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Regulation and Directive on digital operational resilience – ECB publishes Opinion

4 June 2021 – The European Central Bank (ECB) has published an opinion (CON/2021/21) on the proposal for a Regulation on digital operational resilience for the financial sector (DORA) (2020/0266 (COD)) and related proposal for a Directive that clarifies and amends certain existing EU financial services Directives to align them with the proposed Regulation (2020/0268 (COD)).

The ECB recommends further consideration of potential inconsistencies between the proposed Regulation and the Network and Information Security Directive ((EU) 2016/1148) (NIS Directive). It also suggests clarification of the interplay between the proposed Regulation and the Regulatory Technical Standards supplementing the Central Securities Depositories Regulation (909/2014) (CSD Regulation). It notes that the DORA should be consistent with the range of requirements related to information and communications technology (ICT) risk that are currently distributed over a number of different pieces of EU legislation.

The ECB has set out certain specific drafting proposals in a separate technical working document, accompanied by an explanatory text.

Opinion of the European Central Bank on a proposal for a regulation on digital operational resilience for the financial sector (CON/2021/20)

COVID-19 – ECB adopts decision extending exclusion of certain central bank exposures from leverage ratio

18 June 2021 – The ECB has adopted a decision to extend the temporary exclusion of certain exposures to central banks from the leverage ratio total exposure measure (TEM) in view of COVID-19 (ECB/2021/07).

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Article 500b of the Capital Requirements Regulation (575/2013/EU) (CRR), introduced by Regulation (EU) 2020/873 (COVID-19 CRR Amending Regulation), currently allows institutions to exclude exposures to their central bank from the TEM where the institution's national competent authority (NCA) has determined there are exceptional macro-economic circumstances. Further to this provision, in September 2020, the ECB adopted Decision (EU) 2020/1306 (ECB/2020/44) which allows credit institutions to exclude certain central bank exposures from the leverage ratio in light of COVID-19. Article 500b will cease to apply from 27 June 2021, and its provisions on the exclusion of central bank exposures are replicated in new Article 429a which was inserted by the CRR II Regulation ((EU) 2019/876) and will apply from 28 June 2021.

The ECB has decided to extend the effect of the exclusion, as it considers that exceptional macro-economic circumstances continue to apply in respect of the Eurozone. The decision, made under Article 429a(5) of the CRR, will apply from 28 June 2021 in respect of any credit institution that is a significant supervised entity for the purposes of the ECB's banking supervision role under the Single Supervisory Mechanism (SSM). The decision also repeals Decision (EU) 2020/1306 with effect from 28 June 2021.

The decision will cease to apply on 31 March 2022. The ECB states that this date was chosen to facilitate the implementation of monetary policy measures linked to the situation resulting from COVID-19, including measures under the Pandemic Emergency Purchase Programme.

In a press release, the ECB warns that banks that make use of the exclusion should plan to maintain sufficient capital in preparation for the expiry of the exclusion in March 2022.

Decision (EU) [2021/XX] on the temporary exclusion of certain exposures to central banks from the total exposure measure in view of COVID-19 and repealing Decision (EU) 2020/1306 (ECB/2021/27)

Press release: ECB extends leverage ratio relief for banks until March 2022

Press release: ECB's Governing Council confirms that exceptional circumstances continue to justify leverage ratio relief

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Distributed ledger technology – ECB Opinion on proposed Regulation on pilot regime for market infrastructures published in OJ

22 June 2021 – An opinion of the ECB (2021/C 244/04) on a proposed Regulation in relation to a pilot regime for market infrastructures based on distributed ledger technology (DLT) has been published in the Official Journal of the EU. The proposed Regulation is part of the European Commission’s Digital Finance package which seeks to further enable and support the potential of digital finance in the EU in terms of innovation and competition, while mitigating associated potential risks.

The legislation would enable investment firms, market operators and central securities depositors to operate market infrastructures based on DLT, either as a DLT multilateral trading facility or a DLT securities settlement system. The ECB raises a number of general concerns, including in relation to monetary policy, oversight and systemic issues, financial stability and prudential supervision. Specific drafting proposals are set out in a separate technical working document, which can be found attached to the original version of the opinion.

