EUROPEAN CENTRAL BANK

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OPINION OF THE EUROPEAN CENTRAL BANK

of 27 April 2022

on a proposal for a Directive of the European Parliament and of the Council amending Directive 2013/36/EU as regards supervisory powers, sanctions, third-country branches, environmental, social and governance risk

(CON/2022/16)

Introduction and legal basis

On 17 and 21 January 2022 the European Central Bank (ECB) received requests from the European Parliament and the Council of the European Union for an opinion on a proposal for a Directive of the European Parliament and of the Council amending Directive 2013/36/EU as regards supervisory powers, sanctions, third-country branches, environmental, social and governance risk[1] (hereinafter the 'proposed amendments to the CRD').

The proposed amendments to the CRD are closely linked to another proposal on which the ECB received a consultation request, namely a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 575/2013 as regards requirements for credit risk, credit valuation adjustment risk, operational risk, market risk and the output floor[2] (together with the proposed amendments to the CRD, the 'Commission's banking reform package').

The ECB's competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union since the proposed amendments to the CRD contain provisions affecting the ECB's tasks concerning the prudential supervision of credit institutions pursuant to Article 127(6) of the Treaty and the European System of Central Banks' contribution to the smooth conduct of policies relating to the stability of the financial system, as referred to in Article 127(5) of the Treaty. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

General observations

The ECB strongly supports the Commission's banking reform package, which implements important elements of the global regulatory reform agenda into Union legislation. This will reinforce the EU Single Rulebook and substantially strengthen the regulatory framework in areas where supervisory authorities have identified gaps that could potentially lead to risks being insufficiently monitored and covered.

First, enhancing the way environmental, social and governance (ESG) risks are addressed by imposing stricter requirements and by broadening the supervisory toolkit in this area will help to ensure that

1 COM(2021) 663 final.

2 COM(2021) 664 final.

institutions proactively develop enhanced risk management frameworks, thereby reducing the probability of the build-up of excessive risks by individual institutions and the financial system as a whole.

Second, the faithful implementation of the output floor will reduce unwarranted risk weight variability[3] and it is welcome that there will be no double-counting of risks with respect to other requirements, while operational complexities should be avoided.

Third, harmonised provisions for the assessment of banks' directors and key staff (fit and proper assessments) will facilitate supervisory effectiveness and enhance sound governance.

Fourth, a common set of rules for branches of third-country banking groups operating in Member States will replace heterogeneous national approaches and strengthen the single market.

Fifth, further harmonising national powers related to the acquisition of qualifying holdings, transfers of assets or liabilities, mergers or divisions, as well as the sanctioning regime, will ensure the consistency and robustness of the framework.

Sixth, the ECB calls for consistency between Directive 2013/36/EU of the European Parliament and of the Council[4] (hereinafter 'the CRD') and Council Regulation (EU) No 1024/2013 of 15 October 2013[5], on matters relating to supervisory independence in general and conflicts of interest in particular. In limiting possible conflicts of interest, a strict but proportional and flexible approach is important, allowing due consideration of each individual situation.

Finally, allowing supervisors to withdraw the authorisation of credit institutions that have been declared failing or likely to fail, but do not qualify for resolution because the public interest criterion is not met, will facilitate the orderly exit of these banks from the market[6].

This opinion addresses issues of particular importance to the ECB, which have been divided into the sections listed below.

1. Environmental, social and governance risks (ESG risks)

1.1 *Support for the proposed amendments*

The ECB strongly welcomes the proposal of the Commission to enhance the requirements with respect to ESG risks for credit institutions and the respective mandate for competent authorities. The ECB shares the view that ESG risks can have far-reaching implications for the stability of both individual institutions and the financial system as a whole. The Commission has rightly set ambitious targets for the adaptation of the EU to the impacts of ESG risks and its transition towards a sustainable economy, involving specific changes to its productive system over a limited time horizon. The strategy highlights that 'the success of the European Green Deal depends on the contribution

3 See, regarding the general implementation of the output floor, Opinion CON/2022/11 of the European Central Bank of 24 March 2022 on a proposal for amendments to Regulation (EU) No 575/2013 as regards requirements for credit risk, credit valuation adjustment risk, operational risk, market risk and the output floor. All ECB opinions are available on EUR-Lex.

4 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, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

5 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).

6 See, in particular, ECB contribution to the European Commission's targeted consultation on the review of the crisis management and deposit insurance framework, p. 9, available on the ECB website at www.ecb.europa.eu.

of all economic stakeholders and on their incentives to meet our targets. To that end, financial institutions must translate EU sustainability goals into their long-term financing strategies and decision-making processes'[7]. The transition and the associated risks affect almost all sectors of the economy and have widespread impacts across regions; they moreover depend on decarbonisation policies, shifts in consumer and investor preferences as well as technological changes. These widespread impacts warrant bespoke strategies as well as enhanced risk management capabilities to ensure the resilience of the business models of credit institutions in the short, medium and long term and to avoid the build-up of excessive transition risk in their portfolios. It is therefore crucial that credit institutions monitor the risk arising from the misalignment of their portfolios with the transition objectives of the EU, thereby setting ambitious and concrete timelines, including intermediate milestones, for the purpose of their strategic planning.

The ECB supports the proposal to cover ESG risks more explicitly in supervisory requirements, which will help minimise the threats that these risks pose to individual institutions and financial stability. The need for better bank-internal risk management and more supervisory scrutiny regarding these risks has been highlighted by a recent ECB supervisory assessment. This comprehensive exercise revealed that no institution is close to fully aligning their practices with supervisory expectations on climate-related and environmental (C&E) risks and that institutions themselves consider 90% of their reported practices to be only partially or not at all aligned with the ECB's supervisory expectations[8].

