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COVER NOTE

From: Mr Mario DRAGHI, President of the European Central Bank
date of receipt: 16 October 2017
To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of
the European Union

Subject: OPINION OF THE EUROPEAN CENTRAL BANK of 11 October 2017 on
a proposal for a regulation of the European Parliament and of the Council
amending Regulation (EU) No 648/2012 as regards the clearing obligation,
the suspension of the clearing obligation, the reporting requirements, the
risk-mitigation techniques for OTC derivatives contracts not cleared by a
central counterparty, the registration and supervision of trade repositories
and the requirements for trade repositories
(CON/2017/42)

Delegations will find attached the above mentioned Opinion.



OPINION OF THE EUROPEAN CENTRAL BANK

of 11 October 2017

on a proposal for a regulation of the European Parliament and of the Council
amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the
clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivatives
contracts not cleared by a central counterparty, the registration and supervision of trade
repositories and the requirements for trade repositories

(CON/2017/42)

Introduction and legal basis

On 6 and 9 June 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 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivatives contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories¹ (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 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, the ESCB's contribution to the smooth conduct of policies relating to the stability of the financial system, as referred to in Article 127(5) of the Treaty, and the specific tasks conferred upon the ECB concerning the prudential supervision of credit institutions, as referred to in Article 127(6) of the Treaty. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

General observations

The ECB generally supports the Commission's initiative to introduce a number of targeted modifications to Regulation (EU) No 648/2012 of the European Parliament and of the Council² with a view to simplifying the applicable rules and eliminating disproportionate burdens.

¹ COM(2017) 208 final.

² 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).

Specific observations

1. Exemption of central bank transactions

- 1.1 Article 1(4) of Regulation (EU) No 648/2012 exempts members of the ESCB, but not their counterparties, from the reporting obligation. As a result, where a derivative contract is concluded with a member of the ESCB, its counterparty needs to report the details of the transaction to a trade repository. In this context it may be noted that relevant central bank transactions are exempted from reporting under Regulation (EU) 2015/2365 of the European Parliament and of the Council³. Moreover, central bank transactions in relation to the performance of monetary, foreign exchange and financial stability policy are exempted from disclosure under Directive 2014/65/EU of the European Parliament and of the Council⁴ and Regulation (EU) No 600/2014 of the European Parliament and of the Council⁵.
- 1.2 The ECB has concerns regarding the risks that may emerge if, in spite of confidentiality regimes applied by counterparties, information arising out of ESCB policy operations were to be leaked to the public and if market participants could identify the transactions of ESCB national central banks (NCBs). Indeed, this could have an adverse impact on the performance by NCBs of their tasks in respect of those central bank transactions, particularly in the field of monetary policy or foreign exchange operations, where confidentiality is required⁶. Requiring the counterparties of the members of the ESCB to report all data on their transactions to trade repositories has the unintended consequence of establishing an indirect reporting obligation for central bank transactions, thus limiting the effectiveness of the exemption granted to the members of the ESCB. It is therefore important that the books of ESCB members are protected and that signalling based on central bank operations remains effective⁷.
- 1.3 The ECB therefore takes the view that in order to ensure that NCBs continue to perform their statutory tasks effectively it is important that central bank transactions are fully exempted from reporting requirements.

2. Reporting obligation

- 2.1 With regard to the proposed amendment of Article 9(1), the ECB takes note of the results of the Commission's impact assessment and understands the need to reduce the reporting burden for small non-financial counterparties. In this regard, the ECB welcomes the solution proposed by the Commission that in some specific cases the responsibility for reporting should be undertaken by

³ Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012 (OJ L 337, 23.12.2015, p. 1).

⁴ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

⁵ Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p. 84).

⁶ See paragraph 7 of Opinion CON/2012/21. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

⁷ See pages 2 and 13 to 14 of the ECB response to the European Commission's 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.

central counterparties (CCPs), financial counterparties, management companies of undertakings for collective investment in transferable securities, and managers of alternative investment funds⁸. This proposal appears to strike a good balance between ensuring the completeness of data, minimising reporting burdens and, at the same time, aligning the structure of the reporting obligations under Regulation (EU) No 648/2012 and Regulation (EU) 2015/2365.

