



Council of the  
European Union

Brussels, 14 November 2017  
(OR. en)

14387/17

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**Interinstitutional Files:**

2016/0360 (COD)

2016/0361 (COD)

2016/0362 (COD)

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EF 282  
ECOFIN 947  
CCG 33  
DRS 70  
CODEC 1823

**COVER NOTE**

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From: Mr Mario DRAGHI, President of the European Central Bank  
date of receipt: 10 November 2017  
To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of  
the European Union  
Subject: OPINION OF THE EUROPEAN CENTRAL BANK of 8 November 2017 on  
revisions to the Union crisis management framework

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Delegations will find attached the above mentioned opinion.

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## OPINION OF THE EUROPEAN CENTRAL BANK

of 8 November 2017

on revisions to the Union crisis management framework

(CON/2017/47)

**Introduction and legal basis**

On 2 and 20 February 2017 the European Central Bank (ECB) received requests from the Council of the European Union and the European Parliament, respectively, for an opinion on a proposal for a Regulation of the European Parliament and of the Council 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 amending Regulation (EU) No 648/2012<sup>1</sup> (hereinafter the 'proposed amendments to the Capital Requirements Regulation')<sup>2</sup>.

On 17 and 20 February 2017 the ECB received requests from the European Parliament and the Council of the European Union, respectively, for an opinion on a proposal for a Directive of the European Parliament and of the Council 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<sup>3</sup> (hereinafter the 'proposed amendments to the Capital Requirements Directive').

On 2 and 20 February 2017 the ECB received requests from the Council of the European Union and the European Parliament, respectively, for an opinion on a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 806/2014 as regards loss-absorbing and Recapitalisation Capacity for credit institutions and investment firms<sup>4</sup> (hereinafter the 'proposed amendments to the Single Resolution Mechanism Regulation').

On 20 February 2017 the ECB received requests from the Council of the European Union and the European Parliament for an opinion on a proposal for a Directive of the European Parliament and of the Council amending Directive 2014/59/EU on loss-absorbing and recapitalisation capacity of credit institutions and investment firms and amending Directive 98/26/EC, Directive 2002/47/EC, Directive 2012/30/EU, Directive 2011/35/EU, Directive 2005/56/EC, Directive 2004/25/EC and Directive 2007/36/EC<sup>5</sup> (hereinafter the 'proposed amendments to the Bank Recovery and Resolution Directive') (hereinafter collectively referred to as the 'proposed amending regulations and directives').

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 since the proposed amending regulations and directives contain

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1 COM(2016) 850 final.

2 The ECB has adopted a separate opinion on some of the proposed amendments to the Capital Requirements Regulation and the Capital Requirements Directive, see CON/2017/xx of the European Central Bank of date Month Year on amendments to the Union framework for capital requirements of credit institutions and investment firms (not yet published in the Official Journal). All ECB opinions are published on the ECB's website at [www.ecb.europa.eu](http://www.ecb.europa.eu).

3 COM(2016) 854 final.

4 COM(2016) 851 final.

5 COM(2016) 852 final.

provisions affecting the ECB's tasks concerning policies relating to the prudential supervision of credit institutions in accordance with Article 127(6) of the Treaty and the European System of Central Banks' contribution to the smooth conduct of policies pursued by the competent authorities relating to the stability of the financial system, as referred to in Article 127(5) of the Treaty. 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. Implementation of the total loss-absorbing capacity (TLAC) standard in the Union

The ECB welcomes the proposed amending regulations and directive, which aim to implement the TLAC standard of the Financial Stability Board (FSB)<sup>6</sup> for global systemically important institutions (G-SIIs) established in the Union. Extending the scope of the TLAC requirements to another set of credit institutions, e.g. to other systemically important institutions (O-SIIs), would raise calibration issues, since they have very heterogeneous profiles. However, if an extension of the scope is considered, an alternative could be to cover a subset of O-SIIs, which resemble the G-SIIs in terms of size, complexity, business model, interconnectedness and systemic importance, possibly with a lower minimum calibration floor. This would allow the differences compared to G-SIIs to be more precisely reflected.

