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**COVER NOTE**

From:	Ms Christine LAGARDE, President of the European Central Bank
date of receipt:	28 April 2021
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
Subject:	Opinion of the European Central Bank of 28 April 2021 on a proposal for a regulation of the European Parliament and of the Council on a pilot regime for market infrastructures based on distributed ledger technology

Delegations will find attached the opinion mentioned above, and its technical working document.

Encl.

**OPINION OF THE EUROPEAN CENTRAL BANK**

**of 28 April 2021**

**on a proposal for a regulation of the European Parliament and of the Council on a pilot regime for market infrastructures based on distributed ledger technology**

**(CON/2021/15)**

**Introduction and legal basis**

On 18 and 30 November 2020 the European Central Bank (ECB) received requests from the Council and the European Parliament, respectively, for an opinion on a proposal for a regulation on a pilot regime for market infrastructures based on distributed ledger technology<sup>1</sup> (hereinafter 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, as the proposed regulation contains provisions falling within the ECB's fields of competence, in particular, the definition and implementation of monetary policy, the promotion of the smooth operation of payment systems, contribution to the smooth conduct of policies pursued by competent authorities relating to the stability of the financial system, and the ECB's tasks concerning the prudential supervision of credit institutions pursuant to Article 127(2), first and fourth indents, Article 127(5) and Article 127(6) 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.

**1. General observations**

- 1.1 The ECB welcomes the proposed regulation, which aims to enable investment firms, market operators and central securities depositories (CSDs) to operate market infrastructures based on distributed ledger technology (DLT), either as a DLT multilateral trading facility (hereinafter referred to as a 'DLT MTF') or a DLT securities settlement system (SSS) (hereinafter referred to as a 'DLT SSS' or together with DLT MTFs as 'DLT market infrastructures').
- 1.2 The ECB welcomes the limitations that the proposed regulation brings, both in terms of asset classes and market size, as regards the DLT transferable securities<sup>2</sup> available for registration, trading and settlement via DLT MTFs and DLT SSSs while facilitating the mitigation of potential risks associated with the use of DLT. Nevertheless, it could be further considered whether to extend the asset classes, while maintaining the thresholds, to include sovereign bonds. That said, the ECB emphasises that its opinion is predicated on the understanding that the specific thresholds set out in the proposed regulation<sup>3</sup> are preserved, as any increase in these thresholds might pose risks to the level playing

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<sup>1</sup> COM(2020) 594 final.

<sup>2</sup> See Article 2(5) of the proposed regulation.

<sup>3</sup> See Article 3(1) and (3) of the proposed regulation.

field between incumbent and DLT market infrastructures and possibly also to the stability of the financial system. Moreover, the ECB believes that, bearing in mind the level of capital markets' development in some EU Member States, it would be advisable to consider providing the national competent authorities with an option to lower the relevant thresholds. Consequently, the ECB wishes to be reconsulted on the proposed regulation if there is any material alteration to the thresholds. In addition, it should be ensured these thresholds are not circumvented, as this would undermine their effectiveness. For instance, it should not be possible for an issuer to divide the issuance of bonds into two (or more) tranches to be issued via a single DLT market infrastructure. In this context, imposing obligations only on operators of DLT market infrastructures may prove ineffective if not complemented by obligations on the issuers of bonds. Furthermore, an additional threshold, set at the level of a DLT market infrastructure on the basis of settled value, could be contemplated, as this is one of the relevant indicators used in assessing the systemic importance of a settlement infrastructure. Finally, the ECB understands that, under the proposed regulation, meeting the thresholds is not a sufficient condition to be exempted from Union legislative requirements. Even when the thresholds are fully met, operators of DLT market infrastructures can only be exempted on a case-by-case basis by the relevant competent authorities also subject to financial stability considerations.

- 1.3 Under the proposed regime, operators of DLT MTFs may provide services in addition to those provided under Directive 2014/65/EU of the European Parliament and of the Council<sup>4</sup> (hereinafter referred to as 'MiFID II'); namely, they may provide core CSD services<sup>5</sup>. The provision of such additional services would entail new and additional risks for their participants that need to be catered for by the proposed regulation. However, the additional requirements set out in the proposed regulation appear rather limited. Therefore, the proposed regulation does not seem to ensure a level playing field between DLT MTFs and DLT SSSs as well as between these DLT market infrastructures and CSDs operating SSSs based on traditional technology as these provide similar services in competition with one another. In other words, the proposed regulation does not follow the principle of 'same business, same risks, same rules'. Furthermore, while the proposed regulation envisages that an operator of an MTF can settle DLT transferable securities, the opposite possibility of a CSD operating a DLT SSS also operating an MTF should be explored as well. This consideration stems from the fact that, as acknowledged in the recitals to the proposed regulation, the use of DLT, with all transactions recorded in a decentralised ledger, can condense trading and settlement to nearly real-time and could enable the merger of trading and post-trading activities.
- 1.4 In addition, as regards e-money tokens that may be used for the settlement of DLT transferable securities transactions, the proposed regulation does not seem to respect the principle of technological neutrality. Specifically, while e-money tokens may be issued also based on a

<sup>4</sup> 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).

<sup>5</sup> See Article 2(3) of the proposed regulation and section A of the Annex to Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (OJ L 257, 28.8.2014, p. 1).

technology other than DLT<sup>6</sup>, the infrastructures covered under the proposed regulation may be based on DLT only.

- 1.5 Finally, the ECB, while welcoming the aim of the proposed regulation to support innovation, wishes to highlight a potential shortcoming with regard to the envisaged exemption from the application of the provisions on access set out in Regulation (EU) No 909/2014 (hereinafter referred to as the 'CSD Regulation')<sup>7</sup>. The ECB believes that such an exemption, if granted in a wide manner by the national competent authorities across the Union, may hamper the CSD Regulation's aim of harmonising and enhancing the efficiency of cross-border settlement within the Union. Furthermore, the ECB believes that such exemption has the potential to affect interoperability among SSSs, which could ultimately lead to increased fragmentation of liquidity.

## 2. Monetary policy aspects

- 2.1 From a monetary policy standpoint, securities transactions are of critical importance for the functioning of the money market and for the conduct of open market operations. In this respect, DLT as an innovative technology to be applied in SSSs to potentially facilitate more efficient execution of securities transactions could bring about opportunities as well as risks. From a monetary policy standpoint, the ability of market participants to efficiently transfer securities is of key importance. Therefore, over the long-term public policy will have to carefully evaluate how this new technology is applied in the existing securities settlement ecosystem and/or whether and how it potentially affects existing arrangements to settle securities.
- 2.2 In principle, a proliferation of different non-interoperable infrastructures available for securities transactions could lead to fragmentation in collateral and liquidity pools, with implications for monetary policy transmission through its potential effect on collateral availability, collateral valuation and price formation in the market. However, the realisation of such risks would depend on the specific features of the different settlement infrastructures and their functionality in terms of allowing participants to access their collateral on a timely basis.
- 2.3 In addition, regarding access to central bank liquidity for settlement, the Eurosystem currently supports settlement in central bank money for securities transactions via TARGET2-Securities (T2S). Access by CSDs to T2S is subject to a positive assessment against the eligibility criteria and conditions under the applicable ECB Guidelines<sup>8</sup>. Where no access to central bank money is available to participants in DLT SSSs then commercial bank money, commercial bank money in tokenised form and/or e-money tokens could be used to settle securities transactions. If the proliferation of such DLT SSSs led to a significant increase in the use of commercial bank money or

<sup>6</sup> See Article 3(2) of the proposed Markets in Crypto-assets regulation (Proposal for a regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937 – COM(2020) 593 final).

<sup>7</sup> See Articles 50 and 53 of the CSD Regulation.

<sup>8</sup> Guideline (EU) 2015/510 of the European Central Bank of 19 December 2014 on the implementation of the Eurosystem monetary policy framework (ECB/2014/60) (OJ L 91, 2.4.2015, p. 3); Guideline ECB/2012/27 of the European Central Bank of 5 December 2012 on a Trans-European Automated Real-time Gross settlement Express Transfer system (TARGET2) (OJ L 30, 30.1.2013, p. 1).

e-money tokens to settle securities transactions, the effects for monetary policy transmission would have to be thoroughly analysed.

