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COVER NOTE

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
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To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union
Subject:	Opinion of the European Central Bank on amendments to the Union crisis management and deposit insurance framework

Delegations will find attached the opinion mentioned above, and the technical working document in annex.

Encl.

EUROPEAN CENTRAL BANK

EUROSYSTEM

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OPINION OF THE EUROPEAN CENTRAL BANK

of 5 July 2023

on amendments to the Union crisis management and deposit insurance framework

(CON/2023/19)

Introduction and legal basis

On 18 April 2023 the European Commission adopted proposals for (1) a regulation of the European Parliament and of the Council amending Regulation (EU) No 806/2014 as regards early intervention measures, conditions for resolution and funding of resolution action[1] (hereinafter the 'proposed amendments to the Single Resolution Mechanism Regulation' or the 'proposed amendments to the SRMR'); (2) a directive of the European Parliament and of the Council amending Directive 2014/59/EU as regards early intervention measures, conditions for resolution and financing of resolution action[2] (hereinafter the 'proposed amendments to the Bank Recovery and Resolution Directive' or the 'proposed amendments to the BRRD'); (3) a directive of the European Parliament and of the Council amending Directive 2014/49/EU as regards the scope of deposit protection, use of deposit guarantee schemes funds, cross-border cooperation, and transparency[3] (hereinafter the 'proposed amendments to the Deposit Guarantee Schemes Directive' or the 'proposed amendments to the DGSD'); and (4) a proposal for a directive of the European Parliament and of the Council amending Directive 2014/59/EU and Regulation (EU) No 806/2014 as regards certain aspects of the minimum requirement for own funds and eligible liabilities[4] (hereinafter the 'proposed amendments regarding daisy chains'). The proposed amendments to the SRMR, the proposed amendments to BRRD, the proposed amendments to the DGSD and the proposed amendments regarding daisy chains, are hereinafter collectively referred to as 'the proposed legislative package'.

The Commission has proposed that the ECB be consulted on the proposed amendments to the SRMR, the proposed amendments to the BRRD and the proposed amendments to the DGSD. On 23 June and on 3 July 2023 the ECB received requests from the Council of the European Union and from the European Parliament, respectively, for an opinion on the proposed amendments regarding daisy chains.

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 legislative package contains provisions affecting: (1) the task of the European System of Central Banks (ESCB) to contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions

1 COM(2023) 226 final.
2 COM(2023) 227 final.
3 COM(2023) 228 final.
4 COM(2023) 229 final.

and the stability of the financial system pursuant to Article 127(5) of the Treaty; and (2) the tasks conferred upon the ECB concerning the prudential supervision of credit institutions in accordance with Article 127(6) 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.

General observations

1. A necessary update of the Union crisis management and deposit insurance framework

1.1 The ECB strongly welcomes the European Commission's proposed legislative package, which seeks to make improvements across all the different stages of the Union crisis management and deposit insurance (CMDI) framework[5]. A well-functioning Union CMDI framework is essential to address possible or actual failures of credit institutions of all sizes within and across Member States. The current CMDI framework, introduced in response to the global financial crisis of 2008, has been in place for some years now and experience has shown that the reforms implemented over the last decade have significantly strengthened the effectiveness of the framework. This review is an important opportunity to further enhance the CMDI framework in the light of the lessons learned in the first years of its application.

1.2 The proposed legislative package aims to increase the resilience of European financial markets in crisis situations. It further harmonises the applicable crisis management rules across the Union, reducing the complexity of cross-border crisis management. It also widens the scope, and aims to improve the effectiveness, of the crisis management toolkit available to address crisis situations, in particular in relation to failures of smaller and medium-sized credit institutions.

1.3 The ECB welcomes the improvements to the early intervention regime, as well as the new provisions on cooperation and exchange of information between supervisory and resolution authorities, which aim to further enhance the crisis management process. Within this regime it will be important to maintain a clear distribution of responsibilities between supervisory and resolution authorities.

1.4 The ECB also welcomes the proposed expansion of resolution[6], as this will improve the effective management of failures of smaller and medium-sized credit institutions across Member States in a harmonised way[7]. At the same time, it is imperative that this wider scope for resolution is accompanied by adequate resolution funding for these smaller and medium-sized credit institutions. Without improved access to funding, expanding the scope of resolution risks being impossible to implement in practice. The ECB therefore fully supports that, building on the principle

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5 See Opinion CON/2017/6 of the European Central Bank of 8 March 2017 on a proposal for a directive of the European Parliament and of the Council on amending Directive 2014/59/EU as regards the ranking of unsecured debt instruments in insolvency hierarchy (OJ C 132, 26.4.2017, p. 1) and Opinion CON/2017/47 of the European Central Bank of 8 November 2017 on revisions to the Union crisis management framework (OJ C 34, 31.1.2018, p. 17). All ECB opinions are available on EUR-Lex. See also ECB contribution to the European Commission's targeted consultation on the review of the crisis management and deposit insurance framework, available on the ECB's website at www.ecb.europa.eu.

6 See explanatory memorandum to the proposed amendments to the SRMR, pp. 5 and 10.

7 See ECB contribution to the European Commission's targeted consultation on the review of the crisis management and deposit insurance framework, p. 1.

that losses in a credit institution failure should be borne first and foremost by shareholders and creditors, the proposed legislative package also provides for a stronger role for deposit guarantee schemes (DGSs) in resolution, subject to certain safeguards. It is important that such role is facilitated by a harmonised least-cost test and a single-tier depositor preference.

1.5 The proposed legislative package will make access to resolution financing arrangements more feasible in certain scenarios. Yet, in systemic crises where multiple credit institutions simultaneously face issues, or where the bail-in of a certain category of creditors threatens to seriously undermine financial stability, it would be beneficial to allow extraordinary access to resolution financing arrangements in order to safeguard the public interest and to avoid systemic fallout. To deal with such exceptional situations, the ECB would support introducing a financial stability exemption catering for the possibility to access resolution financing arrangements prior to a loss absorption of 8 % total liabilities and own funds (TLOF) in exceptional circumstances, subject, however, to strong safeguards.

1.6 Regardless of the expansion of the scope of resolution, some credit institutions will continue to be wound up under the national liquidation or insolvency proceedings. In such cases it is important to ensure a smooth and timely process to avoid any 'limbo' situation[8] following a negative public interest assessment.

1.7 The proposed legislative package also seeks to harmonise and enhance, e.g. by means of the single-tier depositor preference, the ability of DGSs' to intervene through preventive and alternative measures. The ECB would, however, support further harmonisation of these measures. Furthermore, the ECB would have appreciated an explicit requirement to segregate institutional protection scheme (IPS) funds and DGS funds in the articles of the DGSD. This would notably ensure that the specific functions of an IPS can then continue to be carried out with the help of those dedicated IPS funds.

1.8 The ECB sees a need for improvements to the current rules governing the transfer of DGS contributions in cases where credit institutions change their affiliation to a different DGS within the Union, as these rules could otherwise impede a more integrated single market for banking services in the Union. In this regard the ECB supports mandating the European Banking Authority (EBA) with developing a methodology for calculating the amount of contributions to be transferred to ensure alignment with the transferred risks.

1.9 The ECB strongly supports a swift finalisation of the legislative process, in line with the objective of finalising discussions during the current legislature[9]. The proposed legislative package strikes the right balance between the key objectives to protect taxpayers and depositors and preserve financial stability. It forms a coherent package, which must be discussed holistically, as its key elements will only function as intended if they are put in place at the same time.

8 See explanatory memorandum to the proposed amendments to the BRRD, p. 19.

9 See Eurogroup statement on the future of the Banking Union of 16 June 2022, available on the Council of the European Union's website at www.consilium.europa.eu.

2. Completing the Banking Union

2.1 Beyond the proposed legislative package, which represents a critical step towards strengthening the Banking Union, further initiatives will be essential to complete the Banking Union in the coming years.

2.2 First, a European deposit insurance scheme (EDIS) is the necessary third pillar to complete the Banking Union[10] and would further strengthen the resilience of the Union banking sector. Putting in place an EDIS with full risk-sharing, including full coverage of both liquidity needs and losses, remains a key priority[11]. A common scheme would ensure that the level of confidence in the safety of bank deposits is equally high in all Member States[12], thereby reducing the risk of bank runs and safeguarding financial stability. Keeping depositor protection at the national level maintains the link between a credit institution and its sovereign. This impedes the creation of a level playing field, weakens financial stability and implies that one of the main objectives of the Banking Union has not been achieved. Establishing an EDIS could also unlock further improvements to the crisis management framework and cross-border integration in the Banking Union. The ECB welcomes the Commission's call for a renewed effort to reach a political agreement on EDIS[13] and calls on the Union legislators to make progress in this respect.

2.3 Second, full operationalisation of the European Stability Mechanism in its backstop function to the Single Resolution Fund (SRF) needs to be ensured as a matter of priority.

2.4 Third, access to liquidity is essential for successful resolution, as also demonstrated by recent crisis events. The Banking Union currently still lacks a framework for liquidity in resolution. Such a framework should be set up in accordance with the Guiding Principles of the Financial Stability Board and with international best practices.

Specific observations

3. Early intervention measures adopted by the supervisor

3.1 The ECB welcomes the Commission's proposals with regard to the early intervention framework, which build on past ECB recommendations[14]. The proposed legislative package is important to address the current challenges in the application of this framework. Providing a direct legal basis for the ECB's exercise of early intervention powers under Regulation (EU) No 806/2014 of the

10 See paragraph 1.1 of Opinion CON/2016/26 of the European Central Bank of 20 April 2016 on a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 806/2014 in order to establish a European Deposit Insurance Scheme (OJ C 252, 12.7.2016, p. 1).

11 See ECB contribution to the European Commission's targeted consultation on the review of the crisis management and deposit insurance framework, pp. 1-4 and 14-15.

12 See paragraph 1.1 of Opinion CON/2016/26.

13 See Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions on the review of the crisis management and deposit insurance framework contributing to completing the Banking Union (COM(2023) 225 final).

14 See paragraph 4 of Opinion CON/2017/47 and ECB contribution to the European Commission's targeted consultation on the review of the crisis management and deposit insurance framework, pp. 2 and 5-6.

European Parliament and of the Council[15] (hereinafter the 'Single Resolution Mechanism Regulation' (SRMR))[16] reduces the risk arising from potentially diverging transpositions of Directive 2014/59/EU of the European Parliament and of the Council[17] (hereinafter the 'Bank Recovery and Resolution Directive' (BRRD)) into national law. The proposed legislative package also removes the overlap between early intervention and supervisory measures, enhancing their respective practical application[18]. In addition to those changes, the ECB supports aligning the conditions for adopting early intervention measures with the conditions for the adoption by the ECB of supervisory measures. This would broaden the possibility for the supervisory authority to intervene promptly through the adoption of early intervention measures to address identified weaknesses, even if an infringement or likely infringement of prudential requirements has not yet materialised. The ECB recommends deleting the reference to a rapid and significant deterioration of the financial condition of the entity as a prerequisite for taking an early intervention measure. Such a reference could undermine the supervisor's capability to properly and in a timely manner address a deterioration of the entity's situation where, for example, such deterioration is not rapid, but still significant or such deterioration is related to governance issues, internal controls and other non-financial parameters.

3.2 The ECB also welcomes the proposal to include the power to adopt all early intervention measures under a single provision[19], subject to the same conditions, without including an escalation ladder. This would enable the swift adoption of the most appropriate early intervention measure(s), taking into account the specific circumstances of each situation.

3.3 The proposed amendments to the SRMR seek to empower the ECB to adopt early intervention measures based on an infringement or likely infringement of the minimum requirements for own funds and eligible liabilities (MREL)[20], even if such infringement does not breach prudential requirements. MREL are intended to facilitate the implementation of an orderly resolution strategy for a credit institution that is no longer viable. As such, they serve a separate purpose compared with prudential requirements, which aim to ensure the safety and soundness of credit institutions. It follows that resolution authorities are best placed, as well as legally competent, to monitor compliance with MREL targets and to initiate remedial measures in connection therewith. Therefore, the prerogative of addressing MREL breaches should remain exclusively with resolution authorities in all cases where MREL breaches do not simultaneously qualify as breaches of own

15 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).

16 See Article 1, point (15), of the proposed amendments to the SRMR, which amends Article 13 of the SRMR.

17 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).

18 See Article 1, point (15), of the proposed amendments to the SRMR, which amends Article 13 of the SRMR.

19 See Article 1, point (15), of the proposed amendments to the SRMR, which amends Article 13 of the SRMR.

20 See Article 1, point (15), of the proposed amendments to the SRMR, which amends Article 13 of the SRMR.

funds requirements. This would avoid the duplication of tasks and the blurring of responsibilities between prudential supervisory and resolution authorities.

3.4 While supervisory measures can indeed effectively address some structural viability issues, they may prove insufficient in cases involving credit institutions with weak business models that experience prolonged difficulties and a continual depletion of capital. As long as such credit institutions do not meet the conditions for being deemed 'failing or likely to fail' (FOLTF) the current toolkit may not provide the competent authority with sufficient tools to prompt these credit institutions to take the adequate steps to address these risks. Recent experience demonstrates that a gradual voluntary wind-down, accompanied by appropriate capital and liquidity support, could, under specific conditions, be a cost-effective solution for credit institutions with a weak business model to exit the market, thus avoiding a protracted decline, including further losses and capital depletion over several years, culminating in the credit institution's failure. In the light of this, the ECB supports the inclusion of an explicit provision empowering competent authorities, in the context of early intervention, to request the submission of a plan to be implemented in the case of a voluntary wind-down scenario. The competent authority may require the institution to include additional elements in the plan. The preparation of such a plan would raise the institution's awareness about the available strategic options and related costs. In any event, the final decision about the implementation of the plan would be left to the institution concerned and its shareholders.

4. Preparation for resolution

4.1 The ECB fully supports the proposals to further enhance cooperation and information exchange between the ECB and the Single Resolution Board (SRB) within the context of preparations for resolution[21]. While cooperation and information exchange between the ECB, in its supervisory function, and the SRB is already comprehensive on the basis of the bilateral Memorandum of Understanding[22], the ECB welcomes the proposals to provide for this closer cooperation directly in the legislation.

4.2 The ECB understands that the proposed power for the ECB to collect resolution-related information, for example through on-site inspections, and provide it to the SRB[23], seeks to replace the current early intervention power provided for in the BRRD[24]. Nevertheless, the ECB suggests some minor modifications to the relevant provisions detailing such power and to introduce an explanatory recital that clarifies the need to assess on a case-by-case basis how to collect that information.