- 2.2 The proposed regulation also introduces a reporting exemption for all intragroup trades involving a non-financial counterparty⁹. The ECB is concerned by this proposed amendment for the reasons set out in paragraphs 2.2.1 to 2.2.3.
- 2.2.1 Based on analyses of existing data, the confirmation that an over-the-counter (OTC) derivative contract is an intragroup transaction pursuant to the current reporting framework under Regulation (EU) No 648/2012¹⁰ is often unreliable, when cross-checked with other data sources. In the context of still evolving data quality, therefore, the unconditional exemption of intragroup reporting for non-financial counterparties gives rise to the risk of regulatory arbitrage by reporting agents.
- 2.2.2 Intragroup transactions involving non-financial counterparties are exempted from collateralisation only if certain conditions are met, and subject to authorisation of the competent authorities¹¹. The ECB is concerned that if those conditions are not met and counterparties exchange collateral for their intragroup transactions, then, in the absence of any reporting obligation, risks associated with margins and collateral pro-cyclicality may remain unmonitored. This asymmetry would break the complementarity between transparency and risk mitigation that lies at the core of the policy framework under Regulation (EU) No 648/2012.
- 2.2.3 The proposed exemption may potentially lead to sophisticated forms of circumvention of reporting requirements under Regulation (EU) No 648/2012, as trades may be channelled through non-financial subsidiaries of larger financial groups. Due to the higher participation rate of non-financial counterparties in foreign exchange derivatives transactions, the impact of the amendment could be particularly relevant for currency derivatives reporting.
- 2.3 The ECB considers that financial counterparties' obligation to report on behalf of non-financial counterparties¹² already addresses the excessive reporting burden for small non-financial counterparties, also in the case of intragroup trades. The marginal cost of additional reports for non-financial counterparties that should already have appropriate IT infrastructures in place should be negligible. The ECB therefore recommends that intragroup trades between financial counterparties and non-financial counterparties should not be exempted from reporting. Among intragroup trades between non-financial counterparties, only trades concluded by small non-financial counterparties that pose no systemic risk should be exempted. In the light of this, the ECB recommends that intragroup trades between non-financial counterparties are exempted from reporting provided that these non-financial counterparties are not subject to the clearing obligation.

⁸ See Article 1(7)(b) of the proposed regulation.

⁹ See Article 1(7)(a) of the proposed regulation.

¹⁰ See Article 3(1) and (2) of Regulation (EU) No 648/2012.

¹¹ See Article 11(7) of Regulation (EU) No 648/2012.

¹² See Article 1(7)(b) of the proposed regulation.

As a corollary, non-financial counterparties that are subject to the clearing obligation have to report on behalf of other non-financial counterparties in the event of intragroup trades between them.

- 2.4 The ECB notes that intragroup trades involving a counterparty from a third country that is not granted an equivalence decision by the Commission will still be subject to the reporting obligation and that the current exemption¹³ does not therefore apply to such trades.
- 2.5 The ECB welcomes the amendments to Article 9(6). The implementation of standards for counterparty, trade and securities identification, operationalised by Commission Implementing Regulation (EU) 2017/105¹⁴, is a key step towards improving the quality of data collected pursuant to Regulation (EU) No 648/2012. The alignment of Regulation (EU) No 648/2012 with Regulation (EU) 2015/2365 and Regulation (EU) No 600/2014 is also important to guarantee comparability and ensure a global view on financial markets' structures and activities.

3. Amendments to ensure the quality of data

- 3.1 The ECB considers the proposed amendments to Article 78¹⁵ and Article 81(5)¹⁶ to be valuable steps forward as they will facilitate harmonisation of trade repositories' procedures and policies and the conditions under which they provide data to competent authorities.
- 3.2 The ECB also welcomes the mandate granted to the European Securities and Markets Authority (ESMA) to report on the implementation of the reporting obligation under the new Article 85(3)(d)¹⁷ and would welcome the involvement of the ESCB in preparing the report to the Commission pursuant to the new Article 85(3)(d).

4. Credit institutions' compliance with risk-management procedures, intragroup exemptions and capital requirements

- 4.1 The ECB supports the proposal that there should be supervisory procedures to ensure initial and ongoing validation of risk-management procedures requiring the timely, accurate and appropriately segregated exchange of collateral with respect to OTC derivative contracts¹⁸.
- 4.2 The ECB notes that within the framework of Article 6 of Council Regulation (EU) No 1024/2013¹⁹ the tasks of ensuring that credit institutions comply with the risk management requirements set out in Article 11(3) of Regulation (EU) No 648/2012 regarding procedures concerning timely, accurate and appropriately segregated exchange of collateral, including the connected intragroup

¹³ See Article 13(2) of Regulation (EU) No 648/2012.

