



Ms Danuta Maria Hübner
Ms Aurore Lalucq
Mr Erik Poulsen
Mr Claude Gruffat
Ms Dorien Roomaker
Members of the European Parliament
60, rue Wiertz
B-1047 Brussels
Belgium

ECB-PUBLIC
ESRB/2023/0047

EMIR 3.0 / EMIR review

20 March 2023

Honourable Members of the European Parliament, dear Ms Hübner, dear Ms Lalucq, dear Mr Poulsen, dear Mr Gruffat, dear Ms Roomaker,

I write with reference to the European Commission's proposal of 7 December 2022 regarding the review of Regulation (EU) No 648/2012 on over-the-counter (OTC) derivatives, central counterparties and trade repositories (European Market Infrastructure Regulation, EMIR)¹. I welcome this opportunity to enhance the regulatory and supervisory framework for central clearing and would like to draw your attention to a number of elements the European Systemic Risk Board (ESRB) recommends incorporating into the EMIR review in order to make the financial system safer.

The ESRB appreciates the inclusion of its proposed requirement that central counterparties (CCPs) should not, to the best of their ability, hold intraday variation margin calls, as well the new requirement that liquidity risk should now be measured by considering the default of a minimum of two entities of any type – rather than solely of clearing members. The latter change was also suggested by the ESRB with regard to the

¹ Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories Text with EEA relevance (OJ L 201, 27.7.2012, p. 1).

assessment of Recommendation ESRB/2020/06². It is important to ensure that these elements are not watered down during the legislative review since they could provide a meaningful contribution towards reaching the objective of preventing or mitigating risks to financial stability. The ESRB had also previously noted it is necessary to strengthen the powers of the European Securities and Markets Authority (ESMA) within the EU, such that, as exposures to EU CCPs grow, the legal and supervisory framework in the EU adequately reflects the greater role played by some EU CCPs³. Against this backdrop, the ESRB welcomes some of the Commission's legislative proposals aimed at strengthening ESMA's powers.

At the same time, I would like to draw your attention to five areas – most of which have been previously flagged by the ESRB – which have not yet been addressed or for which EU co-legislators could take this opportunity to further enhance the earlier proposals.

1) **Active account.** The ESRB supports the requirement, included in the Commission's proposal, to establish and maintain an active account in CCPs authorised in the EU⁴, especially since the measure only targets clearing services (for products denominated) in currencies (EUR and PLN) that are identified as being of substantial systemic importance by ESMA. If properly calibrated and implemented, following a thorough cost-benefit analysis taking into account any unintended negative effects which could arise when setting a minimum level of clearing activity to take place at EU CCPs, this measure is expected to contribute to the reduction of EU entities' overreliance on third-country CCPs for targeted contracts, thereby improving the resilience of the EU financial system. The ESRB also recognises that it is important not to undermine the competitiveness of European market players vis-à-vis their clients, and therefore believes that the current text of the draft regulation should be amended to provide criteria for its implementation. At the same time, the ESRB has also identified some gaps in the active account framework that could significantly impair the

² Recommendation of the European Systemic Risk Board of 25 May 2020 on liquidity risks arising from margin calls.

³ See [ESRB response to ESMA's consultation on determining the degree of systemic importance of LCH Ltd and ICE Clear Europe or some of their clearing services](#).

⁴ See also the ESRB's letter: [ESRB response to the European Commission targeted review of the central clearing framework in the EU](#).

efficiency of this regulatory solution. It therefore proposes some amendments in order to ensure that the requirements serve their purpose effectively.

2) **Data.** The ESRB has repeatedly highlighted the importance of receiving high-quality data in order to monitor and address financial stability risks.⁵ Nearly a decade after the entry into force of reporting requirements, the data reported by EU CCPs and large banking groups still present substantial quality issues.⁶ This is partly due to the fact that only limited efforts have been made to establish internal procedures for verifying and checking data before they are submitted to the EU authorities. In addition, recent events have underlined the existence of certain regulatory data gaps with regard to the supervision of products or entities such as the third-country subsidiaries of EU groups active at third-country CCPs. This hampers transparency – one of the key principles underpinning the move to central clearing – for regulators and supervisors. In the ESRB’s view, improving data quality and filling data gaps will effectively complement the main goals of the proposed changes to EMIR, as clearing at EU CCPs will become more attractive and CCP supervision will be more robust. This is because better data offer more transparency to authorities and market participants alike and make it possible to monitor (financial stability) risks at an earlier stage, before they have had the chance to manifest themselves.

The current proposal includes the introduction of an additional analytical body in the form of a Joint Monitoring Mechanism (JMM), as well as new reporting obligations and reporting lines (e.g. for monitoring the active account requirement). High-quality data are of the utmost importance if this body is to be able to carry out its monitoring tasks effectively. In this vein, the ESRB previously proposed several approaches that could make it possible to improve data quality, and would respectfully draw the attention of EU legislators to the possibility that some of these proposals might usefully be taken into consideration in the context of the EMIR review. Some proposals, more generally, also encompass the scope of other reporting frameworks, including the Securities Financing Transactions Regulation (SFTR)⁷.

