



EUROPEAN CENTRAL BANK
EUROSYSTEM

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OPINION OF THE EUROPEAN CENTRAL BANK
of 28 July 2022
on a proposal for a regulation amending the Central Securities Depositories Regulation
(CON/2022/25)

Introduction and legal basis

On 13 April 2022 the European Central Bank (ECB) received a request from the Council for an opinion on a proposal for a regulation amending Regulation (EU) No 909/2014 on improving securities settlement in the European Union and on central securities depositories¹ (hereinafter the 'proposed regulation').

The ECB's competence to deliver an opinion on the proposed regulation is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union (TFEU), as the proposed regulation touches upon (1) the basic task of the European System of Central Banks (ESCB) to promote the smooth operation of payment systems pursuant to Article 127(2), fourth indent, TFEU, and Article 3.1 of the Statute of the ESCB and the ECB (hereinafter the 'Statute of the ESCB'), and (2) the ESCB's contribution to the smooth conduct of policies pursued by the competent authorities relating to the stability of the financial system pursuant to Article 127(5) TFEU and Article 3.3 of the Statute of the ESCB. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

General observations

The ECB welcomes the proposed regulation, which supports both the priorities of the Union in the areas of capital markets and post-trading, and one of the core actions in the Commission's 2020 Capital Markets Union (CMU) Action Plan to develop cross-border settlement services. It does this, inter alia, by simplifying the passporting process under Regulation (EU) No 909/2014 of the European Parliament and of the Council² (hereinafter the 'Central Securities Depositories Regulation', or the 'CSDR') and enhancing cooperation among competent and relevant authorities. The ECB strongly supports the general aim of further facilitating capital markets integration by reducing barriers to the cross-border provision of settlement services. The proposed regulation is also broadly aligned with policies pursued internationally in the aftermath of the global financial crisis that emerged in 2008-2009, aimed at reinforcing the resilience and effectiveness of core, systemically important financial market infrastructures – including securities

¹ COM(2022) 120 final.

² Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (OJ L 257, 28.8.2014, p.1).

settlement systems – as a precondition for sound and robust capital markets, and the promotion of financial stability³.

Specific observations

1. Settlement discipline regime

- 1.1 The ECB welcomes the Union legislator's objective to establish a more targeted scope for the CSDR's settlement discipline regime by addressing market behaviours that lead to settlement inefficiencies, but without automatically penalising every individual settlement fail regardless of the context and parties involved. The scope and functioning of the settlement discipline regime should be based on the principle of proportionality. This requires, inter alia, differentiating between, on the one hand, settlement fails that produce adverse financial effects for the non-failing party to a financial transaction, and, on the other hand, those that either produce no adverse financial effects at all or merely affect the financial interests of the failing party. The inclusion of these latter settlement fails within the scope of the settlement discipline regime would be inconsistent with the regime's rationale. Therefore, the review of the settlement discipline regime should take as its starting point the aim of sanctioning only those settlement fails that result in adverse financial effects for the counterparty of the failing party.
- 1.2 In the same vein, the ECB welcomes the proposed exclusions from the settlement discipline regime of both settlement fails caused by factors not attributable to the participants to the transaction, and settlement fails occurring in the context of transactions that do not involve 'two trading parties'. However, the ECB invites the Union legislator to consider clarifying the scope of the second of these two proposed exclusions, which lends itself to different interpretations. The ECB understands this proposed exclusion as encompassing free-of-payment (FOP) securities transfers to securities accounts at central securities depositories (CSDs) in the context of the (de)mobilisation of collateral, whether those transfers are between private parties or between members of the ESCB and their counterparties. The ECB would welcome an explicit clarification to this effect in the proposed regulation. In this respect, further clarifications on the scope of the second proposed exclusion should be provided in the delegated acts of the Commission, to specify the transactions that are not considered as involving two trading parties. CSDs might not at present be equipped to identify settlement instructions that are to be excluded from the scope of the settlement discipline regime under the proposed regulation. To facilitate such identification, the delegated acts of the Commission could helpfully include definitions that enable the envisaged exclusions to be concretely identified, thereby assisting CSDs in reaching an automated process. The ECB stands ready to support the Union legislator in the elaboration of these clarifications, and notes that the Commission draft delegated acts qualify as 'proposed Union acts' for the purposes of Articles 127(4) and 282(5) of the Treaty, which provides that the ECB must be consulted on any draft Union acts falling within its fields of competence⁴.

³ The reference is to the seminal work of the Financial Stability Board entitled 'Reducing the moral hazard posed by systemically important financial institutions - FSB Recommendations and Time Lines', 20 October 2010, available on the Financial Stability Board's website at www.fsb.org

⁴ See paragraph 4.1 of Opinion CON/2017/39. All ECB Opinions are published on EUR-Lex.

- 1.3 In addition, such Commission delegated acts that specify the transactions that are not to be considered as involving two trading parties should contemplate sufficient lead time for CSDs and financial market participants to adjust their systems. For instance, as regards TARGET2-Securities (T2S), if certain transactions are to be excluded from the scope of the settlement discipline regime at CSD level, a dialogue with the market would be advisable to help identify potential implementation issues and possible solutions. Where the relevant Commission delegated acts entail material changes to the design of T2S, the implementation of such changes would require significant time. Hence, the ECB recommends that the period of 24 months which the proposed regulation contemplates between the adoption of the revised CSDR and the entry into force of the amended scope of the settlement discipline regime⁵ should only start from the adoption of the relevant Commission delegated acts.
- 1.4 The existence of regulation-driven mandatory buy-ins is a significant interference in the execution of securities transactions and the functioning of securities markets. Because of the implications that the deployment by the European Commission of mandatory buy-ins may have (including with respect to the potential non-availability of a buy-in agent), it would be preferable to discard the possibility of mandatory buy-ins altogether. Any later changes in this regard should be left to the subsequent consideration of the Union legislator.
- 1.5 If, nevertheless, the Union legislator decides to retain the proposed provisions regarding the implementing act by the European Commission for the deployment of the mandatory buy-in mechanism, the ECB would like to note the following points. First, the ECB welcomes the proposed regulation's revisions to the mandatory buy-in mechanism. The application, through an implementing act, of conditions for activating a mandatory buy-in mechanism in respect of certain financial instruments or categories of transactions should be weighed against the impact of mandatory buy-ins on the functioning of securities markets. Furthermore, such an implementing act should take into account the potential effects of the mandatory buy-in mechanism on the financial stability of the Union and on settlement efficiency in the Union⁶ – both of which are matters that should be considered as falling within the ECB's fields of advisory competence – and such an implementing act should therefore be submitted for ECB consultation prior to its adoption. It should also afford market participants sufficient time for implementation so that they can achieve operational readiness. Regarding the requirements related to the modalities applicable to the execution of buy-ins, it is important that the costs of execution should not be disproportionate to the value exchanged in the underlying transaction. Moreover, in accordance with the proportionality principle, some measure of flexibility should be given to market participants to whom the buy-in would apply in a given case. Consideration should be given to an approach whereby, instead of legislation prescribing the exact method of executing buy-ins, market participants are required to contractually agree on such details between themselves. In addition, an option could be given to the non-failing party to decide whether or not the buy-in process is to be triggered. This flexibility would enable a non-failing party to avoid the disproportionate burden of the implementation of complex operational, technical and legal changes necessary for the use of buy-ins.