## 2. Amendments to the minimum requirement for own funds and eligible liabilities (MREL)

2.1 The MREL consists of two parts: a loss absorption amount and a recapitalisation amount. The proposed amendments to the Bank Recovery and Resolution Directive<sup>7</sup> (BRRD) and to the Single Resolution Mechanism Regulation<sup>8</sup> (SRMR) provide the possibility for the resolution authority to adjust the MREL recapitalisation amount in order to adequately reflect risks resulting from the business model, funding model and overall risk<sup>9</sup>. This allows the resolution authority to take account of a probable asset reduction and the different risk profile of the institution after the application of resolution tools and to adjust the recapitalisation amount to the new smaller balance sheet size.

In addition, the ECB considers that the resolution authority should be allowed, after consultation with the competent authority, to adjust the MREL recapitalisation amount upwards to provide for a 'safety margin'. This small buffer will ensure that the group and entities resulting from resolution have sufficient resources to cover additional unexpected losses and unforeseen costs that may arise in the period after resolution, which may, e.g., arise from the final outcome of the valuation or be related to costs arising from the implementation of a business reorganisation plan. The amount of such a safety margin should be established on a case-by-case basis, dependent on the resolution plan for the credit institution.

<sup>6</sup> See the FSB's Principles on Loss-absorbing and Recapitalisation Capacity of G-SIBs in Resolution Total Loss-absorbing Capacity (TLAC) Term Sheet of 9 November 2015, available on the FSB's website at [www.fsb.org](http://www.fsb.org).

<sup>7</sup> 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).

<sup>8</sup> 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).

<sup>9</sup> Proposed new Article 45c(3) of the BRRD and proposed new Article 12d(3) of the SRMR.

- 2.2 The proposed amendments to the BRRD and the SRMR allow a resolution authority to give guidance to an entity on having own funds and eligible liabilities in excess of the MREL, in order to cover the entity's potential additional losses and to ensure market confidence in resolution<sup>10</sup>. The ECB recommends that the proposed MREL guidance is eliminated as it adds complexity to the framework without providing clear benefits. First, the MREL guidance may increase the overall MREL calibration, as the guidance may be perceived by the market as a requirement that must always be respected. The resolution authority's power to convert the MREL guidance, if consistently breached, into a hard MREL requirement<sup>11</sup> may reinforce the market's perception that the MREL guidance essentially contributes to an increased MREL requirement. Second, the MREL guidance is not needed in order to underpin compliance with the MREL requirement since the combined buffer requirement is already stacked up on top of the MREL requirement in the Commission's proposal. Third, the MREL guidance cannot be justified by the objective of avoiding automatic maximum distributable amount (MDA) restrictions since a breach of the combined buffer requirement stacked on top of the MREL requirement should, in any case, not lead to immediate automatic restrictions on distributions<sup>12</sup>. Fourth, the MREL guidance does not appear to be necessary to enhance the flexibility of the resolution authority since the MREL requirement can also be adjusted if needed, for example by taking into account the proposed safety margin.
- 2.3 Under the proposed amendments to the Capital Requirements Directive<sup>13</sup> (CRD)<sup>14</sup>, credit institutions will fail to meet the combined buffer requirement if they do not have enough own funds and eligible liabilities to meet the combined buffer requirement, the capital requirements and the MREL at the same time. As the combined buffer requirement is stacked on top of both the MREL requirement<sup>15</sup> (first scenario) and the capital requirements<sup>16</sup> (second scenario) the powers to address a breach of the buffers must be tailored depending on the underlying situation. Although the resolution authority is well placed to require an MREL restoration plan in the first scenario, the competent authority should act in line with the CRD in the second scenario.
- 2.4 The process to address or remove impediments to resolvability due to a breach of buffers stacked on top of the MREL<sup>17</sup> should be modified to include consultation of the competent authority, as is already provided for in relation to other impediments. Furthermore, the resolution authorities should have more flexibility regarding deadlines in order to ensure that the credit institution has sufficient time, if necessary, to develop the most appropriate strategy to address the breach of buffers. Additionally, the ECB welcomes the Commission's proposal, which allows the resolution authority to require an institution to change the maturity profile of MREL instruments as part of the measures to address impediments to resolvability<sup>18</sup>.

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10 See the proposed new Article 45e(1) of the BRRD and the proposed new Article 12f(1) of the SRMR.