### 3. Oversight and systemic/financial stability aspects

#### 3.1 *Role of the ESCB in the area of securities settlement*

- 3.1.1 Pursuant to the fourth indent of Article 127(2) of the Treaty, as mirrored in Article 3.1 of the Statute of the European System of Central Banks and the European Central Bank (hereinafter referred to as the 'Statute'), one of the basic tasks to be carried out through the ESCB is 'to promote the smooth operation of payment systems.' To further the performance of this basic task, 'the ECB and national central banks may provide facilities, and the ECB may make regulations, to ensure efficient and sound clearing and payments systems within the Union and with other countries'<sup>9</sup>.
- 3.1.2 CSDs are financial market infrastructures (FMIs) that are strictly regulated and supervised by different authorities pursuant to the CSD Regulation, which sets out requirements on the settlement of financial instruments as well as rules on the organisation and conduct of CSDs. Furthermore, CSDs must take note of the Committee on Payment and Market Infrastructures (CPMI) and the International Organization of Securities Commissions (IOSCO) Guidance on cyber resilience<sup>10</sup>, for which detailed implementation guidance has been developed in the Eurosystem Cyber Resilience Oversight Expectations for FMIs<sup>11</sup>, which is addressed to all FMIs. In addition to the supervisory competences entrusted to national competent authorities (NCAs) under the CSD Regulation, the members of the ESCB act as 'relevant authorities', in their capacity as overseers of SSSs operated by CSDs, as central banks issuing the most relevant currencies in which settlement takes place and as central banks in whose books the cash leg of transactions is settled<sup>12</sup>. In this regard, recital 8 of the CSD Regulation states that the Regulation should apply without prejudice to the responsibilities of the ECB and the national central banks (NCBs) to ensure efficient and sound clearing systems and payment systems within the Union and other countries. It further states that the CSD Regulation should not prevent the members of the ESCB from accessing information relevant to the performance of their duties<sup>13</sup>, including the oversight of CSDs and other FMIs<sup>14</sup>.
- 3.1.3 In addition, the members of the ESCB often act as settlement agents for the cash leg of securities transactions and the Eurosystem offers settlement services via T2S<sup>15</sup> to CSDs (hereinafter referred to as 'T2S participants'). By means of T2S the Eurosystem provides a single, neutral and borderless

<sup>9</sup> See Article 22 of the Statute.

<sup>10</sup> Available on the Bank for International Settlements' website at [www.bis.org](http://www.bis.org).

<sup>11</sup> Available on the ECB's website at [www.ecb.europa.eu](http://www.ecb.europa.eu).

<sup>12</sup> See Article 12 of the CSD Regulation.

<sup>13</sup> See also Article 13 and Articles 17(4) and 22(6) of the CSD Regulation.

<sup>14</sup> See paragraph 7.3 of Opinion of the European Central Bank of 6 April 2017 (CON/2017/10); paragraph 7.2 of Opinion of the European Central Bank of 8 November 2018 (CON/2018/47); paragraph 3.5.2 of Opinion of the European Central Bank of 2 May 2019 (CON/2019/17); and paragraph 3.5.2 of Opinion of European Central Bank of 11 November 2019 (CON/2019/38), each available on [www.eur-lex.europa.eu](http://www.eur-lex.europa.eu).

<sup>15</sup> Annex IIA to Guideline ECB/2012/27; Guideline of the European Central Bank of 18 July 2012 on TARGET2-Securities (ECB/2012/13) (OJ L 215, 11.8.2012, p. 19); and Decision ECB/2011/20 of the European Central Bank of 16 November 2011 establishing detailed rules and procedures for implementing the eligibility criteria for central securities depositories to access TARGET2-Securities services (OJ L 319, 2.12.2011, p. 117). See also the T2S Framework Agreement and the Collective Agreement, both available on the ECB's website at [www.ecb.europa.eu](http://www.ecb.europa.eu).

settlement service for securities transactions on a delivery versus payment basis in central bank money to euro area and non-euro area CSDs and central banks. The Eurosystem's oversight of T2S is related to its mandate to ensure efficient and sound clearing and payment systems, while competent and relevant authorities of CSDs aim to ensure their smooth functioning, the safety and efficiency of settlement and the proper functioning of financial markets in their respective jurisdictions.

- 3.1.4 The proposed regulation sets out a series of exemptions from requirements, obligations and definitions<sup>16</sup> under the CSD Regulation and Directive 98/26/EC of the European Parliament and of the Council (hereinafter referred to as the 'Settlement Finality Directive')<sup>17</sup> that CSDs may request when seeking permission to operate DLT SSSs<sup>18</sup>. Such exemptions may be granted by the competent authority following an assessment procedure that does not envisage the involvement of the relevant authorities under the CSD Regulation<sup>19</sup>, including, specifically, the members of the ESCB. In particular, the proposed regulation envisages no role for the relevant authorities in the procedure for granting a permission, an exemption or the modification of an existing permission or exemption. The same holds true for the procedure for withdrawing a permission or exemption granted to a CSD operating a DLT SSS<sup>20</sup>. In the ECB's view, the involvement of the relevant authorities in these assessment processes is needed in order to ensure the proper exercise by the relevant authorities of their competences under the CSD Regulation. Hence, the proposed regulation should cater for the involvement of the relevant authorities in the assessment processes referred to in order to properly reflect the allocation of competencies envisaged by the CSD Regulation. Furthermore, the involvement of the relevant authorities should not be confined to CSDs, but extended to cover the operators of DLT MTFs that intend to provide core CSD services. The reason for this is that the competences of the relevant authorities relate to the services regardless of the provider of the services or the technology employed.
- 3.1.5 Finally, under the CSD Regulation, various provisions of the CSD Regulation, including the requirement to report to competent authorities, do not apply to the members of the ESCB in relation to any CSD which the ESCB central banks directly manage under their own responsibility,<sup>21</sup>. Under the proposed regulation, a CSD operating a DLT SSS is subject to the requirements applicable to a CSD under the CSD Regulation, except if such a CSD has sought specific exemptions or permissions from the competent authority<sup>22</sup>. Taken together, these provisions mean that a CSD operated by an ESCB central bank which operates a DLT SSS is not required to seek specific exemptions or permissions from a competent authority, since such CSDs are not required to report to competent authorities, and are subject to a limited set of requirements under the CSD Regulation. For the sake of legal certainty, it would be helpful to expressly clarify in the recitals of the proposed regulation that

<sup>16</sup> See Article 5 of the proposed regulation.

<sup>17</sup> Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ L 166, 11.6.1998, p. 45).

<sup>18</sup> See Article 8(2)(g) of the proposed regulation.

<sup>19</sup> See Articles 10 and 12 of the CSD Regulation.

<sup>20</sup> See Article 8(6) and (7) of the proposed regulation.

<sup>21</sup> See Article 1(4) of the CSD Regulation. Such CSD must have access to the funds of the ESCB central bank and must not be a separate entity.

<sup>22</sup> See Article 5 of the proposed regulation.



the CSDs operated by ESCB central banks are exempt from the provisions of the proposed regulation concerning the process of granting exemptions and withdrawing permissions<sup>23</sup>. In practice, this would imply that ESCB central banks would take advantage of the exemptions envisaged under the proposed regulation based on their own risk analysis.