⁵ See Article 2 of the proposed regulation.

⁶ See Article 1(2)(b) of the proposed regulation.

1.6 Finally, the ECB invites the Union legislator to consider excluding securities financing transactions from the scope of any mandatory buy-ins. A securities financing transaction does not create an outright open position between the trading parties such as to justify a buy-in against the failing party. Accordingly, the application of mandatory buy-ins in the context of securities financing transactions would not be proportionate to the intention of the legislator to reduce, through mandatory buy-ins, the number of settlement fails.

2. Cooperation between competent authorities and relevant authorities: review and evaluation

2.1 The ECB welcomes the enhancement under the proposed regulation of the role of the relevant authorities in the authorisation of CSDs to provide core services and banking-type ancillary services, as well as in the conduct of the regular review and evaluation of CSDs, that duly acknowledges the legitimate interest that such authorities have in the smooth functioning of the relevant infrastructures. By the same token, the ECB welcomes the balanced approach of the proposed regulation as regards the frequency of conducting the review and evaluation of core CSD services, as well as the longer timeframe within which the relevant authorities may provide a reasoned opinion on the authorisation of CSDs to provide banking-type ancillary services. To ensure consistency, there would be merit in aligning the proposed minimum frequency with which the competent authorities review and evaluate compliance with the CSDR of banking-type ancillary services with the frequency of the review and evaluation of core CSD services.

2.2 As regards the review and evaluation of core CSD services, the proposed regulation envisages that a competent authority consults the relevant authorities. However, no corresponding procedure is contemplated as regards the review and evaluation of banking-type ancillary services. To address this inconsistency, the ECB recommends introducing in the proposed regulation a corresponding consultation procedure for the review and evaluation of banking-type ancillary services.

2.3 For those ESCB members that act as a relevant authority, such a consultation procedure would facilitate the performance of the ESCB's task to ensure efficient and sound clearing systems within the Union. Moreover, in the conduct of their day-to-day activities, CSDs authorised as providers of banking-type ancillary services rely heavily on central bank services⁷, further warranting the involvement of central banks. The safety and efficiency of cash settlements in commercial bank money are particularly relevant for central banks of issue, as inadequate management of credit and liquidity risks by the CSDs providing banking type-ancillary services could affect the smooth functioning of money markets.

2.4 In their role as overseers of clearing and payments systems, central banks have extensive expertise in the field of cash settlement in central bank and commercial bank money (including associated banking-type ancillary services), in particular from the perspective of the management of financial risks. In conducting their oversight activities, central banks apply a framework which – in line with global standards – reflects a systemic perspective. Therefore, their involvement as relevant

⁷ For example, CSDs deposit their long cash balances in accounts with central banks, organise the funding and defunding of their settlement activity through transfers via accounts with payment systems operated by central banks, and have recourse to central bank credit facilities as a key source of qualifying liquid resources.

authorities under the CSDR in the regular review and evaluation of banking-type ancillary services is advisable.

3. Cooperation among competent authorities and relevant authorities: establishment of colleges

- 3.1 The ECB welcomes the introduction of colleges of supervisors in order to enhance supervisory convergence and facilitate information exchanges among involved authorities⁸. Nevertheless, the structure of the passporting colleges could benefit from further adjustments to ensure, on the one hand, that various types of cross-border activity are covered and, on the other hand, that the cooperation within the college is efficient and does not create a burden where participation in multiple colleges is required. The passporting activity does not include all CSD services with a cross-border dimension. Therefore, the ECB proposes to widen the scope of the passporting colleges' mandate to cover other types of cross-border activities, including settlement in relevant foreign currencies and the operation of interoperable links, except for interoperable links of CSDs that outsource some of their services (related to those interoperable links) to a public entity as referred to in Article 19(5) of the CSDR⁹. The ECB also proposes to rename the passporting colleges as cross-border activity colleges. Moreover, participation in the colleges is crucial for the authorities of Member States where the activities of a CSD are important to their markets. However, it might be less relevant for the authorities of Member States where the activity of a CSD is limited, and should not be mandatory.
- 3.2 As regards group colleges, the ECB supports their establishment and, in particular, the optionality introduced in the proposed regulation to merge colleges into one single college. In addition, further flexibility could be introduced by allowing the home competent authority to invite the competent and relevant authorities from countries that are not Member States as observers for both passporting and/or group colleges.

4. Banking-type ancillary services

- 4.1 The proposed regulation includes amendments to the CSDR allowing the settlement of the cash payments in a securities settlement system operated by a CSD through another CSD that is authorised to provide banking-type ancillary services. Together with the proposed increase of the threshold for settlement via designated credit institutions, these amendments would facilitate settlement in foreign currencies, and promote cross-border settlement within the Union. At the same time, the potential recourse to FOP settlement where cash and securities transfers are not conditional on each other - and therefore increase settlement risk – would be limited.
- 4.2 Nevertheless, the provision of banking-type ancillary services by CSDs authorised to provide them (hereinafter the 'banking CSDs') to other CSDs (hereinafter the 'user CSDs') would have implications for the financial risk profile of the banking CSDs and for the level playing field for CSDs and for participants in the securities settlement systems that the CSDs operate, as well as in relation to conflicts of interest; all of these implications would need to be further addressed by the Union

⁸ See Article 1(9) of the proposed regulation.

