

III

(Preparatory acts)

EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 1 August 2012

on a proposal for a regulation on improving securities settlement in the European Union and on central securities depositories

(CON/2012/62)

(2012/C 310/02)

Introduction and legal basis

On 3 April 2012 the European Central Bank (ECB) received a request from the Council of the European Union for an opinion on a proposal for a regulation on improving securities settlement in the European Union and on central securities depositories (CSDs) and amending Directive 98/26/EC ⁽¹⁾ (hereinafter the 'proposed regulation'). On 19 April 2012 the ECB received a request from the European Parliament for an opinion on 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 which relate to the ECB's definition and implementation of the monetary policy of the euro area and promotion of the smooth operation of payment systems under Article 127(2) of the Treaty, as well as the ECB's contribution to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system under Article 127(5) of the Treaty. Furthermore, Article 22 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB') provides that the ECB and the national central banks 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. 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

Together with Directive 2004/39/EC ⁽²⁾ and the proposal for a regulation on OTC derivatives, central counterparties and trade repositories ⁽³⁾, the proposed regulation will be part of the regulatory framework for market infrastructures and trading venues. Because of their size, complexity and systemic interconnectedness, CSDs are deemed to be systemically important ⁽⁴⁾ and therefore require a comprehensive regulatory framework for supervision and oversight that combines micro- and macro-prudential tools. The ECB

⁽¹⁾ COM(2012) 73 final.

⁽²⁾ Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1). Currently under review. See the proposal for a directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council, COM(2011) 656 final, and the proposal for a regulation of the European Parliament and of the Council on markets in financial instruments and amending regulation [EMIR] on OTC derivatives, central counterparties and trade repositories, COM(2011) 652 final.

⁽³⁾ See the proposal for a regulation of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories, COM(2010) 484 final.

⁽⁴⁾ See paragraph 1 of the explanatory memorandum to the proposed regulation.

strongly supports the Commission's proposal to strengthen the legal framework applicable to CSDs and to harmonise the rules underpinning the operation, authorisation and supervision of CSDs, as well as those relating to the issuance, holding and transfer of securities through such CSDs in the Union ⁽⁵⁾.

The Eurosystem is developing TARGET2-Securities (T2S) with the aim of delivering a single settlement engine for Europe. Also in this context, the ECB strongly supports the proposed regulation, which will enhance the legal and operational conditions for cross-border settlement in the Union in general and in T2S in particular. In this respect, the ECB recommends that the proposed regulation, and the corresponding implementing acts, is adopted prior to the launch of T2S planned for June 2015.

1. Scope of the regulation

The proposed regulation lays down uniform requirements for the settlement of financial instruments ⁽⁶⁾. Under Directive 2004/39/EC ⁽⁷⁾ 'financial instruments' includes transferable securities, money market instruments, units in collective investment undertakings, derivative contracts, financial contracts for differences and emission allowances. The ECB notes in this respect that the proposed regulation does not define 'financial instruments' and that some parts of it apply only to 'securities' or transferable securities ⁽⁸⁾, whereas others also apply to money market instruments ⁽⁹⁾, units in collective investment undertakings and emission allowances ⁽¹⁰⁾. In addition, the proposed regulation defines CSDs as legal persons that operate a securities settlement system and perform at least one other core service listed in the Annex ⁽¹¹⁾. The ECB is of the view that all three core services should be regulated. Against this backdrop, for the sake of legal clarity, the ECB recommends further clarifying the scope of the proposed regulation, both as regards the type of instruments it applies to and the definition of CSD.

The definition of CSD should be amended to avoid regulatory arbitrage stemming from the creation by a CSD of two or three legal entities to perform different core activities without being subject to the Regulation applicable to CSDs. The ECB considers that each legal person offering any of the three core services indicated in Section A of the Annex should be subject to the Regulation.

2. Cooperation between authorities

- 2.1. The proposed regulation grants a predominant role to competent supervisory authorities and a supporting role to the members of the European System of Central Banks (ESCB) as relevant authorities with respect to CSDs. Taking into account the role of central banks as overseers and/or central banks of issue, as well as the fact that central banks use CSDs' services for the settlement of monetary policy operations, the proposed regulation should ensure that the powers of competent authorities and the European Securities and Markets Authority (ESMA) are complemented and balanced by an adequate involvement of the members of the ESCB. Central banks and securities regulators in the Committee on Payment and Settlement Systems (CPSS) and the International Organisation of Securities Commissions (IOSCO) have recognised the importance of regulation, supervision and oversight in financial market infrastructures, including CSDs ⁽¹²⁾. The ECB considers that the proposed regulation should be

⁽⁵⁾ See also the ECB services response of 22 March 2011 (hereinafter 'the ECB response') to the Commission's public consultation on central securities depositories and on the harmonisation of certain aspects of securities settlement in the European Union (hereinafter the 'Commission consultation'). The ECB response is available on the ECB's website at <http://www.ecb.int>

⁽⁶⁾ See Article 1(1) of the proposed regulation.

⁽⁷⁾ Directive 2004/39/EC. The Commission's proposal to repeal Directive 2004/39/EC (see footnote 3) also incorporates the notion of emission allowances.

⁽⁸⁾ See Article 4(18) of Directive 2004/39/EC.

⁽⁹⁾ See Article 4(19) of Directive 2004/39/EC.

⁽¹⁰⁾ Emission allowances are defined in the proposed regulation by reference to Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ L 275, 25.10.2003, p. 32).

⁽¹¹⁾ See Article 2(1)(1) of and Section A of the Annex to the proposed regulation.

⁽¹²⁾ See CPSS-IOSCO, 'Principles for financial market infrastructures', April 2012, available on the BIS website at <http://www.bis.org>, in particular Chapter 4 (hereinafter the 'CPSS-IOSCO principles').

consistent with the CPSS-IOSCO principles. An effective and close cooperation should be fostered between competent authorities and the members of the ESCB, both from an oversight perspective and as central banks of issue and without prejudice to central bank powers⁽¹³⁾.

- 2.2. The ECB further notes that the proposed regulation already identifies a number of areas of cooperation and suggests some additional areas where it considers that this ESMA-ESCB involvement is also required. Moreover, the ECB stresses the need for joint ESMA-ESCB work on the development of draft technical standards. This should ensure that members of the ESCB do not need to develop additional, and potentially different, requirements in oversight measures, including legal acts. In addition, it would avoid the need for the continual assessment of CSDs taking part in the settlement of monetary policy operations against user standards⁽¹⁴⁾ which would otherwise be required to meet the ESCB legal obligations. Timely and adequate exchange of necessary information, including for financial stability, oversight and statistical purposes, is also of particular importance in this context.
- 2.3. The draft regulation should therefore provide for cooperation rules enabling the competent and relevant authorities to fulfil their responsibilities both domestically and in a cross-border context in accordance with the CPSS-IOSCO principles⁽¹⁵⁾. The proposed regulation should facilitate comprehensive supervision and oversight in a cross-border context given the expected development of cross-border operations and settlement, as well as links between CSDs, a feature which will be facilitated and even fostered by the launch of the T2S common platform. Competent authorities should have the option of deciding on the appropriate form of cooperation arrangements. Against this backdrop, the option to establish colleges of authorities could be envisaged in particular when a CSD engages in cross-border activity through a subsidiary or a branch or where the provision of cross-border services becomes substantial⁽¹⁶⁾.

3. Macro-prudential oversight

It has been recognised that robust financial market infrastructures, including securities settlement systems, are an essential contribution to financial stability by reducing systemic risk⁽¹⁷⁾. The ECB notes that macro-prudential oversight by the European Systemic Risk Board and by relevant national authorities as appropriate should be performed without prejudice to the respective powers of the members of the ESCB.