11 See the proposed new Article 45e(3) of the BRRD.

12 See paragraphs 2.9 and 2.10.

13 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).

14 See the proposed new Article 141a of the CRD.

15 See the proposed new Article 141a(1)(d) of the CRD.

16 See the proposed new Article 141a(1)(a), (b) and (c) of the CRD.

17 See the proposed new Article 17(5)(h1) of the BRRD.

18 See the proposed new Article 17(5)(j1) of the BRRD.

- 2.5 The ECB recommends that the proposed amendments to the BRRD and SRMR clarify that resolution authorities have the task of monitoring the levels of available MREL eligible instruments and the MREL ratio itself, taking account of all the calculations on deductions. Likewise, it should be clarified that resolution authorities also have the task of monitoring compliance with MREL and informing the competent authority of any breaches and other relevant events that may affect the credit institution's ability to fulfil the MREL or the MREL guidance.
- 2.6 In the event of a breach of the MREL that coincides with a breach of capital requirements, the competent authority should first address the capital requirements breach by adopting the relevant measures, i.e. supervisory measures or use of early intervention powers in consultation with the resolution authority. This consultation should be short in order to ensure a prompt reaction to the breach of capital requirements. In addition, in exercising its power to address the MREL breach, the resolution authority must take account of the measures adopted by the competent authority.
- 2.7 Under the proposed amendments to the Capital Requirements Regulation<sup>19</sup> (CRR), early redemption of eligible liabilities requires prior permission to avoid an erosion of bail-in-able liabilities. The resolution authority should be responsible for granting such permission, since it is also responsible for determining the MREL and specifying the amount and quality of instruments that will be needed for the preferred resolution strategy<sup>20</sup>.
- The resolution authority should be required to consult the competent authority in those cases where a credit institution is converting MREL eligible liabilities into own funds instruments in order to ensure compliance with capital requirements, as the approval of such a measure may be necessary to preserve the going concern capital position of the institution. Finally, the amendments should clarify that eligible liabilities instruments with a residual maturity below one year are also subject to this requirement for prior permission where the entity or resolution group is in breach of its MREL.
- 2.8 The ECB sees merit in the proposed amendments to the CRD, which provide that automatic MDA restrictions do not apply where the breach of the combined buffer requirement is due to the inability of the institution to replace liabilities that no longer meet the MREL eligibility or maturity criteria<sup>21</sup>. This exemption should be extended to include the situation where the institution breaches its combined buffer requirement stacked on top of the MREL requirement<sup>22</sup> because it suffers a reduction of own funds but does not breach its combined buffer requirement stacked on top of capital requirements. In such a situation, the credit institution may still have a relatively high level of own funds, which, considered in isolation without the MREL, would suffice to meet its own fund requirements and its combined buffer requirement.
- 2.9 The ECB recommends that the proposed exemption from the application of MDA restrictions where the credit institution lacks MREL instruments should not be limited to a six-month period, since this may not be a sufficient delay of automatic application of MDA restrictions and thus may still further exacerbate stress in funding markets when there is the need to issue new capital or debt

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19 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).

20 This is in line with the view expressed in paragraph 2.6.

21 See the proposed new Article 141a(2) of the CRD.

22 See the proposed new Article 141a(1)(d) of the CRD.

instruments<sup>23</sup>. Instead, the exemption should apply for a twelve-month period, which will allow for additional time for the institution to issue MREL eligible instruments. This is particularly relevant since MREL instruments generally have shorter maturities than own funds instruments and thus bring greater refinancing risks, which might coincide with future stress in funding markets.