### 3.2 *Participation of natural persons in DLT market infrastructures*

The proposed regulation<sup>24</sup> provides for the possibility for a CSD operating a DLT SSS (as well as for operators of DLT MTFs) to admit as participants natural persons as well as legal persons other than those referred to in the CSD Regulation<sup>25</sup>. The proposed conditions for the admission of such persons as participants are rather general. In this respect, the regulatory technical standards supplementing the CSD Regulation<sup>26</sup> detail legal, financial and operational risks that a CSD must assess when analysing a request for participation. It is unclear how those risks will be assessed where a natural person applies for CSD participation<sup>27</sup>. In this case, where such risks are not properly taken into account, concerns may arise as to how a level playing field can be ensured between traditional and DLT SSSs and regarding the risks that such participants may pose, either to the CSD itself or to its other participants. Similarly, it is unclear which MiFID II requirements applicable to investment firms participating in MTFs (e.g. those related to the use of algorithmic trading) would also be applicable to natural persons participating in DLT MTFs. It may be impossible for some of the requirements on investor protection under MiFID II and Regulation (EU) No 600/2014 of the European Parliament and of the Council<sup>28</sup> to apply<sup>29</sup>. If there were no intermediation by investment firms, then retail investors could invest in DLT transferable securities that may be unsuitable or inappropriate for them. Furthermore, there is a difference, unsatisfactory in terms of a level playing field, between the requirements applicable to DLT SSSs and DLT MTFs in terms of the maximum period for which natural persons can be admitted as participants in these market infrastructures<sup>30</sup>.

### 3.3 *Settlement of payments in DLT market infrastructures*

- 3.3.1 The proposed regulation envisages that payments may be settled in DLT market infrastructures through three means. *First*, the settlement of payments may be carried out through central bank money, where practicable and available. *Second*, where settlement through central bank money is not practicable and available, payments may be settled through commercial bank money, including

<sup>23</sup> See Articles 7 and 8 of the proposed regulation.

<sup>24</sup> See Article 4 and Article 5(4) of the proposed regulation and Article 2(19) of the CSD Regulation.

<sup>25</sup> However, at the same time, the proposed regulation does not provide any exemption from the provisions of Article 33(1) of the CSD Regulation, which refers to certain legal persons as participants of a CSD.

<sup>26</sup> See Article 89 of Commission Delegated Regulation (EU) 2017/392 of 11 November 2016 supplementing Regulation (EU) No 909/2014 of the European Parliament and of the Council with regard to regulatory technical standards on authorisation, supervisory and operational requirements for central securities depositories (OJ L 65, 10.3.2017, p. 48).

<sup>27</sup> See paragraph 3.18.5 of CPMI-IOSCO Principles for financial market infrastructures. Principle 18 on Access and participation requirements details the operational, financial, legal and risk-management requirements for participation that should be taken into account by an FMI, mentioning also the possibility that an FMI admits non-regulated entities. In such a case, the FMI should (i) take into account any additional risks that may arise from such participation and (ii) design its participation requirements and risk-management controls accordingly.

<sup>28</sup> Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p. 84).

<sup>29</sup> See Article 25 of MiFID II on the assessment of the suitability and appropriateness of financial instruments for investors.

<sup>30</sup> Compare Article 5(4) of the proposed regulation with Article 6(4) – proposing an amendment to Article 19 of MiFID II – of the Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2009/65/EC, 2009/138/EU, 2011/61/EU, EU/2013/36, 2014/65/EU, (EU) 2015/2366 and EU/2016/2341 - COM(2020) 596 final.

commercial bank money in a token-based form. The ECB understands that such commercial bank money in a token-based form, also referred to as 'settlement coins' under the proposed regulation, is, from a legal perspective, indistinguishable from traditional cash deposits. *Third*, payments may be settled in e-money tokens, as defined in the proposal for a regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937 (hereinafter referred to as the 'proposed Markets in Crypto-assets regulation').

### 3.3.2 *Settlement of payments in central bank money*

The ECB considers that settlement in central bank money should be the default requirement for DLT market infrastructures, and therefore an exemption from this requirement should be possible only in cases where the relevant DLT market infrastructure operator proves that this settlement method is not available and practicable.

3.3.3 The Eurosystem offers settlement of securities transactions on a delivery versus payment basis in central bank money to T2S participants. While the ECB remains open to innovation and to further explore the potential of innovative technologies in the context of the provision of securities settlement services, the potential settlement in central bank money of DLT transferable securities transactions in T2S would be subject to limitations arising from the current technological constraints as well as contractual and regulatory framework governing the provision of T2S services<sup>31</sup>. In this vein, it is worth highlighting that the specific design features and exemptions characterising each DLT SSS operated by a CSD will be taken into account when assessing the fulfilment of the T2S eligibility criteria<sup>32</sup> if a CSD wishes to join T2S.

3.3.4 Where settlement of DLT transferable securities transactions is intended to take place outside T2S, DLT SSSs may also be subject to some of the limitations in ensuring settlement in central bank money arising from the current technological constraints as well as contractual and regulatory framework, depending on the specific design features of the DLT SSS and the applicable ECB Guidelines<sup>33</sup>. The same considerations concerning settlement outside T2S apply *mutatis mutandis* to operators of DLT MTFs.

### 3.3.5 *Settlement of payments with persons that are not licensed as credit institutions*

Under the CSD Regulation, where it is not practical and available to settle through central bank accounts, a CSD may offer to settle the cash payments for all or part of its SSS through accounts opened with a credit institution or through the CSD's own accounts. If a CSD offers to settle in accounts opened with a credit institution or through its own accounts, it must do so in accordance with the provisions of Title IV of the CSD Regulation<sup>34</sup>. While the proposed regulation provides that a CSD operating a DLT SSS must identify, measure, monitor, manage, and minimise any counterparty risk arising from the use of commercial bank money or e-money tokens<sup>35</sup>, the

<sup>31</sup> See Chapter 15 of the Advisory Group on Market Infrastructures for Securities and Collateral report titled 'The potential impact of DLTs on securities post-trading harmonisation and on the wider EU financial market integration' available on the ECB's website [www.ecb.europa.eu](http://www.ecb.europa.eu).

<sup>32</sup> See Annex IIA to Guideline ECB/2012/27; Guideline ECB/2012/13 and Decision ECB/2011/20. See also the T2S Framework Agreement and the Collective Agreement available on the ECB's website [www.ecb.europa.eu](http://www.ecb.europa.eu).

<sup>33</sup> Guideline (EU) 2015/510 (ECB/2014/60) and Guideline ECB/2012/27.

<sup>34</sup> See Article 40(2) and Article 54 of the CSD Regulation.

<sup>35</sup> See Article 4(3) of the proposed regulation.



requirements for ensuring a sound cash settlement through commercial bank money (or e-money tokens) in the proposed regulation are very general, when compared to the requirements under the CSD Regulation<sup>36</sup>. The same also applies, *mutatis mutandis*, to operators of DLT MTFs. Significantly, the proposed regulation<sup>37</sup> provides that the competent authority may exempt a CSD operating a DLT SSS from the provisions on cash settlement under the CSD Regulation<sup>38</sup>, provided that the CSD ensures delivery versus payment. This would appear to implicitly open the door to exempting a CSD settling the cash leg of securities transactions through its own accounts from the requirement to be licensed as a credit institution under Directive 2013/36/EU of the European Parliament and of the Council (hereinafter referred to as the 'Capital Requirements Directive')<sup>39</sup> and from the provisions governing banking-type ancillary services under the CSD Regulation<sup>40</sup>. Along the same lines, the broad formulation of this provision under the proposed regulation<sup>41</sup> could also be interpreted as implicitly opening the door to exempting a CSD from settling the cash leg of securities transactions through accounts opened with a licensed credit institution.

- 3.3.6 Under the Capital Requirements Directive, persons or undertakings that are not credit institutions are prohibited from carrying out the business of taking deposits or other repayable funds from the public. This prohibition does not apply to 'cases expressly covered by national or Union law'<sup>42</sup>. It is suggested that the possibility for an exemption under the proposed regulation from the application of Article 40 and Title IV of the CSD Regulation on cash settlement is insufficiently clear to qualify as a 'case expressly covered by Union law' that would allow a person that is not a credit institution to receive deposits from the public. In view of this apparent conflict between the proposed regulation and the Capital Requirements Directive, the Union legislative bodies need to expressly clarify the exact scope of the derogation from the cash settlement provisions of the CSD Regulation that a CSD operating a DLT SSSs (or an operator of a DLT MTF<sup>43</sup>) may apply for.
- 3.3.7 In the absence of specific details on how settlement of payments in e-money tokens may take place, participants in a CSD operating a DLT SSS would be able to open accounts directly with the CSD for the purposes of settling the cash leg of a securities transaction in e-money tokens, or alternatively the CSD operating a DLT SSS and its participants would open an account with a third party providing services relating to e-money tokens. In these two cases, the CSD or the third party would be the issuer of e-money tokens and would ensure that settlement of the cash leg takes place in e-money tokens. In this respect, it is worth noting that, under the proposed Markets in Crypto-assets regulation, e-money tokens can only be issued either by credit institutions or e-money institutions<sup>44</sup>. In the absence of any provision to the contrary under the proposed regulation, the ECB understands that

<sup>36</sup> See Article 40 and Title IV of the CSD Regulation.

