

## I

*(Resolutions, recommendations and opinions)*

## OPINIONS

## EUROPEAN CENTRAL BANK

## OPINION OF THE EUROPEAN CENTRAL BANK

of 13 January 2011

on a proposal for a regulation of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories

(CON/2011/1)

(2011/C 57/01)

**Introduction and legal basis**

On 13 October 2010, the European Central Bank (ECB) received a request from the Council of the European Union for an opinion on a proposal for a regulation of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories<sup>(1)</sup> (hereinafter the 'proposed regulation').

The ECB's competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union since the proposed regulation contains provisions in particular affecting the promotion by the European System of Central Banks (ESCB) of the smooth operation of payment systems, but also its contribution to the smooth conduct of policies relating to the stability of the financial system, its conduct of foreign-exchange operations and its holding and management of the official foreign reserves of the Member States, as referred to in Article 127(2) and (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**

In view of the G20 leaders' commitment announced at the Pittsburgh Summit in September 2009 to promote resilience and transparency in the over-the-counter (OTC) derivatives market, the ECB supports the proposed regulation's aim to lay down uniform requirements for OTC derivative contracts, and for the performance of activities of central counterparties (CCPs) and trade repositories (TRs).

However, the ECB has concerns with respect to some of the provisions of the proposed regulation. In particular, the proposed regulation aims to promote financial stability in the OTC derivatives market from a prudential supervisory point of view. Central banks have a statutory role and responsibilities to safeguard financial stability as well as for the safety and efficiency of financial infrastructures. This role is performed both by central banks responsible for oversight of CCPs and TRs and central banks of issue of currencies used in relation to transactions cleared by CCPs or registered by TRs. Hence, the adequate involvement of the ECB and the national central banks (NCBs) in the ESCB in various aspects of the proposed regulation (in particular concerning decisions to grant or withdraw authorisation, including for the extension of activities;

<sup>(1)</sup> COM(2010) 484 final.

ongoing risk assessments of CCPs; the definition of the technical standards for CCPs and TRs; and decisions to allow third country CCPs and TRs to conduct their activities in the Union) needs to be ensured without regulating, in substance, on central bank competencies.

Moreover, the ECB stresses the need to ensure that CCPs are strictly regulated. In this regard, it should also be considered further whether an amendment of the definition of 'credit institution' in Article 4(1) of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) <sup>(1)</sup> is warranted in order to ensure that CCPs are classified as credit institutions with a limited purpose banking licence.

The ECB also notes that this reform will have enormous practical consequences for market participants, particularly with regard to operations, risk management and legal documentation.

### Specific observations

Under the fourth indent of Article 127(2) of the Treaty and the fourth indent of Article 3.1 and Article 22 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB'), in conjunction with the derogations provided for under Article 139 of the Treaty and 42.1 of the Statute of the ESCB, one of the basic tasks to be carried out through the ESCB is the promotion of the smooth operation of payment systems. In this respect, the ECB and the NCBs of the Member States whose currency is the euro may provide facilities, and the ECB may make regulations, to ensure efficient and sound clearing and payment systems within the Union and with other countries. The Eurosystem's oversight competence over clearing and payment systems derives from these provisions <sup>(2)</sup>. The oversight competence is also inherent to the ESCB's task of contributing to the stability of the financial system under Article 127(5) of the Treaty, as mirrored in Article 3.3 of the Statute of the ESCB. Moreover, the implementation of monetary policy in the euro area under the first indent of Article 127(2) of the Treaty, as mirrored in the first indent of Article 3.1 of the Statute of the ESCB, depends on the existence of reliable and effective market systems and infrastructures. The promotion of the smooth operation of such systems and infrastructures is, therefore, a basic task of the Eurosystem <sup>(3)</sup>. NCBs from Member States whose currency is not the euro also have similar powers under their respective national legal frameworks.

In the area of financial market infrastructures, including CCPs, central bankers and securities regulators in the Committee of Payment and Settlement Systems (CPSS) and the International Organisation of Securities Commissions (IOSCO) have recognised the importance of both regulation and oversight. In view of this, the CPSS-IOSCO recommendations are based on the concept of undertaking regulation, supervision and oversight by securities commissions and central banks on an equal footing. The proposed regulation should follow the same approach by ensuring that the powers of the European Securities and Markets Authority (ESMA) are complemented and balanced by an adequate involvement of the ECB and the NCBs. The overarching regulatory objective should be to develop standards elaborated in close cooperation between ESMA and the ESCB, thereby avoiding the need for central banks to develop additional and potentially different oversight measures (including legal acts) to ensure the safety and soundness of CCPs and TRs. This may, however, lead to an excessively burdensome Union regulatory framework for CCPs and may even create legal risks where there are duplicate or even divergent requirements.

Against this background, it is critical to ensure effective cooperation between supervisors and overseers in the context of the proposed regulation. As set out already in the Eurosystem contribution to the 'European Commission's public consultation on derivatives and market infrastructures' <sup>(4)</sup>, the ECB considers that the role of the members of the ESCB should be explicitly reflected and spelled out in the following respects. First, the determination of eligibility for the clearing obligation under Article 4 of the proposed regulation should not be carried out by ESMA in isolation, but in cooperation with the members of the ESCB. Second, the setting of regulatory technical standards, guidelines and recommendations for CCPs and TRs should be conducted in close cooperation with the members of the ESCB. To ensure consistency with past procedures

<sup>(1)</sup> OJ L 177, 30.6.2006, p. 1.

<sup>(2)</sup> In addition, the oversight activities of some NCBs of Member States whose currency is the euro are carried out on the basis of national laws and regulations, which complement and, in some cases, duplicate the Eurosystem's competence. The oversight competence of NCBs of the Member States which have not yet introduced the euro, is laid down in national laws and regulations.

<sup>(3)</sup> See also 'Eurosystem Oversight Policy Framework', 20 February 2009, available on the ECB's website at <http://www.ecb.europa.eu>

<sup>(4)</sup> July 2010, available on the ECB's website at <http://www.ecb.europa.eu>

and policy decisions<sup>(1)</sup> and to fully recognise the competence of ESMA and the ESCB, the best way to organise this work would be through a joint ESMA-ESCB group based on the model of the present ESCB-CESR group. Third, the relevant members of ESCB should, both from an oversight perspective and as central banks of issue, as the case may be, be involved in all tasks of the college established by Article 14 of the proposed regulation, including in the authorisation and ongoing review of CCPs under Title III of the proposed regulation. Fourth, with regard to relations with third countries, the decision to recognise third country CCPs under Article 23 of the proposed regulation should not be taken by ESMA without close cooperation with the relevant members of the ESCB, both from an oversight perspective and as central banks of issue, in order to ensure that any central bank concerns and policies regarding, for instance, liquidity and risk management are adequately reflected. In addition, the ECB recommends that a requirement for such recognition should be the reciprocal treatment of CCPs from the Union under the relevant laws of such third countries. Fifth, there must be adequate participation and cooperation between all relevant authorities, bodies and central banks. In the case of central banks, this applies with respect to both their participation in the college and with regard to the exchange of necessary information, including for financial stability, oversight and statistical purposes.

Finally, the ECB notes that central banks may offer CCPs a range of facilities, possibly including overnight credit and deposit and settlement services, depending on their statutory tasks and responsibilities. The ECB recognises that central bank facilities are the most effective tool for market infrastructures in view of their liquidity and risk management needs. However, central bank facilities are not designed *per se* to meet the business needs of market infrastructures, and it remains for the Eurosystem and other central banks to determine for themselves which facilities they wish to offer to CCPs and other market infrastructures, and under what terms. In this respect, Article 10(1) of the proposed regulation requires that CCPs have 'access to adequate liquidity' as a pre-condition for obtaining authorisation to perform services and activities as a CCP. The adequate liquidity referred to 'could result from access to central bank liquidity or to creditworthy and reliable commercial bank liquidity'. The ECB considers that commercial bank money does not truly eliminate risks, whilst central bank money does, as recognised by the CPSS-IOSCO and ESCB-CESR recommendations. Therefore, the proposed regulation should not present central bank liquidity and commercial bank money as two equally safe and preferable options.

