

GUIDELINE (EU) 2016/1994 OF THE EUROPEAN CENTRAL BANK**of 4 November 2016****on the approach for the recognition of institutional protection schemes for prudential purposes by national competent authorities pursuant to Regulation (EU) No 575/2013 of the European Parliament and of the Council (ECB/2016/38)**

THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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 ⁽¹⁾, and in particular Article 6(1) and Article 6(5)(a) thereof,

Having regard to Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 ⁽²⁾, and in particular Article 113(7) thereof,

Whereas:

- (1) An institutional protection scheme (IPS) is referred to in Article 113(7) of Regulation (EU) No 575/2013 as a contractual or statutory liability arrangement which protects its member institutions and ensures that they have the liquidity and solvency needed to avoid bankruptcy where necessary. According to that provision, competent authorities may, subject to certain conditions laid down in Regulation (EU) No 575/2013, waive selected prudential requirements or allow certain exemptions for IPS members.
- (2) The European Central Bank (ECB), as the competent authority for prudential supervision within the single supervisory mechanism (SSM) of credit institutions that are classified as significant, is responsible for the assessment of applications submitted by such institutions.
- (3) The conditions for the assessment of IPSs for prudential purposes are stipulated in Article 113(7) of Regulation (EU) No 575/2013. This Regulation gives some discretion to competent authorities when developing the supervisory assessment required to determine if the conditions are met. To ensure coherence, effectiveness and transparency, the ECB added a new chapter to the 'ECB Guide on options and discretions available in Union law' concerning the approach for the recognition of institutional protection schemes (IPS) for prudential purposes ⁽³⁾, which specifies how the ECB will assess the compliance of IPSs and their members with the abovementioned conditions.
- (4) The ECB is responsible for the effective and consistent functioning of the SSM and, as part of its oversight tasks, has to ensure the consistency of supervisory outcomes. In this context, the ECB adopts guidelines addressed to national competent authorities (NCAs), in accordance with which supervisory tasks are to be performed and supervisory decisions adopted in relation to less significant institutions.
- (5) As IPSs may consist of both significant and less significant institutions, it is important to ensure the consistent treatment of their members across the SSM, to foster consistency in decisions adopted by the ECB and the NCAs. For IPSs whose members include both significant and less significant credit institutions, it is particularly important that both the ECB, which is responsible for the prudential supervision of significant institutions, and the NCAs, which are responsible for the supervision of less significant institutions, use the same specifications for the eligibility assessment. The use of the same specifications by NCAs is also warranted in the assessment of IPSs consisting solely of less significant institutions, since the composition of the IPSs, as well as the classification of their members as significant or less significant, may change over time,

⁽¹⁾ OJ L 287, 29.10.2013, p. 63.

⁽²⁾ OJ L 176, 27.6.2013, p. 1.

⁽³⁾ This chapter of the Guide was adopted in July 2016. The consolidated version of the 'ECB Guide on options and discretions available in Union law' is available on the ECB's banking supervision website at www.bankingsupervision.europa.eu

HAS ADOPTED THIS GUIDELINE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Scope

This Guideline lays down the specifications for assessing the compliance of IPSs and their members with the requirements laid down in Article 113(7) of Regulation (EU) No 575/2013 in order to determine whether permission within the meaning of that Article can be granted to individual institutions. NCAs shall apply the specifications in relation to less significant institutions.

Article 2

Definitions

For the purposes of this Guideline, the definitions contained in Regulation (EU) No 575/2013, Directive 2013/36/EU of the European Parliament and of the Council ⁽¹⁾, Regulation (EU) No 1024/2013 and Regulation (EU) No 468/2014 of the European Central Bank (ECB/2014/17) ⁽²⁾ shall apply.

CHAPTER II

SPECIFICATIONS FOR THE ASSESSMENT PURSUANT TO ARTICLE 113(7) OF REGULATION (EU) No 575/2013

Article 3

Article 113(7)(a) in conjunction with Article 113(6)(a) and (d) of Regulation (EU) No 575/2013: assessment of prudential status and legal domicile

In accordance with Article 113(7)(a) in conjunction with Article 113(6)(a) and (d) of Regulation (EU) No 575/2013, when assessing the prudential status and legal domicile of the counterparty the NCAs shall take into account whether:

- (a) the counterparty is an institution, financial institution or ancillary services undertaking subject to appropriate prudential requirements;
- (b) the counterparty requesting the permission is established in the same Member State.