⁹ Article 19(5) of the CSDR provides for special treatment of such interoperable links.

legislator. Therefore, the proposed regulation could be amended to include the possibility of developing regulatory technical standards to address the implications described in paragraphs 4.3 to 4.8 below of the provision of banking-type ancillary services by banking CSDs to user CSDs.

- 4.3 Article 40 of the CSDR requires CSDs to settle the cash leg of securities transactions processed in their securities settlement systems through accounts held with a central bank specifically for transactions denominated in the currency of the country where the settlement takes place, where practical and available. The amendments envisaged by the proposed regulation should neither lead to an unintended shift from settlement in central bank money to settlement in commercial bank money, nor disincentivise the efforts of CSDs to achieve settlement in central bank money. In this respect, it should be noted that currently, subject to one exception, all national central banks of the Member States allow access to central bank money settlement for non-domestic Union CSDs and their participants. However, settlement in central bank money for non-Union currencies may be difficult to achieve.
- 4.4 While the objective of the amendments envisaged by the proposed regulation is to facilitate settlement in foreign currencies¹⁰, they also open the possibility to the banking CSDs to offer, without restriction, any banking-type ancillary service to user CSDs. The scope of services to be offered by banking CSDs to user CSDs should be limited to services which are provided for the purposes of settlement in foreign currencies. Such a limitation would prevent the banking CSDs from engaging in a broad range of activities and taking excessive risks. In addition, such a limitation would also discourage user CSDs from seeking the services of banking CSDs where, for EU currencies, cash settlement in central bank money would also be available.
- 4.5 The provision by CSDs of banking-type ancillary services to user CSDs would entail additional exposures. In particular, the services that a banking CSD could provide to user CSDs would generate financial risks for the CSDs (e.g. investment, credit and/or liquidity risks)¹¹. The magnitude of these risks depends on the scope of services availed of by the user CSDs and the value of the activity of such CSDs on the accounts with the banking CSDs. Furthermore, if settlement in foreign currencies is concentrated in one or two banking CSDs within the Union, this may lead to contagion risk. The prudential requirements laid down in the CSDR establish a sound prudential framework and address risks in relation to banking-type ancillary services. However, setting up measures to control risks when a banking CSD provides services to user CSDs may prove to be complex in a context where the participants of the user CSD, as well as the activity generating these risks and the evolution of those risks, are not under the direct control of that banking CSD. Therefore, the Union legislator may need to contemplate introducing a requirement for banking CSDs to develop a framework that elaborates on how risks stemming from the activity of the user CSDs can be contained. Overall, the ECB favours a balanced approach aimed at ensuring that the potential expansion of this activity by banking CSDs (and, therefore, also the increased risk exposures, as well as the concentration and

¹⁰ See recital 25 of the proposed regulation.

¹¹ For instance, intraday/overnight deposits of user CSDs' participants in accounts with a banking CSD need to be reinvested, which gives rise to risk exposures. Extension of intraday credit could result in credit and liquidity risk in case one or more participants of non-banking CSDs do not reimburse the amounts when due. Credit lines provided in several currencies by the banking CSD would also represent a source of market, credit and liquidity risks. Payments of coupons or redemptions of securities issued via/held through the user CSD also generate intraday or overnight risk exposures for the banking CSD.

potential contagion risk stemming from this expansion) is commensurate with the intended objective of facilitating settlement in foreign currencies by user CSDs, and does not put at risk the financial soundness of banking CSDs.

- 4.6 Under the proposed regulation, banking CSDs could provide cash clearing and settlement services not only to their participants but also to participants of user CSDs. This could give rise to potential conflicts of interest whereby a banking CSD takes decisions or puts in place policies that favour its own participants or CSDs within the same group. This could be particularly relevant in a crisis situation, for example when unforeseen liquidity shortfalls or uncovered credit losses emerge. Therefore, the regulatory framework should include a requirement for CSDs to have in place clear rules and procedures addressing potential conflicts of interest and mitigating the risk of discriminatory treatment towards any user CSDs and their participants.
- 4.7 The provision by banking CSDs of banking-type ancillary services to user CSDs would impact the risk profile of those banking CSDs and may also entail additional costs and operational complexity. Not all banking CSDs may be willing or able to increase their exposures to credit and liquidity risks and to allocate resources in order to allow for an expansion of the settlement activity in foreign currencies of user CSDs. The ECB understands that the provision of banking-type ancillary services to user CSDs remains a business decision of each banking CSD (in distinction to the establishment of links and open access to other CSDs, which should be ensured as a matter of course¹²).
- 4.8 Moreover, in order to foster transparency in relation to the terms and conditions for the provision of banking-type ancillary services, any future regulatory technical standards should set out the disclosure requirements to which the banking CSDs should adhere as regards the minimum range of services offered, as well as the terms and conditions of such services and the costs and risks associated with them. This would avoid the possibility that CSDs within the same group as a banking CSD benefit from preferential treatment and, therefore, gain a competitive advantage over other user CSDs as regards settlement services in foreign currencies.

5. Netting

- 5.1 The ECB welcomes the introduction by the proposed regulation of a requirement for banking CSDs to adequately monitor and manage any risks stemming from netting arrangements in relation to the cash leg of their applied settlement model¹³. The ECB understands there are CSDs established in the Union that operate securities settlement systems in which cash and/or securities in relation to securities transactions are settled on a net basis. Such CSDs are not currently subject to specific requirements addressing the risks stemming from their netting arrangements.
- 5.2 The risks associated with netting arrangements and the requirements that are intended to address those risks are reflected in several principles of the Principles for financial market infrastructures (PFMIs) issued by the Committee on Payment and Settlement Systems (CPSS) and the International Organization of Securities Commissions (IOSCO)¹⁴. It is noted that the requirement envisaged by

¹² See Chapter III, Section 2 of the CSDR on access between CSDs.

¹³ See Article 1(19)(a)(iii) of the proposed regulation.

