

III

(Preparatory acts)

EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 27 November 2012

on various draft regulatory and implementing technical standards submitted by the European Securities and Markets Authority to the Commission to be adopted by means of Commission delegated and implementing regulations supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories

(CON/2012/95)

(2013/C 60/01)

Introduction and legal basis

On 8 November 2012, the European Central Bank (ECB) received a request from the Commission for an opinion on the draft regulatory technical standards (hereinafter the 'draft RTS') and draft implementing technical standards (hereinafter the 'draft ITS') submitted by the European Securities and Markets Authority (ESMA) to the Commission and to be adopted in accordance with Articles 10 to 15 of Regulation (EU) No 1095/2010 ⁽¹⁾ by means of:

- (a) a Commission delegated regulation (EU) No .../... supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 with regard to regulatory technical standards on indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, risk mitigation techniques for OTC derivatives contracts not cleared by a CCP (hereinafter the 'draft RTS on clearing obligation and risk mitigation');
- (b) a Commission delegated regulation (EU) No .../... supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 with regard to regulatory technical standards on colleges for central counterparties (hereinafter the 'draft RTS on colleges for central counterparties');
- (c) a Commission delegated regulation (EU) No .../... supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 with regard to regulatory technical standards on requirements for central counterparties (hereinafter the 'draft RTS on requirements for central counterparties');
- (d) a Commission delegated regulation (EU) No .../... supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories with regard to regulatory technical standards on the minimum details of the data to be reported to trade repositories (hereinafter the 'draft RTS on the minimum details of data to be reported to trade repositories');
- (e) a Commission delegated regulation (EU) No .../... supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories, with regard to regulatory technical standards specifying the data to be published and made

⁽¹⁾ OJ L 331, 15.12.2010, p. 84.

available by trade repositories and operational standards for aggregating, comparing and accessing the data (hereinafter the 'draft RTS on the data to be published and made available by trade repositories and operational standards for aggregating, comparing and accessing the data');

- (f) a Commission implementing regulation (EU) No .../... 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 (hereinafter the 'draft ITS on the format and frequency of trade reports to trade repositories')

(collectively referred to as the 'draft regulatory and implementing standards').

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 draft regulatory and implementing standards contain provisions affecting, in particular, the task of the European System of Central Banks (ESCB) to promote the smooth operation of payment systems, as well as 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.

1. **General observations**

- 1.1. On 13 January 2011, the ECB issued Opinion CON/2011/1 on a proposal for a regulation of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories ⁽¹⁾ in which it highlighted, *inter alia*, that central banks have a statutory role and responsibilities to safeguard financial stability as well as for the safety and efficiency of financial infrastructures. The final text of Regulation (EU) No 648/2012 has accordingly emphasised the role of the ESCB in promoting the smooth operation of payment systems and requires ESMA to develop draft technical standards in close cooperation with the ESCB ⁽²⁾.
- 1.2. The ECB has been very closely involved in ESMA's work on the technical standards in respect of central counterparties and trade repositories and welcomes ESMA's cooperation in taking most of the ECB's comments into account in the draft regulatory and implementing standards. Generally, the ECB is supportive of ESMA's final draft technical standards and considers them well balanced and in line with the CPSS-IOSCO Principles for financial market infrastructures ⁽³⁾. Nevertheless, the ECB wishes to comment on and suggest amendments in relation to some of the most crucial issues, including the issues relevant to the ECB where Regulation (EU) No 648/2012 does not require the ESCB to be involved in ESMA's preparatory work.

2. **Specific observations**

- 2.1. The ECB welcomes the provision of the draft RTS on clearing obligation and risk mitigation ⁽⁴⁾ which specifies the elements ESMA should take into consideration in order to assess the degree of standardisation of the contractual terms and operational processes of the relevant class of OTC derivatives subject to clearing. Indeed, this provision adds clarity to the concept of 'standardisation' itself. This is essential in order to improve the transparency of OTC derivatives markets, reduce systemic risk and improve financial stability, as advocated by the G20 leaders ⁽⁵⁾. Nonetheless, it is important to ensure that the focus on standardisation of contractual terms does not offer incentives for market participants to refrain from the process of contractual standardisation, in order to avoid introducing a mandatory

⁽¹⁾ OJ C 57, 23.2.2011, p. 1.

⁽²⁾ See recital 11 and Articles 26(9), 34(3), 41(5), 42(5), 44(2), 45(5), 46(3), 47(8), 49(4), 54(4), 81(5) of Regulation (EU) No 648/2012.

