

**OPINION OF THE EUROPEAN CENTRAL BANK****of 11 October 2017****on a proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivatives contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories****(CON/2017/42)****(2017/C 385/04)****Introduction and legal basis**

On 6 and 9 June 2017, respectively, the European Central Bank (ECB) received requests from the Council of the European Union and the European Parliament for an opinion on a proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivatives contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade 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 affecting the basic tasks of the European System of Central Banks (ESCB) to define and implement monetary policy and to promote the smooth operation of payment systems pursuant to the first and fourth indents of Article 127(2) of the Treaty, the ESCB's contribution to the smooth conduct of policies relating to the stability of the financial system, as referred to in Article 127(5) of the Treaty, and the specific tasks conferred upon the ECB concerning the prudential supervision of credit institutions, as referred to in Article 127(6) of the Treaty. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

**General observations**

The ECB generally supports the Commission's initiative to introduce a number of targeted modifications to Regulation (EU) No 648/2012 of the European Parliament and of the Council <sup>(2)</sup> with a view to simplifying the applicable rules and eliminating disproportionate burdens.

**Specific observations****1. Exemption of central bank transactions**

- 1.1 Article 1(4) of Regulation (EU) No 648/2012 exempts members of the ESCB, but not their counterparties, from the reporting obligation. As a result, where a derivative contract is concluded with a member of the ESCB, its counterparty needs to report the details of the transaction to a trade repository. In this context it may be noted that relevant central bank transactions are exempted from reporting under Regulation (EU) 2015/2365 of the European Parliament and of the Council <sup>(3)</sup>. Moreover, central bank transactions in relation to the performance of monetary, foreign exchange and financial stability policy are exempted from disclosure under Directive 2014/65/EU of the European Parliament and of the Council <sup>(4)</sup> and Regulation (EU) No 600/2014 of the European Parliament and of the Council <sup>(5)</sup>.

<sup>(1)</sup> COM(2017) 208 final.

<sup>(2)</sup> 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).

<sup>(3)</sup> 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).

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

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

1.2 The ECB has concerns regarding the risks that may emerge if, in spite of confidentiality regimes applied by counterparties, information arising out of ESCB policy operations were to be leaked to the public and if market participants could identify the transactions of ESCB national central banks (NCBs). Indeed, this could have an adverse impact on the performance by NCBs of their tasks in respect of those central bank transactions, particularly in the field of monetary policy or foreign exchange operations, where confidentiality is required<sup>(1)</sup>. Requiring the counterparties of the members of the ESCB to report all data on their transactions to trade repositories has the unintended consequence of establishing an indirect reporting obligation for central bank transactions, thus limiting the effectiveness of the exemption granted to the members of the ESCB. It is therefore important that the books of ESCB members are protected and that signalling based on central bank operations remains effective<sup>(2)</sup>.

1.3 The ECB therefore takes the view that in order to ensure that NCBs continue to perform their statutory tasks effectively it is important that central bank transactions are fully exempted from reporting requirements.

## 2. Reporting obligation

2.1 With regard to the proposed amendment of Article 9(1), the ECB takes note of the results of the Commission's impact assessment and understands the need to reduce the reporting burden for small non-financial counterparties. In this regard, the ECB welcomes the solution proposed by the Commission that in some specific cases the responsibility for reporting should be undertaken by central counterparties (CCPs), financial counterparties, management companies of undertakings for collective investment in transferable securities, and managers of alternative investment funds<sup>(3)</sup>. This proposal appears to strike a good balance between ensuring the completeness of data, minimising reporting burdens and, at the same time, aligning the structure of the reporting obligations under Regulation (EU) No 648/2012 and Regulation (EU) 2015/2365.

2.2 The proposed regulation also introduces a reporting exemption for all intragroup trades involving a non-financial counterparty<sup>(4)</sup>. The ECB is concerned by this proposed amendment for the reasons set out in paragraphs 2.2.1 to 2.2.3.