- 2.10 From a financial stability perspective, cross-holdings of MREL liabilities between credit institutions are not desirable. In order to prevent double counting and limit contagion effects, deduction rules should apply to all holdings of external MREL liabilities, i.e. issued to entities outside the resolution group, irrespective of the type of credit institution, i.e. not limited to GSIs. The same method currently proposed for G-SIs should apply in respect of all credit institutions, i.e. deductions are made from MREL eligible liabilities and from own funds on the basis of a corresponding deduction approach. In general, other aspects of the deduction rules should be consistent with what is agreed internationally for TLAC, i.e. in the FSB TLAC Term Sheet and the Basel III framework, including for banking groups with more than one resolution entity and resolution group.
- 2.11 From a financial stability perspective, resolvability may be reduced if new ‘non-preferred’ senior debt instruments as well as subordinated debt instruments were to be held by retail investors. Therefore, consideration could be given to clear and easily understandable disclosure requirements and other safeguards to raise investor awareness of the risks associated with such instruments. In the same vein, it may be advisable to consider requiring a minimum denomination of at least EUR 100 000 per unit in respect of each instrument. This would increase the investment threshold and thus also raise investor awareness, thereby limiting direct retail investment. A common framework at Union level should be pursued on these issues in order to avoid divergent approaches being taken across Member States, which would lead to fragmentation within the Union market for these instruments<sup>24</sup>.
- 2.12 The treatment of groups to be resolved under a multiple point of entry approach should be clarified. First, the definition of a ‘resolution group’ should exclude third-country subsidiaries that are points of entry themselves since these will be treated separately from the rest of the group in the event of resolution<sup>25</sup>. Second, the amendments should clarify that compliance with MREL at resolution entity level must be achieved on a consolidated basis at the level of the resolution group<sup>26</sup>. Third, the proposed rules on deductions from eligible liabilities applicable to groups to be resolved under the multiple point of entry approach<sup>27</sup> should fully reflect the TLAC term sheet with regard to the adjustments permitted and the components of the formula.

### 3. Transitional arrangements for MREL

- 3.1 One key factor in the implementation of an entity-specific MREL is the determination of an adequate transition period. The potentially high level of MREL shortfalls that may occur at the onset of the introduction of the new harmonised levels could pose significant challenges for certain credit

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<sup>23</sup> Note that a combined buffer requirement breach may also occur at high levels of regulatory capital where a credit institution actually meets a significant part of its MREL through own funds and not other MREL eligible liabilities.

<sup>24</sup> See also paragraph 3.5 of Opinion CON/2017/23.

<sup>25</sup> Such clarification concerning the treatment of third-country subsidiaries may have a sizeable effect on the MREL for these group types.

<sup>26</sup> See the proposed new Article 11(3) of the CRR.

<sup>27</sup> See the proposed new Article 72e(4) of the CRR.

institutions as regards meeting these requirements in a timely manner in the current macroeconomic environment. Therefore, the ECB proposes that an adequate minimum transition period across credit institutions should be introduced, which should be no shorter than the period applicable to G-SIIs set out in the TLAC term sheet. In addition, the resolution authority should be given the flexibility to determine, on a case-by-case basis, a final period for compliance that is longer than this harmonised minimum. The ECB recommends clarifying that any extension, beyond the minimum transition period for a given institution, should be based on an assessment of the challenges in meeting the MREL requirement that such an institution would face due to limited market access or market capacity, or similar constraints in the relevant macroeconomic environment.

- 3.2 Moreover, the ECB sees merit in the introduction of new eligibility criteria for MREL eligible instruments which align the MREL eligibility criteria with the TLAC eligibility criteria<sup>28</sup> and introduce additional features that improve the permanence of MREL eligible instruments<sup>29</sup>. These will assist in ensuring the loss-absorption capacity of MREL at the point of resolution. However, the additional features that go beyond the TLAC eligibility criteria may lead to further shortfalls, e.g. by making liabilities with acceleration clauses ineligible, which should be taken into account when setting the final transition period for compliance with MREL on a case-by-case basis. Alternatively, the proposed amendments to the CRR could be reworded to specify that liabilities that were previously MREL eligible but are not compliant with new additional features will be subject to 'grandfathering', meaning that they will continue to be eligible as they are under the current regime. Such grandfathering should be phased out over a reasonable time horizon.
- 3.3 Regarding the requirement that liabilities arising from debt instruments with embedded derivatives must be excluded from eligible liabilities, further clarification of the definition of 'embedded derivatives' is necessary. This could possibly be achieved by developing appropriate regulatory technical standards<sup>30</sup>.

#### 4. Early intervention measures

- 4.1 There is a significant overlap between supervisory measures under the CRD<sup>31</sup>, the SSM Regulation<sup>32</sup> (SSMR) and early intervention measures provided for in the BRRD, both in terms of content as well as the conditions for their application. This overlap creates significant challenges for the practical implementation of the early intervention framework, especially in view of the lack of clarity regarding the conditions for early intervention.