At the same time, the ECB positively notes that the proposed regulation does not contain any suggestions about regulating access to central bank credit. More than for other facilities, the decision to provide routine or emergency credit is a prerogative of a central bank and is linked directly to monetary policy.

Where the ECB recommends that the proposed regulation is amended, specific drafting proposals are set out in the Annex accompanied by explanatory text to this effect.

Done at Frankfurt am Main, 13 January 2011.

*The President of the ECB*

Jean-Claude TRICHET

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<sup>(1)</sup> See the Ecofin Council conclusions of 9 October 2007, stating that 'As to the work on ESCB/CESR "Standards for Securities Clearing and Settlement in the EU", the Council ... recognises that the investor protection and prudential safety of the post-trading sector, including its risk-management aspects, are important issues to be discussed and that concrete action, including for example by agreeing on the standards or regulatory measures, should be considered as a complement for the Code of Conduct on risks and financial stability'; see also the Ecofin Council conclusions of 3 June 2008, inviting the ESCB and CESR to conclude the work on the abovementioned standards.

## ANNEX

## Drafting proposals

Text proposed by the Commission	Amendments proposed by the ECB <sup>(1)</sup>
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**Amendment 1**

Recital 7 bis of the proposed regulation (new)

No current text.	<p><b>‘(7 bis) Under Article 127(2) of the Treaty on the Functioning of the European Union and the second sentence of Article 1, Article 3.1 and Article 22 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the “Statute of the ESCB”), in conjunction with the derogation provided for under Article 139 of the Treaty and Article 42.1 of the Statute of the ESCB, one of the basic tasks to be carried out through the European System of Central Banks (ESCB) is to promote the smooth operation of payment systems. In this respect, the ECB and the national central banks of the Member States whose currency is the euro may provide facilities, and the ECB may make regulations, to ensure efficient and sound clearing and payment systems within the Union and with other countries. National central banks from Member States whose currency is not the euro also have similar powers under their respective national legal frameworks. It follows that the exercise of oversight powers can be discerned as a basic ESCB task. The provisions of this Regulation concerning OTC derivatives, central counterparties and trade repositories are without prejudice to the oversight powers of the members of the ESCB as laid down in the Treaty and the Statute of the ESCB and should be without prejudice to the oversight powers derived from any national laws and regulations.’</b></p>
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*Explanation*

*The proposed regulation lays down prudential requirements for CCPs and TRs without reflecting properly the oversight competence of the members of the ESCB over such infrastructures, as laid down in the Treaty, the Statute of the ESCB and national laws and regulations. For this reason, the proposed new recital would set the context in which the proposed regulation will apply once adopted.*

**Amendment 2**

Recital 29 of the proposed regulation

<p>‘(29) Direct rules regarding the authorisation and supervision of CCPs are an essential corollary to the obligation to clear OTC derivatives. It is appropriate that national competent authorities should retain the responsibility for all aspects of the authorisation and the supervision of CCPs, including the verification that the applicant CCP is compliant with this Regulation and with 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, in view of the fact that those national competent authorities remain best placed to examine how the CCPs operate on a daily basis, to carry out regular reviews and to take appropriate action, where necessary.’</p>	<p>‘(29) Direct rules regarding the authorisation and supervision of CCPs are an essential corollary to the obligation to clear OTC derivatives. It is appropriate that national competent authorities should retain the responsibility for all aspects of the authorisation and the supervision of CCPs, including the verification that the applicant CCP is compliant with this Regulation and with 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, in view of the fact that those national competent authorities remain best placed to examine how the CCPs operate on a daily basis, to carry out regular reviews and to take appropriate action, where necessary. <b>Taking into account</b></p>
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Text proposed by the Commission	Amendments proposed by the ECB (1)
	<p><b>their oversight powers and the role of the central banks of issue, the members of the ESCB should for efficiency reasons, to avoid duplication of work, be closely involved by the competent authority in the regular reviews of CCPs and decisions for appropriate action.'</b></p>

*Explanation*

*If, under the proposed regulation, the members of the ESCB, in their role as overseers and as central banks of issue, are involved by the competent authority in the regular reviews of CCPs and decisions for appropriate action, it would avoid the duplication of work undertaken by such competent authorities from a supervisory perspective and by the ECB and NCBs from an oversight perspective. It would also be more efficient for the regulated CCP, as it would not have to provide relevant information to and cooperate with multiple authorities and central banks.*

**Amendment 3**

Recital 49 of the proposed regulation

<p>(49) It is important to ensure international convergence of requirements for central counterparties and trade repositories. This Regulation follows the recommendations developed by CPSS-IOSCO and ESCB-CESR [footnote] and creates a Union framework in which CCPs can operate safely. ESMA should consider these developments when drawing up the regulatory technical standards as well as the guidelines and recommendations foreseen in this Regulation.'</p> <p>Footnote text: European System of Central Banks and the Committee of European Securities Regulators.</p>	<p>(49) It is important to ensure international convergence of requirements for central counterparties and trade repositories. This Regulation follows the <b>existing</b> recommendations developed by CPSS-IOSCO and ESCB-CESR [footnote], <del>and</del> <b>noting that the CPSS-IOSCO recommendations for financial market infrastructure, including CCPs, are currently under review. In this respect, this Regulation</b> creates a Union framework in which CCPs can operate safely. <del>—, whereas ESMA, in close co-operation with the members of the ESCB and the relevant authorities, should consider</del> <b>take into account these existing standards but also new</b> developments when drawing up <b>and revising</b> the regulatory technical standards as well as the guidelines and recommendations foreseen in this Regulation.'</p> <p>Footnote text: <b>The</b> European System of Central Banks and the Committee of European Securities Regulators. <b>On 3 June 2008, the Ecofin Council invited the ESCB and CESR to adapt and finalise the 'ESCB-CESR Recommendations for securities clearing and settlement in the European Union'. In view of the financial stability risk posed by the growing scale of OTC derivatives exposures, the Ecofin Council invited the ESCB and CESR in December 2008 to consider explicitly addressing the risks of OTC derivatives when reviewing and finalising the recommendations for CCPs. The ESCB and CESR resumed their work in June 2009 and revised the recommendations in line with the Ecofin Council's requests, taking into account all recent regulatory and legal developments and other initiatives. On 23 June 2009, the ESCB and CESR published the 'Recommendations for securities settlement systems and central counterparties in the European Union'.</b></p>
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*Explanation*

*To ensure consistency of legislation at a global level, the ECB proposes clarifying that the proposed regulation takes into account the standards developed by CPSS-IOSCO. In the same vein, taking into account the competences of the members of the ESCB, and other relevant authorities, the ECB further proposes clarifying that ESMA, in close cooperation with the members of the ESCB and the relevant authorities, should take into account not only the existing standards but also new developments when drawing up and revising the regulatory technical standards, guidelines and recommendations foreseen in the proposed regulation.*

Text proposed by the Commission

Amendments proposed by the ECB (1)

**Amendment 4**

Recital 50 of the proposed regulation

(50) The Commission should be empowered to adopt delegated acts in accordance with Article 290 of the Treaty in respect of the details to be included in the notification to ESMA and in the register and the criteria for the decision of ESMA on the eligibility for the clearing obligation, on the information and clearing threshold, on the maximum time lag regarding the contract, on liquidity, on the minimum content of governance rules, on details of record keeping, on minimum content of business continuity plan and the services guaranteed, on percentages and time horizon for margin requirements, on extreme market conditions, on highly liquid collateral and haircuts, on highly liquid financial instruments and concentration limits, on details for performance of tests, on details concerning the application of a trade repository for registration with ESMA, on fines and on details concerning the information that a trade repository should make available, as referred to in this Regulation. In defining the delegated acts, the Commission should make use of the expertise of the relevant European Supervisory Authorities (ESMA, EBA and EIOPA). In view of the expertise of ESMA regarding issues concerning securities and securities markets, ESMA should play a central role in advising the Commission on the preparation of the delegated acts. However, where appropriate, ESMA should consult closely with the other two European Supervisory Authorities.'