4.3 Furthermore, the term 'supervisory activity' is not defined in the proposed legislative package, which makes it difficult to define the scope of the proposed duty of the ECB to inform the SRB of

21 See recital 14 and Article 1, point (16), of the proposed amendments to the SRMR, which inserts a new Article 13c in the SRMR.

22 Memorandum of Understanding between the Single Resolution Board and the European Central Bank in respect of Cooperation and Information Exchange, available on EUR-Lex.

23 See Article 1, point (16), of the proposed amendments to the SRMR, which inserts a new Article 13c in the SRMR.

24 See Article 27(1), point (h), of the BRRD.

such 'supervisory activity'[25]. The ECB may instead inform the SRB of all relevant ECB supervisory assessments, shared with its decision-making bodies.

5. Precautionary recapitalisation and government liquidity support

5.1 The ECB reiterates that precautionary recapitalisation constitutes a useful tool for extraordinary circumstances within the current crisis management framework that should be maintained[26]. It is one of the few exceptions to the general rule that the provision of extraordinary public financial support to a credit institution leads to it being considered a credit institution that is failing or likely to fail. Precautionary recapitalisation is subject to stringent conditions that have been fulfilled only in a limited number of cases in the past. The limited use of the instrument indicates that the current conditionality is appropriate. Indeed, the relevant authorities need to be able to take the specific circumstances of each case fully into account.

5.2 The ECB generally welcomes the clarifications set out in the proposed amendments to the SRMR as well as the proposals to maintain the existing toolkit for identifying incurred losses (i.e. no mandatory asset quality review, as other tools such as on-site inspections could be suitable as well), since precautionary recapitalisations typically have to be implemented quickly to be effective[27].

5.3 At the same time, the conditions for precautionary recapitalisation should not constrain the ability of the relevant authorities to take the specific circumstances of each case into account. In this regard, the newly proposed definition of solvency[28] would force the competent authority to conclude that an entity is not solvent for this specific purpose of precautionary recapitalisation also based on mere technical or foreseeably temporary breaches of capital requirements, which may unjustifiably further constrain precautionary recapitalisations as well as government liquidity support. Therefore, the ECB recommends clarifying the new definition so that an entity can still be assessed as solvent also in cases of breaches or likely breaches of capital requirements if those breaches are considered of a temporary nature in the light of the specific circumstances of the case.

5.4 The ECB acknowledges the merits of requiring an exit strategy from the support measure[29]. However, setting a fixed timeline without the possibility to extend it creates the risk of a cliff edge effect, because markets may anticipate the exit deadline, creating adverse consequences for market conditions to the detriment of public revenue. Moreover, it should be possible to take into account unexpected market developments. The ECB also sees no need to approve any exit strategy from the supervisory perspective in addition to the Commission's approval already

25 See Article 1, point (16), of the proposed amendments to the SRMR, which inserts a new Article 13c(1), point (b), in the SRMR.

26 See ECB contribution to the European Commission's targeted consultation on the review of the crisis management and deposit insurance framework, pp. 2 and 6-7.

27 See Article 1, point (20), of the proposed amendments to the SRMR, which inserts a new Article 18a(2) in the SRMR.

28 See Article 1, point (20), of the proposed amendments to the SRMR, which inserts a new Article 18a in the SRMR and Article 1, point (19), of the proposed amendments to the BRRD, which inserts a new Article 32c in the BRRD.

29 See Article 1, point (20), of the proposed amendments to the SRMR, which inserts a new Article 18a(2), point (b), in the SRMR.

required under the general State aid process. In order to be able to react effectively in the event of unexpected circumstances, the automatic linkage between any delays regarding the implementation of the exit strategy and a FOLTF assessment should be removed. Finally, limiting the amount of Common Equity Tier 1 (CET1) instruments acquired through a precautionary recapitalisation to 2 % of the total risk exposure amount may also unduly constrain the use of available solutions. For instance, it may create undesirable cliff edge effects and entail the risk that the recapitalisation measure may be insufficient and fail to restore market confidence.

6. Interventions of deposit guarantee schemes

6.1 DGS preventive measures have proven to be a useful crisis prevention tool. Under the proposed legislative package, allowing the DGSs to finance preventive interventions would remain an option for Member States[30]. Given the potential benefits of these tools, the ECB encourages Union legislators to make DGS preventive measures available across the Union under a harmonised deposit insurance framework. The ECB acknowledges, however, that building up the necessary capacity for preventive measures may take some time for DGSs and considers that a transition period may therefore be appropriate. Further harmonisation is warranted to ensure a level playing field across the Union, adequate safeguards and a better equipped toolkit, thus ensuring consistency with the overall objectives of the CMDI framework.

6.2 The ECB welcomes the clarifications proposed to the SRMR[31] and the BRRD[32] that DGS interventions made in accordance with the DGSD[33] rules on preventive measures do not trigger a FOLTF assessment. This will provide greater clarity and certainty to competent authorities. Nevertheless, the ECB has some reservations regarding the condition under which the competent authority would need to establish that a DGS intervention is necessary to preserve the financial soundness and long-term viability of the concerned credit institution in order for the preventive intervention not to trigger a FOLTF assessment[34]. Therefore, the ECB recommends deleting that reference in the proposed amendments to the SRMR and the BRRD.

6.3 The ECB also welcomes the harmonisation of the least-cost test before using DGS funds or when considering applying a DGS preventive measure[35]. In all cases of DGS use, a harmonised least-cost test framework will help level the playing field and ensure consistency across Member States. For the specific situation of preventive measures, the proposed amendments to the DGSD note that predicting liquidation recoveries is challenging, as preventive measures should be taken long

30 See Article 1, point (12), of the proposed amendments to the DGSD, which amends Article 11 of the DGSD.

31 See Article 1, point (19)(b), of the proposed amendments to the SRMR, which amends Article 18(4), point (d), of the SRMR.

32 See Article 1, point (17)(b), of the proposed amendments to the BRRD, which amends Article 32(4), point (d), of the BRRD.

33 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).

34 See Article 1, point (20), of the proposed amendments to the SRMR, which inserts a new Article 18a(1), point (b), in the SRMR and Article 1, point (19), of the proposed amendments to the BRRD, which inserts a new Article 32c(1), point (b), in the BRRD.

35 See Article 1, point (13), of the proposed amendments to the DGSD, which inserts a new Article 11e in the DGSD.

before any foreseeable liquidation[36]. These proposals therefore suggest applying a scaling factor of 85 % to the estimated ratio of recoveries when carrying out a least-cost test for a preventive measure, unlocking additional funding from the DGS. Applying such a scaling factor evenly for preventive and alternative measures as well as contributions of the DGS to resolution would further level the playing field and help facilitate these DGS interventions in more scenarios. However, as the situations of institutions to which preventive measures are applied can be very diverse in terms of their balance sheets and the degree of their deterioration, a scaling factor may not adequately address the specificities of preventive measures. This issue may be addressed more effectively by the EBA as part of its proposed draft regulatory technical standards[37].

6.4 The proposed amendments to the DGSD provide that credit institutions that request a DGS to finance preventive measures are to present to the competent authority for consultation a note with measures that those credit institutions commit to undertake in order to ensure or restore compliance with supervisory requirements, including actions to mitigate the risk of deterioration of financial soundness and strengthen the credit institution's capital and liquidity position. The ECB proposes to clarify that the supervisor would only be required to check envisaged compliance with prudential requirements. This would include verifying the prudential and supervisory aspects of the remediation plans, which aim to ensure or restore compliance with supervisory requirements, and ensuring the long-term viability of the credit institution. The supervisor should cooperate closely with national designated authorities or DGS authorities in matters within their mandate and for which they remain responsible. Moreover, the DGS and/or the designated authority have a genuine interest and are in the best position to monitor the credit institution's repayment of the amount contributed by the DGS to the preventive measure, as well as the associated timeframe, and to decide on that basis whether or not to grant further preventive measures to that credit institution.

6.5 The ECB proposes an explicit requirement to segregate IPS and DGS funds. Past experience has shown that a separate IPS fund is important for the smooth functioning of such schemes. There would also be significant benefits from having separate IPS and DGS funds, given that separate IPS funds are not subject to the constraints imposed by the DGSD. Hence, a separate IPS fund ensures that other functions of an IPS can continue to be carried out with the help of those funds dedicated to the IPS purpose. For example, by intervening proactively and in a timely manner the IPS ensures that its member institutions fulfil the regulatory own funds and liquidity requirements. The ECB welcomes that, as in the past, these separate IPS funds would not be subject to DGSD requirements. As regards their role as DGSs, the ECB supports that the IPSs should remain subject to the DGSD to ensure a level playing field. The Commission proposal – combined with a separation of IPS and DGS funds – therefore keeps the necessary flexibility, whilst ensuring legal clarity and a level playing field.

36 See recital 30 of the proposed amendments to the DGSD.

37 See Article 1, point (13), of the proposed amendments to the DGSD, which inserts a new Article 11e(5) in the DGSD.

7. Early warning of a possible FOLTF assessment

7.1 The proposed amendments to the SRMR provide that the ECB or the relevant national competent authority should notify the SRB, as early as possible, when they consider that there is a material risk that one or more of the conditions for an institution to be considered failing or likely to fail would be met[38]. The ECB or the national competent authority and the SRB will then exchange views on possible measures to prevent such failure from materialising, as well as a reasonable timeframe for their implementation. The ECB or national competent authority and the SRB will monitor the evolution of the case and meet regularly.

7.2 The ECB supports this new early warning process and welcomes that it does not affect the well-established resolution procedure[39], including in particular the principles, competence and process for assessing that an institution is failing or likely to fail. This will further develop best practices regarding cooperation between the ECB and the SRB. Additionally, it ensures that the ECB or national competent authority and the SRB can assess crisis situations as they evolve and react in the most appropriate way with their full toolkit.

7.3 In this vein, the ECB welcomes that the triggering of this new early warning process is not a precondition for a subsequent FOLTF assessment[40]. In times of fast-evolving crises, it may be appropriate to proceed immediately to such assessment, given the gravity of the situation and the absence of readily available measures that could prevent the failure.

8. Resolution procedure

8.1 The ECB welcomes the expansion of the scope of resolution. A broader scope of resolution will make resolution tools available to a broader set of credit institutions, thus improving access to international best-practice resolution tools and ensuring further harmonisation in crisis management. At the same time, the ECB understands that the proposal will not require resolution authorities to earmark smaller credit institutions for resolution where such action would be disproportionate. These credit institutions could still be wound down under national insolvency procedures where this would lead to a more satisfactory outcome. In any event, the ECB would welcome an analysis whether the cumulative effect of the proposed changes to the public interest assessment, including the new objective to minimise losses for DGSs, achieves the intended proportionate expansion of resolution.

8.2 Broadening the scope of resolution to include smaller and medium-sized credit institutions can only be credible if realistic solutions are found to ensure adequate funding of resolution, including credit institutions' internal loss absorption capacity, but, importantly, also access to DGS funding and resolution financing arrangements.

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38 See recital 15 and Article 1, point (16), of the proposed amendments to the SRMR, which inserts a new Article 13c in the SRMR.

39 See recital 15 of the proposed amendments to the SRMR.

40 See recital 16 of the proposed amendments to the SRMR.

8.3 The principle that losses in a credit institution failure should first and foremost be borne by shareholders and creditors is a cornerstone of the Union crisis management framework. The ECB therefore welcomes that this key principle is confirmed in the proposed legislative package.

8.4 At the same time, widening the scope of resolution to smaller and medium-sized credit institutions entails challenges. These credit institutions are often strongly reliant on deposits as a funding source and, depending on local market conditions, may have difficulties with issuing other financial instruments that can reliably absorb losses or be converted to equity when the credit institution fails. There may be situations where the bail-in of deposits that are not protected by the DGS (uncovered deposits) can trigger financial stability risks, which could lead to a destruction of value harming the public interest. This may for instance occur where the bail-in of uncovered deposits in one credit institution leads to withdrawals of uncovered deposits in other credit institutions, hence spreading contagion. The ECB welcomes that the proposed legislative package puts in place options to improve the protection of depositors by enhancing the ability of the DGS to provide funding in resolution[41]. Crucially, this would be achieved by clarifying and broadening the least-cost test[42] and introducing a single-tier depositor preference with an equal ranking of all deposits[43]. Similarly, the ECB welcomes the Commission's proposal to count the contribution of the DGS towards the minimum loss absorption requirement for accessing resolution financing arrangements, including the SRF, when a transfer tool is used[44]. These changes, improving the ability of the DGS and resolution financing arrangements to support the resolution of smaller and medium-sized credit institutions, are an indispensable counterpart to meaningfully expanding the application of resolution tools to such credit institutions. It is therefore important to adopt the proposed legislative package holistically and to ensure that changes to the CMDI framework are articulated coherently. Implementing only some of the elements of the proposed legislative package could lead to the inability to successfully apply resolution in practice.

8.5 In accordance with the principle that losses in a credit institution failure should be borne first and foremost by shareholders and creditors, all credit institutions earmarked for resolution are required to have a minimum loss absorption capacity as a first line of defence, adequately calibrated in line with the resolution strategy, thereby ensuring market discipline and minimising reliance on external funding sources. However, even with the possibility for DGSs to contribute to funding of resolution and for this contribution to count towards the 8 % TLOF minimum loss absorption requirement[45], reaching the 8 % TLOF threshold could reinforce adverse dynamics in a systemic crisis, e.g. where multiple credit institutions fail simultaneously or where this would require imposing losses on certain creditors, which in turn could seriously undermine financial stability. Therefore, the ECB would support, for exceptional cases, the introduction of a financial stability exemption for accessing resolution financing arrangements in line with the recommendation of the International

41 See, for example, Article 1, point (56), of the proposed amendments to the BRRD, which amends Article 109 of the BRRD.

42 See Article 1, point (13), of the proposed amendments to the DGSD, which inserts a new Article 11e in the DGSD.

43 See Article 1, point (55)(a), of the proposed amendments to the BRRD, which amends Article 108(1) of the BRRD.

44 See Article 1, point (24)(a), of the proposed amendments to the SRMR, which amends Article 27(7) of the SRMR.

45 See Article 1, point (24)(a), of the proposed amendments to the SRMR, which amends Article 27(7) of the SRMR.

Monetary Fund (IMF)[46]. This would allow access to resolution financing arrangements prior to loss absorption of 8 % TLOF in cases where this is strictly necessary to protect the public interest and safeguard financial stability. This option should therefore be subject to strict conditions and governance arrangements, along the lines of a comparable mechanism that exists in the United States, e.g. requiring the joint approval of the SRB, the Commission and the ECB. The exemption would be used only in times of a euro area-wide or Member State-wide crisis or where there is a risk of such a crisis, as a last resort and after using credit institutions' loss absorbing capacity to the maximum extent possible without creating adverse effects for financial stability[47].

