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COVER NOTE

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

Subject: OPINION OF THE EUROPEAN CENTRAL BANK of 22 August 2018 on
the review of prudential treatment of investment firms (CON/2018/36)

Delegations will find attached the above mentioned Opinion.

OPINION OF THE EUROPEAN CENTRAL BANK
of 22 August 2018
on the review of prudential treatment of investment firms
(CON/2018/36)

Introduction and legal basis

On 26 and 29 January 2018 the European Central Bank (ECB) received requests from the European Parliament and the Council of the European Union, respectively, for an opinion on a proposal for a Regulation of the European Parliament and of the Council on the prudential requirements of investment firms and amending Regulations (EU) No 575/2013, (EU) No 600/2014 and (EU) No 1093/2010 and a proposal for a Directive of the European Parliament and of the Council on the prudential supervision of investment firms and amending Directives 2013/36/EU and 2014/65/EU¹ (hereinafter the 'proposed regulation' and the 'proposed directive', collectively referred to as the 'proposed acts').

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 acts contain provisions affecting the ECB's tasks concerning policies relating to the prudential supervision of credit institutions in accordance with Article 127(6) of the Treaty and Article 1 of Council Regulation (EU) No 1024/2013² and the European System of Central Banks' contribution to the smooth conduct of policies pursued by the competent authorities relating to the stability of the financial system, as referred to in Article 127(5) 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 supports the objective of the proposed acts in setting out a prudential framework that is better adapted to the risks and business models of different types of investment firms.

Whilst the ECB generally supports the purpose of subjecting systemically important investment firms to the same prudential rules as credit institutions, the proposed acts should be carefully assessed in order to avoid unintended consequences for other Union legal acts due to the change in the definition of credit institutions. This opinion highlights in particular certain implications for the statistics regime. However, such effects are not limited to the statistics framework.

¹ COM(2017)790 final and COM(2017)791 final.

² Council Regulation (EU) No 1024/2013 conferring specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

Currently, only credit institutions can be eligible counterparties for Eurosystem monetary policy operations³. The possible consequences of an inclusion of Class 1 investment firms in the definition of 'credit institution' will need to be carefully assessed by the ECB.

1. Classification of investment firms as credit institutions

The Commission proposes three classes of investment firms: (i) investment firms whose business consists of dealing on own account and/or underwriting of financial instruments and/or placing financial instruments on a firm commitment basis⁴ and whose total assets exceed EUR 30 billion, or investment firms which are part of a group of undertakings carrying out these activities with total assets exceeding EUR 30 billion⁵ (Class 1 firms); (ii) investment firms which meet specific thresholds⁶ (Class 2 firms); and (iii) all remaining investment firms (Class 3 firms). Class 1 firms are classified as credit institutions and as such should be subject to Directive 2013/36/EU⁷ and Regulation (EU) No 575/2013⁸. As a consequence, Class 1 firms, by virtue of becoming credit institutions within the meaning of Article 1 of Regulation (EU) No 1024/2013, would be subject to supervision by the ECB in the framework of the Single Supervisory Mechanism⁹.

Since Council Regulation (EU) No 1024/2013 specifically states that it does not confer on the ECB any other supervisory tasks, it is acknowledged, from a legal perspective, that an alternative means of ensuring that the ECB supervises Class 1 firms could have been to amend Council Regulation (EU) No 1024/2013 in order to confer specific tasks upon the ECB concerning the prudential supervision of Class 1 firms. In terms of the impact on ECB supervisory competences, it is worthwhile recalling that the number of Class 1 firms is limited, and that there is an overlap in the services provided by credit institutions and Class 1 firms. Thus, the impact of the proposed regulation on the ECB seems to be marginal¹⁰.

³ Guideline (EU) 2015/510 of the European Central Bank of 19 December 2014 on the implementation of the Eurosystem monetary policy framework (ECB/2014/60), Article 55.

⁴ Services under 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), Section A of Annex I, points (3) and (6), which include [underwriting, placing orders on a firm commitment basis].