Article 4

Article 113(7)(a) taken in conjunction with Article 113(6)(e) of Regulation (EU) No 575/2013: prompt transfer of own funds or repayment of liabilities from the counterparty to the members

When assessing whether there is a current or foreseeable material, practical or legal impediment to the prompt transfer of own funds or repayment of liabilities from the counterparty to the members under Article 113(7)(a) in conjunction with Article 113(6)(e) of Regulation (EU) No 575/2013, the NCAs shall take into account whether:

- (a) the shareholding or legal structure of the members could hamper the transferability of own funds or repayment of liabilities;
- (b) the formal decision-making process regarding the transfer of own funds between members ensures prompt transfers;
- (c) the by-laws of the members, any shareholder's agreement, or any other known agreements contain any provisions that could obstruct the transfer of own funds or repayment of liabilities by the counterparty;

⁽¹⁾ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

⁽²⁾ Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17) (OJ L 141, 14.5.2014, p. 1).

- (d) there have been any serious management difficulties or corporate governance issues related to the members, which could have a negative impact on the prompt transfer of own funds or the repayment of liabilities;
- (e) any third parties ⁽¹⁾ are able to exercise control over or prevent the prompt transfer of own funds or repayment of liabilities;
- (f) there are any indications from the past regarding flows of funds between members which demonstrate the ability to promptly transfer funds or repay liabilities.

The crisis management intermediation role and responsibility of the IPS to provide funds to support troubled members is considered key.

Article 5

Article 113(7)(b) of Regulation (EU) No 575/2013: an IPS's ability to grant the support necessary under its commitment

When assessing whether arrangements are in place which ensure that an IPS is able to grant the support it has committed to provide from funds readily available to it under Article 113(7)(b) of Regulation (EU) No 575/2013, the NCAs shall take into account whether:

- (a) the arrangements include a broad range of measures, processes and mechanisms, making up the framework under which the IPS operates. This framework should comprise a series of possible actions, ranging from less intrusive to more substantial measures that are proportionate to the riskiness of the beneficiary institution and the severity of its financial constraints, including direct capital and liquidity support. The support may be conditional, for example on the implementation of certain recovery and restructuring measures by the institution;
- (b) the IPS's governance structure and the process for making decisions on support measures allow support to be provided in a timely manner;
- (c) a clear commitment exists to provide support when, despite previous monitoring of risks and early intervention measures, a member is or is likely to become insolvent or illiquid and to ensure that its members abide by the relevant regulatory own funds and liquidity requirements;
- (d) the IPS conducts stress tests at regular intervals to quantify potential capital and liquidity support measures;
- (e) the IPS's risk-absorbing capacity (consisting of paid-up funds, potential *ex post* contributions and comparable commitments) is sufficient to cover potential support measures taken in respect of its members;
- (f) an *ex ante* fund has been created to ensure that the IPS has funds for support measures readily available, and
 - (i) contributions to that fund follow a clearly defined framework;
 - (ii) the funds are invested only in liquid and secure assets that may be liquidated at any time and whose value does not depend on the solvency and liquidity position of the members and their subsidiaries;
 - (iii) the IPS's stress test results are considered for the determination of the minimum target amount of the *ex ante* fund;
 - (iv) there is an adequate floor/minimum amount for the *ex ante* fund to ensure the prompt availability of the funds.

IPSs may be recognised as deposit guarantee schemes pursuant to Directive 2014/49/EU of the European Parliament and of the Council ⁽²⁾ and may be allowed under the conditions set out in the relevant national law to use the available financial means for alternative measures to prevent the failure of a credit institution. In this case the NCAs shall consider the available financial means when assessing the availability of funds to grant support, taking into account the different purposes of IPSs, which aim to protect their members, and deposit guarantee schemes, whose key task is to protect depositors against the consequences of the insolvency of a credit institution.

⁽¹⁾ A third party is any party that is not the parent, a subsidiary, a member of a decision-making body or a shareholder of a member.

⁽²⁾ 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).

*Article 6***Article 113(7)(c) of Regulation (EU) No 575/2013: IPS systems for the monitoring and classification of risk**

Article 113(7)(c) of Regulation (EU) No 575/2013 provides that an IPS must have at its disposal suitable and uniformly stipulated systems for the monitoring and classification of risk, which give a complete overview of the risk situations of all the individual members and the IPS as a whole, with corresponding possibilities to intervene; and that those systems must suitably monitor defaulted exposures in accordance with Article 178(1) of the same Regulation. In assessing compliance with this condition the NCAs shall take into account whether:

- (a) the IPS members are obliged to provide the IPS's main management body with up-to-date data on their risk situations at regular intervals, including information on their own funds and own funds requirements;
- (b) corresponding appropriate data flows and IT systems are in place;
- (c) the IPS main management body lays down uniform standards and methodologies for the risk management framework to be applied by the members;
- (d) for the purposes of the monitoring and classification of risk by the IPS there is a common definition of risks, the same risk categories are monitored for all members, and the same confidence level and time horizon is used for the quantification of risks;
- (e) the IPS systems for the monitoring and classification of risks classify the members in accordance with their risk situation, i.e. the IPS has defined different categories to which to assign its members to allow early intervention;
- (f) the IPS is able to influence the risk situation of its members by issuing instructions and recommendations, etc., to them, for example to restrict certain activities or to require a reduction of certain risks.