The ECB acknowledges the prioritisation of C&E risks over social and governance factors, also in light of the differences in methodologies. C&E risks notably comprise threats stemming from the required transition towards a more sustainable economy and the adaptation to increasing physical threats. Transition and physical risks are special compared to other prudential risks and as they build up over time, careful planning and clear mitigation strategies are needed, while decisive and immediate short-term action may be required to mitigate long-term impacts.

The ECB supports the proposed requirement for credit institutions to develop specific plans to monitor and address ESG risks arising in the short, medium and long term. This will ensure that credit institutions measure ESG risks over longer-time horizons and thoroughly assess the structural changes that are likely to occur within the industries they are exposed to, according to the transition pathways determined by the EU legal framework[9]. The requirement to develop such plans will increase transparency on the risks to which the financial system is exposed. Furthermore, it will also ensure that credit institutions proactively review, also in relation to the EU's transition objectives, whether their strategies sufficiently incorporate ESG-related considerations, thereby mitigating reputational risks or risks arising from rapidly changing market sentiment as well.

The ECB stands ready to collaborate with EU agencies to monitor credit institutions' progress in

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7 See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 6 July 2021: Strategy for Financing the Transition to a Sustainable Economy, COM(2021) 390 final, p. 14.

8 The state of climate and environmental risk management in the banking sector – Report on the supervisory review of banks' approaches to manage climate and environmental risks, November 2021, available on the ECB website at www.ecb.europa.eu.

9 E.g. Regulation (EU) 2019/631 of the European Parliament and of the Council of 17 April 2019 setting CO_2 emission performance standards for new passenger cars and for new light commercial vehicles, and repealing Regulations (EC) No 443/2009 and (EU) No 510/2011 (OJ L 111, 25.4.2019, p. 13). Such standards directly affect credit institutions, via their counterparties, in the short, medium and long term.

developing their specific plans (new Article 76(2)) and stresses the need for timely action on this front. The ECB sees a need to prioritise the resilience and adaptation of institutions to the long-term negative impacts of ESG risks. The proposed European Banking Authority (EBA) guidelines on the content of institutions' plans (new Article 87a(5)(b)) will be particularly important in this regard, and the ECB considers therefore that these guidelines should be published within 12 months. Conversely, a deadline of 24 months seems more appropriate for the proposed guidelines on minimum standards and reference methodologies (new Article 87a(5)(a)).

Proper internal risk management, including specific planning, will also facilitate the assessment by competent and macroprudential authorities of ESG risks. In the context of the further articulation of the requirement for credit institutions to manage all material risks, by testing their resilience to the long-term negative impacts of C&E risks, the ECB welcomes the enhancement of the related supervisory powers in a manner that is consistent with the time horizon for the materialisation of ESG risks. This will allow the ECB to more effectively address ESG risks, starting with climate-related and environmental risks, affecting the prudential situation of the credit institution (e.g. capital and liquidity) also in the medium to long term (i.e. 5-10 years). Such requirements will also help macroprudential authorities to mitigate the system-wide repercussions of ESG risks, notably analysing their systemic aspects, e.g. through economy-wide climate stress testing. All this should provide the ECB with more adequate tools to help avert, jointly with the other relevant authorities, the build-up of stranded assets on credit institutions' balance sheets and ensuring complementarity between the microprudential and macroprudential approaches.

With respect to the macroprudential toolbox, the ECB also welcomes the clarification in a recital of the proposed amendments to the CRD that the systemic risk buffer (SyRB) framework may already be used to address various kinds of systemic risks, including risks related to climate change. To the extent that risks related to climate change have the potential to have serious negative consequences for the financial system and the real economy in Member States, a SyRB rate can be introduced to mitigate those risks.

1.2 *Resilience to long-term negative impacts of ESG risks*

With respect to the scenarios and methods to assess resilience to long-term negative impacts of ESG risks, particularly climate change and environmental degradation, the ECB wishes to highlight the fact that the challenges they pose to the financial sector can only be assessed and addressed by integrating scientific analysis into policymaking. The contribution of scientific research, financial sector entities and environmental agencies will be instrumental in this respect. The ECB welcomes the Commission's commitment to strengthen the cooperation among all relevant public authorities, including supervisors and that such cooperation is intended 'to help define intermediate targets for the financial sector'[10]. Nevertheless, it would be useful to recall, in the recitals of the proposed amendments to the CRD, the commitment made in Action point 5.c of the Strategy for Financing the Transition to a Sustainable Economy (COM(2021) 390 final). Specifically, it is important to stress that the Commission has committed to strengthen the cooperation with the ECB, the European Systemic

10 See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 6 July 2021: Strategy for Financing the Transition to a Sustainable Economy, COM(2021) 390 final, p. 17.

Risk Board, the European Supervisory Authorities and the European Environment Agency and that such cooperation is intended to help define intermediate targets for the financial sector, understand better whether ongoing and prospective progress is sufficient, and thus facilitate taking a more collaborative policy action by all relevant public authorities where necessary. The ECB would welcome a reference to such commitment also in the context of the mandate established in the new Article 87a(5)(c) of the CRD.

2. Output floor

The ECB welcomes the introduction of the output floor, which is an important element of the Basel III reforms[11]. The ECB notes that the proposed amendments to the CRD include some mechanisms governing the interaction between the output floor and the setting of (i) supervisory Pillar 2 requirements and (ii) macroprudential buffers.

The ECB agrees with the overall objective of avoiding double-counting of risks within the microprudential and macroprudential frameworks and with the intention of ensuring that the respective requirements remain appropriate. With regard to the Pillar 2 requirements, the ECB wishes to underline the fact that there is already a general requirement to avoid any double-counting of risks and, therefore, stands ready to ensure that no such double-counting of risks occurs within its remit. With respect to macroprudential buffers, as presently used, these address macroprudential risks which are different from the output floor's target of reducing risks of excessive variability or lack of comparability of risk weights from the use of internal models by the institution.