2.2.1 Based on analyses of existing data, the confirmation that an over-the-counter (OTC) derivative contract is an intragroup transaction pursuant to the current reporting framework under Regulation (EU) No 648/2012<sup>(5)</sup> is often unreliable, when cross-checked with other data sources. In the context of still evolving data quality, therefore, the unconditional exemption of intragroup reporting for non-financial counterparties gives rise to the risk of regulatory arbitrage by reporting agents.

2.2.2 Intragroup transactions involving non-financial counterparties are exempted from collateralisation only if certain conditions are met, and subject to authorisation of the competent authorities<sup>(6)</sup>. The ECB is concerned that if those conditions are not met and counterparties exchange collateral for their intragroup transactions, then, in the absence of any reporting obligation, risks associated with margins and collateral pro-cyclicality may remain unmonitored. This asymmetry would break the complementarity between transparency and risk mitigation that lies at the core of the policy framework under Regulation (EU) No 648/2012.

2.2.3 The proposed exemption may potentially lead to sophisticated forms of circumvention of reporting requirements under Regulation (EU) No 648/2012, as trades may be channelled through non-financial subsidiaries of larger financial groups. Due to the higher participation rate of non-financial counterparties in foreign exchange derivatives transactions, the impact of the amendment could be particularly relevant for currency derivatives reporting.

<sup>(1)</sup> See paragraph 7 of Opinion CON/2012/21. All ECB opinions are published on the ECB's website at [www.ecb.europa.eu](http://www.ecb.europa.eu)

<sup>(2)</sup> See pages 2 and 13 to 14 of the ECB response to the European Commission's consultation on the review of the European Market Infrastructure Regulation (EMIR) dated 2 September 2015, available on the ECB's website at [www.ecb.europa.eu](http://www.ecb.europa.eu)

<sup>(3)</sup> See Article 1(7)(b) of the proposed regulation.

<sup>(4)</sup> See Article 1(7)(a) of the proposed regulation.

<sup>(5)</sup> See Article 3(1) and (2) of Regulation (EU) No 648/2012.

<sup>(6)</sup> See Article 11(7) of Regulation (EU) No 648/2012.

- 2.3 The ECB considers that financial counterparties' obligation to report on behalf of non-financial counterparties<sup>(1)</sup> already addresses the excessive reporting burden for small non-financial counterparties, also in the case of intragroup trades. The marginal cost of additional reports for non-financial counterparties that should already have appropriate IT infrastructures in place should be negligible. The ECB therefore recommends that intragroup trades between financial counterparties and non-financial counterparties should not be exempted from reporting. Among intragroup trades between non-financial counterparties, only trades concluded by small non-financial counterparties that pose no systemic risk should be exempted. In the light of this, the ECB recommends that intragroup trades between non-financial counterparties are exempted from reporting provided that these non-financial counterparties are not subject to the clearing obligation. As a corollary, non-financial counterparties that are subject to the clearing obligation have to report on behalf of other non-financial counterparties in the event of intragroup trades between them.
- 2.4 The ECB notes that intragroup trades involving a counterparty from a third country that is not granted an equivalence decision by the Commission will still be subject to the reporting obligation and that the current exemption<sup>(2)</sup> does not therefore apply to such trades.
- 2.5 The ECB welcomes the amendments to Article 9(6). The implementation of standards for counterparty, trade and securities identification, operationalised by Commission Implementing Regulation (EU) 2017/105<sup>(3)</sup>, is a key step towards improving the quality of data collected pursuant to Regulation (EU) No 648/2012. The alignment of Regulation (EU) No 648/2012 with Regulation (EU) 2015/2365 and Regulation (EU) No 600/2014 is also important to guarantee comparability and ensure a global view on financial markets' structures and activities.
3. *Amendments to ensure the quality of data*
- 3.1 The ECB considers the proposed amendments to Article 78<sup>(4)</sup> and Article 81(5)<sup>(5)</sup> to be valuable steps forward as they will facilitate harmonisation of trade repositories' procedures and policies and the conditions under which they provide data to competent authorities.
- 3.2 The ECB also welcomes the mandate granted to the European Securities and Markets Authority (ESMA) to report on the implementation of the reporting obligation under the new Article 85(3)(d)<sup>(6)</sup> and would welcome the involvement of the ESCB in preparing the report to the Commission pursuant to the new Article 85(3)(d).
4. *Credit institutions' compliance with risk-management procedures, intragroup exemptions and capital requirements*
- 4.1 The ECB supports the proposal that there should be supervisory procedures to ensure initial and ongoing validation of risk-management procedures requiring the timely, accurate and appropriately segregated exchange of collateral with respect to OTC derivative contracts<sup>(7)</sup>.
- 4.2 The ECB notes that within the framework of Article 6 of Council Regulation (EU) No 1024/2013<sup>(8)</sup> the tasks of ensuring that credit institutions comply with the risk management requirements set out in Article 11(3) of Regulation (EU) No 648/2012 regarding procedures concerning timely, accurate and appropriately segregated exchange of collateral, including the connected intragroup exemptions<sup>(9)</sup>, and with the requirement in the area of own funds set out in Article 11(4) of Regulation (EU) No 648/2012 to hold an appropriate and proportionate amount of capital to manage the risks not covered by appropriate exchange of collateral, are of a prudential nature, and thus fall within the scope of the tasks conferred on the ECB by Article 4(1)(e) and (d) of Regulation (EU) No 1024/2013.