3) **Collateral.** In the past, the ESRB was in agreement with ESMA’s view that the use of uncollateralised bank guarantees should be restricted to non-financial clearing members as, in the ESRB’s opinion, bank

⁵ See the [ESRB’s view regarding data quality issues and risks for financial stability](#).

⁶ European banking supervision has highlighted “deficiencies in risk data aggregation and reporting” as one of the supervisory priorities for 2023-25.

⁷ See the [ESRB’s view on data quality issues and risks for financial stability](#).

guarantees do not provide sufficiently liquid collateral compared with cash or government bonds⁸. The acceptance of bank guarantees could lead to significantly increased interdependency between banks and CCPs and should therefore be restricted with regard to both quantity and addressees (i.e. only to non-financial counterparties). Also, the current energy market exemption was originally supposed to be time-limited. The ESRB would like to underline that the liquidity pressure experienced by some market participants in 2022 was predominantly a result of geopolitical developments, and that the regulatory framework was not the cause of such problems. Therefore, the ESRB is in favour of either (i) ensuring that the current temporary extension does not turn into a permanent extension or (ii) applying on a permanent basis the same strict cumulative conditions regarding the acceptance of uncollateralised bank guarantees as those currently applied in the adjusted RTS.

4) **The non-objection procedure.** The ESRB generally supports the introduction of the non-objection procedure granting permission to extend the scope of activities or services included in the draft regulation, as this could lower the regulatory burden on EU CCPs and improve their competitiveness. It could also potentially increase the popularity of centrally cleared transactions within the EU. However, in the opinion of the ESRB, a caveat should be considered with regard to the scope of the procedure. The ESRB is of the view that the non-objection procedure should not be permitted where settlement in a new EU currency would be added to a class of financial instruments already covered by the CCP's authorisation. In such cases, dedicated liquidity risk management and payment and settlement arrangements should be established, ensuring that these would not constitute non-material changes. In addition, in its current wording the proposal may lead to situations in which material extensions to the scope of services provided by EU CCPs, in particular in respect of the set of currencies in which the cleared transactions are denominated, could be implemented without a thorough risk assessment and without making the necessary adaptations to EU CCPs' risk management frameworks. This could create critical gaps in these frameworks and could expose both the CCPs and the markets for these additional currencies to risks that have not been properly evaluated, which in turn could have an adverse impact on financial stability in the EU.

5) **Joint Monitoring Mechanism.** The ESRB appreciates all efforts to make the supervision of EU CCPs more efficient and effective as well as to gauge financial stability risks on a timely basis. It therefore,

⁸ [Emergency measures on collateral requirements – draft Regulatory Technical Standards amending Commission Delegated Regulation \(RTS\) 153/2013.](#)

welcomes the proposal to establish the Joint Monitoring Mechanism (JMM). The JMM is a unique setup that provides for holistic cross-border and cross-sectoral monitoring across all CCPs currently not present in the supervisory landscape. This is particularly relevant when it comes to identifying potential horizontal risks related to the interconnectedness of financial actors across several jurisdictions. The ESRB is well aware that new supervisory and monitoring frameworks increase the administrative burden on both CCPs and the authorities, but appropriate coordination and information-sharing mechanisms can significantly alleviate such a burden. It would therefore be helpful if the legal text could further clarify the interaction between the JMM and the existing supervisory framework. In addition, the ESRB notes that although the resolution authorities of both CCPs and the largest clearing members are not considered to be part of the JMM, they could contribute to the intended work of the JMM.

In the annexes to this letter you will find several suggested changes, including the changes mentioned above. This letter, including the suggestions presented in the annexes, is consistent with the proposals made by the ESRB in its response to the consultation with Commission services on the review of EMIR.⁹ It has been approved by the General Board. My staff and I are at your disposal to discuss these proposals.

Finally, please be informed that the same letter has been sent to the Chair of the Council Working Party responsible for the related legislative file. This letter will be published on the ESRB's website.

Yours sincerely,



Francesco Mazzaferro

Head of the ESRB Secretariat

⁹ [ESRB response to the European Commission targeted consultation on the review of the central clearing framework in the EU.](#)

Annex A Drafting proposals related to the highlighted topics

Explanatory notes

The following takes as its starting point the text of the European Commission's proposal (marked in grey).

Each article is preceded by a short paragraph setting out what the suggested drafting changes are seeking to achieve.

Deletions relating to the text of the European Commission's proposal are indicated by strikethroughs and are marked in yellow; additions are indicated by italics and are marked in yellow.

Rationale and suggested changes

Ad Recital 26

As the ESRB is responsible for macroprudential issues, ESMA should seek the ESRB's advice when assessing potential risks to the EU's financial stability. It should be borne in mind that the ECB is not currently responsible for the supervision of CCPs, a task assigned to national competent authorities (NCAs) which should, therefore, also be included in the analytical work via their participation in ESMA's CCP Supervisory Committee. As there are no direct contractual links between CCPs and indirect clients, it might only be possible to identify interconnections "as far as possible".

