

III

(Preparatory acts)

EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 26 April 2023

on a proposal for a regulation amending Regulations (EU) No 648/2012, (EU) No 575/2013 and (EU) 2017/1131 as regards excessive exposures to third-country central counterparties and improve the efficiency of union clearing markets and a proposal for a Directive amending directives 2009/65/EU, 2013/36/EU and (EU) 2019/2034 as regards the treatment of concentration risk towards central counterparties and the counterparty risk on centrally cleared derivative transactions

(CON/2023/11)

(2023/C 204/03)

Introduction and legal basis

On 31 January 2023 and 6 February 2023, the European Central Bank (ECB) received requests from the Council of the European Union and the European Parliament, respectively, for an opinion on a proposal for a regulation of the European Parliament and of the Council amending Regulations (EU) 648/2012, (EU) 575/2013 and (EU) 2017/1131 as regards measures to mitigate excessive exposures to third-country central counterparties and improve the efficiency of Union clearing markets ⁽¹⁾ (hereinafter the 'proposed regulation') and on a proposal for a directive of the European Parliament and of the Council amending Directives 2009/65/EU, 2013/36/EU and (EU) 2019/2034 as regards the treatment of concentration risk towards central counterparties and the counterparty risk on centrally cleared derivative transactions ⁽²⁾ (hereinafter the 'proposed directive').

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 and the proposed directive contain 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. 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 package proposed by the European Commission, which aims at strengthening the Union central clearing system by introducing targeted enhancements of the regulatory framework. The ECB agrees that resilient and well-developed central counterparties (CCPs) are critical to a well-functioning Capital Markets Union.

First, the ECB welcomes the proposed steps to enhance the safety and resilience of EU central clearing by strengthening cooperation among authorities and, in view of evolving financial risks, updating prudential requirements for CCPs and bank exposures to CCPs. Second, the ECB supports the proposed measures to streamline CCP supervisory processes with a view to enabling EU CCPs to respond more swiftly to new market developments. Third, the ECB agrees with the need for additional action to reduce excessive exposures of EU clients and clearing members to third-country CCPs with a view to limiting potential risks outside the full control of Union authorities.

⁽¹⁾ COM(2022) 697 final.

⁽²⁾ COM(2022) 698 final.

Robust arrangements ensuring the safety and efficiency of Union central clearing are critical from the perspective of the Eurosystem as central bank of issue. Disruptions at a CCP with significant euro-denominated business could have a negative impact on the liquidity position of euro area credit institutions and the smooth operation of payment systems, implying risks to effective monetary policy transmission and, ultimately, to achieving the Eurosystem's primary objective of maintaining price stability⁽³⁾. A strong Union central clearing system is also important for the Single Supervisory Mechanism (SSM) due to the size of the exposures of SSM supervised credit institutions to EU CCPs.

Specific observations

1. *Enhancing cooperation between authorities*

The ECB supports the proposed strengthening of cooperation among authorities at Union level and the expanded role for the European Securities and Markets Authority (ESMA) in fostering supervisory convergence, in particular by voting and opining on supervisory matters, as well as coordinating in crisis situations. The ECB believes that this is a step in the right direction, enhancing the supervision of central clearing at the Union level, considering the growth of clearing capacity within the Union and the related risk with a cross-border dimension. The importance and complexity of EU CCPs, which is expected to increase with the implementation of the active account requirement, as well as CCPs' interconnection with significant credit institutions as their clearing members, call for stronger supervision at Union level and the need to manage the potential spill-over of systemic risk across several Member States.

1.1. *Colleges*

1.1.1. Ongoing involvement of the college: opinions and annual review process

The colleges framework, established pursuant to Regulation (EU) No 648/2012 of the European Parliament and of the Council⁽⁴⁾ (hereinafter 'EMIR'), has proven to be an effective way to address the specific challenges of central clearing resulting from the pronounced risk implications of CCPs across borders and sectors. Colleges enable authorities from different jurisdictions and with diverse mandates to exchange information, provide input, and raise concerns regarding the risk management approaches and range of services of EU CCPs. Currently, colleges issue opinions on, among others, the authorisation of CCPs, the extension of CCPs' activities and services and significant model changes. However, CCPs' risk management responses to evolving market developments and risks are not currently scrutinised in formal college processes unless such CCPs' actions imply a significant change of activities or risk models.

With a view to strengthening college involvement on an ongoing basis, the ECB fully supports the Commission's proposal for the competent authority of each CCP to submit to the college, on at least an annual basis, a comprehensive report reviewing the CCP's compliance with the provisions of EMIR and evaluating the risks to which the CCP is exposed⁽⁵⁾. The ECB welcomes the Commission's proposal to require the college to issue additional opinions on key supervisory decisions, such as with respect to reports on the review and evaluation of the CCP, margin requirements and potential withdrawals of authorisation⁽⁶⁾.

⁽³⁾ See General observations of Opinion CON/2017/39 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 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 (OJ C 385, 15.11.2017, p. 3). All ECB opinions are available on EUR-Lex.

⁽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).

⁽⁵⁾ See Article 1, point (16)(b), of the proposed regulation.

⁽⁶⁾ See Article 1, point (12), of the proposed regulation, which inserts a new Article 17b(1), point (b), in EMIR.

Under the proposed framework, college opinions, in addition to agreeing or disagreeing with certain supervisory decisions, may also include conditions and recommendations that the college considers necessary to mitigate any shortcomings in the CCP's risk management ⁽⁷⁾. The ECB welcomes the proposed regulation as it enables college members to specify the considerations informing their votes and to flag remaining concerns. To further enhance the voting process, college members should also be encouraged to provide reasoning when casting their votes in the college opinion process, so as to allow the CCP's competent authority to benefit more from the various perspectives of college members in a college opinion. Finally, the ECB supports the proposed obligation for the CCP's competent authority to state reasons, fully explaining, in its decision, any significant deviations from the college opinion ⁽⁸⁾. The ECB believes that these proposed measures will enhance college involvement on an ongoing basis and will help to ensure that CCP supervision supports effective engagement with, and benefits from the perspectives of, all relevant authorities.

The ECB supports the provision in the proposed regulation for college members to provide greater input on the conduct of the annual review process, and suggests that such input should not be restricted to simply establishing the frequency and depth of the annual review but should also address the substantive supervisory focus of that review.

1.1.2. Cooperation in joint supervisory teams (JSTs)

The ECB fully supports the intent underlying the proposal to introduce JSTs in the supervision of authorised EU CCPs. Enhancing the involvement of college members in the process of ongoing supervision – notably with respect to the review of the application of non-objection procedures, on-site inspections and in the context of the annual review process – is a step towards strengthening supervision at Union level. It will help college members to gain a deeper shared understanding of key developments affecting the risks and risk management of CCPs, thereby enhancing the efficiency and effectiveness of the dialogue between CCPs' competent authorities and college members across the Union. It will also enable a pooling of the resources of CCPs' competent authorities and colleges, which will further contribute to the cost-effectiveness of EU CCP supervision, to the benefit of both national competent authorities and college members.