⁵ Where the undertaking has a total asset value below EUR 30 billion at solo level, but is part of a group whose combined total asset value exceeds EUR 30 billion (i.e. combined total asset value of entities within the group which provide the relevant services and have solo total asset values below EUR 30 billion), each undertaking within the group providing the relevant services will be a credit institution; or where the total asset value of all undertakings in a group as a whole carrying on the relevant services exceeds EUR 30 billion, (i.e. parent undertaking and subsidiaries) the consolidating supervisor in consultation with the college can decide to classify one or more undertakings in that group with a total asset value of less than EUR 30 billion at solo level as a credit institution in order to address potential risks of circumvention and potential risks for the financial stability of the Union.

⁶ See Article 12 of the proposed regulation.

⁷ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

⁸ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

⁹ See recital 33 of the proposed regulation and page 26 of Commission Staff Working document 'Review of the prudential framework for investment firms' accompanying the proposed acts (SWD(2017)481 final).

¹⁰ See the third paragraph of page 2 of the explanatory memorandum to the proposed regulation.

Under the proposed regulation the criteria according to which an investment firm is to be considered a credit institution within the meaning of Article 4(1) of Regulation (EU) No 575/2013¹¹ aims to capture systemic investment firms with total assets above certain thresholds.

The ECB welcomes this proposal given that firms which meet these criteria can pose increased financial stability risks as well as an increased risk of spill-over effects on other credit institutions, given their size and interconnectedness and in view of their exposure to substantial counterparty credit risk and market risk for positions they take on their own account. Overall, the proposed distinction ensures the application of prudent and consistent supervisory standards so as to ensure a level playing field for institutions similar to credit institutions. However, without prejudice to the existing responsibility of national competent authorities for the supervision of third country branches of credit institutions, the proposed regulation should provide clarification as to how the assets are to be calculated, i.e. including the assets of Union branches of third country groups and third country subsidiaries of undertakings in the Union arising from their consolidated balance sheet.

Furthermore, given that total assets are not the only measure for identifying the systemic importance of investment firms, it is suggested that the total asset threshold could be complemented with other criteria including for example a revenue criterion, significance of cross-jurisdictional activity or interconnectedness. It would be desirable to align such criteria as much as possible with the criteria for significance outlined in Regulation (EU) No 1024/2013, also taking into account the EBA recommendation¹². In this light, once more experience has been gained with the proposed regime, there could be merit in further refinement of these criteria on the basis of an underlying methodology for assessing systemic risk posed by investment firms, to ensure that it achieves its objectives and does not result in excessive unintended consequences, for example through regulatory arbitrage.

Directive 2013/36/EU requires Member States to ensure that the competent authority for the authorisation of credit institutions consults the competent authorities for the supervision of investment firms if the relevant investment firm is controlled by the same natural or legal persons as those who control the credit institution¹³. The proposed directive should, therefore, clarify that such a consultation is also required where an investment firm is reclassified as a credit institution¹⁴.

On 23 November 2016, the Commission published a proposal for a directive amending Directive 2013/36/EU¹⁵, on which the ECB was consulted. Under that proposal third country credit institutions and investment firms would be obliged to set up, where certain conditions are met, an EU parent undertaking that would consolidate all of their assets in the Union¹⁶. The ECB reiterates its strong support for the intermediate

¹¹ See Article 60 of the proposed regulation.

¹² See the Opinion of the European Banking Authority in response to the European Commission's Call for Advice on Investment Firms (EBA/Op/2017/11) of 29 September 2017. Recommendation 4 states that in order to identify Class 1 firms the EBA should develop dedicated Level 2 Regulatory Technical Standards in order to carry out such identification, taking into account the specificities of investment firms.

¹³ See Article 16(2) of Directive 2013/36/EU.

¹⁴ See the proposed amendment to Article 57(7a)(new) of the proposed directive.

¹⁵ Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures (COM(2016) 854 final).