¹⁴ Commission Implementing Regulation (EU) 2017/105 of 19 October 2016 amending Implementing Regulation (EU) No 1247/2012 laying down implementing technical standards with regard to the format and frequency of trade reports to trade repositories according to Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories (OJ L 17, 21.1.2017, p. 17).

¹⁵ See Article 1(16) of the proposed regulation.

¹⁶ See Article 1(17)(c) of the proposed regulation.

¹⁷ See Article 1(19)(c) of the proposed regulation.

¹⁸ See Article 1(9)(a) of the proposed regulation.

¹⁹ 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).

exemptions²⁰, and with the requirement in the area of own funds set out in Article 11(4) of Regulation (EU) No 648/2012 to hold an appropriate and proportionate amount of capital to manage the risks not covered by appropriate exchange of collateral, are of a prudential nature, and thus fall within the scope of the tasks conferred on the ECB by Article 4(1)(e) and (d) of Regulation (EU) No 1024/2013.

5. CCPs' transparency

- 5.1 The ECB supports the proposal that CCPs should provide their clearing members with a tool to simulate their initial margin requirements and with a detailed overview of the initial margin models that they use²¹. This will increase the transparency and predictability of initial margin requirements, thus improving clearing participants' understanding of the risks and costs involved in participation in a CCP.
- 5.2 In addition, the ECB proposes the inclusion of macroprudential intervention tools, in order to prevent the build-up of systemic risk resulting, in particular, from excessive leverage, and to further limit the pro-cyclicality of margins and haircuts. The ECB proposes that the relevant principles for macroprudential tools are established in the Level 1 act. Macroprudential policy tools would be applied to counterparties at transaction level. In this way, all relevant transactions would be affected, including those contracted by non-banks, regardless of whether these transactions have been concluded in the centrally cleared market, the non-centrally cleared market, or by Union counterparties clearing their trades via a third country CCP²². The requisite principles and requirements for such macroprudential tools should be included if not in the current proposal then at the next appropriate time, such as at the occasion of the next review of Regulation (EU) No 648/2012 in 2020.
- 5.3 Moreover, as pointed out in a recently published ESRB report on the review of Regulation (EU) No 648/2012²³, the ECB considers that CCPs operating in the Union should be required to publish quantitative and qualitative information consistent with the CPMI-IOSCO public disclosure principles²⁴. Having a stronger legal basis for making CCPs publish data consistent with these principles would help the financial industry and the public at large better understand the complex environment in which CCPs operate.

²⁰ See Article 4(2) of Regulation (EU) No 648/2012.

²¹ See Article 1(10) of the proposed regulation.

²² This is in line with the ECB's position in the ECB response to the European Commission's 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.

²³ The Revision of the European Market Infrastructure Regulation, ESRB, April 2017. Available at https://www.esrb.europa.eu/pub/pdf/other/20170421_esrb_emir.en.pdf

²⁴ Final report of the CPMI-IOSCO Board on Public quantitative disclosure standards for central counterparties, February 2015. Available at <http://www.bis.org/cpmi/publ/d125.pdf>.

6. Classification of securitisation special purpose entities as financial counterparties

- 6.1 The ECB notes that securitisation special purpose entities (SSPEs) are proposed to be classified as financial counterparties²⁵. However, Article 27 of the proposal for a regulation of the European Parliament and of the Council laying down common rules on securitisation and creating a European framework for simple, transparent and standardised (STS) securitisation and amending Directives 2009/65/EC, 2009/138/EC, 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012²⁶ proposes to amend Regulation (EU) No 648/2012 and exempt STS SSPEs from the clearing obligation, provided that counterparty credit risk is adequately mitigated. The ECB reiterates its position²⁷ that STS SSPEs should be fully exempted both from the clearing obligation and from the legislative requirements to provide collateral²⁸.
- 6.2 Accordingly, the ECB supports the provisions of Article 27 of the proposal mentioned in paragraph 6.1, including the mandate for the European Supervisory Authorities to develop draft regulatory technical standards specifying criteria for establishing which arrangements under covered bonds or securitisations adequately mitigate counterparty credit risk to be adopted by the Commission²⁹, as well as other necessary amendments that exempt STS SSPEs from both clearing obligations and from obligations to provide margin. Such treatment is necessary to achieve a level playing field with respect to qualifying covered bonds and can be justified on prudential grounds in respect of STS SSPEs.

