



EUROPEAN CENTRAL BANK

EUROSYSTEM

EN

ECB-PUBLIC

OPINION OF THE EUROPEAN CENTRAL BANK

of 20 November 2015

on the recovery and resolution of credit institutions and investment firms and for deposit guarantee and compensation schemes

(CON/2015/48)

Introduction and legal basis

On 15 October 2015, the European Central Bank (ECB) received a request from the Luxembourg Ministry of Finance for an opinion on a draft law on measures for the resolution, reorganisation and winding up of credit institutions and certain investment firms and on deposit guarantee schemes and compensation schemes for investors (hereinafter the 'draft law').

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 third and sixth indents of Article 2(1) of Council Decision 98/415/EC¹, as the draft law relates to a national central bank and to the 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 The main purpose of the draft law is to implement Directive 2014/59/EU of the European Parliament and of the Council² (the 'Bank Recovery and Resolution Directive' (BRRD)) into Luxembourg law, thereby providing a legal framework for the recovery and resolution of certain types of entities active in financial markets (hereinafter 'obliged entities'), including credit institutions, investment firms, and financial holding companies that have their head office in Luxembourg.

The draft law regulates: (a) plans and procedures for the recovery and resolution of obliged entities at both individual and group level; (b) the status and powers of the competent supervisory authority and resolution authority and (c) the procedures according to which these authorities may intervene in distressed entities or subject them to resolution measures if they are failing or likely to fail. The national supervisory authority (*Commission de surveillance du secteur financier* (CSSF)) is designated as the national resolution authority. The functions and powers attributed to the CSSF as

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).

a national resolution authority are entrusted to an internal governing body called the Resolution Council, set up within the CSSF. As provided for in the BRRD, the draft law also establishes a national resolution fund mechanism (*Fonds de resolution Luxembourg* (FRL)) as a separate legal entity under the authority of the Ministry of Finance, which will be governed by a Directorate Committee. In line with the provisions of the BRRD, the draft law provides for a privileged ranking in insolvency proceedings for covered deposits and eligible deposits.

- 1.2 The draft law also implements into Luxembourg law Directive 2014/49/EU of the European Parliament and of the Council³ (the Deposit Guarantee Schemes Directive (DGSD)). The principal purpose of this part of the draft law is to transform the private, Deposit Guarantee Scheme (DGS) that is funded ex post into a public DGS that is funded ex ante. To this end, the draft law establishes: (i) a public fund, called *Fonds de garantie des dépôts Luxembourg* (FGDL), as a separate legal entity under the authority of the Ministry of Finance and (ii) an internal governing body, called the *Conseil de protection des déposants et des investisseurs* (CPDI), set up within the CSSF and designated as the national administrative authority under the DGSD.
- 1.3 The Governor of the Banque centrale du Luxembourg (BCL) is a member of the four new bodies established by the draft law: the Resolution Council, the FRL's Directorate Committee, the FGDL's Directorate Committee and the CPDI. Furthermore, the draft law requires the funds of the FGDL to be placed in an account with the BCL.

2. General observations

- 2.1 The ECB welcomes the draft law, as it strengthens the tools and procedures available to the national authorities for effective preventive measures, early intervention in institutions and, if necessary, the effective resolution of institutions, in line with the common framework of intervention powers and rules laid down in the BRRD.
- 2.2 The ECB stresses, however, that it is not opining on whether the draft law effectively discharges Luxembourg's obligations to implement the BRRD and the DGSD, but rather on those provisions of the draft law that may impact on either the role and tasks of the BCL as a central bank and as a member of the European System of Central Banks (ESCB) or on the tasks of the ECB.

3. Specific observations

3.1 *Role of the BCL's Governor*

- 3.1.1 The ECB takes note of the provisions of the draft law designating the Governor of the BCL as a member of the bodies responsible for resolution and for the deposit guarantee scheme in Luxembourg, as well as the provision allowing the Governor to invite the Resolution Committee to consider taking resolution measures with regard to an obliged entity. These membership positions have been entrusted⁴ to the Governor of the BCL as a result of the BCL's competences for

³ Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (OJ L 173, 12.6.2014, p. 149).