Furthermore, the proposal requires that the nominal amount of Pillar 2 requirements does not immediately increase as a result of an institution becoming bound by the output floor. The ECB agrees with the underlying objective and the spirit of these provisions to neutralise unwarranted arithmetic effects on Pillar 2 requirements arising from the introduction of the output floor and stands ready to undertake the necessary steps to neutralise this impact.

It is important that the proposed mechanisms are respectful of existing supervisory and macroprudential practices and avoid operational complexities and administrative burdens for competent and macroprudential authorities. In particular, with regard to Pillar 2 requirements, as already mentioned, the ECB considers that competent authorities are already mandated, in the current regulatory framework, to avoid double-counting of risks and unwarranted changes in prudential requirements, and that the guidelines issued by the EBA under Article 107(3) of the CRD provide a sound legal basis for establishing a common methodology for achieving this. While the ECB therefore does not see the need for permanently enshrining in Level 1 legislation how the output floor should be taken into account when setting Pillar 2 requirements, it takes note of the specific legislative proposal on this issue and stresses the need to ensure that the proposed provision – including the temporary freeze – does not permanently interfere with both the current Pillar 2 approach and its frequency. The ECB is of the view that the instantaneous neutralisation should take place at the moment when the bank becomes bound by the floor. In subsequent years any needed adjustment would be done in the context of the regular supervisory review and evaluation process.

11 See also Opinion CON/2022/11, which provides more detailed comments on the implementation of the output floor, notably with respect to its level of application and transitional arrangements.

EU legislators may wish to provide the EBA with a specific mandate to develop guidelines on how competent authorities should deal with the impact of the output floor when setting Pillar 2 requirements, as defined in the Commission's proposal for a Regulation amending Regulation (EU) No 575/2013 (Article 465(1)). Should EU legislators wish to include a legislative reference to this issue, the ECB has also provided suggestions in the technical working document on how the legislative draft could be amended to be respectful of both the current Pillar 2 approach and its frequency, while also explicitly regulating the interaction between the output floor and Pillar 2 requirements in the Level 1 text.

With regard to the SyRB, the ECB has strong concerns with regard to the proposed requirement for a mandatory review of its calibration, which includes a dynamic cap on the buffer, freezing it at pre-output floor levels until such a review has been concluded and the outcome published.

There are three reasons for these concerns.

First, the proposed mandatory review increases the complexity of the framework and the administrative burden, as it implies that authorities would need to review the calibration of the SyRB for each credit institution becoming bound by the output floor individually. Second, a temporary cap and institution-specific review of the SyRB is at odds with the macroprudential nature of the buffer and its (sub-) sector-wide application. This would establish an unwarranted specific treatment of an individual credit institution which is affected by a SyRB and becomes bound by the output floor. Third, the CRD already includes adequate provisions for the regular review of capital buffers, which are sufficient to ensure any required changes in the implemented rates.

The ECB has similar concerns regarding the proposed requirement to review the calibration of the other systemically important institutions (O-SII) buffer when the output floor becomes binding. Similar to the review of the SyRB, this obligation to review the O-SII buffer increases the complexity of the framework and the administrative burden. Moreover, the O-SII buffer regular reviews are already provided for in the CRD.

Instead of the proposed review mechanism of the SyRB when the output floor becomes binding for a credit institution, the ECB proposes the insertion of an explicit clarification specifying that the SyRB may not be used to address the risk that is captured by the output floor, regardless of whether the output floor becomes binding for a specific institution or not. This clarification should preferably be inserted as a recital but could also be inserted in an article of the CRD. It should address any potential concerns that risks could be double-counted under the output floor and the SyRB. The same reasoning and clarification could also be implemented in relation to the O-SII buffer.

3. Fit and proper

3.1 *Support for the proposed amendments*

The ECB strongly welcomes the proposal of the Commission to revise the fit and proper framework. The supervision of the fitness and propriety of members of the management board of credit institutions is a key supervisory tool that is essential to improve the governance of credit institutions. Good governance in credit institutions increases their resilience to adverse market developments and is a key prerequisite for financial stability. Within its supervisory activities the ECB still sees a

considerable need to plug gaps and to raise the bar in the quality of governance frameworks[12], and therefore strongly welcomes the strengthening of the supervisory toolkit as proposed by the Commission. The current fit and proper framework stands out as one of the least harmonised areas of supervisory law due to the divergence of national laws implementing the CRD. These differences hamper the efficiency of the ECB's fit and proper supervision and have hindered the level playing field within the EU. The Commission proposals constitute a major step forward, as they would ensure a more consistent, efficient and effective supervision of board members and of key function holders, focusing on the more important issues for prudential supervision. This is the case especially in relation to matters such as (i) the establishment of clear deadlines and processes for all Member States; (ii) the need for the occurrence of new facts in order to assess renewals of terms of office; (iii) mandatory *ex ante* assessments for the most impactful institutions; (iv) the assessment of key function holders; (v) the removal of the CEO-Chair waiver from Article 88 of the CRD; and (vi) the credit institution's responsibility for ensuring the suitability of their board members.

The ECB considers that an adequate level of proportionality should be embedded in the new framework, which would also benefit from an even more proportionate approach to fit and proper assessments by competent authorities. While the proposed framework in general already takes a duly proportionate approach to fit and proper assessments (including by limiting *ex ante* assessments to large institutions), the ECB is open to further explore and discuss avenues to ensure the appropriate level of proportionality of the new framework. In particular, proportionality allows competent authorities to focus their resources on the most important assessments.

