resolution funds are financed by means of ordinary ex ante and extraordinary ex post contributions levied on banks established in Italy and on Italian subsidiaries of banks established outside the Union, borrowings and other forms of financial support, and amounts paid by the institution subject to resolution or by the bridge institution. The assets of the funds are ring-fenced from the Banca d'Italia's and the funding institutions' own assets and only meet the liabilities assumed in connection with resolution actions. The same applies where resolution funds are established within other entities, including recognised deposit guarantee schemes. Creditors of the Banca d'Italia, creditors of other entities within which the fund is established and creditors of the contributors to the funds are prevented from taking individual enforcement action against the funds.
- 1.13 In accordance with the no creditor worse off principle, shareholders or creditors that have incurred greater losses in a resolution than they would have incurred in a winding-up under normal insolvency proceedings are entitled to the payment of the difference from the resolution funds. Where a bridge institution tool or asset separation tool is used, the capital of the bridge institution and of the asset management vehicle company is wholly or partially held by the resolution fund or by other public entities.
- 1.14 Procedural requirements are established to ensure that resolution actions are properly notified and a confidentiality regime is imposed upon the authorities involved in resolution actions and their staff. A cooperation regime between public authorities is established, and the Banca d'Italia, other competent authorities and the MoF are also required to provide one another, upon request, with all the relevant information for the other authority to carry out its tasks. The Banca d'Italia is authorised to impose administrative measures and administrative sanctions.
- 1.15 The civil liability of the Banca d'Italia, the members of its bodies and its staff towards third parties for actions or omissions in the performance of their duties is limited to gross negligence and wilful misconduct⁹.
- 1.16 In order to implement the depositor preference rule in Italian law, the ranking of unsecured claims in the context of compulsory administrative liquidation of credit institutions has been amended

⁷ See Article 37(7) and (8) of the Implementing Decree.

⁸ See Articles 78 to 86 of the Implementing Decree.

⁹ See Article 24(6-bis) of Law No 262 of 28 December 2005.

such that deposit claims take priority over other unsecured claims in the following order: (a) claims related to covered deposits and claims of deposit guarantee schemes subrogated to the rights and obligations of covered depositors; (b) that part of the deposits of natural persons, micro, small and medium-sized enterprises eligible exceeding the amount covered by deposit guarantee schemes and comparable deposits referred paid into non-Union branches of banks having their registered office in Italy; and (c) other deposits. The definition of 'deposits' clarifies that it includes certificates of deposits not taking the form of transferrable securities and not issued in a series.

- 1.17 Finally, the draft legislative decrees provide for the provision of financing by the Banca d'Italia where a bank is placed into compulsory administrative liquidation and liquid financial resources are not available or insufficient to meet preference claims. In particular, the costs of proceedings in relation to any phases preceding the liquidation phase (provisional management, special administration or voluntary wind up) are paid in advance by the Banca d'Italia and advance payments are then recovered from the financial resources available to the credit institution, after reimbursement of the clients entitled to restitution of financial instruments held on custody by the credit institution, and before the payment of other preference claims. Where financial resources are insufficient to meet the costs of the proceedings in the liquidation phase, which are normally to be paid ahead of other preference claims, and where clients' financial resources are not available or not easily available or insufficient for this purpose, the Banca d'Italia may make advance payments up to EUR 400,000 or double the amount payable to the liquidators, whichever is higher. Advance payments made by the Banca d'Italia are then recovered from the available financial resources with priority over other preference claims (and then from clients' available financial resources)¹⁰.

2. General observations

- 2.1 The ECB welcomes the draft legislative decrees, as they strengthen the tools and procedures available to the Banca d'Italia to carry out effective preventive, early intervention and effective resolution measures in line with the common framework of intervention powers, rules and procedures laid down in Directive 2014/59/EU.
- 2.2 The ECB stresses, however, that it does not opine on whether the draft law effectively discharges the obligations of the Italian State to implement Directive 2014/59/EU in Italian law. Rather, the ECB focuses primarily on those provisions that may impact on the role and tasks of the Banca d'Italia as a central bank and as a member of the European System of Central Banks (ESCB), as well as on those provisions that may impact on the specific tasks conferred on the ECB concerning policies relating to the prudential supervision of credit institutions by Council Regulation (EU) No 1024/2013¹¹.

¹⁰ Article 1(35) of the Amending Decree.