7. Changes to methodology for calculating counterparties' positions in OTC derivative contracts

The ECB notes that the proposed introduction of a methodology for calculating the positions in OTC derivative contracts relevant for determining whether a financial counterparty or a non-financial counterparty is subject to the clearing obligation, which is based on end-of-period data instead of a rolling average position in OTC derivative contracts over 30 working days³⁰, may create an incentive for 'window dressing' to avoid the clearing obligation. The ECB therefore proposes to add to the new Articles 4a(2)³¹ and 10(2)³² introduced by the proposed regulation a requirement that a financial counterparty and a non-financial counterparty shall be able to demonstrate to the relevant competent authority that the calculation of the aggregate month-end position in OTC derivative contracts does not lead to a systematic underestimation of the overall position.

25 See Article 1(1) of the proposed regulation.

26 COM(2015) 472 final.

27 See the Joint response from the Bank of England and the European Central Bank to the Consultation Document of the European Commission: "An EU framework for simple, transparent and standardised securitisation", available on the ECB's website at www.ecb.europa.eu.

28 On the exemption from the requirement to provide collateral, see paragraphs 2.2 and 5.5 of Opinion CON/2016/11.

29 See Article 27(2) of COM(2015) 472.

30 See Article 1(3) and (8) of the proposed regulation.

31 See Article 1(3) of the proposed regulation.

32 See Article 1(8) of the proposed regulation.

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

- 8.1 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*³³ with reference to the ECB's functions and expertise. In the 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) 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 its competence taking fully into account the timelines for adoption of these acts and the need to ensure the smooth adoption of implementing legislation³⁴.
- 8.2 Moreover, in respect of a number of elements of the proposed regulation, not only the consultation of the ECB, but also 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.
- 8.3 First, the Commission is empowered to adopt implementing technical standards, on the basis of draft implementing technical standards developed by ESMA specifying the data standards and formats of information to be reported, the methods and arrangements for reporting, the frequency of the reports and the date by which derivative contracts are to be reported³⁵. The ESCB is increasingly using data collected pursuant to Regulation (EU) No 648/2012 in the fulfilment of its mandates. In order to leverage the insights gained by the ESCB on the quality of data reported under Regulation (EU) No 648/2012, the development of draft regulatory technical standards by ESMA should be carried out in close cooperation with the relevant members of the ESCB.
- 8.4 Second, the Commission is empowered to adopt regulatory technical standards, on the basis of draft regulatory technical standards developed by ESMA, specifying the procedures for the reconciliation of data between trade repositories and the procedures for the verification of data as to its completeness and accuracy and of compliance with the reporting requirements³⁶. Authorities

³³ *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'.

³⁴ See paragraph 2 of Opinion CON/2015/10, paragraph 4 of Opinion CON/2012/5, paragraph 8 of Opinion CON/2011/44, and paragraph 4 of Opinion CON/2011/42.

³⁵ See Article 1(7)(c) of the proposed regulation.

³⁶ See Article 1(16) of the proposed regulation.

with direct and immediate access to trade repositories' data, including the relevant members of the ESCB, have developed significant expertise in this field. Ensuring that such expertise is leveraged in the development of the regulatory technical standards is therefore important. For this purpose the development of draft regulatory technical standards by ESMA should be carried out in close cooperation with the relevant members of the ESCB.

Where the ECB recommends that the proposed regulation is amended, specific drafting proposals are set out in the separate technical working document accompanied by explanatory text to that effect. The technical working document is available on the ECB's website.

Done at Frankfurt am Main, 11 October 2017.



The President of the ECB

Mario DRAGHI

Technical working document

produced in connection with ECB Opinion CON/2017/42¹

Proposal for a regulation of the European Parliament and of the Council

amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivatives contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories

Drafting proposals

Text proposed by the Commission	Amendments proposed by the ECB ²
Amendment 1 Recital 28a (new)	
No text.	‘Delegated and implementing acts adopted in accordance with Articles 290 and 291 TFEU constitute Union legal acts. Pursuant to 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.’

