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From:	Mr Mario DRAGHI, President of the European Central Bank
date of receipt:	21 November 2014
To:	Mr Uwe CORSEPIUS, Secretary-General of the Council of the European Union
Subject:	Opinion of The European Central Bank of 19 November 2014 on a proposal for a regulation of the European Parliament and of the Council on structural measures improving the resilience of EU credit institutions

Delegations will find attached the ECB Opinion (CON/2014/83).

EUROPEAN CENTRAL BANK

EUROSYSTEM

Mario DRAGHI
President

Frankfurt am Main, 21 November 2014

Mr Uwe Corsepius
Secretary General
Council of the European Union
Rue de la Loi 175
1048 Bruxelles

Opinion of the European Central Bank on a proposal for a regulation of the European Parliament and of the Council on structural measures improving the resilience of EU credit institutions (CON/2014/83) [COM(2014) 43 final] [2014/0020 (COD)]

Dear Mr Corsepius,

Please find attached the Opinion of the European Central Bank on the above mentioned proposal for a regulation of the European Parliament and of the Council on structural measures improving the resilience of EU credit institutions.

Yours sincerely,

Encl.

OPINION OF THE EUROPEAN CENTRAL BANK

of 19 November 2014

on a proposal for a regulation of the European Parliament and of the Council on structural measures improving the resilience of EU credit institutions

(CON/2014/83)

Introduction and legal basis

On 14 March 2014, the European Central Bank (ECB) received a request from the European Parliament for an opinion on a proposal for a regulation of the European Parliament and of the Council on structural measures improving the resilience of EU credit institutions[1] (hereinafter the 'proposed regulation'). On 27 March 2014, the ECB received a request from the Council of the European Union for an opinion on the proposed regulation.

The ECB's competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union since the proposed regulation contains provisions affecting the European System of Central Banks' contribution to the smooth conduct of policies relating to the stability of the financial system, as referred to in Article 127(5) of the Treaty. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

General observations

The ECB welcomes the proposal to address this matter by means of a regulation of the European Parliament and of the Council on structural measures improving the resilience of EU credit institution. This measure will be directly applicable in all 28 Member States[2] and will contribute towards ensuring a harmonised Union framework addressing concerns regarding banks that are 'too big to fail' and 'too interconnected to fail'. The proposed regulation seeks to reduce the potential fragmentation that could be caused by different national structural regulations in the banking sector and that could lead to inconsistencies, regulatory arbitrage and a lack of a level playing field in the single market[3].

1 COM(2014) 43 final.

2 The proposed regulation will not need any additional implementation at national level, with the exception of a few provisions. See paragraph 6 of this Opinion as regards the sanctioning framework.

3 See COM(2014) 43 final, p. 5.

The proposed regulation also specifies the detail of certain tasks within the ECB's exclusive field of competence under Council Regulation (EU) No 1024/2013[1]. The effectiveness of the Single Supervisory Mechanism (SSM) would be limited by inconsistent national legislation, thereby increasing the complexity of supervision and supervisory costs[2]. Accordingly, there is a need for harmonisation at Union level.

Specific observations

1. Scope of application of the proposed rules

1.1. The proposed regulation applies to credit institutions designated as Global Systemically Important Institutions[3] as well as other credit institutions whose balance sheets and trading activities meet certain thresholds for a period of three consecutive years[4]. The ECB understands that this is in line with the explicit focus on the limited subset of the largest and most complex credit institutions and groups that in spite of other legislative acts may still remain too-big-to-fail, too-big-to-save or too-complex-to-manage, supervise and resolve[5].

1.2. In the case of a concentration of credit institutions (for example, a merger) which would immediately create a single credit institution falling within the scope of the proposed regulation, the combined figure for the credit institutions which formed the single entity, during the period of two years prior to the concentration, should be considered when the competent authority assesses whether the thresholds for the new single entity are met[6]. Apart from such cases, national competent authorities should review on a regular basis, and in any case at least annually, whether the threshold criteria are met[7].

1 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

2 See recital 8 of the proposed regulation.

3 Under Article 131 of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

4 Pursuant to Article 3 of the proposed regulation the thresholds are: (a) total assets amounting at least to EUR 30 billion; and (b) trading activities amounting at least to EUR 70 billion or 10 per cent of its total assets.

5 See recital 13 of the proposed regulation.

6 See Amendments 7 and 18 in the Annex to this Opinion.

7 See Amendment 19 in the Annex to this Opinion.

Moreover, the Commission should assess the appropriateness of the threshold criteria in its review of the proposed regulation, e.g. to verify whether all relevant credit institutions are covered[1]. Accordingly, if there is evidence that not all credit institutions' trading assets are being appropriately captured within the definition of trading activities the Commission, when compiling the report referred to in Article 34, should be required to afford specific consideration to whether all financial assets and financial liabilities measured at fair value, or equivalent balance sheet items for non-IFRS (International Financial Report Standards) banks, should be included in the calculation of trading activities under the proposed regulation. To this end, an updated impact assessment may be useful.

2. Prohibited trading activities, in particular proprietary trading

2.1. The ECB generally supports that the proposed regulation prohibits proprietary trading, as narrowly defined in Article 5, by certain credit institutions. In particular only desks', units', divisions' or individual traders' activities specifically dedicated to taking positions for making a profit for own account, without any connection to client activity or hedging the entity's risk, would be prohibited[2]. Given that banks, in the aftermath of the financial crisis, have scaled back significantly or have altogether eliminated their desks, units and divisions specifically dedicated to proprietary trading, the ECB understands that the proposed regulation is a forward-looking preventative measure aimed at disincentivising banks from re-engaging in this activity. The cost of implementing the prohibition on proprietary trading should therefore be limited[3].

Events before and during the last financial crisis demonstrate that proprietary trading is a high-risk activity that has the potential to create systemic risk through large open positions and interconnectedness between financial institutions. Compared to other more client-based activities, for instance lending, proprietary trading is easy to scale up over a short time. In particular, when proprietary trading is carried out in banking groups which benefit from the implicit guarantee of banks' safety net (resolution funds, deposit guarantee funds, or ultimately tax payers) there may be an incentive to increase such high-risk activity at the expense of the safety net.

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1 See Amendment 23 in the Annex to this Opinion.

2 See Article 5(4) of the proposed regulation.

3 See Annex A6 of the Commission's Impact Assessment (Part 3 of 3), p. 58. Of the few banks that submitted quantitative evidence in the public consultation, none of them reported that they had any significant revenue from proprietary trading.

Furthermore, the ECB understands that proprietary trading activities do not relate or respond to the requirements of banks' clients. Indeed, within a banking group that carries out proprietary trading there may be conflicts of interest between its proprietary trading business and the service of its clients. By prohibiting, rather than merely separating proprietary trading, the proposed regulation ensures that banks will not incur direct exposure to this business or reputational risk.

For the same reason the ECB also welcomes that the proposed regulation prohibits relevant credit institutions from owning or investing in hedge funds[1]. This prohibition would limit the risk of circumventing a prohibition on proprietary trading and help mitigate the spillover effects between banks and the shadow banking system.

2.2. In order to distinguish proprietary trading from other trading activities, in particular market-making activities[2], adequate definitions have to be established. The ECB acknowledges that distinguishing proprietary trading from market making is difficult, both in theory and in practice[3]. The ECB generally supports the definition of proprietary trading as put forward in the proposed regulation[4] but suggests some amendments that aim to clarify the prohibited activities[5]. In particular, the ECB suggests clarifying that there will be a prohibition on transactions relating to proprietary trading that are undertaken in reaction to and in order to exploit market valuations and with the aim of making profit, irrespective of whether a profit is in fact realised either in the short or in the longer term. Credit institutions would undertake proprietary trading – in contrast to market-making activities – by exploiting information on true asset values with the purpose of making profits on the basis of market value variations, without any relation to client orders.

