EUROPEAN CENTRAL BANK

EUROSYSTEM

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OPINION OF THE EUROPEAN CENTRAL BANK

of 27 October 2020

on the deposit guarantee scheme and other amendments to the financial services legislation

(CON/2020/25)

Introduction and legal basis

On 5 August 2020 the European Central Bank (ECB) received a request from the Luxembourg Ministry of Finance for an opinion on a draft law which seeks to implement Directives (EU) 2019/878 and (EU) 2019/879 of the European Parliament and of the Council[1] and Regulation (EU) 2019/876 of the European Parliament and of the Council[2] and to amend various provisions of Luxembourg financial sector legislation[3] (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 sixth indent of Article 2(1) of Council Decision 98/415/EC[4], as the draft law concerns 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.

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1 Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures (OJ L 150, 7.6.2019, p. 253); Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC (OJ L 150, 7.6.2019, p. 296).

2 Regulation (EU) 2019/876 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, and Regulation (EU) No 648/2012 (OJ L 150, 7.6.2019, p. 1).

3 Projet de loi portant: 1. transposition: a) de la directive (UE) 2019/878 du Parlement européen et du Conseil du 20 mai 2019 modifiant la directive 2013/36/UE en ce qui concerne les entités exemptées, les compagnies financières holding, les compagnies financières holding mixtes, la rémunération, les mesures et pouvoirs de surveillance et les mesures de conservation des fonds propres; et b) de la directive (UE) 2019/879 du Parlement européen et du Conseil du 20 mai 2019 modifiant la directive 2014/59/UE en ce qui concerne la capacité d'absorption des pertes et de recapitalisation des établissements de crédit et des entreprises d'investissement et la directive 98/26/CE; 2. mise en oeuvre du règlement (UE) 2019/876 du Parlement européen et du Conseil du 20 mai 2019 modifiant le règlement (UE) n° 575/2013 en ce qui concerne le ratio de levier, le ratio de financement stable net, les exigences en matière de fonds propres et d'engagements éligibles, le risque de crédit de contrepartie, le risque de marché, les expositions sur contreparties centrales, les expositions sur organismes de placement collectif, les grands risques et les exigences de déclaration et de publication, et le règlement (UE) n° 648/2012; et 3. modification: a) de la loi modifiée du 5 avril 1993 relative au secteur financier; b) de la loi modifiée du 18 décembre 2015 relative à la défaillance des établissements de crédit et de certaines entreprises d'investissement ; c) de la loi modifiée du 24 mars 1989 sur la Banque et Caisse d'Epargne de l'Etat, Luxembourg; d) de la loi modifiée du 23 décembre 1998 portant création d'une commission de surveillance du secteur financier; e) de la loi modifiée du 12 novembre 2004 relative à la lutte contre le blanchiment et contre le financement du terrorisme; f) de la loi modifiée du 10 novembre 2009 relative aux services de paiement, à l'activité d'établissement de monnaie électronique et au caractère définitif du règlement dans les systèmes de paiement et les systèmes de règlement des opérations sur titres; et g) de la loi modifiée du 7 décembre 2015 sur le secteur des assurances.

4 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).

1. Purpose of the draft law

1.1 The main purpose of the draft law is to implement into Luxembourg law Directive (EU) 2019/878, which amends the Capital Requirements Directive (CRD)[5], Directive (EU) 2019/879, which amends the Bank Recovery and Resolution Directive (BRRD)[6] and Regulation (EU) 2019/876 which amends the Capital Requirements Regulation (CRR)[7]. For this purpose, the draft law seeks to amend primarily[8] the Law of 5 April 1993 on the financial sector and the Law of 18 December 2015 on the failure of credit institutions and certain investment undertakings[9]. In that context, in order to transpose Article 32b of the BRRD[10], the draft law introduces in the latter Law a new Article 33-2 on insolvency proceedings for the institutions and entities which are not subject to a resolution action. This provision specifies that where the Resolution Board considers that an institution is failing or likely to fail without the prospect of an alternative measure to prevent this, but a resolution measure is not in the public interest, it requests the Court to wind up the institution in accordance with a normal insolvency procedure or, where applicable, in accordance with the provisions of the Code of Commerce.