⁴ See comments on Article 207 of the draft law, p. 337.

supervising the general liquidity situation on the markets⁵, for promoting the smooth operation of payment systems⁶ and in the field of financial stability⁷. As such, they represent an increase in the role of the BCL's Governor as regards the BCL's existing tasks of ensuring macro-prudential supervision and financial stability. The Luxembourg legislator considers it to be of particular importance that these BCL competences will allow the BCL's Governor to contribute efficiently to the decisions of the Resolution Council.

3.1.2 With particular regard to the provisions under the draft law that provide for a voting right, the role of the BCL's Governor goes beyond a purely advisory function. As highlighted in the past by the ECB, to the extent that national legislation establishes a role for a national central bank (NCB) that goes beyond an advisory function, it must be ensured that the NCB's ability to carry out its ESCB-related tasks from an operational and financial point of view will not be affected⁸. As such, the ECB notes that the draft law does not adversely affect the existing tasks of either the BCL or its Governor.

3.1.3 Additionally, as the draft law provides for the inclusion of the BCL's Governor in the collegiate decision-making resolution body, it should be amended to give due consideration to safeguarding the independence of the BCL and its Governor when carrying out their functions in the abovementioned bodies⁹. The draft law states, for each of the different bodies mentioned therein, that the role of a member may be terminated in accordance with the terms upon which that member was appointed¹⁰. In line with the principle of the personal independence of the members of an NCB's decision-making bodies, the ECB understands that the role held by the BCL's Governor under the draft law may only be terminated if the mandate of the BCL's Governor is terminated in line with the central bank law.

3.2 *Cooperation and exchange of information between competent authorities*

3.2.1 *Cooperation and exchange of information with the BCL*

The draft law states that both the Resolution Council and the CPDI must cooperate with the BCL, insofar as this cooperation respects the BCL's competences and independence. Since information sharing is an important precondition for resolution to work effectively¹¹, the ECB welcomes these provisions as they will enable the relevant entities to perform their statutory tasks in a coordinated fashion. In particular, they facilitate the BCL's performance of its financial stability mandate. Such arrangements are also in line with past ECB opinions drawing attention to the requirements under the BRRD, pursuant to which Member States must ensure that, where the central bank is not itself the resolution authority, the competent authority (i.e. the authority responsible for the prudential

⁵ See Article 2(4) of the Law of 23 December 1998 concerning the monetary status of the Central Bank of Luxembourg, as modified (hereinafter the 'BCL Organic law').

⁶ See Article 2(5) of the BCL Organic law.

⁷ See Article 2(6) of the BCL Organic law.

⁸ See Opinion CON/2009/93. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

⁹ See Opinion CON/2010/94 and the ECB's 2014 Convergence Report, p. 22.

¹⁰ See Article 207 of the draft law – which proposes a new Article 12-2(5) of the law of 23 December 1998 establishing the CSSF.

¹¹ See Opinion CON/2013/76.

supervision of institutions) and the resolution authority engage in an adequate exchange of information with the NCB¹².

3.2.2 *The BCL's independence in relation to cooperation and information exchange*

The ECB welcomes the provision that cooperation and information exchange between both the Resolution Council and the CPDI and the BCL will take place in respect of the BCL's independence and its confidentiality regime under Article 37 of the ESCB Statute. The primacy of EU law and the rules adopted thereunder means that national laws giving third parties access to documents and information may not lead to infringements of the ESCB's confidentiality regime. The ECB therefore understands that respect of the BCL's independence and its confidentiality regime necessarily extends to those circumstances where the BCL is represented by its Governor in the bodies outlined by the draft law.

3.2.3 *Cooperation and exchange of information with the ECB*

The draft law provides for the direct exchange of information and cooperation between both the Resolution Council and the CPDI as well as with the ECB. The ECB notes that these provisions are based on the corresponding provisions in the BRRD and the DGSD and apply to the exchange of information with the ECB in its banking supervisory function under Article 27(2) of Council Regulation (EU) No 1024/2013¹³.