26) ESMA should have the means to identify potential risks to the Union's financial stability. *The ESMA CCP Supervisory Committee* should therefore, in cooperation with the *ESRB*, EBA, EIOPA and the ECB in the framework of the tasks concerning the prudential supervision of credit institutions within the single supervisory mechanism conferred upon it in accordance with Council Regulation (EU) No 1024/2013, identify the interconnections and interdependencies between different CCPs and legal persons, including *as far as possible* shared clearing members, clients and indirect clients, shared material service providers, shared material liquidity providers, cross-collateral arrangements, cross-default provisions and cross-CCP netting, cross-guarantee agreements and risk transfers, and back-to-back trading arrangements.

Ad Recital 38

The ESRB believes that, given the relevance to financial stability of CCPs in the EU, the legislative proposal should focus more broadly on interconnectedness within central clearing. The proposal to ban CCPs from acting as clearing members at EU CCPs is a simple solution that would address some of the risks associated with links between CCPs. However, the proposed legal text does not offer any alternative solutions involving cooperation between CCPs, such as cross-margining agreements or interoperability beyond transferable securities and money market instruments. The ESRB is therefore of the opinion that further analysis of these interconnectedness risks is needed before any proposals are put forward banning existing participation arrangements between CCPs. This should include the effects of recovery and resolution tools on CCPs

which are interoperable or which are acting as clearing members¹⁰. In this vein, the ESRB would refer to its earlier suggestion on the current gap in the legislative framework regarding the interoperability in the case of derivatives and would add that the gap also applies to commodities clearing. Should the co-legislators nonetheless endeavour to include such a ban into the regulation, a transitional period sufficiently long to allow for the establishment of alternative solutions would be needed to avoid possible cliff edge effects.

Article 7a Active Account

The ESRB supports the requirement, included in the Commission proposal, to establish and maintain an active account in CCPs authorised in the EU, especially since it only targets derivative contracts in two EU currencies linked to clearing services identified by ESMA as being of substantial systemic importance. If properly framed, calibrated and implemented, this measure should contribute to the reduction of EU entities' overreliance on third-country CCPs, thereby improving the resilience of the EU financial system. In particular, choosing to apply the requirement to all EU entities' activities without exception would greatly contribute to the efficiency of the measure. At the same time, the ESRB believes that the current text of the draft regulation should be amended to ensure that the requirements effectively serve the purpose of the regulation. An overall objective should be to outline in the Level 1 text how the requirement will work in practice, thus ensuring that either ambiguities are addressed in Level 1 or sufficient mandates are in place to address them in Level 2.

1) The ESRB is of the opinion that it should be the responsibility of legislators to determine the share of activities of the accounts in the short term as well as the long-run objective (i.e. the level at which systemically important Tier 2+ services would no longer be of substantial systemic importance). Nevertheless, this would require technical work which would be the competence of the European Supervisory Authorities, the ECB and the ESRB. The ESRB thus suggests mandating ESMA to submit RTS which propose to the Commission (i) the level of activity at which the identified services would no longer be considered to be of substantial systemic importance and (ii) parameters for calibrating the active account, in order to achieve a reduction of excessive exposures in the long run and limit the impact on the competitiveness of EU entities. The proposed RTS should also take into account the potentially negative impact of a forced relocation on financial stability, the competitive disadvantage of EU clearing members compared with non-EU counterparties, and the potential unintended side effects of relocation to CCPs

¹⁰ See ESRB (2017), [Opinion on a central counterparty recovery and resolution framework](#), July.

outside the United Kingdom and the EU, compared to possible adverse effects of maintaining the current overreliance on certain services provided by third-country CCPs. Especially in the context of current and potential future divergence of regulatory frameworks for the functioning and risk management of CCPs and recovery and resolution regimes between the EU and third countries in which these CCPs are located.

2) Most importantly, setting a deadline (or establishing a more complex roadmap) for achieving the desired level or proportion of activity would be worth considering. This would provide a transitional period during which counterparties would have to meet the expected threshold (i.e. the desired level or proportion of activity to be cleared at EU CCPs). The proposed text neither specifies a clear deadline by which the targeted reduction should be achieved nor provides a mandate setting a gradual pathway towards the target. It should also be made clear that the active account requirement generally targets new trades, but it leaves market participants with the flexibility to reach the desired level faster if they are willing to conduct an orderly relocation of some parts of their portfolios or, alternatively, to take more time if needed. Otherwise, some counterparties could be forced to close out their established risk protection in the form of outstanding trades at third-country CCPs and enter into new trades at EU CCPs, which might imply financial losses and a disorderly relocation, especially in the current environment of increased interest rates. A need for rapid relocation could prove to be disruptive, and building up positions to ensure an orderly relocation will take some time. Specifying the desired proportion of trades to be cleared at EU CCPs relative to trades cleared at all CCPs and a feasible deadline by which this ratio should be met, assuming both these parameters are set at reasonable levels, would significantly decrease the risk of a disorderly or rapid relocation of trades.