4. Central bank money settlement

The proposed regulation allows CSDs to offer cash settlement in commercial bank money when settlement in central bank money is not practical and available⁽¹⁸⁾. This is in line with the CPSS-IOSCO principles and the ESCB-CESR recommendations⁽¹⁹⁾, evidencing that central bank liquidity and commercial bank money are not equivalent options in terms of risk. Where a CSD is allowed to offer cash settlement in commercial bank money, it should be required to establish and monitor adherence to strict criteria for the credit institution acting as settlement bank⁽²⁰⁾. The ECB further welcomes that the proposed regulation does not regulate access to central bank credit, including emergency liquidity assistance, which is a prerogative of central banks and is directly linked to monetary policy.

⁽¹³⁾ See ECB Opinion CON/2011/1 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 (OJ C 57, 23.2.2011, p. 1). All ECB opinions are published on the ECB's website at <http://www.ecb.europa.eu>

⁽¹⁴⁾ Standards for the use of EU securities settlement systems in ESCB credit operations, European Monetary Institute, January 1998.

⁽¹⁵⁾ See in particular Responsibility E (Cooperation with other authorities) of the CPSS-IOSCO principles.

⁽¹⁶⁾ Both the EU EMIR legislative framework and Directive 2006/48/EC relating to the taking up and pursuit of the business of credit institutions (OJ L 177, 30.6.2006, p. 1) and the CPSS-IOSCO principles already provide for the establishment of colleges.

⁽¹⁷⁾ See Financial Stability Board, 'Reducing the moral hazard posed by systemically important financial institutions — recommendations and time lines', October 2010, p. 8.

⁽¹⁸⁾ Article 37(2) of the proposed regulation.

⁽¹⁹⁾ See in this respect principle 9 of the CPSS-IOSCO principles, and Recommendation 10 of the ESCB-CESR 'Recommendations for securities settlement systems and recommendations for central counterparties in the European Union', May 2009 (hereinafter the 'ESCB-CESR recommendations').

⁽²⁰⁾ See in this respect principle 9 of the CPSS-IOSCO principles and Recommendation 10 of the ESCB-CESR recommendations.

5. CSDs and banking type of ancillary services

- 5.1. The proposed regulation provides that CSDs cannot themselves provide any banking type of ancillary services and that they should instead be authorised to designate one or more credit institutions to perform certain banking type of ancillary services defined in the proposed regulation. However, by way of derogation and taking account of certain safeguards, some CSDs may be granted a limited authorisation to perform such services ⁽²¹⁾.
- 5.2. This requires a careful review to ensure consistency with the Union competition rules and systemic macroprudential oversight and banking legislative frameworks ⁽²²⁾, as well as an appropriate allocation of tasks between the CSDs' supervisory authorities and the banking supervisory authorities. In this respect and as pointed out in a previous opinion the ECB favours the systematic involvement of the European Banking Authority (EBA) to undertake any prior technical analysis regarding Union banking legislation ⁽²³⁾.

More specifically, the proposed regulation distinguishes between banking type of ancillary services for the participants of a securities settlement system related to settlement service on the one hand, and banking type of ancillary services related to other core or ancillary services on the other hand ⁽²⁴⁾. It also empowers the Commission to adopt delegated acts to specify these ancillary services ⁽²⁵⁾. The ECB is of the view that the above distinction is not clear and that the banking type of ancillary services referred to should be aligned as much as possible to the terminology in European banking legislation.

- 5.3. The framework for the provision of ancillary banking services should be guided by an appropriate mitigation of risks whilst safeguarding the efficiency of CSDs in providing their services. Given the crucial nature of this issue, a more comprehensive assessment of the various options for the provision of ancillary banking services may be warranted. Such an assessment would be of assistance in fully determining (a) different risks, including resolution-based risks as well as legal, credit, liquidity, operational and business risks, and (b) efficiency profiles inherent to these options and it would help to define the safest and most efficient model. The ECB is prepared to contribute to such an assessment.

Furthermore, there should be no uncertainty as to the exact scope of the ancillary banking services which designated credit institutions would be authorised to perform ⁽²⁶⁾, the prudential requirements to which they would be subject, and their degree of autonomy vis-à-vis the banking legislative framework ⁽²⁷⁾.

- 5.4. The proposed regulation limits the services to be provided by a designated credit institution that belongs to the same group as the CSD ⁽²⁸⁾. The ECB understands that this limitation is driven by risk considerations, in particular the avoidance of spillover effects. The ECB recommends extending this limitation to all credit institutions providing banking services listed in Section C of the Annex for the participants of a securities settlement system having regard to the potential adverse effects on the ability of the CSD to continue to perform its functions, in particular those based on a delivery versus payment mechanism, in the case of a resolution or insolvency of the credit institution.
- 5.5. Lastly, the ECB considers that the proposed procedure for granting a derogation is rather complex and could be streamlined to achieve the necessary degree of certainty and uniformity. In particular, the adoption of objective criteria, including quantitative criteria where possible, in addition to the necessary qualitative criteria provided for in the proposal, should be ensured for determining whether a derogation may be granted or not.

⁽²¹⁾ See in particular Title IV and Section C of the Annex to the proposed regulation.

⁽²²⁾ See Directive 2006/48/EC and the amendments currently under discussion in the presidency compromise texts.

⁽²³⁾ See in this respect paragraph 3.2 of ECB Opinion CON/2012/5 of 25 January 2012 on a proposal for a directive on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms and a proposal for a regulation on prudential requirements for credit institutions and investment firms (OJ C 105, 11.4.2012, p. 1).

⁽²⁴⁾ See Section C of the Annex to the proposed regulation.

⁽²⁵⁾ See Article 2(2) of the proposed regulation.

⁽²⁶⁾ See Article 54 of the proposed regulation.

⁽²⁷⁾ See in this respect Articles 57 and 58 of the proposed regulation.

⁽²⁸⁾ See Article 52(5) of the proposed regulation.

6. Consistency with global standards for CSDs

The proposed regulation recognises that the Regulation should follow the existing recommendations developed by CPSS-IOSCO⁽²⁹⁾. Nevertheless, there are some inconsistencies between the CPSS-IOSCO principles and the proposed regulation, which the ECB recommends addressing. For example, requirements for tiered participation⁽³⁰⁾ are not addressed by the proposed regulation. Furthermore, the proposed regulation mentions the need to manage risks stemming from interdependencies⁽³¹⁾ only in the context of operational risk⁽³²⁾. There are also inconsistencies concerning the management of liquidity risk⁽³³⁾, i.e. the proposed regulation does not distinguish between deferred net settlement systems (DNS) that provide a settlement guarantee and those DNS that do not. This is not in line with the CPSS-IOSCO principles which require DNS providing a settlement guarantee to cover credit and liquidity exposures fully, while DNS without a settlement guarantee need to cover the credit exposures to the largest two participants and their affiliates and the liquidity exposure to the largest participant and its affiliates.

7. Outsourcing to public entities

The proposed regulation introduces requirements that CSDs have to fulfil when outsourcing part of their activities⁽³⁴⁾. An exemption is made for situations where a CSD outsources certain of its operations to public entities, provided that an appropriate legal, regulatory and operational framework governs this arrangement. The ECB notes that this exemption would cover the current T2S project undertaken by the Eurosystem. The ECB welcomes this exemption, which takes into account that such outsourcing may result in significant benefits for the economy, contributes to the performance of Eurosystem tasks and is subject to a framework agreement containing safeguards⁽³⁵⁾.