<sup>(1)</sup> See Article 1(7)(b) of the proposed regulation.

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

<sup>(3)</sup> Commission Implementing Regulation (EU) 2017/105 of 26 October 2016 amending Implementing Regulation (EU) No 1247/2012 laying down implementing technical standards with regard to the format and frequency of trade reports to trade repositories according to Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories (OJ L 17, 21.1.2017, p. 17).

<sup>(4)</sup> See Article 1(16) of the proposed regulation.

<sup>(5)</sup> See Article 1(17)(c) of the proposed regulation.

<sup>(6)</sup> See Article 1(19)(c) of the proposed regulation.

<sup>(7)</sup> See Article 1(9)(a) of the proposed regulation.

<sup>(8)</sup> 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).

<sup>(9)</sup> See Article 4(2) of Regulation (EU) No 648/2012.

5. *CCPs' transparency*

5.1 The ECB supports the proposal that CCPs should provide their clearing members with a tool to simulate their initial margin requirements and with a detailed overview of the initial margin models that they use<sup>(1)</sup>. This will increase the transparency and predictability of initial margin requirements, thus improving clearing participants' understanding of the risks and costs involved in participation in a CCP.

5.2 In addition, the ECB proposes the inclusion of macroprudential intervention tools, in order to prevent the build-up of systemic risk resulting, in particular, from excessive leverage, and to further limit the pro-cyclicality of margins and haircuts. The ECB proposes that the relevant principles for macroprudential tools are established in the Level 1 act. Macroprudential policy tools would be applied to counterparties at transaction level. In this way, all relevant transactions would be affected, including those contracted by non-banks, regardless of whether these transactions have been concluded in the centrally cleared market, the non-centrally cleared market, or by Union counterparties clearing their trades via a third country CCP<sup>(2)</sup>. The requisite principles and requirements for such macroprudential tools should be included if not in the current proposal then at the next appropriate time, such as at the occasion of the next review of Regulation (EU) No 648/2012 in 2020.

5.3 Moreover, as pointed out in a recently published ESRB report on the review of Regulation (EU) No 648/2012<sup>(3)</sup>, the ECB considers that CCPs operating in the Union should be required to publish quantitative and qualitative information consistent with the CPMI-IOSCO public disclosure principles<sup>(4)</sup>. Having a stronger legal basis for making CCPs publish data consistent with these principles would help the financial industry and the public at large better understand the complex environment in which CCPs operate.