8.6 Even with an expansion of the public interest assessment, a number of smaller credit institutions are likely to remain outside the scope of resolution. For these credit institutions, for which the application of the resolution framework would still not be proportionate, the ECB would welcome improvements to and further harmonisation of national insolvency proceedings[48]. The level of ambition of the proposed legislative package is limited in this regard. The ECB encourages the Union legislators to harmonise and expand across all Member States the availability of alternative measures in liquidation, in particular, the ability for DGSs to support transfers of assets and liabilities to an acquiring credit institution. The ECB welcomes the proposed amendments to the creditor hierarchy and the clarifications to the least-cost test, which will lead to better access to DGS funding and a broader availability of these measures. Having these alternative measures in all Member States would allow for a swifter, more efficient and more harmonised process to manage credit institution liquidations, which will ultimately benefit financial stability and depositors, and limit pay-out needs for DGSs.

8.7 Finally, the ECB welcomes the clarification that the division of responsibilities in the procedure for the write-down of capital instruments and other eligible liabilities fully mirrors the division of responsibilities in the resolution procedure[49]. This entails that the supervisor's primary responsibility pertains to FOLTF assessments, whereas the remaining conditions for the write-down are assessed by the resolution authority.

9. Depositor preference

9.1 The ECB welcomes the Commission's proposal to establish a single-tier depositor preference[50]. This approach will ensure greater harmonisation of the credit institution creditor hierarchy across the Union and ensure that all deposits, including those of large corporates and excluded deposits, rank *pari passu* and above ordinary unsecured claims. This approach will improve access to DGS

46 See IMF, Financial Sector Assessment Program – Technical Note – Bank Resolution and Crisis Management (2018), pp. 6 and 30, available on the IMF's website at www.imf.org.

47 See also ECB contribution to the European Commission's targeted consultation on the review of the crisis management and deposit insurance framework, p. 4.

48 See ECB contribution to the European Commission's targeted consultation on the review of the crisis management and deposit insurance framework, pp. 3 and 11. The ECB encouraged the Commission to explore the feasibility of solutions such as the creation of a European administrative liquidation framework – supported by EDIS – in order to ensure that failures of such credit institutions are handled in an efficient and harmonised way.

49 See recital 26 and Article 1, point (23), of the proposed amendments to the SRMR, which amends Article 21 SRMR.

50 See Article 1, point (55)(a), of the proposed amendments to the BRRD, which amends Article 108(1) of the BRRD.

funding with the benefit of preserving the deposit book as a whole, which means that the DGS can better contribute to crisis management measures, in resolution as well as via preventive or alternative measures, including transfer strategies. This significantly enhances the available crisis management solutions[51] and makes it easier to prevent contagion-induced financial stability concerns due to other credit institutions facing bank runs of uninsured depositors. The expanded availability of sale-of-business strategies, either in resolution or in the context of DGS alternative measures, can reduce the use of piecemeal liquidation as a means of managing credit institution failures. This is beneficial, as piecemeal liquidation can destroy value and be disruptive for depositors and for financial stability. The proposed approach also reduces the need for depositor pay-outs, which often require the mobilisation of large sums by DGSs, thereby constraining their liquidity and their ability to handle further credit institution failures. By better safeguarding access to deposits and financial stability, incentives to use taxpayers' money in credit institution failures are also reduced. Importantly, covered depositors remain fully protected by the DGS in all scenarios, but also benefit from transfer strategies that can achieve uninterrupted access to their deposits[52].

9.2 By preferring all deposits to senior claims in the creditor hierarchy, this approach would also facilitate the allocation of losses to unsecured credit institution debt instruments, making it easier to ensure full loss absorption by bail-inable creditors without facing financial stability issues. It would also minimise the risk of compensation claims under the 'no creditor worse off' principle, thereby enhancing resolvability[53].

9.3 At the same time, the ECB acknowledges that the introduction of a single-tier depositor preference may lead to additional costs for DGSs in some bank crisis management scenarios. While the ECB notes that a single-tier depositor preference has proven successful in a number of jurisdictions, some further analysis of the specific situations in which additional costs might be generated for DGSs or unwarranted consequences may arise would be welcome. This analysis should also consider, to the extent possible and taking into account the experience gained in jurisdictions that have introduced a single-tier depositor preference, the impact of the proposed changes on the rating and pricing of senior unsecured debt, and should further examine the interaction between the single-tier depositor preference and the eligibility of certain deposits for the purposes of MREL. Furthermore, the ECB is open to explore alternative solutions that improve DGSs' ability to contribute to resolution (as well as by means of preventive and alternative measures) to the same extent as would be possible with a single-tier depositor preference, while limiting DGSs' exposure to losses following a pay-out in liquidation. In exploring such solutions, it will be imperative to ensure that any extension of the scope of resolution is coupled with adequate access to funding in resolution, including in particular funding from DGSs. Finally, the impact from the introduction of a single-tier depositor preference on credit institutions' liability structure would obviously merit close

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51 See also in this regard ECB contribution to the European Commission's targeted consultation on the review of the crisis management and deposit insurance framework, pp. 4 and 13.

52 For further information about the US approach, which includes a single-tier depositor preference and a significant reliance on transfer strategies, see speech by Andrea Enria, Chair of the Supervisory Board of the ECB, 'Of temples and trees: on the road to completing the European banking union', available on the ECB's Banking Supervision website at www.bankingsupervision.europa.eu.

53 See paragraph 2.3.2 of Opinion CON/2017/6.

supervisory attention, and the ECB stands ready to assess this carefully for the credit institutions under its remit.

10. Addressing the risk of 'limbo' situations

10.1 The BRRD already requires Member States to ensure a failing institution that is not subject to resolution is wound up in an orderly manner in accordance with applicable national law[54]. The ECB supports the proposed amendments to the BRRD that further clarify this mechanism[55], ensuring that such winding-up is initiated without delay and that it results in the credit institution exiting the market or terminating its banking activities within a reasonable timeframe[56].

10.2 National procedures for managing non-resolution cases should be further harmonised by empowering the resolution authorities to start an administrative winding-up procedure for institutions that meet the first two resolution conditions, but are not subject to resolution because of the lack of a public interest in resolution[57]. This would be the most efficient route to decisively address the possibility of a 'limbo' situation for an extended period of time.

10.3 The ECB supports empowering the competent authority to withdraw the authorisation of credit institutions that are failing or likely to fail but not put into resolution[58]. At the same time, the amendments should not introduce any automaticity, maintaining the withdrawal as a discretionary power of the ECB in line with Council Regulation (EU) No 1024/2013[59].

10.4 Regarding the proposal to establish that the withdrawal of the authorisation is a sufficient condition for the initiation of a winding-up[60], the ECB considers it of utmost importance to avoid any unintended consequences in terms of conflicting interpretations or diverging national transposition. The Commission's principal proposal to address 'limbo' situations provides that when a resolution authority determines that a credit institution meets all conditions for resolution except the public interest condition, the relevant national authority must also have the power to initiate without delay the procedure to wind up the credit institution[61]. The proposal that the withdrawal of the authorisation is a 'sufficient' condition for the winding-up may create an impetus for Member States to forego appropriate transposition of this important requirement to empower national authorities[62]. Such an approach could lead to the incorrect interpretation that the supervisor's withdrawal of the

54 See Article 32b of the BRRD.

55 See Article 1, point (18), of the proposed amendments to the BRRD, which amends Article 32b of the BRRD.

56 See paragraph 3.2 of Opinion CON/2020/25; ECB contribution to the European Commission's targeted consultation on the review of the crisis management and deposit insurance framework, pp. 2 and 8.

57 See also paragraph 8.6 above.

58 See Article 1, point (18), of the proposed amendments to the BRRD, which amends Article 32b(3) of the BRRD.

59 See Article 4(1), point (a), and Article 14(5) of 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).

60 See recital 16 and Article 1, point (18) of the proposed amendments to the BRRD, which amends Article 32b(4) of the BRRD).

61 See recital 16 and Article 1, point (18) of the proposed amendments to the BRRD, which amends Article 32b(1) and (2) of the BRRD.

62 See Article 1, point (18), of the proposed amendments to the BRRD, which amends Article 32b(1) of the BRRD and provides that the relevant national administrative or judicial authority must have the power to initiate without delay the procedure to wind up the institution or entity in an orderly manner.

licence would be the exclusive trigger for the opening of winding-up proceedings, without any account being taken of the earlier decision by the resolution authority regarding whether the conditions for resolution have been met. This approach could lead to a practice where national administrative authorities or national courts postpone the commencement of a winding-up procedure until the licence is withdrawn. This would disregard the possibility that in some cases it would be more appropriate for the winding-up proceedings to be initiated while the credit institution still has a banking license. In view of these considerations, the ECB recommends that the withdrawal of authorisation is not a harmonised precondition for the winding-up of credit institutions.

11. Irrevocable payment commitments to the SRF

11.1 The ECB strongly recommends not to increase the share of irrevocable payment commitments from 30 % to 50 % of the total amount of institutions' ex ante contributions to the SRF and resolution financing arrangements[63]. The practice of credit institutions having subscribed irrevocable payment commitments has shown that the treatment applied by some credit institutions may generate a risk of overstating their CET1 capital. This could, where the assessment of the credit institution's situation shows that such risk exists and remains uncovered, trigger the adoption of supervisory measures to mitigate that risk.

11.2 The background to this prudential issue is that for accounting purposes many credit institutions do not record an irrevocable payment commitment as a liability but keep it off their balance sheet, and at the same time they record the cash collateral as an asset, without recording any expense in the profit and loss statement. In this way, the CET1 capital of the credit institution is overstated because it does not reflect the fact that the resources contributed as collateral to the resolution fund cannot be retrieved without a corresponding cash payment. The existence of a prudential risk in connection with irrevocable payment commitments has been acknowledged also by the General Court[64]. Note that even the proposed clarifications would not resolve this issue[65].

11.3 In any case, the ECB welcomes the clarifications[66] that where a credit institution no longer falls within the scope of the SRMR or the BRRD and is no longer subject to the obligation to pay contributions to the SRF, the resolution authority will call the irrevocable payment commitments made and still due. This amendment further confirms that credit institutions cannot under any circumstances retrieve the cash collateral posted to secure the irrevocable payment commitments,

63 See Article 1, point (37)(a), of the proposed amendments to the SRMR, which amends Article 70(3) of the SRMR and Article 1, point (53)(a), of the proposed amendments to the BRRD, which amends Article 103(3) of the BRRD.

64 See Judgment of 9 September 2020, *BNP Paribas* v *European Central Bank,* T-150/18 and T-345/18, EU:T:2020:394, paragraph 78.

65 See Article 1, point (37)(b), of the proposed amendments to the SRMR, which inserts a new Article 70(3a) in the SRMR and Article 1, point (53)(b), of the proposed amendments to the BRRD, which inserts a new Article 103(3a) in the BRRD.

66 See Article 1, point (37)(b), of the proposed amendments to the SRMR, which inserts a new Article 70(3a) in the SRMR and Article 1, point (53)(b), of the proposed amendments to the BRRD, which inserts a new Article 103(3a) in the BRRD.

unless a corresponding payment is made to the resolution fund, triggering the need to deduct such cash collateral from the credit institutions' CET1 capital.

11.4 Finally, given that some credit institutions do not record these contributions to the SRF as an expense during the build-up of the fund, they would then have to record these contributions as an expense when the fund is used. While the effect on prudential ratios is limited by the prudential deductions applied by the ECB, irrevocable payment commitments raise credit institutions' profits in calm economic times (when the SRF is built up) and deepen losses in crisis (when the SRF is used), thereby creating a procyclical contagion channel. The ECB therefore considers irrevocable payment commitments, when not accounted for as an expense during the build-up phase of the SRF, as problematic from the perspective of systemic risk and suggests minimising their use.

12. Compliance with minimum requirements for own funds and eligible liabilities requirements (daisy chains)

12.1 The proposed amendments regarding daisy chains empower resolution authorities to permit certain subsidiary entities to comply with internal MREL requirements on a consolidated basis[67], rather than on an individual basis. This possibility is subject to two sets of safeguards[68]. First, for resolution entities that are Union parent (mixed) financial holding companies, it is required that the subsidiary entity is the only direct subsidiary held by the resolution entity, and that both the resolution entity and the subsidiary entity are established in the same Member State and are part of the same resolution group. Alternatively, for other types of resolution entities, it is required that the subsidiary entity is subject to a Pillar 2 requirement or a combined buffer requirement on a consolidated basis. Second, the resolution authority must have concluded that compliance with internal MREL requirements on a consolidated basis does not negatively affect the resolvability of the relevant group, nor the application of the write down and conversion powers to that intermediate entity or to other entities in the same resolution group.

12.2 With regard to resolution entities that are not Union parent (mixed) financial holding companies, a link is made with a Pillar 2 requirement imposed on the subsidiary entity on a consolidated basis. The ECB notes that consolidated or sub-consolidated requirements imposed on a subsidiary entity within a Union banking group must be set in accordance with the relevant conditions under Regulation (EU) No 575/2013 of the European Parliament and of the Council[69] (hereinafter the 'Capital Requirements Regulation' (CRR)) and Directive 2013/36/EU of the European Parliament and of the Council[70] (hereinafter the 'Capital Requirements Directive' (CRD)). For example, when the subsidiary institution is neither a parent institution in a Member State nor holds subsidiaries in

67 See Article 1, point (3)(a), and Article 2, point (7)(a), of the proposed amendments regarding daisy chains, which amend Article 45f(1) of the BRRD and Article 12g(1) of the SRMR respectively.

68 See Article 1, point (3)(a), and Article 2, point (7)(a), of the proposed amendments regarding daisy chains, which amend Article 45f(1) of the BRRD and Article 12g(1) of the SRMR respectively.

69 Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

70 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, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

third countries, the supervisor may require compliance with certain obligations under the CRR and the CRD[71] on a sub-consolidated basis only when this is justified for supervisory purposes by the specificities of the risk or of the capital structure of an institution or where Member States adopt national laws requiring the structural separation of activities within a banking group[72].

13. Other aspects relating to the deposit insurance framework

13.1 The proposed amendments to the DGSD propose a number of other changes to the deposit insurance framework[73]. The ECB welcomes those changes that lead to further harmonisation and enlarge the authorities' toolkit under the CMDI framework.