8. Conflict of laws

The proposed regulation provides as a general rule that any question with respect to proprietary aspects in relation to securities held by a CSD is governed by the law of the country where the securities account is maintained⁽³⁶⁾. While such a general rule is consistent with the approach followed in other Union legal acts of applying the law of the place of the relevant intermediary to proprietary aspects in relation to securities⁽³⁷⁾, the ECB strongly objects to the introduction of the additional conflict of laws rules which would be inconsistent with existing Union legislation and would affect legal certainty⁽³⁸⁾.

In addition, and as pointed out in a previous opinion, while a clear and simple conflict of laws rule for all aspects of book-entry securities is important for the efficient and secure cross-border holding and transfer of financial instruments, the practical application of a single conflict of laws regime for cross-border securities clearing and settlement in the Union continues to reveal differences between Member States concerning the interpretation of 'location of an account'⁽³⁹⁾. In this respect, the ECB considers it necessary to harmonise the various Union legal frameworks for holding and disposing of securities and the exercise of rights attached to securities in line with the final report of the Legal Certainty Group⁽⁴⁰⁾.

⁽²⁹⁾ See recital 25 of the proposed regulation.

⁽³⁰⁾ See principle 19 of the CPSS-IOSCO principles.

⁽³¹⁾ See principle 3 of the CPSS-IOSCO principles.

⁽³²⁾ Article 42(6) of the proposed regulation.

⁽³³⁾ See principle 7 of the CPSS-IOSCO principles and Article 57 of the proposed regulation.

⁽³⁴⁾ See Article 28 of the proposed regulation.

⁽³⁵⁾ See the Commission consultation and the ECB response.

⁽³⁶⁾ See Article 46(1) of the proposed regulation.

⁽³⁷⁾ See Article 9 of 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 (OJ L 166, 11.6.1998, p. 45), Article 9 of Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (OJ L 168, 27.6.2002, p. 43), and Article 24 of Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions (OJ L 125, 5.5.2001, p. 15).

⁽³⁸⁾ See Article 46(2) of the proposed regulation.

⁽³⁹⁾ See in this respect ECB Opinion CON/2008/37 of 7 August 2008 on a proposal for a directive amending Directive 98/26/EC and Directive 2002/47/EC (OJ C 216, 23.8.2008, p. 1), paragraph 8.

⁽⁴⁰⁾ See http://ec.europa.eu/internal_market/financial-markets/docs/certainty/2ndadvice_final_en.pdf

9. **Specific regime for resolution of CSDs**

As the proposed regulation does not contain a specific, comprehensive regime for the resolution of CSDs, the ECB recommends adopting such a regime.

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, 1 August 2012.

The President of the ECB

Mario DRAGHI

ANNEX

Drafting proposals

Text proposed by the Commission	Amendments proposed by the ECB (1)
Amendment 1	
Recital 6	
<p>'6. The Financial Stability Board (FSB) called, on 20 October 2010, for more robust core market infrastructures and asked for the revision and enhancement of the existing standards. The Committee on Payments and Settlement Systems (CPSS) of the Bank of International Settlements (BIS) and the International Organisation of Securities Commissions (IOSCO) are finalising draft global standards. These are to replace the BIS recommendations from 2001, which were adapted through non-binding guidelines at European level in 2009 by the European System of Central Banks (ESCB) and the Committee of European Securities Regulators (CESR).'</p>	<p>'6. The Financial Stability Board (FSB) called, on 20 October 2010, for more robust core market infrastructures and asked for the revision and enhancement of the existing standards. In April 2012, the Committee on Payments and Settlement Systems (CPSS) of the Bank of International Settlements (BIS) and the International Organisation of Securities Commissions (IOSCO) are finalising draft global standards published principles for financial market infrastructures. These principles are to replace the BIS CPSS-IOSCO recommendations for securities settlement systems from November 2001, which were adapted implemented at Union level through non-binding guidelines the recommendations for securities settlement systems and for central counterparties at European level jointly adopted in May 2009 by the European System of Central Banks (ESCB) and the Committee of European Securities Regulators (CESR).'</p>

Explanation

The amendment takes account of the adoption of the CPSS-IOSCO principles and clarifies the reference to the ESCB-CESR.

Amendment 2

Recital 8

<p>'8. One of the basic tasks of the ESCB is to promote the smooth operation of payment systems. In this respect, the members of the ESCB execute oversight by ensuring efficient and sound clearing and payment systems. The members of the ESCB often act as settlement agents for the cash leg of the securities transactions. They are also important clients of CSDs, which often manage the collateralisation of monetary policy operations. The members of the ESCB should be closely involved by being consulted in the authorisation and supervision of CSDs, recognition of third country CSDs and the approval of CSD links. They should also be closely involved by being consulted in the setting of regulatory and implementing technical standards as well as of guidelines and recommendations. The provisions of this Regulation should be without prejudice to the responsibilities of the European Central Bank (ECB) and the National Central Banks (NCBs) to ensure efficient and sound clearing and payment systems within the Union and other countries.'</p>	<p>'8. One of the basic tasks of the ESCB is to promote the smooth operation of payment systems. In this respect, the members of the ESCB execute oversight by ensuring efficient and sound clearing and payment systems. The members of the ESCB often act as settlement agents for the cash leg of the securities transactions. They are also important clients of CSDs, which often manage the collateralisation of monetary policy operations. The members of the ESCB should be closely involved by being and be consulted in the authorisation and supervision of CSDs, recognition of third country CSDs and the approval of CSD links. To prevent the emergence of parallel sets of rules, they should also be closely involved by being and be consulted in the setting of regulatory and implementing technical standards as well as of guidelines and recommendations. The provisions of this Regulation should be without prejudice to the responsibilities of the European Central Bank (ECB) and the National Central Banks (NCBs) to ensure efficient and sound clearing and payment systems within the Union and other countries. Access to information by the members of the ESCB is crucial for the adequate performance of their oversight of financial market infrastructures as well as to the function of a central bank of issue.'</p>
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Text proposed by the Commission

Amendments proposed by the ECB (1)

Explanation

The amendment aims to underline the importance of close and equal cooperation between ESMA and the ESCB when preparing draft technical standards. It also addresses access to information by the relevant stakeholders. It would support the proposed amendments to Article 20.

Amendment 3

Recital 25

'25. Considering the global nature of financial markets and the systemic importance of the CSDs, it is necessary to ensure international convergence of the prudential requirements to which they are subject. The provisions of this Regulation should follow the existing recommendations developed by CPSS-IOSCO and ESCB-CESR. ESMA should consider the existing standards and their future developments when drawing up or proposing to revise the regulatory technical and implementing standards as well as the guidelines and recommendations required in this Regulation.'

'25. Considering the global nature of financial markets and the systemic importance of the CSDs, it is necessary to ensure international convergence of the prudential requirements to which they are subject. The provisions of this Regulation should follow the existing ~~recommendations developed by CPSS-IOSCO~~ **principles for financial market infrastructures and the ESCB-CESR recommendations for securities settlement systems and recommendations for central counterparties in the European Union**. ESMA should consider the existing standards and their future developments when ~~drawing up or proposing to revise~~ the draft regulatory technical and implementing standards as well as the guidelines and recommendations ~~required~~ **referred to** in this Regulation.'

Explanation

The amendment aims at clarifying the text of this recital and takes into account the adoption of the CPSS-IOSCO principles.