¹⁶ Reference is made to the proposed Article 21b of Directive 2013/36/EU. See also paragraph 1.6 of the Opinion of the European Central Bank of 8 November 2017 on amendments to the Union framework for capital requirements of credit institutions and investment firms (CON/2017/46) (OJ C 34, 31.1.2018, p. 5). All ECB opinions are published on the ECB website at www.ecb.europa.eu.

EU parent undertaking proposal introduced by the Commission in the context of revisions to Directive 2013/36/EU and Regulation (EU) No 575/2013¹⁷. For the avoidance of doubt, the proposed amendment to the definition of ‘institutions’ in the proposed regulation should not exclude investment firms from being required to set up an intermediate EU parent undertaking.

2. Authorisation of certain investment firms as credit institutions

Under the proposed directive responsibility for the authorisation of an investment firm that falls within the definition of a credit institution is assigned to the competent authority for the authorisation of credit institutions under Directive 2013/36/EU¹⁸. Competent authorities for the supervision of credit institutions and investment firms should be required to cooperate, especially in order to ensure that, if the thresholds under the proposed regulation are reached, investment firms promptly apply for authorisation as credit institutions and supervision can be smoothly assumed by the banking supervisor¹⁹.

Whilst the proposed directive stipulates that those investment firms that can be classified as credit institutions must obtain authorisation as a credit institution, clarification is needed as to what happens once authorisation as a credit institution is granted²⁰. The proposed directive should also clarify the consequences for an investment firm which has reached the threshold but operates without the relevant authorisation for an extended period of time and whose application for authorisation is subsequently rejected by the competent authority. In this case, a question may arise as to the relevant competent authority for the sanctioning of the investment firm for operating as a credit institution without authorisation, whether it would be the competent authority for supervision of investment firms or the competent authority for supervision of credit institutions. Furthermore, the proposed directive should further specify that investment firms that fulfil the definition of credit institutions, irrespective of which part of the definition their activities fall under, are only permitted to perform the traditional banking activities (e.g., receiving deposits from the public or granting loans) after having obtained the authorisation to undertake all banking activities²¹. Therefore, until such authorisation is granted, these entities should only perform activities for which they were authorised as an investment firm.

3. Statistical implications

The ECB notes the importance of ensuring a high degree of consistency and harmonised methodologies for statistical concepts and definitions in Union legislation and between Union statistical legislation and international statistical standards, in particular the System of National Accounts adopted by the United

¹⁷ See also paragraph 1.6 of Opinion CON/2017/46.

¹⁸ It is noted in this respect that Article 16(2) of Directive 2013/36/EU requires the competent authority for the supervision of credit institutions to consult in certain circumstances the competent authorities responsible for the supervision of investment firms before granting authorisation to a credit institutions.

¹⁹ See the proposed amendment to Article 5(2) of the proposed directive.

²⁰ See in this respect also Recital 38 of Directive 2014/65/EU which provides: ‘Credit institutions that are authorised under Directive 2013/36/EU should not need another authorisation under this Directive in order to provide investment services or perform investment activities. When a credit institution decides to provide investment services or perform investment activities the competent authorities, before granting an authorisation under Directive 2013/36/EU, should verify that it complies with the relevant provisions of this Directive’.

²¹ See the proposed amendment to Article 57(6) of the proposed directive.

Nations Statistical Commission²². For this reason, the ECB has previously welcomed that the definition of the 'monetary financial institution' (MFI) subsector in ESA 2010²³ follows the ECB definition²⁴ to which it makes express reference²⁵.

Moreover, certain statistical regulations of the ECB define the reporting population by direct reference to the definition of MFIs in Regulation (EU) No 1071/2013²⁶ or by reliance on the sub-sector of 'deposit-taking corporations except the central bank' (ESA sub-sector S.122) or by referring to 'credit institutions' as defined in Article 4(1)(1) of Regulation (EU) No 575/2013²⁷.

