

**OPINION OF THE EUROPEAN CENTRAL BANK**  
**of 22 August 2018**  
**on the review of prudential treatment of investment firms**  
**(CON/2018/36)**  
**(2018/C 378/04)**

### Introduction and legal basis

On 26 and 29 January 2018 the European Central Bank (ECB) received requests from the European Parliament and the Council of the European Union, respectively, for an opinion on a proposal for a Regulation of the European Parliament and of the Council on the prudential requirements of investment firms and amending Regulations (EU) No 575/2013, (EU) No 600/2014 and (EU) No 1093/2010 and a proposal for a Directive of the European Parliament and of the Council on the prudential supervision of investment firms and amending Directives 2013/36/EU and 2014/65/EU <sup>(1)</sup> (hereinafter the ‘proposed regulation’ and the ‘proposed directive’, collectively referred to as the ‘proposed acts’).

The ECB’s competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union since the proposed acts contain provisions affecting the ECB’s tasks concerning policies relating to the prudential supervision of credit institutions in accordance with Article 127(6) of the Treaty and Article 1 of Council Regulation (EU) No 1024/2013 <sup>(2)</sup> and the European System of Central Banks’ contribution to the smooth conduct of policies pursued by the competent authorities relating to the stability of the financial system, as referred to in Article 127(5) of the Treaty. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

### General observations

The ECB supports the objective of the proposed acts in setting out a prudential framework that is better adapted to the risks and business models of different types of investment firms.

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

Currently, only credit institutions can be eligible counterparties for Eurosystem monetary policy operations <sup>(3)</sup>. The possible consequences of including Class 1 firms in the definition of ‘credit institution’ will need to be carefully assessed by the ECB.

#### 1. Classification of investment firms as credit institutions

The Commission proposes three classes of investment firms: (i) investment firms whose business consists of dealing on own account and/or underwriting of financial instruments and/or placing financial instruments on a firm commitment basis <sup>(4)</sup> and whose total assets exceed EUR 30 billion, or investment firms which are part of a group of undertakings carrying out these activities with total assets exceeding EUR 30 billion <sup>(5)</sup> (Class 1 firms); (ii) investment firms which meet specific thresholds <sup>(6)</sup> (Class 2 firms); and (iii) all remaining investment firms (Class 3 firms). Class 1 firms are

<sup>(1)</sup> COM(2017) 790 final and COM(2017) 791 final.

<sup>(2)</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>(3)</sup> See Article 55 of Guideline (EU) 2015/510 of the European Central Bank of 19 December 2014 on the implementation of the Eurosystem monetary policy framework (ECB/2014/60) (OJ L 91, 2.4.2015, p. 3).

<sup>(4)</sup> Services under points (3) and (6) of Section A of Annex I to 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> Where the undertaking has a total asset value below EUR 30 billion at solo level, but is part of a group whose combined total asset value exceeds EUR 30 billion (i.e. combined total asset value of entities within the group which provide the relevant services and have solo total asset values below EUR 30 billion), each undertaking within the group providing the relevant services will be a credit institution; or where the total asset value of all undertakings in a group as a whole carrying on the relevant services exceeds EUR 30 billion, (i.e. parent undertaking and subsidiaries) the consolidating supervisor in consultation with the college can decide to classify one or more undertakings in that group with a total asset value of less than EUR 30 billion at solo level as a credit institution in order to address potential risks of circumvention and potential risks for the financial stability of the Union.

<sup>(6)</sup> See Article 12 of the proposed regulation.

classified as credit institutions and as such should be subject to Directive 2013/36/EU of the European Parliament and of the Council<sup>(1)</sup> and Regulation (EU) No 575/2013 of the European Parliament and of the Council<sup>(2)</sup>. As a consequence, Class 1 firms, by virtue of becoming credit institutions within the meaning of Article 1 of Regulation (EU) No 1024/2013, would be subject to supervision by the ECB in the framework of the Single Supervisory Mechanism<sup>(3)</sup>.

Since Regulation (EU) No 1024/2013 specifically states that it does not confer on the ECB any other supervisory tasks, it is acknowledged, from a legal perspective, that an alternative means of ensuring that the ECB supervises Class 1 firms could have been to amend Regulation (EU) No 1024/2013 in order to confer specific tasks upon the ECB concerning the prudential supervision of Class 1 firms. In terms of the impact on ECB supervisory competences, it is worthwhile recalling that the number of Class 1 firms is limited, and that there is an overlap in the services provided by credit institutions and Class 1 firms. Thus, the impact of the proposed regulation on the ECB seems to be marginal<sup>(4)</sup>.