1.2 In addition, the draft law aims at reinforcing the protection of depositors by introducing an additional backstop for the benefit of the national deposit guarantee fund, *Fonds de garantie des dépôts Luxembourg* (FGDL). The FGDL has the status of *établissement public* (public body). It is vested with legal personality and is placed under the authority of the Minister responsible for the financial sector[11].The backstop takes the form of a State guarantee for a maximum amount of one billion

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5 Directive 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).

6 Directive (EU) 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).

7 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).

8 The draft law also amends the following laws: the Law of 23 December 1998 establishing the Financial Sector Supervisory Commission (Loi du 23 décembre 1998 portant création d'une commission de surveillance du secteur financier, Mém. A 1998, N°112), the Law of 12 November 2004 on combating money laundering and terrorism financing (Loi du 12 novembre 2004 relative à la lutte contre le blanchiment et contre le financement du terrorisme portant transposition de la directive 2001/97/CE du Parlement européen et du Conseil du 4 décembre 2001 modifiant la directive 91/308/CEE du Conseil relative à la prévention de l'utilisation du système financier aux fins du blanchiment de capitaux, Mémorial A 2004, n° 183), the Law of 10 November 2009 on payment services (Loi du 10 novembre 2009 relative aux services de paiement, à l'activité d'établissement de monnaie électronique et au caractère définitif du règlement dans les systèmes de paiement et les systèmes de règlement des opérations sur titres, Mémorial A 2009, N° 215) and the Law of 7 December 2015 on the insurance sector (Loi du 7 décembre 2015 sur le secteur des assurances, Mémorial A 2015, N° 229).

9 Loi du 5 avril 1993 relative au secteur financier, Mémorial A 1993 N° 27; Loi du 18 décembre 2015 relative aux mesures de résolution, d'assainissement et de liquidation des établissements de crédit et de certaines entreprises d'investissement ainsi qu'aux systèmes de garantie des dépôts et d'indemnisation des investisseurs, Mémorial A 2015 N° 246.

10 Article 32b of the BRRD, introduced by Directive (EU) 2019/879 states as follows: 'Member States shall ensure that an institution or entity referred to in points (b), (c) or (d) of Article 1(1) in relation to which the resolution authority considers that the conditions in points (a) and (b) of Article 32(1) are met, but that a resolution action would not be in the public interest in accordance with point (c) of Article 32(1), shall be wound up in an orderly manner in accordance with the applicable national law'.

11 Article 154(1) of the Law of 18 December 2015 on the failure of credit institutions and certain investment undertakings.

euro, which the Government is authorised to grant in respect of credit facilities that the FGDL may contract in order to avail itself of adequate financial means. The draft law further provides that when the State guarantee has been used, the payment of contributions to the FGDL must continue until the State has been repaid in full, even if the FGDL's target level has been reached. It also specifies that the FGDL's available financial means will be used to repay the State guarantee, including principal and interest. According to the explanatory memorandum, the State guarantee will be provided against remuneration.

1.3 Furthermore, the draft law amends the Law of 24 March 1989 on the Banque et Caisse d'Epargne de l'Etat[12], which is an autonomous legal entity under public law, in order to ensure the resolvability of the Banque et Caisse d'Epargne de l'Etat (BCEE), in line with the BRRD and the Single Resolution Mechanism Regulation[13]. As noted in the explanatory memorandum, the objective of the draft law in this respect is to allow, in case of bail-in, the conversion of liabilities towards the BCEE's creditors into participation certificates issued by the BCEE, which meet the criteria for Common Equity Tier 1 instruments. To that end, the draft law requires that the participation certificates issued by the BCEE comply with the criteria laid down in Article 28 of the CRR. The draft law also provides that these participation certificates may be held by the State or the public. The draft law amends the provisions in the Law of 24 March 1989 on the available profit of the BCEE, by specifying that interest may be paid on the participation certificates on the basis of the available profit on the endowment capital (held by the State).