3) The information on activity at EU CCPs alone would be insufficient to calculate the proportion (i.e. the ratio of transactions cleared in the EU relative to the entire market activity of a given entity), as this would only provide data on the former (i.e. the numerator). In order to evaluate a given counterparty's dependence on third-country CCPs for the clearing of certain categories of derivative contracts referred to in paragraph 2, the counterparty should also calculate and report its global activity for a given category of such contracts (the denominator), meaning the transactions cleared by both EU-based and third-country CCPs. This ties in with the need to define a quantitative "share of activity" to be located in the EU accounts as opposed to a simple qualitative definition of what an "active account" might be. This point is crucial, not only because it would make the requirement more efficient, but also because it would provide EU institutions with a mandate to carry out analytical work that would be of benefit to the EU's overall policy towards systemically important Tier 2+ services.

4) In the ESRB's opinion, more clarity and guidance are needed on the reporting specifications. The preferred option would be to improve and extend the reporting obligations of Article 9 to include the additional information, as trade repositories and reporting templates are already in place, thereby reducing the risk of potential (expensive) double reporting. An alternative would be to develop Implementing Technical Standards specifying a template or uniform reporting format of information to be reported under paragraph 4

of Article 7a to ensure a minimum level of comparability for data reported by entities in different EU Member States.

5) The current draft does not consider the case of non-compliance. There may be EU counterparties that only use third-country CCPs for the purpose of clearing certain categories of derivative contracts listed under paragraph 2 of draft Article 7a. In such cases the reporting obligation introduced in draft paragraph 4 could be impossible to enforce, as the competent authority of the CCP used by the counterparty would be a third-country authority – not necessarily bound by EMIR provisions to transmit the data to the EU authorities. Furthermore, it should be sufficient to report to (only) one competent authority if the reports are consolidated at the EU level. These concerns can be addressed by replacing in the Level 1 text the competent authority of the CCP by the competent authority of the FC/NFC, ensuring that the latter authority is bound by EMIR.

6) Fixing the types of contracts impacted by the active account requirement in Level 1 may prove to be too rigid as it does not cater for potential market developments. For example, ICE Clear Europe has announced that it will close its credit default swap (CDS) clearing service by the end of March 2023 and, depending on what direction the migration takes, the active account requirement may no longer be necessary for euro CDS. Similarly, it may be appropriate to distinguish between types of interest rate derivatives, taking into account the maturity of alternative clearing arrangements in the EU. The proposed EMIR text seems to provide some flexibility to amend the list of contracts, although the ESRB is proposing that the details of the contracts impacted, which need to be linked to ESMA's assessment of substantial systemic importance, should be listed in the RTS. This would ensure that the framework remains sufficiently flexible to adapt to new market developments and would provide ESMA with a certain degree of discretion where needed.

7) New calculation method for the clearing obligation. The ESRB draws attention to the possibility that the change to the calculation method used for the clearing obligation proposed in Article 4 (i.e. the exclusion of centrally cleared transactions) could have negative and unintended implications for the active account requirement. As the active account only applies to entities subject to the clearing obligation, a reduction in the number of such entities because of the change of methodology would directly narrow the scope of application of the account requirement. For example, using the new calculation method would mean that a financial counterparty clearing 100% of its OTC derivatives at CCPs recognised under Article 25 would not fall under the clearing obligation and would not, therefore, be required to hold an active account at an EU CCP for the OTC derivatives covered by the active account requirements. This could foil the aim of lowering the systemic importance of third-country CCPs. Also, the ESRB believes it is essential for the scope of the active account requirement to include EU entities which voluntarily clear OTC derivatives products – as well as exchange-traded derivatives (ETDs) of a contract type impacted by the active account requirement. Therefore, an alternative approach to scope the active account obligation (and the consequent reporting should be identified) in order to avoid loopholes

8) The effect of the current draft is that if the extent of a reduction means that the clearing service is no longer of substantial systemic importance, there will be a re-evaluation of the systemic relevance of the

respective third-country CCP, which will then be classified as Tier 2 (or even Tier 1). In such cases an active account requirement will no longer apply and exposures may be rebuilt until the threshold is reached once again. These dynamics should be mitigated by taking them into account when thresholds are set.

9) The current proposal focuses mainly on the role of CCPs in the functioning of active accounts but, if it is to be effective, the proposal should be complemented by further measures addressing intermediaries. This would be in line with the stance already expressed during the tiering assessment of UK CCPs¹¹ and the European Commission has been advised to consider providing “macro- and micro-prudential authorities with the power to impose higher risk-based capital charges on the exposures of EU intermediaries at Tier 2 CCPs, when deemed of substantial systemicness, and/or take other measures to incentivise a reduction of those exposures”.