Finally, the ECB notes that the *ex ante* fit and proper assessments envisaged in the proposed amendments to the CRD do not affect the statutory rights of certain bodies to appoint representatives to supervised entities' boards under national law.

Notwithstanding the overall strong support for the proposed changes, the ECB provides, both below and in the technical working document, a number of comments on specific aspects.

3.2 *Clarification that the proposed ex ante fit and proper assessments are only of a procedural nature: Recital 38 of the proposed amendments to the CRD*

Recital 38 highlights the importance of the suitability assessment of large institutions' members of the management body before those members take up their position. While the ECB strongly supports the envisaged proportionate *ex ante* assessment, it could be further clarified that the proposed provisions on *ex ante* fit and proper assessment are mostly procedural and do not affect national statutory rights of certain bodies or legal entities to appoint representatives to supervised entities' management bodies under applicable national law. Therefore, the ECB proposes the introduction of an additional clarification to Recital 38, which aims at reassuring Members States that any statutory rights based in applicable national law shall not be affected by the proposed amendments to the CRD. Nevertheless, appropriate safeguards should be in place to ensure the suitability of these representatives, such as an effective supervision of the suitability of the

12 Deficiencies in management bodies' steering capabilities are among the key vulnerabilities of credit institutions listed in the ECB's supervisory priorities for 2022-2024, which will inform the supervisory review and examination process, available on the ECB website at www.ecb.europa.eu.

management body as a whole (collective suitability) and follow-up measures to tackle potential conflicts of interest and issues related to time commitment and experience where necessary.

3.3 *Introduction of a 2-day deadline for the acknowledgement of receipt: new Articles 91b(3) and 91d(3) of the CRD*

The suggested deadline of only 2 days for the written acknowledgement of receipt would in practice be extremely challenging to meet by all competent authorities involved due to the very high inflow of fit and proper applications and the extensive documentation that needs to be checked. Specifically, in the many cases where the application concerns multiple appointees, this deadline might not be achievable for supervisors. Overall, this provision may jeopardise meeting the given deadline for fit and proper procedures.

The ECB thus urges the deletion of the 2-day deadline.

3.4 *Mandate to develop implementing technical standards (ITS) on standard forms, templates and procedures for the provision of information: new Articles 91b(10) and 91d(8) of the CRD*

The ECB is responsible for the effective and consistent functioning of the Single Supervisory Mechanism (SSM). In this respect, progress has been made within the SSM as regards the consistent use of forms and IT solutions for the purposes of processing fit and proper applications. The ECB thus underlines that the ITS should be consistent with this harmonisation effort and could possibly leverage the infrastructure already developed.

In light of the above, the ECB proposes the insertion, in the relevant provisions or recitals, of a reference encouraging the EBA to build on the best existing practices and tools when developing the ITS.

3.5 *Procedural consequences where supervised entities do not comply with obligations and deadlines: new Articles 91b(7) and 91d(6) of the CRD*

The supervisory powers available to supervisors in cases where entities do not reply to requests for additional information within the given deadline do not include the power for the competent authorities to declare the application incomplete requiring, as a consequence, the submission of a new application. The ECB therefore calls for the introduction of an additional legal basis allowing competent authorities to consider an application incomplete, with the consequent need for its re-submission. This would ensure that there is a procedural consequence for breach of the deadlines for the provision of additional documentation or information, without prejudice to the possibility for the entity to submit a new application thereby initiating a new procedure.

In light of the above, the ECB proposes adding such an additional procedural consequence in the new Articles 91b(4) and 91d(4) of the CRD.

3.6 *Possibility to extend the assessment period where information is requested from other parties*

New Articles 91b(4) and 91d(4) of the CRD allow for the extension of the assessment period where competent authorities request additional documentation or information from entities, but not where documentation or information is requested by other parties, e.g. judicial authorities and/or other supervisory authorities. The latter is a very common occurrence which often consumes more time.

The ECB therefore proposes that these provisions be amended to also cover situations in which

documentation or information is required from other entities/authorities.

3.7 *Possibility for entities to conduct the (internal) suitability assessment of board members after they have taken up their positions: new Article 91a(2) of the CRD*

A new Article 91a(2), second subparagraph, of the CRD allows for the appointment of members of the management body, in urgent contexts, without any kind of suitability assessment. The ECB is concerned that this possibility may lead to the appointment of unsuitable candidates, also due to the ambiguity underlying the interpretation of the terms 'strictly necessary' and 'immediately' used in that context.

Therefore, the ECB proposes that entities should be required to perform a suitability assessment before members of the management body take up their position even in the most exceptional cases. Nevertheless, in such a scenario a lighter assessment might be warranted, under conditions to be specified in guidelines developed by the EBA. These guidelines would also give guidance on cases that might be considered urgent, i.e. when it is strictly necessary to immediately replace board members.

4. Third-country branches (TCBs) requirements

The harmonisation of the TCB framework is important to establish a comprehensive view on the activities of third country groups in the EU, to align practices within the EU and to ensure a level playing field for third country groups in the EU and European credit institutions by avoiding possibilities for regulatory arbitrage, while at the same time not preventing the access of third country groups to the EU financial market via the establishment of branches. The ECB considers it essential to provide the relevant competent authorities with effective supervisory tools. The harmonisation of the TCB framework is also an opportunity to align the EU's requirements with comparable standards in other major jurisdictions and maintain global openness of the Single Market.