2. General observations

This opinion focuses on the following aspects of the draft law: (1) the backstop arrangements of the FGDL, (2) the orderly winding-up of failing or likely to fail institutions that are not subject to a resolution action and (3) the issuance of participation certificates by the BCEE.

3. Specific observations

3.1 *Backstop to the deposit guarantee fund*

The ECB recalls that, as noted previously[13] ,the efficiency of the deposit guarantee schemes (DGSs) in the EU currently ultimately rests on the credibility of national backstop arrangements, which are therefore highly important. Therefore, the ECB welcomes the draft law which aims at ensuring that the FGDL is adequately funded. An adequately funded DGS provides protection for smaller depositors, while enhancing financial stability. Sound funding arrangements ensure an effective deposit guarantee and foster the maintenance of public confidence[14].

The ECB notes, as pointed out in the explanatory memorandum to the draft law, that several other Member States have introduced backstop mechanisms in order to support the funding of their

12 Loi du 24 mars 1989 sur la Banque et Caisse d'Epargne de l'Etat, Mémorial A 1989 N° 16.

13 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).

14 See paragraph 4.1 of Opinion CON/2014/86; paragraph 3 of Opinion CON/2012/53.

respective national DGSs. Member States have followed various paths for the set-up of their backstops. In some instances, the backstops are based on mandatory arrangements, while in others the provision of the backstop is optional. Some backstops are of a private nature, while other backstops are provided by the State[15].

3.2 *Orderly winding-up of failing or likely to fail institutions that are not subject to resolution action*

The explanatory memorandum to the draft law clarifies that the concept of winding-up used in Article 33-2 of the draft law is to be interpreted broadly, and includes procedures such as the suspension of payments, which allow for the restructuring of failing entities. In accordance with the current provisions of the Law of 18 December 2015 on the failure of credit institutions and certain investment undertakings[16], the winding-up may take place where it is apparent that the suspension of payments scheme previously decided upon is not able to rectify the situation which caused it. It is important that the provisions of Directive (EU) 2019/879 are transposed in a comparable manner across EU Member States to ensure a level playing field within the Banking Union. The ECB therefore recommends clarifying that all procedures applicable to the institution meeting the conditions of Article 32b of the BRRD lead to its winding-up in an orderly manner with the eventual realisation of all of its assets.

3.3 *Issuance of participation certificates by the BCEE*

The ECB takes note of the amendments to the Law on the Banque et Caisse d'Epargne de l'Etat, which the ECB understands are aimed at ensuring compliance with the conditions for these instruments to qualify as Common Equity Tier 1 pursuant to Article 28 of the CRR.

This opinion will be published on EUR-Lex.

Done at Frankfurt am Main, 27 October 2020.

[signed]

The President of the ECB

Christine LAGARDE

15 See e.g. for Belgium, Royal Decree of 16 March 2009 on the protection of deposits and life insurances by the special protection fund for deposits and life insurances; for Bulgaria, the Law on bank deposit guarantee; for Croatia, Article 13(3) of the Law on deposit insurance; for Estonia, Section 86(2) of the Law on the guarantee fund; for Greece, Article 29 of Law 4370/2016 implementing the Deposit Guarantee Schemes Directive; for Latvia, the Law on the deposit guarantee; for Netherlands, the Decree on special prudential measures, investor compensation and deposit guarantees; for Romania, the Law on deposit guarantee schemes and the bank deposit guarantee fund, for Sweden, the Law on deposit insurance.

16 See Article 129 of the Law of 18 December 2015 on the failure of credit institutions and certain investment undertakings.