<sup>37</sup> See recital (24) and Article 5(5) of the proposed regulation. See also for DLT MTFs recital (16) and Article 4(3)(f) of the proposed regulation.

<sup>38</sup> See Article 40 of the CSD Regulation.

<sup>39</sup> See Article 9 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).

<sup>40</sup> See Title IV of the CSD Regulation and Section C of the Annex thereto.

<sup>41</sup> See Article 5(5) of the proposed regulation.

<sup>42</sup> See Article 9 of the Capital Requirements Directive.

<sup>43</sup> See Article 4(3) of the proposed regulation.

<sup>44</sup> See Article 43 of the proposed Markets in Crypto-assets regulation.

the exemption provided under the proposed regulation with respect to the cash settlement provisions of the CSD Regulation<sup>45</sup> is not intended to exempt a CSD or a third party issuing e-money tokens and settling the cash leg of securities transactions through its own accounts from the licensing requirements under the proposed Markets in Crypto-assets regulation. The same considerations on the settlement of payment obligations in e-money tokens apply *mutatis mutandis* to the operators of DLT MTFs<sup>46</sup>. It is difficult to understand why the Union legislative bodies would want to require, on the one hand, that e-money tokens can only be issued either by credit institutions or e-money institutions, and, on the other hand, to implicitly open the door to settling the cash leg of securities transactions in traditional cash or settlement coins through accounts opened with persons which are not licensed as credit institutions.

- 3.3.8 In deciding whether it wishes to open the door to settling the cash leg of securities transactions through accounts opened with persons which are not licensed as credit institutions, the Union legislative bodies may wish to have regard to the CPMI-IOSCO Principles for Financial Market Infrastructures (PFMIs)<sup>47</sup>. In particular, under CPMI-IOSCO Principle 9 of the PFMIs (Money settlements), if money settlement does not occur in central bank money, CPMI-IOSCO Principle 9 only envisages settlement in commercial bank money or on the FMI's own books. Specifically, CPMI-IOSCO Principle 9 provides that if the FMI conducts money settlements on its own books, it should minimise and strictly control its credit and liquidity risks. In such an arrangement, an FMI offers cash accounts to its participants, and a payment or settlement obligation is discharged by providing an FMI's participants with a direct claim against the FMI itself. The credit and liquidity risks associated with a claim against an FMI are therefore directly related to the FMI's overall credit and liquidity risks. One way an FMI could minimise these risks is to limit its activities and operations to clearing and settlement and closely related processes. Further, to settle payment obligations, the FMI could be established as a special-purpose financial institution and limit the provision of cash accounts to participants only. Depending on local laws, these special-purpose financial institutions would generally be required to have banking licences and be subject to prudential supervision<sup>48</sup>.
- 3.3.9 Under the proposed regulation, natural persons may directly participate in DLT market infrastructures. If the cash leg of a securities transaction were to occur on the books of a person who is not a licensed credit institution, this would have the consequence that the cash accounts held by natural persons, as well by legal persons such as micro, small and medium-sized enterprises, with DLT market infrastructures would not benefit from the deposit guarantee scheme protection under Directive 2014/49/EU of the European Parliament and of the Council (hereinafter referred to as the 'Deposit Guarantee Schemes Directive')<sup>49</sup> and of the depositor preference under Directive

<sup>45</sup> See Article 5(5) of the proposed regulation and Article 40 of the CSD Regulation.

<sup>46</sup> See Article 4(3) of the proposed regulation.

<sup>47</sup> See CPMI-IOSCO Principles for Financial Market Infrastructures available on the Bank for International Settlements' website at [www.bis.org](http://www.bis.org).

<sup>48</sup> See paragraph 3.9.7 of the CPMI-IOSCO Principles for Financial Market Infrastructures (PFMIs).

<sup>49</sup> See Article 2(1), point (3), of Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (OJ L 173, 12.6.2014, p. 149). See also Article 2(2)(c) of the proposed Markets in Crypto-assets regulation.

2014/59/EU of the European Parliament and of the Council<sup>50</sup> (hereinafter referred to as the 'BRRD'). The Deposit Guarantee Schemes Directive and the depositor preference under the BRRD only apply to deposits in the form of a credit balance which results from funds left in an account or from temporary situations deriving from normal banking transactions and which a credit institution is required to repay<sup>51</sup>. Taking account of CPMI-IOSCO Principle 9, in particular the minimisation and strict control of credit and liquidity risks arising from money settlements using FMI, such a situation would not seem to provide a sufficient means for safeguarding the funds of natural persons placed with operators of DLT market infrastructures. In addition, the proposed regulation does not establish any threshold to limit the ability of operators of DLT market infrastructures to hold funds of natural persons and micro, small and medium-sized enterprises, despite the possibility that such persons may wrongly believe that their funds represent deposits enjoying the benefit of the Deposit Guarantee Schemes Directive and the depositor preference under the BRRD.

3.3.10 Finally, the Union legislative bodies may wish to consider whether risks to the stability of the financial system might emerge should exemptions from the licensing requirements provided for under the Capital Requirements Directive, the CSD Regulation and the proposed Markets in Crypto-assets regulation in connection with (a) carrying out the business of taking deposits or other repayable funds from the public, (b) the provision of banking-type ancillary services and (c) the issuance of e-money tokens, be granted under the proposed regulation. The exemptions from the licensing requirements mentioned would result in a shift from credit institutions to non-bank actors of activities typically confined within the remit of the banking sector. Consequently, participants in DLT market infrastructures, and potentially participants in existing SSSs or MTFs managed by the same operators of DLT market infrastructures, including connected FMIs, would, as a result, be exposed to higher credit and liquidity risks because the strict regulatory and prudential requirements provided for credit institutions do not apply to non-bank operators. Ultimately, DLT market infrastructures would benefit from a lower level and range of safeguards that may not just hamper their overall soundness but more broadly the deployment of DLT technology in the post-trading sector.

#### 3.3.11 *Risk management requirements applicable to banking-type ancillary services*

The CSD Regulation imposes very restrictive requirements on banking-type ancillary services, as the provision of such services involves significant financial risks, including intra-day credit and liquidity risks. The role CSDs play in the financial markets and their related systemic importance justify stringent risk management requirements aimed at ensuring resilience in extreme but plausible circumstances. In particular, as previously noted, only CSDs authorised as credit institutions and

<sup>50</sup> See Article 108 of 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).

<sup>51</sup> See Article 2(1), point (3), of the Deposit Guarantee Schemes Directive in conjunction with Article 2(1), points (4) and (5), and Articles 5 and 6 of the same Directive and Article 2(1), points (94) and (95), and Article 108 of the BRRD.

designated credit institutions<sup>52</sup> observing the requirements of Title IV of the CSD Regulation<sup>53</sup> are allowed to provide banking-type ancillary services. The ECB notes that the proposed regulation allows for the possibility that a CSD that is licensed as a credit institution and operates a DLT SSS, or which relies on a credit institution for the provision of banking-type ancillary services, is exempted from the requirements of Article 40 of the CSD Regulation, including those defined in Title IV of the same Regulation. The scope of the exemption is not defined in the proposed regulation, so it is understood that a DLT SSS operated by a CSD may be exempted from some or all of the requirements of Title IV of the CSD Regulation, including those in relation to the scope of banking-type ancillary services, the management of credit and liquidity risks and capital surcharges<sup>54</sup>.