¹⁴ See CPSS-IOSCO Principles for financial market infrastructures available on the BIS website at www.bis.org.

the proposed regulation as referred to in paragraph 5.1 applies only to banking CSDs. However, it should apply to all CSDs operating securities settlement systems that use netting arrangements, irrespective of whether those CSDs provide banking-type ancillary services or not. Given the technical nature of the additional requirement applicable to such systems under the proposed regulation, this requirement could be further detailed in regulatory technical standards, to which the ECB stands ready to contribute.

6. **Default**

- 6.1 It is beneficial to broaden the scope of the definition of default in the CSDR¹⁵, which is currently confined to the opening of insolvency proceedings against a participant in a securities settlement system operated by a CSD (hereinafter the 'CSD participant'). To that end, the definition could be aligned with the definition set out in the PFMI^{16,17}, which refers to events specified in the CSD's internal rules as constituting a default, including events related to a failure to complete a transfer of assets in accordance with the terms and rules of the concerned system.
- 6.2 It is of crucial importance that when a CSD participant is not able to fulfil its obligations when they fall due, for whatever reason, the relevant CSD can promptly take action to contain losses and limit liquidity pressures. Therefore, the Union legislator may wish to reflect on a clarification to the effect that a CSD has the possibility to determine additional events that constitute a default by a CSD participant, where the default management rules and procedures referred to in the CSDR are not sufficient to address material events that may occur in a system.

Where the ECB recommends that the proposed regulation is amended, specific drafting proposals are set out in a separate technical working document accompanied by an explanatory text to this effect. The technical working document is available in English on EUR-Lex.

Done at Frankfurt am Main, 28 July 2022.

[signed]

The President of the ECB

Christine LAGARDE

¹⁵ See Article 2(26) of the CSDR.

¹⁶ According to Annex H of the PFMI: "default – An event stipulated in an agreement as constituting a default. Generally, such events relate to a failure to complete a transfer of funds or securities in accordance with the terms and rules of the system in question."

¹⁷ In this context, it is noted that recital 6 of the CSDR underlines the importance of ensuring consistency between the CSDR-related legislation and international standards.



EUROPEAN CENTRAL BANK
EUROSYSTEM

Technical working document
produced in connection with ECB Opinion [CON/2022/25]
on a proposal for a regulation amending the Central Securities Depositories Regulation¹
Drafting proposals

Text proposed by the European Commission	Amendments proposed by the ECB ²
Amendment 1 Recital 3a of the proposed regulation (new)	
No text	'(3a) Delegated and implementing acts adopted in accordance with Articles 290 and 291 of the Treaty on the Functioning of the European Union (TFEU) constitute Union legal acts. Pursuant to Articles 127(4) and 282(5) TFEU, the ECB is to be consulted on any proposed Union act in its fields of competence. Safe and efficient financial market infrastructures and the smooth functioning of financial markets are essential for the fulfilment of the basic tasks of the ESCB under Article 127(2) TFEU, and the pursuit of its primary objective of maintaining price stability under Article 127(1) TFEU. The ECB must be duly consulted on the delegated and implementing acts adopted under this Regulation.'
<u>Explanation</u> <i>Commission draft delegated and implementing acts qualify as 'proposed Union acts' for the purposes of Articles 127(4) and 282(5) of the Treaty. Both delegated and implementing acts constitute Union legal acts. The ECB should be consulted in due time on any draft Union acts, including draft delegated and implementing acts, falling within its fields of competence. While the obligation to consult the ECB derives</i>	

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

² Bold in the body of the text indicates where the ECB proposes inserting new text. Strikethrough in the body of the text indicates where the ECB proposes deleting text.

directly from the Treaty, in order to ensure clarity, this requirement should also be reflected in a recital of the proposed regulation³. Payment and settlement systems are one of the six fields of consultative competence of the ECB listed in Article 2(1) of Council Decision 98/415/EC⁴. The framework set up by the CSDR falls within this field and impacts on the safety and efficiency of financial market infrastructures and on the smooth functioning of financial markets. This is particularly true for the settlement discipline regime of the CSDR. The definition of the scope of the new settlement discipline regime through specification of situations where a settlement fail is caused by factors not attributable to the participants to the transaction, or where a transaction does not involve two trading parties, can be expected to impact securities markets, including the settlement of securities transactions.

Due to the implications of a deployment by the European Commission of mandatory buy-ins (including with respect to the potential non-availability of a buy-in agent), the ECB recommends that the possibility of mandatory buy-ins be discarded altogether. If, nevertheless, the Union legislator were to decide to retain the proposed provisions regarding an implementing act by the European Commission for the deployment of the mandatory buy-in mechanism, this could have a very substantial bearing on securities markets, including on the settlement of securities transactions. Therefore, the ECB would have a strong interest in contributing to the preparation of any such acts.

See paragraphs 1.2 and 1.4 of the Opinion.

Amendment 2

Recital 4 of the proposed regulation

'(4) Regulation (EU) No 909/2014 has introduced rules on settlement discipline to prevent and address failures in the settlement of securities transactions and therefore ensure the safety of transaction settlement. Such rules include in particular reporting requirements, a cash penalties regime and mandatory buy-ins. Despite the absence of experience in applying those rules, the development and specification of the framework in Commission Delegated Regulation (EU) 2018/122940 has allowed all interested parties to better understand the regime and the challenges its application could give rise to. In this regard, the scope of cash penalties and mandatory buy-ins set out in Article 7 of Regulation (EU) No 909/2014

'(4) Regulation (EU) No 909/2014 has introduced rules on settlement discipline to prevent and address failures in the settlement of securities transactions and therefore ensure the safety of transaction settlement. Such rules include in particular reporting requirements, a cash penalties regime and mandatory buy-ins. Despite the absence of experience in applying those rules, the development and specification of the framework in Commission Delegated Regulation (EU) 2018/122940 has allowed all interested parties to better understand the regime and the challenges its application could give rise to. In this regard, the scope of cash penalties and mandatory buy-ins set out in Article 7 of Regulation (EU) No

³ For example, recitals recalling the obligation to consult the ECB can be found in Regulation (EU) 2016/792 of the European Parliament and of the Council and Regulation (EU) No 549/2013 of the European Parliament and of the Council.