Against this background, the ECB welcomes the harmonised minimum standards for the authorisation and withdrawal of authorisations of branches, as well as in the area of internal governance and risk controls and the increased harmonised reporting requirements. The ECB also welcomes the power for competent authorities to require TCBs to establish a subsidiary in cases of systemic importance, which should not be subject to an automatic trigger but rather to an open-outcome supervisory assessment mechanism, once certain thresholds are reached. In addition, the new framework will allow comprehensive supervision via enhanced cooperation between supervisors, for example by including Class 1 TCBs in colleges of supervisors. In this regard the ECB also appreciates the efforts of the Commission to ensure an adequate involvement of supervisors of other group entities (i.e. subsidiaries) in the decisions that affect the structure of the operations of third country groups in the EU.

Furthermore, the ECB supports the clarification that TCBs may only conduct the activities for which they have been authorised and solely within the territory of the Member State that has provided such authorisation, and that conducting such activities on a cross-border basis within the territories of the Union is expressly prohibited.

In addition to its strong support for the proposal, the ECB proposes amendments in the following areas.

To ensure that the actual size of the activities of a branch is captured, thus helping to avoid that third country

groups use specific booking practices to stay under the thresholds, it is important that not only the assets that are booked in the branch are taken into consideration, but also the assets that are originated by the branch but booked remotely to another location, to the extent that this practice is considered feasible under the new legislation. While the proposed amendments to the CRD include a mandate for the EBA to develop regulatory technical standards on booking arrangements, the ECB considers that it would be more effective to include in the CRD itself also a direct clarification as to how to calculate the assets of a branch for the purposes of assessing thresholds (e.g. for the classification of the branches as Class 1 and for the assessment of systemic importance).

Furthermore, the ECB proposes that the aggregated information on the assets and liabilities held or booked by a third country group's subsidiaries and third country branches in the Union, which the third country branches are required to report to their competent authority, should also be made available to the competent authorities that are responsible for the supervision of the subsidiaries of that third country group. This proposal will allow for a comprehensive overview and analysis of the European footprint of third country groups. To this end, the ECB also proposes that the scope of this reporting requirement related to services provided by the head undertaking is enhanced to capture also the direct provision of cross border investment services by the third country group and the investment services that are provided by the third country group on the basis of reverse solicitation.

5. Direct provision of banking services in the EU by third country undertakings

5.1 *Requirement to establish a branch for the provision of banking services by third country undertakings: new Article 21c of the CRD*

The ECB welcomes the clarification included in the new Article 21c of the CRD that, in order to provide banking services within the Union, third country undertakings must either establish a branch or create a subsidiary in any of the territories of the Union, in order to avoid unregulated and unsupervised activities creating risks to financial stability in the EU.

However, the ECB considers that the scope of core banking services included within the new Article 21c of the CRD is unclear. Therefore, the ECB invites the Union legislative bodies to clarify the wording of the new Article 21c of the CRD and in particular to provide a clear list of core banking services included within this article, taking into consideration also existing requirements in other EU law that regulate particular services, such as payment services and electronic money, as well as the impact of the new article on the liquidity of global financial markets.

6. Supervisory powers

The ECB welcomes the proposed amendments to the CRD as regards supervisory powers as they further harmonise three types of powers, by requiring the competent authority to assess (i) acquisitions of holdings in financial and non-financial sector entities; (ii) material transfers of assets and (iii) mergers/divisions. The present divergence in national powers in these three respects and the fact that the ECB currently exercises such powers only when available under national law leads to an uneven playing field and renders the ECB's supervisory actions within the SSM less efficient. A common set of rules on core prudential powers will simultaneously foster harmonisation within the internal market and increase the overall quality and efficacy

of supervision. Further coordination between these new supervisory powers and powers already provided for in the CRD is needed. To this end, the ECB provides some drafting recommendations in the technical working document.

The ECB welcomes, in particular, the fact that the Commission's proposal recognises the necessity to align the powers provided for in Title III, Chapters 3, 4 and 5, of the CRD concerning acquisitions of a qualifying holding in a credit institution and acquisitions of a material holding by an institution. However, this alignment should not only provide for the exchange of information between the competent authorities, but also provide for the process and timing of the relevant procedures occurring simultaneously for the same operation.

In addition to this procedural alignment, a clear distinction should be made between the concept of a 'qualifying holding', which should be focused on the impact of an acquisition on the target credit institution, and a 'material acquisition', which should be focused on the impact of an acquisition on the acquirer.

Furthermore, in line with its earlier expressed stance[13], the ECB encourages the inclusion of additional supervisory powers on (i) the amendment of credit institutions' articles of association, (ii) related party transactions, and (iii) material outsourcing arrangements. The harmonisation of these powers remains necessary and would help to progress further towards a genuine single rulebook and reduce regulatory fragmentation across the SSM.

7. Administrative sanctions

The proposed amendments to the CRD reflect the ECB's position on the matter.[14] All efforts to further harmonise and strengthen the sanctioning and enforcement powers at Union level are welcomed, which will foster the effective enforcement of prudential requirements within the Union. In particular, it is noted that the enforcement powers of competent authorities are enhanced by introducing the possibility to impose periodic penalty payments as a new enforcement measure aimed at restoring compliance with prudential requirements and that such measure is without prejudice to the subsequent possibility of sanctioning the occurrence of the breach. It is therefore crucial that the distinction between this new enforcement measure, administrative penalties and other administrative measures under the CRD is also reflected in the Member States' transposition into national law. Moreover, the ECB also welcomes the fact that the list of breaches subject to administrative penalties is extended and that the definition of 'total annual turnover' is clarified.

8. Supervisory benchmarking

The ECB welcomes the amendments proposed to Article 78 of the CRD and, in particular, the fact that these amendments expand the scope of supervisory benchmarking to models used by credit institutions in order to calculate expected credit losses under IFRS9. This is very important to ensure the robustness of models which are used, inter alia, by credit institutions which do not have approved internal models for the determination of their capital requirements for credit risk. The addition of the alternative standardised approach for market risk to the scope of supervisory benchmarking is also welcomed as a complement to the information from the internal model approach and as an additional step towards the full implementation of the Basel market risk framework in the EU.