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>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 8 of the Opinion.</i></p>	
<p style="text-align: center;">Amendment 2</p> <p style="text-align: center;">Article 1(1a) (new) of the proposed regulation concerning Article 1(4) of Regulation (EU) No 648/2012</p>	
No text.	<p>‘(1a) In Article 1(4), the following point (d) is added: “(d) transactions to which the bodies listed in paragraphs (a) to (c) above are counterparties.”’</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>The exemption of the members of the ESCB from the application of the proposed regulation is not sufficient to ensure that transactions to which ESCB members are counterparty are also exempt from the reporting and transparency obligations. Therefore this new subparagraph is necessary. See paragraphs 1.1 to 1.4 of the Opinion.</i></p>	
<p style="text-align: center;">Amendment 3</p> <p style="text-align: center;">Article 1(3) of the proposed regulation concerning new Article4a(2) of Regulation (EU) No 648/2012</p>	
‘2. A financial counterparty that has become subject to the clearing obligation in accordance with paragraph 1 and subsequently demonstrates to the relevant competent authority that its	‘2. A financial counterparty that has become subject to the clearing obligation in accordance with paragraph 1 and subsequently demonstrates to the relevant competent authority that its

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>aggregate month-end average position for the months March, April and May of a given year no longer exceeds the clearing threshold referred to in paragraph 1, shall no longer be subject to the clearing obligation set out in Article 4.'</p>	<p>aggregate month-end average position for the months March, April and May of a given year no longer exceeds the clearing threshold referred to in paragraph 1, shall no longer be subject to the clearing obligation set out in Article 4.</p> <p>The financial counterparty shall be able to demonstrate to the relevant competent authority that the calculation of the aggregate month-end position in OTC derivatives contracts does not lead to a systematic underestimation of the overall position.'</p>
<p><u>Explanation</u></p> <p><i>The proposed introduction of a methodology for calculating the positions in OTC derivatives contracts relevant for determining whether a financial counterparty (FC) or a non-financial counterparty (NFC) is subject to the clearing obligation, which is based on end-of-period data instead of a rolling average position in OTC derivatives contracts over 30 working days, may create an incentive for 'window dressing' to avoid the clearing obligation. The ECB therefore proposes to add a requirement that the FC shall be able to demonstrate to the relevant competent authority that the calculation of the aggregate month-end position in OTC derivatives contracts does not lead to a systematic underestimation of the overall position.</i></p>	
<p>Amendment 4</p> <p>Article 1(8) of the proposed regulation concerning new Article 10(2) of Regulation (EU) No 648/2012</p>	
<p>'2. A non-financial counterparty that has become subject to the clearing obligation in accordance with the second subparagraph of paragraph 1 and subsequently demonstrates to the authority designated in accordance with paragraph 5 that its aggregate month-end average position for the months March, April and May of a given year no longer exceeds the clearing threshold referred to in paragraph 1 shall no longer be subject to the clearing obligation set out in Article 4.'</p>	<p>'2. A non-financial counterparty that has become subject to the clearing obligation in accordance with the second subparagraph of paragraph 1 and subsequently demonstrates to the authority designated in accordance with paragraph 5 that its aggregate month-end average position for the months March, April and May of a given year no longer exceeds the clearing threshold referred to in paragraph 1 shall no longer be subject to the clearing obligation set out in Article 4.</p> <p>The non-financial counterparty shall be able to demonstrate to the relevant competent</p>

Text proposed by the Commission	Amendments proposed by the ECB ²
	<p>authority that the calculation of the aggregate month-end position in OTC derivatives contracts does not lead to a systematic underestimation of the overall position.</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>For the reasons adduced in Amendment 8 the ECB proposes also to add a requirement in the proposed regulation that the NFC shall be able to demonstrate to the relevant competent authority that the calculation of the aggregate month-end position in OTC derivatives contracts does not lead to a systematic underestimation of the overall position.</i></p>	
<p style="text-align: center;">Amendment 5</p> <p style="text-align: center;">Article 1(7)(a) of the proposed regulation concerning Article 9(1) of Regulation (EU) No 648/2012</p>	
<p>'1. Counterparties and CCPs shall ensure that the details of any derivative contract they have concluded and of any modification or termination of the contract are reported in accordance with paragraph 1a to a trade repository registered in accordance with Article 55 or recognised in accordance with Article 77. The details shall be reported no later than the working day following the conclusion, modification or termination of the contract.</p> <p>The reporting obligation shall apply to derivative contracts which:</p> <p>(a) were entered into before 12 February 2014 and remain outstanding on that date;</p> <p>(b) were entered into on or after 12 February 2014.</p> <p>The reporting obligation shall not apply to intragroup transactions referred to in Article 3 where one of the counterparties is a non-financial counterparty.'</p>	<p>'1. Counterparties and CCPs shall ensure that the details of any derivative contract they have concluded and of any modification or termination of the contract are reported in accordance with paragraph 1a to a trade repository registered in accordance with Article 55 or recognised in accordance with Article 77. The details shall be reported no later than the working day following the conclusion, modification or termination of the contract.</p> <p>The reporting obligation shall apply to derivative contracts which:</p> <p>(a) were entered into before 12 February 2014 and remain outstanding on that date;</p> <p>(b) were entered into on or after 12 February 2014.</p> <p>The reporting obligation shall not apply to intragroup transactions referred to in Article 3 where one of the counterparties is a are non-financial counterparty counterparties which are not subject to the clearing obligation referred to in Article 4 pursuant to Article 10(1).'</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>Recital 12 of the proposed regulation mentions reduction of the 'important costs and burdens on non-</i></p>	