⁴ Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (OJ L 189, 3.7.1998, p. 42).

<p>should be clarified, in particular by specifying which categories of transactions are excluded. Such exclusions should cover in particular transactions that failed for reasons not attributable to the participants and transactions that do not involve two trading parties, for which the application of cash penalties or mandatory buy-ins would not be practicable or could lead to detrimental consequences for the market, such as certain transactions from the primary market, corporate actions, reorganisations, creation and redemption of fund units and realignments. The Commission should be empowered to supplement Regulation (EU) No 909/2014 by further specifying the details of such exclusions by means of a delegated act.'</p>	<p>909/2014 should be clarified, in particular by specifying which categories of transactions are excluded. Such exclusions should cover in particular transactions that failed for reasons not attributable to the participants and transactions that do not involve two trading parties, for which the application of cash penalties or mandatory buy-ins would not be practicable or could lead to detrimental consequences for the market, such as certain transactions from the primary market, corporate actions, reorganisations, creation and redemption of fund units, and-realignments, and free-of-payment securities transfers made in the context of (de)mobilisation of collateral. The Commission should be empowered to supplement Regulation (EU) No 909/2014 by further specifying the details of such exclusions by means of a delegated act.'</p>
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Explanation

Free-of-payment securities transfers made in the context of the (de)mobilisation of collateral, whether those transfers are between private parties or between members of the ESCB and their counterparties, do not involve 'two trading parties', and should, therefore, be exempted from the application of the settlement discipline regime laid down in Article 7(2), third subparagraph, and Article 7(3). To avoid doubt, it is suggested to explicitly clarify this in the recital explaining the rationale behind this exemption. See paragraph 1.2 of the ECB Opinion.

Amendment 3
Recital 13 of the proposed regulation

<p>'(13) While Regulation (EU) No 909/2014 requires national supervisors to cooperate with and involve relevant authorities, national supervisors are not required to inform the those relevant authorities if and how their views have been considered in the outcome of the authorisation process and if additional issues have been identified in the course of annual reviews and evaluations. The relevant authorities should therefore be able to issue reasoned opinions on the authorisation of CSDs and the review and evaluation process.'</p>	<p>'(13) While Regulation (EU) No 909/2014 requires national supervisors to cooperate with and involve relevant authorities, national supervisors are not required to inform those relevant authorities if and how their views have been considered in the outcome of the authorisation process and if additional issues have been identified in the course of annual reviews and evaluations. The relevant authorities should therefore be able to issue reasoned opinions on the authorisation of CSDs, on and the review and evaluation process of CSDs and</p>
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<p>The competent authorities should take into account such opinions or explain in a reasoned decision why such opinions were not followed.'</p>	<p>on the review and evaluation by CSD competent authorities of providers of banking-type ancillary services. The competent authorities should take into account such opinions or explain in a reasoned decision why such opinions were not followed.'</p>
<p><u>Explanation</u></p> <p>See Amendment 14 below.</p>	
<p>Amendment 4</p> <p>Recital 14 of the proposed regulation</p>	
<p>'(14) Regular reviews and evaluations of CSDs by competent authorities are necessary to ensure that CSDs continue to have in place appropriate arrangements, strategies, processes and mechanisms to evaluate the risks to which the CSD is, or might be, exposed or which may constitute a threat to the smooth functioning of securities markets. Experience has, however, shown that an annual review and evaluation is disproportionately burdensome for both CSDs and competent authorities and with limited added value. A more appropriately calibrated periodicity should therefore be set in order to alleviate this burden and avoid a duplication of information from one review the other. The supervisory capacities of competent authorities and the objective of safeguarding financial stability should, however, not be undermined.'</p>	<p>'(14) Regular reviews and evaluations of CSDs by competent authorities are necessary to ensure that CSDs continue to have in place appropriate arrangements, strategies, processes and mechanisms to evaluate the risks to which the CSD is, or might be, exposed or which may constitute a threat to the smooth functioning of securities markets. Experience has, however, shown that an annual review and evaluation is disproportionately burdensome for both CSDs and competent authorities and with limited added value. A more appropriately calibrated periodicity should therefore be set in order to alleviate this burden and avoid a duplication of information from one review to the other. To further ensure consistency, the minimum frequency with which the CSD competent authorities and competent authorities referred to in Article 4(1), point (40), of Regulation (EU) No 575/2013 of the European Parliament and of the Council conduct reviews and evaluations of banking-type ancillary services should be aligned with the frequency of the review and evaluation of CSDs. The supervisory capacities of competent authorities and the objective of safeguarding financial stability should, however, not be undermined.'</p>
<p><u>Explanation</u></p>	

See Amendments 13 and 14 below.

Amendment 5

Recital 24a of the proposed regulation (new)

No text

'(24a) Some CSDs established in the Union operate securities settlement systems that apply netting arrangements. Such CSDs should adequately monitor and manage the risks stemming from the application of the netting arrangements put in place for settlement on a net basis.'

Explanation

See Amendment 15 below.

Amendment 6

Recital 25 of the proposed regulation

'(25) In order to avoid settlement risks due to the insolvency of the settlement agent, a CSD should settle, whenever practical and available, the cash leg of the securities transaction through accounts opened with a central bank. Where that option is not practical and available, including where a CSD does not meet the conditions to access a central bank other than that of its home Member State, that CSD should be able to settle the cash leg of transactions in foreign currencies through accounts opened with institutions authorised to provide banking services under the conditions provided in Regulation (EU) No 909/2014. The efficiency of the settlement market would be better served by enhancing the possibilities for CSDs to provide settlement in foreign currencies through the use of accounts opened with institutions authorised to provide banking services, within appropriate risk limits, with a view to deepen capital markets and enhance cross-border settlement. For that purpose, CSDs authorised to provide banking-type ancillary services in accordance with Regulation (EU) No 909/2014