(50) The Commission should be empowered to adopt delegated acts in accordance with Article 290 of the Treaty in respect of the details to be included in the notification to ESMA and in the register and the criteria for the decision of ESMA on the eligibility for the clearing obligation, on the information and clearing threshold, on the maximum time lag regarding the contract, on liquidity, on the minimum content of governance rules, on details of record keeping, on minimum content of business continuity plan and the services guaranteed, on percentages and time horizon for margin requirements, on extreme market conditions, on highly liquid collateral and haircuts, on highly liquid financial instruments and concentration limits, on details for performance of tests, on details concerning the application of a trade repository for registration with ESMA, on fines and on details concerning the information that a trade repository should make available, as referred to in this Regulation. In defining the delegated acts, the Commission should make use of the expertise of the relevant European Supervisory Authorities (ESMA, EBA and EIOPA). In view of the expertise of ESMA regarding issues concerning securities and securities markets, **and the expertise of the members of the ESCB in the field of payment, clearing and settlement infrastructures, ESMA and the members of the ESCB** should play a central role in advising the Commission on the preparation of the delegated acts. ~~However~~**Moreover**, where appropriate, ESMA should consult closely with the other two European Supervisory Authorities.'

*Explanation*

*Taking into account the oversight competence of the members of the ESCB, as laid down in the Treaty and the Statute of the ESCB and/or any national laws and regulations on the NCB's oversight activities, it should be ensured that central banks are closely involved in the establishment of the relevant regulatory technical standards, guidelines and recommendations provided for in the proposed regulation. This would avoid the risk of possible double regulatory standards being separately issued by the ECB and/or the NCBs. It would also be more efficient for the regulated CCP, as it would have to comply with only one set of rules.*

**Amendment 5**

New definition to be inserted in Article 2

No current text.

**“competent overseers” means the members of the European System of Central Banks (ESCB) that carry out oversight of a given CCP or trade repository;**

*Explanation*

*The term ‘competent overseers’ clarifies that the members of the ESCB overseeing a given CCP or TR, as the case may be, will carry out the functions set out in the proposed regulation.*

Text proposed by the Commission	Amendments proposed by the ECB (1)
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**Amendment 6**

New definition to be inserted in Article 2

No current text.	<p>“<b>central bank of issue</b>” means the central bank within the Union issuing a currency used in relation to transactions cleared by a CCP or registered by a trade repository;</p>
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*Explanation*

The central bank of issue is the central bank that issues the currency cleared by a CCP and registered by a TR, which is not necessarily the same as the central bank executing oversight.

**Amendment 7**

Article 4(5) of the proposed regulation

<p>‘5. ESMA shall, on its own initiative and in consultation with the European Systemic Risk Board (ESRB), identify and notify to the Commission the classes of derivatives contracts that should be included in its public register, but for which no CCP has yet received authorisation.’</p>	<p>‘5. ESMA shall, on its own initiative and in consultation with <b>the members of the ESCB and</b> the European Systemic Risk Board (ESRB), identify and notify to the Commission the classes of derivatives contracts that should be included in its public register, but for which no CCP has yet received authorisation.’</p>
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*Explanation*

In view of the systemic importance of the identification of classes of derivatives contracts to be included in ESMA’s public register under the bottom-up approach, the members of the ESCB should be consulted on such inclusions.

**Amendment 8**

Article 4(6) of the proposed regulation

<p>‘6. Powers are delegated to the Commission to adopt regulatory technical standards specifying the following: [...] ESMA shall submit drafts for those regulatory standards to the Commission by 30 June 2012.’</p>	<p>‘6. Powers are delegated to the Commission to adopt regulatory technical standards specifying the following: [...] ESMA, <b>in close cooperation with the members of the ESCB</b>, shall submit drafts for those regulatory standards to the Commission by 30 June 2012.’</p>
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*Explanation*

In view of their statutory role and responsibilities in the area of oversight, the members of the ESCB should work closely with ESMA in the process of determining the regulatory standards for the eligibility of derivatives subject to the clearing obligation.

Text proposed by the Commission	Amendments proposed by the ECB (1)
<b>Amendment 9</b> Article 6(4) of the proposed regulation	
<p>'4. Powers are delegated to the Commission to determine the details and type of the reports referred to in paragraphs 1 and 2 for the different classes of derivatives.</p> <p>Those reports shall contain at least:</p> <p>(a) the parties to the contract and, where different, the beneficiary of the rights and obligations arising from it are appropriately identified;</p> <p>(b) the main characteristics of the contract, including the type, underlying, maturity and notional value are reported.</p> <p>[...]</p> <p>ESMA shall develop draft regulatory technical standards for submission to the Commission by 30 June 2012.'</p>	<p>'4. Powers are delegated to the Commission to determine the details and type of the reports referred to in paragraphs 1 and 2 for the different classes of derivatives.</p> <p>Those reports shall contain at least:</p> <p>(a) the parties to the contract and, where different, the beneficiary of the rights and obligations arising from it are appropriately identified;</p> <p>(b) the main characteristics of the contract, including the type, underlying, maturity and notional value are reported.</p> <p>[...]</p> <p>ESMA, <b>in close cooperation with the members of the ESCB</b>, shall develop draft regulatory technical standards for submission to the Commission by 30 June 2012.'</p>

*Explanation*

The ECB is of the view that the reporting system should be set up in such a way as to allow the information collected to be used for multiple purposes and in particular to support the statistical function of the ESCB. This would enable regulators to monitor developments and to cross check such developments with information stored in other databases, thereby allowing a proper and timely financial stability and systemic risk analysis. To this end, it is also important that progress is made towards ensuring that each OTC counterparty can be referred to with a unique entity identifier following an agreed standard, which would also ensure the interoperability of existing databases.

<b>Amendment 10</b> Article 10(1) of the proposed regulation	
<p>'1. Where a CCP that is a legal person established in the Union and has access to adequate liquidity intends to perform its services and activities, it shall apply for authorisation to the competent authority of the Member State where it is established.</p> <p>Such liquidity could result from access to central bank liquidity or to creditworthy and reliable commercial bank liquidity, or a combination of both. Access to liquidity could result from an authorisation granted in accordance with Article 6 of Directive 2006/48/EC or other appropriate arrangements.'</p>	<p>'1. Where a CCP that is a legal person established in the Union and has access to adequate liquidity intends to perform <del>its</del> CCP services and activities, it shall apply for authorisation <del>to</del> by the competent authority of the Member State <b>in accordance with Article 13 of this Regulation</b> where it is established.</p> <p><del>Such liquidity could result from access to central bank liquidity or to creditworthy and reliable commercial bank liquidity, or a combination of both. Access to liquidity could result from an authorisation granted in accordance with Article 6 of Directive 2006/48/EC or other appropriate arrangements.'</del></p>

*Explanation*

As explained in further detail above, whilst the ECB considers central bank money as the safest source of liquidity for cash settlement purposes, it stresses that central bank facilities are not designated per se to meet the business needs of market infrastructures. Therefore, it remains for central banks to determine for themselves which facilities they wish to offer to CCPs and other market infrastructures, and under what terms and conditions. At the same time, it is important for systemic risk reasons to retain the reference to 'access to adequate liquidity' as part of the requirement for (continued) authorisation.