Text proposed by the Commission	Amendments proposed by the ECB ²
<p><i>financial counterparties' as an objective of the intragroup reporting exemption for trades where at least one entity is a NFC. However, by holding financial counterparties engaging in derivative trades with NFCs below the clearing threshold responsible and liable for reporting on behalf of both counterparties, this objective is already achieved. The ECB therefore proposes excluding from the intragroup exemption trades where only one of the counterparties is a financial counterparty, as such trades would provide valuable information on derivatives trading while not imposing any additional burden on small NFCs.</i></p> <p><i>With regard to intragroup trades between NFCs, the ECB's internal analysis shows that, although such trades represent a small share of the total reports collected under Regulation (EU) No 648/2012, their relative share increases for some asset classes, e.g. currency derivatives. While it is understood that the Commission's objective is to reduce an unnecessary reporting burden on NFCs, a broad exemption such as that proposed in the current text may be problematic as it:</i></p> <ul style="list-style-type: none"> - <i>could trigger regulatory arbitrage by agents to avoid the reporting obligation;</i> - <i>would deprive competent authorities of information on derivatives transactions that may not have hedging purposes;</i> - <i>would apply equally to small NFCs with little impact on the market and large NFCs that trade significant volumes of contracts.</i> <p><i>For these reasons, the ECB suggests that the reporting obligation should not apply to intragroup transactions between NFCs which are not subject to the clearing obligation.</i></p>	
<p>Amendment 6</p> <p>Article 1(7)(b) of the proposed regulation</p> <p>concerning Article 9 of Regulation (EU) No 648/2012</p>	
<p>'1a. The details of derivative contracts referred to in paragraph 1 shall be reported as follows:</p> <p>(a) CCPs shall be responsible for reporting on behalf of both counterparties the details of derivative contracts that are not OTC derivative contracts as well as for ensuring the accuracy of the details reported;</p> <p>(b) financial counterparties shall be responsible for reporting on behalf of both counterparties the details of OTC derivative contracts concluded with a non-financial counterparty that is not subject to the conditions referred to in the second subparagraph of Article 10(1) as well as for ensuring the accuracy of the details reported;</p>	<p>'1a. The details of derivative contracts referred to in paragraph 1 shall be reported as follows:</p> <p>(a) CCPs shall be responsible for reporting on behalf of both counterparties the details of derivative contracts that are not OTC derivative contracts as well as for ensuring the accuracy of the details reported;</p> <p>(b) financial counterparties shall be responsible for reporting on behalf of both counterparties the details of OTC derivative contracts concluded with a non-financial counterparty that is not subject to the conditions referred to in the second subparagraph of Article 10(1) as well as for ensuring the accuracy of the details reported;</p>