The proposed regulation would include firms within the definition of a 'credit institution' which, insofar as they are principally engaged in financial intermediation other than taking deposits (or close substitutes for deposits), fall under the ESA sub-sector 'Other financial intermediaries, except insurance corporations and pension funds' (S.125). This sub-sector is not, however, within the scope of the MFI definition in Union legislation. Thus, if Class 1 firms are classified as credit institutions, there would be inconsistencies in the common standards, definitions and classifications of relevance for the statistical treatment of financial corporations set out in Union legislation that would need to be remedied.

4. Macro-prudential perspective on investment firms

The proposed acts do not take on board the EBA recommendations on the need for a macro-prudential perspective on investment firms²⁸. A possible future review of the criteria for determining systemic investment firms may also consider whether certain macro-prudential tools could be developed to address specific risks that smaller investment firms could pose to financial stability. For instance, smaller investment firms that are significant market participants, engage in cross-border activities or are connected to credit institutions could function as shock amplifiers.

²² See European Commission, International Monetary Fund, Organization for Economic Cooperation and Development, United Nations, World Bank, System of National Accounts 2008 (New York, 2009), available at: <https://unstats.un.org/unsd/nationalaccount/docs/SNA2008.pdf>.

²³ ESA 2010 is the European System of Accounts set up by Regulation (EU) No 549/2013 of the European Parliament and of the Council on the European system of national and regional accounts in the European Union (OJ L 174, 26.6.2013, p.1).

²⁴ See Article 1(a) of Regulation (EU) No 1071/2013 of the European Central Bank of 24 September 2013 concerning the balance sheet of the monetary financial institutions sector (recast) (ECB/2013/33) (OJ L 297, 7.11.2013, p. 1).

²⁵ See paragraph 6 of Opinion of the European Central Bank of 19 May 2011 on the proposal for a regulation of the European Parliament and of the Council on the European system of national and regional accounts in the European Union (CON/2011/44) (OJ C 203, 9.7.2011, p. 3).

²⁶ See, for example, Regulation (EU) No 1011/2012 of the European Central Bank of 17 October 2012 concerning statistics on holdings of securities (ECB/2012/24) (OJ L 305, 1.11.2012, p. 6); Regulation (EU) No 1072/2013 of the ECB of 24 September 2013 concerning statistics on interest rates applied by monetary and financial institutions (ECB/2013/34) (OJ L 297, 7.11.2013, p. 51); Regulation (EU) No 1333/2014 of the European Central Bank of 26 November 2014 concerning statistics on the money markets (ECB/2014/48) (OJ L 359, 16.12.2014, p. 97).

²⁷ See Article 3(1) of Regulation (EU) 2016/867 of the European Central Bank of 18 May 2016 on the collection of granular credit and credit risk data (ECB/2016/13) (OJ L 144, 1.6.2016, p.44).

²⁸ See the Opinion of the European Banking Authority in response to the European Commission's Call for Advice on Investment Firms (EBA/Op/2017/11) of 29 September 2017. Recommendation 60 of that opinion states that the new prudential regime for investment firms should include a macroprudential perspective. In this regard, the importance of mitigating the build-up and the materialisation of systemic risks should be emphasised with a view to determining whether appropriate macroprudential tools to address those risks should be developed. Recommendation 61 states that a detailed analysis assessing the potential systemic impact of the three classes of investment firms is needed. In this regard, it should be considered whether the macroprudential perspective ought to be tailored to the specificities of investment firms' business models. See also the EBA Discussion Paper 'Designing a new prudential regime for investment firms' (EBA/DP/2016/02) of 4 November 2016.

5. Provision of services by third country firms

Regarding the Commission's proposal to strengthen and further harmonise the Union legislation applicable to branches of third country investment firms²⁹, the Union legislator might wish to give further consideration to the possibility of applying the harmonised rules to all branches, even those that provide services to professional clients and eligible counterparties, in order to ensure that material risks are addressed consistently across the Union and to avoid regulatory arbitrage. In this respect, the proposed acts recognise that credit institutions and investment firms are qualitatively different institutions with different primary business models, but with a certain degree of overlap in the services they can provide³⁰. In this light, further reflection on possible avenues for regulatory arbitrage could be considered, for example as regards the treatment of branches of third-country credit institutions, which arguably should be consistent with the proposed treatment of branches of third country investment firms and therefore also further harmonised at Union level.