2.3. Finally in this regard, some carve-outs are implied by the Commission proposal: (a) although proprietary trading is viewed as a high-risk activity by the Commission, it would remain permissible in relation to government bonds; and (b) credit institutions that do not fall within the scope of the proposed regulation would still be able to engage in high-risk activities which could become large in scale on an aggregated level. Such carve-outs seem to indicate that the nature of the exempted trading activities should be further assessed in the upcoming review of the proposed regulation in order to determine the extent of the possible threat that they may pose to individual credit institutions or the global financial system[6].

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1 See Article 6 of the proposed regulation.

2 See paragraph 3.3 of this Opinion.

3 See the Commission's Impact Assessment, Section 5.3.1.1.

4 See Article 5(4) of the proposed regulation.

5 See Amendment 5 in the Annex to this Opinion.

6 See Amendment 23 in the Annex to this Opinion.

3. Decision on whether or not to request separation of trading activities, in particular the treatment of market-making activities

3.1. The ECB generally supports the introduction of metrics relating to the size, complexity, leverage and interconnectedness of trading activities in the supervisory assessment conducted under the proposed regulation[1]. However, these metrics do not enable an in-depth assessment of individual trading activities to be made by the supervisor. Therefore, the ECB agrees that such criteria should not provide the sole basis for commencing the procedure leading to a decision to separate. The assessment of these metrics should be complemented by the exercise of the consolidating supervisor's discretion.

The proposed regulation provides some margin of discretion for supervisors at the different stages of the separation process. In the proposed regulation the competent authority's decision to commence the procedure leading to a decision to separate particular trading activities is dependent on a determination by the competent authority that there is a threat to the financial stability of the core credit institution or to the Union financial system as a whole, taking into account the objectives of the proposed regulation[2]. If the competent authority concludes, following an assessment of the trading activities, that the activities meet the relevant metrics in terms of relative size, leverage, complexity, profitability, associated market risk and interconnectedness, it should require the separation of such activities from the core credit institution[3]. However, in the final analysis, this determination is also dependent on a further financial stability assessment by the competent authority. Moreover, even after the core credit institution has been notified of the competent authority's conclusions, it has an opportunity to demonstrate to the satisfaction of the competent authority that those trading activities do not pose a threat to the financial stability of the institution or to the Union financial system as a whole, taking into account the objectives of the proposed regulation[4].

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1 See Article 9 of the proposed regulation.

2 See Article 10(1) of the proposed regulation.

3 As suggested by recital 23 of the proposed regulation.

4 See Article 10(3) and recital 23 of the proposed regulation.

3.2. The ECB supports the proposed regulation's approach to separation. It will avoid the initiation of lengthy and costly procedures where size and complexity thresholds are met, but actual risks to the financial stability of the core institution or the wider Union are substantially mitigated by existing regulatory requirements and supervisory scrutiny. Moreover, a credit institution could potentially meet the abovementioned thresholds by engaging in certain trading activities that actually contribute to broader financial stability, e.g. market-making activities that are crucial to the financing of the economy or activities that are aimed at generating liquidity buffers in order to ensure the fulfilment of other prudential requirements. Therefore, supervisors need flexibility beyond the set thresholds in order to apply their judgement, mindful of broader regulatory interactions and consequences for the financial system as a whole. This judgement should also take into account the financial stability of individual Member States or groups of Member States in the Union, as the supervisor's assessment may have a significant impact in that Member State or group of Member States.

It would be useful to supplement these helpful provisions by introducing more clarity to the assessment of whether a core credit institution's trading activities pose a threat to financial stability and thus require separation[1]. The requirement in the proposed regulation for transparency in the decision-making process[2] is a key element in ensuring that decisions not to separate particular trading activities are well-reasoned and justified. In this respect, the supervisory decision needs to be made by reference to a set of criteria broader than that contained in the proposed regulation. Establishing a harmonised framework that facilitates more insightful supervisory judgement than that currently provided for would guide the competent authority in the exercise of its discretion and assist supervisors in detecting the need for separation. This may also provide an incentive to credit institutions to improve their governance, including their internal systems and procedures, in order to avoid compliance risk and to mitigate the cost of any future requirement for separation.

To this end, the metrics could usefully be complemented by additional qualitative information such as: (a) a cartography of trading activities, including methods for assessing the need to build up inventories in order to meet anticipated client demand; (b) the compliance framework implementing the proposed regulation; and (c) the compensation schemes for traders. The metrics could also be complemented by additional quantitative data such as inventory turnover, value-at-risk variations, 'day 1 profit and loss', limits on trading desks and geographic diversification of the trading activities[3]. This would make the process more operationally feasible for supervisors. In line with the general aim of the proposed regulation, credit institutions should provide all information required for the calculation of the metrics used by the supervisor in assessing trading activities[4].

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1 See Amendments 2 and 10 to 15 in the Annex to this Opinion.

2 See Article 10(3), third subparagraph, of the proposed regulation.

3 See Amendment 8 in the Annex to this Opinion.

4 See Amendment 9 in the Annex to this Opinion.

3.3. The ECB considers it important to sufficiently preserve the market-making activities of banks in order to maintain or increase asset and market liquidity, moderate price volatility and increase security markets' resilience to shocks. This is essential for financial stability, the implementation and smooth transmission of monetary policy, and the financing of the economy. Therefore, any regulatory treatment should avoid negative consequences for market-making activities that are not justified by significant risks.

When performing the in-depth review of market-making activities in accordance with Article 9(1) of the proposed regulation, supervisors should pay careful attention to the potential effects of these activities on financial stability. Of course, market-making activities that will remain in the core credit institution should be consistent with the purposes of the proposed regulation. In particular, such activities should not lead to the creation of a bank that is too big to fail or too interconnected to fail and should not include a proprietary trading activity, under the guise of market making, which could ultimately threaten financial stability. Therefore, it would be helpful to clarify that the competent authority may authorise the core credit institution to carry out those market making activities that do not pose a threat to the financial stability of the institution or to the whole or part of the Union financial system[1]. In view of the above, the ECB also suggests some changes in order to ensure the effective application of the conclusions of the competent authority as to trading activities which should be performed within the trading entity[2].

The ECB suggests a more accurate definition of market making[3] by adding the words 'or in reasonable anticipation of potential client activity' to the proposed definition of market making, in line with the elements contained in the definition of proprietary trading. Furthermore, the ECB recommends aligning the definition of market making across Union legislation, in accordance with Regulation (EU) No 236/2012 of the European Parliament and of the Council[4], which concerns short selling and certain aspects of credit default swaps, and Directive 2014/65/EU of the European Parliament and of the Council[5], on markets in financial instruments. A drawback in the proposed regulation is the lack of a definition for the term 'material market risk'. It is suggested that the term 'market making' is further aligned with Regulation (EU) No 236/2012.

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1 See Amendment 12 in the Annex of this Opinion

2 See Amendments 14 and 15 in the Annex to this Opinion.

3 See Amendment 6 in the Annex to this Opinion.

4 Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps (OJ L 86, 24.3.2012, p. 1).

5 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

3.4. Credit institutions, as a consequence of their activities, adopt risk management rules based on risk to the credit institution or its customers. Adequate risk management contributes to the solvency of the credit institution and to the stability of the financial system. In this respect, the proposed regulation limits the risk management obligations of the core credit institution to certain derivative instruments where those instruments are eligible for central counterparty clearing. It is therefore recommended that the Commission, in the exercise of its power to adopt delegated acts under Article 11(3) of the proposed regulation, takes into account the specificity and appropriateness of banks' risk management policies.

3.5. Finally, it should be noted that separation does not in itself solve the too-big-to-fail issue. The failure of a large, already separated trading entity may still have systemic impacts with major consequences on capital markets. With this in mind, certain banks may determine that a separate trading entity does not have sufficient scale to be economically viable. This determination may lead them to dispense with all their trading activities, which could possibly result in a concentration of these trading activities at the larger banks, making them even larger. This result is inconsistent with the aim of reducing the too-big-to-fail problem. Alternatively, those trading activities may be shifted to the shadow banking sector. Such developments would require close monitoring of any unintended consequences and, if they become significant, specific measures to address them may be warranted.

4. Derogation clause

Article 21 of the proposed regulation provides that the Commission, at the request of a Member State, can authorise a derogation from the separation requirements for credit institutions that are covered by national legislation having an 'equivalent effect' to the provisions of the proposed regulation.

