
QUICK LINKS

[EUROPEAN CENTRAL
BANK \(ECB\)](#)

[SINGLE SUPERVISORY
MECHANISM \(SSM\)](#)

[SINGLE RESOLUTION
MECHANISM \(SRM\)](#)

[EFIG GROUP](#)

EUROPEAN CENTRAL BANK (ECB)

UCITS and AIFM Directives – ECB publishes opinion on proposed amendments

10 August 2022 - The European Central Bank (ECB) has published an opinion (CON/2022/26) (dated 9 August 2022) on the proposed Directive amending the Alternative Investment Fund Managers (AIFMs) Directive (2011/61/EU) (AIFMD) and the Directive relating to undertakings for collective investment in transferable securities (UCITS) (2009/65/EC) (the UCITS Directive), regarding delegation arrangements, liquidity risk management, supervisory reporting, provision of depository and custody services, and loan origination, by alternative investment funds (AIFs). The European Commission (the Commission) adopted the legislative proposals for the Directive in November 2021.

Although the ECB welcomes the Commission's proposals, it highlights a number of issues for consideration, including in relation to:

- **liquidity management and macroprudential tools:** the ECB notes that the proposed Directive should aim to limit the liquidity mismatch between the assets and liabilities of AIFs by means of measures that specifically target either assets or liabilities. The ECB also suggests how the ability of certain AIFs to withstand liquidity risks could be strengthened
- **reporting:** the ECB supports the development of integrated supervisory data collection, but stresses that the integration of the underlying reporting infrastructure must not interfere with or otherwise prejudice the ECB's competence to adopt statistical regulations for its own purposes; and
- **European System of Central Banks (ESCB) access to detailed data in the AIF sector:** the proposed Directive should require ESMA, which currently receives individual AIF data from NCAs, to make the data available to the ECB and other relevant ESCB central banks.

The ECB has set out specific drafting in proposals in a technical working document accompanied by explanatory tools.

Opinion of the European Central Bank of 9 August 2022 on a proposal for a directive as regards delegation arrangements, liquidity risk management, supervisory reporting, provision of depository and custody services and loan origination by alternative investment funds

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[SINGLE SUPERVISORY
MECHANISM \(SSM\)](#)

[SINGLE RESOLUTION
MECHANISM \(SRM\)](#)

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SINGLE SUPERVISORY MECHANISM (SSM)

Supervisory sanctions – ECB imposes sanctions totalling €4.765 million on Crédit Agricole S.A. and two subsidiaries

23 August 2022 - The ECB had already sanctioned Crédit Agricole S.A. and two of its subsidiaries Crédit Agricole Corporate Investment Bank (CACIB) and Crédit Agricole Consumer Finance (CACF) in 2018 for having classified capital instruments as CET 1 without prior ECB permission, but the banks challenged the decisions before the EU Court of Justice. The EU Court of Justice confirmed the bank's liability for the breaches but annulled the pecuniary penalties due to an insufficient statement of reasons concerning the determination of the amount of the penalty ([Case T-576/18](#)).

The ECB has now provided a supplemental statement of reasons taking into account its 'Guide to the method of setting administrative pecuniary penalties' and imposed a penalty which corresponds to the pecuniary penalty imposed in the initial ECB decision. The ECB has classified the degree of misconduct as 'high', taking into account the fact that the entity continued to classify the capital instruments as CET1 instruments even after it had applied for permission and despite an explicit warning by the ECB. The ECB classified the impact of the breach as 'low', resulting in an overall qualification as: (i) 'moderately severe' for the parent bank Crédit Agricole S.A.; and (ii) 'low' for the two subsidiaries, CACIB and CACF.

[Press release](#)

[Decision](#)

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MECHANISM \(SRM\)](#)

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SINGLE RESOLUTION MECHANISM (SRM)

Algebris (UK) Ltd and another v Single Supervisory Board (Case T 570/17) [2022]

1 June 2022 – Resolution tools – Single Resolution Mechanism – Charter of Fundamental Human Rights

The European General Court has dismissed an action seeking an annulment of a decision by the European Commission (the Commission) endorsing the resolution scheme for Banco Popular Español SA under the Single Resolution Mechanism (SRM) Regulation (806/2014). The applicants were investment fund managers that hold Additional Tier 1 capital instruments and Tier 2 capital instruments issued by Banco Popular before the resolution. Among other things, the applicants argued that certain actions of the Commission and the Single Resolution Board were in breach of principles established by the Charter of Fundamental Rights of the EU (the Charter). In particular, the applicants claimed that the resolution process for Banco Popular had breached their right to property under Article 17(1) of the Charter, as the resolution scheme involved the write-down of capital instruments, and their right to be heard under Article 41(2)(a) of the Charter, as the decision had been made without their having the opportunity to make representations.

The Court held that the resolution process pursued an objective of general interest under Article 52(1) through the pursuit of ensuring the stability of the financial markets and consequently was capable of justifying a limitation on these rights. Consequently, it issued a judgment dismissing the applicants' action in seeking to annul the Commission's decision to endorse a resolution scheme.

Judgment

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Our European Financial Institutions Group, consisting of ‘Best Friends’ BonelliErede, Bredin Prat, De Brauw Blackstone Westbroek, Hengeler Mueller, Slaughter and May and Uría Menéndez, brings together market-leading lawyers with corporate and financing experience and financial regulatory skills.

We have unrivalled coverage of regulatory developments in the EU, which enables us to provide pure regulatory advice on the interpretation and application of EU directives and regulations. We also have strong connections with the best financial institutions lawyers in the United States, Asia and South America.

Our many years of experience of advising a diverse range of major financial institutions allows us to offer the most incisive advice available.

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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AUGUST 2022

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