Text proposed by the Commission	Amendments proposed by the ECB (1)
<b>Amendment 11</b> Deletion of Article 10(5) of the proposed regulation	
<p>'5. Powers are delegated to the Commission to adopt regulatory technical standards specifying the criteria for adequate liquidity referred to in paragraph 1.</p> <p>The regulatory technical standards referred to in the first subparagraph shall be adopted in accordance with Articles [7 to 7d] of Regulation .../... [ESMA Regulation].</p> <p>EBA shall, in consultation with ESMA, submit a draft to the Commission for those regulatory technical standards by 30 June 2012.'</p>	<p><del>'5. Powers are delegated to the Commission to adopt regulatory technical standards specifying the criteria for adequate liquidity referred to in paragraph 1.</del></p> <p><del>The regulatory technical standards referred to in the first subparagraph shall be adopted in accordance with Articles [7 to 7d] of Regulation .../... [ESMA Regulation].</del></p> <p><del>EBA shall, in consultation with ESMA, submit a draft to the Commission for those regulatory technical standards by 30 June 2012.'</del></p>

*Explanation*

*As a consequence of amendment 10 above, proposing a deletion of the reference to 'access to adequate liquidity', the content of Article 10(5) on the setting of regulatory technical standards would need to be moved elsewhere in the proposed regulation (see amendment 33 below).*

<b>Amendment 12</b> Article 12(3) of the proposed regulation	
<p>'3. Powers are delegated to the Commission to adopt regulatory technical standards specifying the capital, retained earnings and reserves of a CCP referred to in paragraph 2.</p> <p>[...]</p> <p>ESMA shall in consultation with EBA, submit a draft to the Commission for those regulatory technical standards by 30 June 2012.'</p>	<p>'3. Powers are delegated to the Commission to adopt regulatory technical standards specifying the capital, retained earnings and reserves of a CCP referred to in paragraph 2.</p> <p>[...]</p> <p>ESMA shall, <b>in close cooperation with the members of the ESCB, and</b> in consultation with EBA, submit a draft to the Commission for those regulatory technical standards by 30 June 2012.'</p>

*Explanation*

*An adequate level of initial and ongoing capital requirements are of essential importance to financial stability. In this respect, the members of the ESCB should be involved in the development of regulatory technical standards to further specify the high-level principles already contained in the proposed regulation.*

<b>Amendment 13</b> Article 13(1) of the proposed regulation	
<p>'1. The competent authority shall only grant authorisation where it is fully satisfied that the applicant CCP complies with all the requirements set out in this Regulation, the requirements adopted pursuant to Directive 98/26/EC, and following the joint positive opinion of the college referred to in Article 15 and the opinion of ESMA.'</p>	<p>'1. The competent authority shall only grant authorisation where it is fully satisfied that the applicant CCP complies with all the requirements set out in this Regulation, the requirements adopted pursuant to Directive 98/26/EC, and following the joint positive opinion of the college referred to in Article 15, <b>and, if provided, the opinion of the competent overseers and central banks of issue.</b>'</p>

Text proposed by the Commission	Amendments proposed by the ECB (1)
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*Explanation*

*The statutory role and responsibilities of the members of the ESCB as overseers and as central banks of issue should be reflected also with regard to the granting or refusing of a CCP authorisation. In this respect, a competent authority should not grant an authorisation solely on the basis of an applicant's compliance with the requirements under the proposed regulation but also on the basis of its compliance with the relevant oversight requirements. For this reason, also the ECB and the NCBs should provide an opinion on requested authorisations.*

**Amendment 14**

Article 14(1) of the proposed regulation

<p>'1. The competent authority of the Member State of establishment of a CCP shall establish and chair a college to facilitate the exercise of the tasks referred to in Articles 10, 11, 46 and 48.</p> <p>The college shall consist of:</p> <p>[...]</p> <p>(f) the authority responsible for the oversight of the CCP and the central banks of issue of the most relevant currencies of the financial instruments cleared.'</p>	<p>'1. The competent authority of the Member State of establishment of a CCP shall establish and chair a college to facilitate the exercise of the tasks referred to in Articles 10, 11, 46 and 48.</p> <p>The college shall consist of:</p> <p>[...]</p> <p>(f) <del>the authority responsible for the oversight of the CCP</del> <b>the competent overseers</b>; and</p> <p><b>(g)</b> the central banks of issue of the most relevant currencies of the financial instruments cleared.'</p>
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*Explanation*

*The statutory role and responsibilities of the members of the ESCB as overseers and as central banks of issue should be reflected not only in the granting or refusing of a CCP authorisation, but also, for example, in the other activities of the college such as stress testing and assessing interoperability arrangements. In this respect, a consistent use of terminology is proposed in line with amendment 5 above. Moreover, it is important to ensure that not only are the central banks of issue represented in the college but also the overseeing central banks, which may not be the same.*

**Amendment 15**

First paragraph of Article 17 of the proposed regulation

<p>'The competent authorities shall at least on an annual basis, review the arrangements, strategies, processes and mechanisms implemented by a CCP with respect to compliance with this Regulation and evaluate the market, operational and liquidity risks to which the CCP is, or might be, exposed.'</p>	<p>'The competent authorities shall, <b>in close cooperation with the competent overseers and the central banks of issue</b>, at least on an annual basis, review the arrangements, strategies, processes and mechanisms implemented by a CCP with respect to compliance with this Regulation and evaluate the market, operational and liquidity risks to which the CCP is, or might be, exposed.'</p>
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*Explanation*

*The statutory role and responsibilities of the members of the ESCB as overseers and as central banks of issue should be reflected in the ongoing review of the activities of authorised CCPs also with a view to avoiding CCPs being separately reviewed by supervisors and overseers.*

Text proposed by the Commission

Amendments proposed by the ECB (1)

**Amendment 16**

Article 18(1) of the proposed regulation

'1. Each Member State shall designate the competent authority responsible for carrying out the duties resulting from this Regulation for the authorisation, supervision and oversight of CCPs established in its territory and shall inform the Commission and ESMA thereof.'

Where a Member State designates more than one competent authority, it shall clearly determine the respective roles and shall designate a single authority to be responsible for co-ordinating co-operation and the exchange of information with the Commission, ESMA and other Member States' competent authorities in accordance with Articles 19 to 22.'

'1. Each Member State shall designate the competent authority responsible for carrying out the duties resulting from this Regulation for the authorisation, **and** supervision ~~and oversight~~ of CCPs established in its territory and shall inform the Commission and ESMA thereof.'

Where a Member State designates more than one competent authority, it shall clearly determine the respective roles and shall designate a single authority to be responsible for coordinating cooperation and the exchange of information with the Commission, ESMA, **the competent overseers, the central banks of issue** and other Member States' competent authorities in accordance with Articles 19 to 22.

**The designation of competent authorities shall be without prejudice to the oversight competence as laid down in Article 127(2) of Treaty on the Functioning of the European Union and Article 3.1 and Article 22 of the Statute of the ESCB and/or any national laws and regulations regulating the NCB's oversight competencies.'**

*Explanation*

The proposed amendment to the first subparagraph of Article 18(1), of the proposed regulation is intended to avoid the impression that each Member State is to designate the competent authority responsible for carrying out obligations resulting from the proposed regulation in the area of oversight, for the following reasons.

First, the Treaty and the Statute of the ESCB already empower the ECB and the NCBs of the Member States whose currency is the euro to undertake oversight; in the case of NCBs, national laws or regulations may also duplicate or supplement such powers. In the case of NCBs of Member States which have not yet introduced the euro, the central bank competence to undertake oversight is laid down in national laws and regulations. In order to clarify this, the ECB proposes adding a third subparagraph referring to the applicable legal basis for central banks' oversight competencies.

Second, the proposed regulation does not and should not impose any oversight obligations on the members of the ESCB. Therefore, there is also no need to refer to the designation process of competent authorities in the area of oversight.

In the second subparagraph of Article 18(1) of the proposed regulation concerning the cooperation and exchange of information where more than one competent authority is designated, it is also necessary to refer to the cooperation and exchange of information with the relevant central banks.

**Amendment 17**

Article 19(1) of the proposed regulation

'1. Competent authorities shall cooperate closely with each other and with ESMA.'

'1. Competent authorities shall cooperate closely with each other and with ESMA, **and with the members of the ESCB.**'

*Explanation*

The statutory role and responsibilities of the members of the ESCB in the area of oversight should be reflected in the obligation for cooperation between authorities.