The preamble to the proposed regulation properly observes that inconsistent national legislation would have the effect of limiting the effectiveness of the SSM because the ECB would have to apply a set of different and inconsistent legislation to credit institutions under its supervision, thereby increasing supervisory costs and complexity[1]. This concern is fully shared by the ECB and such considerations weigh against the inclusion of a derogation from the general regime[2]. The derogation is not compatible with the aim of creating a level playing field and may create a precedent for future derogations in other types of Union legislation. This would impair single market integration and obstruct the very objectives sought to be achieved by the proposed regulation[3]. Moreover, the broad scope of the derogation clause may not be consistent with the legal form of a regulation and with the legal basis of the proposed regulation under Article 114 of the Treaty.

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1 As suggested by recital 8 of the proposed regulation.

2 See Amendments 1 and 17 in the Annex to this Opinion.

3 See, for instance, recital 7 and Article 1 of the proposed regulation.

5. Cooperation between the competent authority and the resolution authority

The structural measures in the proposed regulation are intended to prepare the ground for the resolution and recovery of financial institutions, with the two processes being intrinsically linked. Accordingly, the proposed regulation provides for cooperation between competent authorities and relevant resolution authorities at various stages of a competent authority's assessment and implementation of structural measures[1]. The competent authority with the power to require separation must notify the relevant resolution authorities before taking a decision to separate a trading activity. The assessment of the need for separation must also take into account any ongoing or pre-existing resolvability assessment. Finally, the separation measures have to be consistent with measures imposed in the context of the supervisory review and evaluation process and any measures imposed in the context of a resolvability assessment.

Removing impediments to resolvability is essential to developing an operational resolution plan for a credit institution or group. As the ECB has previously observed, while consultation with the supervisor is sufficient regarding the resolvability assessment itself, measures to remove impediments to resolvability should be jointly determined and implemented in cooperation with the supervisor[2]. The adoption of appropriate measures to increase the resolvability of a credit institution or group, such as changes to business practices, structure or organisation, must duly take into account the effect of such measures on the soundness and stability of the entity's ongoing business. This is a relevant consideration for the competent authority. Enhancing the resolvability of banks while preserving critical financial services in the economy as a whole is also a key aim of the supervisory process to which the measures in the proposed regulation should seek to give effect. Therefore, competent authorities and resolution authorities will have to work in close cooperation in both of these processes.

[1] Article 19 of the proposed regulation.

[2] Opinion CON/2013/76, paragraph 2.5. All opinions are published on the ECB's website at www.ecb.europa.eu.

One of the objectives of the proposed regulation is to facilitate the orderly resolution and recovery of a group of entities[1]. However the objectives of the proposed regulation in providing for the imposition of structural measures are not identical to the objectives of resolvability assessment. The range of structural measures available under the proposed regulation is therefore different to the range of measures aimed at removing impediments to resolvability under the recently adopted Union resolution framework[2]. Accordingly, it is the ECB's understanding that even where the resolvability assessment in the context of resolution planning has not identified any substantive impediments to resolvability, the competent authority may nevertheless identify the need for structural measures under the proposed regulation which would facilitate the recovery and resolution of complex institutions[3]. It must be clarified in this regard that while any ongoing or pre-existing resolvability assessment should be taken into account by the competent authority, the conclusions of such assessment should in no way prejudice the competent authority in the exercise of its powers under the proposed regulation, in particular where the competent authority determines that the criteria for the imposition of separation are met[4].

6. Sanctioning powers

While the proposed regulation is directly applicable across the Union, some of its provisions require further implementation by Member States[5]. As the ECB is considered a competent authority for the exclusive purpose of carrying out the tasks conferred on it by, inter alia, Article 4(1) of Regulation (EU) No 1024/2013, and as the tasks specified in the proposed regulation correspond to the tasks already conferred on the ECB under Article 4(1)(i) of Regulation (EU) No 1024/2013, the ECB should also have the power to exercise appropriate sanctioning powers in accordance with the framework laid down in Article 18 of Regulation (EU) No 1024/2013. This should be clarified in the preamble to the proposed regulation and, for the avoidance of doubt, in Article 28[6].

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1 Article 1(g) of the proposed regulation.

2 See in particular Articles 17 and 18 of the Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190) and Article 10 of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, p. 1).

3 See also the Commission's Impact Assessment, Section 5.3.1.1.

4 See Amendment 16 in the Annex to this Opinion.

5 The case law of the Court of Justice of the European Union establishes that some of the provisions of a regulation may necessitate, for their implementation, the adoption of measures of application either by the Member States or by the Union legislature itself. See to that effect paragraphs 32 and 33 of Case C-367/09 *SGS Belgium and Others* [2010] ECR I-10761.

6 See Amendments 4 and 21 in the Annex to this Opinion.

The powers conferred on the ECB do not include the power to sanction natural persons or impose non-pecuniary sanctions. It is also necessary to align the level of pecuniary sanctions in the proposed regulation with Directive 2013/36/EU of the European Parliament and of the Council[1]. Moreover, the power to suspend an authorisation is a particularly new measure envisaged by the proposed regulation[2]. The ECB suggests removing this sanction from the proposed regulation in order to avoid legal difficulties.

Finally, regarding the use of the term 'profits gained or losses avoided' in the proposed regulation, in practice it will be very difficult to prove exactly what these amounts should be. The proposed sanction in Article 28(4)(b) of the proposed regulation takes into account the profits gained or the losses avoided, indicating their disgorgement as one of the possible sanctions. In Article 29(1)(d), the 'importance' of the profits gained or losses avoided is included among the circumstances that authorities have to consider in determining the type and level of sanctions. The ECB suggests replacing that term, in both cases, with the competent authorities' estimation of the profits and the losses that have been gained or avoided as a consequence of the breach[3].

Done at Frankfurt am Main, 19 November 2014.

The President of the ECB

Mario DRAGHI

1 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

2 See Article 28 of the proposed regulation.

3 See Amendment 22 in the Annex to this Opinion.

Drafting proposals

Text proposed by the Commission	Amendments proposed by the ECB[1]
Amendment 1 Recital 10	
'(10) Consistent with the goals of contributing to the functioning of the internal market, it should be possible to grant a derogation for a credit institution from the provisions on separation of certain trading activities where a Member State has adopted national primary legislation prior to 29 January 2014 (including secondary legislation subsequently adopted) prohibiting credit institutions, which take deposits from individuals and Small and Medium sized Enterprises (SMEs) from dealing in investments as a principal and holding trading assets. The Member State should therefore be entitled to make a request to the Commission to grant a derogation from the provisions on separation of certain trading activities for a credit institution that is subject to the national legislation compatible with those provisions. This would allow Member States that already have primary legislation in place, the effects of which are equivalent to and consistent with this Regulation, to avoid alignment of existing, effective provisions. To ensure that the impact of that national legislation, as well as of subsequent implementing measures, does not jeopardise the aim or functioning of the internal market, the aim of that national legislation and related supervisory and enforcement arrangements must be able to ensure that credit institutions that take eligible deposits	'~~(10) Consistent with the goals of contributing to the functioning of the internal market, it should be possible to grant a derogation for a credit institution from the provisions on separation of certain trading activities where a Member State has adopted national primary legislation prior to 29 January 2014 (including secondary legislation subsequently adopted) prohibiting credit institutions, which take deposits from individuals and Small and Medium sized Enterprises (SMEs) from dealing in investments as a principal and holding trading assets. The Member State should therefore be entitled to make a request to the Commission to grant a derogation from the provisions on separation of certain trading activities for a credit institution that is subject to the national legislation compatible with those provisions. This would allow Member States that already have primary legislation in place, the effects of which are equivalent to and consistent with this Regulation, to avoid alignment of existing, effective provisions. To ensure that the impact of that national legislation, as well as of subsequent implementing measures, does not jeopardise the aim or functioning of the internal market, the aim of that national legislation and related supervisory and enforcement arrangements must be able to ensure that credit institutions that take eligible deposits~~

[1] Bold in the body of the text indicates where the ECB proposes inserting new text. Strikethrough in the body of the text indicates where the ECB proposes deleting text.

