



Council of the
European Union

Brussels, 9 October 2017
(OR. en)

12991/17

Interinstitutional File:
2017/0136 (COD)

EF 231
ECOFIN 800
SURE 40
CODEC 1540

COVER NOTE

From: Mr Mario DRAGHI, President of the European Central Bank
date of receipt: 5 October 2017
To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of
the European Union

Subject: Opinion of the European Central Bank on Proposal for a REGULATION OF
THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending
Regulation (EU) No 1095/2010 establishing a European Supervisory
Authority (European Securities and Markets Authority) and amending
Regulation (EU) No 648/2012 as regards the procedures and authorities
involved for the authorisation of CCPs and requirements for the recognition
of third-country CCPs

Delegations will find attached the above-mentioned Opinion.

OPINION OF THE EUROPEAN CENTRAL BANK

of 4 October 2017

on a proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) No 1095/2010 and Regulation (EU) No 648/2012 with regard to the procedures and authorities involved for the authorisation of central counterparties and the recognition of third country central counterparties (CON/2017/39)

Introduction and legal basis

On 22 August 2017 and 15 September 2017 respectively, the European Central Bank (ECB) received requests from the Council of the European Union and the European Parliament for an opinion on a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority) and amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of central counterparties (CCPs) and requirements for the recognition of third-country CCPs¹ (hereinafter the 'proposed regulation').

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 regulation contains provisions affecting: (1) the basic tasks of the European System of Central Banks (ESCB) to define and implement monetary policy and to promote the smooth operation of payment systems pursuant to the first and fourth indents of Article 127(2) of the Treaty; (2) the ESCB's task to contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system pursuant to Article 127(5) of the Treaty; and (3) the tasks conferred upon the ECB concerning the prudential supervision of credit institutions pursuant to Articles 127(6) of the Treaty, within the limits of Article 1 of Council Regulation (EU) No 1024/2013². 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

The ECB strongly supports the initiative set out in the Commission's proposal to enhance the role of the relevant members of the ESCB, as central banks of issue of the currencies of financial instruments cleared by CCPs, in the process for the supervision of Union CCPs and the recognition of third country CCPs. The ECB strongly welcomes and supports the proposal that the Eurosystem, as the central bank

¹ COM(2017)331 final.

² 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).

of issue of the euro, should play a more meaningful role with respect to Union and third country CCPs. This is justified due to the risks that could potentially be posed by the malfunctioning of a CCP, or by certain actions taken by a CCP in the area of risk management, to the performance of the basic tasks to be carried out through the Eurosystem, in particular the definition and implementation of the monetary policy of the Union and the promotion of the smooth operation of payment systems. These risks could ultimately impact upon the pursuit of the Eurosystem's primary objective of maintaining price stability pursuant to Article 127(1) of the Treaty.

Disturbances affecting CCPs can have an impact on the Eurosystem's primary objective through several channels. For example, such disturbances can affect the liquidity position of euro area credit institutions, potentially disrupting the smooth functioning of euro area payment systems. This could lead to increased demand for central bank liquidity and possible challenges in implementing the Eurosystem's single monetary policy. In addition, such disturbances can impair the functioning of financial market segments that are key to the transmission of monetary policy, including euro-denominated markets for securities financing transactions and interest rate derivatives contracts.

Significant developments at both global and European level are expected to increase the risks posed by CCPs to the smooth operation of payment systems and implementation of the single monetary policy. First, central clearing has become increasingly cross-border in nature and systemically important. For this reason, the Commission has already brought forward its proposal for a regulation of the European Parliament and of the Council on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, and (EU) 2015/2365³. Second, the withdrawal of the United Kingdom (UK) from the Union will have a major impact on the Eurosystem's ability to carry out its tasks as central bank of issue for the euro. At present, certain CCPs established in the UK clear significant volumes of euro-denominated transactions. Thus, a significant disturbance affecting a major UK CCP could have severe consequences for the stability of the euro. The Eurosystem's ability to monitor and manage the risks posed by UK CCPs will be adversely affected if UK CCPs are no longer subject to the regulatory and supervisory framework for Union CCPs under Regulation (EU) No 648/2012 of the European Parliament and of the Council⁴.

The proposed regulation envisages an enhanced role for the Eurosystem as central bank of issue for the euro in the framework under Regulation (EU) No 648/2012. In order to ensure that the Eurosystem can carry out this role, it is of utmost importance that it has the relevant powers under the Treaty and the Statute of the European System of Central Banks and of the European Central Bank (the 'Statute of the ESCB'). For this reason, the ECB should be granted regulatory competence over clearing systems for financial instruments, in particular CCPs, by means of an amendment to Article 22 of the Statute of the ESCB. The conferral of regulatory powers on the ECB is without prejudice to Article 12.1 of the Statute of the ESCB, which states that 'to the extent deemed possible and appropriate and without prejudice to the provisions of this Article, the ECB shall have recourse to the national central banks (NCBs) to carry out operations which form part of the tasks of the ESCB'. This includes the tasks of the Eurosystem, as the

³ COM(2016) 856 final.

⁴ Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1).

central bank of issue of the euro. Therefore, the ECB adopted Recommendation ECB/2017/18 of the European Central Bank⁵ on 22 June 2017.

Where the ECB recommends that the proposed regulation is 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 the ECB's website.

Specific observations

1. Voting arrangements in supervisory colleges

1.1 As the ECB has noted previously with regard to colleges, where the Eurosystem central banks, which together form the 'central bank of issue' for the euro, are represented in the college by the ECB or an NCB, and the prudential supervision of credit institutions that are significant CCP clearing members is performed by the ECB, separate votes should be attached to these two functions. On the same occasion, the ECB also stressed that these two functions are distinct, as is reflected in the legal and operational separation between the ECB's monetary policy and prudential supervisory roles⁶. Thus, the ECB strongly welcomes the fact that the proposed regulation addresses this issue, ensuring that separate votes are attached to these two functions.

1.2 The ECB therefore welcomes the provisions of the proposed regulation amending the relevant provisions of Regulation (EU) No 648/2012. First, Article 18(2) of Regulation (EU) No 648/2012 is amended to set out that the college will, among others, comprise (a) the permanent members of the CCP Executive Session; (b) the competent authorities responsible for the supervision of the clearing members of the CCP which are established in the three Member States with the largest contributions to the default fund of the CCP, including, where relevant, the ECB in accordance with Council Regulation (EU) No 1024/2013⁷; and (c) the central banks of issue of the most relevant Union currencies of the financial instruments cleared. Second, Article 19(3) of Regulation (EU) No 648/2012 is amended to specify that where the ECB is a member of the college pursuant to the various points of Article 18(2), it shall have a maximum of two votes in colleges up to and including 12 members; and a maximum of three votes for colleges with more than 12 members⁸.