Text proposed by the Commission

Amendments proposed by the ECB (1)

**Amendment 18**

Second subparagraph of Article 20(4) of the proposed regulation

'4. However, those conditions shall not prevent ESMA, the competent authorities and the relevant central banks from exchanging or transmitting confidential information in accordance with this Regulation and with other legislation applicable to investment firms, credit institutions, pension funds, undertakings for collective investment in transferable securities ("UCITS"), alternative investment fund managers ("AIFM"), insurance and reinsurance intermediaries, insurance undertakings, regulated markets or market operators or otherwise with the consent of the competent authority or other authority or body or natural or legal person that communicated the information.'

'4. However, those conditions shall not prevent ESMA, the competent authorities, **the competent overseers** and the ~~relevant~~ central banks **of issue** from exchanging or transmitting confidential information in accordance with this Regulation and with other legislation applicable to investment firms, credit institutions, pension funds, undertakings for collective investment in transferable securities ("UCITS"), alternative investment fund managers ("AIFM"), insurance and reinsurance intermediaries, insurance undertakings, regulated markets or market operators or otherwise with the consent of the competent authority or other authority or body or natural or legal person that communicated the information.'

*Explanation*

*The exemption for the relevant authorities with respect to the exchange of confidential information would need to cover also the members of the ESCB in view of their statutory role and responsibilities as overseers, as central banks of issue and to fulfil their statistical function as stated in Article 5 of the Statute of the ESCB.*

**Amendment 19**

Article 21(4) of the proposed regulation

'4. Competent authorities shall communicate information to the central banks of the ESCB where such information is relevant for the exercise of their duties.'

'4. Competent authorities shall communicate information to **the competent overseers**, the central banks of **issue** ~~the ESCB and the ESRB~~ where such information is relevant for the exercise of their duties.'

*Explanation*

*It is important that the members of the ESCB performing their roles as overseers, as the central banks of issue and in respect of their statistical function, which may fall upon different ESCB members, receive relevant information for the exercise of their duties from the competent authorities. In the same vein, the ESRB should also receive information relevant to its exercise of its functions taking into account its mandate and the systemic relevance of CCPs.*

**Amendment 20**

Article 22 of the proposed regulation

'The competent authority or any other authority shall inform ESMA the college and other relevant authorities without undue delay of any emergency situation relating to a CCP, including developments in financial markets, which may have an adverse effect on market liquidity and the stability of the financial system in any of the Member States where the CCP or one of its clearing members are established.'

'The competent authority or any other authority shall inform ESMA, **the competent overseers, and the central banks of issue**, the college and other relevant authorities without undue delay of any emergency situation relating to a CCP, including developments in financial markets, which may have an adverse effect on market liquidity and the stability of the financial system in any of the Member States where the CCP or one of its clearing members are established.'

Text proposed by the Commission

Amendments proposed by the ECB (1)

*Explanation*

*It is important that the members of the ESCB performing their roles as overseers and as central banks of issue receive information in emergency situations in view of their statutory obligations related to those roles.*

**Amendment 21**

Article 23(2) of the proposed regulation

'2. ESMA shall recognise a CCP from a third country, where the following conditions are met:

[...]

(c) co-operation arrangements have been established in paragraph 4.'

'2. ESMA, **in close cooperation with the members of the ESCB**, shall recognise a CCP from a third country, where the following conditions are met:

[...]

(c) cooperation arrangements have been established in paragraph 4;

**(d) the applicable laws in the jurisdiction of the third country CCP ensure reciprocity in respect of CCPs from the Union.'**

*Explanation*

*The ECB considers that a decision to recognise third country CCPs should be taken in close cooperation with the members of the ESCB in order to ensure that any central bank oversight concerns and policies regarding, for instance, liquidity and risk management are adequately reflected.*

*In addition, the ECB proposes inserting a fourth condition subject to which the applicable laws in the jurisdiction of the third country CCP ensures reciprocity for CCPs from the Union, which wish to provide services in that third country.*

**Amendment 22**

Article 23(3) of the proposed regulation

'3. The Commission may adopt a Decision in accordance with the procedure referred to in Article 69(2) determining that the legal and supervisory arrangements of a third country ensure that CCPs authorised in that third country comply with legally binding requirements which are equivalent to the requirements resulting from this Regulation and that these CCPs are subject to effective supervision and enforcement in that third country on an ongoing basis.'

'3. The Commission may adopt a decision in accordance with the procedure referred to in Article 69(2), **and on the basis of a joint opinion by ESMA, the members of the ESCB and the relevant competent authorities**, determining that the legal and supervisory arrangements of a third country ensure that CCPs authorised in that third country comply with legally binding requirements which are equivalent to the requirements resulting from this Regulation and that these CCPs are subject to effective supervision, **oversight** and enforcement in that third country on an ongoing basis.'

*Explanation*

*A Commission decision, determining that the legal and supervisory arrangements of a third country ensure that CCPs authorised there comply with Union equivalent binding requirements, should only be adopted on the basis of a joint opinion by ESMA, the members of the ESCB performing their roles as overseers and as central banks of issue and the relevant competent authorities.*

Text proposed by the Commission	Amendments proposed by the ECB (1)
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**Amendment 23**

Article 23(4) of the proposed regulation

<p>'4. ESMA shall establish cooperation arrangements with the relevant competent authorities of third countries whose legal and supervisory frameworks have been recognised as equivalent to this Regulation in accordance with paragraph 3. [...]</p>	<p>'4. ESMA shall, <b>in close cooperation with the competent overseers and the central banks of issue,</b> establish cooperation arrangements with the relevant competent authorities of third countries whose legal and supervisory frameworks have been recognised as equivalent to this Regulation in accordance with paragraph 3. [...]</p>
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*Explanation*

*It is important that the members of the ESCB performing their roles as overseers and as central banks of issue are involved in the setting up of cooperation arrangements with the relevant competent authorities of third countries in order to ensure appropriate coverage of and cooperation on oversight issues.*

**Amendment 24**

Article 24(9) of the proposed regulation

<p>'9. Powers are delegated to the Commission to adopt regulatory technical standards specifying the minimum content of the rules and governance arrangements referred to in paragraphs (1) to (8).  [...]  ESMA shall submit drafts for those regulatory technical standards to the Commission by 30 June 2012.'</p>	<p>'9. Powers are delegated to the Commission to adopt regulatory technical standards specifying the minimum content of the rules and governance arrangements referred to in paragraphs (1) to (8).  [...]  ESMA, <b>in close cooperation with the members of the ESCB,</b> shall submit drafts for those regulatory technical standards to the Commission by 30 June 2012.'</p>
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*Explanation*

*The statutory roles and responsibilities of the members of the ESCB in the area of oversight should be reflected also in respect of regulatory technical standards on general provisions applicable to CCPs.*

**Amendment 25**

Article 27(3) and (5) of the proposed regulation

<p>'3. A CCP shall make the records and information referred to in paragraphs 1 and 2 and all information on the positions of cleared contracts, irrespective of the venue where the transactions was executed, available upon request to the competent authority and to ESMA.  [...]  5. In order to ensure uniform conditions of application of paragraph 1 and 2, powers are conferred to the Commission to determine the format of the records and information to be retained.  The implementing technical standards referred to in the first subparagraph shall be adopted in accordance with [Article 7e] of Regulation .../... [ESMA Regulation].</p>	<p>'3. A CCP shall make the records and information referred to in paragraphs 1 and 2 and all information on the positions of cleared contracts, irrespective of the venue where the transactions was executed, available upon request to the competent authority, <del>and to ESMA,</del> <b>the competent overseers and the central banks of issue.</b>  [...]  5. In order to ensure uniform conditions of application of paragraph 1 and 2, powers are conferred to the Commission to determine the format of the records and information to be retained.  The implementing technical standards referred to in the first subparagraph shall be adopted in accordance with [Article 7e] of Regulation .../... [ESMA Regulation].</p>
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Text proposed by the Commission	Amendments proposed by the ECB (1)
ESMA shall submit drafts on those implementing technical standards to the Commission by 30 June 2012.'	ESMA, <b>in close cooperation with the members of the ESCB</b> , shall submit drafts on those implementing technical standards to the Commission by 30 June 2012.'