However, the ECB does not consider it necessary to establish a new supervisory body for this purpose, as this may lead to greater institutional complexity. In order to ensure proportionality, the ECB proposes to rely on existing cooperation within the college framework. In this vein, the ECB suggests assigning the envisaged tasks of the JSTs to the college as joint supervisory activities, with participation of college members on a voluntary basis, in line with the 'no compulsion – no prohibition' principle. In case no college member volunteers to participate in a joint supervisory activity together with the competent authority, this entails that the competent authority assumes this task alone.

With a view to embedding the joint supervisory activities in the existing college processes, the ECB suggests adding an additional element to CCPs' competent authorities' report on the annual review process ⁽⁹⁾, namely a plan for joint supervisory activities during the forthcoming annual review period.

In addition to the JSTs' tasks under the proposed regulation, the ECB also proposes joint supervisory activities with respect to providing input to the non-objection procedure related to the approval of changes in the CCP's margin models, as well as to the conduct of the annual review and evaluation carried out by the EU CCP's competent authority ⁽¹⁰⁾. Joint supervisory activities should also include potential desktop exercises as an additional tool for cooperative assessments of the CCP's risks and risk management procedures. To enable effective participation of all authorities, including the college, in non-objection procedures, the ECB proposes extending the respective assessment timeline (see paragraph 3.2 below).

⁽⁷⁾ See Article 1, point (12), of the proposed regulation, which inserts a new Article 17b(2), point (c), in EMIR.

⁽⁸⁾ See Article 1, point (12), of the proposed regulation, which inserts a new Article 17b(3) in EMIR.

⁽⁹⁾ See Article 1, point (16), of the proposed regulation.

⁽¹⁰⁾ See Article 1, point (16), of the proposed regulation, which amends Article 21 of EMIR.

With a view to preserving flexibility for potential joint supervisory activities with respect to ad hoc supervisory concerns that may arise, it should be possible to extend joint supervisory activities to areas not foreseen at the time of the previous annual review. In this context, the ECB welcomes the possibility for competent authorities of EU CCPs to request assistance in ongoing supervisory work ⁽¹¹⁾, in line with the 'no compulsion – no prohibition' principle.

Should JSTs be established, as set out in the Commission proposal, the ECB would support the participation of the clearing members' relevant supervisors in JSTs, given the importance of the nexus between clearing members and EU CCPs, and of the relevant central banks of issue and overseers, given their wider systemic perspective on the risk management of CCPs.

1.2. *European Securities and Markets Authority*

1.2.1. ESMA's role in fostering supervisory convergence and cross-border risk mitigation

A well-functioning Capital Markets Union requires closely aligned practices in EU CCP supervision. With a view to further promoting supervisory convergence and the consistent application of EMIR across EU CCPs, the ECB supports the proposals for strengthening the role of ESMA, as one of the European Supervisory Authorities. In particular, ESMA should have a voting right in the colleges and provide opinions on draft supervisory decisions pertaining to the annual review and evaluation, margin requirements and the withdrawal of authorisation. The ECB also supports the proposed process for ESMA opinions addressed to the EU CCP's competent authority ⁽¹²⁾. This is fully in line with the horizontal participation of ESMA in all colleges and its resulting unique capacity and important role in promoting a consistent assessment of common issues across colleges.

1.2.2. Cross-border coordination in crisis situations

The ECB agrees that there is a need to strengthen the Union framework for coordination between relevant authorities in the event of stress situations that impact, or are likely to impact, EU CCPs or centrally cleared markets more generally. This is essential both with a view to identify and address Union-wide contagion risks, arising from stress situations at individual EU CCPs, at an early stage and to achieve a well-coordinated and Union-wide response to such Union-wide emergencies. A more specific framework for emergency situations will help clarify expectations of the relevant authorities and CCPs regarding the practical steps to be followed, speed up the Union's response to such emergency situations and reduce the potential risk of conflicting approaches of those authorities.

Therefore, the ECB welcomes the proposed revision of the provisions for emergency situations ⁽¹³⁾, including the specification of relevant emergency scenarios, the formal coordinating role of ESMA, the possibility for ESMA to directly retrieve the information necessary for this coordinating role and its power to issue emergency recommendations to competent authorities in situations where more than one EU CCP would be impacted by the emergency situation or where Union-wide events are destabilising cross-border centrally cleared markets.

A well-coordinated response to serious stress events impacting central clearing in the Union requires the effective interaction of the CCP Supervisory Committee with other relevant authorities. Relevant central banks of issue should therefore always be invited to meetings of the CCP Supervisory Committee that are convened when developments in financial markets may have an adverse effect on market liquidity, the transmission of monetary policy or the smooth operation of payment systems. This would also ensure consistency with the proposed regulation's approach, whereby central banks of issue would be involved in all discussions on EU CCPs (see paragraph 1.3.1 below).

⁽¹¹⁾ See Article 1, point (18), of the proposed regulation, which inserts a new Article 23b(2d) in EMIR.

⁽¹²⁾ See Article 1, points (12) and (17), of the proposed regulation.

⁽¹³⁾ See Article 1, point (19), of the proposed regulation.

1.3. Cooperation within the CCP Supervisory Committee

1.3.1. Involvement of central banks of issue

Currently, the involvement of central banks of issue in Union-level discussions regarding EU CCPs is highly asymmetrical to their respective role for Tier 2 third-country CCPs, even though EU CCPs account for the majority of clearing in Union currencies and the resulting risk implications. Within the Eurosystem, this applies even in the field of over-the-counter (OTC) derivatives, where the reliance of Union clearing members on UK CCPs is most pronounced: EU CCPs account for around 60 % of the initial margin posted by Union clearing members to EU and UK CCPs ⁽¹⁴⁾. However, while central banks of issue may participate in meetings of the CCP Supervisory Committee on a wide range of issues in relation to Tier 2 third-country CCPs, their respective involvement for EU CCPs is currently limited to the discussions concerning Union-wide CCP stress tests and relevant market developments ⁽¹⁵⁾.

Against this background, the ECB strongly welcomes the proposal to invite central banks of issue as non-voting members to all discussions of the EU CCP Supervisory Committee on EU CCPs ⁽¹⁶⁾. This will enable central banks of issue to participate, for example, also in discussions of peer review analyses, regular information-sharing on relevant supervisory activities and decisions and all colleges' opinions and recommendations.

1.3.2. Involvement of prudential supervisors

The risk profile of a CCP can have an impact on the risk profile of the undertakings acting as clearing members of that CCP. Such undertakings are mainly credit institutions and investment firms ⁽¹⁷⁾. The resulting exposure has been steadily increasing since the global financial crisis of 2008 and the implementation of the G20 regulatory reform agenda incentivising central clearing. The institutions acting as clearing members not only implement the clearing obligation for their own trades but also act as intermediary between CCPs and other market participants, being required, or choosing, to centrally clear those trades. Thus, the interlinkage between institutions that act as clearing members and CCPs is vital and is expected to remain so in the future. Considering this interlinkage, it is not only crucial for the competent authorities responsible for the supervision of such institutions to be fully informed and in a timely manner about the risks managed by CCPs but also that they are in a position to offer their supervisory expertise and perspectives.