The proposed regulation strengthens the regime outlined in Regulation (EU) No 600/2014³¹ with regard to the provision of services and performance of activities by third country investment firms after an equivalence decision has been taken. The equivalence of third-country regulatory regimes is used in different areas of relevant Union law and consistency and additional enhancements to those approaches could be further considered. At the same time, the Union legislator might wish to further consider whether the equivalence regime in Regulation (EU) No 600/2014 should be limited (e.g., by limiting this regime to the provision of investment advice and the placing of financial instruments without a firm commitment basis to professional clients and eligible counterparties). Also, consideration might be given to whether the current regime for third country investment firms should continue to leave the regulation of investment services by non-equivalent third country investment firms to Member States, as Member States and national supervisors cannot unilaterally solve the systemic risks posed by, for example, certain large firms operating on a cross-border basis beyond the scope of national jurisdictions. In order to ensure a level playing field, one possibility might be to ensure that such non-equivalent third-country firms are required over time to establish a branch (or a subsidiary) in the Union in order to provide any investment services in the Union.

6. Alignment

6.1 The interplay between the proposed acts and Directive 2013/36/EU and Regulation (EU) No 575/2013 should be carefully assessed in order to avoid unintended consequences due to the change in the definition of credit institutions. The proposal does not affect the scope of consolidation under Regulation (EU) No 575/2013 or the requirement that investment firms that are either owners of entities within a banking group or that are subsidiaries of entities within a banking group are to be included within the scope of such consolidation. Any further amendments to the proposed acts should

²⁹ See Article 58(3) of the proposed Directive, aimed at amending Article 41 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).

³⁰ See page 2 of the explanatory memorandum to the proposed directive and page 2 of the explanatory memorandum to the proposed regulation.

³¹ 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).

be carefully reviewed with the aim of maintaining the scope of consolidation under Regulation (EU) No 575/2013. Similarly, coherence between the proposed acts and certain amendments to Directive 2013/36/EU and Regulation (EU) No 575/2013, which are expected to enter into force in the coming months, should be ensured.

- 6.2 The proposed directive provides that competent authorities and all persons associated with those authorities are bound by an obligation of professional secrecy³². The wording of the relevant provisions in the proposed directive differs from the provisions on professional secrecy in Directive 2013/36/EU and Directive 2014/65/EU of the European Parliament and of the Council^{33, 34}. The proposals should aim to align the wording in the different sectoral acts of Union law so as to harmonise, where appropriate, the scope of professional secrecy obligations.
- 6.3 It is suggested to avoid the replication of existing definitions. For instance, the term ‘management body in its supervisory function’ is defined both in Directive 2013/36/EU and in the proposed directive.

Done at Frankfurt am Main, 22 August 2018.

The President of the ECB

Mario DRAGHI

³² See Article 13 of the proposed directive.

³³ 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).

³⁴ See Article 53 of Directive 2013/36/EU and Article 76 of Directive 2014/65/EU.

Technical working document

produced in connection with ECB Opinion CON/2018/36³⁵

Drafting proposals in relation to proposal for a Regulation of the European Parliament and of the Council on the prudential requirements of investment firms and amending Regulations (EU) No 575/2013, (EU) No 600/2014 and (EU) No 1093/2010 ('the proposed regulation')

and

Drafting proposals in relation to proposal for a Directive of the European Parliament and of the Council on the prudential supervision of investment firms and amending Directives 2013/36/EU and 2014/65/EU ('the proposed directive')