2. The requirement to obtain the consent of the central bank of issue regarding certain draft decisions

2.1 The proposed regulation requires that the competent authorities must submit draft decisions regarding Union CCPs to the relevant central banks of issue before adopting any decision regarding the granting and withdrawal of authorisation, extension of services, and prudential

⁵ Recommendation ECB/2017/18 of 22 June 2017 for a Decision of the European Parliament and of the Council amending Article 22 of the Statute of the European System of Central Banks and of the European Central Bank (OJ C 212, 1.7.2017, p. 14).

⁶ See paragraph 2.1.2 of Opinion CON/2017/38 of the European Central Bank of 20 September 2017 on a proposal for a regulation of the European Parliament and of the Council on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, and (EU) 2015/2365, not yet published in the Official Journal. All ECB opinions are published on the ECB's website at www.ecb.europa.eu. See also the ECB response to the Commission consultation on the review of the European Market Infrastructure Regulation (EMIR) dated 2 September 2015, available on the ECB's website at www.ecb.europa.eu.

⁷ See Article 2(3) of the proposed regulation.

⁸ See Article 2(4) of the proposed regulation.

requirements for liquidity risk controls, collateral requirements, settlement, and approval of interoperability arrangements⁹. Competent authorities must obtain the consent of the central bank of issue in respect of any aspect of those decisions relating to the carrying out of their monetary policy tasks. Where the central bank of issue proposes amendments, the competent authority may only adopt the decision as amended; and where the central bank of issue objects to a draft decision, the competent authority shall not adopt that decision. Likewise, the proposed regulation requires that with regard to recognised Tier 2 third country CCPs, the European Securities and Markets Authority (ESMA) must submit draft decisions to the central bank of issue before adopting any decisions regarding liquidity risk controls, collateral requirements, settlement, approval of interoperability arrangements, as well as margin requirements¹⁰. ESMA must likewise obtain the consent of the central bank of issue in respect of any aspect of those decisions relating to the carrying out of their monetary policy tasks. Where the central bank of issue proposes amendments, ESMA may only adopt the decision as amended; and where the central bank of issue objects to a draft decision, ESMA shall not adopt that decision. The ECB strongly welcomes the role envisaged for the central banks of issue under the proposed regulation, which will enable the members of the ESCB to have meaningful and effective involvement in decision-making on matters of direct relevance to the fulfilment of the basic tasks of the ESCB under the Treaties, and the achievement of its primary objective of maintaining price stability. The ECB has a number of comments in this regard.

- 2.2 First, where the proposed regulation clarifies that the consent of the central bank of issue must be obtained 'in respect of any aspect of those decisions relating to the carrying out of their monetary policy tasks', it should be emphasised that this phrase is intended to clarify the monetary policy context in which the central bank of issue carries out its role and the purpose the role fulfils. The same is true with regard to the reference to the compliance of third country Tier 2 CCPs with any requirements of the central bank of issue 'in the carrying out of their monetary policy tasks'¹¹. This phrase should be read in conjunction with recital 7 of the proposed regulation. It should be emphasised that this phrase is not intended to grant discretion to the competent authorities or to ESMA to determine whether or not the consent of the central bank of issue should be sought on particular draft decisions, nor is it intended to grant discretion as to whether proposed amendments or objections to the draft decision by the central bank of issue are followed. In this respect, it should be noted that the Eurosystem enjoys broad discretion to define and implement monetary policy. This has been recognised by the Court of Justice of the European Union¹² and is imperative to ensure the independence of the ECB and NCBs, in accordance with Article 130 of the Treaty. In the interests of clarity and legal certainty, a new recital should be added to the proposed regulation to reflect this point.

⁹ Article 2(7) of the proposed regulation adds a new Article 21 a(2).

¹⁰ Article 2(10) of the proposed regulation adds a new Article 25b(2).

¹¹ Article 2(9) of the proposed regulation introduces a new Article 25(2b)(b).

¹² Paragraph 68 of *Gauweiler and others*, C-62/14, ECLI:EU:C:2015:400; and paragraph 68 of *Accorinti and Others v ECB*, T-79/13, ECLI:EU:T:2015:756.

2.3 Second, with regard to which draft decisions should be subject to the consent of the central bank of issue, the ECB considers that the proposed regulation should ensure the involvement of the central bank of issue regarding certain further key aspects of CCP risk management. First, the ECB considers that in relation to both Union and third country CCPs, the consent of the central bank of issue should also be required regarding draft decisions taken in respect of the CCP's margin requirements (Article 41). This is important for the central bank of issue because of the crucial links between liquidity risk management, which is at the core of the central bank of issue's focus, and the margin processes applied by a CCP. For example, the arrangements regarding intra-day margin collection have a significant effect on the CCP's ability to obtain resources to meet its liquidity needs when they fall due. Margin processes and procedures, including rules regarding the adjustment of margin levels in times of market stress, can also have significant implications in terms of procyclicality: if improperly managed, they can create serious liquidity pressure on clearing members, potentially impairing the central bank of issue's ability to implement its monetary policy objectives.

Moreover, the proposed regulation should provide that the consent of the central bank of issue is required for decisions regarding the review of models, stress testing and back testing for the validation of the models and parameters adopted by the CCP to calculate its margin requirements, default fund contributions, collateral requirements and other risk control measures under Article 49 of Regulation (EU) No 648/2012. This is important for the central bank of issue, because decisions under Article 49 may have direct consequences for the CCP's compliance with the procedural and substantive requirements under Regulation (EU) No 648/2012 in relation to which the central bank of issue must otherwise give its consent. For example, a change to the CCP's methodology for stress testing the adequacy of its collateral requirements would have a direct impact on the CCP's observance of the obligations in relation to collateral under Article 46.

In the separate technical working document accompanying this opinion, the ECB sets out specific drafting proposals regarding the types of decisions on which the consent of the central bank of issue should be required.

2.4 Third, the ECB notes that the competent authorities have a certain margin of appreciation as to whether changes proposed by a CCP should be subject to decisions under Article 15 of Regulation (EU) No 648/2012, with regard to the extension of activities and services not covered by the initial authorisation, or in respect of decisions under Article 49 with regard to the review of models, stress testing and back testing. If the competent authority considers that the changes proposed by CCPs do not comprise the extension of business to 'additional services or activities' or are not 'significant changes' to the models and parameters, such changes are not subject to decisions under Articles 15 and 49 respectively. In order to build a common Union supervisory culture and ensure consistent supervisory practices, ESMA recently published an opinion¹³ on the common indicators for additional products and services under Article 15 and for significant changes under Article 49. The ECB takes the view that observance of the criteria set out in the ESMA opinion will be

¹³ ESMA Opinion of 15 November 2016 on common indicators for new products and services under Article 15 and for significant changes under Article 49 of EMIR (ESMA/2016/1574), available on ESMA's website at www.esma.europa.eu.

essential in order to ensure the consent of the relevant central banks of issue is sought in all cases where such consent is required. Thus, the ECB proposes that the guidance provided by ESMA regarding the interpretation of these articles should be made binding. To this end, ESMA should develop it as draft regulatory technical standards, which the Commission should then adopt in the form of a delegated act. For this purpose, the ECB sets out specific drafting proposals in the separate technical working document accompanying this opinion.