Amendment 4

Recital 35

'35. The safety of the link arrangements set up between CSDs should be subject to specific requirements to enable the access of their respective participants to other securities settlement systems. The requirement to provide banking type of ancillary services in separate legal entity should not prevent CSDs from receiving such services, in particular when they are participants in a securities settlement system operated by another CSD. It is particularly important that any potential risks resulting from the link arrangements such as credit, liquidity, organisational or any other relevant risks for CSDs are fully mitigated. For interoperability links, it is important that linked securities settlement systems have identical moments of entry of transfer orders into the system, irrevocability of transfer orders and finality of transfers of securities and cash. The same principles should apply to CSDs that use a common settlement information technology (IT) infrastructure.'

'35. The safety of the link arrangements set up between CSDs should be subject to specific requirements to enable the access of their respective participants to other securities settlement systems. The requirement to provide banking type of ancillary services in separate legal entity should not prevent CSDs from receiving such services, in particular when they are participants in a securities settlement system operated by another CSD. It is particularly important that any potential risks resulting from the link arrangements such as credit, liquidity, organisational or any other relevant risks for CSDs are fully mitigated. For interoperability links, ~~it is important that linked securities settlement systems~~ **Directive 98/26/EC requires systems, to the extent possible, to have identical ensure that their rules are coordinated concerning the** moments of entry of transfer orders into the system, irrevocability of transfer orders and finality of transfers of securities and cash. The same principles should apply to CSDs that use a common settlement information technology (IT) infrastructure.'

Explanation

The amendment introduces a reference to Directive 98/26/EC as Article 3(4) thereof requires systems to coordinate, to the extent possible, the rules of all interoperable systems concerned. See also the proposal to add a new paragraph to Article 45 of the proposed regulation.

Text proposed by the Commission	Amendments proposed by the ECB (1)
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Amendment 5

Article 1(4) and Article 1(5) (new)

<p>'4. Articles 9 to 18 and 20 as well as the provisions of Title IV do not apply to the members of the European System of Central Banks (ESCB), other Member States' national bodies performing similar functions or Member States' public bodies charged with or intervening in the management of the public debt.'</p>	<p>'4. Articles 9 to 18 and 20 as well as the provisions of Title IV do not apply to the members of the European System of Central Banks (ESCB), other Member States' national bodies performing similar functions or Member States' public bodies charged with or intervening in the management of the public debt.'</p> <p>'4. This Regulation shall not apply to the members of the European System of Central Banks (ESCB), other Member States' national bodies performing similar functions or Member States' public bodies charged with or intervening in the management of the public debt.'</p> <p>5. Notwithstanding paragraph 4, this Regulation, with the exception of Article 7(1) and Articles 9 to 18, 20, 25 and 44 as well as the provisions of Title IV, applies to the members of the ESCB when operating a securities settlement system and performing the core services listed in Section A of the Annex.'</p>
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Explanation

The ECB supports a general exemption from financial services legislation for the members of the ESCB. At the same time, the ECB supports the application of the proposed regulation, with the exemption of the authorisation and supervision requirements provided for in Articles 9 to 18 and 20 as well as in Title IV, to members of the ESCB that operate securities settlement systems. The amendment aims at providing for this. In addition, the reference to other Member States' national bodies performing similar functions is deleted since it is redundant given the reference to ESCB members.

Amendment 6

Article 2(1)

<p>'“central securities depository” (“CSD”) means a legal person that operates a securities settlement system listed in point 3 of Section A of the Annex and performs at least one other core service listed in Section A of the Annex;'</p>	<p>'“central securities depository” (“CSD”) means a legal person that operates a securities settlement system listed in point 3 of Section A of the Annex and performs at least one other of the core services listed in Section A of the Annex;'</p>
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Explanation

The amendment changes the definition of CSD to avoid regulatory arbitrage stemming from the creation by a CSD of two or three legal entities to perform different core activities without being subject to regulation applicable to CSDs. The ECB considers that each legal person offering any of the three core services indicated in Section A of the Annex should be subject to the Regulation.

Amendment 7

Article 3(1)

<p>'1. Any company that issues transferable securities which are admitted to trading on regulated markets shall arrange for such securities to be represented in book-entry form as immobilisation through the issuance of a global note, which represents the whole issue, or subsequent to a direct issuance of the securities into a dematerialised form.'</p>	<p>'1. Any company legal entity that issues transferable securities which are admitted to trading on regulated markets shall arrange for such securities to be represented in book-entry form as immobilisation through the issuance of a global note, which represents the whole issue, or subsequent to a direct issuance of the securities into a dematerialised form.'</p>
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Explanation

Transferable securities can be issued by companies and by other legal entities, such as Member States, Member States' regional or local authorities, or public international bodies. It is proposed to broaden the scope of Article 3(1) of the proposed regulation to include issuers other than companies, by replacing the term 'company' with 'legal entity'. If this proposal is accepted, Article 4(1) of the proposed regulation should be amended accordingly.

Amendment 8

Article 6(4)

<p>'4. The European Securities and Markets Authority (ESMA) shall develop in consultation with the members of the European System of Central Banks (ESCB) draft regulatory technical standards to specify the details of the</p>	<p>'4. The European Securities and Markets Authority (ESMA), shall develop in consultation with close cooperation with the members of the European System of Central Banks (ESCB) shall develop draft regulatory</p>
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Text proposed by the Commission	Amendments proposed by the ECB ⁽¹⁾
<p>procedures enabling confirmation of relevant details of transactions and facilitating settlement referred to in paragraphs 1 and 2 and the details of the monitoring tools identifying likely settlement fails referred to in paragraph 3.</p> <p>[...]</p>	<p>technical standards to specify the details of the procedures enabling confirmation of relevant details of transactions and facilitating settlement referred to in paragraphs 1 and 2 and the details of the monitoring tools identifying likely settlement fails referred to in paragraph 3.</p> <p>[...]</p>

Explanation

The amendment aims at ensuring the adequate involvement of the ESCB in the development of draft regulatory standards by ESMA.

Amendment 9

Article 7(1)

<p>'1. For each securities settlement system it operates, a CSD shall establish a system that monitors settlement fails of transactions in financial instruments referred to in Article 5(1). It shall provide regular reports to the competent authority and to any person with a legitimate interest as to the number and details of settlement fails and any other relevant information. The competent authorities shall share with ESMA any relevant information on settlement fails.'</p>	<p>'1. For each securities settlement system it operates, a CSD shall establish a system that monitors settlement fails of transactions in financial instruments referred to in Article 5(1). It shall provide regular reports to the competent authority, to the authorities referred to in Article 11 and to any person with a legitimate interest as to the number and details of settlement fails and any other relevant information. The competent authorities shall share with ESMA any relevant information on settlement fails.'</p>
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Explanation

The proposed amendment aims at ensuring the provision of timely and adequate information to both competent authorities and the members of the ESCB.