Depending on the scope of an exemption, the level of risk which DLT SSSs may be exposed to would vary and, in particular, if the exemption covers all Title IV requirements, the risks could be very significant. However, the requirements<sup>55</sup> applicable for conducting settlement in commercial bank money, as set out in the proposed regulation, are only general and may not ensure application of risk management measures commensurate to the risks incurred. In view of the foregoing, the ECB proposes that the Union legislative bodies should specify in more detail the scope of the exemptions to Article 40 of the CSD Regulation and the conditions to be met for receiving such exemptions. The same should also apply, *mutatis mutandis*, to operators of DLT MTFs, where they do not conduct settlement in central bank money, having regard to the considerations on ensuring a level playing field between DLT MTFs and DLT SSSs, as noted in paragraph 1.3.

### 3.4 Insolvency protections under the Settlement Finality Directive

Under the proposed regulation, the operation by a CSD of a DLT SSS may not be tantamount to the operation of a 'system', as defined under the Settlement Finality Directive, not least because, according to the proposed regulation, natural persons are eligible participants in a DLT SSS<sup>56</sup>. In such a case, the operation of a DLT SSS would not be regarded as an extension of activities or services under the CSD Regulation<sup>57</sup>, but as an additional activity or service that should be subject to the assessment and authorisation process under the CSD Regulation. The ECB has three remarks to make in this respect. *First*, the ECB recalls the pivotal role of the concept of (legal) finality for the protection of settlement systems participants from the disruptive consequences of insolvency proceedings against other participants, and for the reduction of systemic risks emanating from the operation of FMIs. If a DLT SSS were not to qualify as a 'system', within the meaning of the Settlement Finality Directive, the insolvency protections thereunder would not apply to the DLT SSS itself. *Second*, the ECB notes that the proposed regulation is not clear as to what legal measures it may need to take when the same CSD is simultaneously operating an SSS and a DLT SSS (e.g. to

<sup>52</sup> Under the CSD Regulation, a credit institution that offers to settle the cash payments for part of the CSD's SSS is exempted from some requirements of Title IV only where the total value of such cash settlement through accounts opened with that credit institution does not exceed certain thresholds over a period of time. See Article 54(4) and (5) of the CSD Regulation.

<sup>53</sup> In particular, Article 54(4)(d) of CSD Regulation provides that the credit institution used as a cash settlement agent can be used only to provide banking-type ancillary services as defined in the CSD Regulation and not to carry out any other activities.

<sup>54</sup> The exemption from the requirement to have a banking licence is discussed in paragraphs 3.3.5 to 3.3.10.

<sup>55</sup> See the final subparagraph of Article 5(5) of the proposed regulation.

<sup>56</sup> See Article 2(a) and (d) of the Settlement Finality Directive and recital (23) and Article 5(8) of the proposed regulation.

<sup>57</sup> See Article 19 of the CSD Regulation and recital (33) of the proposed regulation.

ring-fence the two by entrusting their operation to separate legal entities). Should finality risks materialise for unprotected DLT SSSs and/or their participants, these could spill over to other regular SSSs operated by the same CSD, as well as to its participants. Such risks could materialise, for instance, where one or more entities participate in both a regular and a DLT SSS operated by the same CSD. In view of the foregoing, it would be helpful for the proposed regulation to require a CSD operating a DLT SSS (whether or not in parallel to the operation of a regular SSS) to clearly explain the insolvency and settlement finality risks to which its participants are exposed, as well as any mitigating measures that the CSD has put in place in order to mitigate such risks. *Third*, the ECB sees merit in the proposed regulation explicitly catering for the involvement of the relevant authorities in the assessment of the risks to which the parallel operation of regular and DLT SSSs may give rise, as part of the CSD authorisation process.

### 3.5 *Level playing field between operators of DLT market infrastructures*

The proposed regulation refers briefly to the issue of preventing and addressing settlement fails, which is pivotal for promoting settlement discipline and the safe and efficient settlement of transactions<sup>58</sup>. There is a significant asymmetry between the requirements applicable to a DLT MTF and the provisions set out in the CSD Regulation<sup>59</sup>. The absence of uniform requirements on settlement fails may trigger a race to the bottom among operators of DLT MTFs and may ultimately result in a more favourable treatment of DLT MTF operators compared to CSDs and a lower level of settlement safety for DLT MTF participants compared to CSD participants.

### 3.6 *Exit strategy for operators of DLT market infrastructures and removal of DLT transferable securities from trading*

The proposed regulation refers in broad terms to a transition strategy i.e. an exit strategy that operators of DLT market infrastructures must have in place in the event that the permission or some of the exemptions granted have to be withdrawn or otherwise discontinued, or in the event of any voluntary or involuntary cessation of the business<sup>60</sup>. Where permissions or exemptions are revoked or the market valuation of DLT transferable securities exceeds certain thresholds, an operator of a DLT market infrastructure may have to undertake substantial changes, the implementation of which would likely require a significant period of time. Moreover, if there is no alternative operator of a DLT market infrastructure able or willing to ensure continuity of services, the withdrawal of a specific permission or of any of the exemptions granted<sup>61</sup> may not be implemented in practice, contrary to the spirit of the proposed regulation. In view of the foregoing, the ECB proposes that the Union legislative bodies should provide greater detail on the specific content of the exit strategy and the timeline for its implementation. In addition, the proposed regulation should be supplemented with specific procedures that would be applicable in the case of removal of DLT transferable securities from trading on a DLT MTF, as well as in the case of a breach of the EUR 200 million market capitalisation limit for the admission to trading on a DLT MTF. Most importantly, it should be clearly indicated how investors holding the relevant DLT transferable securities would be protected in such

<sup>58</sup> See Article 4(3)(g) of the proposed regulation.

<sup>59</sup> See Article 6(3) and (4) and Article 7 of the CSD Regulation.

<sup>60</sup> See Articles 6(6) and 3(5) of the proposed regulation.

<sup>61</sup> See Articles 7(6) and 8(6) of the proposed regulation.



cases. It should be indicated whether the issuer (or its largest shareholder) should conduct a buy back of the relevant DLT transferable securities, whether such an operation would be mandatory also for investors, and how the fair price would be determined in such cases. Alternatively, the ECB suggests that there should be specific arrangements in place for the conversion of such DLT transferable securities into 'non-DLT' transferable securities registered in a CSD.

### 3.7 *Interplay with the proposed Markets in Crypto-assets regulation*

- 3.7.1 There is a potential mismatch between the proposed regulation and the scope of application of the proposed Markets in Crypto-assets regulation. In the settlement models for e-money tokens described in paragraph 3.3.7, e-money token issuers and/or service providers, which, under the proposed Markets in Crypto-assets regulation, fall under the umbrella definitions of crypto-assets issuers and crypto-assets services providers, would *de facto* provide services in relation to financial instruments, namely DLT transferable securities. If this is the case, it seems that such services are neither regulated under the proposed regulation nor under the proposed Markets in Crypto-assets regulation.
- 3.7.2 Furthermore, under the proposed Markets in Crypto-assets regulation, e-money tokens classified as significant are subject to additional requirements<sup>62</sup>. In particular, with regard to the custody of reserve assets<sup>63</sup>, issuers of significant e-money tokens must ensure at all times that the reserve assets are not encumbered or pledged as a 'financial collateral arrangement', a 'title transfer financial collateral arrangement' or a 'security financial collateral arrangement' within the meaning of points (a), (b) and (c) respectively of Article 2(1) of Directive 2002/47/EC of the European Parliament and of the Council<sup>64</sup>. In view of the fact that for the purposes of settlement of securities transactions either DLT transferable securities or e-money tokens may need to be posted as collateral, it is unclear how a pledge as a 'financial collateral arrangement', a 'title transfer financial collateral arrangement' or a 'security financial collateral arrangement' could be validly executed on e-money tokens' reserve of assets in view of the above-mentioned limitations which exist under the proposed Markets in Crypto-assets regulation. In order to use e-money tokens in the context of securities settlement, it is of utmost importance to ensure that they can be posted as collateral. In view of the foregoing, the ECB believes that further reflection and attention should be given to the interaction between the proposed regulation, the proposed Markets in Crypto-assets regulation and existing Union financial services and banking legislation.