'(25) In order to avoid settlement risks due to the insolvency of the settlement agent, a CSD should settle, whenever practical and available, the cash leg of the securities transaction through accounts opened with a central bank. Where that option is not practical and available, including where a CSD does not meet the conditions to access a central bank other than that of its home Member State, that CSD should be able to settle the cash leg of transactions in foreign currencies through accounts opened with institutions authorised to provide banking services under the conditions provided in Regulation (EU) No 909/2014. The efficiency of the settlement market would be better served by enhancing the possibilities for CSDs to provide settlement in foreign currencies through the use of accounts opened with institutions authorised to provide banking services, within appropriate risk limits, with a view to deepen capital markets and enhance cross-border settlement. For that purpose, CSDs authorised to provide banking-type ancillary services in

<p>and for which the relevant risks are already monitored, should be able to offer such services to other CSDs that do not hold such license irrespective if the latter are part of the same group of companies.'</p>	<p>accordance with Regulation (EU) No 909/2014 and for which the relevant risks are already monitored, should be able to offer such services to other CSDs that do not hold such license irrespective if the latter are part of the same group of companies. Designated credit institutions and CSDs authorised to provide banking-type ancillary services should only be authorised to provide such services for the purposes of settlement of the cash leg of the transactions in the securities settlement system of the CSD seeking to use the banking-type ancillary services in a currency or currencies other than that of the country where the settlement takes place, and not to carry out any other activities.'</p>
<p><u>Explanation</u></p> <p>See Amendment 12 below.</p>	
<p>Amendment 7</p> <p>Point 1(a) of Article 1 of the proposed regulation (new)</p> <p>Point (26) of Article 2(1) of Regulation (EU) No 909/2014</p>	
<p>No text</p>	<p>'(1a) in Article 2(1), point 26 is amended as follows:</p> <p>(26) "default", in relation to a participant, means a situation where insolvency proceedings, as defined in point (j) of Article 2 of Directive 98/26/EC, are opened against a participant or an event stipulated in the CSD's internal rules as constituting a default, including an event that leads to a failure to complete a transfer of funds or securities in accordance with those rules;'</p>
<p><u>Explanation</u></p> <p><i>It is beneficial to broaden the scope of the definition of default in the CSDR, which is currently confined to the opening of insolvency proceedings against a participant in a securities settlement system operated by a CSD. To that end, the definition could be aligned with the definition laid down in the Principles for financial market infrastructures (PFMIs) issued by the Committee on Payment and Settlement Systems (CPSS) and the International Organization of Securities Commissions (IOSCO), which refers to events stipulated in a CSD's internal rules as constituting a default, including events related to a failure to</i></p>	

*complete a transfer of assets in accordance with the terms and rules of the concerned system.
See paragraph 6.1 of the Opinion.*

Amendment 8

Point 1(b) of Article 1 of the proposed regulation (new)
Point 28a of Article 2(1) of Regulation (EU) No 909/2014 (new)

No text

**'(1b) in Article 2(1), the following point 28a is inserted:
“(28a) ‘netting’ means netting as defined in point (k) of Article 2 of Directive 98/26/EC;”;**

Explanation

See Amendment 15 below.

Amendment 9

Point (2)(c) and (d) of Article 1 of the proposed regulation
(Article 7(3) and (new) (3a) of Regulation (EU) No 909/2014)

'(c) paragraph 3 is replaced by the following:

“3. Where the Commission has adopted an implementing act pursuant to paragraph 2a and where a failing participant has not delivered financial instruments covered by that implementing act to the receiving participant within a period after the intended settlement date ('extension period') equal to 4 business days, a buy-in process shall be initiated whereby those instruments shall be available for settlement and delivered to the receiving participant within an appropriate timeframe.

Where the transaction relates to a financial instrument traded on an SME growth market, the extension period shall be 15 calendar days unless the SME growth market decides to apply a shorter period.”

(d) the following paragraph 3a is inserted:

“3a. Where a receiving participant (the 'intermediate receiving participant') does not receive the financial instruments by the date referred to in paragraph 3

'(c) paragraph 3 is replaced by the following:

“3. Where the Commission has adopted an implementing act pursuant to paragraph 2a and where a failing participant has not delivered financial instruments covered by that implementing act to the receiving participant within a period after the intended settlement date ('extension period') equal to 4 business days, a buy-in process **may shall** be initiated **by the receiving participant** whereby those instruments shall be available for settlement and delivered to the receiving participant within an appropriate timeframe.

Where the transaction relates to a financial instrument traded on an SME growth market, the extension period shall be 15 calendar days unless the SME growth market decides to apply a shorter period.”

(d) the following paragraph 3a is inserted:

“3a. Where a receiving participant (the 'intermediate receiving participant') does not

<p>leading to a failing onward delivery of those financial instruments to another receiving participant (the 'end receiving participant'), the intermediate receiving participant shall be considered as complying with the obligation to execute a buy-in against the failing participant where the end receiving participant executes the buy-in for those financial instruments. Similarly, the intermediate receiving participant may pass-on to the failing participant its obligations toward the end receiving participant pursuant to paragraphs 6, 7 and 8.”;</p>	<p>receive the financial instruments by the date referred to in paragraph 3 leading to a failing onward delivery of those financial instruments to another receiving participant (the 'end receiving participant'), the intermediate receiving participant shall be considered as complying with the obligation to execute a buy-in against the failing participant where the end receiving participant executes the buy-in for those financial instruments. Similarly, the intermediate receiving participant may pass-on to the failing participant its rights and obligations toward the end receiving participant pursuant to paragraphs 3, 6, 7 and 8.”;</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>The non-failing party should be given the flexibility to decide whether or not to trigger the buy-in process. Such flexibility would remove the disproportionate burden imposed on the non-failing party of implementing the complex operational, technical and legal changes on which the activation of buy-ins is conditional.</i></p> <p><i>See paragraph 1.4 of the opinion.</i></p>	
<p style="text-align: center;">Amendment 10</p> <p style="text-align: center;">Point (2)(e) of Article 1 of the proposed regulation (Article 7(4) of Regulation (EU) No 909/2014)</p>	
<p>‘(e) paragraph 4 is replaced by the following: “4. [...] (d) for transactions that do not involve two trading parties the buy-in process referred to in paragraph 3 shall not apply”;</p>	<p>‘(e) paragraph 4 is replaced by the following: “4. [...] (d) for transactions that do not involve two trading parties the buy-in process referred to in paragraph 3 shall not apply”;</p> <p>(e) for securities financing transactions as defined in Article 3(11) of Regulation (EU) No 648/2012 the buy-in process referred to in paragraph 3 shall not apply.”;</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>Securities financing transactions do not create an outright open position between the trading parties such as to justify a buy-in against the failing party. Accordingly, the application of mandatory buy-ins in the context of securities financing transactions would not be proportional to the intention of the legislator to reduce, through recourse to buy-ins, the level of settlement fails.</i></p>	

See paragraph 1.5 of the Opinion.