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13 See paragraph 1.12.2 of Opinion CON/2017/46 of the European Central Bank of 8 November 2017 on amendments to the Union framework for capital requirements of credit institutions and investment firms (OJ C 34, 31.1.2018, p. 5).

14 See paragraph 1.15 of Opinion CON/2017/46.

Furthermore, the ECB welcomes the proposal to give the EBA the flexibility to conduct the benchmarking exercises on a biannual basis. The ECB recommends giving even more flexibility to the EBA to set the frequency of these exercises. The ECB also proposes that the exercises are more clearly defined.

Finally, the ECB suggests that institutions should not be required to submit the results of their calculations to the competent authorities annually, i.e. also in years where the EBA does not conduct the exercise. Instead, the ECB proposes that the frequencies for submission and assessment are aligned, reducing the reporting burden for institutions.

9. Disclosure

The ECB welcomes the objective of the new integrated hub managed by the EBA for Pillar III disclosure by credit institutions, which aims to reduce the burden for banks and to facilitate the use of Pillar III information by all stakeholders. Supervisors could benefit from a centralised disclosure hub as it would make it easier for them to ensure the quality of Pillar III information.

The proposal is to apply a different approach in relation to the quantitative public disclosure of small and non-complex institutions (SNCIs) and larger credit institutions. For SNCIs, the EBA will use supervisory reporting to compile the corresponding (quantitative) public disclosure on the basis of a predefined mapping, while for larger institutions the EBA will receive the full disclosure files 'in electronic format' and will need to publish the files on the same day it receives them. This different approach does not seem justified. The same approach for quantitative disclosures could be applied to all credit institutions, regardless of their size and complexity, with the objective of reducing the reporting burden of all credit institutions. Also, the timeline for the EBA to publish Pillar III information on the centralised hub does not allow for the reconciliation between supervisory reporting and Pillar III disclosure information to be performed, which could lead to additional workload for supervisors and lack of clarity for investors and other users of Pillar III information. Moreover, qualitative disclosures and some quantitative disclosures cannot be extracted from supervisory reporting on the basis of the predefined mapping. This issue concerns both SNCIs and other institutions. Therefore, the process to submit such disclosures to the EBA should be clarified. Additional considerations regarding the envisaged Pillar III centralised disclosure hub are provided in the context of Opinion CON/2022/11.

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

Done at Frankfurt am Main, 27 April 2022.

[signed]

The President of the ECB

Christine LAGARDE

EUROPEAN CENTRAL BANK

EUROSYSTEM

Technical working document

produced in connection with ECB Opinion CON/2022/16 on a proposal for a Directive of the European Parliament and of the Council amending Directive 2013/36/EU as regards supervisory powers, sanctions, third-country branches, environmental, social and governance risk[1]

Text proposed by the European Commission	**Amendments proposed by the ECB**[2]
Amendment 1 Recital 5 of the proposed directive	
'(5) Concerning mergers and divisions, the Directive (EU) 2017/1132 lays down harmonised rules and procedures, in particular for cross-border mergers and divisions of limited liability companies. Therefore, the assessment procedure by the competent authorities stipulated in this directive should be complementary to the Directive (EU) 2017/1132 and should not contradict any of its provisions. In case of those cross-border mergers and divisions which fall under the scope of Directive 2017/1132, the motivated opinion issued by the competent supervisory authority should be part of the assessment of the compliance with all relevant conditions and the proper completion of all procedures and formalities required for the pre-merger or pre-division certificate. The motivated opinion should therefore be transferred to the designated national authority responsible for issuing the pre-merger or pre-division certificate under Directive 2017/1132.'	'(5) Concerning mergers and divisions, the Directive (EU) 2017/1132 lays down harmonised rules and procedures, in particular for cross-border mergers and divisions of limited liability companies. Therefore, the assessment procedure by the competent authorities stipulated in this directive should be complementary to the Directive (EU) 2017/1132 and should not contradict any of its provisions. In case of those cross-border mergers and divisions which fall under the scope of Directive 2017/1132, the motivated ~~opinion~~ **decision** issued by the competent supervisory authority should be part of the assessment of the compliance with all relevant conditions and the proper completion of all procedures and formalities required for the pre-merger or pre-division certificate. The motivated ~~opinion~~ **decision** should therefore be transferred to the designated national authority responsible for issuing the pre-merger or pre-division certificate under Directive 2017/1132.'

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

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

Text proposed by the European Commission	Amendments proposed by the ECB[2]
Explanation *The binding nature of the competent authorities' powers relating to mergers and divisions should be clearly reflected in the wording of this recital. See also Amendment 22 which makes the corresponding amendment to the operative provisions of Directive 2013/36/EU of the European Parliament and of the Council (hereinafter the CRD)[3].*	
Amendment 2 Recital 8 of the proposed directive	
'(8) In order to ensure proportionality and avoid undue administrative burden, those additional powers of competent authorities should be applicable only to operations deemed material. Only operations consisting in mergers or divisions should be treated automatically as material operations, as the newly created entity can be expected to present a significantly different prudential profile from the entities initially involved in the merger or division. Also, mergers or division should not be concluded by entities undertaking them before a prior positive opinion is received from the competent authorities. Other operations (including acquisition of holding and transfers of assets and liabilities), when considered material, should be assessed by the competent authorities based on a tacit approval procedure.'	'(8) In order to ensure proportionality and avoid undue administrative burden, those additional powers of competent authorities should be applicable only to operations deemed material. Only operations consisting in mergers or divisions should be treated automatically as material operations, as the newly created entity can be expected to present a significantly different prudential profile from the entities initially involved in the merger or division. Also, mergers or division should not be concluded by entities undertaking them before a prior ~~positive opinion~~ **approval** is received from the competent authorities. Other operations (including acquisition of holding and transfers of assets and liabilities), when considered material, should be assessed by the competent authorities based on a tacit approval procedure.'
Explanation *The binding nature of the competent authorities' powers relating to mergers and divisions should be clearly reflected in the wording of this recital. See also Amendment 23 which makes the corresponding amendment to the operative provisions of the CRD.*	