13.2 A few of the proposed DGSD changes are a source of concern for the ECB. First, the proposed amendments to the DGSD seek to confer on the supervisor an obligation to ensure compliance by credit institutions with their obligations as DGS members[74]. The supervisor's powers under the CRD can only be used to fulfil the objectives set out therein, and cannot be extended to unrelated issues, such as a lack of compliance by credit institutions with their obligations as DGS members. In addition, DGS authorities are much better placed to assess such compliance and should instead be empowered with the relevant enforcement powers. Therefore, the ECB recommends that this proposal is reconsidered.

13.3 Second, the proposed amendments to the DGSD suggest that DGSs will be permitted to hold their funds in national central bank (NCB) accounts[75]. While the opening of such accounts would be consistent with the Treaty[76], this provision might require changes to some NCBs' statutes under national law to ensure that both public and private DGSs are eligible to open the necessary accounts. Moreover, any financing by an NCB of a DGS, for example through the extension of overdraft facilities in respect of a DGS's account at an NCB, would not be compatible with the monetary financing prohibition insofar as the DGS qualifies as a 'body governed by public law' within the meaning of Article 123(1) of the Treaty[77].

14. Facilitating the transfer of DGS contributions

14.1 Currently, when a credit institution ceases to be a member of a DGS and joins another DGS, or if some of its activities are transferred to another DGS, the DGS of origin transfers only a small share of the credit institution's past contributions to the new DGS. As of 2024, once DGSs have reached

71 See Parts Two to Eight of the CRR and Title VII of the CRD.

72 See Article 11(6) of the CRR.

73 The majority of these changes can be traced back to the Opinion of the European Banking Authority on deposit guarantee scheme funding and uses of deposit guarantee scheme funds (EBA/OP/2020/02), available on the EBA's website at www.eba.europa.eu.

74 See Article 1, point (3)(a), of the proposed amendments to the DGSD, which amends Article 4(4) of the DGSD.

75 See Article 1, point (11)(e), of the proposed amendments to the DGSD, which inserts a new Article 10(7a) in the DGSD.

76 See Article 17 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB'), which provides that, in order to conduct their operations, NCBs may open accounts for credit institutions, public entities and other market participants.

77 See ECB's Convergence Report 2022, paragraph 2.2.3; and Opinion CON/2020/24.

their target level, the possibility to transfer contributions may cease entirely, as only the contributions of the last 12 months can be transferred. In the case of a credit institution changing its DGS affiliation, this will lead to a funding surplus in the DGS of origin as the risks covered by this DGS are reduced while its financial means remain very similar. On the other hand, in the receiving DGS, a funding gap arises as the transferred resources are not commensurate with the transferred risks. This gap must be filled by the transferring credit institution or all members of the receiving DGS. The current deposit insurance framework treats the DGS of origin favourably at the expense of the transferring credit institution and/or the members of the receiving DGS. If left unchanged, the deposit insurance framework imposes significant sunk costs on a credit institution changing its DGS affiliation. This constitutes a material obstacle to the objective of promoting the single market for banking services in the Union.

14.2 The ECB regrets that the Commission proposal does not follow the EBA recommendation[78] to mandate the EBA with developing a methodology that would address this flaw in the deposit insurance framework. The ECB would propose to give the EBA the mandate to develop a methodology for calculating the amount of contributions to be transferred to ensure there is alignment with the transferred risks. This would minimise the funding surplus in the DGS of origin and any funding gap in the receiving DGS, and thereby avoid imposing unnecessary costs on the transferring credit institution and other members of the receiving DGS. Such methodology should balance the interests of the DGSs involved and should preserve financial stability across the system.

15. Exchange of information

15.1 The proposed legislative package aims to further enhance the provisions governing the exchange of information in the context of crisis management[79].

15.2 The ECB supports comprehensive and timely exchange of information between competent authorities and resolution authorities for the purposes of crisis management. The ECB and the SRB already have in place a comprehensive bilateral Memorandum of Understanding facilitating such exchange[80]. The Memorandum establishes multiple channels for information exchange and cooperation, ensuring that the SRB is informed of relevant developments concerning entities directly supervised by the ECB.

15.3 The ECB has concerns, however, about the proposed amendments to the SRMR and to the BRRD requiring the ECB and other members of the ESCB to provide the SRB with all the information necessary for the performance of the SRB's tasks under the SRMR[81] and to provide the

78 See Opinion of the European Banking Authority on the eligibility of deposits, coverage level and cooperation between deposit guarantee schemes (EBA/OP/2019/10), available on the EBA's website at www.eba.europa.eu.

79 See Article 1, points (25) and (43), of the proposed amendments to the SRMR, which amend Article 30 and Article 88 SRMR respectively.

80 Memorandum of Understanding between the Single Resolution Board and the European Central Bank in respect of cooperation and information exchange.

81 See Article 1, point (29), of the proposed amendments to the SRMR, which amends Article 34 of the SRMR and Article 1, point (58), of the proposed amendments to the BRRD, which amends Article 128 of the BRRD.

Commission with all information necessary for the performance of the Commission's tasks under the BRRD related to policy development, including the preparation of impact assessments and the preparation and negotiation of legislative proposals[82].

15.4 The material scope of these obligations is not clear and therefore a further specification of the type of information to be transmitted to the SRB and the Commission would be welcome. Specifically, any new provisions on the exchange of information to be included in the BRRD can only apply to the subject matter of that Directive. Such an information exchange would not encompass, for example, information related to the prudential supervision of credit institutions or the Commission's activities in the field of policy development. The ECB understands that this information exchange concerns only information in aggregated form that does not concern individual credit institutions. In addition, the ECB would welcome the establishment of cooperation arrangements with the Commission in order to ensure an effective and smooth transmission of this information. Finally, the ECB understands that any confidential information will be transmitted to the Commission in compliance with relevant sectoral Union law establishing the protection of confidential information and the exceptions to such protection.

15.5 It should also be recalled that confidential statistical information may only be transmitted to the SRB and the Commission in compliance with relevant Union law on the protection of confidential information. In particular, Article 8(4a) of Council Regulation (EC) No 2533/98[83] allows ESCB members to transmit confidential statistical information[84] to authorities or bodies of the Member States and the Union responsible for the supervision of financial institutions, markets and infrastructures or for the stability of the financial system to the extent and at the level of detail necessary for the performance of their respective tasks. Pursuant to the same Article, the authorities or bodies receiving confidential statistical information must take all the necessary regulatory, administrative, technical and organisational measures to ensure the physical and logical protection of confidential statistical information. On that basis, and upon the SRB's request, the ECB transmits confidential statistical information to the SRB.

16. Personal data transfers

16.1 While the proposed legislative package seeks to further enhance the provisions governing exchange of information in the context of crisis management, it does not touch upon the issue of personal data protection, which is an important topic and a fundamental right. The SRMR could provide clearer guidance on personal data exchange and appropriate safeguards for data subjects in order to ensure a fair balance between the different interests at stake.

16.2 In addition, experience has shown that the compliance with data protection rules could require additional time in order to perform the actions needed before exchanging the relevant information.

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82 See Article 1, point (58), of the proposed amendments to the BRRD, which amends Article 128 of the BRRD.

83 Council Regulation (EC) No 2533/98 of 23 November 1998 concerning the collection of statistical information by the European Central Bank (OJ L 318, 27.11.1998, p. 8). The legal basis for Regulation (EC) No 2533/98 is Article 5.4 of the Statute of the ESCB, which provides that the Council, in accordance with the procedure laid down in Article 41 of the Statute of the ESCB, shall, inter alia, define the confidentiality regime applicable to the collection of statistical information by the ECB, assisted by the NCBs.

84 As defined in Article 1, point (12), of Regulation (EC) 2533/98.

This additional time needed could lead to potential delays. This would be particularly problematic in the context of a crisis situation when, for example, the SRB needs prompt information to prepare for resolution. Therefore, there could be a need to introduce specific provisions to temporarily ease the procedural data protection requirements in order to ensure a fair balance between the different interests at stake in those crisis circumstances.

Where the ECB recommends that the proposed regulation and directives are amended, specific drafting proposals are set out in a separate technical working document accompanied by an explanatory text to this effect. The technical working document is available in English on EUR-Lex.

Done at Frankfurt am Main, 5 July 2023.

The President of the ECB

Christine LAGARDE

EUROPEAN CENTRAL BANK

EUROSYSTEM

ECB-PUBLIC

Technical working document

produced in connection with ECB Opinion [CON/2023/19][1] on amendments to the Union crisis management and deposit insurance framework

Drafting proposals

Part I: drafting proposals on the proposed amendments to the Single Resolution Mechanism Regulation

Text proposed by the European Commission	**Amendments proposed by the ECB[2]**
Amendment 1 Recital 14a of the proposed regulation (new)	
No text	**(14a) Where the Board requires information that is necessary for the purposes of updating resolution plans, preparing for the possible resolution of an entity or of carrying out the valuation, the ECB or the relevant national competent authorities should provide the Board with that information to the extent that it is available to them. Where the relevant information is not already available to the ECB or the relevant national competent authorities, the Board and the ECB or the relevant national competent authorities should cooperate and coordinate to collect the information considered necessary by the Board. In the context of such cooperation, the authorities will assess, with due regard to the principle of**

1 This technical working document is produced in English only and communicated to the consulting Union institution(s) after adoption of the opinion. It is also published on EUR-Lex alongside the opinion itself.

2 Bold in the body of the text indicates where the ECB proposes inserting new text. Strikethrough in the body of the text indicates where the ECB proposes deleting text.

Text proposed by the European Commission	Amendments proposed by the ECB[2]
	proportionality, the timing and other relevant circumstances, how to collect the necessary information.
Explanation *The tasks and responsibilities of the European Central Bank (ECB) are subject to Council Regulation (EU) No 1024/2013[3]. To the extent the ECB collects information for on-site inspections for the purposes of the resolution tasks of the Single Resolution Board (SRB), additional safeguards must be put in place. Given the non-prudential nature of such information, the ECB may only collect data and further transmit it to the SRB, without undue delay.* *See Amendment 6 of Part I.* *See also paragraph 4.2 of the ECB Opinion.*	
Amendment 2 Point (15) of Article 1 of the proposed regulation (Article 13(1) of Regulation (EU) No 806/2014 of the European Parliament and of the Council[4] (hereinafter the 'SRMR'))	
'1. The ECB may apply early intervention measures where an entity as referred to in Article 7(2)(a) meets any of the following conditions: (a) the entity meets the conditions referred to in Article 102 of Directive 2013/36/EU or in Article 16(1) of Regulation (EU) No 1024/2013 and either of the following applies: (i) the entity has not taken the remedial actions required by the ECB, including the measures referred to in Article 104 of Directive 2013/36/EU, Article 16(2) of Regulation (EU) No 1024/2013 or Article 49 of Directive (EU) 2019/2034; (ii) the ECB deems that remedial actions other than	'1. The ECB may apply early intervention measures where an entity as referred to in Article 7(2)(a) meets any of the following conditions: (a) the entity meets the conditions referred to in Article 102 of Directive 2013/36/EU or in Article 16(1) of Regulation (EU) No 1024/2013 and either of the following applies: (i) the entity has not taken the remedial actions required by the ECB, including the measures referred to in Article 104 of Directive 2013/36/EU, Article 16(2) of Regulation (EU) No 1024/2013 or Article 49 of Directive (EU) 2019/2034; (ii) the ECB deems that remedial actions other than

3 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).

4 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).

Text proposed by the European Commission	Amendments proposed by the ECB[2]
early intervention measures are insufficient to address the problems due inter alia to a rapid and significant deterioration of the financial condition of the entity;	early intervention measures are insufficient to address the problems ~~due inter alia to a rapid and significant deterioration of the financial condition of the entity~~;
(b) the entity infringes or is likely to infringe in the 12 months following the assessment of the ECB the requirements laid down in Title II of Directive 2014/65/EU, in Articles 3 to 7, 14 to 17, or 24, 25 and 26 of Regulation (EU) No 600/2014, or in Articles 12f or 12g of this Regulation.	(b) the entity infringes or is likely to infringe in the 12 months following the assessment of the ECB the requirements laid down in Title II of Directive 2014/65/EU, in Articles 3 to 7, 14 to 17, or 24, 25 and 26 of Regulation (EU) No 600/2014~~, or in Articles 12f or 12g of this Regulation~~.
The ECB may determine that the condition referred to in the first subparagraph, point (a)(ii), is met without having previously taken other remedial actions, including the exercise of the powers referred to in Article 104 of Directive 2013/36/EU or in Article 16(2) of Regulation (EU) No 1024/2013.'	The ECB may determine that the condition referred to in the first subparagraph, point (a)(ii), is met without having previously taken other remedial actions, including the exercise of the powers referred to in Article 104 of Directive 2013/36/EU or in Article 16(2) of Regulation (EU) No 1024/2013.'

Explanation

The reference to a rapid and significant deterioration of the financial condition of the entity as a prerequisite for taking an early intervention measure could undermine the possibility of the supervisor to properly address a deterioration of the situation of the entity if, for example, it is not rapid, but still significant. Therefore, the ECB recommends deleting that reference.

Except when breaches of minimum requirements for own funds and eligible liabilities (MREL) also qualify as breaches of own funds requirements, addressing such breaches should remain the sole responsibility of the resolution authorities, in order to avoid duplicating tasks and blurring responsibilities between prudential supervisory and resolution authorities. MREL aim to facilitate an orderly resolution strategy for non-viable credit institutions and are distinct from prudential requirements, which ensure credit institutions' safety and soundness. In this context, resolution authorities, which are responsible for determining MREL, are better suited to monitor MREL compliance and initiate remedial actions.

See also paragraph 3.1 and 3.3 of the ECB Opinion.