3.3 *Resolution planning*

The draft law provides that resolution plans may not assume any access to or receipt of any extraordinary public financial support that goes beyond the provision of funds as provided for in the draft law. Nor may such plans assume access to or receipt of any emergency liquidity assistance provided by a central bank or any liquidity assistance provided by a central bank that is based on non-standardised collateral, maturities or interest rates. However, resolution plans must include an analysis of how and under what circumstances a distressed institution may apply for the use of central bank facilities¹⁴. While acknowledging that these provisions are in line with the requirements of the BRRD, the ECB emphasises that they do not in any way affect the competence of central banks to decide independently and at their full discretion on the provision of central bank liquidity to solvent institutions, both through standard monetary policy operations and via emergency liquidity assistance, within the limits imposed by the monetary financing prohibition under the Treaty¹⁵.

3.4 *Depositor ranking*

In line with Article 108 of the BRRD, the draft law introduces a privileged ranking for depositors in normal insolvency proceedings as follows: (a) the covered deposits and claims of FGDL when subrogated into the rights of the covered depositors are ranked immediately after the privilege of the Treasury; (b) with regard to deposits from natural persons and micro, small and medium-sized enterprises, eligible deposits for the amounts exceeding the covered deposits, as well as deposits which would be eligible deposits if they had not been made through branches located outside the

¹² See paragraph 3.1 of Opinion CON/2012/99 and paragraph 5 of Opinion CON/2015/17.

¹³ 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).

¹⁴ See Article 8(2) and (3) of the draft law.

¹⁵ See Opinion CON/2014/67.

Union of institutions established within the Union, are ranked immediately after the general privilege of salaries. The ECB understands that, apart from the newly introduced ranking of covered and eligible depositors, the Luxembourg legislator did not intend to legislate on the overall ranking of creditors in normal insolvency proceedings or in resolution proceedings for credit institutions. However, the BCL, as well as the Eurosystem, has a statutory privilege dating back to 1998, which provides that claims of the BCL, the ECB or any other NCB in the ESCB resulting from operations in connection with monetary or exchange rate policies, will have priority over all debtor assets, whether held with the BCL or with a securities settlement system or any other counterpart in Luxembourg, and that this privilege ranks equally with that of a pledgee¹⁶. In this context, the ECB recalls its concerns regarding the lack of clarity of the exact ranking of the privilege of the BCL and the Eurosystem in insolvency proceedings, and the legal position of the BCL and the Eurosystem vis-à-vis other privileged creditors¹⁷. Therefore, the ECB recommends that the draft law should ensure clarity and efficiency with respect to the BCL privilege set out in article 27-1 of the BCL Organic Law, both as regards resolution and normal insolvency proceedings. This should in particular be achieved by specifying the nature of the privilege (a special as opposed to a general one) and by increasing the ranking of this privilege.

3.5 *Funds of the Deposit Guarantee Scheme*

As mentioned above, the draft law requires funds of the FGDL to be deposited in an account with the BCL. The investment decisions regarding these funds will be made by the Directorate Committee of the FGDL¹⁸. The ECB understands that although the BCL's Governor is one of the members of this committee, he is not responsible for the committee's investment decisions, and therefore the BCL's financial independence would not be affected by such decisions. Furthermore, the ECB notes that, in line with the provisions of the DGSD, the FGDL will be funded by contributions from its members, without excluding the need for additional financing sources, including loans¹⁹. Given that any such loans could only be provided by a national central bank upon strict conditions²⁰, in line with the monetary financing prohibition under Article 123 of the Treaty, the deposit of the FGDL's funds at the BCL would not entail the provision of any loans or other forms of financial support from the BCL. The further conditions on the functioning of the accounts opened by

¹⁶ See Article 27-1, previously Article 4(4) of the BCL Organic law.

¹⁷ See Opinion CON/2005/12.

¹⁸ See Article 154(5) of the draft law.

¹⁹ See Article 179(2) of the draft law.

²⁰ See the ECB's 2014 convergence report, p. 30, where it is stated that: 'National legislation which provides for the financing by an NCB of a national deposit insurance scheme for credit institutions or a national investor compensation scheme for investment firms would be compatible with the monetary financing prohibition only if it were short term, addressed urgent situations, systemic stability aspects were at stake, and decisions were at the NCB's discretion.'

the FGDL would be determined by the BCL's Executive Board in accordance with the applicable BCL rules.

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

Done at Frankfurt am Main, 20 November 2015.

[signed]

The President of the ECB

Mario DRAGHI