¹¹ Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

2.3 The ECB underlines that, in the context of the proposed conferral of tasks on an ESCB member, it is necessary to assess such conferral against the prohibition of monetary financing under Article 123 of the Treaty¹². The ECB has developed the guidance outlined below, in the form of general and specific considerations, on the basis of which it decides whether a new task conferred on an ESCB national central bank (NCB) is to be considered a central banking task or a government task for the purposes of the prohibition of monetary financing.

2.3.1 *General considerations*

First, the systematic categorisation of tasks assigned to NCBs as central banking or government tasks applies to genuinely new tasks that either did not exist in the past or did not form an integral part of the central banking tasks assigned to the NCB in the past. In recognition of the different Member States' legal frameworks, central banking traditions and national set-ups, the tasks currently discharged by an NCB as central banking tasks are not reviewed and re-categorised, but may be reassessed if they are subject to legislative amendments of substance.

Second, the principle of financial independence requires that the Member States may not put their NCBs in a position where they have insufficient financial resources to carry out their ESCB- or Eurosystem-related tasks, as applicable.

Third, central banking tasks comprise in particular those tasks that are related to the tasks listed in Article 127(2), (5) and (6) of the Treaty.

Fourth, new tasks conferred on an NCB which are atypical of NCBs' tasks, or which are clearly discharged on behalf of and in the exclusive interest of the government or of other public entities, should be considered as government tasks. In that context, a distinction should be drawn between liquidity- and solvency-related tasks of NCBs. While, for purposes of the monetary financing prohibition, solvency support is a government task, liquidity-related tasks, the ultimate objective of which are to finance the economy, are central banking tasks.

2.3.2 *Specific considerations*

Resolution tasks can be considered central banking tasks, provided that they do not undermine an NCB's independence in accordance with Article 130 of the Treaty. However, the discharge of these tasks by central banks may not extend to the financing of resolution funds or other resolution financial arrangements as these are government tasks¹³. This is without prejudice to the following: (a) the possibility that central banks may provide short-term financing to deposit guarantee schemes under certain conditions; and (b) the possibility that NCBs may provide emergency liquidity assistance to solvent credit institutions.

An important criterion for qualifying a new task as a government task is therefore the impact of the task on the institutional, financial and personal independence of the NCB. In particular, the following should be taken into account.

First, it should be assessed whether the performance of the new task creates inadequately addressed conflicts of interests with existing central banking tasks, and does not necessarily

¹² See Opinion CON/2015/22.

¹³ See paragraph 2.3.2 of Opinion CON/2015/22.

complement those existing central banking tasks. If a conflict of interest arises between existing and new tasks, there should be sufficient mitigation in place to adequately address that conflict. Complementarity between the new task and existing central banking tasks should not, however, be interpreted extensively, so as to lead to the creation of an indefinite chain of ancillary tasks. Complementarity should also be examined from the point of view of the financing of those tasks.

Second, it should be assessed whether without new financial resources the performance of the new task is disproportionate to the financial or organisational capacity of the NCB and may negatively impact on its capacity to properly perform existing central banking tasks.

Third, it should be assessed whether the performance of the new task does not fit into the institutional set-up of the NCB in the light of central bank independence and accountability considerations.

Fourth, it should be assessed whether the performance of the new task harbours substantial financial risks.

Fifth, it should be assessed whether the performance of the new task exposes the members of the NCB's decision-making bodies to political risks which are disproportionate and may also impact on their personal independence and, in particular, the guarantee of the term of office under Article 14.2 of the Statute of the ESCB.

- 2.3.3 Any final assessment on the qualification of a task given to an NCB as either falling within the scope of a central banking task or a government task will be guided by the objective of ensuring the consistent application of the prohibition of monetary financing within the Eurosystem and the ESCB to the extent that it applies to its members.