Text proposed by the European Commission	Amendments proposed by the ECB[2]
Amendment 3 Point (15) of Article 1 of the proposed regulation (Article 13(2) of the SRMR)	
'For the purposes of paragraph 1, early intervention measures shall include the following: […] (f) the appointment of one or more temporary administrators to the entity, in accordance with Article 13b'	'For the purposes of paragraph 1, early intervention measures shall include the following: […] (f) the appointment of one or more temporary administrators to the entity, in accordance with Article 13b**;** **(g) require the management body of the entity to draw up a plan that the entity can implement in case the relevant corporate body decides to initiate the voluntary wind-down of the entity; the plan shall include analyses of the necessary capital and liquidity support for winding down and of the concrete relevant strategic options for a market exit.'**
Explanation *The ECB proposes the introduction of an early intervention measure requiring an entity's management body to draw up a plan that the entity can implement in case the relevant corporate body decides to initiate a voluntary wind-down. The development of such a plan would enable the concerned entity to assess relevant strategic options and prepare for a potential market exit and would be a valuable addition to the early intervention toolkit.* *See also paragraph 3.4 of the ECB Opinion.*	
Amendment 4 Point (16) of Article 1 of the proposed regulation (Article 13c(1) of the SRMR)	
'1. For the entities and groups referred to in Article 7(2), and the entities and groups referred to in Article 7(4), point (b), and Article 7(5) where the conditions for the application of those provisions	1. For the entities ~~and groups~~ referred to in Article 7(2), and the entities ~~and groups~~ referred to in Article 7(4), point (b), and Article 7(5) where the conditions for the application of those provisions

Text proposed by the European Commission	Amendments proposed by the ECB[2]
are met, the ECB or national competent authorities shall notify the Board without delay of any of the following: (a) any of the measures referred to in Article 16(2) of Regulation (EU) No 1024/2013 or Article 104(1) of Directive 2013/36/EU they require an entity or group to take; (b) where supervisory activity shows that the conditions laid down in Article 13(1) of this Regulation or Article 27(1) of Directive 2014/59/EU are met in relation to an entity or group, the assessment that those conditions are met, irrespective of any early intervention measure; (c) the application of any of the early intervention measures referred to in Article 13 of this Regulation or Article 27 of Directive 2014/59/EU. […]'	are met, the ECB or national competent authorities shall notify the Board without delay of any of the following: (a) any of the measures referred to in Article 16(2) of Regulation (EU) No 1024/2013 or Article 104(1) of Directive 2013/36/EU they require an entity ~~or group~~ to take **that aim to address a deterioration in the situation of that entity**; (b) where supervisory **assessment** ~~activity~~ shows that the conditions laid down in Article 13(1) of this Regulation or Article 27(1) of Directive 2014/59/EU are met in relation to an entity ~~or group~~, the assessment that those conditions are met, irrespective of any early intervention measure; (c) the application of any of the early intervention measures referred to in Article 13 of this Regulation or Article 27 of Directive 2014/59/EU. […]'
Explanation *In order to promote efficient and effective cooperation between competent authorities and the SRB, the ECB considers it crucial to adopt an effective and efficient approach to communication and collaboration. Such communication and collaboration should focus on supervisory actions with potential implications for the resolution of relevant entities. This will not only ensure an efficient resource allocation and minimise administrative burdens, but also ensure prompt responses to situations posing risks to financial stability.* *In addition, the SRMR does not define the term 'supervisory activity', which makes it difficult to define the scope of the proposed duty of the ECB to inform the SRB of such 'supervisory activity'. Instead, the ECB should inform the SRB of all relevant supervisory assessments shared with its decision making bodies.* *See also paragraph 4.3 of the ECB Opinion.*	

Text proposed by the European Commission	Amendments proposed by the ECB[2]
Amendment 5 Point (16) of Article 1 of the proposed regulation (Article 13c(2) of the SRMR)	
‘2 […] Following the notification referred to in the first subparagraph, the ECB or the relevant national competent authority and the Board shall, in close cooperation, monitor the situation of the entity, the implementation of the any relevant measures within their expected timeframe and any other relevant developments. For that purpose, the Board and the ECB or the relevant national competent authority shall meet regularly, with a frequency set by the Board considering the circumstances of the case. The ECB or the relevant national competent authority and the Board shall provide each other with any relevant information without delay’	‘2. […] Following the notification referred to in the first subparagraph, the ECB or the relevant national competent authority ~~and the Board~~ shall, in close cooperation **with the Board**, monitor the situation of the entity, the implementation of the any relevant measures within their expected timeframe and any other relevant developments. For that purpose, the Board and the ECB or the relevant national competent authority shall meet regularly, with a frequency set by the Board considering the circumstances of the case. The ECB or the relevant national competent authority and the Board shall provide each other with any relevant information without delay.’
Explanation *The ECB proposes to clarify that, during the pre-resolution phase, the ECB or the relevant national competent authority remains in the lead while maintaining close cooperation with the SRB. This clarification would ensure effective collaboration while preserving the distinct roles and responsibilities of each authority.*	
Amendment 6 Point (16) of Article 1 of the proposed regulation (Article 13c(3) of the SRMR)	
‘3. The ECB or the relevant national competent authority shall provide the Board with all the information requested by the Board that is necessary for all of the following: (a) updating the resolution plan and preparing	‘3. The ECB **for the entities referred to in Article 7(2), point (a),** or the relevant national competent authority **for entities referred to in Article 7(2), point (b), Article 7(3), second subparagraph, Article 7(4), point (b), and Article 7(5),** shall

Text proposed by the European Commission	Amendments proposed by the ECB[2]
for the possible resolution of an entity as referred to in Article 7(2), or an entity as referred to in Article 7(4), point (b), and Article 7(5) where the conditions for the application of those provisions are met; (b) carrying out the valuation referred to in Article 20(1) to (15). Where such information is not already available to the ECB or the national competent authorities, the Board and the ECB and such national competent authorities shall cooperate and coordinate to obtain that information. For that purpose, the ECB and the national competent authorities shall have the power to require the entity to provide such information, including through on-site inspections, and to provide that information to the Board.'	provide the Board with all the information requested by the Board that is necessary for all of the following: (a) updating the resolution plan and preparing for the possible resolution of an entity as referred to in Article 7(2), or an entity as referred to in Article 7(4), point (b), and Article 7(5) where the conditions for the application of those provisions are met; (b) carrying out the valuation referred to in Article 20(1) to (15). Where such information is not already available to the ECB **for the entities referred to in Article 7(2), point (a),** or **to** the **relevant** national competent authorities **for entities referred to in Article 7(2), point (b), Article 7(3), second subparagraph, Article 7(4), point (b) and Article 7(5)**, the Board and the ECB **or the Board and** such **relevant** national competent authorities shall cooperate and coordinate **how** to obtain that information. ~~For that purpose,~~ The ECB **for the entities referred to in Article 7(2), point (a), or** the **relevant** national competent authorities **for entities referred to in Article 7(2), point (b), Article 7(3), second subparagraph, Article 7(4), point (b) and Article 7(5)**, shall have the power to require the entity to provide such information, including through on-site inspections**, upon reasoned request by the Board**, and to provide that information to the Board.'
Explanation *See Amendment 1 of Part I.* *See also paragraph 4.2 of the ECB Opinion.*	

Text proposed by the European Commission	Amendments proposed by the ECB[2]
Amendment 7 Point (20) of Article 1 of the proposed regulation (Article 18a(1), point (b), of the SRMR)	
'(b) where the extraordinary public financial support takes the form of an intervention by a deposit guarantee scheme to preserve the financial soundness and long-term viability of the credit institution in compliance with the conditions set out in Articles 11a and 11b of Directive 2014/49/EU, provided that none or of the circumstances referred to in Article 18(4) are present;'	'(b) where the extraordinary public financial support takes the form of an intervention by a deposit guarantee scheme ~~to preserve the financial soundness and long-term viability of the credit institution~~ in compliance with the conditions set out in Articles 11a and 11b of Directive 2014/49/EU, provided that none or of the circumstances referred to in Article 18(4) are present;'
Explanation *The ECB proposes the removal of the condition under which the relevant competent authority would need to establish that a deposit guarantee scheme (DGS) intervention is necessary to preserve the financial soundness and long-term viability of the concerned credit institution. The ECB considers that, in case of extraordinary public financial support, all preventive measures adopted pursuant to Directive 2014/49/EU of the European Parliament and of the Council[5] (hereinafter the 'DGSD') are an exception to the general rule that the entity is assessed as failing or likely to fail in case of extraordinary public financial support.* *See also paragraph 6.2 of the ECB Opinion.*	
Amendment 8 Point (20) of Article 1 of the proposed regulation (Article 18a(2) of the SRMR)	
'2. The support measures referred to in paragraph 1, point (a), shall fulfil all of the following conditions: […] (b) the measures are of a precautionary and temporary nature and are based on a pre-defined exit strategy approved by the ECB or the relevant national competent authority, including a clearly	'2. The support measures referred to in paragraph 1, point (a), shall fulfil all of the following conditions: […] (b) the measures are of a precautionary and temporary nature and are based on a pre-defined exit strategy ~~approved by the ECB or the relevant national competent authority, including a clearly~~

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

Text proposed by the European Commission	Amendments proposed by the ECB[2]
specified termination date, sale date or repayment schedule for any of the measures provided; […] For the purposes of the first subparagraph, point (a), an entity shall be deemed to be solvent where the ECB or the relevant national competent authority have concluded that no breach has occurred, or is likely to occur in the 12 following months, of any of the requirements referred to in Article 92(1) of Regulation (EU) No 575/2013, Article 104a of Directive 2013/36/EU, Article 11(1) of Regulation (EU) 2019/2033, Article 40 of Directive (EU) 2019/2034 or the relevant applicable requirements under national or Union law. […] By way of derogation from paragraph 1, point (a)(iii), acquisition of Common Equity Tier 1 instruments shall be exceptionally permitted where the nature of the shortfall identified is such that the acquisition of any other own funds instruments or other capital instruments would not make it possible for the entity concerned to address its capital shortfall established in the adverse scenario in the relevant stress test or equivalent exercise. The amount of acquired Common Equity Tier 1	~~specified termination date, sale date or repayment schedule for any of the measures provided~~; […] For the purposes of the first subparagraph, point (a), an entity shall be deemed to be solvent where the ECB or the relevant national competent authority have concluded that no breach has occurred, or is likely to occur in the 12 following months, of any of the requirements referred to in Article 92(1) of Regulation (EU) No 575/2013, Article 104a of Directive 2013/36/EU, Article 11(1) of Regulation (EU) 2019/2033, Article 40 of Directive (EU) 2019/2034 or the relevant applicable requirements under national or Union law. **The ECB or the relevant national competent authorities may deem an entity to be solvent where they determine that a breach of these requirements is temporary in nature, taking into account the specific circumstances of each case, and provided that the entity can demonstrate a reasonable plan to remedy the breach within an appropriate timeframe as determined by the ECB or the relevant national competent authority.** […] By way of derogation from paragraph 1, point (a)(iii), acquisition of Common Equity Tier 1 instruments shall be exceptionally permitted where the nature of the shortfall identified is such that the acquisition of any other own funds instruments or other capital instruments would not make it possible for the entity concerned to address its capital shortfall established in the adverse scenario in the relevant stress test or equivalent exercise. ~~The amount of acquired Common Equity Tier 1 instruments shall not exceed 2% of the total risk~~

Text proposed by the European Commission	Amendments proposed by the ECB[2]
instruments shall not exceed 2% of the total risk exposure amount of the institution or entity concerned calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013. In case any of the support measures referred to in paragraph 1, point (a), is not redeemed, repaid or otherwise terminated in accordance with the terms of the exit strategy established at the time of granting such measure, the ECB or the relevant national competent authority shall conclude that the condition laid down in Article 18(1), point (a), is met in relation to the institution or entity which has received those support measures and shall communicate that assessment to the Commission and to the Board, in accordance with Article 18(1), third subparagraph.'	~~exposure amount of the institution or entity concerned calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013.~~ ~~In case any of the support measures referred to in paragraph 1, point (a), is not redeemed, repaid or otherwise terminated in accordance with the terms of the exit strategy established at the time of granting such measure, the ECB or the relevant national competent authority shall conclude that the condition laid down in Article 18(1), point (a), is met in relation to the institution or entity which has received those support measures and shall communicate that assessment to the Commission and to the Board, in accordance with Article 18(1), third subparagraph.~~'
Explanation *It is necessary to preserve the flexibility the ECB or the relevant national competent authority needs in order to make informed decisions, on a case-by-case basis, concerning an entity's solvency. The proposed amendment allows the ECB or the relevant national competent authority to deem an entity solvent in the event of technical or temporary breaches of the requirements referred to. Accordingly, the ECB or the relevant national competent authority would be able to take the context of each case into account, rather than being constrained by a one-size-fits-all approach.* *The European Commission's Directorate General for Competition is in a better position to evaluate the exit strategy, which will also include a restructuring plan, within the context of the State aid approval. Therefore, there is no need for supervisory approval. Moreover, sufficient flexibility on the FOLTF declaration should be maintained to be able to account for unexpected developments, i.e. no direct linkage between delays with the exit strategy and the supervisory FOLTF assessment.* *Although the ECB generally welcomes the clarifications with respect to the capital interventions, flexibility should be ensured. Therefore, the cap on Common Equity Tier 1 (CET1) instruments should be deleted. In any case, the acquisition of CET1 instruments is the exception to the rule.* *See also paragraphs 5.1 to 5.4 of the ECB Opinion.*	

Text proposed by the European Commission	Amendments proposed by the ECB[2]
Amendment 9 Point (25) of Article 1 of the proposed regulation (Article 30 of the SRMR)	
'[…] 2b. The ECB and other members of the European System of Central Banks (ESCB) shall cooperate closely with the Board and provide it with all information necessary for the performance of the Board's tasks, including information collected by them in accordance with their statute. Article 88(6) shall apply to the exchanges concerned. […] 7. Where necessary, the Board shall conclude a memorandum of understanding with the ECB and other members of the ESCB, the national resolution authorities and the national competent authorities describing in general terms how they will cooperate under paragraphs 2, 2a, 2b and 4 of this Article and under Article 74, second paragraph, in the performance of their respective tasks under Union law. The memorandum shall be reviewed on a regular basis and shall be published subject to the requirements of professional secrecy.'	'[…] 2b. The ECB ~~and other members of the European System of Central Banks (ESCB)~~ shall cooperate closely with the Board and provide it with all **non-statistical** information necessary for the performance of the Board's tasks~~, including information collected by them in accordance with their statute~~. Article 88(6) shall apply to the exchanges concerned. […] 7. Where necessary, the Board shall conclude a memorandum of understanding with the ECB ~~and other members of the ESCB~~, the national resolution authorities and the national competent authorities describing in general terms how they will cooperate under paragraphs 2, 2a, 2b and 4 of this Article and under Article 74, second paragraph, in the performance of their respective tasks under Union law. The memorandum shall be reviewed on a regular basis and shall be published subject to the requirements of professional secrecy.'
Explanation *Statistical information consists of the statistical data, statistical indicators and related metadata that the ECB collects from reporting entities pursuant to Article 5 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB') and Council Regulation (EC) 2533/98[6]. Any amendments to the provisions governing the exchange of European System of Central Banks (ESCB) confidential statistical information may only be adopted in accordance*	

6 Council Regulation (EC) No 2533/98 of 23 November 1998 concerning the collection of statistical information by the European Central Bank (OJ L 318, 27.11.1998, p. 8).