Proposed regulation - drafting proposals

Text proposed by the European Commission	Amendments proposed by the ECB ³⁶
Amendment 1 Article 6(1)(d)(iii)	
(iii) upon prior approval by the competent authority, the parent undertaking declares that it guarantees the commitments entered into by the investment firm or that the risks in the investment firm are of negligible interest;	(iii) upon prior approval by the competent authority competent for supervision on a consolidated basis in accordance with Directive 2013/36/EU , the parent undertaking declares that it guarantees the commitments entered into by the investment firm or that the risks in the investment firm are of negligible interest;
<i>Explanation</i> <i>Under Article 6 of the proposed regulation competent authorities can waive the application of certain parts of</i>	

³⁵ This technical working document is produced in English only and communicated to the consulting Union institutions after adoption of the opinion. It is also published in the Legal framework section of the ECB's website alongside the opinion itself.

³⁶ 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 European Commission	Amendments proposed by the ECB ³⁶
<p><i>the regulation to specific investment firms, subject to criteria set out in that Article. Among these criteria is that the investment firm is included in the supervision on a consolidated basis of a credit institution, a financial holding company or a mixed financial holding company in accordance with the CRD³⁷ and that the parent undertaking (declares that it) guarantees the commitments entered into by the investment firm. Such declaration is, according to the text of Article 6, subject to prior approval by the competent authority. The ECB understands that this prior approval is to be provided by the competent authority for supervising the parent undertaking. Therefore, to avoid any confusion, the proposed amendment aims to clarify that it is the competent authority of the parent undertaking, and not that of the investment firm, that is to provide prior approval.</i></p>	
<p>Amendment 2</p> <p>Article 60(2)</p>	
<p>2. Article 4(1) is amended as follows:</p> <p>(a) point (1) is replaced by the following:</p> <p>“(1) ‘credit institution’ means an undertaking the business of which consists of any of the following:</p> <p style="padding-left: 40px;">(a) to take deposits or other repayable funds from the public and to grant credits for its own account;</p> <p style="padding-left: 40px;">(b) to carry out any of the activities referred to in points (3) and (6) of Section A of Annex I of Directive 2014/65/EU, where one of the following applies, but the undertaking is not a commodity and emission allowance dealer, a collective investment undertaking or an insurance undertaking:</p> <p style="padding-left: 80px;">i) the total value of the assets of the undertaking exceeds EUR 30 billion, or</p> <p style="padding-left: 80px;">ii) the total value of the assets of the undertaking is below EUR 30 billion, and the undertaking is part of a group in which</p>	<p>2. Article 4(1) is amended as follows:</p> <p>(a) point (1) is replaced by the following:</p> <p>“(1) ‘credit institution’ means an undertaking the business of which consists of any of the following:</p> <p style="padding-left: 40px;">(a) to take deposits or other repayable funds from the public and to grant credits for its own account;</p> <p style="padding-left: 40px;">(b) to carry out any of the activities referred to in points (3) and (6) of Section A of Annex I of Directive 2014/65/EU, where one of the following applies, but the undertaking is not a commodity and emission allowance dealer, a collective investment undertaking or an insurance undertaking:</p> <p style="padding-left: 80px;">i) the total value of the assets of the undertaking exceeds EUR 30 billion, or</p> <p style="padding-left: 80px;">ii) the total value of the assets of the undertaking does not exceed is below EUR 30 billion, and the undertaking is part</p>