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<p>(c) the management company of a UCITS shall be responsible for reporting the details of OTC derivative contracts to which that UCITS is a counterparty as well as for ensuring the accuracy of the details reported;</p> <p>(d) the manager of an AIF shall be responsible for reporting the details of OTC derivative contracts to which that AIF is a counterparty as well as for ensuring the accuracy of the details reported;</p> <p>(e) counterparties and CCPs shall ensure that the details of their derivative contracts are reported accurately and without duplication.</p> <p>Counterparties and CCPs subject to the reporting obligation referred to in paragraph 1 may delegate that reporting obligation.'</p>	<p>(c) the management company of a UCITS shall be responsible for reporting the details of OTC derivative contracts to which that UCITS is a counterparty as well as for ensuring the accuracy of the details reported;</p> <p>(d) the manager of an AIF shall be responsible for reporting the details of OTC derivative contracts to which that AIF is a counterparty as well as for ensuring the accuracy of the details reported;</p> <p>(e) counterparties and CCPs shall ensure that the details of their derivative contracts are reported accurately and without duplication- ;</p> <p>(f) non-financial counterparties subject to the clearing obligation referred to in Article 4 pursuant to Article 10(1) shall be responsible for reporting on behalf of both counterparties the details of intragroup OTC derivative contracts concluded with a non-financial counterparty that are not subject to the clearing obligation referred to in Article 4 pursuant to Article 10(1), and for ensuring the accuracy of the details reported.'</p> <p>Counterparties and CCPs subject to the reporting obligation referred to in paragraph 1 may delegate that reporting obligation.'</p>
<p><u>Explanation</u></p> <p><i>This amendment is proposed in support of Amendment 5 above and should be read in conjunction with it. The counterparty that is subject to the clearing obligation in an intragroup transaction entered into by two NFCs should be responsible for reporting the transactions on behalf of both counterparties.</i></p>	
<p>Amendment 7</p> <p>Article 1(7)(c) of the proposed regulation</p> <p>concerning Article 9(6) of Regulation (EU) No 648/2012</p>	
<p>'(c) paragraph 6 is replaced by the following:</p> <p>"6. To ensure uniform conditions of application of paragraphs 1 and 3, ESMA shall develop</p>	<p>'(c) paragraph 6 is replaced by the following:</p> <p>"6. To ensure uniform conditions of application of paragraphs 1 and 3, ESMA shall, in close</p>

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<p>draft implementing technical standards specifying:</p> <p>(a) the data standards and formats for the information to be reported, which shall include at least the following:</p> <p>(i) global legal entity identifiers ('LEIs');</p> <p>(ii) international securities identification numbers ('ISINs');</p> <p>(iii) unique trade identifiers ('UTIs');</p> <p>(b) the methods and arrangements for reporting;</p> <p>(c) the frequency of the reports;</p> <p>(d) the date by which derivative contracts are to be reported, including any phase-in for contracts entered into before the reporting obligation applies.</p> <p>In developing those draft technical standards, ESMA shall take into account international developments and standards agreed upon at Union or global level, and their consistency with the reporting requirements laid down in Article 4 of Regulation (EU) No 2015/2365* and Article 26 of Regulation (EU) No 600/2014.</p> <p>ESMA shall submit those draft implementing technical standards to the Commission by <i>[PO please insert the date 9 months after the entry into force of this Regulation]</i>.</p> <p>Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.”</p>	<p>cooperation with the ESCB, develop draft implementing technical standards specifying:</p> <p>(e) the data standards and formats for the information to be reported, which shall include at least the following:</p> <p>(i) global legal entity identifiers ('LEIs');</p> <p>(ii) international securities identification numbers ('ISINs');</p> <p>(iii) unique trade identifiers ('UTIs');</p> <p>(f) the methods and arrangements for reporting;</p> <p>(g) the frequency of the reports;</p> <p>(h) the date by which derivative contracts are to be reported, including any phase-in for contracts entered into before the reporting obligation applies.</p> <p>In developing those draft technical standards, ESMA shall take into account international developments and standards agreed upon at Union or global level, and their consistency with the reporting requirements laid down in Article 4 of Regulation (EU) No 2015/2365* and Article 26 of Regulation (EU) No 600/2014.</p> <p>ESMA shall submit those draft implementing technical standards to the Commission by <i>[PO please insert the date 9 months after the entry into force of this Regulation]</i>.</p> <p>Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.</p> <p>* Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012 (OJ L 337, 23.12.2015, p. 1).”</p>