Text proposed by the European Commission	Amendments proposed by the ECB[2]
with Article 5.4 of the Statute of the ESSB. Therefore, such amendments cannot be included in the proposed regulation. Therefore, the ECB therefore invites the Union legislators to remove all references to statistical information in relation to the ECB and the ESCB from the proposed legislative package. *See also paragraphs 15.3 to 15.5 of the ECB Opinion.*	
Amendment 10 Point (29)(a) of Article 1 of the proposed regulation (Article 34 of the SRMR)	
'1. The Board may, making full use of all of the information which is already available to the ECB, including information collected by the members of the ESCB in accordance with their statute, or of all the information available to the national competent authorities, to the ESRB, the EBA, ESMA or EIOPA, require, through the national resolution authorities or directly, after having informed those authorities, the following legal or natural persons to provide it with all the information necessary, in accordance with the procedure requested by the Board and in the form requested by the Board, to perform its tasks:'	'1. The Board may, making full use of all of the **non-statistical** information which is already available to the ECB, ~~including information collected by the members of the ESCB in accordance with their statute,~~ or of all the information available to the national competent authorities, to the ESRB, the EBA, ESMA or EIOPA, require, through the national resolution authorities or directly, after having informed those authorities, the following legal or natural persons to provide it with all the information necessary, in accordance with the procedure requested by the Board and in the form requested by the Board, to perform its tasks:'
Explanation *See Amendment 9 of Part I.*	
Amendment 11 Point (29)(b) of Article 1 of the proposed regulation (Article 34 of the SRMR)	
'5. The Board, the ECB, the members of the ESCB, the national competent authorities, the ESRB, the EBA, ESMA, EIOPA and the national resolution authorities may draw up memoranda of understanding setting out a procedure governing	'5. The Board, the ECB, the members of the ESCB~~,~~ the national competent authorities, the ESRB, the EBA, ESMA, EIOPA and the national resolution authorities may draw up memoranda of understanding setting out a procedure governing

Text proposed by the European Commission	Amendments proposed by the ECB[2]
the exchange of information. The exchange of information between the Board, the ECB and other members of the ESCB, the national competent authorities, the ESRB, the EBA, ESMA, EIOPA and the national resolution authorities shall not be deemed to infringe the requirements of professional secrecy. 6. National competent authorities, the ECB, members of the ESCB, the ESRB, the EBA, ESMA, EIOPA, and the national resolution authorities shall cooperate with the Board to verify whether some or all of the information requested is already available at the time the request is made. Where such information is available, the national competent authorities, the ECB and other members of the ESCB, the ESRB, the EBA, ESMA, EIOPA, or the national resolution authorities shall provide that information to the Board.'	the exchange of information. The exchange of information between the Board, the ECB and other members of the ESCB, the national competent authorities, the ESRB, the EBA, ESMA, EIOPA and the national resolution authorities shall not be deemed to infringe the requirements of professional secrecy. 6. National competent authorities, the ECB, members of the ESCB, the ESRB, the EBA, ESMA, EIOPA, and the national resolution authorities shall cooperate with the Board to verify whether some or all of the information requested is already available at the time the request is made. Where such information is available, the national competent authorities, the ECB ~~and other members of the ESCB~~, the ESRB, the EBA, ESMA, EIOPA, or the national resolution authorities shall provide that information to the Board.'
Explanation *See Amendment 9 of Part I.*	
Amendment 12 Point (37)(a) of Article 1 of the proposed regulation (Article 70(3) of the SRMR)	
'3. The available financial means to be taken into account in order to reach the target level specified in Article 69 may include irrevocable payment commitments which are fully backed by collateral of low-risk assets unencumbered by any third-party rights, at the free disposal of and earmarked for the exclusive use by the Board for the purposes specified in Article 76(1). The share of those irrevocable payment commitments shall not exceed 50 % of the total amount of contributions raised in	'3. The available financial means to be taken into account in order to reach the target level specified in Article 69 may include irrevocable payment commitments which are fully backed by collateral of low-risk assets unencumbered by any third-party rights, at the free disposal of and earmarked for the exclusive use by the Board for the purposes specified in Article 76(1). The share of those irrevocable payment commitments shall not exceed **30** ~~50~~ % of the total amount of contributions raised

Text proposed by the European Commission	Amendments proposed by the ECB[2]
accordance with this Article. Within that limit, the Board shall determine annually the share of irrevocable payment commitments in the total amount of contributions to be raised in accordance with this Article.'	in accordance with this Article. Within that limit, the Board shall determine annually the share of irrevocable payment commitments in the total amount of contributions to be raised in accordance with this Article.'
Explanation *The ECB strongly recommends to not increase the share of irrevocable payment commitments from 30 % to 50 % of the total amount of institutions' or entities ex ante contributions to the Single Resolution Fund. An increase may further raise the risk of overstating institutions' CET1 capital, where certain accounting practices are applied, and, consequently, the need for the ECB to take mitigating supervisory measures.* *See also paragraph 11 of the ECB Opinion.*	

Part II: drafting proposals on the proposed amendments to the Bank Recovery and Resolution Directive

Text proposed by the European Commission	Amendments proposed by the ECB
Amendment 1 Recital 16 of the proposed directive	
'(16) Competent authorities should be empowered to withdraw the authorisation of an institution or entity solely on the basis of the fact that the institution or entity is failing or likely to fail and is not put in resolution. Competent authorities should be able to withdraw the authorisation to support the objective of winding up the institution or entity in accordance with national law, particularly in cases where the available procedures under national law cannot be initiated at the moment the institution or entity is determined to be failing or likely to fail, including the cases where the institution or entity is not yet balance sheet insolvent. To further ensure that the objective of winding up the institution or entity can be achieved, Member States should ensure that the withdrawal of the authorisation by the competent authority is also included among the possible conditions to initiate at least one of the procedures available under national law and applicable to institutions or entities that are failing or likely to fail but are not put in resolution.'	'(16) Competent authorities should be empowered to withdraw the authorisation of an institution or entity solely on the basis of the fact that the institution or entity is failing or likely to fail, **there are no alternatives to prevent the failure** and the **institution** is not put in resolution. **At the same time, withdrawal of authorisation should not be a harmonised condition for the winding-up of institutions or entities, while the decision by the resolution authority should remain a harmonised condition for the winding-up of failed institutions or entities not subject to resolution.** ~~Competent authorities should be able to withdraw the authorisation to support the objective of winding up the institution or entity in accordance with national law, particularly in cases where the available procedures under national law cannot be initiated at the moment the institution or entity is determined to be failing or likely to fail, including the cases where the institution or entity is not yet balance sheet insolvent. To further ensure that the objective of winding up the institution or entity can be achieved, Member States should ensure that the withdrawal of the authorisation by the competent authority is also included among the possible conditions to initiate at least one of the procedures available under national law and applicable to institutions or entities that are failing or likely to fail but are not put in resolution.~~'

Text proposed by the European Commission	Amendments proposed by the ECB
Explanation *The ECB believes that national administrative authorities and national judicial bodies should not delay the initiation of winding-up processes until the licence of the institution or entity is withdrawn. The decision by the resolution authority should remain the harmonised condition for the winding-up of failed institutions not subject to resolution.* *See also paragraph 10.4 of the ECB Opinion.*	
Amendment 2 Point (12) of Article 1 of the proposed directive (Article 27(1) of Directive 2014/59/EU of the European Parliament and of the Council[7] (hereinafter the 'BRRD'))	
'1. Member States shall ensure that competent authorities may apply early intervention measures where an institution or entity referred to in Article 1(1), points (b), (c) or (d) meets any of the following conditions: (a) the institution or entity meets the conditions referred to in Article 102 of Directive 2013/36/EU or in Article 38 of Directive (EU) 2019/2034, or the competent authority has determined that the arrangements, strategies, processes and mechanisms implemented by the institution or entity and the own funds and liquidity held by that institution or entity do not ensure a sound management and coverage of its risks, and either of the following applies: (i) the institution or entity has not taken the remedial actions required by the competent authority, including the measures referred to in Article 104 of Directive 2013/36/EU or in Article 49	'1. Member States shall ensure that competent authorities may apply early intervention measures where an institution or entity referred to in Article 1(1), points (b), (c) or (d) meets any of the following conditions: (a) the institution or entity meets the conditions referred to in Article 102 of Directive 2013/36/EU or in Article 38 of Directive (EU) 2019/2034, or the competent authority has determined that the arrangements, strategies, processes and mechanisms implemented by the institution or entity and the own funds and liquidity held by that institution or entity do not ensure a sound management and coverage of its risks, and either of the following applies: (i) the institution or entity has not taken the remedial actions required by the competent authority, including the measures referred to in Article 104 of Directive 2013/36/EU or in Article 49

7 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).

Text proposed by the European Commission	Amendments proposed by the ECB
of Directive (EU) 2019/2034; (ii) the competent authority deems that remedial actions other than early intervention measures are insufficient to address the problems due inter alia to a rapid and significant deterioration of the financial condition of the institution or entity; (b) the institution or entity infringes or is likely to infringe in the 12 months following the assessment of the competent authority the requirements laid down in Title II of Directive 2014/65/EU, in Articles 3 to 7, Articles 14 to 17, or Articles 24, 25 and 26 of Regulation (EU) No 600/2014, or in Articles 45e or 45f of this Directive. The competent authority may determine that the condition referred to in the first subparagraph, point (a)(ii), is met without having previously taken other remedial actions, including the exercise of the powers referred to in Article 104 of Directive 2013/36/EU or in Article 39 of Directive (EU) 2019/2034.'	of Directive (EU) 2019/2034; (ii) the competent authority deems that remedial actions other than early intervention measures are insufficient to address the problems ~~due inter alia to a rapid and significant deterioration of the financial condition of the institution or entity~~; (b) the institution or entity infringes or is likely to infringe in the 12 months following the assessment of the competent authority the requirements laid down in Title II of Directive 2014/65/EU, in Articles 3 to 7, Articles 14 to 17, or Articles 24, 25 and 26 of Regulation (EU) No 600/2014~~, or in Articles 45e or 45f of this Directive~~. The competent authority may determine that the condition referred to in the first subparagraph, point (a)(ii), is met without having previously taken other remedial actions, including the exercise of the powers referred to in Article 104 of Directive 2013/36/EU or in Article 39 of Directive (EU) 2019/2034.'

Explanation

The reference to a rapid and significant deterioration of the financial condition of the entity as a prerequisite for taking an early intervention measure could undermine the possibility of the supervisor to properly address a deterioration of the situation of the entity if, for example, it is not rapid, but still significant. Therefore, the ECB recommends deleting that reference.

Except when breaches of minimum requirements for own funds and eligible liabilities (MREL) also qualify as breaches of own funds requirements, addressing such breaches should remain the sole responsibility of the resolution authorities, in order to avoid duplicating tasks and blurring responsibilities between prudential supervisory and resolution authorities. MREL aim to facilitate an orderly resolution strategy for non-viable credit institutions and are distinct from prudential requirements, which ensure credit institutions' safety and soundness. In this context, resolution authorities, which are responsible for determining MREL, are better suited to monitor MREL compliance and initiate remedial actions.

See also paragraphs 3.1 and 3.3 of the ECB Opinion.

Text proposed by the European Commission	Amendments proposed by the ECB
Amendment 3 Point (12) of Article 1 of the proposed directive (Article 27(1a) of the BRRD)	
'1a. For the purposes of paragraph 1, early intervention measures shall include the following: […] (f) appointment of one or more temporary administrators to the institution or entity referred to in Article 1(1), points (b), (c) or (d), in accordance with Article 29'	'1a. For the purposes of paragraph 1, early intervention measures shall include the following: […] (f) appointment of one or more temporary administrators to the institution or entity referred to in Article 1(1), points (b), (c) or (d), in accordance with Article 29**;** **(g) require the management body of the entity to draw up a plan that the entity can implement in case the relevant corporate body decides to initiate the voluntary wind-down of the entity; the plan shall include at least analyses of the necessary capital and liquidity support for winding down and of the concrete relevant strategic options for a possible market exit.**'
Explanation *The ECB proposes the introduction of an early intervention measure requiring an entity's management body to draw up a plan that the entity can implement in case the relevant corporate body decides to initiate a voluntary wind-down. The development of such a plan would enable the concerned entity to assess relevant strategic options and prepare for a potential market exit, and would be a valuable addition to the early intervention toolkit.* *See also paragraph 3.4 of the ECB Opinion.*	

Text proposed by the European Commission	Amendments proposed by the ECB
Amendment 4 Point (15) of Article 1 of the proposed directive (Article 30a(1) of the BRRD)	
'1. Member States shall ensure that competent authorities notify the resolution authorities without delay of any of the following: (a) any of the measures referred to in Article 104(1) of Directive 2013/36/EU they require an institution or an entity referred to in Article 1(1), points (b), (c) or (d), of this Directive to take; (b) where supervisory activity shows that the conditions laid down in Article 27(1) of this Directive are met in relation to an institution or entity referred to in Article 1(1), points (b), (c) or (d), of this Directive, the assessment that those conditions are met, irrespective of any early intervention measure; (c) the application of any of the early intervention measures referred to in Article 27. Competent authorities shall closely monitor, in cooperation with the resolution authorities, the situation of the institution or entity and their compliance with the measures referred to in the first subparagraph, point (a), that aim to address a deterioration in the situation of that institution or entity and with the early intervention measures referred to in the first subparagraph, point (c).'	'1. Member States shall ensure that competent authorities notify the resolution authorities without delay of any of the following: (a) any of the measures referred to in Article 104(1) of Directive 2013/36/EU they require an institution or an entity referred to in Article 1(1), points (b), (c) or (d), of this Directive to take **which aim to address a deterioration in the situation of those entities and groups**; (b) where supervisory **assessment** ~~activity~~ shows that the conditions laid down in Article 27(1) of this Directive are met in relation to an institution or entity referred to in Article 1(1), points (b), (c) or (d), of this Directive, the assessment that those conditions are met, irrespective of any early intervention measure; (c) the application of any of the early intervention measures referred to in Article 27. Competent authorities shall closely monitor, in cooperation with the resolution authorities, the situation of the institution or entity and their compliance with the measures referred to in the first subparagraph, point (a), that aim to address a deterioration in the situation of that institution or entity and with the early intervention measures referred to in the first subparagraph, point (c).'
Explanation *The proposed amendments to Article 30a(1) of the BRRD should be aligned with the proposed amendments to Article 13c(1) of the SRMR.* *See Amendment 4 of Part I.*	