3. Review and evaluation

- 3.1 The proposed regulation amends Article 21 of Regulation (EU) No 648/2012, to provide that the competent authorities, in cooperation with ESMA, shall review the arrangements, strategies, processes and mechanisms implemented by CCPs to comply with Regulation (EU) No 648/2012, and evaluate the risks to which CCPs are, or might be, exposed. The amended Article 21 also provides that the CCPs shall be subject to on-site inspections in which ESMA staff shall be invited to participate. In addition, the competent authority is obliged to forward to ESMA any information received from the CCPs and to request from the relevant CCP any information sought by ESMA that it cannot provide.
- 3.2 The review and evaluation process, as amended by the proposed regulation, will serve the key purpose of ensuring that CCPs comply with Regulation (EU) No 648/2012 on an ongoing basis. The ECB considers that the consultation of the central bank of issue in the review and evaluation process, where deemed necessary by the competent authority to ensure that the central bank of issue can fulfil its role under the proposed regulation, would be an important corollary to the requirements under Article 21 a(2). The ability to contribute to the review carried out by competent authorities, in cooperation with ESMA, would enable the central bank of issue to ensure CCPs are not generating risks for the fulfilment of the basic tasks of the Eurosystem under the Treaties, and the achievement of its primary objective of maintaining price stability.
- 3.3 In the separate technical working document accompanying this opinion, the ECB sets out specific drafting proposals regarding the consultation of the central bank of issue in the review and evaluation process under Article 21.

4. The ECB's advisory role regarding draft delegated and implementing acts

- 4.1 It is worth recalling that Commission draft delegated and implementing acts qualify as 'proposed Union acts' within the meaning of Articles 127(4) and 282(5) of the Treaty. Both delegated and implementing acts constitute Union legal acts. The ECB should be consulted in due time on any draft Union acts, including draft delegated and implementing acts, falling within its fields of competence. The obligation to consult the ECB was clarified by the European Court of Justice in *Commission v ECB*¹⁴, with reference to the ECB's functions and expertise. In light of the fact that

¹⁴ *Commission v ECB*, C-11/00, ECLI:EU:C:2003:395, in particular paragraphs 110 and 111. In paragraph 110, the Court of Justice clarified that the obligation to consult the ECB is intended 'essentially to ensure that the legislature adopts the act only when the body has been heard, which, by virtue of the specific functions that it exercises in the Community framework in the area concerned and by virtue of the high degree of expertise that it enjoys, is particularly well placed to play a useful role in the legislative process envisaged'.

safe and efficient financial market infrastructures, in particular clearing systems for financial instruments, are essential for the fulfilment of the basic tasks of the ESCB under Article 127(2) of the Treaty, and the pursuit of its primary objective of maintaining price stability under Article 127(1) of the Treaty, the ECB should be duly consulted on delegated and implementing acts adopted under Regulation (EU) No 648/2012. While the obligation to consult the ECB derives directly from the Treaty, in order to ensure clarity, this requirement should also be reflected in a recital of the proposed regulation. Having regard to the importance of delegated and implementing acts as part of the development of Union financial services legislation, the ECB will exercise its advisory role on matters within the ECB's competence taking fully into account the timelines for adoption of these acts and the need to ensure the smooth adoption of implementing legislation¹⁵.

- 4.2 Moreover, in respect of a number of elements of the proposed regulation, in addition to the consultation of the ECB, the involvement, at an early stage, of the relevant members of the ESCB in the development of draft regulatory and implementing technical standards, delegated and implementing acts could be particularly useful, and should be specifically provided for.
- 4.3 First, several provisions of the proposed regulation refer to the role of the central bank of issue. As noted in paragraph 2, these include where the consent of the central bank of issue is required for certain decisions taken by the competent authorities or by ESMA. Moreover, reference is made to where the central bank of issue must provide ESMA with written confirmation that a Tier 2 third country CCP complies with any requirements imposed by that central bank of issue¹⁶, and to where ESMA concludes, in agreement with the relevant central bank of issue, that a CCP is of 'substantial systemic importance'¹⁷. In order to determine which central bank of issue should participate, the proposed regulation contains cross-references to Article 18(2)(h) of Regulation (EU) No 648/2012, which specifies that the college shall consist of 'the central banks of issue of the most relevant Union currencies of the financial instruments cleared'. The Commission is empowered to adopt a delegated act, on the basis of draft regulatory technical standards developed by ESMA, specifying the conditions under which the Union currencies referred to in Article 18(2)(h) are to be considered as the most relevant. Accordingly, in 2013 it adopted Commission Delegated Regulation (EU) No 876/2013¹⁸, which may now need to be revised and updated, to ensure the appropriate involvement of the central banks of issue of the currencies of the non-euro area Member States, taking into account the influence that disruptions in the functioning of CCPs may have on such currencies. The development of draft regulatory technical standards by ESMA for this purpose should be carried out in close cooperation with the relevant members of the ESCB. Furthermore, the delegated act should only be adopted after formal consultation of the ECB. The ECB also suggests that, in the interests of legal certainty, a cross-reference to Article 18(2)(h) of Regulation

¹⁵ See paragraph 2 of Opinion CON/2015/10, paragraph 2 of Opinion CON/2012/77, paragraph 4 of Opinion CON/2012/5, paragraph 8 of Opinion CON/2011/44, and paragraph 4 of Opinion CON/2011/42.

¹⁶ Article 2(9) of the proposed regulation introduces a new Article 25(2b)(b).

¹⁷ Article 2(9) of the proposed regulation introduces a new Article 25(2c).

¹⁸ Commission Delegated Regulation (EU) No 876/2013 of 28 May 2013 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on colleges for central counterparties (OJ L 244, 13.9.2013, p. 19).

(EU) No 648/2012 should also be introduced in the provisions of the proposed regulation that refer only to the 'relevant central bank of issue'.

- 4.4 Second, the proposed regulation introduces a new Article 25(2a), which provides that ESMA shall determine whether a third country CCP is systemically important or likely to become systemically important for the financial stability of the Union or for one or more of its Member States, referred to as a 'Tier 2 CCP'. It sets out the criteria that ESMA must take into account in making its determination and provides that the Commission shall adopt a delegated act to further specify these criteria. In order to ensure the appropriate involvement of central banks of issue in the elaboration of the relevant criteria, the development of this delegated act by the Commission should be carried out in close cooperation with the relevant members of the ESCB.

5. Third country CCPs of 'substantial systemic importance'

The proposed regulation introduces a new Article 25(2c), which sets out that ESMA, 'in agreement' with the relevant central banks of issue, may conclude that a CCP is of such substantial systemic importance that it should not be recognised. The ECB understands that 'in agreement' means that ESMA may not, without first having obtained the approval of the relevant central banks of issue, recommend that the Commission should adopt an implementing act confirming that that CCP should not be recognised.

