EUROPEAN CENTRAL BANK

EUROSYSTEM

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OPINION OF THE EUROPEAN CENTRAL BANK

of 14 January 2020

on the recovery and resolution of central counterparties

(CON/2020/3)

Introduction and legal basis

On 2 October 2019 the European Central Bank (ECB) received a request from the German Federal Ministry of Finance for an opinion on a draft law introducing dedicated rules for the recovery and resolution of central counterparties (CCPs) into the Law on recovery and resolution (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 (TFEU) and the third, fifth and sixth indents of Article 2(1) of Council Decision 98/415/EC[1], as the draft law relates to the Deutsche Bundesbank, payment and settlement systems, rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets, and the specific tasks conferred upon the ECB concerning the prudential supervision of credit institutions under Article 127(6) TFEU. 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 draft law's main purpose is to create legal instruments relating to CCPs established in Germany, in addition to the existing recovery and resolution instruments for CRR credit institutions[2] under the Law on recovery and resolution[3], which implements Directive 2014/59/EU of the

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 The German legal order distinguishes between two types of credit institutions. Pursuant to Section 1(1) of the Banking Act (*Kreditwesengesetz)* of 9 September 1998 (Bundesgesetzblatt I p. 2776, as amended by article 91 of the law from 20 November 2019, Bundesgesetzblatt I S. 1626), a credit institution is an undertaking which conducts at least one of the banking businesses described in the second sentence of Section 1(1) of the Banking Act commercially or on a scale which requires commercially organised business operations. The banking businesses include deposit business and credit business, as well as specific securities-related activities such as principal broking services and safe custody business. An undertaking that acts a central counterparty is also categorised as a credit institution.
Pursuant to Section 1(3d) of the Banking Act, a CRR credit institution is a credit institution that, in addition, meets the narrower definition of a credit institution set out in point 1 of Article 4(1) of 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).

3 *Gesetz zur Sanierung und Abwicklung von Instituten und Finanzgruppen* of 10 December 2014 (Bundesgesetzblatt I p. 2091) as amended by Article 8(10) of the Law of 10 July 2019 (Bundesgesetzblatt I p. 1002) Law on recovery and resolution.

European Parliament and of the Council[4]. The draft law constitutes a supplementary chapter dedicated to CCPs in the Law on recovery and resolution. The provisions of the draft law apply to CCPs that are also CRR credit institutions within the meaning of European law, as well as to CCPs defined and licensed as credit institutions according to national law. For CCPs that do not hold a CRR credit institution licence, the Law on recovery and resolution, as supplemented by the draft law, will apply as if the CCP was a CRR credit institution.

1.2 The Law on recovery and resolution designates the *Bundesanstalt für Finanzdienstleistungsaufsicht* (Federal Financial Supervisory Authority, hereinafter 'BaFin') as the national resolution authority. BaFin is also the national supervisory authority, insofar as the ECB is not acting in its supervisory capacity in accordance with Council Regulation (EU) No 1024/2013[5].

1.3 The Law on recovery and resolution requires CRR credit institutions to draw up their own recovery plans[6]. The supervisory authority may, however, in agreement with the Deutsche Bundesbank, decide to subject CRR credit institutions to simplified requirements or to exempt them from the obligation to draw up recovery plans altogether, subject to certain conditions relating to the institution's systemic relevance[7]. Recovery plans are subject to review by the supervisory authority, which decides in agreement with the Deutsche Bundesbank on their suitability[8]. The Law on recovery and resolution also provides that the resolution authority must, in consultation with the supervisory authority, draw up resolution plans for all CRR credit institutions. However, it may draw up simplified resolution plans for certain CRR credit institutions taking into account their degree of systemic relevance[9]. Finally, the Law on recovery and resolution sets out the conditions for the resolution of CRR credit institutions, allowing both the supervisory and the resolution authority, following mutual consultation, to determine whether an institution is failing or likely to fail[10]. In this context, the Law on recovery and resolution confers wide-ranging resolution powers on the resolution authority and provides for resolution tools, in particular the sale of business tool, the bridge institution tool, the asset separation tool and the bail-in tool. However, the resolution authority may also take any other measures that are deemed necessary to achieve the resolution objectives[11].

1.4 The draft law supplements the Law on recovery and resolution by introducing additional requirements for the design of recovery plans by CCPs[12]. It requires CCPs both to consider scenarios that may be of particular relevance for the critical functions of CCPs and to take

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4 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).

5 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).