3. Specific observations

3.1 *Establishment of resolution funds within the Banca d'Italia*

- 3.1.1 In line with Article 105 of Directive 2014/59/EU, the draft legislative decrees provide that the funding of resolution funds may be ensured through loans and other forms of financial support in the event that ordinary ex ante and extraordinary ex post contributions are not immediately accessible or sufficient. However, the ECB notes that the draft legislative decrees do not specify the financial institutions or the third parties that are allowed to provide financial support, the nature of eligible financial support arrangements or the terms and conditions of any such arrangements. The ECB underlines that, even though this is not expressly stated in the draft legislative decrees, the Banca d'Italia is not authorised to provide any loan or financing under any circumstances to the resolution funds, as the provision of such financing would constitute a government task in breach of the prohibition of monetary financing under the Treaty¹⁴.
- 3.1.2 The draft legislative decrees provide that where a bridge institution tool or the asset separation tools are used the capital of the bridge institution and of the asset management vehicle company are wholly or partially held by the resolution fund or public bodies. While this provision

¹⁴ See paragraph 3.1.4 of Opinion CON/2015/22.

implements Directive 2014/59/EU¹⁵, where a resolution fund established within a central bank holds such capital, it should be clarified, for the avoidance of doubt, that the central bank will not employ its resources, other than those collected in the resolution fund, to assume or finance any obligation of these entities¹⁶. The role of a resolution fund established within a central bank 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 3603/93¹⁷, which 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 independence¹⁸. The principle of financial independence requires NCBs to have sufficient means to carry out not only their ESCB-related tasks from an operational and financial point of view, but also their national tasks¹⁹. For that reason, it should be ensured that if a resolution fund established within the Banca d'Italia becomes the owner of such an entity, sufficient financial and human resources are provided to address the operational burden associated with it.

3.2 *Conferral of resolution tasks on the Banca d'Italia*

The draft legislative decrees designate the Banca d'Italia as the resolution authority, broadening its responsibilities so as to include the power to propose placing obliged entities into resolution and to take resolution measures in respect of such entities. In the light of the guidance set out in paragraph 2.3, it must be assessed carefully whether the Banca d'Italia's new tasks and responsibilities in this field could constitute a breach of the monetary financing prohibition.

3.2.1 *New tasks*

The ECB notes that whilst the Banca d'Italia has had for many years powerful tools to intervene in distressed financial institutions which pose a risk to financial stability, principally in the form of the special administration regime, the draft legislative decrees introduce specific, new resolution tools, such as the bail-in, bridge institution and asset management vehicle tools, which in their proposed form do not currently exist in Italian law, as well as expanded ancillary powers which did not exist as separate resolution measures or powers in the past. The draft legislative decrees thus introduce substantial legislative amendments to the Banca d'Italia's existing resolution-related tasks that are currently categorised as central banking tasks, and should therefore be assessed in the light of the monetary financing prohibition.

3.2.2 *Principle of financial independence*

The principle of financial independence requires NCBs to have sufficient means to carry out not only their ESCB-related tasks from an operational and financial point of view, but also their

¹⁵ See Articles 40(2)(a) and 42(2)(a) of Directive 2014/59/EU.

¹⁶ See paragraph 3.4.2 of Opinion CON/2015/25.

¹⁷ Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b (1) of the Treaty (OJ L 332 , 31.12.1993, p. 1).

¹⁸ See paragraph 3.3 of Opinion CON/2012/99, paragraph 5 of Opinion CON/2011/84 and paragraph 3.6 of Opinion CON/2011/39.

¹⁹ See the ECB's 2014 Convergence Report, p. 25.

national tasks²⁰. Hence, the provisions of the draft legislative decrees authorise the Banca d'Italia to anticipate allowances due to special commissioners and members of the supervisory committee and then recover such expenses from the institutions concerned²¹ in order to safeguard the Banca d'Italia's financial independence.

Furthermore, the ECB notes that the Banca d'Italia, before deciding to place an obliged credit or financial institution into resolution or compulsory administrative liquidation, is required to obtain the MoF's prior approval. However, the ECB understands that the liability for damages arising due to gross negligence or wilful misconduct under the Consolidated Law on Banking remains with the Banca d'Italia and its staff, while the MoF will also be liable in accordance with the general liability regime of the State.

3.2.3 *Links to tasks listed in Article 127(2), (5) and (6) of the Treaty*

Administrative resolution tasks are considered tasks related to those referred to in Article 127(5) of the Treaty, based on the understanding that administrative resolution tasks and supervisory tasks complement each other, particularly where, as in this case, an NCB has a mandate for the stability of the financial system, or where, as in this case, the designated resolution authority already has certain responsibilities in connection with the supervision of credit and financial institutions.