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<sup>28</sup> The main difference that remains is that subordination is not required for all institutions and that structured notes, under certain conditions, are eligible for MREL.

<sup>29</sup> See the proposed new Article 72b(2) of the CRR, point (h) on incentives to redeem, point (j) on call options exercisable on sole discretion of the issuer, point (k) on the need to comply with Articles 77 and 78 of the CRR, point (l) on no mentioning of early repayment, point (m) on no acceleration rights for holder, and point (n) on the level of payments not being dependent on the credit standing of the institution.

<sup>30</sup> See also paragraph 2.1.2 of Opinion CON/2017/6.

<sup>31</sup> See, in particular, Article 104 of the CRD.

<sup>32</sup> 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), in particular Article 16.

- 4.2 Moreover, the ECB's early intervention powers must be exercised on the basis of individual national transpositions of the BRRD<sup>33</sup>. This results in uncertainty regarding the available measures and the conditions for their exercise in each Member State.
- 4.3 Consequently, the ECB recommends removing from the BRRD those early intervention measures that are already available in the CRD and the SSMR and amending the SRMR to provide a legal basis in a regulation for the ECB's early intervention powers in order to facilitate their consistent application.

## 5. Pre-resolution moratorium tool

- 5.1 The proposed amendments to the BRRD confer new powers to suspend payment and delivery obligations on both the competent authorities and the resolution authorities. While the ECB generally welcomes the harmonisation of such powers at Union level, the ECB expects these far-reaching powers to be exercised only in extreme circumstances, if at all. Due to its exceptional nature and its disruptive impact on contracts, the moratorium tool should be decided in close coordination between all relevant authorities. The ECB suggests introducing a procedure for the allocation of responsibility for a moratorium to either the competent or the resolution authority, depending on whether the moratorium is imposed before or after the 'failing or likely to fail' determination. Such a procedure should as a rule avoid the imposition of successive moratoria. Only exceptionally, where motivated by the specific circumstances and in compliance with the principle of proportionality, should the resolution authority be able to impose an additional moratorium in order to bridge the gap from the 'failing or likely to fail' determination until resolution action is taken.
- 5.2 In general, a pre-resolution moratorium tool should be separate and independent from the early intervention measures. The primary objective of a pre-resolution moratorium should be to prevent severe deterioration of a credit institution's balance sheet. In particular, the pre-resolution moratorium tool would give the competent authority sufficient time, if necessary, to finalise the 'failing or likely to fail' assessment, also taking into consideration the time required to take such a formal decision, which also requires consultation of the resolution authority. Moreover, a moratorium allows additional time for the resolution authority to start preparing for its resolution tasks in parallel. The maximum period for a moratorium should be five working days in total, a limitation which is also necessary considering the severe impact of a moratorium on creditors' rights. The ECB cautions that prolonged periods during which depositors have no access to their deposits undermine confidence in the banking system and might ultimately create risks to financial stability.
- 5.3 An effective pre-resolution moratorium needs to have the broadest possible scope in order to allow for a timely reaction to liquidity outflows. The general exception for covered deposits and claims under investor compensation schemes should be replaced by limited discretionary exemptions to be granted by the competent authority in order to retain a degree of flexibility. Under that approach, the competent authority could, for example, allow depositors to withdraw a limited amount of deposits on a daily basis consistent with the level of protection established under the Deposit Guarantee Schemes Directive (DGSD)<sup>34</sup>, while taking into account potential liquidity and technical constraints. Certain safeguards to

<sup>33</sup> In line with Article 4(3) of the SSMR.

<sup>34</sup> 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). As an example, Article 8(4) of this Directive provides that, during a transitional period,



protect the rights of depositors should be put in place, such as a clear communication on when access to deposits would be restored. Finally, possible implications under the DGSD should be assessed, as the pre-resolution moratorium tool would not be useful if it were to be deemed to trigger the unavailability of deposits under the DGSD.