Cooperation with the prudential supervisors can be better enhanced at the level of the CCP Supervisory Committee. The tasks of the CCP Supervisory Committee, in particular the preparation of draft decisions on validation of significant changes to risk models or tiering, or the coordination of stress testing exercises, provide valuable insights on CCPs' risk profiles and allow for a comprehensive understanding of CCPs. By extension, given the aforementioned interlinkages between institutions acting as clearing members and CCPs, such discussions are also relevant for the risks these institutions may incur due to their exposures to CCPs. Thus, the prudential supervisors of the institutions with the three largest contributions to the default fund of EU CCPs should participate within the CCP Supervisory Committee meetings as non-voting members. In this way, supervisors will be informed in a timely manner on possible risks affecting individual institutions, and are able to address them, if and as needed, within ongoing supervision. Such membership should be made permanent, rather than subject to an ad hoc invitation.

⁽¹⁴⁾ ECB staff calculations for the period from December 2021 to August 2022, based on DTTC Data Warehouse data.

⁽¹⁵⁾ See paragraph 6 and 7 of Opinion CON/2017/39.

⁽¹⁶⁾ See Article 1, point (20)(a), of the proposed regulation, which amends Article 24a(2), point(d)(ii), of EMIR.

⁽¹⁷⁾ See Article 4, points (1) and (2), of 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).

1.4. *Developing a cross-sectoral monitoring mechanism*

1.4.1. Composition

One key feature of the supervisory framework for EU CCPs is its focus on individual CCPs, based on a combination of home country control and cross-border cooperation with host authorities across relevant sectors. Considering the integrated nature of financial markets within the Union, as well as the significant interdependencies between EU CCPs, the supervision of individual CCPs should be complemented with corresponding Union-level arrangements addressing potential Union-wide crisis situations and vulnerabilities. For example, the risk implications of central clearing interdependencies and the monitoring of the implementation of the active account requirement clearly require an assessment that is both cross-sectoral and Union-wide in nature.

Against this background, the ECB welcomes the proposal to bring together Union bodies involved in the supervision of EU CCPs, clearing members and clients – including representatives of ESMA, the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA), the Commission, the European Systemic Risk Board (ESRB), and the ECB, including within the context of its tasks under the SSM – in a new Joint Monitoring Mechanism (JMM) ⁽¹⁸⁾. The JMM should provide a comprehensive overview of the market developments relevant for clearing within the Union as well as of the potential horizontal risks, notably those related to the interconnectedness of financial actors across several jurisdictions.

Furthermore, considering that the JMM's tasks include monitoring the implementation of the active account requirement, the ECB proposes that the relevant central banks of issue of the currencies in which derivatives contracts covered by the active account requirement are denominated should participate in the JMM.

1.4.2. Mandate and relation with other authorities

In terms of substance, the ECB agrees with the proposal to keep the JMM's focus on monitoring and assessing horizontal risks and reporting to the relevant Union institutions, thereby leaving existing decision-making powers and processes for CCP supervision fully intact.

At the same time, it would be helpful to clarify the interaction of the JMM with the existing supervisory framework. First, with a view to ensuring effective input of the national competent authorities on the work of the JMM, the ECB suggests that the JMM's annual report on the results of its activities to the European Parliament, the Council and the Commission should be prepared in consultation with the relevant national competent authorities. Second, in order to support effective follow-up on the JMM reports, national competent authorities, the colleges and the CCP Supervisory Committee should, within the context of their own work, be required to review and consider the results of the JMM's activities, to the extent that the JMM's findings are relevant for the activities, risk profile or risk management of a specific CCP.

Moreover, the scope of the JMM's proposed task to monitor concentration risks should be broadened. The ECB understands that this task currently focuses on identifying concentration risks arising from reliance on the same service providers. The proposed regulation does not explicitly or adequately cover additional critical aspects of concentration. First, concentration risk could arise where one client is significantly exposed to a CCP through the use of various clearing members of that CCP, without prejudice to the types of products cleared in that same CCP. This is a risk that may be conceptually relevant for several CCPs, notwithstanding the fact that such concentration should be analysed at the level of each CCP. Second, concentration risk could arise where a market participant accumulates significant positions in the market for a product tradeable both in regulated as well as OTC markets. This concern can be exacerbated where the same or similar product, or even a highly correlated product, is cleared in more than one CCP. Such forms of concentration risk are currently less visible, for both authorities and market participants, despite their potential significant consequences. As highlighted during recent crises, those risks may have resulted in a significant threat to the safety and soundness of EU CCPs, market participants as well as financial stability more broadly. Thus, the ECB proposes that the monitoring activities of the JMM be enhanced within the proposed regulation by introducing, within the clearing context, more extensive coverage of concentration risk.

⁽¹⁸⁾ See Article 1, point (18), of the proposed regulation, which inserts a new Article 23c in EMIR.

Furthermore, in view of the JMM's novelty, the ECB suggests providing greater flexibility to the JMM regarding the scope of its potential work. To this end, a provision should be introduced that allows for, where considered helpful, the possibility that two or more JMM members agree to use the JMM framework as the basis for conducting cross-sectoral analyses on additional Union-wide and cross-sectoral topics of common interest related to central clearing.

1.5. *Supervision of recognised third-country CCPs*

The ECB generally supports the amendments introducing more proportionality into the recognition process of third-country CCPs as well as the amendments ensuring that ESMA receives all necessary information from Tier 2 third-country CCPs for the purposes of its supervisory activities.

The ECB suggests further clarifying the scope of the consultation of the central bank of issue in relation to the supervisory activities and procedures regarding Tier 2 third-country CCPs. Currently, this scope of consultation is delimited to the CCP's compliance with the five areas of relevance from a central bank of issue perspective: margins, liquidity risk controls, collateral, settlement and interoperability arrangements⁽¹⁹⁾. In practice, CCPs' compliance with these areas may be the subject of formal decisions taken by ESMA pursuant to certain provisions⁽²⁰⁾ as well as of specific supervisory ESMA assessments and procedures and the CCP Supervisory Committee. Furthermore, the area of margin requirements is governed by certain provisions of EMIR⁽²¹⁾. It is important to consult the central banks of issue on 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 EMIR⁽²²⁾. Therefore, the ECB recommends maintaining the focus of the scope of the central banks of issue consultations on those five areas, but to further clarify the type of ESMA acts where the central banks of issue should be consulted (e.g., by including supervisory assessments). Furthermore, the scope of consultation should include all relevant EMIR provisions that empower ESMA to adopt a decision or conduct a supervisory assessment within these areas.

2. *Updating prudential requirements*

2.1. *Amendments to CCP requirements*

2.1.1. *Participation and segregation requirements*

The ECB welcomes the proposal amending the admission requirements established by CCPs for clearing members. The specific features of non-financial counterparties within the context of central clearing is highly relevant, especially given recent experiences with large margin calls stemming from the exceptionally high market volatility. Therefore, CCPs should carefully assess the distinct liquidity profile of non-financial counterparties before they are admitted as direct participants. CCPs should especially examine whether non-financial counterparties are able to meet potential increases in margin requirements or default fund contributions on a timely basis, even under stressed market conditions. Furthermore, for the sake of legal certainty, the interaction of non-financial counterparties' admission as clearing members under EMIR⁽²³⁾ with the requirement for a CCP to be notified as a system pursuant to Directive 98/26/EC of the European Parliament and of the Council⁽²⁴⁾ would particularly merit further specifications. Therefore, the ECB suggests that the relevant draft regulatory technical standards⁽²⁵⁾ should specify the elements of the admission criteria for non-financial counterparties. Furthermore, the ECB proposes to add the ESCB members to the list of authorities that should be consulted by ESMA during the development of these draft regulatory technical standards.