6 The recovery planning is regulated in Chapter 1 of Part 2 of the Law on recovery and resolution.

7 See Sections 19 and 20 of the Law on recovery and resolution.

8 See Section 15 of the Law on recovery and resolution.

9 See Chapter 1 of Part 3 of the Law on recovery and resolution.

10 See Section 62(1)of the Law on recovery and resolution.

11 See Chapter 2 of Part 4, of the Law on recovery and resolution.

12 See Article 1 of the draft law, new Section 152b of the Law on recovery and resolution.

adequate measures to address these scenarios. To this end CCPs must ensure the effective implementation of the proposed measures, including the adaptation of their clearing conditions.

1.5 The draft law requires the supervisory authority to assess the proposed recovery plans of CCPs[13]. If the supervisory authority concludes that the recovery plans do not meet the statutory requirements or that there are potential barriers to their successful implementation, it may request that CCPs revise their recovery plans. Should the CCPs not submit revised recovery plans, or if the recovery plans still do not meet the statutory requirements, the supervisory authority may, in addition to imposing the measures provided for under the Law on recovery and resolution, require CCPs to amend their contractual arrangements as necessary.

1.6 The draft law requires the resolution authority to draw up resolution plans for CCPs in consultation with the supervisory authority[14]. Resolution plans must in particular take into account, in addition to the existing statutory requirements, their impact on CCPs' clearing members, on their clients and on the financial systems in the relevant Member States and in the Union as a whole. Resolution plans must be reviewed at least annually and whenever certain major events arise.

1.7 The draft law entitles the resolution authority, following coordination with the supervisory authority and the Deutsche Bundesbank, to require in addition to the measures foreseen under the Law on recovery and resolution, a modification of CCPs to modify their clearing conditions and contractual arrangements if the resolution authority concludes that there are significant impediments to the resolvability of CCPs[15]. In this regard the draft law empowers the Federal Ministry of Finance to adopt an ordinance setting out detailed provisions on changes necessary to achieve resolvability and appropriate amendments to the clearing conditions and contractual or other related arrangements of CCPs and the conditions under which such amendments may be ordered.

1.8 Where the resolution conditions, as set out in the Law on recovery and resolution[16], are met, the resolution authority may take, in addition to the measures stipulated in the Law on recovery and resolution, all necessary measures to achieve the resolution objectives, in particular it may: (a) terminate contracts, whereby the resolution authority may terminate all or only specific obligations of a CCP undergoing resolution; (b) reduce the profits to be paid to non-defaulting clearing members, and (c) make additional cash calls[17]. However, before resorting to these resolution tools, the resolution authority must first enforce the contractual rights of the CCP. Under certain conditions the resolution authority may also desist from asserting contractual rights in full or in part[18]. Furthermore, the resolution authority may not require an additional cash call from the Deutsche Bundesbank or a reduction in the Deutsche Bundesbank's valuation gains.[19]

13 See Article 1 of the draft law, new Sections 152c and 152d of the Law on recovery and resolution.
14 See Article 1 of the draft law, new Section 152e of the Law on recovery and resolution.
15 See Article 1 of the draft law, new Section 152f of the Law on recovery and resolution.
16 See Section 62 of the Law on recovery and resolution.
17 See Article 1 of the draft law, new Section 152h of the Law on recovery and resolution.
18 See Article 1 of the draft law, new Section 152h(2) and (3) of the Law on recovery and resolution.
19 See Article 1 of the draft law, new Section 152h(5) of the Law on recovery and resolution.

1.9 The draft law introduces safeguards and compensation rights for shareholders, creditors and clearing members whose losses in the resolution process exceed those in a presumed insolvency procedure (the 'no creditor worse off than in insolvency' principle)[20].

1.10 According to the explanatory memorandum, the draft law will be replaced by a Union regulation once such regulation is adopted.

1.11 The draft law also introduces amendments that need to be made to certain supervisory acts, in particular the Law on securities trading[21], in response to Regulation (EU) 2019/834 of the European Parliament and of the Council[22]. Finally, the draft law introduces several editorial changes to a variety of supervisory acts and ordinances.

2. General observations

2.1 The ECB welcomes the draft law's general objective of preserving financial stability in the event of the distress or failure of a CCP. Due to their interconnectedness and market importance, CCPs must generally be considered to be of systemic importance. The failure or distress of a CCP is likely to impair the proper functioning of the financial system, which also has negative consequences for the rest of the economy. Minimising such contagion risks through robust CCP recovery and resolution arrangements is therefore critical.