*Article 7***Article 113(7)(d) of Regulation (EU) No 575/2013: IPS own risk review**

When assessing whether the IPS conducts its own risk review, which is communicated to the individual members in accordance with Article 113(7)(d) of Regulation (EU) No 575/2013, the NCAs shall take into account whether:

- (a) the IPS assesses at regular intervals the risks and vulnerabilities of the sector to which its members belong;
- (b) the results of the risk review are summarised in a report or other document and are distributed to the relevant decision-making bodies of the IPS and/or the members shortly after they have been finalised;
- (c) members are informed of their risk classification by the IPS as required by Article 113(7)(c).

*Article 8***Article 113(7)(e) of the Regulation (EU) No 575/2013: IPS consolidated or aggregated report**

Article 113(7)(e) of Regulation (EU) No 575/2013 provides that the IPS must draw up and publish on an annual basis a consolidated report comprising the balance sheet, the profit and loss account, the situation report and the risk report, concerning the institutional protection scheme as a whole, or a report comprising the aggregated balance sheet, the aggregated profit and loss account, the situation report and the risk report, concerning the institutional protection scheme as a whole. When assessing compliance with this condition the NCAs shall take into account whether:

- (a) the consolidated or aggregated report is audited by an independent external auditor on the basis of the relevant accounting framework or, if applicable, the aggregation method;
- (b) the external auditor is required to provide an audit opinion;

- (c) all of the IPS members and any subsidiaries, any intermediary structures such as holding companies and the entity managing the IPS itself (if it is a legal entity) are included in the scope of consolidation/aggregation;
- (d) in cases where the IPS draws up a report comprising an aggregated balance sheet and an aggregated profit and loss account, the aggregation method can ensure that all intragroup exposures are eliminated.

Article 9

Article 113(7)(f) of Regulation (EU) No 575/2013: advance notice of member termination

The NCAs shall verify whether the contract or statutory arrangements include a provision obliging members of the IPS to give advance notice of at least 24 months if they wish to end the scheme.

Article 10

Article 113(7)(g) of Regulation (EU) No 575/2013: elimination of multiple use of elements eligible for the calculation of own funds

Article 113(7)(g) of Regulation (EU) No 575/2013 provides that the multiple use of elements eligible for the calculation of own funds ('multiple gearing') and any inappropriate creation of own funds between IPS members must be eliminated. For the purposes of assessing compliance with this requirement the NCAs shall take into account whether:

- (a) the external auditor who is responsible for the audit of the consolidated or aggregated financial report can confirm that these practices have been eliminated;
- (b) any transactions by the members have led to the inappropriate creation of own funds at the individual, sub-consolidated or consolidated level.

Article 11

Article 113(7)(h) of Regulation (EU) No 575/2013: broad membership

When assessing compliance with the condition laid down in Article 113(7)(h) of the Regulation (EU) No 575/2013, namely that the IPS must be based on a broad membership of credit institutions of a predominantly homogeneous business profile, the NCAs shall take into account:

- (a) whether the IPS has sufficient members (among the institutions that are potentially eligible for membership) to cover any support measures it may have to implement;
- (b) the members' business models, business strategies, sizes, customers, regional focus, products, funding structures, material risk categories, sales cooperation and service agreements with other IPS members, etc.;
- (c) whether the various business profiles of the members allow the monitoring and classification of their risk situations using the uniformly stipulated systems that the IPS has in place pursuant to Article 113(7)(c) of Regulation (EU) No 575/2013;
- (d) that IPS sectors are often based on collaboration, meaning that central institutions and other specialised institutions in the IPS network offer products and services to other IPS members. When assessing the homogeneity of business profiles the NCA should consider the extent to which the members' business activities are related to the network (products and services provided to local banks, services to shared customers, capital market activities, etc.).

CHAPTER III

FINAL PROVISIONS

*Article 12***Taking effect and implementation**

1. This Guideline shall take effect on the day of its notification to the NCAs.
2. The NCAs shall comply with this Guideline from 2 December 2016.

*Article 13***Addressees**

This Guideline is addressed to the NCAs.

Done at Frankfurt am Main, 4 November 2016.

For the Governing Council of the ECB
The President of the ECB
Mario DRAGHI