6. Cooperation and exchange of information between the CCP Executive Session and the supervisory colleges

The ECB notes that the CCP Executive Session does not include all members of the supervisory colleges, and does not include the European Systemic Risk Board (ESRB). The supervisory college consists not only of the competent authorities supervising the CCP, but also of the supervisors of the entities on which the operations of that CCP might have an impact, in particular selected clearing members, trading venues, interoperable CCPs and central securities depositories. The ESRB is responsible for the macro-prudential oversight of the financial system within the Union. In order to ensure that the ESRB and the supervisory college members which are not also members of the CCP Executive Session have all the relevant information necessary for the purpose of carrying out their tasks, it is crucial that there is an obligation to exchange information between the CCP Executive Session and the ESRB and the other supervisory college members which are not members of the CCP Executive Session. The information exchanged with the ESRB and the supervisory college should be complete, and should include the information available to the CCP Executive Session which is necessary for the ESRB and the supervisory college members to carry out their respective tasks. Likewise, information regarding third country CCPs should be exchanged with the ESRB and the relevant competent authorities listed in Article 25(3) of Regulation (EU) No 648/2012, where this is necessary for the purpose of carrying out their tasks.

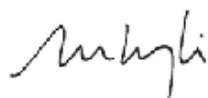
7. The ECB as a non-voting member of the ESMA Board of Supervisors

The ECB notes that the proposed regulation amends Regulation (EU) No 1095/2010 of the European Parliament and of the Council¹⁹ to include the Head and Directors of the CCP Executive Session as non-voting members of the ESMA Board of Supervisors²⁰. The ECB strongly welcomes this arrangement, which ensures that the guidelines, recommendations and other practical instruments and convergence tools developed by the ESMA Board of Supervisors take into account the perspective and expertise of the Head and Directors of the CCP Executive Session. However, the ECB considers that it is also vital for the ECB be included as a non-voting member of the ESMA Board of Supervisors, to ensure effective cooperation, coordination and exchange of information between central banks and supervisory authorities, and to ensure that the guidelines, recommendations and other practical instruments and convergence tools developed by the ESMA Board of Supervisors take into account the ECB's perspective and expertise²¹. This is relevant not only with regard to CCPs, but with regard to other financial market participants, including central securities depositories and trade repositories. For this reason, the ECB recommends that it should also become a non-voting member of the ESMA Board of Supervisors.

8. Interaction with the proposed regulation on a framework for the recovery and resolution of central counterparties

The ECB fully supports the Commission's assessment in the explanatory memorandum to the proposal that the adjustments and enhancements to supervision will also need to be appropriately reflected in the proposed regulation on a framework for the recovery and resolution of CCPs. The ECB agrees that targeted modifications may be necessary to take into account the new role of the CCP Executive Session in colleges under Regulation (EU) No 648/2012 and subsequently in resolution colleges. The ECB would see merit in promoting the consistency and effective interaction of recovery and resolution plans across CCPs, and in monitoring and mitigating their aggregate risk implications for financial stability in the Union. The ECB would support that during the finalisation of the proposed regulation, the Commission, the Council and the European Parliament consider a potential role of the CCP Executive Session in this context²².

Done at Frankfurt am Main, 4 October 2017.



The President of the ECB

Mario DRAGHI

¹⁹ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

²⁰ Article 1(4) of the proposed regulation adds a new point (f) to Article 40(1) of Regulation (EU) No 1095/2010.

²¹ See Opinion CON/2010/5. See also the ECB contribution to the European Commission's consultation on the operations of the European Supervisory Authorities, published on 7 July 2017, available on the ECB's website at www.ecb.europa.eu.

²² See paragraph 1.4 of Opinion CON/2017/38.

Technical working document

produced in connection with ECB Opinion CON/2017/39¹

Proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) No 1095/2010 and Regulation (EU) No 648/2012 with regard to the procedures and authorities involved for the authorisation of central counterparties and the recognition of third country central counterparties

Drafting proposals

Text proposed by the Commission	Amendments proposed by the ECB ²
Amendment 1 Recital 8	
<p>'The Treaties have established an economic and monetary union whose currency is the euro, and the European Central Bank (ECB) as an Institution of the Union for this purpose. The Treaties also provide that the ESCB shall be governed by the decision making bodies of the ECB, and the ECB alone may authorise the issue of the euro. The specific role of the ECB within the ESCB as the central bank of issue of the single currency of the Union should thus be acknowledged.'</p>	<p>'The Treaties have established an economic and monetary union whose currency is the euro, and the European Central Bank (ECB) as an 4institution of the Union. The ECB, together with the national central banks of the Member States whose currency is the euro, which constitute the Eurosystem, conduct the monetary policy of the Union. for this purpose. The Treaties also provide that the ESCB shall be governed by the decision making bodies of the ECB, and the ECB alone may authorize the issue of the euro. The specific role of the Eurosystem ECB within the ESCB as the central bank of issue of the single currency of the Union should thus be acknowledged.'</p>

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 in the Legal framework section of the ECB's website 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 Commission	Amendments proposed by the ECB ²
<p style="text-align: center;"><u>Explanation</u></p> <p><i>The objective of this recital is to reflect that the conferral of regulatory powers on the ECB by means of amendment of Article 22 of the Statute is without prejudice to Article 12.1 of the Statute of the ESCB, which states that to the extent deemed possible and appropriate, the ECB shall have recourse to the national central banks (NCBs) to carry out operations which form part of the tasks of the ESCB. This includes the tasks of the Eurosystem, as the central bank of issue of the euro.</i></p>	
<p style="text-align: center;">Amendment 2 Recital 8a (new)</p>	
<p>No text.</p>	<p>The ESCB enjoys broad discretion to define and implement monetary policy[*], and the ECB and the NCBs enjoy independence when carrying out their monetary policy tasks under Article 130 TFEU. Thus, it is for the ESCB to determine whether particular draft decisions or aspects of those decisions relate to the carrying out of their monetary policy tasks, and thus whether the consent of the central bank of issue should be sought and the proposed amendments or objections should be followed.'</p> <p>[*] Paragraph 68 of <i>Gauweiler and others</i>, C-62/14, ECLI:EU:C:2015:400.</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>The objective of this recital is to clarify and ensure that the proposed regulation is not interpreted as granting discretion to the competent authorities or to ESMA to determine whether or not the consent of the central bank of issue should be sought on particular draft decisions, or whether proposed amendments or objections to the draft decision by the central bank of issue are followed. See paragraph 2.2 of the Opinion.</i></p>	
<p style="text-align: center;">Amendment 3 Recital 49a</p>	
<p>No text.</p>	<p>'Delegated and implementing acts adopted in accordance with Articles 290 and 291 TFEU constitute Union legal acts. Pursuant to</p>