Text proposed by the Commission	Amendments proposed by the ECB[1]
from individuals and from SMEs comply with legally binding requirements that are equivalent and compatible with the provisions provided in this Regulation. The competent authority supervising the credit institution subject to the national legislation in question should be responsible for providing an opinion that should accompany the request for the derogation.'	~~from individuals and from SMEs comply with legally binding requirements that are equivalent and compatible with the provisions provided in this Regulation. The competent authority supervising the credit institution subject to the national legislation in question should be responsible for providing an opinion that should accompany the request for the derogation.~~'
Explanation *Such a derogation is incompatible with the goal of creating a level playing field. Furthermore, such a provision may create a precedent for future derogation clauses in other legislative areas, thus impairing single market integration in general.*	
Amendment 2 Recital 23	
'(23) If, when assessing the trading activities, the competent authority concludes that they exceed certain metrics in terms of relative size, leverage, complexity, profitability, associated market risk, as well as interconnectedness, it should require their separation from the core credit institution unless the core credit institution can demonstrate to the satisfaction of the competent authority that those trading activities do not pose a threat to the financial stability of the core credit institution or to the Union financial system as a whole, taking into account the objectives set out in this Regulation.'	'(23) If, when assessing the trading activities, the competent authority concludes that they exceed certain metrics in terms of relative size, leverage, complexity, profitability, associated market risk, as well as interconnectedness, **and further deems that there is a threat to the financial stability of the core credit institution or to the whole or part of the Union financial system, taking into account the objectives of this Regulation,** it should require their separation from the core credit institution unless the core credit institution can demonstrate to the satisfaction of the competent authority that those trading activities do not pose a threat to the financial stability of the core credit institution or to the Union financial system as a whole, taking into account the objectives set out in this Regulation.'
Explanation	

Text proposed by the Commission	Amendments proposed by the ECB[1]
The suggested wording aims to ensure consistency between recital 23 and Article 10, which provides the competent authority with discretion when reviewing trading activities and deciding whether to commence a procedure for separation.	
Amendment 3 Recital 29	
'Irrespective of separation, the core credit institution should still be able to manage its own risk. Certain trading activities should therefore be allowed to the extent that they are aimed at the prudent management of the core credit institution's capital, liquidity and funding and do not pose concerns to its financial stability. Similarly, the core credit institutions needs to be able to provide certain necessary risk management services to its clients. However, that should be done without exposing the core credit institution to unnecessary risk and without posing concerns to its financial stability. Hedging activities eligible for the purpose of prudently managing own risk and for the provision of risk management services to clients can, but does not have to, qualify as hedge accounting under the International Financial Reporting Standards.'	'Irrespective of separation, the core credit institution should still be able to manage its own risk. Certain trading activities should therefore be allowed to the extent that they are aimed at the prudent management of the core credit institution's capital, liquidity and funding and do not pose concerns to its financial stability. Similarly, the core credit institution~~s~~ needs to be able to provide certain necessary risk management services to its clients. However, that should be done without exposing the core credit institution to unnecessary risk and without posing concerns to its financial stability. Hedging activities eligible for the purpose of prudently managing own risk and for the provision of risk management services to clients can, but do~~es~~ not have to, qualify as hedge accounting under the International Financial Reporting Standards. **Irrespective of a decision to separate, the competent authority shall have the power conferred by Article 104(1)(a) of Directive 2013/36/EU to impose an own funds requirement when the volume of risks and trading activities exceeds certain levels in order to incentivise an institution not to take unnecessary risks for its financial stability or the financial stability of the Union in whole or in part.'**
Explanation	

Text proposed by the Commission	Amendments proposed by the ECB[1]
In order to ensure that financial stability risks due to trading activities are limited, the competent authority should have the power to impose a capital surcharge when the volume of risk and activities exceeds certain levels. Such a surcharge would help to dissuade banks from engaging in excessive trading activities.	
Amendment 4 Recital 37a (new)	
No text	**'(37a) For the purpose of carrying out its exclusive tasks, including the duties specified in this Regulation, the ECB has the sanctioning powers specified in Article 18 of Regulation (EU) No 1024/2013.'**
Explanation *It should be clarified that, following the implementation of Article 28 of the proposed regulation by Member States, the ECB will have, for the purpose of carrying out its tasks, the sanctioning powers as specified in particular in Article 18 of Regulation (EU) No 1024/2013. See also paragraph 6 of the opinion.*	
Amendment 5 Article 5 Definitions	
'4. "proprietary trading" means using own capital or borrowed money to take positions in any type of transaction to purchase, sell or otherwise acquire or dispose of any financial instrument or commodities for the sole purpose of making a profit for own account, and without any connection to actual or anticipated client activity or for the purpose of hedging the entity's risk as result of actual or anticipated client activity, through the use of desks, units, divisions or individual traders specifically dedicated to such position taking and profit making,	'4. "proprietary trading" means using own capital or borrowed money to take positions**, in reaction to and with the motivation of exploiting actual or expected movements in market valuations,** in any type of transaction to purchase, sell or otherwise acquire or dispose of any financial instrument or commodities for the sole purpose of making a profit for own account, and without any connection to actual or anticipated client activity or for the purpose of hedging the entity's risk as **a** result of actual or anticipated client activity, through the use

Text proposed by the Commission	Amendments proposed by the ECB[1]
including through dedicated web-based proprietary trading platforms;'	of desks, units, divisions or individual traders specifically dedicated to such position taking and profit making, including through dedicated web-based proprietary trading platforms**. This definition includes any such transaction undertaken with the aim of making profit, irrespective of whether such profit would be realised in the short term or in the longer term, or is in fact realised;**'
Explanation *Proprietary trading is – in contrast to other trading activities such as for example market making activities – undertaken with the purpose of making profits on the basis of actual or expected movements in market value variations to which the proprietary traders react and upon which they speculate. The proposed change will allow the exclusion from the definition of long-term non-speculative investments in share capital (including shareholdings in other financial institutions, such as banks and insurance companies).*	
Amendment 6 Article 5 Definitions	
'12. "market making" means a financial institution's commitment to provide market liquidity on a regular and on-going basis, by posting two-way quotes with regard to a certain financial instrument, or as part of its usual business, by fulfilling orders initiated by clients or in response to clients' requests to trade, but in both cases without being exposed to material market risk;'	'12. "market making" means a financial institution's commitment to provide market liquidity on a regular and on-going basis, by posting two-way quotes with regard to a certain financial instrument, or as part of its usual business, by fulfilling orders initiated by clients or in response to clients' requests to trade, **or in reasonable anticipation of potential client activity, and by hedging positions arising from the fulfilment of these tasks** ~~but in both cases without being exposed to material market risk~~;'
Explanation *The ECB understands that, in contrast to proprietary trading, market making is a client-driven activity and therefore related to standard bank activities. Market making is sometimes also carried out in*	

Text proposed by the Commission	Amendments proposed by the ECB[1]
anticipation of client business. Therefore, it is suggested to include the words 'reasonable anticipation of potential client activity' within the definition of market making. This also provides a degree of symmetry with regard to the proposed definition of proprietary trading. *Furthermore, in contrast to brokers, a market maker absorbs supply and demand imbalances at any point in time through its own inventory, thereby placing its own capital at risk. It should therefore be possible for the market maker to hedge its positions arising from the fulfilment of its tasks as market maker. Given that the concept of 'material' market risk is not defined, and moreover in order to align as much as possible the definitions used in related Union regulations, it is suggested that the concept of 'hedging positions arising from the fulfilment of these tasks' is used, in line with Regulation (EU) No 236/2012.*	
Amendment 7 Article 5 Definitions	
No text	**'23. "concentration" means a concentration as determined in accordance with Council Regulation (EC) No 139/2004;'**
Explanation *See paragraph 1.2 of this Opinion.*	
Amendment 8 Article 9(2) Duty to review activities	
'2. When performing the assessment referred to in paragraph 1, the competent authority shall use the following metrics: (a) the relative size of trading assets, as measured by trading assets divided by total assets; (b) the leverage of trading assets as measured by trading assets divided by core Tier 1 capital; (c) the relative importance of counterparty credit	'2. When performing the assessment referred to in paragraph 1, the competent authority shall use the following metrics: (a) the relative size of trading assets, as measured by trading assets divided by total assets; (b) the leverage of trading assets as measured by trading assets divided by core Tier 1 capital; (c) the relative importance of counterparty credit