## 4. Prudential supervisory aspects

- 4.1 The ECB and the relevant NCA are the competent authorities exercising specified prudential supervisory powers under Regulation (EU) No 575/2013 of the European Parliament and of the Council<sup>65</sup> (hereinafter referred to as the 'Capital Requirements Regulation') and the Capital

<sup>62</sup> See Articles 33 and 52 of the proposed Markets in Crypto-assets regulation.

<sup>63</sup> See Article 33(1)(b) and Article 52(a) of the proposed Markets in Crypto-assets regulation.

<sup>64</sup> Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (OJ L 168, 27.6.2002, p. 43).

<sup>65</sup> Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).



Requirements Directive. In addition, the SSM Regulation confers specific tasks on the ECB concerning the prudential supervision of credit institutions within the euro area and makes the ECB responsible for the effective and consistent functioning of the Single Supervisory Mechanism (SSM) within which specific supervisory responsibilities are distributed between the ECB and the participating NCAs<sup>66</sup>. In particular, the ECB has the task of authorising and withdrawing the authorisation of all credit institutions. For significant credit institutions, the ECB also has the task, among others, to ensure compliance with the relevant Union laws imposing prudential requirements on credit institutions, including the requirement to have in place robust governance arrangements, such as sound risk management processes and internal control mechanisms<sup>67</sup>. To this end, the ECB is given all supervisory powers to intervene in the activity of credit institutions that are necessary for the exercise of its functions.

- 4.2 The proposed regulation sets out the basic requirements for the operation of DLT market infrastructures, together with a series of exemptions that can be requested from specific requirements embedded in MiFID II, Regulation (EU) No 2014/600 and the CSD Regulation. This means that investment firms also licensed as credit institutions and market operators may request permission from the national competent authority to operate DLT market infrastructures for the purposes, inter alia, of registering and settling DLT transferable securities. Furthermore, the proposed regulation requires the operators of DLT market infrastructures to cooperate with the competent authorities entrusted with the granting of specific permissions as well as with the European Securities and Markets Authority (ESMA)<sup>68</sup>.
- 4.3 The ECB notes that the current approach taken with regard to the authorisation process fosters equal treatment for credit institutions and non-credit institution operators alike and represents a step forward towards risk-based supervision taking account of the activities performed by a given entity. Having said that, while the proposed regulation does not envisage the involvement of the ECB (as prudential supervisor) in the authorisation and exemption process, it may be relevant for the ECB, from a prudential supervision perspective, to receive information from the national competent authority with regard to significant credit institutions that wish to operate a DLT market infrastructure. Therefore, it is suggested that the proposed regulation should include an obligation on the national competent authority to notify the prudential supervisor, including the ECB for significant credit institutions, of whether or not permissions and exceptions are granted, as well as where corrective measures are imposed. For the same reasons, it is suggested that the proposed regulation should include the applicable prudential supervisor among the recipients of the regular reporting by the operators of a DLT market infrastructure<sup>69</sup>.

Where the ECB recommends that the proposed regulation is amended, specific drafting proposals are set out in a separate technical working document accompanied by an explanatory text.

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<sup>66</sup> 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).

<sup>67</sup> See Article 4(1)(e) and Article 6(4) of Regulation (EU) No 1024/2013.

<sup>68</sup> See Article 9 of the proposed regulation.

<sup>69</sup> See Article 9(4) of the proposed regulation.

This opinion will be published on EUR-Lex.

Done at Frankfurt am Main, 28 April 2021.

A handwritten signature in black ink, appearing to read 'Ch Lagarde', written in a cursive style.

*The President of the ECB*

Christine LAGARDE

## Technical working document

produced in connection with ECB Opinion CON/2021/15<sup>1</sup>

Drafting proposals in relation to a proposal for a regulation of the European Parliament and of the Council on a pilot regime for market infrastructures based on distributed ledger technology

Text proposed by the European Commission	Amendments proposed by the ECB <sup>2</sup>
<p style="text-align: center;">Amendment 1</p> <p style="text-align: center;">Recital 5</p>	
<p>'(5) [...] The pilot regime should also enable the European Securities and Markets Authorities (ESMA) and competent authorities to gain experience on the opportunities and specific risks created by crypto-assets that qualify as financial instruments, and by their underlying technology.'</p>	<p><b>'(5) [...] The creation of the pilot regime should be without prejudice to the tasks and responsibilities of the European Central Bank (ECB) and the national central banks in the European System of Central Banks (ESCB), as provided for in the Treaty on the Functioning of the European Union and the Statute of the ESCB and of the ECB, to promote the smooth operation of payment systems and to ensure efficient and sound clearing and payment systems within the Union and with other countries. The pilot regime should also enable the European Securities and Markets Authorities (ESMA) and competent authorities to gain experience on the opportunities and specific risks created by crypto-assets that qualify as financial instruments, and by their underlying technology.'</b></p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>In view of the overlap between the proposed regulation and the basic ESCB task to promote the smooth operation of payment systems and to ensure efficient and sound clearing and payment systems within the Union and with other countries, it should be expressly stated that the proposed regulation is without prejudice to that ESCB task. See section 3.1 of the ECB Opinion.</i></p>	

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

<sup>2</sup> 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 European Commission	Amendments proposed by the ECB <sup>2</sup>
<p style="text-align: center;">Amendment 2</p> <p style="text-align: center;">New recital 6a</p>	
	<p><b>'(6a) Where CSDs operated by the members of the ESCB, other Member States' national bodies performing similar functions, or other public bodies charged with or intervening in the management of public debt in the Union, operate a DLT securities settlement system, they should not be required to seek specific exemptions or permissions from a competent authority, since such CSDs are not required to report to competent authorities or to comply with their orders, and are subject to a limited set of requirements under Regulation (EU) No 909/2014, in accordance with Article 1(4) thereof.'</b></p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>For the sake of legal certainty, the ECB proposes to state expressly that CSDs operated by ESCB central banks which operate a DLT securities settlement system are exempt from the provisions of the proposed regulation concerning the process of granting exemptions and withdrawing permissions. See paragraph 3.1.5 of the ECB Opinion.</i></p>	
<p style="text-align: center;">Amendment 3</p> <p style="text-align: center;">Amendment to Article 4(3)(a), (d) and (g)</p>	
<p>'3. Where an investment firm or a market operator operating a DLT MTF has requested an exemption under paragraph 2, it shall ensure, by means of robust procedures and arrangements that, the DLT MTF:</p> <p>(a) guarantees that the number of DLT transferable securities in an issue or in part of an issue admitted by the investment firm or market operator operating the DLT MTF, is equal to the sum of DLT transferable securities making up such an issue or part of an issue, recorded on the</p>	<p>'3. Where an investment firm or a market operator operating a DLT MTF has requested an exemption under paragraph 2, it shall ensure, by means of robust procedures and arrangements that, the DLT MTF:</p> <p>(a) guarantees, <b>in accordance with Article 37(2) and (3) of Regulation (EU) No 909/2014</b>, that the number of DLT transferable securities in an issue or in part of an issue admitted by the investment firm or market operator operating the DLT MTF, is equal to the sum of DLT transferable securities</p>