*Explanation*

CCPs should make records and information available, upon request, also to the members of the ESCB performing their roles as overseers and as central banks of issue in view of their statutory obligations related to those roles.

**Amendment 26**

Article 32(2) of the proposed regulation

<p>'2. Powers are delegated to the Commission to adopt regulatory technical standards specifying the minimum content of the business continuity plan and the minimum level of services that the disaster recovery plan shall guarantee.</p> <p>[...]</p> <p>ESMA shall submit drafts for those regulatory technical standards to the Commission by 30 June 2012.'</p>	<p>'2. Powers are delegated to the Commission to adopt regulatory technical standards specifying the minimum content of the business continuity plan and the minimum level of services that the disaster recovery plan shall guarantee.</p> <p>[...]</p> <p>ESMA, <b>in close cooperation with the members of the ESCB</b>, shall submit drafts for those regulatory technical standards to the Commission by 30 June 2012.'</p>
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*Explanation*

The statutory role and responsibilities of the members of the ESCB in the area of oversight should be reflected also in respect of regulatory technical standards specifying the minimum content of the business continuity plan and the minimum level of services that the disaster recovery plan shall guarantee.

**Amendment 27**

Deletion of Article 37(5) of the proposed regulation

<p>'5. The requirements set out in paragraphs 1 to 4 shall prevail over any conflicting laws, regulations and administrative provisions of the Member States that prevent the parties from fulfilling them.'</p>	<p><del>'5. The requirements set out in paragraphs 1 to 4 shall prevail over any conflicting laws, regulations and administrative provisions of the Member States that prevent the parties from fulfilling them.'</del></p>
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*Explanation*

Secondary Union law prevails over national law unless it would be shown that no Union competence exists in this respect. Member States' provisions on private law, insolvency law and other rules pertaining to the areas of law are not conferred on the Union, for which reason it would not seem legally feasible to generally disregard the application of such national provisions.

Text proposed by the Commission	Amendments proposed by the ECB (1)
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**Amendment 28**

Article 39(5) of the proposed regulation

<p>'5. Powers are delegated to the Commission to adopt regulatory technical standards specifying the appropriate percentage and time horizon, as referred to in paragraph 1, to be considered for the different classes of financial instruments.</p> <p>[...]</p> <p>ESMA, in consultation with EBA, shall submit drafts for those regulatory technical standards to the Commission by 30 June 2012.'</p>	<p>'5. Powers are delegated to the Commission to adopt regulatory technical standards specifying the appropriate percentage and time horizon, as referred to in paragraph 1, to be considered for the different classes of financial instruments.</p> <p>[...]</p> <p>ESMA, <b>in close cooperation with the members of the ESCB and</b> in consultation with EBA, shall submit drafts for those regulatory technical standards to the Commission by 30 June 2012.'</p>
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*Explanation*

The statutory role and responsibilities of the members of the ESCB in the area of oversight should be reflected also in respect of regulatory technical standards specifying margin requirements.

**Amendment 29**

Article 40(2) of the proposed regulation

<p>'2. A CCP shall establish the minimum size of contributions to the default fund and the criteria to calculate the contributions of the single clearing members. The contributions shall be proportional to the exposures of each clearing member, in order to ensure that the contributions to the default fund at least enable the CCP to withstand the default of the clearing member to which it has the largest exposures or of the second and third largest clearing members, if the sum of their exposures is larger.'</p>	<p>'2. A CCP <del>may shall</del> establish <b>more than one</b> <del>the</del> <del>minimum size of contributions to the default fund</del> <del>for</del> <del>the different classes of instruments it clears</del> <del>and</del> <del>the</del> <del>criteria to calculate the contributions of the single clearing members.</del> <del>The contributions shall be proportional to the exposures of each clearing member, in order to ensure that the contributions to the default fund at least enable the CCP to withstand the default of the clearing member to which it has the largest exposures or of the second and third largest clearing members, if the sum of their exposures is larger.'</del></p>
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*Explanation*

The proposed regulation should be consistent with the ongoing work of CPSS-IOSCO. To this end, the proposed regulation should focus on high-level principles and assign the responsibility of developing technical standards to ESMA, in close cooperation with the members of the ESCB (see also amendment 30 below).

**Amendment 30**

Article 40(3) of the proposed regulation

<p>'3. A CCP may establish more than one default fund for the different classes of instruments it clears.'</p>	<p>'3. A CCP <del>may establish more than one default fund for the different classes of instruments it clears.</del> <b>Powers are delegated to the Commission to adopt regulatory technical standards specifying the details of default funds referred to in paragraphs 1 and 2.</b></p>
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Text proposed by the Commission	Amendments proposed by the ECB <sup>(1)</sup>
	<p><b>The regulatory technical standards referred to in the first subparagraph shall be adopted in accordance with Articles [7 to 7d] of Regulation .../... [ESMA Regulation].</b></p> <p><b>ESMA shall, in close cooperation with the members of the ESCB, submit drafts for those regulatory technical standards to the Commission by 30 June 2012.'</b></p>

*Explanation*

As noted above, the proposed regulation should be consistent with the ongoing work of CPSS-IOSCO. To this end, the proposed regulation should focus on high-level principles and assign the responsibility of developing technical standards to ESMA, in close cooperation with the members of the ESCB.

**Amendment 31**

Article 41(2) of the proposed regulation

<p>'2. A CCP shall develop scenarios of extreme but plausible market conditions, which include the most volatile periods that have been experienced by the markets for which the CCP provides its services. The default fund referred to in Article 40 and the other financial resources referred to in paragraph 1 shall at all times enable the CCP to withstand the default of the two clearing members to which it has the largest exposures and shall enable the CCP to withstand sudden sales of financial resources and rapid reductions in market liquidity.'</p>	<p><del>'2. A CCP shall develop scenarios of extreme but plausible market conditions, which include the most volatile periods that have been experienced by the markets for which the CCP provides its services. The default fund referred to in Article 40 and the other financial resources referred to in paragraph 1 shall at all times enable the CCP to withstand the default of the two clearing members to which it has the largest exposures and shall enable the CCP to withstand sudden sales of financial resources and rapid reductions in market liquidity.'</del></p> <p><b>'2. A CCP shall develop scenarios of extreme but plausible market conditions. A CCP shall develop scenarios of such extreme but plausible market conditions. the default of the two clearing members to which it has the largest exposures and shall enable the CCP to withstand sudden sales of financial resources and rapid reductions in market liquidity.'</b></p>
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*Explanation*

As noted above, the proposed regulation should be consistent with the ongoing work of CPSS-IOSCO. To this end, the proposed regulation should focus on high-level principles and assign the responsibility for developing technical standards to ESMA, in close cooperation with the members of the ESCB (see amendment 33 below).