2.2 The ECB shares the Commission's view that a harmonised approach to the recovery and resolution of CCPs across the Union is appropriate[23]. In the event of the distress or failure of a CCP, divergent approaches to their recovery and resolution across the Member States could lead to the disruption of critical functions to clearing members and clients across borders and wider financial instability, especially since cross-border membership of European CCPs is widespread. A European approach is also warranted to ensure that the legitimate concerns of all affected Union stakeholders are duly considered in the context of CCP recovery and resolution planning and execution, as well as to ensure a level playing field among Union CCPs.

2.3 The draft law regulates aspects of the recovery and resolution of CCPs that are provided for in the Commission's 2016 proposal for a regulation of the European Parliament and of the Council on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, and (EU) 2015/2365 (hereinafter the 'Union CCP recovery and resolution proposal'), on which the ECB opined in 2017[24]. It is understood that the Union's CCP recovery and resolution proposal is currently under discussion in the European Parliament and the Council, and that the decision-making process may be finalised in 2020. In this context, it is

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20 See Article 1 of the draft law, new Section 152m of the Law on recovery and resolution.

21 *Wertpapierhandelsgesetz* of 9 September 1998 (Bundesgesetzblatt I p. 2708) as amended by Article 58 of the Law of 20 November 2019 (Bundesgesetzblatt I p. 1626).

22 See Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories (OJ L 141, 28.5.2019, p. 42).

23 See paragraphs 2.1 and 2.2 of the Explanatory Memorandum to the proposal for a regulation of the European Parliament and of the Council on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, and (EU) 2015/2365, COM(2016) 856 final.

24 See Opinion CON/2017/38. All ECB Opinions are published on the ECB's website at www.ecb.europa.eu.

understood that the German legislator will review the draft law once the Union's CCP recovery and resolution proposal is adopted, in order to ensure full consistency with Union legislation. However, once Union legislation is adopted, the draft law will require additional adaptation, not just by the legislator but also on the part of CCPs, their clearing members and clients.

2.4 A national legislative proposal is subject to certain inherent restrictions that are not imposed on a proposal at Union level.

First, a CCP may hold an authorisation as a CRR credit institution. The draft law has followed a consistent approach for the recovery and resolution of CCPs, irrespective of whether they are CRR credit institutions. However, the compulsory rules governing the recovery and resolution of CRR credit institutions are laid down in Directive 2014/59/EU and Regulation (EU) No 806/2014 of the European Parliament and of the Council[25]. A national legislative proposal's rules on the recovery and resolution of a CCP that is a CRR credit institution may further supplement Directive 2014/59/EU and Regulation (EU) No 806/2014, however, it must not contradict the Union legal requirements. This limitation does not apply to CCPs that do not hold an authorisation as a CRR credit institution. Establishing diverging recovery and resolution rules for CCPs depending on their status as a CRR credit institution could undermine the objective of preserving a Union level playing field and, ultimately, financial stability.

Second, under the Union's CCP recovery and resolution proposal resolution colleges are to be established comprising Member State and Union authorities. A national proposal is necessarily limited to imposing rules only on authorities within its jurisdiction as it can only invite, but cannot dictate the input of authorities in other Member States. The draft law is similarly incapable of introducing a horizontal coordination of recovery and resolution plans across Union CCPs.

2.5 The draft law seeks synergies by building on the existing framework for bank recovery and resolution, according to which resolution and supervisory authorities should be prepared for, and have adequate recovery and resolution tools at their disposal to handle, situations involving the failure of credit institutions. However, due to their divergent functions, organisational structures and business models, the risks inherent in banks and CCPs are different. Specific tools and powers are therefore needed for CCP failure scenarios caused either by the default of the CCP's clearing members or by other non-default-related events. Therefore, an approach that simply supplements the rules for bank recovery and resolution may sometimes fail to respect the intricacies of a CCP recovery and resolution[26]. For example, this shortcoming becomes apparent in connection with the initiation of a resolution. Article 32(1) of Directive 2014/59/EU requires that a CRR credit institution is determined as failing or likely to fail before its resolution can be initiated. According to the

25 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, p. 1).

26 In this context it is understood that in Germany there are two CCPs that have been authorised to offer services and activities in the Union in accordance with Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1): (1) Eurex Clearing AG, which it is understood is supervised as a less significant CRR credit institution within the framework of the Single Supervisory Mechanism, and (2) European Commodity Clearing, a non-CRR credit institution CCP supervised by BaFin. As a CRR credit institution, Eurex already falls under the scope of the Law on recovery and resolution. It is also understood that one of Eurex's clearing members is the Deutsche Bundesbank.