Amendment 11

Point (2)(j) of Article 1 of the proposed regulation
(Article 7(14a) of Regulation (EU) No 909/2014)

‘(j) the following paragraph 14a is inserted:

“14a. The Commission may adopt delegated acts in accordance with Article 67 to supplement this Regulation specifying the reasons for settlement fails that are to be considered as not attributable to the participants to the transaction and the transactions that are not to be considered to involve two trading parties under paragraph 2 and paragraph 4, points (c) and (d), of this Article.”;

‘(j) the following paragraph 14a is inserted:

“14a. The Commission **shall**~~may~~ adopt delegated acts in accordance with Article 67 to supplement this Regulation specifying the reasons for settlement fails that are to be considered as not attributable to the participants to the transaction and the transactions that are not to be considered to involve two trading parties under paragraph 2 and paragraph 4, points (c) and (d), of this Article.”;

Explanation

The ECB considers the adoption of the Commission delegated acts specifying the newly introduced exclusions from the cash penalty mechanism and from the mandatory buy-in to be crucial in order to provide to the relevant market stakeholders sufficient clarity so as to proceed with the appropriate implementation of the settlement discipline regime.

See paragraph 1.2 of the Opinion.

Amendment 12

Point (17)(b) of Article 1 of the proposed regulation
(Article 54(4) of Regulation (EU) No 909/2014)

‘(b) in paragraph 4, the first subparagraph is amended as follows:

(i)
[...]

‘(b) in paragraph 4, the first subparagraph is amended as follows:

(i)
[...]

(iii) point (d) is replaced by the following:

“(d) where a CSD seeks to designate a credit institution which does not itself carry out any of the core services referred to in Section A of the Annex, the authorisation referred to in point (a) is used only to provide the banking-type ancillary services referred to in Section C of the Annex for settlement of the cash leg of

	<p>the transactions in the securities settlement system of the CSD seeking to use the banking-type ancillary services in a currency or currencies other than that of the country where the settlement takes place, and not to carry out any other activities.</p> <p>Where a CSD seeks to use a CSD that is authorised pursuant to paragraph 3, the authorisation referred to in point (a) is used only to provide the banking-type ancillary services in Section C of the Annex for the settlement of the cash leg of the transactions in the securities settlement system of the CSD seeking to use the banking-type ancillary services in a currency or currencies other than that of the country where the settlement takes place, and not to carry out any other activities.”;</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>One of the objectives of the proposed regulation, as set out in recital 25 thereof, is to allow settlement in foreign currencies through accounts opened in institutions authorised to provide banking-type ancillary services under the conditions provided in the proposed regulation, which may be CSDs. The ECB proposes to align Article 54 of the CSDR with recital 25 by restricting the provision by CSDs and designated credit institutions to other CSDs of banking-type ancillary services to settlement in foreign currencies, exclusively.</i></p> <p><i>See paragraphs 4.3 and 4.4 of the Opinion.</i></p>	
<p style="text-align: center;">Amendment 13</p> <p style="text-align: center;">Point (20)(a) of Article 1 of the proposed regulation (Article 60(1), third subparagraph, of Regulation (EU) No 909/2014)</p>	
<p>‘(a) in paragraph 1, the third subparagraph is replaced by the following:</p> <p>The competent authorities referred to in the first subparagraph shall regularly, and at least once a year, assess whether the designated credit institution or CSD authorised to provide banking-type ancillary services complies with Article 59 and shall inform the competent authority of the CSD which shall then inform the authorities referred to in</p>	<p>‘(a) in paragraph 1, the third subparagraph is replaced by the following:</p> <p>“The competent authorities referred to in the first subparagraph shall regularly, and at least every two years once a year, assess whether the designated credit institution or CSD authorised to provide banking-type ancillary services complies with Article 59 and shall inform the competent authority of the CSD which shall then inform the</p>

<p>Article 55(4) and, where applicable, the colleges referred to in Article 24a, of the results, including any remedial actions or penalties, of its supervision under this paragraph.’</p>	<p>authorities referred to in Article 55(4) and, where applicable, the colleges referred to in Article 24a, of the results, including any remedial actions or penalties, of its supervision under this paragraph.”;’</p>
<p><u>Explanation</u></p> <p><i>The proposed regulation changes the frequency of the regular review and evaluation of CSDs under Article 22 of the proposed regulation. For reasons of consistency, there would be merit in aligning the proposed minimum frequency with which the CSD competent authorities and the authorities referred to in point (40) of Article 4(1) of Regulation (EU) No 575/2013 review and evaluate compliance with CSDR of banking-type ancillary services with the frequency of the review and evaluation of CSDs. The ECB proposes to extend the frequency of such assessment to two years.</i></p> <p><i>See paragraph 2.1 of the Opinion.</i></p>	
<p>Amendment 14</p> <p>Article 60(2) of Regulation (EU) No 909/2014⁵</p>	
<p>‘2. The competent authority of the CSD shall, after consulting competent authorities referred to paragraph 1, review and evaluate at least on an annual basis the following:</p> <p>(a) in the case referred to in point (b) of Article 54(2), whether all the necessary arrangements between the designated credit institutions and the CSD allow them to meet their obligations as laid down in this Regulation;</p> <p>(b) in the case referred to in point (a) of Article 54(2), whether the arrangements relating to the authorisation to provide banking-type ancillary services allow the CSD to meet its obligations as laid down in this Regulation.</p> <p>The competent authority of the CSD shall regularly, and at least once a year, inform the authorities referred to in Article 55(4) and, where applicable, the colleges referred to in Article 24a, of the results, including any remedial actions or penalties, of its review and evaluation under this paragraph.</p>	<p>‘2. The competent authority of the CSD shall, after consulting competent authorities referred to paragraph 1 and, in accordance with the procedure laid down in Article 55(5), the relevant authorities, review and evaluate at least once every two years on an annual basis the following:</p> <p>(a) in the case referred to in point (b) of Article 54(2), whether all the necessary arrangements between the designated credit institutions and the CSD allow them to meet their obligations as laid down in this Regulation;</p> <p>(b) in the case referred to in point (a) of Article 54(2), whether the arrangements relating to the authorisation to provide banking-type ancillary services allow the CSD to meet its obligations as laid down in this Regulation.</p> <p>The competent authority of the CSD shall regularly, and at least every two years once a year, inform the authorities referred to in Article</p>

⁵ Note that point (20)(b) of Article 1 of the proposed regulation replaces the second subparagraph of Article 60(2) of Regulation (EU) No 909/2014.