Text proposed by the Commission	Amendments proposed by the ECB[1]
risk, as measured by the fair value of derivatives divided by total trading assets; (d) the relative complexity of trading derivatives, as measured by level 2 and 3 trading derivatives assets divided by trading derivatives and by trading assets; (e) the relative profitability of trading income, as measured by trading income divided by total net income; (f) the relative importance of market risk, as measured by computing the difference between trading assets and liabilities in absolute value and dividing it by the simple average between trading assets and trading liabilities; (g) the interconnectedness, as measured by the methodology referred to in Article 131(18) of Directive 2013/36/EU; (h) credit and liquidity risk arising from commitments and guarantees provided by the core credit institution.'	risk, as measured by the fair value of derivatives divided by total trading assets; (d) the relative complexity of trading derivatives, as measured by level 2 and 3 trading derivatives assets divided by trading derivatives and by trading assets; (e) the relative profitability of trading income, as measured by trading income divided by total net income; (f) the relative importance of market risk, as measured by computing the difference between trading assets and liabilities in absolute value and dividing it by the simple average between trading assets and trading liabilities; (g) the interconnectedness, as measured by the methodology referred to in Article 131(18) of Directive 2013/36/EU; (h) credit and liquidity risk arising from commitments and guarantees provided by the core credit institution~~.~~**;** **(i) the cartography of trading activities, including methods for assessing the need to build up inventories in order to meet anticipated client demand;** **(j) the compliance framework implementing this regulation;** **(k) the compensation schemes for traders;** **(l) additional quantitative data such as inventory turnover, value-at-risk variations, 'day 1 profit and loss', limits on trading desks and geographic diversification of the trading activities.**'
Explanation *See paragraph 3.2 of this Opinion.*	

Text proposed by the Commission	Amendments proposed by the ECB[1]
Amendment 9 Article 9(2a) (new) Duty to review activities	
No text	**'2a. The competent authority may require all quantitative and qualitative information it deems relevant for the assessment of trading activities under paragraph 1.'**
Explanation *See paragraph 3.2 of this Opinion.*	
Amendment 10 Article 10(1) Power of competent authority to require that a core credit institution does not carry out certain activities	
'1. Where the competent authority concludes that, following the assessment referred to in Article 9(1), the limits and conditions linked to the metrics referred to in points (a) to (h) of Article 9(2) and specified in the delegated act referred to in paragraph 5 are met, and it therefore deems that there is a threat to the financial stability of the core credit institution or to the Union financial system as a whole, taking into account the objectives referred to in Article 1, it shall, no later than two months after the finalisation of that assessment, start the procedure leading to a decision as referred to in the second subparagraph of paragraph 3.'	'1. Where the competent authority concludes that, following the assessment referred to in Article 9(1), the limits and conditions linked to the metrics referred to in points (a) to (h) of Article 9(2) and specified in the delegated act referred to in paragraph 5 are met, and it ~~therefore~~ deems that there is a threat to the financial stability of the core credit institution or to the **whole or part of the** Union financial system~~ as a whole~~, taking into account the objectives referred to in Article 1, it shall, no later than two months after the finalisation of that assessment, start the procedure leading to a decision as referred to in the second subparagraph of paragraph 3.'
Explanation *The proposed technical amendment aims to eliminate any residual ambiguity resulting from the use of the word 'therefore', given the fact that competent authorities shall in any case assess the threat to financial stability even when the metric thresholds are met. In addition, the evidence from the additional indicators*	

Text proposed by the Commission	Amendments proposed by the ECB[1]
should also inform the decision of the competent authority (see further paragraph 3.2. of this Opinion).	
Amendment 11 Article 10(2) Power of competent authority to require that a core credit institution does not carry out certain activities	
'2.Where the limits and conditions referred to in paragraph 1 are not met, the competent authority may still start the procedure leading to a decision as referred to in the third subparagraph of paragraph 3 where it concludes, following the assessment referred to in Article 9(1), that any trading activity, with the exception of trading in derivatives other than those permitted under Article 11 and 12, carried out by the core credit institution, poses a threat to the financial stability of the core credit institution or to the Union financial system as a whole taking into account the objectives referred to in Article 1.'	'2.Where the limits and conditions referred to in paragraph 1 are not met, the competent authority may still start the procedure leading to a decision as referred to in the third subparagraph of paragraph 3 where it concludes, following the assessment referred to in Article 9(1), that any trading activity, with the exception of trading in derivatives other than those permitted under Article 11 and 12, carried out by the core credit institution, poses a threat to the financial stability of the core credit institution or to the **whole or to part of the** Union financial system ~~**as a whole**~~ taking into account the objectives referred to in Article 1.'
Explanation *It is proposed that the competent authority's judgement is based on a threat to the financial stability of the whole or part of the Union.*	
Amendment 12 Article 10(3) Power of competent authority to require that a core credit institution does not carry out certain activities	
'3. The competent authority shall notify its conclusions referred to in paragraphs 1 or 2 to the core credit institution and provide the core credit institution with the opportunity to submit written comments within two months from the date of the notification.	'3. The competent authority shall notify its conclusions referred to in paragraphs 1 or 2 to the core credit institution and provide the core credit institution with the opportunity to submit written comments within two months from the date of the notification.

Text proposed by the Commission	Amendments proposed by the ECB[1]
Unless the core credit institution demonstrates, within the time limit referred to in the first subparagraph, to the satisfaction of the competent authority, that the reasons leading to the conclusions are not justified, the competent authority shall adopt a decision addressing the core credit institution and requiring it not to carry out the trading activities specified in those conclusions. The competent authority shall state the reasons for its decision and publicly disclose it. For purpose of paragraph 1, where the competent authority decides to allow the core credit institution to carry out those trading activities it shall also state the reasons for that decision and publicly disclose it. For purpose of paragraph 2, where the competent authority decides to allow the core credit institution to carry out trading activities the competent authority shall adopt a decision addressed to the core credit institution to that effect. Prior to adopting any decision referred to in this paragraph the competent authority shall consult the EBA on the reasons underlying its envisaged decision and on the potential impact of such a decision on the financial stability of the Union and the functioning of the internal market. The competent authority shall also notify the EBA of its final decision. The competent authority shall adopt its final decision within two months from having received the written comments referred to in the first subparagraph.'	Unless the core credit institution demonstrates, within the time limit referred to in the first subparagraph, to the satisfaction of the competent authority, that **the relevant trading activities do not pose a threat to the financial stability of the core credit institution or to the whole or part of the Union financial system** ~~reasons leading to the conclusions are not justified~~, the competent authority shall adopt a decision addressing the core credit institution and requiring it not to carry out the trading activities specified in those conclusions. The competent authority shall state the reasons for its decision and publicly disclose it. For **the** purpose of paragraph 1, where the competent authority decides to allow the core credit institution to carry out those trading activities it shall also state the reasons for that decision and publicly disclose it. For **the** purpose of paragraph 2, where the competent authority decides to allow the core credit institution to carry out trading activities the competent authority shall adopt a decision addressed to the core credit institution to that effect. **The competent authority may in particular authorise the core credit institution to carry out those market making activities which do not pose a threat to the financial stability of the core credit institution or to the whole or part of the Union financial system.** Prior to adopting any decision referred to in this paragraph the competent authority shall consult the EBA on the reasons underlying its envisaged decision and on the potential impact of such a decision on the financial stability of the Union and

