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**NOTE**

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From: General Secretariat of the Council  
To: Permanent Representative Committee

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Subject: Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directives 2009/65/EU, 2013/36/EU and (EU) 2019/2034 as regards the treatment of concentration risk towards central counterparties and the counterparty risk on centrally cleared derivative transactions

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- Confirmation of the final compromise text with a view of agreement

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Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**amending Directives 2009/65/EU, 2013/36/EU and (EU) 2019/2034 as regards the treatment of concentration risk towards central counterparties and the counterparty risk on centrally cleared derivative transactions**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53(1) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Central Bank <sup>(1)</sup>,

Acting in accordance with the ordinary legislative procedure <sup>(2)</sup>,

Whereas:

- (1) To ensure consistency with Regulation (EU) No 648/2012 and to ensure the proper functioning of the internal market, it is necessary to lay down in Directive 2009/65/EU a uniform set of rules to address counterparty risk in derivative transactions performed by undertakings for collective investment in transferable securities (UCITS), where the transactions have been cleared by a **central counterparty (CCP)** that is authorised or recognised under that Regulation. Directive 2009/65/EU imposes regulatory limits on counterparty risk only **in respect of over-the-counter (OTC)** derivative transactions, irrespective of whether the derivatives have been centrally cleared. As central clearing arrangements mitigate **the** counterparty risk that is inherent in derivative contracts, it is necessary to take into consideration whether a derivative has been centrally cleared by a CCP that is authorised or recognised under Regulation (EU) No 648/2012 and to establish a level playing-field between exchange traded and OTC derivatives, when determining the applicable counterparty risk limits. It is also necessary, for regulatory and harmonisation purposes, to **increase** counterparty risk limits only when the counterparties use CCPs that are authorised in a Member State or recognised, in accordance with Regulation (EU) No 648/2012, to provide clearing services to clearing members and their clients.

- (2) To contribute to the objectives of the capital markets union it is necessary, for the efficient use of CCPs, to address certain impediments to the use of central clearing in Directive 2009/65/EU and to provide clarifications in Directives 2013/36/EU and (EU) 2019/2034. The excessive reliance of the Union financial system on systemically important third-country CCPs (Tier 2 CCPs) could pose financial stability concerns that *need* to be addressed appropriately. To ensure financial stability in the Union and adequately mitigate potential risks of contagion across the Union financial system, appropriate measures should therefore be introduced to foster the identification, management and monitoring of concentration risk arising from exposures towards CCPs. In that context, Directives 2013/36/EU and (EU) 2019/2034 should be amended to encourage institutions and investment firms to take the necessary steps to adapt their business model to ensure consistency with the new requirements for clearing introduced by the revision of Regulation (EU) No 648/2012 and to enhance *overall* their risk management practices, also considering the nature, scope and complexity of their market activities. Whilst competent authorities *already have a comprehensive set of supervisory measures and powers to address deficiencies in the risk management practices of institutions and investment firms, including the requirement to have* additional own funds for risks that are not or not adequately covered by the existing capital requirements, *those measures and powers* should be *enhanced* with additional, more *specific* tools and powers under Pillar 2 *in the context of excessive concentration risk arising from exposures towards CCPs.*

- (3) Directives 2009/65/EU, 2013/36/EU and (EU) 2019/2034 should therefore be amended accordingly.
- (4) Since the objectives of this Directive, namely ensuring that credit institutions, investment firms and their competent authorities adequately monitor and mitigate the concentration risk arising from exposures towards Tier 2 CCPs which offer services of substantial systemic importance and eliminating counterparty risk limits for derivative transactions that are centrally cleared by a CCP authorised or recognised in accordance with Regulation (EU) No 648/2012, cannot be sufficiently achieved by the Member States but can rather, by reason of their scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives,

HAVE ADOPTED THIS DIRECTIVE:

*Article 1*

**Amendments to Directive 2009/65/EC**

Directive 2009/65/EC is amended as follows:

- (1) in Article 2(1), the following point **■** is added:
- ‘(u) ‘central counterparty’ (‘CCP’) means a CCP as defined in Article 2, point (1), of Regulation (EU) No 648/2012 of the European Parliament and of the Council\*<sup>2</sup>.

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\*<sup>2</sup>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 (OJ L 201, 27.7.2012, p. 1).;’

- (2) Article 52 is amended as follows:
- (a) in paragraph 1, second subparagraph, the introductory wording is replaced by the following:

- ‘ The risk exposure to a counterparty of the UCITS in a derivative transaction that is not centrally cleared through a CCP authorised in accordance with Article 14 of Regulation (EU) No 648/2012 or recognised in accordance with Article 25 of that Regulation, shall not exceed either: █
- (b) paragraph 2 is amended as follows:
- (i) the first subparagraph is replaced by the following:
- ‘ Member States may raise the 5 % limit laid down in *paragraph 1*, first subparagraph, *to* a maximum of 10 %. If they do so, however, the total value of the transferable securities and the money market instruments held by the UCITS in the issuing bodies in each of which it invests more than 5 % of its assets shall not exceed 40 % of the value of its assets. That limitation shall not apply to deposits or derivative transactions made with financial institutions subject to prudential supervision. █

- (ii) in the second subparagraph, point (c) is replaced by the following:
- ‘(c) exposures arising from derivative transactions ***undertaken with that body*** that are not centrally cleared through a CCP authorised in accordance with Article 14 of Regulation (EU) No 648/2012 or recognised in accordance with Article 25 of that Regulation ■ .’