Amendment 10

Article 8

<p>'1. The relevant authority of the Member State whose law applies to the securities settlement system operated by a CSD shall be competent for ensuring that Articles 6 and 7 are applied and for monitoring the penalties imposed, in close cooperation with the authorities competent for the supervision of the regulated markets, MTFs, OTFs, and CCPs referred to in Article 7. In particular, the authorities shall monitor the application of penalties referred to in Article 7(2) and (4) and of the measures referred to in Article 7(6).</p> <p>2. In order to ensure consistent, efficient and effective supervisory practices within the Union in relation to Articles 6 and 7 of this Regulation, ESMA may issue guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010.'</p>	<p>'1. The relevant authority ies of the Member State whose law applies to the securities settlement system operated by a CSD referred to in Article 10 shall be competent responsible for ensuring that Articles 6 and 7 are applied and for monitoring the any penalties imposed, in close cooperation with the authorities competent for the supervision of the regulated markets, MTFs, OTFs, and CCPs referred to in Article 7, and the authorities referred to in Article 11(1). In particular, these authorities shall monitor the application of penalties referred to in Article 7(2) and (4) and of the measures referred to in Article 7(6).</p> <p>2. In order to ensure consistent, efficient and effective supervisory practices within the Union in relation to Articles 6 and 7 of this Regulation, ESMA may issue, in close cooperation with the members of the ESCB, guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010.'</p>
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Explanation

The term 'relevant authority' is not defined in Article 1 of the proposed regulation. The amendment to paragraph 1 aims at clarifying that the authorities referred to in Article 10 and Article 11(1) should ensure compliance with Articles 6 and 7. The ECB further notes that the reference to applicable law is not aligned with the terminology used in Directive 98/26/EC ⁽²⁾. The proposed

Text proposed by the Commission	Amendments proposed by the ECB (1)
<p>amendment to paragraph 2 aims at ensuring adequate involvement of the members of the ESCB. Articles 7(8), 15(7) to (8), 20(8) to (9), 24(8), 27(3) to (4), 30(6), 34(4), 35(6), 36(9), 42(7), 44(3), 47(6), 50(6), 51(5), 53(6), 57(5) and 58(4) should be amended accordingly.</p>	
<p>Amendment 11</p>	
<p>Article 11(1)</p>	
<p>'1. The following authorities shall be involved in the authorisation and supervision of CSDs whenever specifically referred to in this Regulation:</p> <p>(a) the authority responsible for the oversight of the securities settlement system operated by the CSD in the Member State whose law applies to that securities settlement system;</p> <p>(b) where applicable, the central bank in the Union in whose books the cash leg of a securities settlement system operated by the CSD is settled or, in case of settlement through a credit institution in accordance with Title IV, the central bank in the Union of issue of the relevant currency.'</p>	<p>'1. The following authorities shall be involved in the authorisation and supervision of CSDs whenever specifically referred to in this Regulation:</p> <p>(a) the authority responsible for the oversight of the securities settlement system operated by the CSD in the Member State whose law applies to that securities settlement system;</p> <p>(b) where applicable, the central bank in the Union issuing the currency in which settlement takes place;</p> <p>(c) where relevant, the member of the ESCB in whose books the cash leg of a securities settlement system operated by the CSD is settled or, in case of settlement through a credit institution in accordance with Title IV, the central bank in the Union of issue of the relevant currency.'</p>
<p>Explanation</p>	
<p>The amendment aims at clarifying the role of central banks of issue, and that settlement in central bank money should be understood as settlement in the currency issued by that central bank.</p>	
<p>Amendment 12</p>	
<p>Article 12(1), second subparagraph</p>	
<p>'In order to ensure consistent, efficient and effective supervisory practices within the Union, including cooperation between authorities referred to in Articles 9 and 11 in the different assessments necessary for the application of this Regulation, ESMA may issue guidelines addressed to authorities referred to in Article 9 in accordance with Article 16 of Regulation (EU) No 1095/2010.'</p>	<p>'In order to ensure consistent, efficient and effective supervisory practices within the Union, including cooperation between authorities referred to in Articles 9 and 11 in the different assessments necessary for the application of this Regulation, ESMA, in close cooperation with the members of the ESCB, may issue guidelines addressed to authorities referred to in Article 9 in accordance with Article 16 of Regulation (EU) No 1095/2010.'</p>
<p>Explanation</p>	
<p>The proposed amendment aims at ensuring the adequate involvement of the members of the ESCB in the preparation of ESMA guidelines as authorities referred to in Article 11 of the proposed regulation.</p>	
<p>Amendment 13</p>	
<p>Article 13</p>	
<p>'The authorities referred to in Articles 9 and 11 shall immediately inform ESMA and each other of any emergency situation relating to a CSD, including of any developments in financial markets, which may have an adverse effect on market liquidity and on the stability of the financial system in any of the Member States where the CSD or one of its participants are established.'</p>	<p>'Without prejudice to the notification referred to in Article 6 of Directive 98/26/EC, the authorities referred to in Articles 9 and 11 shall immediately inform ESMA, the ESRB and each other of any emergency situation relating to a CSD, including of any developments in financial markets, which may have an adverse effect on market liquidity, the stability of a currency in which settlement takes place, integrity of monetary policy and the stability of the financial system in any of the Member States where the CSD or one of its participants are established.'</p>

Text proposed by the Commission	Amendments proposed by the ECB (1)
<i>Explanation</i>	
<p><i>The amendment aims at involving the ESRB in view of the nature of the emergency situation referred to, which may affect the stability of the financial system. It also aims at clarifying that the stability of relevant currencies and the integrity of monetary policy are relevant factors for the safety of CSDs. The information procedure in this Article should be without prejudice to the notification required under Article 6(3) of Directive 98/26/EC.</i></p>	
Amendment 14	
Article 15(5)	
<p>'5. The competent authority shall, before granting authorisation to the applicant CSD, consult the competent authorities of the other Member State involved in the following cases:</p> <p>[...]</p>	<p>'5. The competent authority shall, before granting authorisation to the applicant CSD, consult the competent authorities and the authorities referred to in Article 11 of the other Member State involved in the following cases:</p> <p>[...]</p>
<i>Explanation</i>	
<p><i>The CPSS-IOSCO principles underline the importance of cooperation between central banks, supervisors and other relevant authorities. The proposed amendment aims at ensuring such cooperation with respect to the rules applicable to authorisation of CSDs. If this proposal is accepted, Article 17(2), Article 18(2), Article 22 and Article 23 of the proposed regulation should be amended accordingly.</i></p>	
Amendment 15	
Article 17(1)(d)	
<p>'An authorised CSD shall submit a request for authorisation to the competent authority of the Member State where it is established whenever it wishes to outsource a core service to a third party under Article 28 or extend its activities to one or more of the following:</p> <p>[...]</p> <p>(d) setting up any CSD link.'</p>	<p>'An authorised CSD shall submit a request for authorisation to the competent authority of the Member State where it is established whenever it wishes to outsource a core service to a third party under Article 28 or extend its activities to one or more of the following:</p> <p>[...];</p> <p>(d) setting up any interoperability CSD link.'</p>
<i>Explanation</i>	
<p><i>Considering its administrative burden, the procedure provided for in Article 17(1) should be limited to interoperable CSD links. It is also proposed to apply similar amendments to Articles 45(2) and 50(3) of the proposed regulation.</i></p>	
Amendment 16	
Article 19(2)	
<p>'2. Central banks shall immediately inform ESMA of any CSD that they operate.'</p>	<p>'2. Central banks Members of the ESCB shall immediately inform ESMA of any CSD securities settlement system that they operate.'</p>
<i>Explanation</i>	
<p><i>The amendment aims at clarifying the scope of Article 19(2). In line with recital 9 and Article 1(4) of the proposed regulation, it clarifies that members of the ESCB do not operate CSDs, but may operate a securities settlement system and perform another core service listed in Section A of the Annex.</i></p>	
Amendment 17	
Article 20	
<p>'1. The competent authority shall, at least on an annual basis, review the arrangements, strategies, processes and mechanisms implemented by a CSD with respect to compliance with this Regulation and evaluate the risks to which the CSD is, or might be, exposed.</p> <p>[...]</p>	<p>'1. The competent authority shall, at least on an annual basis, review the arrangements, strategies, processes and mechanisms implemented by a CSD with respect to compliance with this Regulation and evaluate the risks to which the CSD is, or might be, exposed or associated with. The competent authority shall be entitled to collect all the relevant information necessary for its evaluation.</p> <p>[...]</p>

Text proposed by the Commission	Amendments proposed by the ECB ⁽¹⁾
4. When performing the review and evaluation referred to in paragraph 1, the competent authority shall consult at an early stage the relevant authorities referred to in Article 11 concerning the functioning of the securities settlement systems operated by the CSD.	4. When performing the review and evaluation referred to in paragraph 1, the competent authority shall consult at an early stage closely cooperate with the relevant authorities referred to in Article 11 at an early stage concerning the functioning of the securities settlement systems operated by the CSD.
5. The competent authority shall regularly, and at least once a year, inform the relevant authorities referred to in Article 11 of the results, including any remedial actions or penalties, of the review and evaluation referred to in paragraph 1.	5. The competent authority shall discuss regularly and at least once a year, inform in advance with the relevant authorities referred to in Article 11 of the results, including any remedial actions or penalties, of the review and evaluation referred to in paragraph 1.
[...]	[...]