Text proposed by the Commission	Amendments proposed by the ECB ²
	<p>Articles 127(4) and 282(5) TFEU, the ECB is to be consulted on any proposed Union act in its fields of competence. In light of the fact that safe and efficient financial market infrastructures, in particular clearing systems, are essential for the fulfilment of the basic tasks of the ESCB under Article 127(2) TFEU, and the pursuit of its primary objective of maintaining price stability under Article 127(1) TFEU, the ECB should be duly consulted on delegated and implementing acts adopted under this Regulation.'</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>Commission draft delegated and implementing acts qualify as 'proposed Union acts' within the meaning of Articles 127(4) and 282(5) of the Treaty. Both delegated and implementing acts constitute Union legal acts. The ECB should be consulted in due time on any draft Union acts, including draft delegated and implementing acts, falling within its fields of competence. While the obligation to consult the ECB derives directly from the Treaty, in order to ensure clarity, this requirement should also be reflected in a recital of the proposed regulation. For example, recitals recalling the obligation to consult the ECB can be found in Regulation (EU) 2016/792 of the European Parliament and of the Council³ and Regulation (EU) No 549/2013 of the European Parliament and of the Council⁴. See paragraph 4 of the Opinion.</i></p>	
<p style="text-align: center;">Amendment 4</p> <p style="text-align: center;">Article 1(4)</p> <p style="text-align: center;">concerning Article 40(1) of Regulation (EU) No 1095/2010</p>	
<p>'In Article 40(1), the following point (f) is added:</p> <p>"(f) the permanent members of the CCP Executive Session, referred to in point (i) of Article 44a(1)(a), who shall be non-voting."</p>	<p>'In Article 40(1), the following points (f) and (g) are added:</p> <p>"(f) the permanent members of the CCP Executive Session, referred to in point (i) of Article 44a(1)(a), who shall be non-voting;</p> <p>(g) one representative of the ECB, who shall be non-voting."</p>

³ Regulation (EU) 2016/792 of the European Parliament and of the Council of 11 May 2016 on harmonised indices of consumer prices and the house price index, and repealing Council Regulation (EC) No 2494/95 (OJ L 135, 24.5.2016, p. 11). See recital 4.

⁴ Regulation (EU) No 549/2013 of the European Parliament and of the Council of 21 May 2013 on the European system of national and regional accounts in the European Union (OJ L 174, 26.6.2013, p. 1). See recital 24.

Text proposed by the Commission	Amendments proposed by the ECB ²
<p><u>Explanation</u></p> <p><i>It is vital for the ECB to be included as a non-voting member of the ESMA Board of Supervisors, to ensure effective cooperation, coordination and exchange of information between central banks and supervisory authorities, and to ensure that the guidelines, recommendations and other practical instruments and convergence tools developed by the ESMA Board of Supervisors take into account the perspective and expertise of the ECB. This is relevant not only with regard to CCPs, but also with regard to other financial market participants, including central securities depositories and trade repositories. See paragraph 7 of the Opinion.</i></p>	
<p>Amendment 5</p> <p>Article 1(7)</p> <p>concerning Article 44b of Regulation (EU) No 1095/2010</p>	
<p>'1. The CCP Executive Session shall be responsible for:</p> <p>(a) providing the consent referred to in Article 21a(1) of Regulation (EU) No 648/2012;</p> <p>(b) the recognition and supervision of third-country CCPs in accordance with Article 25 of Regulation (EU) No 648/2012, the monitoring of regulatory and supervisory developments in third countries under Chapter 2 of Title II of Regulation (EU) No 648/2012; and</p> <p>(c) the tasks referred to in the first subparagraph of Article 5(1), the first subparagraph of Article 9(3), Article 9(4), Article 17(2), Article 17(3), Article 18(1), Article 20(2), Article 20(6), Article 21c, Article 23, Article 24, Article 29(3), Article 38(5), 48(3), 49(1) and 54(3) of Regulation (EU) No 648/2012.</p> <p>2. The CCP Executive Session shall have a dedicated staff and adequate resources provided by ESMA to carry out its tasks.</p> <p>3. The CCP Executive Session shall inform the Board of Supervisors of its decisions.'</p>	<p>'1. The CCP Executive Session shall be responsible for:</p> <p>(a) providing the consent referred to in Article 21a(1) of Regulation (EU) No 648/2012;</p> <p>(b) the recognition and supervision of third-country CCPs in accordance with Article 25 of Regulation (EU) No 648/2012, the monitoring of regulatory and supervisory developments in third countries under Chapter 2 of Title II of Regulation (EU) No 648/2012; and</p> <p>(c) the tasks referred to in the first subparagraph of Article 5(1), the first subparagraph of Article 9(3), Article 9(4), Article 17(2), Article 17(3), Article 18(1), Article 20(2), Article 20(6), Article 21c, Article 23, Article 24, Article 29(3), Article 38(5), Article 48(3), Article 49(1), Article and 54(3) and Article 84 of Regulation (EU) No 648/2012.</p> <p>2. The CCP Executive Session shall have a dedicated staff and adequate resources provided by ESMA to carry out its tasks.</p> <p>3. The CCP Executive Session shall inform the Board of Supervisors of its decisions.</p> <p>4. The CCP Executive Session shall ensure that members of the college referred to in Article</p>

Text proposed by the Commission	Amendments proposed by the ECB ²
	<p>18(2), the authorities referred to in Article 25(3) of Regulation (EU) No 648/2012 and the ESRB, in accordance with Article 15 of Regulation (EU) No 1092/2010*, have access to all information necessary for the purpose of carrying out their tasks.’</p> <p>* Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board (OJ L 331, 15.12.2010, p. 1).</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>In order to ensure that the ESRB and the supervisory college members which are not also members of the CCP Executive Session have all the relevant information necessary for the purpose of carrying out their tasks, it is crucial that there is an obligation to exchange information between the CCP Executive Session and the ESRB and the other supervisory college members which are not members of the CCP Executive Session. The information exchanged with the ESRB and the supervisory college should be complete, and should include the information available to the CCP Executive Session which is necessary for the ESRB and the supervisory college members to carry out their respective tasks. Likewise, information regarding third country CCPs should be exchanged with the ESRB and the relevant competent authorities listed in Article 25(3) of Regulation (EU) No 648/2012, where this is necessary for the purpose of carrying out their tasks. See paragraph 6 of the Opinion.</i></p>	
<p style="text-align: center;">Amendment 6 Article 2(1 a) (new) concerning Article 15 of Regulation (EU) No 648/2012</p>	
No text.	<p>‘1a. In Article 15, the following paragraph 3 is added:</p> <p>“3. In order to ensure consistent application of this Article, ESMA shall, in close cooperation with the ESCB, develop draft regulatory technical standards specifying the indicators for additional services and activities referred to in paragraph 1.</p>