3.2.4 *Atypical tasks*

A number of Member States have conferred on their NCBs a significant role in the resolution of financial institutions, whether as the resolution authority or as a competent authority in the decision-making process for resolution. The ECB has generally welcomed the allocation of such tasks to NCBs provided they do not interfere financially and operationally with the performance of the NCB's ESCB-related tasks²². The resolution tasks of an NCB can therefore be regarded as being tasks not atypical of a central bank, particularly if, as in the case of the Banca d'Italia, it has had for many years powerful tools to intervene in distressed financial institutions which pose a risk to financial stability.

3.2.5 *Discharge of tasks on behalf of and in the exclusive interest of the Government or of other public entities*

Whilst the Banca d'Italia is designated as the sole resolution authority and takes resolution measures acting as an administrative authority in the exercise of public functions in its own name, and not on behalf of any other authority, as noted in paragraph 3.3.2 above, it is required, before deciding to place an obliged credit or financial institution into resolution or compulsory administrative liquidation, to obtain the MoF's prior approval. There is, however, no indication that in discharging its resolution function the Banca d'Italia acts exclusively in the interests of the MoF or another public entity.

²⁰ See the ECB's Convergence Report, 2014, p. 25.

²¹ See para. 3.2.2.

²² See paragraph 2.3 of Opinion CON/2015/22, paragraphs 2.1 and 3.2.4 of Opinion CON/2015/22, paragraph 4.1 of Opinion CON/2014/60, paragraph 2.1 of Opinion CON/2013/73, paragraph 2.3 of Opinion CON/2011/72, paragraph 2.2 of Opinion CON/2011/83, and paragraph 2.2 of Opinion CON/2011/39.

3.2.6 *Extent to which conflict of interests with existing Banca d'Italia tasks are addressed*

The ECB has repeatedly noted²³, in line with Directive 2014/59/EU²⁴, that staff involved in carrying out the functions of a resolution authority in accordance with Directive 2014/59/EU must be structurally separate and subject to separate reporting lines from the staff involved in carrying out prudential banking supervision tasks pursuant to applicable EU legal acts²⁵ or with regard to the other functions of the relevant authority. Directive 2014/59/EU 'exceptionally' allows one authority to carry out both resolution and supervisory functions on the condition that adequate structural arrangements are put in place in order to ensure operational independence and to avoid conflicts of interest between that authority's resolution function and its other functions. For example, Directive 2014/59/EU envisages structural separation being achieved by keeping the reporting lines for staff involved in carrying out resolution tasks separate from those used by staff involved in supervision activities²⁶. Pursuant to the draft legislation, the Banca d'Italia, in full compliance with the principle of independence, shall provide appropriate arrangements for the separation of crisis management tasks from other tasks, to ensure the operational independence of the Banca d'Italia, and shall establish cooperation and coordination arrangement between the structures involved²⁷.

3.2.7 *Extent to which the performance of tasks is proportionate to the Banca d'Italia's financial and operational capacity and its ability to perform its ESCB-related tasks*

3.2.7.1 In line with Article 37(7) of Directive 2014/59/EU, the draft legislative decrees authorise the Banca d'Italia to advance the allowances of commissioners and members of the supervisory committee of an institution placed into resolution, and then recover these advances out of the amounts paid in exchange for the transfer of shares and other equities from the entity under resolution or from the surplus, if any, of the bridge institution or the asset management vehicle company. Claims for such allowances enjoy general priority and, in case of insolvency, are treated as preference claims in liquidation proceedings.

3.2.7.2 Also, where a bank is placed into compulsory administrative liquidation and liquid financial resources are not available or insufficient, costs and allowances related to provisional management, special administration or voluntary winding up are paid in advance by the Banca d'Italia. Advance payments are then recovered from the financial resources available to the credit institution, after reimbursement of the clients entitled to restitution of financial instruments held on custody by the credit institution, and before the payment of other preference claims. Costs of proceedings in relation to compulsory administrative liquidation may be also paid in advance by

²³ See paragraph 4.3 of Opinion CON/2015/2, paragraphs 5.1 and 5.2 of Opinion CON/2015/3, and paragraph 3.3 of Opinion CON/2014/67.

²⁴ See the second subparagraph of Article 3(3) of Directive 2014/59/EU.

²⁵ Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1), and Directive No. 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

²⁶ See Opinion CON/2014/67, paragraph 3.1.

²⁷ Article 3(6).

the Banca d'Italia where financial resources are not available.²⁸ Such advance payments are then recovered from the available liquid financial resources with priority over other preference claims (and then from clients' available financial resources)²⁹.