Text proposed by the European Commission	Amendments proposed by the ECB <sup>2</sup>
<p>DLT, at any given time;</p> <p>[...]</p> <p>(d) provides clear, accurate and timely information in relation to the settlement of transactions, including settlement finality, by defining the moment from which transfer orders or other pre-identified instructions may not be revoked by a member, participant, issuer or client;</p> <p>[...]</p> <p>(g) either prevents or, if not possible, addresses settlement fails.<sup>1</sup></p>	<p>making up such an issue or part of an issue, recorded on the DLT, at any given time;</p> <p>[...]</p> <p>(d) provides, <b>in accordance with Article 39(5) of Regulation (EU) No 909/2014</b>, clear, accurate and timely information in relation to the settlement of transactions, including settlement finality, by defining the moment from which transfer orders or other pre-identified instructions may not be revoked by a member, participant, issuer or client;</p> <p>[...]</p> <p>(g) either prevents or, if not possible, addresses settlement fails, <b>in accordance with Article 7 of Regulation (EU) No 909/2014 and Commission Delegated Regulation (EU) 2018/1229*</b>.</p> <p><small>*Commission Delegated Regulation (EU) 2018/1229 of 25 May 2018 supplementing Regulation (EU) No 909/2014 of the European Parliament and of the Council with regard to regulatory technical standards on settlement discipline (OJ L 230, 13.9.2018, p. 1).<sup>1</sup></small></p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>In order to avoid a playing field that is not level, the requirements on the provision of core CSD services by an operator of DLT MTFs should be aligned with the relevant provisions of Regulation (EU) No 909/2014. See paragraphs 1.3, 3.4 and 3.5 of the ECB Opinion.</i></p>	
<p style="text-align: center;">Amendment 4</p> <p style="text-align: center;">Amendment to Article 5(3)</p>	
<p>'3. At its request, a CSD operating a DLT securities settlement system may be exempted by the competent authority from the application of Article 19 and Article 30 of Regulation (EU) No 909/2014, provided that:</p> <p>[...]</p>	<p>'3. At its request, a CSD operating a DLT securities settlement system may be exempted by the competent authority from the application of Article 19 <b>of Regulation (EU) No 909/2014 in relation only to the outsourcing of a core service to a third party</b> and from Article 30 of <del>that Regulation (EU) No 909/2014</del>, provided that:</p> <p>[...]</p>

Text proposed by the European Commission	Amendments proposed by the ECB <sup>2</sup>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>The exemption from Article 19 of Regulation (EU) No 909/2014 should be narrowed to the outsourcing of services and should not include the extension of a CSD's activities. In addition, the operation by a CSD of a DLT SSS may not be tantamount to the operation of a 'system'. In such a case, the operation of a DLT SSS would not be regarded as an extension of activities or services under Regulation (EU) No 909/2014. As a result, an assessment by the relevant authorities, including ESCB central banks, of the authorisation for the operation of a DLT SSS would be necessary in accordance with Article 19 of Regulation (EU) No 909/2014. See paragraph 3.1.4 of the ECB Opinion.</i></p>	
<p style="text-align: center;">Amendment 5 Amendment to Article 5(5)</p>	
<p>'5. At its request, a CSD operating a DLT securities settlement system may be exempted by the competent authority from the application of Article 40 of Regulation (EU) No 909/2014 on cash settlement, provided that the CSD ensures delivery versus payment.</p> <p>The settlement of payments may be carried out through central bank money, where practicable and available, or where not practicable and available, through commercial bank money, including commercial bank money in a token-based form, or in e-money tokens.</p> <p>Where settlement occurs through commercial bank money or e-money tokens, the investment firm or market operator operating the DLT MTF shall identify, measure, monitor, manage, and minimise any counterparty risk arising from the use of such money.'</p>	<p>'[5. At its request, a CSD operating a DLT securities settlement system may be exempted by the competent authority from the application of Article 40 of Regulation (EU) No 909/2014 on cash settlement, provided that the CSD ensures delivery versus payment.]</p> <p>The settlement of payments <del>may</del> <b>shall</b> be carried out through central bank money, where practicable and available, or where not practicable and available, through commercial bank money, including commercial bank money in a token-based form, or in e-money tokens.</p> <p>Where settlement occurs through commercial bank money or e-money tokens, the <del>investment firm or market operator</del> <b>CSD operating the DLT MTF securities settlement system</b> shall identify, measure, monitor, manage, and minimise any <del>counterparty</del> <b>also taking into account any risk arising from the designation or non-designation of the DLT securities settlement system as a system for the purposes of</b></p>



Text proposed by the European Commission	Amendments proposed by the ECB <sup>2</sup>
	Directive 98/26/EC and paragraph 8. '
<p style="text-align: center;"><u>Explanation</u></p> <p><i>The ECB has placed the first subparagraph of paragraph 5 in square brackets, in view of the need for the Union legislative bodies to reconsider the scope of the exemption under Article 40 of Regulation (EU) No 909/2014. When the CSD operating the DLT securities settlement system is identifying risks arising from the use of commercial bank money and e-money tokens it should also take account of whether or not insolvency protection under Directive 98/26/EC exists. See paragraphs 3.3.2 and 3.3.5 to 3.4 of the ECB Opinion.</i></p>	
<p style="text-align: center;">Amendment 6</p> <p style="text-align: center;">Amendments to Article 6(1) and (2)</p>	
<p>'1. [...] Such legal arrangements shall specify the governing law, the pre-litigation dispute settlement mechanism and the jurisdiction for bringing legal action.</p> <p>2. A CSD operating a DLT securities settlement system, and an investment firm or a market operator operating a DLT MTF requesting an exemption from Article 3(2) of Regulation (EU) No 909/2014, shall establish rules on the functioning of the DLT they operate, including the rules for accessing the distributed ledger technology, the participation of the validating nodes, addressing potential conflicts of interest, and risk management including any mitigation measures.'</p>	<p>'1. [...] Such legal arrangements shall specify the governing law, the pre-litigation dispute settlement mechanism, <b>any insolvency protection under Directive 98/26/EC</b> and the jurisdiction for bringing legal action.</p> <p>2. A CSD operating a DLT securities settlement system, and an investment firm or a market operator operating a DLT MTF requesting an exemption from Article 3(2) of Regulation (EU) No 909/2014, shall establish:</p> <p><b>(a) rules on the functioning of the DLT they operate, including the rules for accessing the distributed ledger technology, the participation of the validating nodes, addressing potential conflicts of interest, and risk management including any mitigation measures; and</b></p> <p><b>(b) measures to mitigate the risks arising on insolvency, where insolvency protections under Directive 98/26/EC do not apply.'</b></p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>From an oversight perspective, the settlement finality and insolvency risks, together with the relevant mitigating measures, should be specified and disclosed to the participants in the DLT SSS or DLT MTF. See paragraph 3.4 of the ECB Opinion.</i></p>	

Text proposed by the European Commission	Amendments proposed by the ECB <sup>2</sup>
<p style="text-align: center;">Amendment 7</p> <p style="text-align: center;">Amendments to Article 7(3) and (6)</p>	
<p>'3. Before deciding on an application for a specific permission to operate a DLT MTF under this Regulation, the competent authority of the home Member State shall notify and provide all relevant information on the DLT MTF to ESMA, an explanation of the exemptions requested, their justifications and any compensatory measures proposed by the applicant or required by the competent authority.</p> <p>[...]</p> <p>6. Without prejudice to Article 8 and Article 44 of Directive 2014/65/EU, the competent authority which granted a specific permission under this Regulation shall withdraw such permission or any of the exemptions granted, after consultation with ESMA, in accordance with paragraph 3, if any of</p>	<p>'3. Before deciding on an application for a specific permission to operate a DLT MTF under this Regulation, the competent authority of the home Member State shall notify and provide all relevant information on the DLT MTF, <b>in the case of an application by a credit institution, to its prudential supervisor, including the ECB for significant credit institutions, and, in all cases,</b> to ESMA, <b>including</b> an explanation of the exemptions requested, their justifications and any compensatory measures proposed by the applicant or required by the competent authority. <b>In addition, where an applicant intends to provide core services listed in Section A of the Annex to Regulation (EU) No 909/2014, before deciding on an application for a specific permission to operate a DLT MTF under this Regulation, the competent authority of the home Member State shall transmit all information included in the application to the relevant authorities specified in Article 12 of Regulation (EU) No 909/2014 and consult those authorities on the features of the securities settlement system operated by the applicant. A relevant authority may inform the competent authority of its views within 3 months of receipt of the information from the competent authority.</b></p> <p>[...]</p> <p>6. Without prejudice to Article 8 and Article 44 of Directive 2014/65/EU, the competent authority which granted a specific permission under this Regulation shall withdraw such permission or any of the exemptions granted, after consultation with ESMA <b>and informing the relevant authorities</b></p>