Explanation

The amendment to paragraph 1 aims at ensuring that the competent authorities collect and receive all relevant information necessary for the assessment and macro-prudential analysis of risks to which a CSD is or may be exposed, including risks associated with its systemic role.

The amendments to paragraphs 4 and 5 aim at formalising close cooperation between competent authorities, overseers and other relevant authorities.

Amendment 18

Article 21(2)

'2. Any CSD wishing to provide its services within the territory of another Member State for the first time, or to change the range of services provided shall communicate the following information to the competent authority of the Member State where it is established:	'2. Any CSD wishing to provide its services within the territory of another Member State for the first time, or to change the range of services provided shall communicate the following information to the competent authority of the Member State where it is established:
(a) the Member State in which it intends to operate;	(a) the Member State in which it intends to operate;
(b) a programme of operations stating in particular the services which it intends to provide;	(b) a programme of operations stating in particular the services which it intends to provide, including the currency or currencies it processes;
(c) in case of a branch, the organisational structure of the branch and the names of those responsible for the management of the branch.'	(c) in case of a branch, the organisational structure of the branch and the names of those responsible for the management of the branch.'

Explanation

The CSD should provide information on the currency or currencies in which it provides settlement. This information is necessary in order to determine the central banks of issue that should be involved in the authorisation and assessment process of that CSD.

Amendment 19

Article 21(3)

'3. Within three months from the receipt of the information referred to in paragraph 2, the competent authority shall communicate that information to the competent authority of the host Member State unless, by taking into account the provision of services envisaged, it has reasons to doubt the adequacy of the administrative structure or the financial situation of the CSD wishing to provide its services in the host Member State.'	'3. Within three months from the receipt of the information referred to in paragraph 2, the competent authority shall communicate that information to the authorities referred to in Article 11 and the competent authority of the host Member State unless, by taking into account the provision of services envisaged, it has reasons to doubt the adequacy of the administrative structure or the financial situation of the CSD wishing to provide its services in the host Member State.'
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Explanation

The amendment aims at ensuring that the authorities referred to in Article 11 of the proposed regulation are also provided with the information referred to in Article 21(2) of the proposed regulation immediately and on an equal basis.

Text proposed by the Commission

Amendments proposed by the ECB ⁽¹⁾**Amendment 20**

Article 20a — Professional secrecy (new)

[No text]

1. The obligation of professional secrecy shall apply to all persons who work or who have worked for the authorities referred to in Articles 10 and 11 and ESMA, or auditors and experts instructed by the competent authorities, ESMA or the ESRB.

Confidential information they may receive in the course of their duties shall not be divulged to any other person or authority whatsoever, except in summary or aggregate form such that an individual CSD or any other person cannot be identified, without prejudice to cases covered by criminal law or taxation or the other provisions of this Regulation.

2. Where a CSD has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties may be divulged in civil or commercial proceedings where necessary for carrying out the proceeding.

3. Without prejudice to cases covered by criminal and tax law, the authorities referred to in Articles 10 and 11, ESMA, bodies or natural or legal persons other than competent authorities which receive confidential information pursuant to this Regulation may use it only in the performance of their duties and for the exercise of their functions including the disclosure of information to a superior body, in the case of the competent authorities, within the scope of this Regulation or, in the case of other authorities, bodies or natural or legal persons, for the purpose for which such information was provided to them or in the context of administrative or judicial proceedings specifically related to the exercise of those functions, or both. Where ESMA, the competent authority or another authority, body or person communicating information consents thereto, the authority receiving the information may use it for other non-commercial purposes.

4. Any confidential information received, exchanged or transmitted pursuant to this Regulation shall be subject to the conditions of professional secrecy laid down in paragraphs 1, 2 and 3.

However, those conditions shall not prevent ESMA, or the authorities referred to in Articles 10 and 11, from exchanging or transmitting confidential information in accordance with their statutory tasks and with other legislation applicable to investment firms, credit institutions, pension funds, undertakings for collective investment in transferable securities (UCITS), alternative investment fund managers (AIFMs), 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.

Text proposed by the Commission	Amendments proposed by the ECB ⁽¹⁾
	5. Paragraphs 1, 2 and 3 shall not prevent the authorities referred to in Articles 10 and 11 from exchanging or transmitting confidential information, in accordance with national law, that has not been received from a competent authority of another Member State.'

Explanation

With this amendment, the ECB proposes introducing a professional secrecy regime similar to the corresponding provisions in other European financial services legislation, such as EMIR. To this end, it is proposed to insert a new Article 20a.

Amendment 21

Article 20b — Exchange of information (new)

[No text]	<p>'1. ESMA, the authorities referred to in Articles 10 and 11 and other relevant authorities shall without undue delay provide one another with the information required for the purposes of carrying out their duties.</p> <p>2. The authorities referred to in Articles 10 and 11, other relevant authorities, ESMA and other bodies or natural and legal persons receiving confidential information in the exercise of their duties under this Regulation shall only use it in the course of their duties.</p> <p>3. Competent authorities shall communicate information to the ESRB and to the relevant members of the ESCB where such information is relevant for the exercise of their duties.'</p>
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Explanation

With this amendment, the ECB proposes introducing a regime on the exchange of information similar to the corresponding provisions in other European financial services legislation, such as EMIR. To this end, it is proposed to insert a new Article 20b.

Amendment 22

Article 22(7)

<p>'7. ESMA shall develop draft implementing technical standards to establish standard forms, templates and procedures for the cooperation arrangements referred to in paragraphs 1, 3 and 5.</p> <p>ESMA shall submit those draft implementing technical standards to the Commission by six months from the date of entry into force of this Regulation.</p> <p>Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with the procedure laid down in Article 15 of Regulation (EU) No 1095/2010.'</p>	<p>'7. ESMA, in close cooperation with the members of the ESCB, shall develop draft implementing technical standards to establish standard forms, templates and procedures for the cooperation arrangements referred to in paragraphs 1, 3 and 5.</p> <p>ESMA shall submit those draft implementing technical standards to the Commission by six months from the date of entry into force of this Regulation.</p> <p>Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with the procedure laid down in Article 15 of Regulation (EU) No 1095/2010.'</p>
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Explanation

The amendment aims at ensuring that the members of the ESCB are adequately involved in the preparation of draft implementing technical standards.

