



Technical working document

produced in connection with ECB Opinion [CON/2021/40]¹

Drafting proposals in relation to the proposal for a regulation laying down harmonised rules
on artificial intelligence (Artificial Intelligence Act)

Text proposed by the European Commission	Amendments proposed by the ECB ²
Amendment 1 Recitals (recital 80)	
<p>'(80) Union legislation on financial services includes internal governance and risk management rules and requirements which are applicable to regulated financial institutions in the course of provision of those services, including when they make use of AI systems. In order to ensure coherent application and enforcement of the obligations under this Regulation and relevant rules and requirements of the Union financial services legislation, the authorities responsible for the supervision and enforcement of the financial services legislation, including where applicable the European Central Bank, should be designated as competent authorities for the purpose of supervising the implementation of this Regulation, including for market surveillance activities, as regards AI systems provided or used by regulated and supervised financial institutions. To further</p>	<p>'(80) Union legislation on financial services includes internal governance and risk management rules and requirements which are applicable to regulated financial institutions in the course of provision of those services, including when they make use of AI systems. In order to ensure coherent application and enforcement of the obligations under this Regulation and relevant rules and requirements of the Union financial services legislation, the competent authorities responsible for the supervision and enforcement of the financial services legislation, including where applicable the European Central Bank competent authorities as defined in Directive 2013/36/EU of the European Parliament and of the Council³, should be designated as competent authorities for the purpose of supervising the implementation of this Regulation, including for excluding market</p>

¹ This technical working document is produced in English only and communicated to the consulting Union institution(s) after adoption of the opinion. It is also published on EUR-Lex alongside the opinion itself.

² 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.

³ 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).

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<p>enhance the consistency between this Regulation and the rules applicable to credit institutions regulated under Directive 2013/36/EU of the European Parliament and of the Council, it is also appropriate to integrate the conformity assessment procedure and some of the providers' procedural obligations in relation to risk management, post marketing monitoring and documentation into the existing obligations and procedures under Directive 2013/36/EU. In order to avoid overlaps, limited derogations should also be envisaged in relation to the quality management system of providers and the monitoring obligation placed on users of high-risk AI systems to the extent that these apply to credit institutions regulated by Directive 2013/36/EU.'</p>	<p>surveillance activities, as regards AI systems provided or used by regulated and supervised financial institutions. To further enhance the consistency between this Regulation and the rules applicable to credit institutions regulated under Directive 2013/36/EU of the European Parliament and of the Council, it is also appropriate to integrate certain aspects of the conformity assessment procedure and some of the providers' procedural obligations in relation to risk management, post marketing monitoring and documentation into the existing obligations and procedures under Directive 2013/36/EU. In order to avoid overlaps, limited derogations should also be envisaged in relation to the quality management system of providers and the monitoring obligation placed on users of high-risk AI systems to the extent that these apply to credit institutions regulated by Directive 2013/36/EU.'</p>
<p><u>Explanation</u></p> <p><i>To avoid any deviation from the tasks conferred on the ECB under Council Regulation (EU) No 1024/2013⁴ (hereinafter the 'SSM Regulation'), it is suggested that instead of referring directly to the ECB as a competent authority, the proposed regulation should refer to 'competent authorities as defined in' the relevant acts of Union law, for example, Directive 2013/36/EU of the European Parliament and of the Council.</i></p> <p><i>The proposed regulation defines the 'market surveillance authority' as 'the national authority carrying out the activities and taking the measures pursuant to Regulation (EU) 2019/1020'⁵. The ECB suggests that, to be consistent with the ECB's prudential supervisory competence under Article 127(6) of the Treaty and the SSM Regulation, the text of the proposed regulation should unambiguously clarify that the ECB is not designated as a market surveillance authority or entrusted with any market surveillance activities.</i></p> <p><i>Finally, the ECB suggests that the proposed regulation should be amended so that only prudential aspects are part of the conformity assessment.</i></p>	

⁴ 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).

⁵ See Article 3(26) of the proposed regulation.