Text proposed by the Commission	Amendments proposed by the ECB ²
	<p>ESMA shall submit those draft regulatory technical standards to the Commission by <i>[12 months from the entry into force of this Regulation]</i>.</p> <p>Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.”</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>The ECB takes the view that the competent authorities have a certain margin of appreciation with regard to whether changes proposed by a CCP should be subject to decisions under Article 15 of Regulation (EU) No 648/2012, with regard to the extension of activities and services not covered by the initial authorisation. ESMA recently published an opinion⁵ on the common indicators for additional products and services under Article 15. The ECB takes the view that observance of the criteria set out in the ESMA opinion will be essential in order to ensure the consent of the relevant central banks of issue is sought in all cases where such consent is required. Thus, the ECB proposes that the guidance provided by ESMA regarding the interpretation of Article 15 should be made binding, and thus be developed by ESMA as draft regulatory technical standards and adopted by the Commission in the form of a delegated act. See paragraph 2.5 of the Opinion.</i></p>	
<p style="text-align: center;">Amendment 7</p> <p style="text-align: center;">Article 2(3)(d) (new)</p> <p style="text-align: center;">concerning Article 18(6) of Regulation (EU) No 648/2012</p>	
No text.	<p>‘paragraph 6 is replaced by the following:</p> <p>“6. In order to ensure the consistent and coherent functioning of colleges across the Union, ESMA shall, in close cooperation with the ESCB, develop draft regulatory technical standards specifying the conditions under which the Union currencies referred to in paragraph 2(h) are to be considered as the most relevant and the details of the practical</p>

⁵ ESMA Opinion of 15 November 2016 on common indicators for new products and services under Article 15 and for significant changes under Article 49 of EMIR (ESMA/2016/1574).

Text proposed by the Commission	Amendments proposed by the ECB ²
	<p>arrangements referred to in paragraph 5.</p> <p>Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.”</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>Commission Delegated Regulation (EU) No 876/2013⁶, which was adopted on the basis of Article 18(6) of Regulation (EU) No 648/2012, may need to be revised and updated. The development of draft regulatory technical standards by ESMA for this purpose should be carried out in close cooperation with the relevant members of the ESCB. This is without prejudice to the need to consult the ECB on such draft delegated and implementing acts. See paragraph 4 of the Opinion.</i></p>	
<p style="text-align: center;">Amendment 8</p> <p style="text-align: center;">Article 2(6)(c) (new)</p> <p style="text-align: center;">concerning Article 21 of Regulation (EU) 648/2012</p>	
No text.	<p>(c) a new paragraph 3a is inserted:</p> <p>“3a. The competent authorities shall consult the relevant central bank of issue referred to in Article 18(2)(h) in the review and evaluation referred to in paragraph 1, where necessary for the central bank of issue to fulfil its role under this Regulation.”</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>The proposed amendment seeks to provide the relevant central banks of issue with a consultation role in the review and evaluation process conducted by competent authorities under Article 21 of Regulation (EU) No 648/2012, together with ESMA. The review of arrangements strategies, processes and mechanisms implemented by CCPs to comply with Regulation (EU) No 648/2012 should be carried out in consultation with the relevant central banks of issue. See paragraph 3 of the Opinion.</i></p>	

⁶ Commission Delegated Regulation (EU) No 876/2013 of 28 May 2013 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on colleges for central counterparties (OJ L 244, 13.9.2013, p. 19).

Text proposed by the Commission	Amendments proposed by the ECB ²
Amendment 9 Article 2(7) concerning Article 21a(2) of Regulation (EU) 648/2012	
<p>'2. Competent authorities shall prepare and submit draft decisions to the central banks of issue referred to in Article 18(2)(h) before adopting any decision pursuant to Articles 14, 15, 20, 44, 46, 50 and 54.</p> <p>Competent authorities shall obtain, in accordance with Article 21(b) the consent of the central banks of issue referred to in the first subparagraph in respect of any aspect of those decisions relating to the carrying out of their monetary policy tasks.'</p>	<p>2. Competent authorities shall prepare and submit draft decisions to the central banks of issue referred to in Article 18(2)(h) before adopting any decision pursuant to Articles 14, 15, 17, 20, 41, 44, 46, 49, 50 and 54.</p> <p>Competent authorities shall obtain, in accordance with Article 21(b), the consent of the central banks of issue referred to in the first subparagraph in respect of any aspect of those decisions relating to the carrying out of their monetary policy tasks.'</p>
<p><u>Explanation</u></p> <p><i>The proposed amendment adds draft decisions taken regarding margin requirements and the review of models, stress testing and back testing to the list of legal bases where the consent of the central bank of issue must be sought.</i></p> <p><i>See paragraph 2.3 of the Opinion.</i></p>	
Amendment 10 Article 2(7) concerning Article 21b(1) of Regulation (EU) 648/2012	
<p>'1. The consent referred to in Article 21a(2) shall be deemed to be given unless the central bank of issue proposes amendments or objects to the draft decision within a maximum period of 15 calendar days after its submission. Where the central bank of issue proposes amendments or objects to a draft decision, it shall provide full and detailed reasons, in writing.</p> <p>Where ESMA has proposed amendments pursuant to Article 21a(4) to the draft decisions to be adopted pursuant to Articles 14, 15, 20 and 54, it shall also submit them also to the central bank of</p>	<p>'1. The consent referred to in Article 21a(2) shall be deemed to be given unless the central bank of issue proposes amendments or objects to the draft decision within a maximum period of 15 calendar days after its submission. Where the central bank of issue proposes amendments or objects to a draft decision, it shall provide full and detailed reasons, in writing.</p> <p>Where ESMA has proposed amendments pursuant to Article 21a(4) to the draft decisions to be adopted pursuant to Articles 14, 15, 17, 20, 41, 49 and 54, it shall also submit them also to the central</p>