⁽³⁾ Available at the website of the Bank for International Settlements at: <http://www.bis.org>

⁽⁴⁾ Article 6.

⁽⁵⁾ See, in particular, the G20 Toronto Summit Declaration of 26 and 27 June 2010 available at: <http://canadainternational.gc.ca>

clearing obligation. In this respect, the ECB also emphasises ESMA's mandate to: (a) monitor the activity in derivatives which are not eligible for clearing, in order to identify cases where a particular class of derivatives may pose systemic risk; and (b) prevent regulatory arbitrage between cleared and non-cleared derivative transactions ⁽¹⁾.

- 2.2. Further, the ECB notes that Article 1(4) of Regulation (EU) No 648/2012 provides that the Regulation should not apply to: (a) the members of the ESCB; (b) other Member States' bodies performing similar functions; and (c) other Union public bodies charged with or intervening in the management of the public debt which includes both clearing and reporting obligations ⁽²⁾. However, requiring the counterparties of the members of the ESCB to report all data on their transactions to the trade repositories would limit the effectiveness of the above exemption. To prevent Regulation (EU) No 648/2012 from limiting the power of ESCB members to perform their tasks of common interest, it is crucial that, in particular, the books of ESCB members are protected and that signalling based on central bank operations remains effective. This could be most effectively ensured if not only ESCB members are exempt from the obligation to report on their derivatives transactions, but also ESCB members' counterparties to those transactions.
- 2.3. The ECB notes that cash deposits made through standing deposit facilities or other comparable means provided for by a central bank may be denominated either in the currency issued by that central bank (i.e. 'central bank money') or in another currency not issued by that central bank (i.e. 'commercial bank money') and therefore may have a different risk profile. This fact should be reflected in a central counterparty's investment policy by different treatment of such deposits and may have to be taken into account on the occasion of the next review of Regulation (EU) No 648/2012.

Where the ECB recommends that the draft regulatory and implementing standards are amended, specific drafting proposals are set out in the Annex accompanied by explanatory text to this effect.

Done at Frankfurt am Main, 27 November 2012.

The President of the ECB
Mario DRAGHI

⁽¹⁾ Articles 11(13) and 5(3) of Regulation (EU) No 648/2012.

⁽²⁾ Article 1(4) of Regulation (EU) No 648/2012.

ANNEX

Drafting proposals for the draft RTS on colleges for central counterparties

Text submitted to the Commission by ESMA	Amendments proposed by the ECB ⁽¹⁾
Amendment 1	
Preamble	
<p>'Having regard to the Treaty on the Functioning of the European Union,</p> <p>Having regard to 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, and in particular Article 18(6), thereof,'</p>	<p>'Having regard to the Treaty on the Functioning of the European Union,</p> <p>Having regard to 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, and in particular Article 18(6), thereof,</p> <p>Having regard to the opinion of the European Central Bank (*)</p> <hr/> <p>(*) OJ C X, xx.xx.201x, p. xx.'</p>

Explanation

In accordance with Article 296 of the Treaty, which provides that legal acts shall refer to any opinions required by the Treaties, the proposed amendment is necessary in order to reflect the fact that the draft delegated regulation is adopted in accordance with Articles 127(4) and 282(5) of the Treaty. These provisions contain the obligation to consult the ECB on any proposed Union act falling within its fields of competence ⁽²⁾.

Amendment 2

Article 8 (new)

No text	<p>'Crisis Management in emergency situations</p> <p>The procedures to address emergency situations shall reflect the responsibilities and information needs of the members of a college and shall include the necessary tools to allow for a timely, proportionate and effective communication during a crisis management process. As part of the procedures for emergency situations, a CCP's competent authority shall ensure that the college considers the establishment of the following tools:</p> <p>(a) standing crisis communication facilities;</p> <p>(b) minimum checklist of key issues to be communicated during a crisis;</p> <p>(c) regular testing of crisis management procedures.'</p>
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Explanation

ESMA's Consultation paper (ESMA/2012/379) included some language with respect to emergency situations. In accordance with Responsibility E 'Cooperation with other authorities' of the CPSS-IOSCO Principles for financial market infrastructures, cooperation arrangements amongst authorities need to be effective not only in normal circumstances, but also during periods of market stress and crisis situations.

⁽¹⁾ 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.

⁽²⁾ The ECB notes that each draft RTS and draft ITS to which amendments are proposed in this opinion should refer to this opinion.