3.2.7.3 As noted in paragraph 3.2.2, in order to remain financially independent, NCBs must have sufficient means to carry out not only their ESCB-related tasks from an operational and financial point of view, but also their national tasks.

3.2.8 *Extent to which the performance of tasks fits into the Banca d'Italia's institutional set-up in the light of central bank independence and accountability considerations*

As noted above, the Banca d'Italia is required, before deciding to place an obliged credit or financial institution into resolution or compulsory administrative liquidation, to obtain the MoF's prior approval. The Banca d'Italia and the MoF shall agree the practical arrangements for the timely sharing of information in order to ensure the efficiency and effectiveness of crisis management. The ECB considers that the broadened resolution tasks that the Banca d'Italia will assume under the draft legislative decrees entail closer cooperation with the MoF than for the exercise of its other functions.

3.2.9 *Extent to which the performance of tasks involves substantial financial risks*

The draft legislative decrees stipulate that the Banca d'Italia, the members of its bodies and its staff are liable for damages caused by gross negligence or wilful misconduct in the course of discharging their functions under the Consolidated law on Banking³⁰. The ECB understands that liability could attach even if the Banca d'Italia had obtained prior approval from the MoF for the improper resolution measure. However, as noted above, the ECB understands that the MoF will also be liable for its decisions.

3.2.10 *Conclusion*

The ECB considers that there are grounds for regarding the Banca d'Italia's expanded resolution tasks as central banking tasks, in the sense that they complement the Banca d'Italia's existing supervisory functions. The fact that the Banca d'Italia will be authorised to recover advance payments made for allowances from the institutions concerned should also mitigate their impact on its financial independence. In addition, even though the draft legislative decrees may create financial risks for the Banca d'Italia in terms of liability for damages incurred in the performance of the new resolution tasks, these risks will be mitigated by the provision whereby the Banca d'Italia will be liable, along with the members of its management bodies and its staff, only for damages incurred as a consequence of its acts or omissions constituting gross negligence and wilful misconduct, while the MoF will be liable for its decisions also in the approval of the Banca d'Italia's resolution measures.

28 See paragraph 1.14.

29 Article 1(35) of the Amending Decree.

30 Article 1(2) amending the Consolidated Law on Banking by reference to Article 24(6-bis) Law No 262 of 28 December 2005.

3.3 *The MoF's role in resolutions*

In requiring the Banca d'Italia to obtain the MoF's prior approval before deciding to place an obliged credit or financial institution into resolution or compulsory administrative liquidation, the question arises as to whether the MoF may be considered to be a second resolution authority alongside the Banca d'Italia. The consulting authority is invited to consider whether the MoF's prior consent should be more appropriately limited to those cases in which the resolution measures have a direct fiscal impact or systemic implications, as required by Article 3(6) of Directive 2014/59/EU. This would avoid the MoF acting *de facto* as joint resolution authority alongside the Banca d'Italia, since, if this were the case, the MoF would need to ensure the operational independence of its resolution function³¹.

3.4 *Resolution planning*

The draft legislative decrees stipulate that the evaluation of resolvability and resolution plans must not assume the granting of extraordinary public financial support except the use of the resources of the resolution funds, nor the granting of central bank emergency liquidity assistance, nor central bank liquidity assistance provided under non-standard collateralisation, tenor and interest rates terms³². While this appears to be in line with the requirements of Directive 2014/59/EU, the ECB emphasises that these provisions do not in any way affect the competence of central banks to decide independently and in their full discretion on the provision of central bank liquidity to solvent institutions, both through standard monetary policy operations and emergency liquidity assistance, within the limits imposed by the monetary financing prohibition under the Treaty³³.

3.5 *Determination of failing or likely to fail*

The draft legislative decrees stipulate that the Banca d'Italia, acting as resolution authority, may also determine autonomously that an institution is failing or likely to fail in line with Article 32(2) of Directive 2014/59/EU. The ECB notes that Directive 2014/59/EU assigns the failing or likely to fail assessment also to the respective supervisory authority, i.e. the ECB or national competent authorities, in line with the distribution of competences provided for in Regulation (EU) No 1024/2013. The ECB also notes that, pursuant to Article 9(1), subparagraph 2, Article 4(1)(e) and Article 4(3) of Council Regulation (EU) No 1024/2013, and Article 104(1)(b) of Directive 2013/36/EU of the European Parliament and of the Council, the ECB shall have all the powers of the competent and designated authorities under the applicable Union law to ensure compliance with regard to significant institutions³⁴.