⁽¹⁹⁾ See Articles 41, 44, 46, 50 and 54 of EMIR.

⁽²⁰⁾ See Articles 25(2b) and 25b(1) of EMIR.

⁽²¹⁾ See Articles 41 and 49 of EMIR.

⁽²²⁾ See Article 49 of EMIR; see paragraph 2.3 of Opinion CON/2017/39.

⁽²³⁾ See Article 17(4) of EMIR.

⁽²⁴⁾ Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ L 166, 11.6.1998, p. 45).

⁽²⁵⁾ See Article 1, point (29)(c), of the proposed regulation, which adds a new paragraph 7 to Article 37 of EMIR.

Finally, the ECB suggests clarifying that the prohibition for CCPs to participate in another CCP ⁽²⁶⁾ is without prejudice to the existing provisions on interoperability arrangements that ensure an appropriate risk framework for cross-CCP clearing services ⁽²⁷⁾.

2.1.2. Margin and transparency requirements

The ECB supports taking the opportunity of this legislative review to draw lessons from recent periods of exceptionally high market volatility, showing that there could be room to enhance margining practices. A recent report by the Basel Committee on Banking Supervision (BCBS), the Bank for International Settlements' Committee on Payments and Market Infrastructures (CPMI) and the International Organization of Securities Commissions (IOSCO) ⁽²⁸⁾ identified areas that merit further analysis, in particular with regard to the responsiveness and the transparency of CCP margin models as well as variation margin practices. It is expected that this further analysis will result in recommendations from international standard setters in the context of CCPs' margining practices, approaches and models.

Against this background, the ECB supports the proposed amendments concerning margin requirements. Passing through intraday margin calls ⁽²⁹⁾ could channel back liquidity to the clearing members. However, sometimes this practice may be impractical not only for CCPs but also for clearing members and their clients. Today some CCPs may commingle intraday variation and initial margin calls. This often means that clearing members and their clients could opt to meet intraday margin calls with non-cash collateral or in a currency different from the currency in which the product is denominated. Where CCPs introduce passing through of variation margins, such flexibilities on the collateral side may be lost as intraday calls would need to be separated between variation and initial margins. Furthermore, only cash (i.e., the product currency) is likely to be accepted as eligible coverage for variation margins. Consequently, as the proposed regulation ⁽³⁰⁾ foresees, passing through of variation margins should remain an option, to be considered and developed by a CCP on a best-effort basis, after assessing all pros and cons in consultation with its clearing members and their clients. This is without prejudice to potential recommendations resulting from the ongoing international work, which could eventually be reflected in draft regulatory technical standards on margin requirements ⁽³¹⁾.

With respect to transparency and disclosure of margining practices, the ECB strongly supports expanding the responsibilities of clearing members and clients clearing transactions on behalf of their respective clients (i.e., client clearing service providers). Additionally, there would be merit to mandate ESMA ⁽³²⁾, in consultation with EBA and the members of the ESCB, to develop draft regulatory technical standards in relation to these transparency requirements applicable to CCPs and client clearing service providers. Draft regulatory technical standards would considerably enhance the standardisation and the quality of relevant disclosures. Within the context of transparency and disclosure, they would also ensure effective interaction between the responsibilities of CCPs and client clearing service providers. Finally, such draft regulatory technical standards could take into account, at a later stage and to the extent relevant, the outcome of the international work ongoing under the auspices of BCBS-CPMI-IOSCO ⁽³³⁾ with respect to margin transparency.

⁽²⁶⁾ See Article 1, point (29)(a), of the proposed regulation, which amends Article 37(1) of EMIR.

⁽²⁷⁾ See Title V of EMIR.

⁽²⁸⁾ See 'Review of margining practices', BCBS, CPMI and IOSCO, September 2022. Available on the Bank for International Settlements' website at www.bis.org.

⁽²⁹⁾ The pass-through of intraday margin calls may concern only variation margins, which means margins collected or paid out to reflect current exposures resulting from actual changes in market prices (see Article 1, points (4) and (6), of Commission Delegated Regulation (EU) No 153/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on requirements for central counterparties (OJ L 52, 23.2.2013, p. 41)).

⁽³⁰⁾ See Article 1, point (31), of the proposed regulation, which amends Article 41(3) of EMIR.

⁽³¹⁾ See Article 41 of EMIR.

⁽³²⁾ This would require a new Article in the proposed regulation, which would insert a new paragraph 9 in Article 38 of EMIR.

⁽³³⁾ See 'Review of margining practices', BCBS, CPMI and IOSCO, September 2022. Available on the Bank for International Settlements' website at www.bis.org.

2.1.3. Collateral requirements

In general, there is merit in allowing CCPs to accept public guarantees and public bank guarantees as collateral. The ECB acknowledges the Union's regulatory efforts to alleviate exceptional liquidity stresses stemming from recent periods of unprecedented market volatility. To avoid any doubt, however, and because the proposal remains silent on the specificities of commercial bank guarantees, the ECB emphasises that it does not support allowing uncollateralised commercial bank guarantees to be eligible collateral on a permanent basis⁽³⁴⁾. The acceptance of uncollateralised commercial bank guarantees should remain a temporary regulatory measure applicable only to non-financial counterparties. The possibility to accept uncollateralised commercial bank guarantees on a permanent basis would represent a structural shift in regulatory risk tolerance, going beyond the objective to address non-banks' exceptional liquidity stresses. In addition, the ECB cautions against allowing CCPs to accept commercial bank guarantees from all clearing members, including financial institutions, as opposed to only from non-financial counterparties as is currently the case.

Finally, the ECB proposes expanding the scope of the regulatory technical standards developed by ESMA, which lay down the conditions under which commercial bank guarantees may be accepted as collateral to include public guarantees and public bank guarantees. This would allow ESMA to further specify the relevant collateral requirements with respect to public guarantees and public bank guarantees.

2.1.4. Reporting obligation

The ECB strongly supports the proposal to remove the exemption from reporting requirements for intragroup transactions involving a non-financial counterparty⁽³⁵⁾. In the context of the introduction of this exemption in 2017, the ECB identified several negative consequences for both the quality and usefulness of data reported under EMIR as well as the ability of the authorities to monitor financial stability in certain areas of financial markets⁽³⁶⁾. These consequences are still relevant. For example, the lack of information on certain intragroup transactions impaired the ECB in the exercise of its financial stability-related tasks during the 2022 energy markets turmoil. The activity of non-financial companies represents a very large share of the energy derivatives markets. As a result, the lack of data on intragroup transactions with at least one non-financial counterparty constituted a material gap in the ECB's capability to monitor this segment of the derivatives markets. More generally, in the commodity derivatives markets, intragroup transactions form a material part of total bilateral exposures between market participants, and their identification can reveal the importance of some large conglomerates from a financial stability perspective. While the recent turmoil predominantly affected energy commodity derivatives, the nature of future crises cannot be predicted. In general, the lack of a full market picture could also impede efficient monitoring of quickly changing market dynamics by competent authorities. In this context, it is important to note that Regulation (EU) 2015/2365 of the European Parliament and of the Council⁽³⁷⁾ does not contain any similar exemption for reporting of intragroup repos, securities financing and margin lending transactions. The removal of the exemption for intragroup transactions involving a non-financial counterparty from the reporting requirements of EMIR is an important measure for the establishment of a full market picture and achieving consistency between the respective regulations.