Drafting proposals for the draft RTS on the minimum details of data to be reported to trade repositories

Text submitted to the Commission by ESMA	Amendments proposed by the ECB								
Amendment 3									
Annex, Table 2, insert new section on credit derivatives following field 54									
No text	<table border="1"> <thead> <tr> <th style="width: 10%;"></th> <th style="width: 20%;">'Section 2h ⁽¹⁾ — Credit</th> <th style="width: 50%;">If a UPI is reported and contains all the information below, this is not required to be reported</th> <th style="width: 20%;">Credit derivatives</th> </tr> </thead> <tbody> <tr> <td style="text-align: center;">55</td> <td style="text-align: center;">Restructuring clause</td> <td style="text-align: center;">Indicates the type of restructuring clause</td> <td></td> </tr> </tbody> </table> <p>⁽¹⁾ Please note that subsequent sections and fields need to be renumbered.'</p>		'Section 2h ⁽¹⁾ — Credit	If a UPI is reported and contains all the information below, this is not required to be reported	Credit derivatives	55	Restructuring clause	Indicates the type of restructuring clause	
	'Section 2h ⁽¹⁾ — Credit	If a UPI is reported and contains all the information below, this is not required to be reported	Credit derivatives						
55	Restructuring clause	Indicates the type of restructuring clause							

Explanation

From a financial stability and systemic risk analysis perspective, it is crucial to obtain information regarding the type of restructuring clauses of the outstanding credit default swap (CDS) contracts. This information allows the authorities to analyse the impact of a credit event on the CDS exposures of market participants more precisely and to understand which types of credit events would apply to certain CDS positions. Thus, the lack of this information would hinder the systemic risk analysis related to credit events.

Drafting proposals for the draft RTS on the data to be published and made available by trade repositories and operational standards for aggregating, comparing and accessing the data

Text submitted to the Commission by ESMA	Amendments proposed by the ECB
Amendment 4	
Article 2(10)	
'10. A trade repository shall provide a relevant ESCB member with access to position data for derivatives contracts in the currency issued by that member.'	'10. A trade repository shall provide a relevant ESCB member with access to transaction level data as well as position data for derivatives contracts in the currency issued by that member. If neither of the counterparties to the derivative contract is located in the jurisdiction of such ESCB member, the trade repository may provide such transaction level data without identifying the counterparties to the derivative.'

Explanation

The current draft only provides for access to 'position data' for the central bank of issue. In order to fulfil its mandate under Article 127(2) and (5) of the Treaty, in particular regarding monetary policy, the smooth functioning of payment systems and financial stability, the ECB requires access to transaction level data with respect to derivatives contracts denominated in euro.

In this respect, the ECB has an interest in: (a) monitoring aggregate or individual payment flows affecting payment and settlement systems; (b) monitoring the liquidity of the euro; and (c) monitoring for speculative activity in that currency. This will be especially useful to assess the potential liquidity strains that may have an impact on the implementation of monetary policy. Position data will only provide data on outstanding amounts ('stocks'), but not on flows, which are needed to conduct analysis on liquidity.

Furthermore, mandatory clearing will have a significant impact on market liquidity and payment flows. Access to transaction level data is therefore also needed to understand the market structure and liquidity resilience of the OTC derivatives market.

Text submitted to the Commission by ESMA	Amendments proposed by the ECB
<p>The Eurosystem will also need access to transaction level data in light of its role as a member of CCP colleges representing the central bank of issue. Given that the euro is by far the most important Union currency with respect to derivatives contracts, the ECB expects that the Eurosystem will be a member of a large number of CCP colleges.</p>	

Drafting proposals for the draft ITS on the format and frequency of trade reports to trade repositories

Text submitted to the Commission by ESMA	Amendments proposed by the ECB
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Amendment 5

Annex, Table 2, insert new section on credit derivatives following field 54

No text			
	Section 2h ⁽¹⁾ — Credit	If a UPI is reported and contains all the information below, this is not required to be reported	Credit derivatives
	55	Restructuring clause Old R = Old Restructuring Mod R = Modified Restructuring Mod-Mod R = Modified Modified Restructuring No R = No Restructuring	
<p>⁽¹⁾ Please note that subsequent sections and fields need to be renumbered.</p>			

Explanation

From a financial stability and systemic risk analysis perspective, it is crucial to obtain information regarding the type of restructuring clauses of the outstanding CDS contracts. This information allows the authorities to analyse the impact of a credit event on the CDS exposures of market participants more precisely and to understand which types of credit events would apply to certain CDS positions. Thus, the lack of this information would hinder the systemic risk analysis related to credit events.