³⁷ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

Text proposed by the European Commission	Amendments proposed by the ECB ³⁶
<p>the combined total value of the assets of all undertakings in the group that carry out any of the activities referred to in points (3) and (6) of Section A of Annex I of Directive 2014/65/EU and have total assets below EUR 30 billion exceeds EUR 30 billion, or</p> <p>iii) the total value of the assets of the undertaking is below EUR 30 billion, and the undertaking is part of a group in which the combined total value of the assets of all undertakings in the group that carry out any of the activities referred to in points (3) and (6) of Section A of Annex I of Directive 2014/65/EU exceed EUR 30 billion, where the consolidating supervisor in consultation with the supervisory college so decides in order to address potential risks of circumvention and potential risks for the financial stability of the Union.</p>	<p>of a group in which the combined total value of the assets of all undertakings in the group that carry out any of the activities referred to in points (3) and (6) of Section A of Annex I of Directive 2014/65/EU and have total assets that do not exceed below EUR 30 billion, exceeds EUR 30 billion, or</p> <p>iii) the total value of the assets of the undertaking is below does not exceed EUR 30 billion, and the undertaking is part of a group in which the combined total value of the assets of all undertakings in the group that carry out any of the activities referred to in points (3) and (6) of Section A of Annex I of Directive 2014/65/EU exceed EUR 30 billion, where the supervisors that would be responsible for the authorisation under Article 8a of Directive 2013/36/EU, and the consolidating supervisor, in consultation with the supervisory college, so decides, in order to address potential risks of circumvention and potential risks for the financial stability of the Union.</p> <p>For the purpose of points (ii) and (iii), when the undertaking is part of a third country group, the total assets of each branch of the third country group authorised in the Union are included in the combined total value of the assets of all undertakings in the group.”.</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>This proposal aims to clarify how firms whose balance sheet equals EUR 30 billion should be categorised.</i></p> <p><i>The proposal also takes into account the possibility that the group is only composed of investment firms. In</i></p>	

Text proposed by the European Commission	Amendments proposed by the ECB ³⁶
<p><i>this case, up to the moment that the abovementioned threshold is met, the competent authorities do not include the competent authority for granting authorisation. It is desirable that the competent authority for authorisation is responsible for determining whether the investment firms should be considered as credit institutions.</i></p> <p><i>It is proposed to clarify, when calculating the threshold in respect of a third country group, that the total assets of each branch of the third country group authorised in the Union are included in the combined total value of the assets of all undertakings in the group. In this respect it should be noted that the proposed amendment uses the term 'third country group'. The Commission proposal for a Directive amending Directive 2013/36/EU³⁸ includes a proposal for a definition of 'third country group' and for 'group'. In case these proposed definitions are not adopted in the context of the proposed Directive amending Directive 2013/36/EU, the definitions of 'third country group' and 'group' would have to be included in the proposed directive.</i></p> <p><i>See paragraph 1 of ECB Opinion [CON/2018/XX] ('the opinion').</i></p>	

³⁸ COM(2016) 854 final.

Proposed directive - drafting proposals

Text proposed by the European Commission	Amendments proposed by the ECB
Amendment 1 Article 5(2)	
<p>2. Competent authorities that are different from those designated in accordance with Article 67 of Directive 2014/65/EU shall establish a mechanism for cooperation with those authorities and for the exchange of all information that is relevant for the exercise of their respective functions and duties.</p>	<p>2. Competent authorities that are different from those designated in accordance with Article 67 of Directive 2014/65/EU shall establish a mechanism for cooperation with those authorities and for the exchange of all information that is relevant for the exercise of their respective functions and duties. In particular, competent authorities designated in accordance with Article 67 of Directive 2014/65/EU shall ensure that, where an investment firm is likely to require authorisation as a credit institution, the competent authority shall communicate this fact to the relevant investment firm and to the competent authority responsible for granting authorisation under Articles 8 and 8a of Directive 2013/36/EU.</p>
<p><u>Explanation</u></p> <p><i>The proposed reclassification of investment firms to credit institutions requires that these institutions are authorised as credit institutions in a timely manner. The proposed amendment aims to make it explicit that competent authorities responsible for the supervision of investment firms duly cooperate with the competent authorities responsible for the supervision of credit institutions (if different) so as to ensure a smooth transition of the supervision of these firms.</i></p> <p><i>See paragraph 2 of the opinion.</i></p>	
Amendment 2 Article 44(3)	