⁽³⁴⁾ See Article 1, point (33)(a), of the proposed regulation, which amends Article 46(1) of EMIR.

⁽³⁵⁾ See Article 1, point (5)(a), of the proposed regulation.

⁽³⁶⁾ See paragraphs 2.2.1 to 2.2.3 of Opinion CON/2017/42 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 (OJ C 385, 15.11.2017, p. 10).

⁽³⁷⁾ 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).

2.1.5. Estimation of liquidity needs

The ECB finds it important that CCPs monitor their exposures to the most relevant Union currencies on a daily basis to better manage liquidity risk, as well as to provide their competent authorities with appropriate reporting per relevant Union currency. The proposed regulation should reflect this so as to ensure that the largest payment obligations are assessed in aggregate for all currencies and separately for each of the most relevant Union currencies of the financial instruments cleared.

2.2. *Impact on prudential supervision of credit institutions*

2.2.1. Exemptions of intragroup transactions

The proposed regulation introduces changes to the currently applicable framework exempting intragroup trades from requirements for clearing and margining⁽³⁸⁾ as well as from capital requirements for credit valuation adjustment risk⁽³⁹⁾. The proposed changes encompass the framework for third-country equivalence assessments, which is a precondition for these exemptions. In the case of EMIR, it is proposed to replace the current equivalence assessment framework with a simplified framework. The exemptions should be subject to conditions ensuring that the safety and soundness of institutions, but also the stability of the financial system more broadly, are not compromised. In this context, the ECB has a number of observations.

First, for the purpose of exempting intragroup transactions from the requirements of clearing and margining, it is inadequate to limit the prior assessment of the relevant third country's framework to anti-money laundering and countering the financing of terrorism aspects only. The ECB firmly believes that several other aspects, notably the equivalence of that third country's regulatory and supervisory framework with the broader scope of EMIR, should be assessed before the exemptions are available to institutions. The assessment should include, but not be limited to, key requirements on risk mitigation techniques for OTC trades, as already provided in the current EMIR framework⁽⁴⁰⁾. The ECB supports a more comprehensive equivalence assessment because it provides assurance that counterparties located in third countries are subject to sound regulatory and supervisory frameworks and Union counterparties do not incur undue risks by entering into transactions with such counterparties. According to the proposed regulation, the Commission may carry out a more comprehensive assessment of a third country's framework, potentially including the aforementioned aspects. However, such assessment should not be discretionary. Rather, this assessment should be carried out and concluded in advance, before Union counterparties are able to benefit from the aforementioned exemptions. Otherwise, Union counterparties bear significant risks from entering into, or maintaining, a large volume of intragroup transactions with counterparties that may not be subject to appropriate regulatory requirements and/or adequate supervision. Consequently, the ECB considers that, instead of the proposed simplified framework, the currently applicable equivalence framework should be maintained.

Second, the proposal has a direct impact on the application of capital requirements for credit valuation adjustment risk as specified within Regulation (EU) No 575/2013. Credit valuation adjustment is the risk of losses caused by changes in the credit spread of a derivatives transaction's counterparty due to changes in its credit quality. This adjustment arises when the Union counterparty enters into a derivatives transaction with another counterparty, including a counterparty within the same group. One of the most common reasons why Union counterparties incur such intragroup risk exposure is to support back-to-back booking practices. In the past⁽⁴¹⁾, the ECB has highlighted that prudential risks can arise from certain booking practices within international groups, in particular back-to-back booking practices. Irrespective of whether the intragroup transaction giving rise to credit valuation adjustment risk supports a back-to-back booking practice or not, the resulting credit valuation adjustment risk negatively impacts the Union counterparty's risk profile. Thus, Union counterparties must have adequate local arrangements and staff to properly manage such risk and hold regulatory capital to cover it, unless the relevant exemption under Regulation (EU) No 575/2013⁽⁴²⁾ applies. This exemption should only be available to Union counterparties provided that the equivalence assessment of the third country, where the other counterparty is established, covers all relevant prudential aspects of that third country's rules and specifically targets credit valuation adjustment risk in a comprehensive manner. Consequently, the ECB welcomes the introduction, in the

⁽³⁸⁾ See Articles 4 and 11 of EMIR.

⁽³⁹⁾ See Article 382(4) of Regulation (EU) No 575/2013.

⁽⁴⁰⁾ See Article 11 of EMIR.

⁽⁴¹⁾ See 'Supervisory expectations on booking models', ECB, August 2018, available on the ECB's Banking Supervision website at www.bankingsupervision.europa.eu.

⁽⁴²⁾ See Article 382(4), point (b), of Regulation (EU) No 575/2013.

proposed regulation, of a mandate for the assessment of third country equivalence ⁽⁴³⁾, but suggests making it targeted to the prudential and supervisory requirements of the third country in question. The ECB supports that the mandate is laid down in Regulation (EU) No 575/2013. A specific equivalence decision for the purposes of exemption of intragroup transactions pursuant to Regulation (EU) No 575/2013 would be better suited as it would allow the assessment to focus on credit valuation adjustment risk. This would result in a more prudent outcome, compared to the status quo, even after the – otherwise welcome – EBA clarifications ⁽⁴⁴⁾.

Finally, irrespective of the applicable framework for the equivalence assessment, the ECB objects to assigning the assessment of the eligibility of the third countries to the prudential supervisor, even on a temporary basis, as the proposed regulation envisages. The ECB believes that, from an institutional perspective, the Commission is best placed to undertake the responsibility of assessing the equivalence of third countries' regulatory frameworks, which requires obtaining, and keeping up to date, a comprehensive overview of regulation and supervision in third countries. This is in line with the existing Union framework for financial services, under which assessments of equivalence are typically performed by the Commission, sometimes based on technical advice from European Supervisory Authorities ⁽⁴⁵⁾.