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<p><u>Explanation</u></p> <p><i>Authorities, including the relevant members of the ESCB, that have direct and immediate access to trade repositories' data have developed significant expertise in this field. It is important to ensure that such expertise is leveraged in the development of implementing technical standards, in particular with regard to data standards and formats.</i></p>	
<p>Amendment 8</p> <p>Article 1(16) of the proposed regulation concerning Article 78 of Regulation (EU) No 648/2012</p>	
<p>'(16) In Article 78, the following paragraph 9 and 10 are added:</p> <p>“(9) A trade repository shall establish the following procedures and policies:</p> <p>(a) procedures for the effective reconciliation of data between trade repositories;</p> <p>(b) procedures to ensure the completeness and accuracy of the reported data;</p> <p>(c) policies for the orderly transfer of data to other trade repositories where requested by the counterparties or CCPs referred to in Article 9 or where otherwise necessary.</p> <p>(10) To ensure a consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying:</p> <p>(a) the procedures for the reconciliation of data between trade repositories;</p> <p>(b) the procedures to be applied by the trade repository to verify the compliance by the reporting counterparty or submitting entity with the reporting requirements and to verify the completeness and accuracy of the information reported under Article 9.</p> <p>ESMA shall submit those draft regulatory technical standards to the Commission by <i>[PO please insert the date 9 months after the entry into force of this</i></p>	<p>'(16) In Article 78, the following paragraphs 9 and 10 are added:</p> <p>“(9) A trade repository shall establish the following procedures and policies:</p> <p>(a) procedures for the effective reconciliation of data between trade repositories;</p> <p>(b) procedures to ensure the completeness and accuracy of the reported data;</p> <p>(c) policies for the orderly transfer of data to other trade repositories where requested by the counterparties or CCPs referred to in Article 9 or where otherwise necessary.</p> <p>(10) To ensure a consistent application of this Article, ESMA shall, in close cooperation with the ESCB, develop draft regulatory technical standards specifying:</p> <p>(a) the procedures for the reconciliation of data between trade repositories;</p> <p>(b) the procedures to be applied by the trade repository to verify the compliance by the reporting counterparty or submitting entity with the reporting requirements and to verify the completeness and accuracy of the information reported under Article 9.</p> <p>ESMA shall submit those draft regulatory technical standards to the Commission by <i>[PO please insert the date 9 months after the entry into force of this</i></p>

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<p><i>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><i>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><u>Explanation</u></p> <p><i>Authorities, including the relevant members of the ESCB, that have direct and immediate access to trade repositories’ data have developed significant expertise in this field. It is important to ensure that this expertise is leveraged in the development of regulatory technical standards.</i></p>	
<p>Amendment 9</p> <p>Article 1(19)(c) of the proposed regulation</p> <p>concerning Article 85(3) of Regulation (EU) No 648/2012</p>	
<p>‘3. By <i>[PO please add 6 months before the date referred to in paragraph 1]</i> ESMA shall report to the Commission on the following:</p> <p>(a) whether viable technical solutions have been developed that facilitate the participation of PSAs in central clearing and the impact of those solutions on the level of central clearing by PSAs, taking into account the report referred to in paragraph 2;</p> <p>(b) the impact of this Regulation on the level of clearing by non-financial counterparties and the distribution of clearing within the non-financial counterparty class, especially with regard to the appropriateness of the clearing thresholds referred to in Article 10(4);</p> <p>(c) the impact of this Regulation on the level of clearing by financial counterparties other than those subject to Article 4a(2) and the distribution of clearing within that financial counterparty class, especially with regard to the appropriateness of the clearing thresholds referred to in Article 10(4);</p>	<p>‘3. By <i>[please add 6 months before the date referred to in paragraph 1]</i> ESMA shall report to the Commission on the following:</p> <p>(a) whether viable technical solutions have been developed that facilitate the participation of PSAs in central clearing and the impact of those solutions on the level of central clearing by PSAs, taking into account the report referred to in paragraph 2;</p> <p>(b) the impact of this Regulation on the level of clearing by non-financial counterparties and the distribution of clearing within the non-financial counterparty class, especially with regard to the appropriateness of the clearing thresholds referred to in Article 10(4);</p> <p>(c) the impact of this Regulation on the level of clearing by financial counterparties other than those subject to Article 4a(2) and the distribution of clearing within that financial counterparty class, especially with regard to the appropriateness of the clearing thresholds referred to in Article 10(4);</p>

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<p>(d) the improvement of the quality of transaction data reported to trade repositories, the accessibility of those data and the quality of the information received from trade repositories in accordance with Article 81;</p> <p>(e) the accessibility of clearing by counterparties.'</p>	<p>(d) in close cooperation with the relevant members of the ESCB, the improvement of the quality of transaction data reported to trade repositories, the accessibility of those data and the quality of the information received from trade repositories in accordance with Article 81;</p> <p>(e) the accessibility of clearing by counterparties.'</p>
<p><u>Explanation</u></p> <p><i>Authorities, including the relevant members of the ESCB, that have direct and immediate access to trade repositories' data have developed significant expertise in this field. It is important to ensure that this expertise is leveraged in the development of implementing technical standards, in particular with regard to data standards and formats.</i></p>	