[European Central Bank Opinion on a proposal for a regulation on a pilot regime for market infrastructures based on distributed ledger technology \(CON/2021/15\) \(2021/C 244/04\)](#)
[Original version of opinion with technical working document attached](#)

Options and discretions policies – ECB launches consultation on amendments

29 June 2021 – The ECB, as has published a consultation proposing updates and amendments to its harmonised policies for exercising options and discretions that it is permitted to exercise under EU law when supervising banks. The ECB has also published a Q&A on its consultation proposals.

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The current policy framework for the exercise of options and discretions is in the form of a Guide, a Regulation, a Recommendation and a Guideline. The proposed revisions are intended to provide transparency on supervisory activities and ensure the consistent application of standards of supervision for credit institutions within the Single Supervisory Mechanism.

The revisions mainly take account of legislative changes that have been adopted since the options and discretions policies were first published in 2016, including the Capital Requirements Directive V ((EU) 2019/878) (CRD V) and the Capital Requirements Regulation II ((EU) 2019/876) (CRR II). Both pieces of legislation introduced some new options and discretions and amended others. Other changes are based on the ECB's experience gained as a result of its supervision of banks since the policies were first adopted. The ECB explains that most of the proposed changes relate to the application of liquidity requirements.

In addition to the consultation paper, the ECB has published an explanatory memorandum on its review of its options and discretions policies, and a number of draft revised instruments for comment, including:

- a draft ECB Regulation amending the ECB Regulation on the exercise of options and discretions available in EU law ((EU) 2016/445);
- a draft ECB Recommendation amending ECB Recommendation ECB/2017/10 on common specifications for the exercise of some options and discretions available in EU law by national competent authorities in relation to less significant institutions; and
- a draft ECB Guideline amending ECB Guideline (EU) 2017/697 on the exercise of options and discretions available in EU law by NCAs relating to less significant institutions.

The instruments are intended to provide transparency as to how the ECB exercises options and discretions in its supervision of significant institutions, ensure the consistent application of high supervisory standards, and support consistency in the supervision of significant and less significant institutions.

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The consultation closes on 23 August 2021. Once responses has been assessed, revised versions of the Guide, Regulation, Guideline and Recommendation will be published on the ECB's website, together with the ECB's evaluation of comments and its response.

[Consultation: Draft revisions to the ECB Guide on options and discretions available in EU law Q&A](#)

[Explanatory memorandum on the review of the ECB's policies concerning the exercise of options and discretions available in EU law](#)

[Draft ECB Regulation amending Regulation \(EU\) 2016/445 on the exercise of options and discretions available in EU law](#)

[Draft ECB Recommendation amending ECB Recommendation ECB/2017/10 on common specifications for the exercise of some options and discretions available in EU law by national competent authorities in relation to less significant institutions](#)

[Draft ECB Guideline amending Guideline \(EU\) 2017/697 of the ECB on the exercise of options and discretions available in EU law by national competent authorities relating to less significant institutions](#)

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COVID-19 – ECB Decision extending exclusion of certain central bank exposures from leverage ratio published in OJ

30 June 2021 – Decision 2021/1074 of the ECB to extend the temporary exclusion of certain exposures to central banks from the total exposure measure in view of COVID-19 has been published in the Official Journal of the EU.

The Decision relates to Article 500b of the Capital Requirements Regulation (575/2013/EU) (CRR), which was introduced by Regulation (EU) 2020/873 (COVID-19 CRR Amending Regulation) and ceased to apply on 27 June 2021. It allows institutions to exclude exposures to their central bank from the total exposure measure where the institution's national competent authority (NCA) has determined there are exceptional macro-economic circumstances. The Article 500b provisions on the exclusion of central bank exposures are replicated in a new Article 429a, which was inserted by the CRR II Regulation ((EU) 2019/876), and have applied since 29 June 2021.

The ECB has decided to extend the effect of the exclusion, as it considers that exceptional macro-economic circumstances continue to apply in respect of the Eurozone.