Text proposed by the Commission	Amendments proposed by the ECB[1]
	the functioning of the internal market. The competent authority shall also notify the EBA of its final decision. The competent authority shall adopt its final decision within two months from having received the written comments referred to in the first subparagraph.'
Explanation *For reasons of legal certainty and consistency, it is suggested that the wording of this provision should reflect the wording of recital 23 of the proposed regulation.* *Market making activities that will continue to be carried out in the core credit institution should be consistent with the purposes of the proposed regulation. In particular, such activities should not lead to the creation of a bank that is too-big-to-fail or too-interconnected-to-fail and should not include a proprietary trading activity, under the guise of market-making, which could ultimately threaten financial stability. Therefore, it would be helpful to clarify that the competent authority may authorise the core credit institution to carry out those market making activities that do not pose a threat to the financial stability of the institution or to the whole or part of the Union financial system (see further paragraph 3.2 of this Opinion).*	
Amendment 13 Article 10(5) Power of competent authority to require that a core credit institution does not carry out certain activities	
The Commission shall, [*OP insert the correct date* by 6 months of publication of this Regulation] adopt delegated acts in accordance with Article 35 to: […] (b) specify which type of securitisation is not considered to pose a threat to the financial stability of the core credit institution or to the Union financial system as a whole with regard to each of the following aspects: […]	The Commission shall, [*OP insert the correct date* by 6 months of publication of this Regulation] adopt delegated acts in accordance with Article 35 to: […] (b) specify which type of securitisation is not considered to pose a threat to the financial stability of the core credit institution or to the **whole or part of the** Union financial system ~~as a whole~~ with regard to each of the following aspects: […]

Text proposed by the Commission	Amendments proposed by the ECB[1]
Explanation *It is proposed that the Commission's delegated act is based on the consideration that there is no threat to the financial stability of the whole or part of the Union.*	
Amendment 14 Article 11 Prudent management of own risk	
1. A core credit institution that has been subject to a decision referred to in Article 10(3) may carry out trading activities to the extent that the purpose is limited to only prudently managing its capital, liquidity and funding. As part of the prudent management of its capital, liquidity and funding, a core credit institution may only use interest rate derivatives, foreign exchange derivatives and credit derivatives eligible for central counterparty clearing to hedge its overall balance sheet risk. The core credit institution shall demonstrate to the competent supervisor that the hedging activity is designed to reduce, and demonstrably reduces or significantly mitigates, specific, identifiable risks of individual or aggregated positions of the core credit institution. […]	1. **Without prejudice to the decision of the competent authority referred to in Article 10(3)**, a core credit institution ~~that has been subject to a decision referred to in Article 10(3)~~ may **also** carry out trading activities to the extent that the purpose is limited to only prudently managing its capital, liquidity and funding. As part of the prudent management of its capital, liquidity and funding, a core credit institution may only use interest rate derivatives, foreign exchange derivatives and credit derivatives eligible for central counterparty clearing to hedge its overall balance sheet risk. The core credit institution shall demonstrate to the competent supervisor that the hedging activity is designed to reduce, and demonstrably reduces or significantly mitigates, specific, identifiable risks of individual or aggregated positions of the core credit institution. […]
Explanation *The suggested change aims to clarify that the separation decision will identify all the activities which the core credit institution may continue to perform.*	
Amendment 15	

Text proposed by the Commission	Amendments proposed by the ECB[1]
Article 12 Provisions of risk management services to customers	
1. A core credit institution that has been subject to a decision referred to in Article 10(3) may sell interest rate derivatives, foreign exchange derivatives, credit derivatives, emission allowances derivatives and commodity derivatives eligible for central counterparty clearing and emission allowances to its non-financial clients, to financial entities referred to in the second and third indents of point (19) of Article 5, to insurance undertakings and to institutions providing for occupational retirement benefits when the following conditions have been satisfied: (a) the sole purpose of the sale is to hedge interest rate risk, foreign exchange risk, credit risk, commodity risk or emissions allowance risk; (b) the core credit institution's own funds requirements for position risk arising from the derivatives and emission allowances does not exceed a proportion of its total risk capital requirement to be specified in a Commission delegated act in accordance with paragraph 2. When the requirement in point (b) is not fulfilled, the derivatives and emission allowances may neither be sold by the core credit institution nor be recorded on its balance sheet. […]	1. **Without prejudice to the decision of the competent authority referred to in Article 10(3)**, ~~A~~a core credit institution ~~that has been subject to a decision referred to in Article 10(3)~~ may **also** sell interest rate derivatives, foreign exchange derivatives, credit derivatives, emission allowances derivatives and commodity derivatives eligible for central counterparty clearing and emission allowances to its non-financial clients, to financial entities referred to in the second and third indents of point (19) of Article 5, to insurance undertakings and to institutions providing for occupational retirement benefits when the following conditions have been satisfied: (a) the sole purpose of the sale is to hedge interest rate risk, foreign exchange risk, credit risk, commodity risk or emissions allowance risk; (b) the core credit institution's own funds requirements for position risk arising from the derivatives and emission allowances does not exceed a proportion of its total risk capital requirement to be specified in a Commission delegated act in accordance with paragraph 2. When the requirement in point (b) is not fulfilled, the derivatives and emission allowances may neither be sold by the core credit institution nor be recorded on its balance sheet. […]
Explanation *The suggested change aims to clarify that the separation decision will identify all the activities which the core credit institution may continue to perform.*	

Text proposed by the Commission	Amendments proposed by the ECB[1]
Amendment 16 Article 19 Cooperation between competent authorities and relevant resolution authorities	
'2. When carrying out the assessment in accordance with Article 9 and when requiring the core credit institution not to carry out certain activities in accordance with Article 10, the competent authority shall take into account any ongoing or pre-existing resolvability assessments carried out by any relevant resolution authority pursuant to Article 13 and 13(a) of Directive [BRRD]. 3. The competent authority shall cooperate with the relevant resolution authority and exchange relevant information that is deemed necessary in carrying out its duties. 4. The competent authority shall ensure that measures imposed pursuant to this Chapter, are consistent with the measures imposed pursuant to Article 13(b) of Regulation (EU) No 1024/2013, Article 8(9) of Regulation (EU) No [SRM], Article 13 and 13(a), Articles 14 and 15 of Directive [BRRD] and Article 104 of Directive 2013/36/EU.'	'2. When carrying out the assessment in accordance with Article 9 and when requiring the core credit institution not to carry out certain activities in accordance with Article 10, the competent authority shall take into account any ongoing or pre-existing resolvability assessments carried out by any relevant resolution authority pursuant to Article**s** 13 and 13(a) of Directive [BRRD]. **A finding by the relevant resolution authority that there are no substantive impediments to resolvability shall not in itself be deemed sufficient indication that the conclusions referred to in Article 10(3) are not justified.** 3. The competent authority shall cooperate with the relevant resolution authority and exchange relevant information that is deemed necessary in carrying out its duties, **including the list of institutions that fall within the scope of this regulation.** 4. The competent authority shall ensure measures imposed pursuant to this Chapter, are **compatible** ~~consistent~~ with the measures imposed pursuant to Article 13(b) of Regulation (EU) No 1024/2013, Article 8(9) of Regulation (EU) No [SRM], Article**s** 13 and 13(a), Articles 14 and 15 of Directive [BRRD] and Article 104 of Directive 2013/36/EU.'
Explanation *See paragraph 5 of this Opinion. The cooperation between competent authorities and relevant resolution authorities should ensure that relevant resolution authorities are informed of the list of institutions that might be subject to a decision to separate under the proposed regulation.*	