Under the proposed regulation the criteria according to which an investment firm is to be considered a credit institution within the meaning of Article 4(1) of Regulation (EU) No 575/2013<sup>(5)</sup> aim to capture systemic investment firms with total assets above certain thresholds.

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

Furthermore, given that total assets are not the only measure for identifying the systemic importance of investment firms, it is suggested that the total asset threshold could be complemented with other criteria including for example a revenue criterion, significance of cross-jurisdictional activity or interconnectedness. It would be desirable to align such criteria as much as possible with the criteria for significance outlined in Regulation (EU) No 1024/2013, also taking into account the EBA recommendation<sup>(6)</sup>. In this light, once more experience has been gained with the proposed regime, there could be merit in further refinement of these criteria on the basis of an underlying methodology for assessing systemic risk posed by investment firms, to ensure that it achieves its objectives and does not result in excessive unintended consequences, for example through regulatory arbitrage.

Directive 2013/36/EU requires Member States to ensure that the competent authority for the authorisation of credit institutions consults the competent authorities for the supervision of investment firms if the relevant investment firm is controlled by the same natural or legal persons as those who control the credit institution<sup>(7)</sup>. The proposed directive should, therefore, clarify that such a consultation is also required where an investment firm is reclassified as a credit institution<sup>(8)</sup>.

<sup>(1)</sup> Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

<sup>(2)</sup> Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

<sup>(3)</sup> See recital 33 of the proposed regulation and page 26 of Commission Staff Working document 'Review of the prudential framework for investment firms' accompanying the proposed acts (SWD(2017) 481 final).

<sup>(4)</sup> See the third paragraph of page 2 of the explanatory memorandum to the proposed regulation.

<sup>(5)</sup> See Article 60 of the proposed regulation.

<sup>(6)</sup> See the Opinion of the European Banking Authority in response to the European Commission's Call for Advice on Investment Firms (EBA/Op/2017/11) of 29 September 2017. Recommendation 4 states that in order to identify Class 1 firms the EBA should develop dedicated Level 2 Regulatory Technical Standards in order to carry out such identification, taking into account the specificities of investment firms.

<sup>(7)</sup> See Article 16(2) of Directive 2013/36/EU.

<sup>(8)</sup> See the proposed amendment to Article 57(6a)(new) of the proposed directive.

On 23 November 2016, the Commission published a proposal for a directive amending Directive 2013/36/EU<sup>(1)</sup>, on which the ECB was consulted. Under that proposal third country credit institutions and investment firms would be obliged to set up, where certain conditions are met, an EU parent undertaking that would consolidate all of their assets in the Union<sup>(2)</sup>. The ECB reiterates its strong support for the intermediate EU parent undertaking proposal introduced by the Commission in the context of revisions to Directive 2013/36/EU and Regulation (EU) No 575/2013<sup>(3)</sup>. For the avoidance of doubt, the proposed amendment to the definition of 'institutions' in the proposed regulation should not exclude investment firms from being required to set up an intermediate EU parent undertaking.

## 2. Authorisation of certain investment firms as credit institutions

Under the proposed directive responsibility for the authorisation of an investment firm that falls within the definition of a credit institution is assigned to the competent authority for the authorisation of credit institutions under Directive 2013/36/EU<sup>(4)</sup>. Competent authorities for the supervision of credit institutions and investment firms should be required to cooperate, especially in order to ensure that, if the thresholds under the proposed regulation are reached, investment firms promptly apply for authorisation as credit institutions and supervision can be smoothly assumed by the banking supervisor<sup>(5)</sup>.

Whilst the proposed directive stipulates that those investment firms that can be classified as credit institutions must obtain authorisation as a credit institution, clarification is needed as to what happens once authorisation as a credit institution is granted<sup>(6)</sup>. The proposed directive should also clarify the consequences for an investment firm which has reached the threshold but operates without the relevant authorisation for an extended period of time and whose application for authorisation is subsequently rejected by the competent authority. In this case, a question may arise as to the relevant competent authority for the sanctioning of the investment firm for operating as a credit institution without authorisation, whether it would be the competent authority for supervision of investment firms or the competent authority for supervision of credit institutions. Furthermore, the proposed directive should further specify that investment firms that fulfil the definition of credit institutions, irrespective of which part of the definition their activities fall under, are only permitted to perform the traditional banking activities (e.g., receiving deposits from the public or granting loans) after having obtained the authorisation to undertake all banking activities<sup>(7)</sup>. Therefore, until such authorisation is granted, these entities should only perform activities for which they were authorised as an investment firm.