Text proposed by the European Commission	Amendments proposed by the ECB
See also paragraph 4.3 of the ECB Opinion.	
Amendment 5 Point (15) of Article 1 of the proposed directive (Article 30a(2) of the BRRD)	
'2. […] Following the notification referred to in the first subparagraph, competent authorities and resolution authorities shall, in close cooperation, monitor the situation of the institution or entity referred to in Article 1(1), points (b), (c) or (d), the implementation of the any relevant measures within their expected timeframe and any other relevant developments. For that purpose, resolution authorities and competent authorities shall meet regularly, with a frequency set by resolution authorities considering the circumstances of the case. Competent authorities and resolution authorities shall provide each other with any relevant information without delay.'	'2. […] Following the notification referred to in the first subparagraph, competent authorities ~~and resolution authorities~~ shall, in close cooperation **with resolution authorities**, monitor the situation of the institution or entity referred to in Article 1(1), points (b), (c) or (d), the implementation of the any relevant measures within their expected timeframe and any other relevant developments. For that purpose, resolution authorities and competent authorities shall meet regularly, with a frequency set by resolution authorities considering the circumstances of the case. Competent authorities and resolution authorities shall provide each other with any relevant information without delay.'
Explanation *The ECB proposes to clarify that, during the pre-resolution phase, the competent authority remains in the lead while maintaining close cooperation with the resolution authority. This clarification would ensure effective collaboration, while preserving the distinct roles and responsibilities of each authority.*	
Amendment 6 Point (18) of Article 1 of the proposed directive (Article 32b(4) of the BRRD)	
'4. Member States shall ensure that the withdrawal of the authorisation of the institution or entity referred to in Article 1(1), points (b), (c) or (d) is a	'~~4. Member States shall ensure that the withdrawal of the authorisation of the institution or entity referred to in Article 1(1), points (b), (c) or (d) is a~~

Text proposed by the European Commission	Amendments proposed by the ECB
sufficient condition for a relevant national administrative or judicial authority to be able to initiate without delay the procedure to wind up the institution or entity in an orderly manner in accordance with the applicable national law.'	~~sufficient condition for a relevant national administrative or judicial authority to be able to initiate without delay the procedure to wind up the institution or entity in an orderly manner in accordance with the applicable national law.~~'
Explanation *This provision may contradict the result required by Article 32b(1) and (2) of the BRRD, and may foster a situation where national authorities delay the initiation of winding-up processes until the licence of the institution or entity is withdrawn. Therefore, the ECB suggest to delete it. The main avenues for the initiation of such market exit should be unambiguous triggers in national law, as well as the empowerment of the relevant national authorities to start an administrative winding-up procedure on the basis of the resolution authority's decision. Conversely, supervisory discretion to withdraw a licence should be retained, as this would allow the specific circumstances of each case to be taken into account (e.g. in some cases transactions requiring a banking licence could be necessary to ensure a smooth liquidation process, protecting the interests of stakeholders).* *See also paragraph 10.4 of the ECB Opinion.*	
Amendment 7 Point (19) of Article 1 of the proposed directive (Article 32c(1), point (b), of the BRRD)	
'(b) where the extraordinary public financial support takes the form of an intervention by a deposit guarantee scheme to preserve the financial soundness and long-term viability of the credit institution in compliance with the conditions set out in Articles 11a and 11b of Directive 2014/49/EU, provided that none of the circumstances referred to in Article 32(4) are present;'	'(b) where the extraordinary public financial support takes the form of an intervention by a deposit guarantee scheme ~~to preserve the financial soundness and long-term viability of the credit institution~~ in compliance with the conditions set out in Articles 11a and 11b of Directive 2014/49/EU, provided that none of the circumstances referred to in Article 32(4) are present;'
Explanation *The ECB proposes the removal of the condition under which the relevant competent authority would need to establish that DGS intervention is necessary to preserve the financial soundness and long-term viability of the concerned credit institution. The ECB considers that, in case of extraordinary public financial support, all preventive measures conducted in accordance with the DGSD are an exception to the general rule that the entity is assessed as failing or likely to fail in case of extraordinary public*	

Text proposed by the European Commission	Amendments proposed by the ECB
financial support. *See also paragraph 6.2 of the ECB Opinion.*	
Amendment 8 Point (19) of Article 1 of the proposed directive (Article 32c(2) of the BRRD)	
'2. The support measures referred to in paragraph 1, point (a), shall fulfil all of the following conditions: […] (b) the measures are of a precautionary and temporary nature and are based on a pre-defined exit strategy approved by the competent authority, including a clearly specified termination date, sale date or repayment schedule for any of the measures provided; […] For the purposes of the first subparagraph, point (a), an institution or entity shall be deemed to be solvent where the competent authority has concluded that no breach has occurred, or is likely to occur in the 12 following months, of any of the requirements referred to in Article 92(1) of Regulation (EU) No 575/2013, Article 104a of Directive 2013/36/EU, Article 11(1) of Regulation (EU) 2019/2033, Article 40 of Directive (EU) 2019/2034 or the relevant applicable requirements under Union or national law. […] By way of derogation from paragraph 1, point (a)(iii), acquisition of Common Equity Tier 1 instruments shall be exceptionally permitted where the nature of the shortfall identified is such that the acquisition of any other own funds instruments or other capital instruments would not make it	'2. The support measures referred to in paragraph 1, point (a), shall fulfil all of the following conditions: […] (b) the measures are of a precautionary and temporary nature and are based on a pre-defined exit strategy ~~approved by the competent authority, including a clearly specified termination date, sale date or repayment schedule for any of the measures provided~~; […] For the purposes of the first subparagraph, point (a), an institution or entity shall be deemed to be solvent where the competent authority has concluded that no breach has occurred, or is likely to occur in the 12 following months, of any of the requirements referred to in Article 92(1) of Regulation (EU) No 575/2013, Article 104a of Directive 2013/36/EU, Article 11(1) of Regulation (EU) 2019/2033, Article 40 of Directive (EU) 2019/2034 or the relevant applicable requirements under Union or national law. **The competent authority may deem an institution or entity to be solvent where it determines that a breach of these requirements is temporary in nature, taking into account the specific circumstances of each case, and provided that the institution or entity can demonstrate a reasonable plan to remedy the breach within an appropriate**

Text proposed by the European Commission	Amendments proposed by the ECB
possible for the institution or entity concerned to address its capital shortfall established in the adverse scenario in the relevant stress test or equivalent exercise. The amount of acquired Common Equity Tier 1 instruments shall not exceed 2% of the total risk exposure amount of the institution or entity concerned calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013. In case any of the support measures referred to in paragraph 1, point (a), is not redeemed, repaid or otherwise terminated in accordance with the terms of the exit strategy established at the time of granting such measure, the competent authority shall conclude that the condition laid down in Article 32(1), point (a), is met in relation to the institution or entity which has received those support measures, and shall communicate that assessment to the resolution authority concerned.'	**timeframe as determined by the competent authority.** […] By way of derogation from paragraph 1, point (a)(iii), acquisition of Common Equity Tier 1 instruments shall be exceptionally permitted where the nature of the shortfall identified is such that the acquisition of any other own funds instruments or other capital instruments would not make it possible for the institution or entity concerned to address its capital shortfall established in the adverse scenario in the relevant stress test or equivalent exercise. ~~The amount of acquired Common Equity Tier 1 instruments shall not exceed 2% of the total risk exposure amount of the institution or entity concerned calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013.~~ ~~In case any of the support measures referred to in paragraph 1, point (a), is not redeemed, repaid or otherwise terminated in accordance with the terms of the exit strategy established at the time of granting such measure, the competent authority shall conclude that the condition laid down in Article 32(1), point (a), is met in relation to the institution or entity which has received those support measures, and shall communicate that assessment to the resolution authority concerned~~.'
Explanation *It is necessary to preserve the flexibility competent authorities need in order to make informed decisions, on a case-by-case basis, concerning the solvency of an entity or institution. The proposed amendment allows the competent authority to deem an institution or entity as solvent in the event of technical or temporary breaches of the requirements referred to. Accordingly, the competent authority would be able to take the context of each institution or entity into account, rather than being constrained by a one-size-fits-all definition of solvency.*	

Text proposed by the European Commission	Amendments proposed by the ECB
Competition authorities are in a better position to discuss the exit strategy, which will also include a restructuring plan, in the context of the State aid approval. Therefore, there is no need for a supervisory approval. Moreover, sufficient flexibility on the FOLTF declaration should be maintained to be able to account for unexpected developments, i.e. no direct linkage between delays with the exit strategy and the supervisory FOLTF assessment. *Although the ECB generally welcomes the clarifications with respect to the capital interventions, flexibility should be ensured. Therefore, the cap on CET1 instruments should be deleted. In any case, the acquisition of CET1 instruments is anyway the exception to the rule.* *See also paragraphs 5.1 to 5.4 of the ECB Opinion.*	
Amendment 9 Article 37(10) of the BRRD (new)	
No text	'10. In the very extraordinary situation of a systemic crisis, the resolution authority may seek funding from alternative financing sources through the use of government stabilisation tools provided for in Articles 56 to 58 when the following conditions are met: (a) a contribution to loss absorption and recapitalisation equal to an amount not less than 8 % of total liabilities including own funds of the institution under resolution, measured at the time of resolution action in accordance with the valuation provided for in Article 36, has been made by the shareholders and the holders of other instruments of ownership, the holders of relevant capital instruments and other bail-inable liabilities through **reduction,** write down or conversion ~~otherwise~~ **and by the deposit guarantee scheme pursuant to Article 109 where relevant**; (b) it shall be conditional on prior and final approval under the Union State aid framework.'

Text proposed by the European Commission	Amendments proposed by the ECB
Explanation *The ECB suggests mirroring the proposed amendments to Article 44(5) of the BRRD in Article 37(10) of the BRRD, in order to ensure consistency in the application of tools.*	
Amendment 10 Point (49) of Article 1 of the proposed directive (Article 97(4) of the BRRD)	
'4. […] Competent authorities shall conclude non-binding cooperation arrangements with the relevant third-country authorities referred to in paragraph 2 where appropriate. Those arrangements shall be in line with EBA framework arrangement and shall ensure that the information disclosed to the third-country authorities is subject to a guarantee that professional secrecy requirements at least equivalent to those referred to in Article 53(1) of Directive 2013/36/EU are complied with.'	'4. […] Competent authorities shall conclude non-binding cooperation arrangements with the relevant third-country authorities referred to in paragraph 2 where appropriate. Those arrangements shall be in line with EBA framework arrangement and shall ensure that the information disclosed to the third-country authorities is subject to a guarantee that professional secrecy requirements at least equivalent to those referred to in Article **84 of this** ~~53(1) of~~ Directive ~~2013/36/EU~~ are complied with.'
Explanation *The ECB proposes to change of the reference concerning professional secrecy standards from Article 53(1) of Directive 2013/36/EU of the European Parliament and of the Council[8] to Article 84 of the BRRD. This would ensure that this provision is aligned with the Commission's proposed amendments in Article 98(1) of the BRRD, based on which information sharing with relevant third-country authorities is permitted, provided that their professional secrecy requirements are equivalent to those imposed by Article 84 of the BRRD.*	
Amendment 11 Point (53) of Article 1 of the proposed directive	

8 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, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

Text proposed by the European Commission	Amendments proposed by the ECB
(Article 103(3) of the BRRD)	
'3. The available financial means to be taken into account in order to reach the target level specified in Article 102 may include irrevocable payment commitments which are fully backed by collateral of low risk assets unencumbered by any third party rights, at the free disposal and earmarked for the exclusive use by the resolution authorities for the purposes specified in Article 101(1). The share of irrevocable payment commitments shall not exceed 50 % of the total amount of contributions raised in accordance with this Article. Within that limit, the resolution authority shall determine annually the share of irrevocable payment commitments in the total amount of contributions to be raised in accordance with this Article.'	'3. The available financial means to be taken into account in order to reach the target level specified in Article 102 may include irrevocable payment commitments which are fully backed by collateral of low risk assets unencumbered by any third party rights, at the free disposal and earmarked for the exclusive use by the resolution authorities for the purposes specified in Article 101(1). The share of irrevocable payment commitments shall not exceed **30** ~~50~~ % of the total amount of contributions raised in accordance with this Article. Within that limit, the resolution authority shall determine annually the share of irrevocable payment commitments in the total amount of contributions to be raised in accordance with this Article.'
Explanation *The ECB strongly recommends to not increase the share of irrevocable payment commitments from 30 % to 50 % of the total amount of entities' ex ante contributions to their resolution financing arrangements. An increase may further raise the risk of overstating institutions' CET1 capital, where certain accounting practices are applied, and, consequently, the need for the ECB to take mitigating supervisory measures.* *See also paragraph 11 of the ECB Opinion.*	
Amendment 12 Point (56)(a) of Article 1 of the proposed directive (Article 109 of the BRRD)	
'1. Member States shall ensure that, where the resolution authorities take resolution action with respect to a credit institution, and provided that such action ensures that depositors continue to have access to their deposits, to prevent depositors from bearing losses the deposit guarantee scheme to which that credit institution is	'1. Member States shall ensure that, where the resolution authorities take resolution action with respect to a credit institution, and provided that such action ensures that depositors continue to have access to their deposits, to prevent **covered** depositors **as referred to in point (a) and depositors as referred to in point (b)** from

Text proposed by the European Commission	Amendments proposed by the ECB
affiliated shall contribute the following amounts: (a) where the bail-in tool is applied, independently or in combination with the asset separation tool, the amount by which covered deposits would have been written down or converted in order to absorb the losses and recapitalise the institution under resolution pursuant to Article 46(1), had covered deposits been included within the scope of bail-in; (b) where the sale of business or the bridge institution tools are applied, independently or in combination with other resolution tools: (i) the amount necessary to cover the difference between the value of the covered deposits and of the liabilities with the same or a higher. […]'	bearing losses the deposit guarantee scheme to which that credit institution is affiliated shall contribute the following amounts: (a) where the bail-in tool is applied, independently or in combination with the asset separation tool, the amount by which covered deposits would have been written down or converted in order to absorb the losses and recapitalise the institution under resolution pursuant to Article 46(1), had covered deposits been included within the scope of bail-in; (b) where the sale of business or the bridge institution tools are applied, independently or in combination with other resolution tools: (i) the amount necessary to cover the difference between the value of the covered deposits and of the liabilities with the same or a higher. […]'
Explanation *This technical amendment reflects that Article 109, points (1)(a), of the BRRD includes DGS support for covered depositors only.*	
Amendment 13 Point (58)(b) of Article 1 of the proposed directive (Article 128 of the BRRD)	
'The resolution authorities, competent authorities, the EBA, the Single Resolution Board, the ECB and other members of the European System of Central Banks shall provide the Commission, upon its request and within the specified timeframe, with any information necessary for the performance of its tasks related to policy development, including the carrying out of impact assessments, the preparation of legislative proposals, and the participation in the legislative process. The	'The resolution authorities, competent authorities, the EBA~~,~~ **and** the Single Resolution Board~~, the ECB and other members of the European System of Central Banks~~ shall provide the Commission, upon its request and within the specified timeframe, with any information necessary for the performance of its tasks related to policy development **concerning this Directive**, including the carrying out of impact assessments, the preparation of legislative proposals, and the

Text proposed by the European Commission	Amendments proposed by the ECB
Commission and the Commission staff shall be subject to the requirements of professional secrecy laid down in Article 88 of Regulation (EU) No 806/2014 of the European Parliament and of the Council with regard to the information received.'	participation in the legislative process, **in summary or aggregate form, such that individual entities cannot be identified**. ~~The Commission and the Commission staff shall be subject to the requirements of professional secrecy laid down in Article 88 of Regulation (EU) No 806/2014 of the European Parliament and of the Council with regard to the information received.~~'

Explanation

The proposed amendment is designed to clarify that the Commission only receives non-confidential information for the performance of its tasks related to this Directive concerning policy development, impact assessments, and the legislative process. These activities primarily require aggregated data, trends and general insights into the banking sector, which can be sufficiently obtained without accessing confidential or institution-specific information, which is subject to strict professional secrecy protection.