Text proposed by the European Commission	Amendments proposed by the ECB <sup>2</sup>
<p>the following has occurred: [...]</p>	<p><b>specified in Article 12 of Regulation (EU) No 909/2014 and, in the case of a specific permission granted to a credit institution, its prudential supervisor, including the ECB for significant credit institutions,</b> in accordance with paragraph 3, if any of the following has occurred: [...]</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>The ECB acknowledges that the proposed regulation does not envisage the involvement of the ECB (as prudential supervisor) in the authorisation and exemption process. However, in view of the prudential supervisory competences of the national competent authorities and the ECB with respect to credit institutions, the national competent authorities and the ECB should be notified of the assessment process. In addition, the provision by an operator of a DLT MTF of core CSD services should require an assessment by the relevant authorities, including ESCB central banks, in accordance with Articles 16 and 17 of Regulation (EU) No 909/2014. See paragraphs 3.1.4 and 4.3 of the ECB Opinion.</i></p>	
<p style="text-align: center;">Amendment 8</p> <p style="text-align: center;">Amendments to Article 8(3), (4) and (6)</p>	
<p>'3. Before deciding on an application for a specific permission to operate a DLT MTF under this Regulation, the competent authority shall notify and provide all relevant information on the DLT securities settlement system to ESMA and an explanation of the exemptions requested, their justification and any compensatory measures proposed by the applicant or required by the competent authority.</p> <p>Within three months of receipt of the notification, ESMA shall provide the competent authority with a non-binding opinion on the application and shall make any recommendations on the exemptions requested by the applicant, that are necessary to ensure investor protection, market integrity and financial stability. ESMA shall also promote the consistency and proportionality of exemptions</p>	<p>'3. Before deciding on an application for a specific permission to operate a DLT MTF <b>securities settlement system</b> under this Regulation, the competent authority shall notify and provide all relevant information on the DLT securities settlement system to <b>the relevant authorities specified in Article 12 of Regulation (EU) No 909/2014 and consult these authorities on the features of the securities settlement system operated by the applicant and, in the case of an application by a credit institution, to the prudential supervisor, including the ECB for significant credit institutions, and, in all cases, to ESMA, and including</b> an explanation of the exemptions requested, their justification and any compensatory measures proposed by the applicant or required by the competent authority.</p>

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<p>granted by competent authorities to CSDs operating DLT securities settlement systems, across the Union. In order to do so, ESMA, shall consult the competent authorities of the other Member States in a timely manner and take the utmost account of their views in its opinion.</p> <p>4. Without prejudice to Article 17 of Regulation (EU) No 909/2014, a competent authority shall refuse to grant a specific permission under this Regulation, if there are grounds for believing any of the following:</p> <p>[...]</p> <p>6. Without prejudice to the application of Article 20 of Regulation (EU) No 909/2014, the competent authority which granted the specific permission, under this Regulation shall withdraw such permission or any of the exemptions granted, after consultation with ESMA, in accordance with paragraph 3, if any of the following has occurred: [...]</p>	<p>Within three months of receipt of the notification, <b>the relevant authorities specified in Article 12 of Regulation (EU) No 909/2014 may respond to the competent authority, and</b> ESMA shall provide the competent authority with a non-binding opinion on the application and shall make any recommendations on the exemptions requested by the applicant, that are necessary to ensure investor protection, market integrity and financial stability. ESMA shall also promote the consistency and proportionality of exemptions granted by competent authorities to CSDs operating DLT securities settlement systems, across the Union. In order to do so, ESMA, shall consult the competent authorities of the other Member States in a timely manner and take the utmost account of their views in its opinion.</p> <p>4. Without prejudice to Article 17 of Regulation (EU) No 909/2014, <b>after having informed the relevant authorities specified in Article 12 of Regulation (EU) No 909/2014 and, in the case of a credit institution, its prudential supervisor, including the ECB for significant credit institutions,</b> a competent authority shall refuse to grant a specific permission under this Regulation, if there are grounds for believing any of the following:</p> <p>[...]</p> <p>6. Without prejudice to the application of Article 20 of Regulation (EU) No 909/2014, the competent authority which granted the specific permission, under this Regulation shall withdraw such permission or any of the exemptions granted, after consultation with ESMA <b>and the relevant authorities specified in Article 12 of Regulation (EU) No 909/2014 and informing, in</b></p>

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	<p><b>the case of a credit institution, its prudential supervisor, including the ECB for significant credit institutions, in accordance with paragraph 3, if any of the following has occurred:</b></p> <p>[...]</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>In view of the prudential supervisory competences of the national competent authorities and the ECB with respect to credit institutions, both the national competent authorities and the ECB should be kept informed of the authorisation and post-authorisation process for credit institutions that are CSDs operating DLT SSSs. In addition, the provision by a CSD operating a DLT SSS of core CSD services should require an assessment by the relevant authorities, including ESCB central banks, in accordance with Articles 16 and 17 of Regulation (EU) No 909/2014. See paragraphs 3.1.4 and 4.3 of the ECB Opinion.</i></p>	
<p style="text-align: center;">Amendment 9</p> <p style="text-align: center;">Amendments to Article 9(1) and (4)</p>	
<p>'1. Without prejudice to the application of any relevant provisions of Directive 2014/65/EU and Regulation (EU) No 909/2014, the operators of DLT market infrastructures shall cooperate with the competent authorities which are entrusted with granting specific permissions under this Regulation and with ESMA.</p> <p>In particular, immediately upon becoming aware of any of the matters listed below, the operators of DLT market infrastructures shall notify, the said competent authorities and ESMA, thereof. Such matters include, without limitation:</p> <p>[...]</p>	<p>'1. Without prejudice to the application of any relevant provisions of Directive 2014/65/EU and Regulation (EU) No 909/2014, the operators of DLT market infrastructures shall cooperate with the competent authorities, <b>including, in the case of credit institutions, their prudential supervisors, including the ECB for significant credit institutions</b>, which are entrusted with granting specific permissions under this Regulation and with ESMA.</p> <p>In particular, immediately upon becoming aware of any of the matters listed below, the operators of DLT market infrastructures shall notify, the said competent authorities, <b>including, in the case of credit institutions, their prudential supervisors, including the ECB for significant credit institutions</b>, and ESMA, thereof. Such matters include, without limitation:</p> <p>[...]</p>

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<p>2. The operators of DLT market infrastructures shall provide the competent authority which granted the specific permission and ESMA with any relevant information they may require.</p> <p>3. [...] Before requiring any corrective measures, the competent authority shall consult ESMA, in accordance with Article 7(3) or Article 8(3). [...]</p> <p>4. Every six months from the date of the specific permission, the operator of a DLT market infrastructure shall submit a report to the competent authority and ESMA. [...]</p>	<p>2. The operators of DLT market infrastructures shall provide the competent authority which granted the specific permission and ESMA with any relevant information they may require. <b>In the case of a DLT securities settlement system or DLT MTF providing core CSD services, the competent authority shall transmit information concerning the functioning of the securities settlement systems to the relevant authorities specified in Article 12 of Regulation (EU) No 909/2014 as soon as possible.</b></p> <p>3. [...] Before requiring any corrective measures, the competent authority shall consult ESMA, in accordance with Article 7(3) or Article 8(3). [...]</p> <p>4. Every six months from the date of the specific permission, the operator of a DLT market infrastructure shall submit a report to the competent authorities, including, <b>in the case of a credit institution, its prudential supervisor, including the ECB for significant credit institutions, and ESMA. In the case of a DLT securities settlement system or DLT MTF providing core CSD services, the competent authority shall transmit that information to the relevant authorities specified in Article 12 of Regulation (EU) No 909/2014 as soon as possible.</b> [...]</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>In view of the prudential supervisory competence of the national competent authorities and the ECB for significant credit institutions, the national competent authorities and the ECB should be kept informed of any material change post-authorisation and notified accordingly. In addition, the provision by an operator of a DLT market infrastructure of core CSD services should require an assessment by the</i></p>	



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<i>relevant authorities, including ESCB central banks, in accordance with Articles 16 and 17 of Regulation (EU) No 909/2014. See paragraph 4.3 of the ECB Opinion.</i>	

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