## 3. Statistical implications

The ECB notes the importance of ensuring a high degree of consistency and harmonised methodologies for statistical concepts and definitions in Union legislation and between Union statistical legislation and international statistical standards, in particular the System of National Accounts adopted by the United Nations Statistical Commission<sup>(8)</sup>. For this reason, the ECB has previously welcomed that the definition of the 'monetary financial institution' (MFI) subsector in ESA 2010<sup>(9)</sup> follows the ECB definition<sup>(10)</sup> to which it makes express reference<sup>(11)</sup>.

<sup>(1)</sup> Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures (COM(2016) 854 final).

<sup>(2)</sup> Reference is made to the proposed Article 21b of Directive 2013/36/EU. See also paragraph 1.6 of the Opinion of the European Central Bank of 8 November 2017 on amendments to the Union framework for capital requirements of credit institutions and investment firms (CON/2017/46) (OJ C 34, 31.1.2018, p. 5). All ECB opinions are published on the ECB website at [www.ecb.europa.eu](http://www.ecb.europa.eu).

<sup>(3)</sup> See also paragraph 1.6 of Opinion CON/2017/46.

<sup>(4)</sup> It is noted in this respect that Article 16(2) of Directive 2013/36/EU requires the competent authority for the supervision of credit institutions to consult in certain circumstances the competent authorities responsible for the supervision of investment firms before granting authorisation to a credit institution.

<sup>(5)</sup> See the proposed amendment to Article 5(2) of the proposed directive.

<sup>(6)</sup> See in this respect also Recital 38 of Directive 2014/65/EU which provides: 'Credit institutions that are authorised under Directive 2013/36/EU should not need another authorisation under this Directive in order to provide investment services or perform investment activities. When a credit institution decides to provide investment services or perform investment activities the competent authorities, before granting an authorisation under Directive 2013/36/EU, should verify that it complies with the relevant provisions of this Directive'.

<sup>(7)</sup> See the proposed amendment to Article 57(6) of the proposed directive.

<sup>(8)</sup> See European Commission, International Monetary Fund, Organization for Economic Cooperation and Development, United Nations, World Bank, System of National Accounts 2008 (New York, 2009), available at: <https://unstats.un.org/unsd/nationalaccount/docs/SNA2008.pdf>.

<sup>(9)</sup> ESA 2010 is the European System of Accounts set up by Regulation (EU) No 549/2013 of the European Parliament and of the Council of 21 May 2013 on the European system of national and regional accounts in the European Union (OJ L 174, 26.6.2013, p. 1).

<sup>(10)</sup> See Article 1(a) of Regulation (EU) No 1071/2013 of the European Central Bank of 24 September 2013 concerning the balance sheet of the monetary financial institutions sector (recast) (ECB/2013/33) (OJ L 297, 7.11.2013, p. 1).

<sup>(11)</sup> See paragraph 6 of Opinion of the European Central Bank of 19 May 2011 on the proposal for a regulation of the European Parliament and of the Council on the European system of national and regional accounts in the European Union (CON/2011/44) (OJ C 203, 9.7.2011, p. 3).

Moreover, certain statistical regulations of the ECB define the reporting population by direct reference to the definition of MFIs in Regulation (EU) No 1071/2013<sup>(1)</sup> or by reliance on the sub-sector of 'deposit-taking corporations except the central bank' (ESA sub-sector S.122) or by referring to 'credit institutions' as defined in Article 4(1)(1) of Regulation (EU) No 575/2013<sup>(2)</sup>.

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

#### 4. Macro-prudential perspective on investment firms

The proposed acts do not take on board the EBA recommendations on the need for a macro-prudential perspective on investment firms<sup>(3)</sup>. A possible future review of the criteria for determining systemic investment firms may also consider whether certain macro-prudential tools could be developed to address specific risks that smaller investment firms could pose to financial stability. For instance, smaller investment firms that are significant market participants, engage in cross-border activities or are connected to credit institutions could function as shock amplifiers.

#### 5. Provision of services by third country firms

Regarding the Commission's proposal to strengthen and further harmonise the Union legislation applicable to branches of third country investment firms<sup>(4)</sup>, the Union legislator might wish to give further consideration to the possibility of applying the harmonised rules to all branches, even those that provide services to professional clients and eligible counterparties, in order to ensure that material risks are addressed consistently across the Union and to avoid regulatory arbitrage. In this respect, the proposed acts recognise that credit institutions and investment firms are qualitatively different institutions with different primary business models, but with a certain degree of overlap in the services they can provide<sup>(5)</sup>. In this light, further reflection on possible avenues for regulatory arbitrage could be considered, for example as regards the treatment of branches of third-country credit institutions, which arguably should be consistent with the proposed treatment of branches of third country investment firms and therefore also further harmonised at Union level.