**Amendment 32**

Article 41(3) of the proposed regulation

<p>'3. A CCP shall obtain the necessary credit lines or similar arrangements to cover its liquidity needs in case the financial resources at its disposal are not immediately available. Each clearing member, parent undertaking or subsidiary of the clearing member may not provide more than 25 per cent of the credit lines needed by the CCP.'</p>	<p><b>'3. A CCP shall measure on a daily basis its potential liquidity needs. A CCP shall at all times have access to adequate liquidity to perform its services and activities. To that end, a A-CCP shall obtain the necessary credit lines or similar arrangements to cover its liquidity needs in case the financial resources at its disposal are not immediately available. Each clearing member, parent undertaking or subsidiary of the clearing member may not provide more than 25 % of the credit lines needed by the CCP.'</b></p>
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Text proposed by the Commission	Amendments proposed by the ECB (1)
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*Explanation*

*In order to ensure alignment with the ongoing work of CPSS-IOSCO, a reference to the CCP's daily calculation of their potential liquidity needs should be inserted in addition to a reference ensuring the CCP's availability of adequate liquidity.*

**Amendment 33**

Article 41(5) of the proposed regulation

<p>'5. Powers are delegated to the Commission to adopt regulatory technical standards specifying the extreme conditions referred to in paragraph 2 that the CCP shall withstand.</p> <p>[...]</p> <p>ESMA, in consultation with EBA, shall submit drafts for those regulatory technical standards to the Commission by 30 June 2012.'</p>	<p>'5. Powers are delegated to the Commission to adopt regulatory technical standards specifying the extreme conditions referred to in paragraph 2 that the CCP shall withstand. <b>and the criteria for adequate liquidity referred to in paragraph 3.</b></p> <p>[...]</p> <p>ESMA, <b>in close cooperation with the members of the ESCB and</b> in consultation with EBA, shall submit drafts for those regulatory technical standards to the Commission by 30 June 2012.'</p>
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*Explanation*

*As a consequence of amendments 11 and 32 above, Article 41(5) of the proposed regulation should be amended to ensure that regulatory technical standards are developed, and this should take place in close cooperation with the members of the ESCB.*

**Amendment 34**

Article 42(2) to (4) of the proposed regulation

<p>'2. Where the margins posted by the defaulting clearing member are not sufficient to cover the losses incurred by the CCP, the CCP shall use the default fund contribution of the defaulting member to cover these losses.</p> <p>3. A CCP shall use contributions to the default fund and other contributions of non-defaulting clearing members only after having exhausted the contributions of the defaulting clearing member and, where relevant, the CCP's own funds referred to in Article 41(1).</p> <p>4. A CCP shall not be allowed to use the margins posted by non-defaulting clearing members to cover the losses resulting from the default of another clearing member.'</p>	<p>'2. <b>Powers are delegated to the Commission to adopt regulatory technical standards specifying the details of the default waterfall referred to in paragraph 1.</b></p> <p><b>The regulatory technical standards referred to in the first subparagraph shall be adopted in accordance with Articles [7 to 7d] of Regulation .../... [ESMA Regulation].</b></p> <p><b>ESMA shall, in close cooperation with the members of the ESCB, submit drafts for those regulatory technical standards to the Commission by 30 June 2012.</b><del>Where the margins posted by the defaulting clearing member are not sufficient to cover the losses incurred by the CCP, the CCP shall use the default fund contribution of the defaulting member to cover these losses.</del></p> <p><del>3. A CCP shall use contributions to the default fund and other contributions of non-defaulting clearing members only after having exhausted the contributions of the defaulting clearing member and, where relevant, the CCP's own funds referred to in Article 41(1).</del></p> <p><del>4. A CCP shall not be allowed to use the margins posted by non-defaulting clearing members to cover the losses resulting from the default of another clearing member.'</del></p>
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Text proposed by the Commission

Amendments proposed by the ECB (\*)

*Explanation*

As noted above, the proposed regulation should be consistent with the ongoing work of CPSS-IOSCO. To this end, the proposed regulation should focus on high-level principles and assign the responsibility for developing technical standards to ESMA, in close cooperation with the members of the ESCB.

**Amendment 35**

Article 43(3) of the proposed regulation

'3. Powers are delegated to the Commission to adopt regulatory technical standards specifying the type of collateral that can be considered highly liquid and the haircuts referred to in paragraph 1.

[...]

ESMA, in consultation with the ESCB and EBA, shall submit drafts on those regulatory technical standards to the Commission by 30 June 2012.'

'3. Powers are delegated to the Commission to adopt regulatory technical standards specifying the type of collateral that can be considered highly liquid and the haircuts referred to in paragraph 1.

[...]

ESMA, **in close cooperation with the members of the ESCB and** in consultation with the ~~ESCB~~ and EBA, shall submit drafts on those regulatory technical standards to the Commission by 30 June 2012.'

*Explanation*

The statutory role and responsibilities of the members of the ESCB in the area of oversight is already reflected in Article 43(3) of the proposed regulation concerning the elaboration of regulatory technical standards specifying collateral requirements. However, as the ESCB does not have legal personality, 'ESCB' should be replaced with 'members of the ESCB'.

**Amendment 36**

Article 44(5) of the proposed regulation

'5. Powers are delegated to the Commission to adopt regulatory technical standards specifying the highly liquid financial instruments referred to in paragraph 1 and the concentration limits referred to in paragraph 4.

[...]

ESMA, in consultation with EBA, shall submit drafts on those regulatory technical standards to the Commission by 30 June 2012.'

'5. Powers are delegated to the Commission to adopt regulatory technical standards specifying the highly liquid financial instruments referred to in paragraph 1 and the concentration limits referred to in paragraph 4.

[...]

ESMA, **in close cooperation with the members of the ESCB and** in consultation with EBA, shall submit drafts on those regulatory technical standards to the Commission by 30 June 2012.'

*Explanation*

The statutory role and responsibilities of the members of the ECB in the area of oversight should be reflected also in respect of regulatory technical standards to be issued on investment policies applicable to CCPs.

Text proposed by the Commission	Amendments proposed by the ECB (1)
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**Amendment 37**

Article 45(3) of the proposed regulation

<p>'3. The CCP shall promptly inform the competent authority. That competent authority shall immediately inform the authority responsible for the supervision of the defaulting clearing member where the CCP considers that the clearing member will not be able to meet its future obligations and when the CCP intends to declare its default.'</p>	<p>'3. The CCP shall promptly inform the competent authority. That competent authority shall immediately inform the authority responsible for the supervision of the defaulting clearing member, <b>together with the competent overseers and relevant central banks of issue</b>, where the CCP considers that the clearing member will not be able to meet its future obligations and when the CCP intends to declare its default.'</p>
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*Explanation*

*In view of the statutory role and responsibilities of the members of the ESCB as overseers and as central banks of issue, the information obligation concerning defaulting clearing members of CCPs, which the competent authority is envisaged to have under Article 45(3) of the proposed regulation vis-à-vis supervisors, should be extended to cover also members of the ESCB performing the above mentioned roles.*

**Amendment 38**

Article 46(4) of the proposed regulation

<p>'4. Powers are delegated to the Commission to adopt regulatory technical standards specifying the following:</p> <p>[...]</p> <p>ESMA, in consultation with EBA, shall submit drafts on those regulatory technical standards to the Commission by 30 June 2012.'</p>	<p>'4. Powers are delegated to the Commission to adopt regulatory technical standards specifying the following:</p> <p>[...]</p> <p>ESMA, <b>in close cooperation with the members of the ESCB, and</b> in consultation with EBA, shall submit drafts on those regulatory technical standards to the Commission by 30 June 2012.'</p>
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*Explanation*

*The statutory role and responsibilities of the members of the ESCB in the area of oversight should be reflected also in respect of regulatory technical standards to be issued on review models, stress testing and back testing applicable to CCPs.*

**Amendment 39**

Article 50(3) of the proposed regulation

<p>'3. Where a competent authority considers that the requirements set out in paragraph 2 are not met, it shall provide explanations in writing regarding its risk considerations to the other competent authorities and the CCPs involved. It shall also notify ESMA, which shall issue an opinion on the effective validity of the risk considerations as grounds for denial of an interoperability arrangement. ESMA's opinion shall be made available to all the CCPs involved. Where ESMA's assessment differs from the assessment of the relevant competent authority, this authority shall reconsider its position, taking into account the opinion of ESMA.'</p>	<p>'3. Where a competent authority considers that the requirements set out in paragraph 2 are not met, it shall provide explanations in writing regarding its risk considerations to the other competent authorities and the CCPs involved. It shall also notify ESMA, <b>the competent overseers and the relevant central banks of issue and they shall be invited to issue separate</b> <del>which shall issue</del> <del>an</del> opinions on the effective validity of the risk considerations as grounds for denial of an interoperability arrangement. ESMA's opinion <b>and the opinions of the competent overseers and the relevant central banks of issue</b> shall be made available to all the CCPs involved. Where <del>ESMA's</del> <b>the assessment in these opinions</b> differs</p>
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Text proposed by the Commission	Amendments proposed by the ECB <sup>(1)</sup>
	<p>from the assessment of the relevant competent authority, this authority shall reconsider its position, taking into account the opinions of ESMA, <b>the competent overseers and the relevant central banks of issue.</b></p>