10) Finally, the regulation should mandate ESMA and the European Commission to take potential negative effects into account when setting a minimum level of clearing activity that should take place at EU CCPs. In particular, this applies to possible negative and unintended indirect effects on Union currencies not identified by ESMA as being of substantial systemic importance, as setting the mandatory activity of the euro and Polish zloty at a particular level may break up netting sets at third country CCPs between these and other Union currency exposures. Significant relocation of euro and Polish zloty clearing volumes to EU CCPs, possibly due to a high level of mandatory activity, might result in clearing volumes in other Union currencies following suit because of better netting efficiencies. Although this is beneficial from an active account perspective, it could lead to market fragmentation at third country CCPs in other Union currencies.

A thorough cost-benefit analysis would be needed to prevent recourse to inappropriate levels of mandatory activity under the active account requirements. Negative effects that should be considered include: (i) a competitive disadvantage suffered by EU clearing members compared with non-EU counterparties, (ii) potential negative effects on financial stability when large volumes are moved, thereby breaking up netting sets and increasing interdependence, (iii) the relocation of clearing outside the EU and the United Kingdom, bearing in mind that the relocation of clearing services outside the United Kingdom would, nevertheless, mean that the systemic importance of UK CCPs could be reduced. As a consequence, the risks to the EU clearing system stemming from UK Tier 2 CCPs would also be lowered.

¹¹ See [ESRB response to ESMA's consultation on determining the degree of systemic importance of LCH Ltd and ICE Clear Europe or some of their clearing services](#).

Ad Recital 11

It is necessary to ensure that the calibration of the level of the clearing activity to be maintained in accounts at Union CCPs *can be increased gradually over time* and can be adapted to changing circumstances.

(...)

Furthermore, ESMA should also ensure that the envisaged reduction in clearing in those instruments, identified as of substantial systemic importance, results in them *reducing no longer being considered of substantial systemic importance when ESMA reviews the [...].-On the basis of the annual reports submitted by the Joint Monitoring Mechanism to the European Parliament, the Council and the Commission, ESMA should evaluate the calibration of the active account every X years.*

Ad Article 7a

1. Financial counterparties or non-financial counterparties that are subject to the clearing obligation in accordance with Articles 4a or 10 and clear any of the categories of the derivative contract referred to in this paragraph, shall clear at least a proportion of such contracts at accounts at CCPs authorised under Article 14.

2(a).interest rate derivatives denominated in euro and Polish zloty;

(b) Credit Default Swaps (CDS) denominated in euro;

(c) Short-Term Interest Rate Derivatives (STIR) denominated in euro.

3. A financial counterparty or a non-financial counterparty that is subject to the obligation set out in paragraph 1 shall calculate its activities in the categories of derivative contract referred to in ~~paragraph 1~~ *paragraph 2* and at CCPs authorised under Article 14 *and, separately, at CCPs recognised under Article 25.*

4. A financial counterparty or a non-financial counterparty that is subject to the obligation set out in paragraph 1 shall report to the competent authority *of the counterparty* the outcome of the calculation referred to in ~~paragraph 2-paragraph 3~~ *paragraph 3* on an annual basis, confirming their compliance with the obligation set out in ~~that paragraph 1~~ *paragraph 1*. The counterparty's competent authority shall immediately transmit that information to ESMA and the Joint Monitoring Mechanism referred to in Article 23c..

5. ESMA shall, in cooperation with the EBA, EIOPA and the ESRB, and after consulting the ESCB, develop draft Regulatory Technical Standards specifying:

(a) The level of activity for the identified services at which they would cease to be considered to be of substantial systemic importance.

(ab) the proportion of activity in each category of the derivative contracts referred to in paragraph 2 and the related impacts in terms of migration and costs for EU entities; this proportion of activity shall ~~proportion shall be set at a level that~~ results in a reduction in clearing in such derivative contracts at those Tier 2 CCPs offering services of substantial systemic importance to the financial stability of the Union or one or more of its Member States pursuant to Article 25(2c), and shall be aligned with the long-term objective of ~~that~~ ensuring that clearing in such derivative contracts is no longer of substantial systemic importance;

In determining the proportion of activity, consistent with the objective of reducing exposure to third-country CCPs or some of their clearing services that are of substantial systemic importance, ESMA shall perform a cost-benefit analysis, taking into account:

(i) the existence of potential alternatives for the provision to clearing members of the clearing services concerned in the currencies concerned, and to the extent the relevant information is available, to their clients and to indirect clients established in the Union;

(ii) the effects of the proportion on the competitiveness of EU counterparties compared with non-EU counterparties

(iii) the potential negative effects on financial stability of the Union or of one or more of its Member States stemming from reduced access for EU counterparties to third-country CCPs and from moving large volumes of transactions from third-country CCPs to EU CCPs, thereby breaking up netting sets and increasing interdependence.

(iv) the potential costs and indirect adverse effects of maintaining the current overreliance on the services provided by third country CCPs of substantial systemic importance, especially in the context of current and potential future divergence of regulatory frameworks between the EU and third country jurisdictions in which these CCPs are established.