Text proposed by the European Commission	Amendments proposed by the ECB
<p>3. Colleges of supervisors shall also be established where all subsidiaries of an investment firm group headed by an Union investment firm, Union parent investment holding company or Union parent mixed financial holding company are located in a third country.</p>	<p>3. Colleges of supervisors shall also be established where all subsidiaries of an investment firm group headed by an Union investment firm, Union parent investment holding company or Union parent mixed financial holding company are located in a third country.</p>
<p><i>Explanation</i></p> <p><i>It is proposed that this provision be deleted since there seems to be no need for a college in a situation where all subsidiaries of an investment firm group are located in a third country, given that in such a scenario there would only be one relevant entity within the Union.</i></p>	
<p>Amendment 3</p> <p>Article 44(5)</p>	
<p>The following authorities shall be members in the college of supervisors:</p> <p>a. [...];</p> <p>b. [...].</p>	<p>The following authorities shall be members in the college of supervisors:</p> <p>a. [...];</p> <p>b. [...].</p> <p>The competent authorities for granting the authorisation under Articles 8 and 8a of Directive 2013/36/EU, where the conditions for such authorisation laid down in Article 4(1)(1)(b) of Regulation (EU) 575/2013 are fulfilled, or are likely to be fulfilled, shall be invited to attend the college.</p>
<p><i>Explanation</i></p> <p><i>Competent authorities of credit institutions should be able to participate in the college of supervisors, with a view to ensuring a smooth transition of tasks in case the conditions of Article 4(1)(1)(b)(i) and (ii) CRR³⁹ are close to being met, and also with a view to taking a decision under Article 4(1)(1)(b)(iii) CRR.</i></p>	

³⁹ Regulation (EU) 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 649/2012 (OJ L 176, 27.6.2013, p. 1).

Text proposed by the European Commission	Amendments proposed by the ECB
<p style="text-align: center;">Amendment 4</p> <p style="text-align: center;">Article 57(6a) (new)</p>	
No text	<p>(6a) in Article 16(2) the following point (d) is added:</p> <p style="text-align: center;">(d) an undertaking as referred to in Article 4(1)(1)(b) of Regulation (EU) No 575/2013.”;</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>The proposed directive should clarify that the competent authority responsible for granting authorisation to a credit institution as referred to in Article 4(1)(1)(b) of Regulation (EU) No 575/2013 consults the authorities that are responsible for the supervision of investment firms and insurance undertakings where the credit institution is affiliated with an investment firm or insurance undertaking. This proposed amendment aims to ensure that both authorities fully cooperate and provide each other with all relevant information necessary for the authorisation of this type of credit institution.</i></p> <p><i>See paragraph 2 of the opinion.</i></p>	
<p style="text-align: center;">Amendment 5</p> <p style="text-align: center;">Article 57(6)</p>	
<p>(6) the following Article 8a is inserted:</p> <p>“[...]”</p> <p>2. The undertakings referred to in paragraph 1 may continue carrying out the activities referred to in Article 4(1)(1)(b) of Regulation (EU) No 575/2013 until they obtain the authorisation referred to in that paragraph.</p> <p>[...]”.</p>	<p>(6) the following Article 8a is inserted:</p> <p>“[...]”</p> <p>2. The undertakings referred to in paragraph 1 may continue carrying out the activities referred to in Article 4(1)(1)(b) of Regulation (EU) No 575/2013 until they obtain the authorisation referred to in that paragraph. Those undertakings may take deposits or other repayable funds from the public and grant loans for their own account only once they have obtained the authorisation for those activities in accordance with Article 8.</p>

Text proposed by the European Commission	Amendments proposed by the ECB
	[...]"
<p style="text-align: center;"><u>Explanation</u></p> <p><i>The proposed regulation does not expressly state whether undertakings that fulfil the definition in Article 4(1)(1)(b) of Regulation (EU) No 575/2013 may take deposits or other repayable funds or grant loans for their own account. The proposed amendment aims to clarify that they may do so only insofar as they have obtained authorisation for those activities in accordance with Article 8 of the CRD IV⁴⁰.</i></p> <p><i>See paragraph 2 of the opinion</i></p>	

⁴⁰ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).