2.2.2. Removal of supervisory validation of models

As also observed in recent crises, significant risks can arise from OTC transactions that are not centrally cleared, affecting both the safety and soundness of counterparties that enter into such transactions as well as financial stability more broadly. These risks are exacerbated by the fact that the volume of non-centrally cleared OTC transactions is large and is expected to remain so, notwithstanding the gradual implementation of the clearing obligation following the G20 regulatory reforms. It is thus critical that financial counterparties apply the risk management procedures, referred to in EMIR ⁽⁴⁶⁾, which are technically sound and fit to achieve the purpose of reducing the underlying risk from the relevant transactions. This may involve the use of models for initial margin calculation. To this end, the ECB supports clarifying supervisory requirements for Union counterparties in connection with initial margin models ⁽⁴⁷⁾. In this regard the ECB is open to introducing greater proportionality and more flexibility, such as enabling the usage of models at the counterparties' discretion and replacing a formal validation process with a general power of objection by competent authorities. Competent authorities will have the power to take action in order to ensure that these models are sufficiently robust. The ECB suggests that these counterparties, especially credit institutions, report sufficient information on risk management procedures to their respective competent authorities, including information on the performance of the models supporting the calculation of initial margin. However, information on the performance of initial margin models is not available within the existing regulatory framework in a form appropriate for prudential purposes. If competent authorities have this information at their disposal, they will be in a position to evaluate these risk management procedures, including the initial margin models, and assess whether there is a need to take appropriate supervisory action to ensure the soundness of their application. The ECB recommends this to be defined with draft regulatory technical standards rather than guidelines, in order to ensure convergence.

In addition to the more detailed information requirements of competent authorities, market participants would also benefit from having access to key information on these risk management procedures themselves, including the aforementioned initial margin models. Such access would ensure transparency of counterparties' risk management of their non-centrally cleared OTC transactions and would also facilitate the evaluation by market participants of the approach used. Thus, the ECB suggests introducing a requirement for disclosures of high-level information on the usage of initial margin models within the EMIR framework.

⁽⁴³⁾ See Article 2 of the proposed regulation.

⁽⁴⁴⁾ See 'Question & Answer 2022_6495', EBA, September 2022, available on the EBA's website at www.eba.europa.eu.

⁽⁴⁵⁾ See Commission Staff Working Document, EU equivalence decisions in financial services policy: an assessment, SWD(2017) 102 final.

⁽⁴⁶⁾ See Article 11(3) of EMIR.

⁽⁴⁷⁾ See paragraph 4.1 of Opinion CON/2017/42.

3. *Simplifying and accelerating supervisory approval processes*

3.1. *Procedures for the authorisation and extension of services*

The ECB supports the proposal to streamline the procedures for CCP authorisation and extension of activities and services with a view to enhancing the ability of EU CCPs to respond to new market developments in a timely manner ⁽⁴⁸⁾.

In particular, the ECB welcomes that the format and content of required documentation for CCP applications ⁽⁴⁹⁾ should be specified through draft regulatory technical standards developed by ESMA in close cooperation with the ESCB. More detailed clarification of the respective supervisory requirements will foster transparency and predictability for CCPs and will help to significantly speed up the supervisory approval process.

The ECB also welcomes the proposal for ESMA to maintain a central database ⁽⁵⁰⁾, to which the CCPs' competent authorities, ESMA and the members of the colleges would have access, and to which the CCP would submit all applications for authorisation ⁽⁵¹⁾, extension of services and activities ⁽⁵²⁾ and significant changes of risk models and parameters ⁽⁵³⁾. This will facilitate swifter engagement of all relevant competent authorities during the respective assessment processes.

The ECB also agrees that a firm timeline should be set for concluding the assessment of whether an application is complete. This is important to limit respective uncertainties and delays and corresponding risks to the agility and competitiveness of EU CCPs. However, the ECB is concerned that the proposed timeline of two working days for the competent authority to confirm completeness of a CCP's application ⁽⁵⁴⁾ is too short. To ensure that a competent authority would be able to conduct a solid assessment in any circumstances, the ECB suggests extending this period to ten working days. It may otherwise not be possible to exclude the risk of unnecessary rejections of applications, if in exceptional situations a national competent authority may not have been able to confirm within two days that all required documentation has been provided.

To benefit from the national competent authority's knowledge of the CCP due to its ongoing supervisory activities and with a view to supporting effective dialogue between the national competent authority, ESMA and the college during the assessment process, the ECB suggests that the college should be given adequate time to finalise its assessment by taking into account the draft national competent authority's assessment and the draft ESMA opinion. The national competent authority and ESMA should share their draft assessments with the college within 30 business days. Thereafter, the ECB suggests to then give all stakeholders – national competent authorities, ESMA and the college – 20 additional business days to finalise their assessments.

3.2. *Non-objection procedures for non-material changes*

The ECB welcomes the proposed introduction of a new non-objection procedure for granting a request for extension of activities or services for non-material service changes ⁽⁵⁵⁾. This would ensure that the depth of supervisory review is proportionate to the financial risks posed by a new activity or service and that the respective approval processes support a dynamic Union central clearing landscape. At the same time, appropriate safeguards for supervisory scrutiny should be preserved.

⁽⁴⁸⁾ See Article 1, points (9), (10) and (11), of the proposed regulation.

⁽⁴⁹⁾ See Article 1, points (9) and (10), of the proposed regulation.

⁽⁵⁰⁾ See Article 1, point (11), of the proposed regulation.

⁽⁵¹⁾ See Article 1, point (9), of the proposed regulation.

⁽⁵²⁾ See Article 1, point (10), of the proposed regulation.

⁽⁵³⁾ See Article 1, point (34), of the proposed regulation.

⁽⁵⁴⁾ See Article 1, points (9) and (10), of the proposed regulation.

⁽⁵⁵⁾ See Article 1, point (12), of the proposed regulation, which inserts a new Article 17a in EMIR.

The proposed regulation's common criteria related to the non-material effect of a change of clearing service or activity are important to promote the overall transparency and consistency of supervisory approaches. However, these criteria would be too high-level to capture all relevant factors. Against this background, the ECB considers that the proposed additional conditions determining when the non-objection procedure may be applied ⁽⁵⁶⁾ should be coupled with a mandate for ESMA to develop, in close cooperation with the ESCB, more granular guidance based on draft regulatory technical standards. Such additional technical guidance would also have the benefit of being more easily adaptable, considering that the non-objection procedure would be an entirely new procedure that may require adaptations upon experience with its practical application.

Accordingly, the ECB is of the view that the use of the non-objection procedure for cases where a new currency would be added to existing services should not be addressed in the proposed regulation itself but only in draft regulatory technical standards developed by ESMA, given that that the risk impact would depend on more granular factors, such as the size of the projected clearing values and the prospective need for new liquidity risk management or settlement procedures. In order to allow all authorities involved in non-objection procedures (see paragraph 1.1.2 above) sufficient time for a substantive assessment, the ECB proposes to extend the respective time frame from 10 to 20 working days.

Finally, an EU CCP should not be permitted to start a new activity or service before the supervisory non-objection procedure has been concluded to avoid undue CCP risk-taking in the interim period. Furthermore, it would most likely be unattractive for the EU CCP to start engaging in new activities or services without assurances that supervisors would agree that such services or activities continue.

4. ***Reducing excessive exposures to third-country CCPs***

4.1. *Active account*

4.1.1. Active account requirement

The proposed regulation introduces a requirement for financial and non-financial counterparties that are subject to the clearing obligation to clear at an authorised EU CCP a proportion of their exposures towards services that are offered by third-country CCPs and determined as being of substantial systemic importance. It also proposes that ESMA, in cooperation with EBA, EIOPA and the ESRB, after having consulted the ESCB, calibrates via draft regulatory technical standards the level of the clearing activity to be maintained in active accounts at EU CCPs. Such calibration should ensure that the envisaged relocation of exposures to EU CCPs results in such services no longer being considered of substantial systemic importance in terms of what would remain with the relevant third-country CCP.