[Decision \(EU\) 2021/1074 on the temporary exclusion of certain exposures to central banks from the total exposure measure in view of COVID-19 and repealing Decision \(EU\) 2020/1306 \(ECB/2021/27\)](#)

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NEWS FOR THE SINGLE SUPERVISORY MECHANISM (SSM)

SSM – ECB Regulation amending Regulation on reporting of supervisory financial information published in OJ

14 June 2021 – European Central Bank (ECB) Regulation (EU) 2021/943 (Amending Regulation) amending ECB Regulation (EU) 2015/534 on the reporting of supervisory financial information under the single supervisory mechanism (Financial Reporting Regulation) has been published in the Official Journal of the European Union (OJ).

The Amending Regulation amends the Financial Reporting Regulation to:

- reflect the repeal and replacement of Commission Implementing Regulation (EU) 680/2014 by Commission Implementing Regulation (EU) 2021/451, with effect from 28 June 2021; and
- update cross-references to refer to Commission Implementing Regulation (EU) 2021/451.

The ECB adopted the Amending Regulation on 14 May 2021. It enters into force on 19 June 2021 (the fifth day after publication in the OJ) and applies from 28 June 2021.

[Regulation \(EU\) 2021/943 amending Regulation \(EU\) 2015/534 on reporting of supervisory financial information \(ECB/2021/24\)](#)

SSM – ECB publishes consultation paper on revised guide for fit and proper questionnaire

15 June 2021 – The ECB has published a consultation paper on revisions to both its guide for fit and proper assessments and its fit and proper questionnaire for members of the management bodies of significant credit institutions under the single supervisory mechanism (SSM). The aim of the revisions is to “raise the bar, increase transparency and improve the quality and efficiency of fit and proper assessments and processes”.

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The revised guide for fit and proper assessments has two main objectives. The first is to explain in greater detail the existing policies applied by the ECB when assessing the suitability of members of the management bodies of significant banks. The second is to introduce and explain enhanced supervisory expectations regarding the collective suitability of boards, the individual accountability of board members and the new criteria that will be used to reassess them. This enhanced approach to fit and proper supervision marks another step in the ECB's efforts to promote diversity within the management bodies of European banks as a necessary condition for the sounder governance of credit institutions and, as a result, a safer financial system.

The fit and proper questionnaire has been updated to include new policies and practices that have developed since it was first introduced. The ECB explains that streamlining the necessary requests for information from the supervised entity and individual seeking approval increases efficiency and harmonisation across the SSM and enables better data quality and use of digitalisation and artificial intelligence.

The consultation closes on 2 August 2021. Questions for a public meeting on 25 July, which the ECB is holding for discussion of the proposed revisions, should be submitted by 5 July 2021.

[Webpage: Public consultation on draft Fit and Proper Guide and new Fit and Proper Questionnaire](#)

[Draft: Guide to fit and proper assessments](#)

[Draft: Updated fit and proper questionnaire – ECB template](#)

[Press release](#)

[Blog](#)

[Comments template](#)

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Systemic investment firms - ECB takes over supervision

25 June 2021 - The ECB has announced that it will supervise the largest and most systemic investment firms under new EU legislation, which applies as of 26 June 2021.

The new Investment Firms Regulation ((EU) 2019/2033) and Investment Firms Directive ((EU) 2019/2034) introduce a new framework for the supervision of investment firms. The largest and most systemic investment firms (referred to as Class 1 investment firms) must apply for a banking licence from the ECB and hence become subject to European banking supervision, under which significant banks will be directly supervised by the ECB. These firms were previously supervised by national market authorities. From 26 June 2021, investment firms will be subject to a new EU regulatory regime.