Union's CCP recovery and resolution proposal[27], a resolution authority may also initiate the resolution of a CCP irrespective of whether the CCP is failing or likely to fail if the CCP's envisaged recovery measures could cause significant adverse effects for the financial system.

3. Specific observations

It is recalled that the draft law would have to be reviewed once the Union's CCP recovery and resolution proposal is adopted. The observations made in this opinion are therefore without prejudice to the need for the German legislator to adapt the draft legislation to any future Union legislation.

Against this background the ECB acknowledges that the draft law has taken into account the Union's CCP recovery and resolution proposal, but notes that there is still room for improvement in the following areas.

3.1 *Recovery Planning*

3.1.1 Recovery plans should be required to envisage severe scenarios, including the default of more than two clearing members to which a CCP has its largest exposures, and both idiosyncratic and system-wide stress scenarios, taking into account the potential impact of domestic and cross-border contagion in crises, as well as simultaneous crises in several significant markets[28].

3.1.2 It would be useful to clarify that BaFin's review, as supervisory authority, must take place not only in the context of the initial approval of the recovery plan, but also at a later stage, when BaFin conducts or updates its assessment of the CCP's resolvability. This is important because otherwise BaFin is likely only to conduct its resolution planning and resolvability assessments after the CCP's recovery plan has been finalised[29].

3.1.3 The draft law provides that CCPs may in principle benefit from the simplified procedure for designing a recovery plan, as laid down for credit institutions[30]. Given the systemic nature of each CCP, the ECB expects that the requirements that must be satisfied for a simplified procedure for designing recovery plans to be applicable would not usually be fulfilled in the case of CCPs and that therefore, CCP recovery plans should, in practice, be excluded from such simplified procedures.

3.2 *Resolution Planning*

3.2.1 Resolution plans should clearly differentiate between potential stress scenarios that are related to a clearing member's default and those that are due to other reasons. Similarly, in order to ensure that resolution plans are adequate for all relevant scenarios going beyond 'extreme but plausible' market conditions, the resolution plan should, in terms of default-related failure scenarios, take into consideration not only the default of one or more of the CCP's clearing members, but also the default of at least the three clearing members to which the CCP has the largest exposures,

27 See Article 22(3) of the Union's CCP recovery and resolution proposal.

28 See paragraph 2.3.1 of Opinion CON/2017/38.

29 See paragraph 2.3.2 of Opinion CON/2017/38.

30 See Article 1 of the draft law, new Section 152b(1) in conjunction with new Section 152a(3) of the Law on recovery and resolution.

considering that CCPs are already required under Regulation (EU) No 648/2012 to hold sufficient financial resources to withstand the potential default of at least the two clearing members to which the CCP has the largest exposures[31].

3.2.2 The resolution plan should require that CCPs do not assume extraordinary public financial support, central bank emergency liquidity assistance or central bank liquidity assistance provided under non-standard collateralisation, tenor and interest terms[32]. Moreover, given the importance of pre-empting potential taxpayer losses in resolution, the draft law should also expressly require BaFin, as resolution authority, to make prudent assumptions about the financial resources that may be required to achieve resolution objectives and the resources that it expects to be available under the CCP's rules and arrangements at the time of entry into resolution[33].

3.2.3 In order to ensure better consistency between the key aspects of the resolution plan and international standards[34], the following items should be added to the minimum content of resolution plans[35].

First, an estimation of the timeframe for the replenishment of the financial resources of the CCP (i.e. default fund and regulatory capital).

Second, a description of the general approach and decision-making processes followed by BaFin, as resolution authority, in key areas of resolution with the objective of fostering planning and stakeholder transparency around prospective resolution actions. This should include: (a) BaFin's prospective approach for triggering resolution, including key indicators that would influence BaFin's decision whether to put the CCP in resolution in different types of default and non-default related resolution scenarios; and (b) to the extent that BaFin needs to depart from the CCP's rules and arrangements, the general approach that BaFin would expect to follow in calculating and allocating losses, including the presumed choice and sequencing of different loss allocation tools, and how BaFin would expect to apply the 'no creditor worse off than in insolvency' safeguard and assess losses under the counterfactual for these purposes.