Text proposed by the Commission	Amendments proposed by the ECB[1]
Amendment 17 Article 21 Derogation from the requirements of Chapter III	
‘1. At the request of a Member State, the Commission may grant a derogation from the requirements of this Chapter to a credit institution taking deposits from individuals and SMEs that are subject to national primary legislation adopted before 29 January 2014 when the national legislation complies with the following requirements:	~~‘1. At the request of a Member State, the Commission may grant a derogation from the requirements of this Chapter to a credit institution taking deposits from individuals and SMEs that are subject to national primary legislation adopted before 29 January 2014 when the national legislation complies with the following requirements:~~
(a) it aims at preventing financial stress or failure and systemic risk referred to in Article 1;	~~(a) it aims at preventing financial stress or failure and systemic risk referred to in Article 1;~~
(b) it prevents credit institutions taking eligible deposits from individuals and SMEs from engaging in the regulated activity of dealing in investments as principal and holding trading assets; however, the national legislation may provide for limited exceptions to allow the credit institution taking deposits from individuals and SMEs to undertake risk-mitigating activities for the purpose of prudently managing its capital, liquidity and funding and to provide limited risk management services to customers;	~~(b) it prevents credit institutions taking eligible deposits from individuals and SMEs from engaging in the regulated activity of dealing in investments as principal and holding trading assets; however, the national legislation may provide for limited exceptions to allow the credit institution taking deposits from individuals and SMEs to undertake risk-mitigating activities for the purpose of prudently managing its capital, liquidity and funding and to provide limited risk management services to customers;~~
(c) if the credit institution taking eligible deposits from individuals and SMEs belongs to a group, it ensures that the credit institution is legally separated from group entities that engage in the regulated activity of dealing in investments as a principal or hold trading assets, and the national legislation specifies the following:	~~(c) if the credit institution taking eligible deposits from individuals and SMEs belongs to a group, it ensures that the credit institution is legally separated from group entities that engage in the regulated activity of dealing in investments as a principal or hold trading assets, and the national legislation specifies the following:~~
(i) the credit institution taking eligible deposits	~~(i) the credit institution taking eligible deposits~~

Text proposed by the Commission	Amendments proposed by the ECB[1]
from individuals and SMEs is able to make decisions independently of other group entities; (ii) the credit institution taking eligible deposits from individuals and SMEs has a management body that is independent of other group entities and independent of the credit institution itself; (iii) the credit institution taking eligible deposits from individuals and SMEs is subject to capital and liquidity requirements in its own right; (iv) the credit institution taking eligible deposits from individuals and SMEs may not enter into contracts or transactions with other group entities other than on terms similar to those referred to in Article 13(7). 2. A Member State wishing to obtain a derogation for a credit institution subject to the national legislation in question, shall send a request for derogation, accompanied by a positive opinion issued by the competent authority supervising the credit institution that is subject to the request for derogation, to the Commission. That request shall provide all the necessary information for the appraisal of the national legislation and specify the credit institutions the derogation is applied for. Where the Commission considers that it does not have all the necessary information, it shall contact the Member State concerned within two months of receipt of the request and specify what additional information is required. Once the Commission has all the information it considers necessary for appraisal of the request for derogation, it shall within one month notify the requesting Member State that it is satisfied with the information.	~~from individuals and SMEs is able to make decisions independently of other group entities;~~ ~~(ii) the credit institution taking eligible deposits from individuals and SMEs has a management body that is independent of other group entities and independent of the credit institution itself;~~ ~~(iii) the credit institution taking eligible deposits from individuals and SMEs is subject to capital and liquidity requirements in its own right;~~ ~~(iv) the credit institution taking eligible deposits from individuals and SMEs may not enter into contracts or transactions with other group entities~~ ~~other than on terms similar to those referred to in Article 13(7).~~ ~~2. A Member State wishing to obtain a derogation for a credit institution subject to the national legislation in question, shall send a request for derogation, accompanied by a positive opinion issued by the competent authority supervising the credit institution that is subject to the request for derogation, to the Commission. That request shall provide all the necessary information for the appraisal of the national legislation and specify the credit institutions the derogation is applied for. Where the Commission considers that it does not have all the necessary information, it shall contact the Member State concerned within two months of receipt of the request and specify what additional information is required.~~ ~~Once the Commission has all the information it considers necessary for appraisal of the request for derogation, it shall within one month notify the requesting Member State that it is satisfied with the information.~~

Text proposed by the Commission	Amendments proposed by the ECB[1]
Within five months of issuing the notification referred to in the second subparagraph, the Commission shall, after having consulted the EBA on the reasons underlying its envisaged decision and on the potential impact of such a decision on the financial stability of the Union and the functioning of the internal market, adopt an implementing decision declaring the national legislation not incompatible with this Chapter and granting the derogation to the credit institutions specified in the request referred to in paragraph 1. Where the Commission intends to declare the national legislation incompatible and to not grant the derogation it shall set out its objections in detail and provide the requesting Member State with the opportunity to submit written comments within one month from the date of notification of the Commission objections. The Commission shall within three months from the end of the time limit for submission adopt an implementing decision granting or rejecting the derogation.	~~Within five months of issuing the notification referred to in the second subparagraph, the Commission shall, after having consulted the EBA on the reasons underlying its envisaged decision and on the potential impact of such a decision on the financial stability of the Union and the functioning of the internal market, adopt an implementing decision declaring the national legislation not incompatible with this Chapter and granting the derogation to the credit institutions specified in the request referred to in paragraph 1. Where the Commission intends to declare the national legislation incompatible and to not grant the derogation it shall set out its objections in detail and provide the requesting Member State with the opportunity to submit written comments within one month from the date of notification of the Commission objections. The Commission shall within three months from the end of the time limit for submission adopt an implementing decision granting or rejecting the derogation.~~
Where the national legislation is amended, the Member State shall notify the amendments to the Commission. The Commission may review the implementing decision referred to in the third subparagraph.	~~Where the national legislation is amended, the Member State shall notify the amendments to the Commission. The Commission may review the implementing decision referred to in the third subparagraph.~~
Where the national legislation not declared incompatible with this Chapter no longer applies to a credit institution that has been granted derogation from the requirements of this Chapter, that derogation shall be withdrawn with regard to that credit institution.	~~Where the national legislation not declared incompatible with this Chapter no longer applies to a credit institution that has been granted derogation from the requirements of this Chapter, that derogation shall be withdrawn with regard to that credit institution.~~
The Commission shall notify its decisions to the EBA. The EBA shall publish a list of the credit institutions that have been granted a derogation in	~~The Commission shall notify its decisions to the EBA. The EBA shall publish a list of the credit institutions that have been granted a derogation in~~

Text proposed by the Commission	Amendments proposed by the ECB[1]
accordance with this Article. The list shall be continuously kept up-to-date.'	~~accordance with this Article. The list shall be continuously kept up-to-date.~~'
Explanation *See paragraph 4 of this Opinion and the explanation of Amendment 1.*	
Amendment 18 Article 22(3a) (new) Rules governing the calculation of thresholds	
No text	'**3a. For the purpose of Article 3(1)(b), the calculation of thresholds for entities that have effected a concentration during the previous year shall for the two years prior to the concentration be based on the combined accounts of the merged entities.**'
Explanation *In the case of a concentration of credit institutions, for example a merger, which would immediately create a single credit institution falling within the scope of the proposed regulation, the combined figures for the credit institutions forming the concentration for the two years prior to the formation of the concentration should be assessed in determining whether the thresholds are met by the new single credit institution. See also Amendment 7.*	
Amendment 19 Article 22(4) Rules governing the calculation of thresholds	
'4. By [*OP insert the correct date* by 12 months of publication of this Regulation], the competent authority shall identify credit institutions and groups that are subject to this Regulation in accordance with Article 3 and notify them immediately to the EBA. After having been notified by the competent	'4. By [*OP insert the correct date* by 12 months of publication of this Regulation], the competent authority shall **annually** identify credit institutions and groups that are subject to this Regulation in accordance with Article 3 and notify them immediately to the EBA. After having been notified by the competent