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<p><i>See paragraphs 2.1, 2.2 and 2.3 of the ECB Opinion.</i></p>	
<p style="text-align: center;">Amendment 2 Recitals (recital 84)</p>	
<p>'(84) [...] The European Data Protection Supervisor should have the power to impose fines on Union institutions, agencies and bodies falling within the scope of this Regulation.'</p>	<p>'(84) [...] The European Data Protection Supervisor should have the power to impose fines on Union institutions, agencies and bodies falling within the scope of this Regulation. The powers and responsibilities conferred on the European Data Protection Supervisor under this regulation should be without prejudice to the independence of the European Central Bank under the Treaty.'</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>The ECB understands that any potential supervision of the ECB by the European Data Protection Supervisor would not be in any way intended to impinge on the ECB's ability to independently carry out the tasks conferred on it by the Treaty. The use by the ECB of an artificial intelligence application when carrying out its basic task of defining and implementing monetary policy is one example of this situation.</i></p> <p><i>See paragraph 2.4 of the ECB Opinion.</i></p>	
<p style="text-align: center;">Amendment 3 Article 19(2)</p>	
<p>'2. For high-risk AI systems referred to in point 5(b) of Annex III that are placed on the market or put into service by providers that are credit institutions regulated by Directive 2013/36/EU, the conformity assessment shall be carried out as part of the procedure referred to in Articles 97 to 101 of that Directive.'</p>	<p>'2. For high-risk AI systems referred to in point 5(b) of Annex III that are placed on the market or put into service by providers that are credit institutions regulated by Directive 2013/36/EU, the conformity assessment shall be carried out as part of the procedure referred to in Articles 97 to 101 of that Directive.'</p>

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<p style="text-align: center;"><u>Explanation</u></p> <p><i>To avoid conflict with the first sentence of Article 43(2) of the proposed regulation, Article 19(2) should be removed. As specified in Article 43(2), for high-risk AI systems referred to in points 2 to 8 of Annex III (i.e. including point 5(b)) providers shall follow the conformity assessment procedure based on internal control.</i></p> <p><i>See paragraph 2.2.5 of the ECB Opinion.</i></p>	
<p style="text-align: center;">Amendment 4</p> <p style="text-align: center;">Article 41(2)</p>	
<p>'2. The Commission, when preparing the common specifications referred to in paragraph 1, shall gather the views of relevant bodies or expert groups established under relevant sectorial Union law.'</p>	<p>'2. The Commission, when preparing the common specifications referred to in paragraph 1, shall gather the views of relevant bodies or expert groups established under relevant sectorial Union law, including the relevant competent authorities, when providers that are credit institutions regulated by Directive 2013/36/EU are affected.'</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>The ECB should be included in the list of bodies consulted before the adoption of common specifications, where the common specifications in question concern AI systems intended to be used to evaluate the creditworthiness of natural persons or establish their credit score.</i></p> <p><i>See paragraphs 3.1 to 3.3 of the ECB Opinion.</i></p>	
<p style="text-align: center;">Amendment 5</p> <p style="text-align: center;">Article 43(2)</p>	
<p>'2. For high-risk AI systems referred to in points 2 to 8 of Annex III, providers shall follow the conformity assessment procedure based on internal control as referred to in Annex VI, which does not provide for the involvement of a notified body. For high-risk AI systems referred to in point 5(b) of Annex III, placed on the market or put into service by credit institutions regulated by</p>	<p>'2. For high-risk AI systems referred to in points 2 to 8 of Annex III, providers shall follow the conformity assessment procedure based on internal control as referred to in Annex VI, which does not provide for the involvement of a notified body. For high-risk AI systems referred to in point 5(b) of Annex III, placed on the market or put into service by credit institutions regulated by</p>