(c) the calculation methodology under paragraph 3

(d) the phase-in period of the active account requirement, allowing for gradual implementation in order to avoid market distortions;

ESMA shall submit those draft Regulatory Technical Standards to the Commission by ... [PO: please insert the date = 12 months after the date of entry into force of this Regulation].

Power is delegated to the Commission to adopt the Regulatory Technical Standards referred to in the first sub-paragraph, in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

7 (new): ESMA shall, in cooperation with the EBA, EIOPA and the ESRB, and after consulting the ESCB, develop draft Implementing Technical Standards specifying the format of the information to be reported to the competent authority referred to in paragraph 4.

ESMA shall submit those draft Implementing Technical Standards to the Commission by ... [PO: please insert the date = 12 months after the date of entry into force of this Regulation]. Power is delegated to the Commission to adopt the Regulatory Technical Standards referred to in the first sub-paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010 .

Ad Article 17a Non-objection procedure for granting a request for extension of activities or services

The ESRB generally supports the introduction of the non-objection procedure, included in the draft regulation, for granting a request for extension of activities or services, as this could lower the regulatory burden on EU CCPs, improving their competitiveness and, potentially, increasing the popularity of centrally cleared transactions within the EU. However, the scope of changes that could be subject to a non-objection procedure rather than an ex ante approval process is, in the ESRB's opinion, too broad and could impact the prudential assessment of EU CCPs' projects, with implications for financial stability. Specifically, as it currently stands the proposal may lead to situations in which material extensions of the scope of services provided by EU CCPs, in particular in respect of the set of currencies in which the cleared transactions are denominated or settled, might be implemented without a thorough risk assessment and the necessary adaptations to the EU CCPs' risk management frameworks. This could create potentially critical gaps in these frameworks and could expose both the CCPs and the markets for these additional currencies to risk that has not been properly evaluated.

Adding a new Union currency in a class of financial instruments already covered by the CCP's authorisation should not be considered to be a "non-material change" for the purpose of applying the non-objection procedure. In line with the current definition, the currency of notional amount is one of the defining features of a class of derivatives. Expanding the currency set in which transactions are cleared or settled requires adjustments to be made to the CCP's risk management framework, as well as the resolution of operational issues such as ensuring that liquidity is provided in the new currency and potentially establishing access to the relevant payment system. Moreover, applying a non-objection procedure in this case would seem inconsistent with the approach adopted in sub-paragraph (a) of this draft paragraph, which explicitly indicates that adding services that would involve payment in a new currency may not be considered to be a non-material change. In this context it is unclear why this rule should only apply to derivatives traded on a trading venue and not to OTC derivatives, as the impact on the CCP's liquidity risk profile would be similar in both cases.

Furthermore, the proposed sub-paragraph (c) stipulates that a significant extension of the financial instruments' maturity range is considered to be a material change to the CCP's existing authorisation, as it

could undoubtedly affect its risk profile to a significant extent. There is no reason not to treat an extension of the financial instruments' currency set in a proportionate manner.

Besides, there is no clear indication of what should be considered to be a “non-significant” extension of the maturity range. This may leave too much leeway in interpretation, possibly leading to regulatory arbitrage resulting from repeated extensions. Unless this is prevented by using more precise wording, multiple non-significant changes (each introduced over an extended period) could jointly result in a material extension of the maturity range, which would normally be subject to the regular approval procedure for an extension of activities or services if implemented as a single adjustment. An additional consideration is that in recent years it has been shown that a conflict of interpretation sometimes arises, potentially allowing CCPs and NCAs to validate important projects without following proper validation processes. EMIR 3.0 is an opportunity to strengthen and clarify the criteria and indicators of the RTS for Articles 15 and 49, which have been the object of significant conflict of interpretation between EU authorities. ESMA could be granted the power to decide which projects should be considered to be an extension of activities or major model changes. This option could guarantee a higher degree of supervisory convergence than the involvement of the Joint Supervisory Teams.

More specifically, CCPs would be able to implement, ex ante, the projects they deem non-material, and NCAs would have a period of ten days to determine whether these changes are indeed non-material or whether they require a validation procedure. This proposal has two drawbacks, these being:

- from the NCAs' standpoint: a ten-day period could prove insufficient to conduct a thorough risk assessment;
- from the CCPs' standpoint: the ability of NCAs to trigger a validation procedure ex post would be a source of uncertainty as, depending on the outcome of the validation process, certain decisions or actions might have to be reversed.

1. The non-objection procedure shall apply to non-material changes to a CCP's existing authorisation in any of the following cases in which the proposed additional clearing service or activity:

(a) fulfils all the following conditions:

(i) the CCP intends to clear one or more financial instruments belonging to the same classes of financial instruments for which it has been authorised to clear under Articles 14 or 15;

(ii) the financial instruments referred to in point (i) are traded on a trading venue for which the CCP already provides clearing services or performs activities; and

(iii) the proposed additional clearing service or activity does not involve a payment in a new currency; *or*

(b) adds a new Union currency in a class of financial instruments already covered by the CCP's authorisation; *or*

~~(e)~~ adds one or more additional tenors to a class of financial instruments already covered by the CCP's authorisation, provided the maturity range is not significantly extended.