<p>Where a CSD designates an authorised credit institution in accordance with Article 54, in view of the protection of the participants in the securities settlement systems it operates, a CSD shall ensure that it has access from the credit institution it designates to all necessary information for the purpose of this Regulation and it shall report any infringements thereof to the competent authority of the CSD and to competent authorities referred to in paragraph 1.'</p>	<p>55(4), points (b) to (g), and, where applicable, the colleges referred to in Article 24a, of the results, including any remedial actions or penalties, of its review and evaluation under this paragraph.</p> <p>Where a CSD designates an authorised credit institution in accordance with Article 54, in view of the protection of the participants in the securities settlement systems it operates, a CSD shall ensure that it has access from the credit institution it designates to all necessary information for the purpose of this Regulation and it shall report any infringements thereof to the competent authority of the CSD and to competent authorities referred to in paragraph 1.'</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>In line with Amendment 11 above, the frequency of the regular review and evaluation of banking-type ancillary services should be extended to at least every two years.</i></p> <p><i>See paragraph 2.1 of the Opinion.</i></p> <p><i>The involvement of the relevant authorities in the review and evaluation process of banking-type ancillary services should be aligned with the involvement of the relevant authorities in the context of the authorisation of the provision of banking-type ancillary services, where the proposed regulation foresees a consultation procedure involving the relevant authorities. For those ESCB members that act as a relevant authority, such a consultation procedure would facilitate the performance of the ESCB's task of ensuring efficient and sound clearing systems within the Union. Moreover, in the conduct of their day-to-day activities, CSDs authorised as providers of banking-type ancillary services rely heavily on central bank services, further warranting the involvement of central banks. The involvement of central banks, acting as relevant authorities, in the regular review and evaluation of banking-type ancillary services would also be advisable because of the extensive expertise of central banks in the field of cash settlement in central bank and commercial bank money (including associated banking-type ancillary services) and because of the systemic perspective adopted by central banks in oversight activities.</i></p> <p><i>See paragraphs 2.2 to 2.4 of the Opinion.</i></p>	
<p style="text-align: center;">Amendment 15</p> <p style="text-align: center;">Article 47a of Regulation (EU) No 909/2014 (new)</p>	
<p>No text</p>	<p style="text-align: center;">'Netting</p> <p>1. CSDs shall explicitly indicate in their rules whether they apply netting arrangements.</p>

	<p>2. CSDs applying netting arrangements shall measure, monitor, and manage the credit and liquidity risks arising from such arrangements.</p> <p>3. ESMA shall, in close cooperation with the EBA and the members of the ESCB, develop draft regulatory technical standards to further specify details of the frameworks for the monitoring, measuring, management, reporting and public disclosure of the risks stemming from the netting arrangements.</p> <p>ESMA shall submit those draft regulatory technical standards to the Commission by ... [PO please insert the date = 1 year after the date of entry into force of this Regulation].</p> <p>Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.'</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>The ECB welcomes the introduction by the proposed regulation of a requirement for banking CSDs to adequately monitor and manage any risks stemming from netting arrangements in relation to the cash leg of their applied settlement model. The ECB understands that there are CSDs in the Union that operate securities settlement systems in which cash and/or securities in relation to securities transactions are settled on a net basis. Currently, such CSDs are not subject to specific requirements addressing the risks stemming from their netting arrangements. The requirement to monitor and manage risks stemming from netting arrangements should apply to all CSDs operating securities settlement systems that use netting arrangements, irrespective of whether those CSDs provide banking-type ancillary services or not. Given the technical nature of the additional requirements applicable to such systems, these requirements could be further detailed in regulatory technical standards, to which the ECB stands ready to contribute.</i></p> <p><i>See paragraphs 5.1 and 5.2 of the Opinion.</i></p>	
<p style="text-align: center;">Amendment 16</p> <p style="text-align: center;">Article 2 of the proposed regulation</p>	
<p>'Entry into force and application</p> <p>This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.</p> <p>However, Article 1, point (2)(a), point (9), point</p>	<p>'Entry into force and application</p> <p>This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.</p> <p>However, Article 1, point (2)(a), point (9), point</p>

(10)(a), point (17)(c), point (19)(a) and point (23)(b), second subparagraph, shall apply from ... [PO please insert the date = 24 months after the date of entry into force of this Regulation].

(10)(a), point (17)(c), point (19)(a) and point (23)(b), second subparagraph, shall apply from ... [PO please insert the date = 24 months after the date of entry into force of this Regulation].

Article 1 point (2)(a) shall apply from the date of entry into force of the delegated act adopted by the Commission pursuant to Article 7(14a).

Article [please insert number of amending Regulation Article that introduces proposed Article 47a] shall apply from the date of entry into force of the delegated act adopted by the Commission pursuant to Article 47a(3).'

Explanation

When the details of the scope of the settlement discipline regime are specified in Commission delegated acts, CSDs and financial market participants should be afforded sufficient time to adjust their systems. For instance, in the context of TARGET2-Securities, where the relevant Commission delegated acts entail material changes to the design of T2S, the implementation of such changes would require significant time. Hence, the ECB recommends that the period of 24 months which the proposed regulation contemplates between the adoption of the proposed regulation and the entry into force of the amended scope of the settlement discipline regime⁶ should only start as of the adoption of the relevant Commission delegated acts.

See paragraph 1.3 of the Opinion.

⁶ See Article 2 of the proposed regulation.