- 5.4 The ECB recommends extending the existing exemptions from the moratorium related to financial market infrastructures (FMIs), including CCPs, also to (a) third-country central securities depositories (CSDs) recognised by the European Securities and Markets Authority pursuant to the Central Securities Depositories Regulation<sup>35</sup>, and (b) third-country payment systems subject to a cooperative oversight arrangement involving at least one central bank in the European System of Central Banks. A suspension prohibiting a participant (credit institution) from making any payments to an FMI will de facto cause that participant to no longer be able to meet its obligations as they fall due. For payment obligations to FMIs, this would place the participant in default. Without an exemption for this type of payment, the moratorium would actually have the potential to create and spread systemic risk before the FMI safeguards kick in<sup>36</sup>.
- 5.5 The proposed harmonisation of pre-resolution moratorium powers should also be without prejudice to any other moratorium powers, e.g. supervisory or judicial powers, introduced at national level to safeguard the *par condicio creditorum* (equal treatment of creditors) principle upon the opening of insolvency proceedings. If a credit institution does not enter into resolution once a moratorium has been imposed, e.g. because the resolution authority determines that resolution would not be in the public interest, such national tools may become relevant again. A similar situation could occur if the failing entity goes into insolvency following the application of resolution tools.
- 5.6 The exceptions in the BRRD applicable to central banks, including with respect to the pre-resolution moratorium tool, should be extended to include the Bank for International Settlements (BIS). The BIS has been entrusted with the tasks of promoting cooperation between central banks, providing additional facilities for international financial operations and acting as trustee or agent for international financial settlements, it is therefore appropriate that it receives a treatment under the BRRD that is similar to that of a central bank.
- 5.7 Further assessments should also be undertaken with respect to recognising the moratorium tool under third-country laws, specifically in those cases where a recognition mechanism has not yet been established. In particular, careful consideration should be given to the potential implications of the moratorium tool for the purposes of the International Swaps and Derivatives Association 2015 Universal Resolution Stay Protocol, which only recognises a shorter period for a stay, with an opt-out in relation to jurisdictions that subsequently amend the length of the statutory stay.

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depositors should have access to an appropriate amount of their covered deposits to cover the cost of living within five working days of a request.

<sup>35</sup> See Article 25 of Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (OJ L 257, 28.8.2014, p. 1).

<sup>36</sup> For this reason, there is a common understanding, both at Union and international level (settlement finality laws and FSB Key Attributes), of the need to protect financial obligations linked to FMIs from a moratorium.

5.8 Finally, the possible implications of prudential regulatory requirements should be carefully assessed given the proposed duration of the moratorium tools and the envisaged suspension of termination or netting/set-off rights.

## 6. 'Failing or likely to fail' assessment regarding less significant credit institutions under the direct responsibility of the Single Resolution Board (SRB)

Although the Commission's proposed amendments to the SRMR do not address this, the resolution procedure established in the SRMR requires urgent attention. In particular, the misalignment between the institution-specific responsibilities of the ECB and of the SRB combined with the current wording of the SRMR leads to legal uncertainty as to which authority is responsible for assessing that a less significant credit institution, under the direct responsibility of the SRB, is failing or likely to fail. While a literal reading of Article 18 of the SRMR suggests that the ECB is responsible for making the 'failing or likely to fail' assessments in relation to some less significant credit institutions, this reading does not take account of the limitations of Union primary law. In fact, a systematic interpretation of the Union legal framework suggests that the 'failing or likely to fail' assessment for both less significant cross-border groups and other less significant credit institutions under the direct responsibility of the SRB should be outside the ECB's direct competence and should rather be a competence of the national competent authorities, as the competent supervisory authorities for less significant credit institutions on the basis of the SSMR<sup>37</sup>. The ECB recommends that the proposed amendments to the SRMR are extended to provide explicitly that the respective national competent authority is responsible for the 'failing or likely to fail' assessment for a less significant credit institution under the remit of the SRB<sup>38</sup>.

Specific ECB staff drafting proposals to amend the proposed amending regulations and directives are set out in a separate technical working document accompanied by an explanatory text to this effect. The technical working document has not been adopted by the Governing Council. The technical working document is available in English on the ECB's website.

Done at Frankfurt am Main, 8 November 2017.

*The President of the ECB*

Mario DRAGHI

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<sup>37</sup> See Article 6(4) of the SSMR.

<sup>38</sup> The same considerations apply *mutatis mutandis* to the provisions of Article 21 of the SRMR.