[Press release](#)

[European Central Bank Supervision Newsletter article](#)

[List of supervised banks](#)

[Investment Firms Regulation](#)

[Investment Firms Directive](#)

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NEWS FOR THE SINGLE RESOLUTION MECHANISM (SRM)

BRRD – SRB publishes guidance on notifications of impracticability of bail-in recognition clauses

21 June 2021 – The Single Resolution Board (SRB) has published a document setting out its approach and expectations on notifications of impracticability to include bail-in recognition clauses in contracts. Under Article 55(2) of the Bank Recovery and Resolution Directive (2014/59/EU) (BRRD), if a bank determines that it is impracticable to include a contractual recognition clause in a liability contract, it must make a notification to its resolution authority. The resolution authority then assesses the notification and may require the bank to include the clause. Article 55(7) requires resolution authorities to specify, if deemed necessary, categories of liabilities for which banks may reach the conclusion that it is impracticable to include the relevant bail-in recognition clauses.

In the guidance, the SRB sets out its expectations regarding these notifications and the conditions and categories for impracticability, as well as the process by which it may require banks to include such clauses following the receipt of the notification. The guidance is based on the European Banking Authority's final draft regulatory technical standards and implementing technical standards on Article 55 published in December 2020.

In particular, the SRB specifies four preliminary categories of liabilities for the purposes of Article 55(7):

- liabilities resulting from trade finance operations under internationally agreed frameworks and protocols;
- liabilities resulting from project finance activities under official standardised terms;
- liabilities to financial market infrastructure service providers, where the services are provided on standard terms not susceptible to bilateral negotiation; and
- minor operating liabilities, arising from non-critical business operations, where the terms of the contract are set by the provider and not bilaterally negotiated.

Further detail on each of these categories is set out in Annex I to the document.

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[Guidance: Notification of impracticability to include bail-in recognition clauses in contracts: SRB approach and expectations](#)

[Press release](#)

EU crisis management and deposit insurance framework – SRB publishes speech

23 June 2021 – The SRB has published a speech by SRB Director of Resolution Planning and Decisions, Mr Pedro Machado, on the challenges of resolving mid-sized banks. Among other things, Mr Machado discusses the European Commission’s ongoing review of the EU crisis management and deposit insurance framework (CMDI).

Mr Machado comments that proposals for the harmonisation of bank insolvency procedures will inevitably be fraught with political difficulty and resistance and suggests that an incremental approach may be a more pragmatic solution. However, the ultimate goal must be to put in place an EU liquidation regime alongside an EU resolution regime, potentially in a format akin to an EU version of the US Federal Deposit Insurance Corporation.

[Speech by SRB Director of Resolution Planning and Decisions, Pedro Machado: The challenges of resolving mid-sized banks](#)

Annual Report – SRB launches its 2020 Annual Report

30 June 2021 - The SRB has published its 2020 Annual Report describing the progress made this year in promoting financial stability while protecting the taxpayer through Europe’s banking resolution framework.

Among other things, the Annual Report details the progress made in strengthening the resolution of banks and the reinforcement of the resolvability of SRB entities and less significant institutions (LSIs), as well as the progress made in effective crisis management.

[Press release](#)

[SRB Annual Report 2020](#)

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If you would like to discuss any of the developments in this update, or any other financial regulatory matter, please contact one of the following or your usual EFIG contact.

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Stefano Micheli
stefano.micheli
@belex.com



HENGELER MUELLER

Dirk Bliesener
dirk.bliesener
@hengeler.com



BONELLIEREDE

Giuseppe Rumi
giuseppe.rumi
@belex.com



HENGELER MUELLER

Christian Schmies
christian.schmies
@hengeler.com



BREDIN PRAT

Didier Martin
didiermartin
@bredinprat.com



SLAUGHTER AND MAY

Jan Putnis
jan.putnis
@slaughterandmay.com



BREDIN PRAT

Matthieu Pouchepadass
matthieupouchepadass
@bredinprat.com



SLAUGHTER AND MAY

Ben Kingsley
ben.kingsley
@slaughterandmay.com



DE BRAUW

Mariken van Loopik
mariken.vanloopik
@debrauw.com



URÍA MENÉNDEZ

Pedro Ravina
pedro.ravina
@uria.com



DE BRAUW

Pete Lawley
pete.lawley
@debrauw.com



URÍA MENÉNDEZ

Carlos Costa Andrade
carlos.andrade
@uria.com

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