Text proposed by the Commission	Amendments proposed by the ECB[1]
authority, the EBA shall immediately publish the list referred to in the first subparagraph. The list shall be continuously kept up-to-date.'	authority, the EBA shall immediately publish the list referred to in the first subparagraph. The list shall be continuously kept up-to-date.'
Explanation *This amendment is intended to ensure that the list of credit institutions within the scope of the proposed regulation is kept up to date as an institution's data or structure changes over time.*	
Amendment 20 Article 28(4) Administrative sanctions and measures	
'4. Member States shall, in conformity with national law, confer on competent authorities the power to apply at least the following administrative sanctions and other measures in the event of the breaches referred to in paragraph 1: (a) an order requiring the person responsible for the breach to cease the unlawful conduct and to desist from a repetition of that conduct; (b) the disgorgement of the profits gained or losses avoided due to the breach in so far as they can be determined; (c) a public warning which indicates the person responsible and the nature of the breach; (d) withdrawal or suspension of the authorisation; (e) a temporary ban of any natural person, who is deemed responsible, from exercising management functions of an entity referred to in Article 3; (f) in the event of repeated breaches, permanent ban of any natural person who is deemed responsible, from exercising management functions in an entity referred to in Article 3;	'4. Member States shall, in conformity with national law, confer on competent authorities the power to apply at least the following administrative sanctions and other measures in the event of the breaches referred to in paragraph 1: (a) an order requiring the person responsible for the breach to cease the unlawful conduct and to desist from a repetition of that conduct; (b) the disgorgement of the profits ~~gained~~ or losses ~~avoided~~ **which the competent authority estimates to have been gained or avoided** due to the breach ~~in so far as they can be determined~~; (c) a public warning which indicates the person responsible and the nature of the breach; (d) withdrawal ~~or suspension~~ of the authorisation; (e) a temporary ban of any natural person, who is deemed responsible, from exercising management functions of an entity referred to in Article 3; (f) in the event of repeated breaches, permanent ban of any natural person who is deemed responsible, from exercising management functions in an entity

Text proposed by the Commission	Amendments proposed by the ECB[1]
(g) maximum administrative pecuniary sanctions of at least three times the amount of the profits gained or losses avoided because of the breach where those can be determined; (h) in respect of a natural person, a maximum administrative pecuniary sanction of at least EUR 5 000 000 or in the Member States whose currency is not the euro, the corresponding value in the national currency on the date of entry to force of this Regulation; (i) in respect of legal persons, maximum administrative pecuniary sanctions of at least 10 per cent of the total annual turnover of the legal person according to the last available accounts approved by the management body; where the legal person is a parent undertaking or a subsidiary of the parent undertaking which has to prepare consolidated financial accounts according to Directive 2013/34/EU, the relevant total annual turnover shall be the total annual turnover or the corresponding type of income according to the relevant accounting regime according to the last available consolidated accounts approved by the management body of the ultimate parent undertaking. Member States may provide that competent authorities may have powers in addition to those referred to in this paragraph and may provide for a wider scope of sanctions and higher levels of sanctions than those established in this paragraph.'	referred to in Article 3; **(g) administrative pecuniary penalties of up to twice the amount of the benefit derived from the breach where that benefit can be determined;** **(h) in the case of a natural person, administrative pecuniary penalties of up to EUR 5 000 000 or, in the Member States whose currency is not the euro, the corresponding value in the national currency on the date of entry into force of this Regulation;** **(i) in the case of a legal person, administrative pecuniary penalties of up to 10 per cent of the total annual net turnover including the gross income consisting of interest receivable and similar income, income from shares and other variable or fixed-yield securities, and commissions or fees receivable in accordance with Article 316 of Regulation (EU) No 575/2013 of the undertaking in the preceding business year.** ~~(g) maximum administrative pecuniary sanctions of at least three times the amount of the profits gained or losses avoided because of the breach where those can be determined;~~ ~~(h) in respect of a natural person, a maximum administrative pecuniary sanction of at least EUR 5 000 000 or in the Member States whose currency is not the euro, the corresponding value in the national currency on the date of entry to force of this Regulation;~~ ~~(i) in respect of legal persons, maximum administrative pecuniary sanctions of at least 10 per cent of the total annual turnover of the legal person according to the last available accounts approved by~~

Text proposed by the Commission	Amendments proposed by the ECB[1]
	~~the management body; where the legal person is a parent undertaking or a subsidiary of the parent undertaking which has to prepare consolidated financial accounts according to Directive 2013/34/EU, the relevant total annual turnover shall be the total annual turnover or the corresponding type of income according to the relevant accounting regime according to the last available consolidated accounts approved by the management body of the ultimate parent undertaking.~~ Member States may provide that competent authorities may have powers in addition to those referred to in this paragraph and may provide for a wider scope of sanctions and higher levels of sanctions than those established in this paragraph.'
Explanation *The amendment is proposed in order to align the level of pecuniary sanctions in the proposed regulation with that in Directive 2013/36/EU. See paragraph 6 of this Opinion.*	
Amendment 21 Article 28(6) (new) Administrative sanctions and measures	
No text	'**6. In the event of a breach referred to in paragraph 1, the ECB, as a competent authority, may impose the sanctions laid down in Article 18 of Regulation (EU) No 1024/2013.**'
Explanation *See paragraph 6 of this Opinion.*	
Amendment 22 Article 29	

Text proposed by the Commission	Amendments proposed by the ECB[1]
Administrative sanctions and measures	
'1. Member States shall ensure that when determining the type and level of administrative sanctions and other measures, competent authorities shall take into account all relevant circumstances, including, where appropriate: (a) the gravity and duration of the breach; (b) the degree of responsibility of the person responsible for the breach; (c) the financial strength of the person responsible for the breach, by considering factors such as the total turnover in the case of a legal person, or the annual income in the case of a natural person; (d) the importance of the profits gained or losses avoided by the person responsible for the breach, insofar as they can be determined; (e) the level of cooperation of the person responsible for the breach with the competent authority, without prejudice to the need to ensure disgorgement of profits gained or losses avoided by that person; (f) previous breaches by the person responsible for the breach; (g) measures taken by the person responsible for the breach to prevent its repetition; (h) any potential systemic consequences of the breach.'	'1. Member States shall ensure that when determining the type and level of administrative sanctions and other measures, competent authorities shall take into account all relevant circumstances, including, where appropriate: (a) the gravity and duration of the breach; (b) the degree of responsibility of the person responsible for the breach; (c) the financial strength of the person responsible for the breach, by considering factors such as the total turnover in the case of a legal person, or the annual income in the case of a natural person; (d) the importance of the profits ~~gained~~ or losses ~~avoided~~ **which the competent authority estimates to have been gained or avoided** by the person responsible for the breach, insofar as they can be determined; (e) the level of cooperation of the person responsible for the breach with the competent authority, without prejudice to the need to ensure disgorgement of profits gained or losses avoided by that person; (f) previous breaches by the person responsible for the breach; (g) measures taken by the person responsible for the breach to prevent its repetition; (h) any potential systemic consequences of the breach.'
Explanation *See paragraph 6 of this Opinion.*	

Text proposed by the Commission	Amendments proposed by the ECB[1]
Amendment 23 Article 34 Review	
‘The Commission shall, on a regular basis, monitor the effect of rules laid down in this Regulation in respect of the achievement of the objectives referred to in Article 1 and on the stability of the Union financial system as a whole, taking into account market structure developments as well as the development and activities of the entities regulated by this Regulation, and make any appropriate proposals. The review shall in particular focus on the application of the thresholds referred to in Article 3, the application and effectiveness of the prohibition foreseen in Article 6, the scope of activities referred to in Article 8 and the suitability of the metrics set out in Article 9. By 1 January 2020 and on a regular basis thereafter, the Commission shall, after taking into account the views of the competent authorities, submit to the European Parliament and to the Council a report, including the issues mentioned above, if appropriate accompanied by a legislative proposal.’	‘The Commission shall, on a regular basis, monitor the effect of rules laid down in this Regulation in respect of the achievement of the objectives referred to in Article 1 and on the stability of the Union financial system as a whole, taking into account market structure developments as well as the development and activities of the entities regulated by this Regulation, and make any appropriate proposals. The review shall in particular focus on the **appropriateness and** application of the thresholds referred to in Article 3, the application and effectiveness of the prohibition foreseen in Article 6, **including the exemptions to the prohibition provided in the same Article,** the scope of activities referred to in Article 8 and the suitability of the metrics set out in Article 9. By 1 January 2020 and on a regular basis thereafter, the Commission shall, after taking into account the views of the competent authorities, submit to the European Parliament and to the Council a report, including the issues mentioned above, if appropriate accompanied by a legislative proposal.’
Explanation *See paragraphs 1.2 and 2.3 of this Opinion.*	