Given the granular level of these requirements it may, however, be more appropriate to implement them via an announcement by BaFin, rather than in the draft law itself.

3.3 *Resolvability*

BaFin, as resolution authority, should be empowered to require a CCP to set aside resources to increase its capacity for loss absorption, recapitalisation and the replenishment of pre-funded resources, should the available resolution funding be deemed insufficient. In order to give effect to this power, regulations adopted by the Ministry of Finance or BaFin under the draft law should, as regards assessing resolvability, specify minimum criteria to be considered by BaFin when assessing the adequacy of a CCP's resolution funding[36]. As a minimum BaFin should take into account the following elements.

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31 See paragraph 2.4.1 of Opinion CON/2017/38.

32 See Section 40(2) of the Law on recovery and resolution.

33 See paragraph 2.4.1 of Opinion CON/2017/38.

34 See section 7.5 (i) and (v) of the FSB's 'Guidance on Central Counterparty Resolution and Resolution Planning'.

35 See paragraph 2.4.1 of Opinion CON/2017/38.

36 See paragraph 2.5.1 of Opinion CON/2017/38.

First, in the event of default-related resolution scenarios: (a) the risk characteristics, complexity and pricing uncertainties of the products cleared, and the related potential degree of error in initial and variation margin calculations; (b) the size, structure and liquidity of the underlying market in stressed conditions; (c) the number of clearing member defaults that would be covered by available pre-funded and committed resources under 'extreme but plausible' conditions; (d) the availability and potential impact on affected clearing members of tools such as partial tear-ups and variation margin gains haircutting; and (e) the credibility of unfunded arrangements in meeting the CCP's potential needs; and

Second, and for all types of loss, the substitutability of the CCP in the markets it serves, and the credibility of any additional arrangements, such as insurance agreements or parental guarantees, that may be available to address uncovered credit losses.

3.4 *Resolution tools*

In order to pre-empt moral hazard and minimise potential taxpayer losses, the use of State aid for the purpose of CCP resolution should not only be subject to the condition of approval under the Union State aid framework[37], but should also be dependent on credible mechanisms for the timely and comprehensive recovery of any resources provided[38].

The ECB welcomes the exclusion of the Deutsche Bundesbank from certain CCP resolution tools, namely cash calls and the reduction in valuation gains[39]. This is in line with the ECB's stance as expressed in its opinion on the Union's CCP recovery and resolution proposal, which emphasised the special features of central banks as CCP clearing members[40]. The ECB therefore recommends that the other members of the European System of Central Banks also be excluded from the operation of the draft law.

3.5 *'No creditor worse off than in insolvency' principle*

The ECB notes that the 'no-creditor-worse-off-than-in-insolvency' principle is a critical safeguard to ensure that CCP participants, shareholders and other creditors would not be treated less favourably in resolution than under the hypothetical alternative scenario where the resolution authority would not have intervened and the CCP would have been liquidated under applicable insolvency law[41].

At the same time, it is important that the valuation methodology underlying the application of the no-creditor-worse-off principle properly reflects the fair value of business continuity preserved by CCP resolution in order to avoid excessive compensation claims by relevant stakeholders. The need for a fair and balanced approach in this respect is underlined by the related risks for the public sector, with the financial burden ultimately being borne by taxpayers. Taking proper account of the fair value of business continuity preserved by CCP resolution is an essential consideration in the context of CCP resolution, which would only be envisaged to take place in exceptionally severe market events, where the disruption of a CCP's critical functions would most likely be associated

37 See Section 103(4) of the Law on recovery and resolution.

38 See paragraph 2.6.3 of Opinion CON/2017/38.

39 See Article 1 of the draft law, new Section 152h(5), of the Law on recovery and resolution.

40 See paragraph 2.1.3 of Opinion CON/2017/38.

41 See paragraph 2.7 of Opinion CON/2017/38.

with a large-scale destruction of financial value and very limited opportunities for bilateral clearing alternatives.

The ECB therefore recommends that a fair valuation of the CCP for purposes of the application of the no-creditor-worse-off principle would need to be not only carried out in terms of the assets and liabilities reflected on the CCP's balance sheet at the point in time when resolution is triggered, but would need to be based on a more comprehensive, realistic assessment of the CCP's value in the event of its liquidation, taking full account of losses, replacement costs, and the destruction of value that would result from the closure or liquidation of the CCP.

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

Done at Frankfurt am Main, 14 January 2020.

[signed]

The President of the ECB

Christine LAGARDE