Amendment 23

Article 23(2)

<p>'2. After consultation with the authorities referred to in paragraph 3, ESMA shall recognise a CSD established in a third country that has applied for recognition to provide the services referred to in paragraph 1, where the following conditions are met:</p> <p>(a) the Commission has adopted a decision in accordance with paragraph 6;</p>	<p>'2. After consultation with the authorities referred to in paragraph 3, ESMA shall recognise a CSD established in a third country that has applied for recognition to provide the services referred to in paragraph 1, where the following conditions are met:</p> <p>(a) the Commission has adopted a decision in accordance with paragraph 6;</p>
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Text proposed by the Commission	Amendments proposed by the ECB ⁽¹⁾
(b) the CSD is subject to effective authorisation and supervision ensuring a full compliance with the prudential requirements applicable in that third country;	(b) the CSD is subject to effective authorisation, and supervision and oversight or, if the securities settlement system is operated by a central bank, oversight , ensuring full compliance with the prudential requirements applicable in that third country;
(c) cooperation arrangements between ESMA and the competent authorities in that third country have been established pursuant to paragraph 7.'	(c) cooperation arrangements between ESMA and the competent relevant authorities in that third country have been established pursuant to paragraph 7.'

Explanation

The amendment aims at ensuring that the condition under point (b) applies to third country CSDs operated by central banks that are subject to oversight only, as is the case currently with some CSDs operated by NCBs in the Union. Paragraph 2(c) should include central banks both in their capacity as overseers and as central banks of issue.

Amendment 24

Article 23(3)

'3. When assessing whether the conditions referred to in paragraph 2 are met, ESMA shall consult with:	'3. When assessing whether the conditions referred to in paragraph 2 are met, ESMA shall consult with:
(a) the competent authorities of the Member States in which the third country CSD intends to provide CSD services;	(a) the competent authorities of the Member States in which the third country CSD intends to provide CSD services;
(b) the competent authorities supervising CSDs established in the Union with whom a third country CSD has established links;	(b) the competent authorities supervising CSDs established in the Union with whom a third country CSD has established links;
(c) the authorities referred to in point (a) of Article 11(1);	(c) the authorities referred to in point (a) of Article 11(1);
(d) the authority in the third country competent for authorising and supervising CSDs.'	(d) the authority in the third country competent for authorising and supervising CSDs.'

Explanation

The amendment aims at ensuring that the relevant central bank of issue is involved in the assessment by ESMA in line with the CPSS-IOSCO principles.

Amendment 25

Article 25(5)

'5. A CSD shall clearly determine the roles and responsibilities of the board and shall make the minutes of the board meetings available to the competent authority.'	'5. A CSD shall clearly determine the roles and responsibilities of the board and shall make the minutes of the board meetings available to the competent authority and the auditor. '
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Explanation

The amendment makes this provision consistent with Article 25(3) of EMIR.

Amendment 26

Article 28(5)

'5. Paragraphs 1 to 4 shall not apply where a CSD outsources some of its services or activities to a public entity and where that outsourcing is governed by a dedicated legal, regulatory and operational framework which has been jointly agreed and formalised by the public entity and the relevant CSD and agreed by the competent authorities on the basis of the requirements established in this Regulation.'	'5. Paragraphs 1 to 4 shall not apply where a CSD outsources some of its services or activities to a public entity and where that outsourcing is governed by a dedicated legal, regulatory and operational framework which has been jointly agreed and formalised by the public entity and the relevant CSD and agreed endorsed by the competent authorities of the relevant CSD on the basis of the requirements established in this Regulation. '
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Text proposed by the Commission	Amendments proposed by the ECB (1)
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Explanation

The amendment introduces editorial suggestions. In addition, it is proposed to delete the last part of the sentence, since no specific requirements are provided for in the proposed regulation for the development of this operational framework.

Amendment 27

Article 35

<p>'1. For each securities settlement system it operates a CSD shall keep records and accounts that shall enable it, at any time and without delay, to distinguish in the accounts with the CSD the securities of a participant from the securities of any other participant and, if applicable, from the CSD's own assets.</p> <p>2. A CSD shall keep records and accounts that enable a participant to distinguish the securities of that participant from those of that participant's clients.</p> <p>3. A CSD shall offer to keep records and accounts enabling a participant to distinguish the securities of each of that participant's clients, if and as required by that participant ("individual client segregation").</p> <p>[...]</p>	<p>'1. For each securities settlement system it operates a CSD shall keep records and accounts that shall enable it, at any time and without delay, to distinguish segregate in the accounts with the CSD the securities of a participant from the securities of any other participant and, if applicable, from the CSD's own assets.</p> <p>2. A CSD shall keep records and accounts that enable a participant to distinguish segregate the securities of that participant from those of that participant's clients.</p> <p>3. A CSD shall offer to keep records and accounts enabling a participant to distinguish segregate the securities of each of that participant's clients, if and as required by that participant ("individual client segregation").</p> <p>[...]</p>
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Explanation

The amendment aims at clarifying that securities held by clients should be segregated from the securities of the CSD and of other clients. This is consistent with principle 11 of the CPSS-IOSCO principles.

Amendment 28

Article 36(6)

<p>'6. A CSD shall achieve settlement finality no later than by the end of the business day of the intended settlement date. Upon demand by its user committee, it shall install systems that allow for intraday or real-time settlement.'</p>	<p>'6. A CSD shall achieve settlement finality no later than by the end of the business day of the intended settlement date. Upon demand by its user committee, it shall install systems operational procedures that allow for intraday or real-time settlement.'</p>
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Explanation

In the context of the proposed regulation, the term 'system' has a specific meaning, as defined in Article 2 of Directive 98/26/EC. The amendment aims at avoiding any unintended interpretations of the term 'system'.

Amendment 29

Article 37(1)

<p>'1. For transactions denominated in the currency of the country where the settlement takes place, a CSD shall settle the cash payments of its respective securities settlement system through accounts opened with a central bank operating in such currency whenever practical and available.'</p>	<p>'1. For transactions denominated in the currency of the country where the settlement takes place, a CSD shall settle the cash payments of its respective securities settlement system through accounts opened with a the central bank operating in such of issue of that currency whenever practical and available.'</p>
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Explanation

On the basis of safeguarding the safety and efficiency of settlement and in line with CPSS-IOSCO principles, this provision needs to be completed by providing that for transactions denominated in the currency of the country of the settlement, CSDs should settle in central bank money, whenever practical and feasible. The amendment aims at specifying that the cash settlement accounts should be opened with the central bank of issue of the currency, rather than any central bank operating in such currency.

Text proposed by the Commission	Amendments proposed by the ECB (1)
Amendment 30	
Article 39 of the proposed regulation	
‘A CSD shall adopt a sound risk-management framework for comprehensively managing legal, business, operational and other risks.’	‘A CSD shall adopt a sound risk-management framework for comprehensively managing legal, business, operational, systemic and other risks.’
<i>Explanation</i>	
<i>CSDs are deemed to be systemically important market infrastructures. For this reason, the prudential requirements applicable to them should aim to address systemic risk.</i>	
Amendment 31	
Article 40(2)	
‘2. A CSD shall design its rules, procedures and contracts so as they can be enforced in all relevant jurisdictions, including in the case of the default of the participant.’	‘2. A CSD shall design its rules, procedures and contracts so as they can be enforced in all relevant jurisdictions including in the case of the default of the participant.’
<i>Explanation</i>	
<i>The amendment is editorial. Enforceability of rules, procedures and contracts already implies their enforceability in all relevant jurisdictions.</i>	
Amendment 32	
Article 45(4)	
‘4. In case of a provisional transfer of securities between linked CSDs, retransfer of securities prior to the first transfer becoming final shall be prohibited.’	‘4. In case of a provisional transfer of securities between linked CSDs, retransfer or onward transfer to a third CSD of securities prior to the first transfer becoming final shall be prohibited.’
<i>Explanation</i>	
<i>This amendment addresses problems relating to the possible creation of securities where a provisional transfer is cancelled and the provisionally transferred securities are transferred into another CSD. These risks relate to the integrity of the issue.</i>	
Amendment 33	
Article 45(8a) (new)	
[No text]	‘ A CSD shall provide appropriate account structures to enable participants, including other CSDs, to connect to its systems. The account structure shall be supported by the appropriate settlement, custody and fiscal arrangements. ’
<i>Explanation</i>	
<i>Unless appropriate accounts structures are offered by a CSD to which another CSD is linked, in the form of omnibus accounts structures, for example, the proper functioning of the link between these CSDs is not possible.</i>	
Amendment 34	
Article 45(9)	
‘9. ESMA shall develop in consultation with the members of the ESCB draft regulatory technical standards to specify the conditions as provided in paragraph 3 under which each type of link arrangement provides for adequate protection of the linked CSDs and of their participants, in particular when a CSD intends to participate in the securities settlement system operated by another CSD, the monitoring and managing of additional risks referred to in paragraph 5 arising from the use of intermediaries, the	‘9. ESMA shall develop in consultation close cooperation with the members of the ESCB draft regulatory technical standards to specify the conditions as provided in paragraph 3 under which each type of link arrangement provides for adequate protection of the linked CSDs and of their participants, in particular when a CSD intends to participate in the securities settlement system operated by another CSD, the monitoring and managing of additional risks referred to in paragraph 5