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issue. In that case, the deadline referred to in the first subparagraph shall be extended by 5 days.'	bank of issue. In that case, the deadline referred to in the first subparagraph shall be extended by 5 days.'
<p style="text-align: center;"><u>Explanation</u></p> <p><i>This proposed amendment adjusts the cross-references regarding the legal bases of draft decisions referred to in amendment 8 above.</i></p>	
<p style="text-align: center;">Amendment 11</p> <p style="text-align: center;">Article 2(9)(b)</p> <p style="text-align: center;">concerning Article 25(2a) of Regulation (EU) No 648/2012</p>	
<p>'2a. ESMA shall determine whether a CPP is systemically important or likely to become systemically important for the financial stability of the Union or for one or more of its Member States (Tier 2 CCP) by taking into account all of the following criteria:</p> <p>(a) the nature, size and complexity of the CCP's business, including the value in aggregate terms and in each Union currency of transactions cleared by the CCP, or the aggregate exposure of the CCP engaged in clearing activities to its counterparties;</p> <p>(b) the effect that the failure of or a disruption to the CCP would have on financial markets, financial institutions, or the broader financial system, or on the financial stability of the Union or for one or more of its Member States;</p> <p>(c) the CCP's clearing membership structure;</p> <p>(d) the CCP's relationship, interdependencies, or other interactions with other financial market infrastructures, other financial institutions and the broader financial system.</p> <p>The Commission shall adopt a delegated act in accordance with Article 82 to further specify the criteria set out in the first subparagraph within [six months from the entry into force of this Regulation].'</p>	<p>2a. ESMA shall determine whether a CPP CCP is systemically important or likely to become systemically important for the financial stability of the Union or for one or more of its Member States (Tier 2 CCP) by taking into account all of the following criteria:</p> <p>(a) the nature, size and complexity of the CCP's business, including the value in aggregate terms and in each Union currency of transactions cleared by the CCP, or the aggregate exposure of the CCP engaged in clearing activities to its counterparties;</p> <p>(b) the effect that the failure of or a disruption to the CCP would have on financial markets, financial institutions, or the broader financial system, or on the financial stability of the Union or for one or more of its Member States;</p> <p>(c) the CCP's clearing membership structure;</p> <p>(d) the CCP's relationship, interdependencies, or other interactions with other financial market infrastructures, other financial institutions and the broader financial system.</p> <p>The Commission shall develop a draft delegated act, in close cooperation with the relevant members of the ESCB, to further specify the criteria set out under the first subparagraph. The Commission shall adopt a the</p>

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	delegated act in accordance with Article 82 to further specify the criteria set out in the first subparagraph within [six months from the entry into force of this Regulation].'
<p style="text-align: center;"><u>Explanation</u></p> <p><i>In order to ensure the appropriate involvement of central banks of issue in the elaboration of the relevant criteria to determine whether a third country CCP is systemically important or likely to become systemically important for the financial stability of the Union or for one or more of its Member States, the development of the delegated act by the Commission should be conducted in close cooperation with the relevant members of the ESCB. This is without prejudice to the need to consult the ECB on such draft delegated and implementing acts. See paragraph 4.4 of the Opinion.</i></p>	
<p style="text-align: center;">Amendment 12 Article 2(9)(b) concerning Article 25(2b) of Regulation (EU) No 648/2012</p>	
<p>'2b. Where ESMA determines a CCP to be systemically important or likely to become systemically important (Tier 2 CCP) in accordance with paragraph 2a, it may only recognise that CCP where, in addition to the conditions referred to in Article 25(2)(a), (b), (c) and (d), the following conditions are fulfilled: [...]</p>	<p>'2b. Where ESMA determines a CCP to be systemically important or likely to become systemically important (Tier 2 CCP) in accordance with paragraph 2a, it may, after consulting the authorities referred to in paragraph 3, only recognise that CCP where, in addition to the conditions referred to in Article 25(2)(a), (b), (c) and (d), the following conditions are fulfilled: [...]</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>This proposed amendment seeks to clarify that the consultation requirement under Article 25(3) of Regulation (EU) No 648/2012 also applies to recognition of Tier 2 CCPs under Article 25(2b). This is already implicit from the text of Article 25(2b)(b). However, in the interests of legal certainty, this requirement could be made explicit.</i></p>	
<p style="text-align: center;">Amendment 13 Article 2(9)(b) concerning Article 25(2c) of Regulation (EU) No 648/2012</p>	
<p>'2c. ESMA, in agreement with the relevant central banks of issue and commensurate with the degree</p>	<p>'2c. ESMA, after consulting the authorities referred to in paragraph 3 and in agreement with</p>

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<p>of systemic importance of the CCP in accordance with paragraph 2a, may conclude that a CCP is of such substantial systemic importance that compliance with the conditions set out in paragraph 2b does not sufficiently ensure the financial stability of the Union or of one or more of its Member States and should not therefore be recognised. In such a case, ESMA shall recommend that the Commission adopt an implementing act confirming that that CCP should not be recognised in accordance with paragraph 2b.</p> <p>After submission of the recommendation referred to in the first subparagraph, the Commission may adopt an implementing act declaring that that CCP shall not be recognised pursuant to paragraph 2b and that it may only provide clearing services in the Union after it has been granted authorisation in accordance with Article 14.'</p>	<p>the relevant central banks of issue referred to in Article 18(2)(h) and commensurate with the degree of systemic importance of the CCP in accordance with paragraph 2a, may conclude that a CCP is of such substantial systemic importance that compliance with the conditions set out in paragraph 2b does not sufficiently ensure the financial stability of the Union or of one or more of its Member States and should not therefore be recognised. In such a case, ESMA shall recommend that the Commission adopt an implementing act confirming that that CCP should not be recognised in accordance with paragraph 2b.</p> <p>After submission of the recommendation referred to in the first subparagraph, the Commission may adopt an implementing act declaring that that CCP shall not be recognised pursuant to paragraph 2b and that it may only provide clearing services in the Union after it has been granted authorisation in accordance with Article 14.'</p>
<p><u>Explanation</u></p> <p><i>This proposed technical amendment seeks to ensure legal certainty by clarifying that (a) relevant authorities under Article 25(3) of Regulation (EU) No 648/2012 are consulted; and (b) the relevant central banks of issue are determined consistently and in accordance with Article 18(2)(h) of Regulation (EU) No 648/2012 and Delegated Regulation (EU) No 876/2013. See paragraph 4.3 of the Opinion.</i></p>	
<p>Amendment 14</p> <p>Article 2(9)(ba) (new)</p> <p>concerning the first sentence of Article 25(3) of Regulation (EU) No 648/2012</p>	
<p>No text.</p>	<p>The first sentence of paragraph 3 is replaced by the following:</p> <p>"When assessing whether the conditions referred to in paragraphs 2, 2b and 2c are met, ESMA shall consult:"</p>