3.6 *Establishment of a bridge institution*

Pursuant to the draft legislative decrees, and in line with Article 41(1) of Directive 2014/59/EU, the Banca d'Italia approves a bridge institution's memorandum of association and articles of association, the appointment of the members of its management and supervisory bodies, their

³¹ See paragraph 3.1.2 of Opinion CON/2015/25 and paragraph 3.3 of Opinion CON/2015/22.

³² Articles 12(3) and 102(2) of the Implementing Decree.

³³ See paragraph 3.2 of Opinion CON/2012/99 and paragraph 3.3 of Opinion CON/2014/67.

³⁴ See paragraph 3.3 of Opinion CON/2015/19.

remuneration and any conferral of delegations, and may impose restrictions on its activity to ensure compliance with applicable legislation on State aid.

In this respect, the ECB underlines that under Regulation (EU) No 1024/2013 provisions in relation to the ECB's responsibilities with regard to the authorisation of a credit institution to be established in a participating Member State³⁵ the banking licence necessary for the access to the activity of credit institutions by the bridge institution is to be granted solely by the ECB irrespective of the context and the size of the institution which is being created. ..

Additionally, if the bridge institution is not able to comply with the requirements for authorisation from the intended start of its operations, then the resolution authority shall request a temporary exemption from some or all of these requirements. The ECB will assess the request and if it decides to grant such an authorisation, it shall indicate the period for which the bridge institution is waived from complying with the relevant requirements.³⁶

Furthermore, the bridge institution is wholly or partially owned by one or more public bodies which may include the resolution funds. The remainder of the ownership may be held by third parties. In this respect an assessment of the resulting qualifying holdings might be necessary. In this case the ECB would need to take a decision on the qualifying holdings before the start of the operations of the bridge institution³⁷.

3.7 *Depositor preference*

- 3.7.1 The ECB notes that the draft legislative decrees confer a preference not only on claims arising out of deposits guaranteed under the deposit guarantee scheme (including claims of deposit guarantee schemes subrogated to depositor claims) and deposits above the guaranteed threshold of private individuals and micro, small and medium-sized enterprises, but also on all other deposits. Conferring a priority ranking on all deposits is expected to enhance the implementation of the bail-in tool in resolution, because the resolution authority will be able to bail-in other senior unsecured bank debt instruments prior to deposits, while minimising the risk of compensation claims under the 'no-creditor-worse-off-than-in-insolvency' principle. The bail-in of such senior unsecured bank debt instruments is perceived to carry a lower contagion risk than that of operational liabilities such as deposits. A general depositor preference is therefore likely to render the bail-in of senior unsecured bank debt more effective and credible, thus fostering effective resolution action and reducing the need to have recourse to the resolution fund.
- 3.7.2 The ECB understands from the explanatory memorandum accompanying the draft law, that one motivation of introducing the depositor preference is to make it easier for Global Systemically Important Banks (G-SIBs) to meet the forthcoming Total Loss Absorbing Capacity (TLAC) requirement, as foreseen in the Financial Stability Board's draft proposal on G-SIBs³⁸. This would notably be the case if other senior unsecured bank debt became eligible to count as TLAC.

³⁵ See Articles 4 and 14 of Regulation (EU) No 1024/2013.

³⁶ See Article 41(1), subparagraph, of Directive 2014/59/EU.

³⁷ See Article 15 of Regulation (EU) No 1024/2013.

³⁸ It should be noted that the TLAC proposals are still under discussion, particularly in light of the ongoing impact assessment.

However, the ECB notes that the depositor preference does not address the fact that other operational liabilities, such as derivatives, still rank *pari passu* to senior unsecured bank debt instruments. In this respect, the ECB notes that TLAC eligibility in the draft FSB proposal would require subordination with respect to all TLAC excluded liabilities, not only deposits.

- 3.7.3 A common framework at Union level on the scope of the depositor preference in bank resolution and/or insolvency proceedings may help to avoid fragmentation of the market within the Union and avoid complicating the tasks of the ECB both with regard to monetary policy and to supervision within the Single Supervisory Mechanism³⁹.

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

Done at Frankfurt am Main, 16 October 2015.

[signed]

The President of the ECB

Mario DRAGHI

³⁹ See paragraph 3.4 of Opinion CON/2015/31.