3 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, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

Text proposed by the European Commission	Amendments proposed by the ECB[2]
Amendment 3 Recital 20 of the proposed directive	
'(20) Where the legal system of the Member State does not allow the administrative penalties provided for in this Directive, the rules on administrative penalties may be applied in such a manner that the penalty is initiated by the competent authority and imposed by judicial authorities. Therefore, it is necessary that those Member States ensure that the application of the rules and penalties has an effect equivalent to the administrative penalties imposed by the competent authorities. When imposing such penalties, judicial authorities should take into account the recommendation by the competent authority initiating the penalty. The penalties imposed should be effective, proportionate and dissuasive.'	'(20) **By way of derogation, restricted only to those limited situations** ~~Where~~ **where** the legal system of the Member State does not allow the administrative penalties provided for in this Directive, the rules on administrative penalties may be **exceptionally** applied in such a manner that the penalty is initiated by the competent authority and imposed by judicial authorities. Therefore, it is necessary that those Member States **still** ensure that the application of the rules and penalties has an effect equivalent to the administrative penalties imposed by the competent authorities. When imposing such penalties, judicial authorities should take into account the recommendation by the competent authority initiating the penalty. **In any event,** ~~The~~ **the** penalties imposed should be effective, proportionate and dissuasive.'
Explanation *Recital 20 is revised to clarify further that Article 65(5) of the CRD provides a derogation to paragraph 1 of the same Article only in limited and exceptional cases where the legal system of a Member State does not allow the administrative penalties provided for in the CRD.*	
Amendment 4 Recital 34 of the proposed directive	
'(34) … Since the forward-looking nature of ESG risks means that scenario analysis and stress testing, together with plans for addressing those risks, are particularly informative assessment tools, EBA should be also empowered to develop uniform criteria for the content of the plans to address those risks and for the setting of scenarios and applying the stress testing methods. Environment-related risks, including risks stemming from environmental degradation and	'(34) … Since the forward-looking nature of ESG risks means that scenario analysis and stress testing, together with plans for addressing those risks, are particularly informative assessment tools, EBA should be also empowered to develop uniform criteria for the content of the plans to address those risks and for the setting of scenarios and applying the stress testing methods. **EBA should ground its scenarios in available scientific evidence, taking advantage of**

Text proposed by the European Commission	Amendments proposed by the ECB[2]
biodiversity loss, and climate-related risks in particular should take priority in light of their urgency and the particular relevance of scenario analysis and stress testing for their assessment.'	**the work developed by the Network for Greening the Financial System and of the efforts by the Commission to strengthen cooperation among all relevant public authorities with the objective to develop a common methodological base, as outlined in Action point 5.c of the Strategy for Financing the Transition to a Sustainable Economy (COM(2021) 390 final).** Environment-related risks, including risks stemming from environmental degradation and biodiversity loss, and climate-related risks in particular should take priority in light of their urgency and the particular relevance of scenario analysis and stress testing for their assessment.'
Explanation *Scenarios on climate-related and environmental risks are highly dependent on the underlying scientific and technological assumptions. The work developed by the Network for Greening the Financial System on scenario analysis (grounded in scientific data) has proven to be a key instrument helping competent authorities to explore the possible impacts of climate-related and environmental risks on the economy and financial system. In addition, the Commission has already committed to strengthening the cooperation among all relevant public authorities, including the European Environmental Agency, to monitor the transition of the EU financial system towards sustainability. The ECB considers it of the utmost importance that EU financial institutions are provided with science-based European transition scenarios, which reflect the ongoing developments in the EU legal framework. Such developments can provide for a transition timeline and processes that are substantially different to those described in the scenario of the International Energy Agency (IEA), making the use of IEA scenarios suboptimal, for EU credit institutions, in assessing risks arising from a misalignment with the broader transition to a more sustainable economy. Lastly, scientific evidence on the physical impact of climate change can support a more detailed measurement of the financial risk for banks that is induced by the acute and chronic manifestation of climate change.*	
Amendment 5 Recital 36 of the proposed directive	
'(36) The provisions in Article 133 of Directive 2013/36/EU on the systemic risk buffer framework may already be used to address various kinds of systemic risks, including risks related to climate	'(36) The provisions in Article 133 of Directive 2013/36/EU on the systemic risk buffer framework may already be used to address various kinds of systemic risks, including risks related to climate

Text proposed by the European Commission	Amendments proposed by the ECB[2]
change. To the extent that the relevant competent or designated authorities, as applicable, consider that risks related to climate change have the potential to have serious negative consequences for the financial system and the real economy in Member States, they should introduce a systemic risk buffer rate for those risks where they consider the introduction of such rate effective and proportionate to mitigate those risks.'	change. To the extent that the relevant competent or designated authorities, as applicable, consider that risks related to climate change have the potential to have serious negative consequences for the financial system and the real economy in Member States, they should introduce a systemic risk buffer rate ~~for those risks~~, **which may also be applied to certain sets or subsets of exposures, for instance those subject to physical and transition risks related to climate change**, where they consider the introduction of such rate effective and proportionate to mitigate those risks.'