The ECB supports the view that excessive exposures to, and continued overreliance on, third-country CCPs pose a risk to the financial stability of the Union that needs to be addressed by a reduction of such exposures across clearing services determined as being of substantial systemic importance. The ECB therefore strongly welcomes such measure, which should ensure a balance between limiting systemic and financial stability risks to the Union and supporting a gradual creation of a resilient and liquid Union-based clearing market. The ECB has a number of comments regarding the proposed active account requirement.

First, the proposed regulation provides that ESMA should consider phase-in periods leaving suitable time for the progressive implementation of the active account requirement. The ECB supports this proposal, as it is necessary to avoid any potential negative impact of a sudden implementation of this requirement on market participants and EU CCPs. In order to ensure safe and robust central clearing it is also crucial to calibrate this requirement gradually. This would allow counterparties to progressively fulfil their clearing requirements, in terms of the proportions of exposures cleared at accounts at EU CCPs. This way, ESMA, using the possibility to review the regulatory technical standards on the calibration of the active account requirement on the basis of information submitted by the JMM ⁽⁵⁷⁾, could ensure that the calibration of the proportion of clearing activity to be maintained in active accounts at EU CCPs could be adapted to market developments, or any other relevant circumstances. Such gradual calibration should allow for efficient market-based adjustments and mitigation of potential financial stability risks. As a result, a

⁽⁵⁶⁾ See Article 1, point (12), of the proposed regulation, which inserts a new article 17a(2) in EMIR.

⁽⁵⁷⁾ See Article 1, point (18), of the proposed regulation, which inserts a new Article 23c(5) in EMIR.

more attractive and robust Union clearing market would develop. Thus, the ECB proposes that such gradual implementation should be reflected in the mandate for ESMA to develop draft regulatory technical standards specifying the calibration of the active account requirement.

Second, after completion of the phase-in period, the active account requirement should be calibrated to an ultimate target level where relevant clearing services provided by third-country CCPs are no longer of substantial systemic importance. ESMA is mandated, pursuant to EMIR ⁽⁵⁸⁾, to determine the CCPs or clearing services that are of such substantial systemic importance on the basis of a fully reasoned assessment. Since ESMA performs such assessment using a combination of quantitative indicators and qualitative analysis, it should, for the calibration of the active account requirement, consider a combination of quantitative and qualitative metrics as well.

Third, when calibrating the levels of the clearing activity, ESMA should take into account the possible impact of a gradual relocation, considering the benefits and risks to the Union's financial stability and the potential relocation dynamics of clearing activities to third countries. This could be achieved by requiring ESMA to conduct a cost-benefit analysis when determining the timeline and required activity levels of the phase-in period, as well as every time a recalibration becomes necessary.

Fourth, when developing the methodology for calculating the levels of clearing activity, ESMA should ensure that it elaborates not only on the aggregate proportion of activity on a Union level, which would be necessary to ensure that the reduction in clearing ⁽⁵⁹⁾ is such that the services in third-country CCPs are no longer of systemic importance. ESMA should also ensure that it elaborates on the individual proportions of activity that financial and non-financial counterparties subject to the clearing obligation would need to maintain in their active accounts at EU CCPs. The ECB understands that it is the legislative intention that the draft regulatory technical standards mentioned in the proposed regulation ⁽⁶⁰⁾ will include such individual proportions of activity. This is because the active account requirement itself is directly applicable and addressed to financial and non-financial counterparties that are subject to the clearing obligation. It is only based on such individually determinable proportions that each financial and non-financial counterparty that is subject to the clearing obligation will be able to comply with the active account requirements and develop the related plans envisaged in the proposed amendments to Directive 2013/36/EU of the European Parliament and of the Council ⁽⁶¹⁾, contained in the proposed directive.

Fifth, the proposed regulation clarifies that counterparties subject to the active account requirement must confirm, via reporting to the competent authority of the EU CCP, their compliance with this requirement on an annual basis. The frequency of such reporting may have direct consequences on the effective monitoring of compliance with the active account requirement and of the concentration risk towards recognised third-country CCPs offering services identified as being of substantial systemic importance. Thus, the ECB proposes to increase the frequency of this reporting to a quarterly basis, in line with the frequency for monitoring of regular supervisory reporting.

Sixth, the proposed regulation clarifies that such reporting must be submitted by financial and non-financial counterparties to the EU CCP's competent authority. In accordance with the proposed directive, the ECB understands that other authorities, which are not the EU CCP's competent authority, could be called to review the alignment of counterparties under their supervision with the relevant Union policy objectives or broader transition trends relating to the use of the active account pursuant to the proposed regulation. In this context, it is crucial for such authorities to be included as recipients of such reporting. Furthermore, the information on the clearing activity at EU CCPs alone would be insufficient to monitor compliance with the active account requirement as this requires a view on counterparties' global activity in the relevant categories of derivatives contracts. Therefore,

⁽⁵⁸⁾ See Article 25(2c) of EMIR.

⁽⁵⁹⁾ See Article 1, point (4), of the proposed regulation, which inserts a new Article 7a(5) in EMIR.

⁽⁶⁰⁾ See Article 1, point (4), of the proposed regulation, which inserts a new Article 7a(5) in EMIR.

⁽⁶¹⁾ 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).

reporting should encompass, separately, information on transactions cleared at authorised CCPs and recognised third-country CCPs. This will allow competent authorities to capture cases of non-compliance with the active account requirement, where counterparties subject to the active requirement keep using only recognised third-country CCPs for the purpose of clearing certain categories of derivatives contracts.

Seventh, it is necessary to harmonise the reporting format for the information to be reported by each counterparty on the outcome of the calculation made under the active account requirement ⁽⁶²⁾. This would ensure a minimum level of comparability of the data reported by counterparties subject to the active account requirement and, therefore, a sound monitoring of compliance with the active account requirement. Accordingly, the draft regulatory technical standards on the calibration of the active account requirement should be accompanied by draft implementing technical standards specifying the format of the information to be reported.

Finally, the proposed regulation introduces a change in the calculation methodology for the clearing obligation, requiring, when calculating the positions towards the thresholds, to only include derivatives contracts that are not cleared at an authorised EU or a recognised third-country CCP. Given the link between the scope of the active account and the scope of the clearing obligation, the ECB invites the Union legislator to take into account the potential implications that the calculation methodology change could have on both the scope of the active account requirement, such as its possible expansion, and on the active account's ability to address the risk associated with excessive exposures of Union clearing members and clients to third-country CCPs that provide clearing services identified as being of substantial systemic importance.

4.1.2. Proposed amendments to Directive 2013/36/EU

The proposed amendments to Directive 2013/36/EU require institutions and competent authorities to address any concentration risk that may arise from their exposures towards CCPs, in particular third-country CCPs offering services of substantial systemic importance for the Union. In this context the competent authorities designated pursuant to Directive 2013/36/EU are expected to assess and monitor the alignment of institutions under their supervision with the relevant Union policy objectives, framed by the active account requirement set out in the proposed regulation. Amendments to the review and evaluation process are proposed. In addition, the proposed directive introduces a new supervisory power in Directive 2013/36/EU allowing competent authorities to specifically assess and remediate excessive concentration risk arising from the exposures of institutions under their supervision towards third-country CCPs offering services of substantial systemic importance for the Union. The ECB has a number of comments in this regard.