Text proposed by the Commission	Amendments proposed by the ECB ²
<p style="text-align: center;"><u>Explanation</u></p> <p><i>This proposed technical amendment seeks to ensure legal certainty by clarifying that the relevant authorities under Article 25(3) of Regulation (EU) No 648/2012 are consulted on decisions under the new paragraphs 2b and 2c of Article 25.</i></p>	
<p style="text-align: center;">Amendment 15 Article 2(9)(bb) (new) concerning point (f) of Article 25(3) of Regulation (EU) No 648/2012</p>	
No text.	<p>'point (f) of paragraph 3 is replaced by the following:</p> <p>"(f) the central banks of issue of the most relevant Union currencies of the financial instruments cleared or to be cleared, referred to in Article 18(2)(h)."</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>This proposed technical amendment seeks to ensure legal certainty by clarifying that the relevant central banks of issue are determined consistently and in accordance with Article 18(2)(h) of Regulation (EU) No 648/2012 and Delegated Regulation (EU) No 876/2013. See paragraph 4.3 of the Opinion.</i></p>	
<p style="text-align: center;">Amendment 16 Article 2(10) concerning Article 25b(2) of Regulation (EU) No 648/2012</p>	
<p>'2. ESMA shall prepare and submit draft decisions to the central bank of issue of the relevant currency referred to in Article 18(2)(h) before adopting any decision pursuant to Articles 41, 44, 46, 50, and 54.</p> <p>ESMA shall obtain, in accordance with this paragraph, the consent of the relevant central bank of issue in respect of any aspect of those decisions relating to the carrying out of their monetary policy tasks. The consent of the central bank of issue referred to in the second subparagraph shall be deemed to be given unless it proposes amendments or objects to the draft decision within 15 calendar days after having been notified of the</p>	<p>2. ESMA shall prepare and submit draft decisions to the central bank of issue of the relevant currency referred to in Article 18(2)(h) before adopting any decision pursuant to Articles 25m, 41, 44, 46, 49, 50, and 54. .</p> <p>ESMA shall obtain, in accordance with this paragraph, the consent of the relevant central bank of issue referred to in Article 18(2)(h) in respect of any aspect of those decisions relating to the carrying out of their monetary policy tasks. The consent of the central bank of issue referred to in the second subparagraph shall be deemed to be given unless it proposes amendments or objects to the draft decision within 15 calendar days after</p>

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<p>draft decision. Where the central bank of issue proposes amendments or objects to a draft decision, it shall provide full and detailed reasons, in writing.</p> <p>Where the central bank of issue objects to a draft decision, ESMA shall not adopt that decision.</p> <p>Where the central bank of issue proposes amendments, ESMA may only adopt the decision as amended by that central bank of issue.'</p>	<p>having been notified of the draft decision. Where the central bank of issue proposes amendments or objects to a draft decision, it shall provide full and detailed reasons, in writing.</p> <p>Where the central bank of issue objects to a draft decision, ESMA shall not adopt that decision.</p> <p>Where the central bank of issue proposes amendments, ESMA may only adopt the decision as amended by that central bank of issue.'</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>These proposed amendments relating to the procedure for third country CCPs seek to mirror the proposed amendments for Union CCPs outlined in amendments 8 and 9 of this technical working document.</i></p>	
<p style="text-align: center;">Amendment 17</p> <p style="text-align: center;">Article 2(10)</p> <p style="text-align: center;">concerning Article 25e of Regulation (EU) No 648/2012</p>	
<p>'1. In order to carry out its duties under this Regulation, ESMA may conduct all necessary on-site inspections at any business premises of Tier 2 CCPs. The relevant central bank of issue shall be invited to participate in such on-site inspections.'</p>	<p>'1. In order to carry out its duties under this Regulation, ESMA may conduct all necessary on-site inspections at any business premises of Tier 2 CCPs. The relevant central bank of issue referred to in Article 18(2)(h) shall be invited to participate in such on-site inspections.'</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>This proposed technical amendment seeks to ensure legal certainty by clarifying that the relevant central banks of issue are determined consistently, and in accordance with Article 18(2)(h) of Regulation (EU) No 648/2012 and Delegated Regulation (EU) No 876/2013. See paragraph 4.3 of the Opinion.</i></p>	
<p style="text-align: center;">Amendment 18</p> <p style="text-align: center;">Article 2(11)(c) (new)</p> <p style="text-align: center;">concerning Article 49 of Regulation (EU) No 648/2012</p>	
<p>No text.</p>	<p>'(c) The following paragraph 5 is added:</p> <p>'5. In order to ensure consistent application of this Article, ESMA shall, in close cooperation with the ESCB, develop draft regulatory</p>

Text proposed by the Commission	Amendments proposed by the ECB ²
	<p>technical standards specifying the indicators for significant changes to the models and parameters referred to in the second subparagraph of paragraph 1.</p> <p>ESMA shall submit those draft regulatory technical standards to the Commission by [12 months from the entry into force of this Regulation].</p> <p>Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.”</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>The ECB notes that the competent authorities have a certain margin of appreciation as to whether changes proposed by a CCP should be subject to decisions under Article 49 of Regulation (EU) No 648/2012, with regard to the review of models, stress testing and back testing. ESMA recently published an opinion on the common indicators for significant changes under Article 49⁷. The ECB notes that observance of the criteria set out in the ESMA opinion will be essential in order to ensure the consent of the relevant central banks of issue is sought in all cases where such consent is required. Thus, the ECB proposes that the guidance provided by ESMA regarding the interpretation of Article 49 should be made binding. To this end, ESMA should develop it as draft regulatory technical standards, which the Commission should then adopt in the form of a delegated act. See paragraph 2.5 of the Opinion.</i></p>	
<p style="text-align: center;"><i>Amendment 19</i></p> <p style="text-align: center;"><i>Article 2(11 a) (new)</i></p> <p style="text-align: center;"><i>concerning Article 82 of Regulation (EU) No 648/2012</i></p>	
No text.	<p>'Article 82 is replaced by the following:</p> <p>“1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.</p> <p>2. The delegation of power referred to in Articles 1(6), 15(3), 18(6), 21 c(2), 25(2 a), 25(6a),</p>

⁷ ESMA Opinion of 15 November 2016 on common indicators for new products and services under Article 15 and for significant changes under Article 49 of EMIR (ESMA/2016/1574), available on ESMA's website at www.esma.europa.eu.

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	<p>25a(3) and 25f(7), Articles 25l and 49, Article 64(7), Article 70, Articles 72(3) and 85(2) shall be conferred on the Commission for an indeterminate period of time.</p> <p>3. Before adopting a delegated act, the Commission shall endeavour to consult ESMA.</p> <p>4. A delegation of power referred to in Articles 1(6), 15(3), 18(6), 21c(2), 25(2 a), 25(6 a), 25a(3) and 25f(7), Articles 25l and 49, Article 64(7), Article 70, Articles 72(3) and 85(2) may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of power specified in that decision. The decision to revoke shall take effect on the day following that of its publication in the Official Journal of the European Union or on a later date specified therein. It shall not affect the validity of any delegated acts already in force.</p> <p>5. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and the Council.</p> <p>6. A delegated act adopted pursuant to Articles 1(6), 15(3), 18(6), 21c(2), 25(2 a), 25(6 a), 25a(3) and 25f(7), Articles 25l and 49, Article 64(7), Article 70, Articles 72(3) and 85(2) shall enter into force only if no objection has been expressed by either the European Parliament or the Council within a period of three months of notification of the act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament or the Council have both informed the Commission that they will not object. That period shall be extended by three months at the initiative of the European Parliament or of the Council.”</p>

Text proposed by the Commission	Amendments proposed by the ECB ²
<p style="text-align: center;"><u>Explanation</u></p> <p><i>Given that the Commission's proposal seeks to confer powers on the Commission to adopt delegated acts under certain further provisions, Article 82 of Regulation (EU) No 648/2012 should also be updated with the relevant cross-references.</i></p>	