In addition, an act adopted on the basis of Article 114 of the Treaty on the Functioning of the European Union cannot mandate the transmission of ESCB confidential statistical information. The ECB, assisted by national central banks, collects statistical information from reporting agents pursuant to Article 5 of the Statute of the ESCB) and Regulation (EC) 2533/98. Any changes to the rules on the exchange of ESCB confidential statistical information may only be adopted in accordance with Article 5.4 of the Statute of the ESCB, which provides that the Council, in accordance with the procedure laid down in Article 41 of the Statute of the ESCB, shall, inter alia, define the confidentiality regime applicable to the collection of statistical information. Therefore, any changes to the rules on the exchange of ESCB confidential statistical information cannot be included in the proposed legislative package. The ECB therefore invites the Union legislator to remove all references to statistical information in relation to the ECB and other members of the ESCB from the proposed legislative package. The proposed deletion of 'the ECB and other members of the European System of Central Banks' aims to clarify that this provision can apply only to the ECB in its capacity of competent authority for prudential supervision, but not as collector of statistical information.

See paragraph 15 of the ECB Opinion.

Part III: drafting proposals on the proposed amendments to the Deposit Guarantee Schemes Directive

Text proposed by the European Commission	Amendments proposed by the ECB
Amendment 1 Article 4(2), third subparagraph, of the DGSD (new)	
No text	'[…] **Member States shall ensure that an IPS that is recognised as a DGS in accordance with this paragraph shall segregate the available financial means within the meaning of Article 10(1) from the funding arrangements collected with a view to exercise its purposes as referred to in Article 113(7) of Regulation (EU) No 575/2013.**'
Explanation *The ECB's proposed addition intends to establish an explicit requirement to segregate funds of Institutional Protection Schemes' (IPSs) and funds of DGSs'.* *More specifically, in order to ensure the consistent protection of depositors, it is important that IPS recognised as DGSs properly distinguish the financial resources raised for the purpose of securing covered deposits under the DGSD from those funds collected for IPS purposes. As a matter of fact, this is already common practice for most IPS. This amendment would ensure the credibility of depositor protection in the Union and harmonise the conditions for accessing the funds collected under the DGSD, thus ensuring a level-playing field across the Union. The specific functions of an IPS can then be carried out with the help of separate funds dedicated to this purpose, which – as illustrated by past experience – is important for the smooth functioning of IPS. In addition, the proposed amendment would not contradict the provisions outlined in Article 113(7) of Regulation (EU) No 575/2013 of the European Parliament and of the Council[9], which allows member institutions to benefit from waivers on risk weighted exposure calculations.* *See paragraph 6.5 of the ECB Opinion.*	

9 Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

Text proposed by the European Commission	Amendments proposed by the ECB
Amendment 2 Point (3)(a) of Article 1 of the proposed directive (Article 4(4) of the DGSD)	
'4. Members States shall ensure that where a credit institution does not comply with its obligations as a member of a DGS, that DGS shall immediately notify the competent authority of that credit institution thereof. Member States shall ensure that the competent authority, in cooperation with that DGS, uses the supervisory powers laid down in Directive 2013/36/EU, and promptly takes all measures to ensure that the credit institution concerned complies with its obligations, including where necessary by imposing administrative penalties and other administrative measures in accordance with the national laws adopted in addition to the implementation of provisions of Title VII, Chapter 1, Section IV, of Directive 2013/36/EU.'	'4. Members States shall ensure that where a credit institution does not comply with its obligations as a member of a DGS, that DGS shall immediately notify the **designated authority and the** competent authority of that credit institution thereof. ~~Member States shall ensure that the competent authority, in cooperation with that DGS, uses the supervisory powers laid down in Directive 2013/36/EU, and promptly takes all measures to ensure that the credit institution concerned complies with its obligations, including where necessary by imposing administrative penalties and other administrative measures in accordance with the national laws adopted in addition to the implementation of provisions of Title VII, Chapter 1, Section IV, of Directive 2013/36/EU.~~ **Member States shall ensure that the designated authority promptly takes all appropriate measures, including, if necessary, the imposition of penalties, to ensure that credit institutions comply with their obligations as members of a DGS.** **Member States shall lay down rules on penalties applicable in the event of infringements by credit institutions of the obligations incumbent on them as a members of a DGS. The penalties shall be effective, proportionate and dissuasive.**'
Explanation *The supervisor's powers under Directive 2013/36/EU can only be used to fulfil the objectives set out therein, and cannot be extended to unrelated issues, such as credit institutions' lack of compliance with DGS obligations.*	

Text proposed by the European Commission	Amendments proposed by the ECB
Furthermore, DGS authorities possess a more comprehensive understanding of compliance evaluation in this context. Therefore, the ECB considers it more effective to grant the designated DGS authorities the appropriate enforcement powers. *See also paragraph 13.2 of the ECB Opinion.*	
Amendment 3 Point (12) of Article 1 of the proposed directive (Article 11(3) of the DGSD)	
'3. Member States may allow DGSs to use the available financial means for preventive measures as referred to in Article 11a for the benefit of a credit institution where all of the following applies: (a) none of the circumstances referred to in Article 32(4) of Directive 2014/59/EU are present; (b) the DGS has confirmed that the cost of the measure does not exceed the cost of repaying depositors as calculated in accordance with Article 11e; (c) all of the conditions laid down in Articles 11a and 11b are met.'	'3. Member States **shall ensure that a DGS** may ~~allow DGSs to~~ use the available financial means for preventive measures as referred to in Article 11a for the benefit of a credit institution where all of the following applies: (a) none of the circumstances referred to in Article 32(4) of Directive 2014/59/EU are present; (b) the DGS has confirmed that **the intervention is necessary to preserve financial soundness and long-term viability of the credit institution and** the cost of the measure does not exceed the cost of repaying depositors as calculated in accordance with Article 11e; (c) all of the conditions laid down in Articles 11a and 11b are met.'
Explanation *The ECB suggests making DGS preventive measures available across the Union under a harmonised framework.* *See also paragraphs 6.1 and 6.2 of the ECB Opinion.*	

Text proposed by the European Commission	Amendments proposed by the ECB
Amendment 4 Point (12) of Article 1 of the proposed directive (Article 11(5) of the DGSD)	
'5. Where a credit institution is wound up in accordance with Article 32b of Directive 2014/59/EU in order to exit the market or terminate its banking activity, Member States may allow DGSs to use the available financial means for alternative measures to preserve the access of depositors to their deposits, including the transfer of assets and liabilities and a deposit book transfer, provided that the DGS confirms that the cost of the measure does not exceed the cost of repaying depositors as calculated in accordance with Article 11e of this Directive and that all the conditions laid down in Article 11d of this Directive are met.'	'5. Where a credit institution is wound up in accordance with Article 32b of Directive 2014/59/EU in order to exit the market or terminate its banking activity, Member States **shall ensure that a DGS** may ~~allow DGSs to~~ use the available financial means for alternative measures to preserve the access of depositors to their deposits, including the transfer of assets and liabilities and a deposit book transfer, provided that the DGS confirms that the cost of the measure does not exceed the cost of repaying depositors as calculated in accordance with Article 11e of this Directive and that all the conditions laid down in Article 11d of this Directive are met.'
Explanation *The ECB suggests making DGS alternative measures available across the Union under a harmonised framework.* *See also paragraph 6.1 of the ECB Opinion.*	
Amendment 5 Point (13) of Article 1 of the proposed directive (Article 11a(1) of the DGSD)	
'1. Where Member States allow the use of DGS funds for preventive measures as referred to in Article 11(3), Member States shall ensure that DGSs use the available financial means for the preventive measures referred to in Article 11(3), provided that all of the following conditions are met: (a) the request of a credit institution for the financing of such preventive measures is	'1. ~~Where Member States allow the use of DGS funds for preventive measures as referred to in Article 11(3),~~ Member States shall ensure that DGSs use the available financial means for the preventive measures referred to in Article 11(3), provided that all of the following conditions are met: (a) the request of a credit institution for the financing of such preventive measures is

Text proposed by the European Commission	Amendments proposed by the ECB
accompanied by a note containing measures as referred to in Article 11b; (b) the credit institution has consulted the competent authority on the measures envisaged in the note referred to in Article 11b; (c) the use of preventive measures by the DGS is linked to conditions imposed on the supported credit institution, involving at least more stringent risk monitoring of the credit institution and greater verification rights for the DGS; (d) the use of the preventive measures by the DGS is conditional upon the credit institution's commitments to secure access to covered deposits; (e) the affiliated credit institutions are able to pay the extraordinary contributions in accordance with Article 11(4); (f) the credit institution complies with its obligations under this Directive and has fully reimbursed any previous preventive measure.'	accompanied by a note containing measures as referred to in Article 11b; (b) the credit institution has consulted the competent authority on the measures envisaged in the note**, which refer to compliance with prudential requirements** ~~referred to in Article 11b~~; (c) the use of preventive measures by the DGS is linked to conditions imposed on the supported credit institution, involving at least more stringent risk monitoring of the credit institution and greater verification rights for the DGS; (d) the use of the preventive measures by the DGS is conditional upon the credit institution's commitments to secure access to covered deposits; (e) the affiliated credit institutions are able to pay the extraordinary contributions in accordance with Article 11(4); (f) the credit institution complies with its obligations under this Directive and has fully reimbursed any previous preventive measure.'
Explanation *The amendment reflects the earlier suggestion by the ECB to extend preventive measures across the Union. It should, however, be clarified that the supervisor may only check envisaged compliance with prudential requirements.* *See also paragraphs 6.1 and 6.4 of the ECB opinion.*	
Amendment 6 Point (13) of Article 1 of the proposed directive (Article 11c of the DGSD)	
'[…] 2. In the situation referred to in paragraph 1,	'[…] 2. In the situation referred to in paragraph 1,

Text proposed by the European Commission	Amendments proposed by the ECB
Member States shall ensure that the competent authority requests the credit institution to submit a remediation plan describing the steps the credit institution will take to ensure or restore compliance with supervisory requirements, to ensure its long term viability and to repay the due amount contributed by the DGS to the preventive measure, as well as the associated timeframe. 3. Where the competent authority is not satisfied that the remediation plan is credible or feasible, the DGS shall not grant any further preventive measures to that credit institution. […]'	Member States shall ensure that ~~the competent authority requests~~ the credit institution ~~to~~ **shall** submit a remediation plan **to the designated authority and the DGS** describing the steps the credit institution will take to ensure or restore compliance with supervisory requirements, to ensure its long~~-~~-term viability and to repay the due amount contributed by the DGS to the preventive measure, as well as the associated timeframe. **The designated authority and the DGS shall consult the competent authority as regards the measures envisaged in the remediation plan submitted by the credit institution that aim to ensure or restore compliance with supervisory requirements.** 3. Where the ~~competent~~ **designated** authority is not satisfied that the remediation plan is credible or feasible, the DGS shall not grant any further preventive measures to that credit institution. […]'
Explanation *The ECB proposes to explicitly establish the obligation to submit a remediation plan in the applicable legislation. The role of the competent authority should be aligned with its role in the first part of the process. Competent authorities should verify, to their satisfaction, whether the measures submitted by the credit institution ensure or restore compliance with supervisory requirements. Competent authorities should communicate the outcome of their assessment to the DGS and the designated authority, which should remain ultimately responsible for assessing the remediation plan as credible or feasible.*	
Amendment 7 Point (14)(d) of Article 1 of the proposed directive (Article 14(3) of the DGSD)	
'3. Member States shall ensure that where a credit institution ceases to be member of a DGS and joins a DGS of another Member State, or if some of the	'3. Member States shall ensure that where a credit institution ceases to be member of a DGS and joins a DGS of another Member State, or if some of

Text proposed by the European Commission	Amendments proposed by the ECB
credit institution's activities are transferred to a DGS of another Member State, the DGS of origin shall transfer to the receiving DGS the contributions due for the last 12 months preceding the change of DGS membership, with the exception of the extraordinary contributions referred to in Article 10(8).'	the credit institution's activities are transferred to a DGS of another Member State, the DGS of origin shall transfer to the receiving DGS **an amount that reflects the additional potential liabilities borne by the receiving DGS as a result of the transfer, taking into account the impact of the transfer on the financial situation of both DGSs relative to the risks they cover.** ~~the contributions due for the last 12 months preceding the change of DGS membership, with the exception of the extraordinary contributions referred to in Article 10(8).~~ **The EBA shall develop draft regulatory technical standards specifying the methodology for the calculation of the amount to be transferred to ensure a neutral impact of the transfer on the financial situation of both DGSs relative to the risks they cover.** **The EBA shall submit those draft regulatory technical standards to the Commission by …** **[PO please enter [X] months after entry into force of this Directive].** **Power is delegated to the Commission to adopt the regulatory technical standards referred to in the second subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council*.** *** Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).'**
Explanation *The ECB suggests mandating the European Banking Authority to develop draft regulatory technical*	

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standards, specifying a methodology to calculate the transfer amount based on the transferred risks. This would minimise the funding surplus in the DGS of origin and the funding gap in the receiving DGS, avoiding unnecessary costs for the transferring credit institution and other members of the receiving DGS. *See also paragraph 14 of the ECB Opinion.*	