First, the proposed amendments to the supervisory framework are necessary to ensure that competent authorities can assess and monitor concentration risk arising from exposures towards CCPs in a more targeted manner, in particular those offering services of substantial systemic importance for the Union. The existing provisions under Directive 2013/36/EU ⁽⁶³⁾ only require competent authorities to address such concentration risk in a context where CCPs have an inherent tendency to large scale concentration in order to benefit from economies of scale and network effects. The ECB therefore welcomes the clarification brought by the active account requirement on the notion of concentration. Such clarification, as reflected in the proposed directive, ensures that competent authorities dispose of a more targeted supervisory framework to take actions, compared to the existing possibility for competent authorities to impose additional own funds requirements for risks that are not covered or not adequately covered by the existing capital requirements under Directive 2013/36/EU ⁽⁶⁴⁾.

Second, the competent authorities, when addressing the concentration risk of institutions, should primarily focus on the individual situation of each institution. In this regard, the safety and soundness of institutions should remain the primary objective of the competent authorities exercising prudential supervision under Directive 2013/36/EU.

⁽⁶²⁾ See Article 1, point (4), of the proposed regulation, which inserts a new Article 7a(4) in EMIR.

⁽⁶³⁾ See Article 81 of Directive 2013/36/EU.

⁽⁶⁴⁾ See Article 104 of Directive 2013/36/EU.

Third, considering that the proposed amendments to Directive 2013/36/EU are linked to the active account requirement, competent authorities should not be expected to exercise the proposed powers before ESMA, in cooperation with EBA, EIOPA and ESRB and after consulting the ESCB, has developed draft regulatory technical standards concerning the active account. This is because competent authorities need clear criteria to determine under which circumstances the exposure of a clearing member or client under its supervision could raise concerns. Furthermore, effective monitoring of the active account requirement is dependent on adequate reporting. Thus, the ECB proposes that the reporting under the proposed regulation ⁽⁶⁵⁾ should be directly submitted to both the competent authority of the EU CCP and the competent authority of the institution subject to the reporting requirement.

Fourth, as mentioned above, the JMM is tasked with monitoring the active account requirement, as well as with the broader monitoring of any potential risks, including concentration risks, arising from the interconnectedness of financial actors. Competent authorities could take into account the outcome of such monitoring in their assessment of concentration risk arising from institutions under their supervision's exposures towards CCPs ⁽⁶⁶⁾.

Furthermore, the proposed directive requires EBA, in coordination with ESMA, to develop guidelines ensuring a consistent methodology for integrating concentration risk arising from exposures towards EU CCPs in supervisory stress testing ⁽⁶⁷⁾. Directive 2013/36/EU ⁽⁶⁸⁾ aims at ensuring that competent authorities carry out supervisory stress tests on supervised institutions, using common methodologies defined by EBA guidelines. Furthermore, as EBA Guidelines are not risk-specific, additional standalone guidelines to cover a particular risk or elements of risk should not be required. Any particular risk could be integrated systematically within the existing guidelines.

4.2. *Information on clearing services*

The proposed regulation requires clearing members and clients that provide clearing services in both authorised EU and recognised third-country CCPs to inform their clients about the possibility to clear a derivative contract in an EU CCP ⁽⁶⁹⁾. The ECB supports this requirement, which should contribute to achieving relevant Union policy objectives in two ways. First, the ECB understands that the scope of this requirement is broader than the scope of the active account requirement, as it also encompasses transactions that are not subject to the clearing obligation and requires relevant clearing members and clients to systematically propose Union clearing alternatives even to services that are not identified as being of substantial systemic importance by ESMA. Second, this requirement should provide an incentive to end-clients to clear at CCPs authorised in the Union.

Furthermore, the proposed regulation introduces a requirement for relevant clearing members and clients to report the scope of their clearing activities at recognised third-country CCPs ⁽⁷⁰⁾. The ECB welcomes this requirement, which ensures that competent authorities as well as the JMM have access to necessary information to monitor clearing activities in recognised third-country CCPs. Furthermore, the ECB strongly supports that ESMA, mandated to develop draft regulatory technical standards specifying the content of this reporting, should take into account information already available under the existing reporting framework. Redundancies in reporting create undue burdens for institutions. These issues may affect not only the institutions' reporting costs, but also the quality and integrity of data provided to competent authorities.

The ECB has several comments with regard to such reporting on clearing activities.

⁽⁶⁵⁾ See Article 1, point (4), of the proposed regulation, which inserts a new Article 7a(4) in EMIR.

⁽⁶⁶⁾ See Article 2, point (3), of the proposed directive, which amends Article 81 of Directive 2013/36/EU.

⁽⁶⁷⁾ See Article 2, point (4), of the proposed directive.

⁽⁶⁸⁾ See Article 100 of Directive 2013/36/EU.

⁽⁶⁹⁾ See Article 1, point (4), of the proposed regulation, which inserts a new Article 7b(1) in EMIR.

⁽⁷⁰⁾ See Article 1, point (4), of the proposed regulation, which inserts a new Article 7b(2) in EMIR.

First, to enhance the ability of competent authorities and the JMM to have a comprehensive overview of market developments relevant for clearing in the Union, they should receive the necessary information covering both authorised EU and recognised third-country CCPs. Thus, the ECB proposes to increase the scope of the reporting requirement to cover exposures to authorised EU CCPs. Such an extension of scope will also have to be commensurately reflected in ESMA's mandate to develop draft regulatory and implementing technical standards specifying the content and the format of such reporting.

Second, the proposed regulation clarifies that the reporting by clearing members and clients on clearing activities must be submitted to competent authorities on an annual basis. The frequency of such reporting may have direct consequences on the effective monitoring of those clearing activities, notably in the context of the active account requirement and the monitoring of concentration risk towards CCPs. Thus, the ECB proposes to increase the frequency of this reporting to a quarterly basis, in line with the frequency of regular supervisory reporting.

Third, the proposed regulation clarifies that the reporting must be submitted by clearing members and clients to their competent authorities. In accordance with EMIR ⁽⁷¹⁾, Directive 2013/36/EU ⁽⁷²⁾, and Council Regulation (EU) No 1024/2013 ⁽⁷³⁾, such competent authorities may differ for clearing members and clients. Thus, in the interest of clarity, an amendment should be added to the proposed regulation to reflect this point and ensure that competent authorities receive such reporting in line with their supervisory mandates as per the currently applicable framework.

Where the ECB recommends that the proposed regulation and the proposed directive are 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 EUR-Lex.

Done at Frankfurt am Main, 26 April 2023.

The President of the ECB
Christine LAGARDE

⁽⁷¹⁾ See Article 2, point (13), of EMIR.

⁽⁷²⁾ See Article 4 of Directive 2013/36/EU.

⁽⁷³⁾ See Article 6 of 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).