Ad Article 23c Joint Monitoring Mechanism

The ESRB appreciates the inclusion of the proposed tasks in Level 1 as it is important to assess risks in the clearing landscape.

It is not clear from the draft text which party the Joint Monitoring Mechanism (JMM) should contribute to or who will be responsible for the Union-wide assessment of the resilience of CCPs. In general, it may be worth clarifying the interaction between the JMM and the existing supervisory framework in the legal text.

To avoid expensive double reporting, the information already available to members of the JMM for data processing (trade reporting under Article 9 of EMIR) could be used and improved for the purpose of this proposal. Also, Article 81(3) may need to be extended to grant the JMM members access to trade repository data and to facilitate the exchange of information between its member institutions. There should be an evaluation of whether changes would also need to be made to Articles 7a and 7b in the light of this proposal.

One of the tasks of the JMM is to monitor the implementation of the requirements set out in draft Articles 7a and 7b. As these requirements pertain to certain categories of derivative contract denominated in euro as well as in the Polish zloty, this warrants the participation of both relevant central banks in their capacity as central banks of issue.

Ad Article 46 Collateral

The ESRB proposes restricting the use of uncollateralised bank guarantees to non-financial clearing members as it does not consider uncollateralised bank guarantees to be sufficiently liquid collateral compared with cash or government bonds. Furthermore, the acceptance of (un)collateralised bank guarantees might lead to significantly increased interdependency between banks and CCPs, which is already a concern in some areas (see, for example, [Analysis of Central Clearing Interdependencies \(bis.org\)](#)). The current exemption for the energy market was originally supposed to be time limited. Therefore, the ESRB is in favour of either (i) ensuring the current temporary extension does not turn into a permanent extension or (ii) applying on a permanent basis the same strict cumulative conditions regarding the acceptance of uncollateralised bank guarantees as those currently applied in the adjusted RTS[; for this latter possibility, a textual proposal for Art. 46 is provided below.].

The ESRB appreciates the inclusion of the objective to limit the procyclical effects of haircut adjustments as it had been an area of concern for the ESRB (see [Mitigating the procyclicality of margins and haircuts in derivatives markets and securities financing transactions](#)).

1. A CCP shall accept highly liquid collateral with minimal credit and market risk to cover its initial and ongoing exposure to its clearing members. A CCP may accept public guarantees or public bank or commercial bank guarantees, *including on an uncollateralised basis for non-financial counterparties*, provided they are unconditionally available upon request within the liquidation period referred to in Article 41. [...];

Annex B Secondary proposals for changes

Ad Recital 36

Clearing services can also be of systemic importance.

36) Where recognition is provided under Article 25(2b) of Regulation (EU) No 648/2012, considering that *one or more of* those CCPs' *clearing services* are of systemic importance for the Union or one or more of its Member States, the cooperation arrangements between ESMA and the relevant third-country authorities should cover the exchange of a broader range of information with increased frequency.

Ad Article 4 Clearing obligation

The ESRB supports the recalibration of the so-called “hedging exemption” for non-financial corporations.

Article 7b Information on clearing services

The ESRB suggests deleting Article 7b as most of the information required in this case is already available and deleting it would reduce the regulatory burden on authorities and market participants. Clearing members and clients subject to the clearing obligation and, therefore, subject to the active account requirement are already obliged to report their derivatives under Article 9 of EMIR to trade repositories. The only input from this article would be to impose reporting requirements on the non-EU subsidiaries of EU groups.

Nevertheless, instead of establishing a new reporting scheme, the existing EMIR reporting could be amended to address the purpose of this proposal by extending the reporting obligation to entities that are part of a group subject to consolidated supervision in the EU. For an example see the [ESRB's view regarding data quality issues and risks for financial stability](#). Duplicated reporting structures are inefficient and expensive for both competent authorities and market participants. Furthermore, the data processing infrastructure already exists and reporting processes are well defined.

If Article 7b is kept, several definitions are deemed to be necessary, given that the current draft of Article 7b(2) is unclear in many ways. For example, “type of financial instrument” could be understood as all interest rate derivatives (OTC + ETD combined) or with OTC and exchange-traded interest rate derivatives separated. It could also be understood in a more detailed categorisation, such as all interest rate futures combined or separated via maturity. Furthermore, it is not clear what is meant by “average value” and why notional amounts are not requested. Last but by no means least, “the amount of margins collected” could be understood as an average or as a margin at a peak day. Margins could cover only initial margins but could also comprise variation margins.

Ad Article 9 Reporting obligation

The ESRB welcomes the proposal to terminate the intragroup reporting exemption in order to gain more insight into intragroup transactions, specifically in energy markets. The current non-reporting of ETD and OTC intragroup derivatives creates a significant information gap in the EMIR data. EU authorities are therefore missing an important source of information which could be used for the purposes of monitoring derivatives markets, the impact of which could be exacerbated in the event of market stress. Including this data will provide a more complete overview of the derivatives markets and will increase the chance of financial stability risks being flagged at an early stage.