Text proposed by the Commission	Amendments proposed by the ECB (1)
reconciliation methods referred to in paragraph 6, the cases where DVP settlement through links is practical and feasible as provided in paragraph 7 and the methods of assessment thereof.'	arising from the use of intermediaries, the reconciliation methods referred to in paragraph 6, the cases where DVP settlement through links is practical and feasible as provided in paragraph 7, the provisions of paragraph [8a] on the appropriate account structures including the relevant arrangements and the methods of assessment thereof.'

Explanation

The purpose of the amendment is to provide for the adoption of technical standards by ESMA with respect to account structures for CSD links.

Amendment 35

Article 46

<p>1. Any question with respect to proprietary aspects in relation to financial instruments held by a CSD shall be governed by the law of the country where the account is maintained.</p>	<p>1. Without prejudice to Article 2(a), Article 9 and Article 10 of Directive 98/26/EC, any question with respect to proprietary aspects in relation to financial instruments held by a CSD shall be governed by the law of the country where the account is maintained. The account shall be presumed to be maintained at the place where the CSD has its habitual residence as determined by Article 19 of Regulation (EC) No 593/2008 of the European Parliament and the Council.</p>
<p>2. Where the account is used for settlement in a securities settlement system, the applicable law shall be the one governing that securities settlement system.</p>	<p>2. Where the account is used for settlement in a securities settlement system, the applicable law shall be the one governing that securities settlement system. Where the law of the Member State where the account is maintained differs from the law governing the securities settlement system, and the securities settlement system has been designated in accordance with Article 2 of Directive 98/26/EC, the applicable law shall be the one governing that securities settlement system.</p>
<p>3. Where the account is not used for settlement in a securities settlement system, that account shall be presumed to be maintained at the place where the CSD has its habitual residence as determined by Article 19 of Regulation (EC) No 593/2008 of the European Parliament and the Council.</p>	<p>3. Where the account is not used for settlement in a securities settlement system, that account shall be presumed to be maintained at the place where the CSD has its habitual residence as determined by Article 19 of Regulation (EC) No 593/2008 of the European Parliament and the Council.</p>
<p>4. The application of the law of any country specified in this Article shall comprise the application of the rules of law in force in that country other than its rules of private international law.'</p>	<p>4.3. The application of the law of any country specified in this Article shall comprise the application of the rules of law in force in that country other than its rules of private international law.'</p>

Explanation

The proposed regulation provides for an exception to the principal rule set out in Article 46(1) and allows for a choice of law in relation to any account used for settlement in a securities settlement system. The notion of securities settlement system is defined as a formal arrangement governed by the law of a Member State chosen by the participants (3). Consequently, since participants are able to choose the law applicable to a securities settlement system, the law governing a securities settlement system, as referred to in Article 46(2) of the proposed regulation, is subject to a choice of law and may differ from the law of the place of establishment of the CSD. This creates legal uncertainty as to the applicable law with respect to securities settled on the accounts of a CSD. The amendment aims at limiting the scope of choice of law while catering for certain specific cases where the law of the Member State where the accounts are maintained differs from the law governing the rules of the securities settlement system.

Amendment 36

Article 52(2)

<p>2. [...] Following a detailed impact assessment, a consultation of the undertakings concerned and after taking into account</p>	<p>2. [...] Following a detailed impact assessment, a consultation of the undertakings CSD concerned and after taking into account</p>
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Text proposed by the Commission	Amendments proposed by the ECB ⁽¹⁾
the opinions of the EBA, the ESMA and the ECB, the Commission shall adopt an implementing decision in accordance with the procedure referred to in Article 66. The Commission shall give reasons for its implementing decision.	account the opinions of the EBA, the ESMA, and the ECB, and the supervisory authorities and the assessment of the ESRB , the Commission shall adopt an implementing decision in accordance with the procedure referred to in Article 66. The Commission shall give reasons for its implementing decision.
[...]	[...]

Explanation

The amendment clarifies that the undertakings concerned are CSDs, and that the ESRB would also provide the Commission with its assessment.

Amendment 37

Article 52(3)

'3. A CSD that intends to settle the cash leg of all or part of its securities settlement system in accordance with Article 37(2) of this Regulation shall obtain authorisation to designate for this purpose an authorised credit institution as provided in Title II of Directive 2006/48/EC, unless the competent authority referred to in Article 53(1) of this Regulation demonstrates, based on the available evidence, that the exposure of one credit institution to the concentration of risks under Article 57(3) and (4) of this Regulation is not sufficiently mitigated. In the latter case, the competent authority referred to in Article 53(1) may require the CSD to designate more than one credit institution. The designated credit institutions shall be considered as settlement agents.'	'3. A CSD that intends to settle the cash leg of all or part of its securities settlement system in accordance with Article 37(2) of this Regulation shall obtain authorisation to designate for this purpose an authorised credit institution as provided in Title II of Directive 2006/48/EC, unless the competent authority referred to in Article 53(1) of this Regulation demonstrates, based on the available evidence, that the exposure of one credit institution to the concentration of risks under Article 57(3) and (4) of this Regulation is not sufficiently mitigated. In the latter case, the competent authority referred to in Article 53(1) may require the CSD to designate more than one credit institution. The designated credit institutions shall be considered as settlement agents as defined in Article 2(d) of Directive 98/26/EC. '
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Explanation

The amendment aims at clarifying that a designated credit institution is to be considered a settlement agent within the meaning of Directive 98/26/EC for the cash leg of securities transactions, thereby providing finality to transfer orders relating to that cash leg.

Amendment 38

Article 53(5)

'5. ESMA shall develop in consultation with the members of the ESCB draft regulatory technical standards to specify the information that the applicant CSD shall provide to the competent authority.	'5. ESMA shall develop in consultation close cooperation with the members of the ESCB and EBA draft regulatory technical standards to specify the information that the applicant CSD shall provide to the competent authority.
[...]	[...]

Explanation

The amendment aims at involving EBA in the development of the draft regulatory standards referred to in Article 53(5), as the subject matter of these standards relates to information concerning credit institutions.

⁽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⁾ See in particular Directive 98/26/EC, which refers to governing law rather than applicable law.

⁽³⁾ See in this respect Article 2 of Directive 98/26/EC, which refers to governing law rather than applicable law.