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<p>Directive 2013/36/EU, the conformity assessment shall be carried out as part of the procedure referred to in Articles 97 to 101 of that Directive.'</p>	<p>Directive 2013/36/EU, the conformity assessment procedure based on internal control shall be verified by means of an ex post assessment and carried out as part of the procedure referred to in Articles 97 to 101 of that Directive, but only to the extent that prudential risks and related requirements are concerned.'</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>Because Article 127(6) of the Treaty only permits the conferral of tasks on the ECB in policy areas that relate to the prudential supervision of credit institutions, the ex post control to be conducted by the ECB would focus on the prudential risks credit institutions may be exposed to. To the extent that matters specific to health, safety and fundamental rights are concerned, the Union legislator could decide to allocate responsibility to relevant competent authorities.</i></p> <p><i>See paragraphs 2.2.2, 2.2.3 and 2.2.5 of the ECB Opinion.</i></p>	
<p style="text-align: center;">Amendment 6</p> <p style="text-align: center;">Article 64(4)</p>	
<p>'4. For AI systems placed on the market, put into service or used by financial institutions regulated by Union legislation on financial services, the market surveillance authority for the purposes of this Regulation shall be the relevant authority responsible for the financial supervision of those institutions under that legislation.'</p>	<p>'4. For AI systems placed on the market, put into service or used by financial institutions regulated by Union legislation on financial services, the market surveillance authority for the purposes of this Regulation shall be the [Union legislator to identify relevant relevant authority designated under responsible for the financial supervision of those institutions under that legislation].'</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>To ensure compliance with the scope of the ECB's competence under Article 127(6) of the Treaty, the designation of the ECB as market surveillance authority responsible for AI systems placed on the market, put into service or used by credit institutions should be clarified. The ECB's tasks should be limited to the prudential supervision of credit institutions. They should not include the supervision of products for the purpose of ensuring consumer protection. Nevertheless, it may be the case that certain Member States will consider the designation of national competent authorities currently involved in the supervision of credit institutions as responsible for market surveillance activities if such designation is permitted under the relevant national legal frameworks and at least to the extent</i></p>	

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<p><i>that market surveillance tasks apply to situations in which an AI system is put into service for own use.</i></p> <p><i>See paragraphs 2.1.4 to 2.1.7 of the ECB Opinion.</i></p>	
<p style="text-align: center;">Amendment 7 Point 5(b) of Annex III</p>	
<p>'5(b) AI systems intended to be used to evaluate the creditworthiness of natural persons or establish their credit score, with the exception of AI systems put into service by small scale providers for their own use;'</p>	<p>'5(b) As of the adoption of specific common specifications pursuant to Article 41 of this Regulation, AI systems intended to be used to evaluate the creditworthiness of natural persons or establish their credit score, with the exception of AI systems put into service by small scale providers for their own use and AI systems that leverage on the standalone use of linear regression or logistic regression or decision trees under human supervision, provided that the impact of such approaches to the assessment of natural persons' creditworthiness or credit score is minor;'</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>Currently credit institutions regularly carry out, as part of their day-to-day business, activities that would qualify as high risk merely because they are intended to be used to evaluate the creditworthiness of natural persons or establish their credit score. Given the relatively high degree of standardisation and simplicity of some of these practices, it should be possible to adopt common specifications to clarify when these AI systems can be presumed to be in conformity with the applicable requirements. To minimise any hindrance to the use of these systems until these common specifications are adopted, it is also proposed that the entry into effect of the applicable requirements is postponed until the adoption of these common specifications, which should both spell out the conditions under which high-risk AI systems in this field shall be presumed to be in conformity with applicable requirements, and define when AI systems should be considered as put into service by small scale providers for their own use, and therefore fall within the scope of the exemption from qualification as a high risk AI system.</i></p> <p><i>Additionally, in line with the ECB's technology-neutral approach and to provide for greater clarity in supervisory expectations, AI systems intended to be used to evaluate the creditworthiness of natural persons or establish their credit score and which leverage on the standalone use of linear regression</i></p>	

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<p><i>or logistic regression or decision trees under human supervision should not be classified as high-risk AI systems, provided that the impact of such approaches to the assessment of natural persons' creditworthiness or credit score is minor.</i></p> <p><i>See paragraphs 3.1 to 3.3 of the ECB Opinion.</i></p>	