As the ESRB also acknowledges the potential cost to many reporting entities under EMIR, where intragroup transactions are often used for hedging purposes as part of prudential risk management, it believes it would be appropriate to consider carrying out a cost-benefit analysis as it is vital to determine the proportionality of the measure.

Ad Article 17 Opinion of the college

Overtaking the joint opinion of college members other than the CCPs' competent authority would entail referring the matter to ESMA. Since arriving at the above-mentioned joint opinion would also require the approval of ESMA's representative in the college, this would lead to a situation in which ESMA would be judging its own case. It might therefore be reasonable to argue that ESMA, like the CCP's competent authority, should be excluded from the joint opinion.

17 (4) Where all the members of the college, excluding the authorities of the Member State in which the CCP is established **and ESMA**, arrive at a joint opinion by mutual agreement, pursuant to Article 19(1), that the CCP should not be authorised, the CCP's competent authority may refer the matter to ESMA, in accordance with Article 19 of Regulation (EU) No 1095/2010.

Ad Article 24 Emergency situations

The ESRB understands the desire to coordinate emergency responses. ESMA should support NCAs by contributing advice (for example, with regard to potential second-round effects).

Furthermore, it should be clarified how ESMA's coordination role in emergency situations interplays with other EU legislation covering the emergency situations listed in paragraph 1 and which already provide for coordination and cooperation.

2. ESMA shall **coordinate advise** competent authorities, the resolution authority designated pursuant to Article 3(1) of Regulation (EU) 2021/23 and colleges on how to **build a common facilitate an effective** respond to emergency situations relating to a CCP, **if possible in a timely manner**.

Ad Article 41

Currently, the EMIR Level 1 text includes the parametrisation of models within the scope of the NCA's validation. The ESRB believes that the parametrisation should not be excluded, so the margin model can be assessed holistically.

The ESRB appreciates the inclusion of the objective to pass through CCPs' intraday variation margin as it had proposed earlier (see Chapter 4.1 in [Mitigating the procyclicality of margins and haircuts in derivatives markets and securities financing transactions](#)). The ESRB also appreciates the extension of the liquidity risk generated by the default of at least any two entities. This change was suggested by the ESRB in relation to the assessment of Recommendation 2020/06.

2. When a CCP is setting its margin requirements it shall adopt models and parameters that capture the risk characteristics of the products cleared and take into account the interval between margin collections, market liquidity and the possibility of changes occurring over the duration of the transaction. The models **and parameters** shall be validated by the competent authority and shall be subject to an opinion in accordance with Article 19 and an opinion from ESMA in accordance with Article 24a(7), first sub-paragraph, point (bc), issued in accordance with the procedure under Article 17b.

3. A CCP shall call and collect margins on an intraday basis, as a minimum when predefined thresholds are exceeded. In doing so a CCP shall consider the potential impact of its intraday margin collections and payments on the liquidity position of its participants **and on the resilience of the CCP**. A CCP shall strive to the best of its ability not to hold intraday variation margin calls after all payments due have been received.

Ad Article 49

Currently, the EMIR Level 1 text includes the parametrisation of models within the scope of the NCA's validation (see also Ad Article 41).

1. A CCP shall regularly review the models and parameters adopted to calculate its margin requirements, default fund contributions, collateral requirements and other risk control mechanisms. It shall subject the models to rigorous and frequent stress tests to assess their resilience in extreme but plausible market conditions and shall perform back tests to assess the reliability of the methodology adopted. The CCP shall obtain independent validation, it shall inform its competent authority and ESMA of the results of the tests performed and it shall obtain their validation in accordance with paragraphs 1a to 1e before adopting any significant change to the models **and parameters**.

Ad Article 81

Article 81 should be amended in order to grant data access to national macroprudential authorities. Article 81 currently grants data access to, among others, the ESRB as the macroprudential authority at the EU level but not to national macroprudential authorities. However, the latter have similar tasks at the level of their respective Member States and, therefore, have corresponding data needs. Nevertheless, data access is restricted to those Member States for which the national macroprudential authority is separate from the entities already listed in EMIR. Therefore, in order to close this regulatory gap, the scope of Article 81(3) should be extended accordingly.

The ESRB therefore suggests amending Article 81(3) as follows:

“the following point(s) is(are) inserted:

(s) the designated national macroprudential authorities entrusted with the conduct of macroprudential policy referred to in Recommendation B1 of the Recommendation of the European Systemic Risk Board (ESRB) of 22 December 2011 on the macroprudential mandate of national authorities (ESRB/2011/3).”

Ad Article 85

The ESRB proposes including the financial stability view of the ESRB in the analysis of account segregation models.

1b. By [PO: please insert the date = 1 year after the entry into force of this Regulation] ESMA shall, *in cooperation with the ESRB*, submit a report to the Commission on the possibility and feasibility of requiring the segregation of accounts across the clearing chain of non-financial and financial counterparties. The report shall be accompanied by a cost-benefit analysis;