6. *Classification of securitisation special purpose entities as financial counterparties*

6.1 The ECB notes that securitisation special purpose entities (SSPEs) are proposed to be classified as financial counterparties<sup>(5)</sup>. However, Article 27 of the proposal for a regulation of the European Parliament and of the Council laying down common rules on securitisation and creating a European framework for simple, transparent and standardised (STS) securitisation and amending Directives 2009/65/EC, 2009/138/EC, 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012<sup>(6)</sup> proposes to amend Regulation (EU) No 648/2012 and exempt STS SSPEs from the clearing obligation, provided that counterparty credit risk is adequately mitigated. The ECB reiterates its position<sup>(7)</sup> that STS SSPEs should be fully exempted both from the clearing obligation and from the legislative requirements to provide collateral<sup>(8)</sup>.

6.2 Accordingly, the ECB supports the provisions of Article 27 of the proposal mentioned in paragraph 6.1, including the mandate for the European Supervisory Authorities to develop draft regulatory technical standards specifying criteria for establishing which arrangements under covered bonds or securitisations adequately mitigate counterparty credit risk to be adopted by the Commission<sup>(9)</sup>, as well as other necessary amendments that exempt STS SSPEs from both clearing obligations and from obligations to provide margin. Such treatment is necessary to achieve a level playing field with respect to qualifying covered bonds and can be justified on prudential grounds in respect of STS SSPEs.

<sup>(1)</sup> See Article 1(10) of the proposed regulation.

<sup>(2)</sup> This is in line with the ECB's position in the ECB response to the European Commission's consultation on the review of the European Market Infrastructure Regulation (EMIR) dated 2 September 2015, available on the ECB's website at [www.ecb.europa.eu](http://www.ecb.europa.eu)

<sup>(3)</sup> The Revision of the European Market Infrastructure Regulation, ESRB, April 2017. Available at [https://www.esrb.europa.eu/pub/pdf/other/20170421\\_esrb\\_emir.en.pdf](https://www.esrb.europa.eu/pub/pdf/other/20170421_esrb_emir.en.pdf)

<sup>(4)</sup> Final report of the CPMI-IOSCO Board on Public quantitative disclosure standards for central counterparties, February 2015. Available at <http://www.bis.org/cpmi/publ/d125.pdf>

<sup>(5)</sup> See Article 1(1) of the proposed regulation.

<sup>(6)</sup> COM(2015) 472 final.

<sup>(7)</sup> See the Joint response from the Bank of England and the European Central Bank to the Consultation Document of the European Commission: 'An EU framework for simple, transparent and standardised securitisation', available on the ECB's website at [www.ecb.europa.eu](http://www.ecb.europa.eu)

<sup>(8)</sup> On the exemption from the requirement to provide collateral, see paragraphs 2.2 and 5.5 of Opinion CON/2016/11.

<sup>(9)</sup> See Article 27(2) of COM(2015) 472.

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

The ECB notes that the proposed introduction of a methodology for calculating the positions in OTC derivative contracts relevant for determining whether a financial counterparty or a non-financial counterparty is subject to the clearing obligation, which is based on end-of-period data instead of a rolling average position in OTC derivative contracts over 30 working days<sup>(1)</sup>, may create an incentive for 'window dressing' to avoid the clearing obligation. The ECB therefore proposes to add to the new Articles 4a(2)<sup>(2)</sup> and 10(2)<sup>(3)</sup> introduced by the proposed regulation a requirement that a financial counterparty and a non-financial counterparty shall be able to demonstrate to the relevant competent authority that the calculation of the aggregate month-end position in OTC derivative contracts does not lead to a systematic underestimation of the overall position.