*Explanation*

*The statutory role and responsibilities of the members of the ESCB as overseers and as central banks of issue should be reflected also in respect of the approval procedure of the interoperability arrangements for CCPs.*

**Amendment 40**

Article 50(4) of the proposed regulation

<p>'4. By 30 June 2012, ESMA shall issue guidelines or recommendations with a view to establishing consistent, efficient and effective assessments of interoperability arrangements, in accordance with the procedure laid down in Article 8 of Regulation .../... [ESMA Regulation]'</p>	<p>'4. By 30 June 2012, ESMA shall, <b>in close cooperation with the members of the ESCB</b>, issue guidelines or recommendations with a view to establishing consistent, efficient and effective assessments of interoperability arrangements, in accordance with the procedure laid down in Article 8 of Regulation .../... [ESMA Regulation]'</p>
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*Explanation*

*The statutory role and responsibilities of the members of the ESCB in the area of oversight should be reflected also in respect of the issuance of guidelines or recommendations with a view to establishing consistent, efficient and effective assessments of interoperability arrangements for CCPs.*

**Amendment 41**

Article 52(3) of the proposed regulation

<p>'3. Powers are delegated to the Commission to adopt regulatory technical standards specifying the details of the application for registration to ESMA referred to in paragraph 1.</p> <p>[...]</p> <p>ESMA shall submit drafts for those regulatory technical standards to the Commission by 30 June 2012.'</p>	<p>'3. Powers are delegated to the Commission to adopt regulatory technical standards specifying the details of the application for registration to ESMA referred to in paragraph 1.</p> <p>[...]</p> <p>ESMA, <b>in close cooperation with the members of the ESCB</b>, shall submit drafts for those regulatory technical standards to the Commission by 30 June 2012.'</p>
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*Explanation*

*The statutory role and responsibilities of the members of the ESCB in the area of oversight should be reflected also in respect of the adoption of regulatory technical standards specifying the details of the application for registration as a trade repository to ESMA.*

Text proposed by the Commission	Amendments proposed by the ECB (1)
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**Amendment 42**

Article 52(4) of the proposed regulation

<p>'4. In order to ensure uniform application of paragraph 1, powers are conferred to the Commission to adopt implementing standards determining the format of the application for registration to ESMA.</p> <p>[...]</p> <p>ESMA shall submit drafts for those standards to the Commission by 30 June 2012.'</p>	<p>'4. In order to ensure uniform application of paragraph 1, powers are conferred to the Commission to adopt implementing standards determining the format of the application for registration to ESMA.</p> <p>[...]</p> <p>ESMA, <b>in close cooperation with the members of the ESCB</b>, shall submit drafts for those standards to the Commission by 30 June 2012.'</p>
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*Explanation*

*The statutory role and responsibilities of the members of the ESCB in the area of oversight should be reflected also in respect of the adoption of implementing standards determining the format of the application for registration as a trade repository to ESMA.*

**Amendment 43**

Article 60(1) of the proposed regulation

<p>'1. ESMA shall withdraw the registration of a trade repository in any of the following circumstances:</p> <p>[...]</p>	<p>'1. ESMA, <b>in close cooperation with the members of the ESCB</b>, shall withdraw the registration of a trade repository in any of the following circumstances:</p> <p>[...]</p>
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*Explanation*

*The statutory role and responsibilities of the members of the ESCB in the area of oversight should be reflected also with regard to the withdrawal of registration of a trade repository by ESMA.*

**Amendment 44**

Article 63(4) of the proposed regulation

<p>'4. ESMA shall establish cooperation arrangements with the relevant competent authorities of third countries whose legal and supervisory frameworks have been considered equivalent to this Regulation in accordance with paragraph 3. Such arrangements shall ensure that Union authorities have immediate and continuous access to all the information needed for the exercise of their duties. Those arrangements shall specify at least:</p> <p>[...]</p>	<p>'4. ESMA, <b>in close cooperation with the members of the ESCB</b>, shall establish cooperation arrangements with the relevant competent authorities of third countries whose legal, <b>oversight</b> and supervisory frameworks have been considered equivalent to this Regulation in accordance with paragraph 3. Such arrangements shall ensure that Union authorities have immediate and continuous access to all the information needed for the exercise of their duties. Those arrangements shall specify at least:</p> <p>[...]</p>
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*Explanation*

*It is important that the members of the ESCB are involved in the setting up of cooperation arrangements with the relevant competent authorities of third countries in order to ensure appropriate coverage of and cooperation on oversight issues with regard to trade repositories.*

Text proposed by the Commission	Amendments proposed by the ECB (1)
<b>Amendment 45</b>	
Article 67(2) of the proposed regulation	
<p>2. A trade repository shall make the necessary information available to the following entities:</p> <p>(a) ESMA;</p> <p>(b) the competent authorities supervising undertakings subject to the reporting obligation under Article 6;</p> <p>(c) the competent authority supervising CCPs accessing the trade repository;</p> <p>(d) the relevant central banks of the ESCB.'</p>	<p>2. A trade repository shall make the necessary information available to the following entities:</p> <p>(a) ESMA;</p> <p>(b) the competent authorities supervising undertakings subject to the reporting obligation under Article 6;</p> <p>(c) the competent authority supervising CCPs accessing the trade repository;</p> <p>(d) <del>the relevant central banks of the ESCB</del> <b>competent overseers;</b></p> <p><b>(e) the central banks of issue of the most relevant currencies of the financial instruments registered;</b></p> <p><b>(f) the members of the ESCB for the performance of their statistical function;</b></p> <p><b>(g) the ESRB.'</b></p>

*Explanation*

*The statutory role and responsibilities of the members of the ESCB in their roles as overseers and as central banks of issue, as well as their statistical function, should be reflected with regard to transparency and data availability of trade repositories. Moreover, as pointed out in the Eurosystem contribution from September 2009 to the European Commission's public consultation on 'Possible initiatives to enhance the resilience of OTC derivative markets' (available on the ECB's website at <http://www.ecb.europa.eu>), the ECB regards trade repositories as essential tools for enhancing operational procedures and transparency in financial markets, especially with regard to OTC derivatives markets and, where relevant, the underlying instruments. In particular, to the extent that trade repositories achieve comprehensive coverage of certain products, they can provide regulatory and supervisory authorities and financial market participants with a timely overview of the build-up and distribution of exposures in the relevant markets. In this way, central data repositories can also play a role as the providers of information, and to the extent possible in comparable formats and consistent with the Union's statistical framework which are necessary to enable relevant authorities to establish an early-warning mechanism for emerging financial risks. For these reasons, the ECB proposes adding the ESRB to the list of authorities, institutions and bodies receiving necessary information from trade repositories.*

**Amendment 46**

Article 67(4) of the proposed regulation

<p>'4. Powers are delegated to the Commission to adopt regulatory technical standards specifying the details of the information referred to in paragraphs (1) and (2).</p> <p>[...]</p> <p>ESMA shall submit drafts for those regulatory technical standards to the Commission by 30 June 2012 at the latest.'</p>	<p>'4. Powers are delegated to the Commission to adopt regulatory technical standards specifying the details of the information referred to in paragraphs (1) and (2).</p> <p>[...]</p> <p>ESMA, <b>in close cooperation with the members of the ESCB</b>, shall submit drafts for those regulatory technical standards to the Commission by 30 June 2012 at the latest.'</p>
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Text proposed by the Commission	Amendments proposed by the ECB <sup>(1)</sup>
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*Explanation*

*The statutory role and responsibilities of the members of the ESCB in the area of oversight should be reflected also in respect of the adoption of regulatory technical standards specifying the details of the data to be published by the trade repository as well as the information to be made available to ESMA and other relevant authorities, such as the ESRB, for the exercise of their duties.*

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<sup>(1)</sup> 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.

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