The proposed regulation strengthens the regime outlined in Regulation (EU) No 600/2014<sup>(6)</sup> with regard to the provision of services and performance of activities by third country investment firms after an equivalence decision has been taken. The equivalence of third-country regulatory regimes is used in different areas of relevant Union law and consistency and additional enhancements to those approaches could be further considered. At the same time, the Union legislator might wish to further consider whether the equivalence regime in Regulation (EU) No 600/2014 should be limited (e.g., by limiting this regime to the provision of investment advice and the placing of financial instruments without a firm commitment basis to professional clients and eligible counterparties). Also, consideration might be given to whether the current regime for third country investment firms should continue to leave the regulation of investment

<sup>(1)</sup> See, for example, Regulation (EU) No 1011/2012 of the European Central Bank of 17 October 2012 concerning statistics on holdings of securities (ECB/2012/24) (OJ L 305, 1.11.2012, p. 6); Regulation (EU) No 1072/2013 of the European Central Bank of 24 September 2013 concerning statistics on interest rates applied by monetary financial institutions (ECB/2013/34) (OJ L 297, 7.11.2013, p. 51); Regulation (EU) No 1333/2014 of the European Central Bank of 26 November 2014 concerning statistics on the money markets (ECB/2014/48) (OJ L 359, 16.12.2014, p. 97).

<sup>(2)</sup> See Article 3(1) of Regulation (EU) 2016/867 of the European Central Bank of 18 May 2016 on the collection of granular credit and credit risk data (ECB/2016/13) (OJ L 144, 1.6.2016, p. 44).

<sup>(3)</sup> See the Opinion of the European Banking Authority in response to the European Commission's Call for Advice on Investment Firms (EBA/Op/2017/11) of 29 September 2017. Recommendation 60 of that opinion states that the new prudential regime for investment firms should include a macroprudential perspective. In this regard, the importance of mitigating the build-up and the materialisation of systemic risks should be emphasised with a view to determining whether appropriate macroprudential tools to address those risks should be developed. Recommendation 61 states that a detailed analysis assessing the potential systemic impact of the three classes of investment firms is needed. In this regard, it should be considered whether the macroprudential perspective ought to be tailored to the specificities of investment firms' business models. See also the EBA Discussion Paper 'Designing a new prudential regime for investment firms' (EBA/DP/2016/02) of 4 November 2016.

<sup>(4)</sup> See Article 58(3) of the proposed Directive, aimed at amending Article 41 of 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> See page 2 of the explanatory memorandum to the proposed directive and page 2 of the explanatory memorandum to the proposed regulation.

<sup>(6)</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).

services by non-equivalent third country investment firms to Member States, as Member States and national supervisors cannot unilaterally solve the systemic risks posed by, for example, certain large firms operating on a cross-border basis beyond the scope of national jurisdictions. In order to ensure a level playing field, one possibility might be to ensure that such non-equivalent third-country firms are required over time to establish a branch (or a subsidiary) in the Union in order to provide any investment services in the Union.

## 6. Alignment

- 6.1. The interplay between the proposed acts and Directive 2013/36/EU and Regulation (EU) No 575/2013 should be carefully assessed in order to avoid unintended consequences due to the change in the definition of credit institutions. The proposal does not affect the scope of consolidation under Regulation (EU) No 575/2013 or the requirement that investment firms that are either owners of entities within a banking group or that are subsidiaries of entities within a banking group are to be included within the scope of such consolidation. Any further amendments to the proposed acts should be carefully reviewed with the aim of maintaining the scope of consolidation under Regulation (EU) No 575/2013. Similarly, coherence between the proposed acts and certain amendments to Directive 2013/36/EU and Regulation (EU) No 575/2013, which are expected to enter into force in the coming months, should be ensured.
- 6.2. The proposed directive provides that competent authorities and all persons associated with those authorities are bound by an obligation of professional secrecy<sup>(1)</sup>. The wording of the relevant provisions in the proposed directive differs from the provisions on professional secrecy in Directive 2013/36/EU and Directive 2014/65/EU of the European Parliament and of the Council<sup>(2)</sup>. The proposals should aim to align the wording in the different sectoral acts of Union law so as to harmonise, where appropriate, the scope of professional secrecy obligations.
- 6.3. It is suggested to avoid the replication of existing definitions. For instance, the term 'management body in its supervisory function' is defined both in Directive 2013/36/EU and in the proposed directive.

Done at Frankfurt am Main, 22 August 2018.

*The President of the ECB*

Mario DRAGHI

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<sup>(1)</sup> See Article 13 of the proposed directive.

<sup>(2)</sup> See Article 53 of Directive 2013/36/EU and Article 76 of Directive 2014/65/EU.