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

8.1 It is worth recalling that Commission draft delegated and implementing acts qualify as 'proposed Union acts' within the meaning of Articles 127(4) and 282(5) of the Treaty. Both delegated and implementing acts constitute Union legal acts. The ECB should be consulted in due time on any draft Union acts, including draft delegated and implementing acts, falling within its fields of competence. The obligation to consult the ECB was clarified by the European Court of Justice in *Commission v ECB*<sup>(4)</sup> with reference to the ECB's functions and expertise. In the light of the fact that safe and efficient financial market infrastructures, in particular clearing systems, are essential for the fulfilment of the basic tasks of the ESCB under Article 127(2) of the Treaty, and the pursuit of its primary objective of maintaining price stability under Article 127(1) of the Treaty, the ECB should be duly consulted on delegated and implementing acts adopted under Regulation (EU) No 648/2012. While the obligation to consult the ECB derives directly from the Treaty, in order to ensure clarity, this requirement should also be reflected in a recital of the proposed regulation. Having regard to the importance of delegated and implementing acts as part of the development of Union financial services legislation, the ECB will exercise its advisory role on matters within its competence taking fully into account the timelines for adoption of these acts and the need to ensure the smooth adoption of implementing legislation<sup>(5)</sup>.

8.2 Moreover, in respect of a number of elements of the proposed regulation, not only the consultation of the ECB, but also the involvement, at an early stage, of the relevant members of the ESCB, in the development of draft regulatory and implementing technical standards, delegated and implementing acts could be particularly useful, and should be specifically provided for.

8.3 First, the Commission is empowered to adopt implementing technical standards, on the basis of draft implementing technical standards developed by ESMA specifying the data standards and formats of information to be reported, the methods and arrangements for reporting, the frequency of the reports and the date by which derivative contracts are to be reported<sup>(6)</sup>. The ESCB is increasingly using data collected pursuant to Regulation (EU) No 648/2012 in the fulfilment of its mandates. In order to leverage the insights gained by the ESCB on the quality of data reported under Regulation (EU) No 648/2012, the development of draft implementing technical standards by ESMA should be carried out in close cooperation with the relevant members of the ESCB.

8.4 Second, the Commission is empowered to adopt regulatory technical standards, on the basis of draft regulatory technical standards developed by ESMA, specifying the procedures for the reconciliation of data between trade repositories and the procedures for the verification of data as to its completeness and accuracy and of compliance with the reporting requirements<sup>(7)</sup>. Authorities with direct and immediate access to trade repositories' data, including the relevant members of the ESCB, have developed significant expertise in this field. Ensuring that such expertise is leveraged in the development of the regulatory technical standards is therefore important. For this purpose the development of draft regulatory technical standards by ESMA should be carried out in close cooperation with the relevant members of the ESCB.

<sup>(1)</sup> See Article 1(3) and (8) of the proposed regulation.

<sup>(2)</sup> See Article 1(3) of the proposed regulation.

<sup>(3)</sup> See Article 1(8) of the proposed regulation.

<sup>(4)</sup> *Commission v ECB*, C-11/00, ECLI: EU:C:2003:395, in particular paragraphs 110 and 111. In paragraph 110, the Court of Justice clarified that the obligation to consult the ECB is intended 'essentially to ensure that the legislature adopts the act only when the body has been heard, which, by virtue of the specific functions that it exercises in the Community framework in the area concerned and by virtue of the high degree of expertise that it enjoys, is particularly well placed to play a useful role in the legislative process envisaged'.

<sup>(5)</sup> See paragraph 2 of Opinion CON/2015/10, paragraph 4 of Opinion CON/2012/5, paragraph 8 of Opinion CON/2011/44, and paragraph 4 of Opinion CON/2011/42.

<sup>(6)</sup> See Article 1(7)(c) of the proposed regulation.

<sup>(7)</sup> See Article 1(16) of the proposed regulation.

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

Done at Frankfurt am Main, 11 October 2017.

*The President of the ECB*

Mario DRAGHI

---