*Article 2*

**Amendments to Directive 2013/36/EU**

Directive 2013/36/EU is amended as follows:

- (1) in Article 74(1), [point (b)] is replaced by the following:
- ‘(b) effective processes to identify, manage, monitor and report the risks **that** they are or might be exposed to, **including environmental, social and governance risks in the short, medium and long term**, as well as concentration risk arising from exposures towards central counterparties, taking into account the conditions set out in Article 7a of Regulation (EU) No 648/2012 of the European Parliament and of the Council<sup>\*1</sup>;’

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<sup>\*1</sup>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 (OJ L 201, 27.7.2012, p. 1).’;

(2) in Article 76(2), the following subparagraph is added:

‘Member States shall ensure that the management body develops specific plans and quantifiable targets in accordance with the *requirements laid down in* Article 7a of Regulation (EU) No 648/2012 to monitor and address the concentration risk arising from exposures towards central counterparties offering services of substantial systemic importance for the Union or one or more of its Member States.’

(3) in Article 81, the following paragraph is added:

‘Competent authorities shall assess and monitor developments *the practices* of institutions ■ concerning the management of their concentration risk arising from exposures towards central counterparties, including the plans developed in accordance with Article 76(2) of this Directive, as well as the progress made in adapting *their* business models to the ■ requirements *laid down* in Article 7a of Regulation (EU) No 648/2012;’

(4) in Article 100, the following paragraph ■ is added:

‘ [5]. EBA, in *cooperation with ESMA, shall develop guidelines* in accordance with Article 16 of Regulation (EU) No 1093/2010 to *specify* a consistent methodology for integrating the concentration risk arising from exposures towards central counterparties in the supervisory stress testing.’;

*EBA shall issue those guidelines by ... [18 months from the date of entry into force of this amending Directive].”;*”

(5) Article 104(1) is amended as follows:

(a) the introductory wording is replaced by the following:

‘ For the purposes of Article 97, Article 98(1), (4), (5), (9) and (10), Article 101(4) and Article 102 of this Directive and of the application of Regulation (EU) No 575/2013, competent authorities shall have at least the power to: ■

(b) the following point ■ is added:

‘ [(n)] require institutions, *where the competent authority considers that there is excessive concentration risk towards a central counterparty*, to reduce exposures towards *that* central counterparty or to realign exposures across their clearing accounts in accordance with Article 7a of Regulation (EU) No 648/2012 ■ .;’

*Article 3*

**Amendments to Directive (EU) 2019/2034**

Directive (EU) 2019/2034 is amended as follows:

(1) in Article 26(1), point (b) is replaced by the following:

“(b) effective processes to identify, manage, monitor and report the risks that investment firms are or might be exposed to, or the risks that they pose or might pose to others, including concentration risk arising from exposures towards central counterparties, taking into account the conditions set out in Article 7a of Regulation (EU) No 648/2012.”

(2) Article **29(1)** is amended as follows:

(a) the following point **■** is added:

‘(e) material sources and effects of concentration risk arising from exposures towards central counterparties and any material impact on own funds.;

(b) the following subparagraph is added:

‘For the purpose of the first subparagraph, point (e), Member States shall ensure that the management body develops specific plans and quantifiable targets in accordance with the *requirements laid down in* Article 7a of Regulation (EU) No 648/2012 to monitor and address the concentration risk arising from exposures towards central counterparties offering services of substantial systemic importance for the Union or one or more of its Member States.’”

(3) in Article 36(1), the following subparagraph is added:

‘For the purpose of the first subparagraph, point (a), competent authorities shall assess and monitor developments *in the practices* of investment firms ■ concerning the management of their concentration risk arising from exposures towards central counterparties, including the plans developed in accordance with Article 29(1), point (e), of this Directive as well as the progress made in adapting *their* business models to the ■ requirements *laid down* in Article 7a of Regulation (EU) No 648/2012.’;

(4) Article 39(2) is amended as follows:

(a) the introductory wording is replaced by the following:

‘For the purposes of Article 29, ■ Article 36, Article 37(3) and Article 38 of this Directive and of the application of Regulation (EU) 2019/2033, competent authorities shall have at least the power to:’

(b) the following point ■ is added:

‘(n) require *investment firms* to reduce exposures towards a central counterparty or to realign exposures across their clearing accounts in accordance with Article 7a of Regulation (EU) No 648/2012, where the competent authority considers *that* there is excessive concentration risk towards that central counterparty.’;

#### *Article 4*

##### **Transposition**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by ... [ **■** months *from* the date of entry into force of the EMIR Review Regulation] at the latest. They shall *immediately* communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or *shall* be accompanied by such a reference on the occasion of their official publication. *The methods of making* such reference *shall be laid down by Member States*.

2. Member States shall communicate to the Commission the text of the main *measures* of national law which they adopt in the field covered by this Directive.

#### *Article 5*

##### **Entry into force**

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

#### *Article 6*

##### **Addressees**

This Directive is addressed to Member States.

Done at Brussels,