Explanation

While recital 36 already highlights the flexibility embedded in the provisions on the systemic risk buffer (SyRB), which allows for addressing different types of systemic risk, including climate risks, it could additionally acknowledge its other design feature, namely the possibility to apply it to a subset of exposures. This could be particularly effective in tackling systemic risks arising from climate change in a targeted manner, thus further incentivising its active use. Therefore, the ECB proposes the additional text underlining the possibility for sectoral use of the SyRB in relation to climate risk.

Amendment 6 Recital 38 of the proposed directive	
'(38) The purpose of assessing the suitability of members of management bodies is to ensure that those members are qualified for their role and are of good repute. Having the primary responsibility for assessing the suitability of each member of the management body, institutions should carry out the suitability assessment, followed by a verification by the competent authorities that may perform it before or after the member of the management body takes up the position. However, due to the risks posed by large institutions resulting in particular from potential contagion effects, unsuitable members of management body should be prevented from influencing the running of such large institutions with	'(38) The purpose of assessing the suitability of members of management bodies is to ensure that those members are qualified for their role and are of good repute. Having the primary responsibility for assessing the suitability of each member of the management body, institutions should carry out the suitability assessment, followed by a verification by the competent authorities that may perform it before or after the member of the management body takes up the position. However, due to the risks posed by large institutions resulting in particular from potential contagion effects, unsuitable members of management body should be prevented from influencing the running of such large institutions with

Text proposed by the European Commission	Amendments proposed by the ECB[2]
potential serious detrimental effects. It is therefore appropriate that, safe in exceptional circumstances, the competent authorities assess the suitability of members of the management body of large institutions before those members exercise their duties.'	potential serious detrimental effects. It is therefore appropriate that, sa~~ve~~e in exceptional circumstances, the competent authorities assess the suitability of members of the management body of large institutions before those members exercise their duties. **This should not interfere with any statutory rights of certain bodies or legal entities to appoint representatives to supervised entities' management bodies under applicable national law. In these cases, appropriate safeguards should be in place to ensure the suitability of these representatives**.'
	Explanation *Recital 38 highlights the importance of the suitability assessment of large institutions' members of the management body before those members take up their position. While the ECB strongly supports the envisaged proportionate ex ante assessment, it could be further clarified that the proposed provisions on ex ante fit and proper assessment are mostly procedural and do not affect national statutory rights of certain bodies or legal entities to appoint representatives to supervised entities' management bodies under applicable national law. Therefore, the ECB proposes the introduction of an additional clarification to Recital 38, which aims at reassuring Members States that the statutory rights based in applicable national law shall not be affected by the proposed amendments to the CRD. Nevertheless, appropriate safeguards should be in place to ensure the suitability of these representatives, such as an effective supervision on the suitability of the board as whole (collective suitability) and follow up measures to tackle potential conflicts of interest and issues in relation to time commitment and experience where necessary.*
Amendment 7 Recital 43 of the proposed directive	
'(43) Upon becoming bound by the output floor laid down in Regulation (EU) No 575/2013, the nominal amount of an institution's additional own funds requirement set by the institution's competent authority in accordance with Article 104(1), point (a), of Directive 2013/36/EU to address risks other than the risk of excessive leverage should not immediately increase as a result, all else being equal. Furthermore, in such case, the competent authority should review the institution's additional own funds	'(43) ~~Upon becoming bound by the output floor laid down in Regulation (EU) No 575/2013, the nominal amount of an institution's~~ **The** additional own funds requirement set by ~~the~~ **an** institution's competent authority in accordance with Article 104(1), point (a), of Directive 2013/36/EU to address risks other than the risk of excessive leverage should not ~~immediately increase as a result~~ **be increased by the institution's becoming bound by the output floor laid down in Regulation (EU) No 575/2013**, all else

Text proposed by the European Commission	Amendments proposed by the ECB[2]
requirement and assess, in particular, whether and to what extent such requirement captures model risk from the use of internal models by the institution. Where that is the case, the institution's additional own funds requirement should be regarded as overlapping with the risks captured by the output floor in the own funds requirement of the institution and, consequently, the competent authority should reduce that requirement to the extent necessary to remove any such overlap for as long as the institution remains bound by the output floor.'	being equal. Furthermore, ~~in such case~~ **upon the institution's becoming bound by the output floor**, the competent authority should review the institution's additional own funds requirement and assess, in particular, whether and to what extent such requirement captures ~~model risk~~ **risks of excessive variability or lack of comparability of risk weights** from the use of internal models by the institution. Where that is the case, the institution's additional own funds requirement should be regarded as overlapping with the risks captured by the output floor in the own funds requirement of the institution and, consequently, the competent authority should reduce that requirement to the extent necessary to remove any such overlap for as long as the institution remains bound by the output floor.'
Explanation *The ECB agrees with the overall objective of avoiding double-counting of risks. With regard to the Pillar 2 requirements, the ECB wishes to underline the fact that there is already a general requirement to avoid any double-counting of risks and, therefore, stands ready to ensure that no such double-counting of risks occurs within its remit. The ECB also agrees with the underlying objective and the spirit of these provisions to neutralise unwarranted arithmetic effects on Pillar 2 requirements arising from the introduction of the output floor and stands ready to undertake the necessary steps to neutralise this impact. While the ECB therefore does not see the need for permanently enshrining in Level 1 legislation how the output floor should be taken into account when setting Pillar 2 requirements, it takes note of the specific legislative proposal on this issue and stresses the need to ensure that the proposed provision – including the temporary freeze – does not permanently interfere with both the current Pillar 2 approach and its frequency.*	
Amendment 8 Recitals 44 and 45 of the proposed directive	
'(44) Similarly, upon becoming bound by the output floor, the nominal amount of an institution's CET1 capital required under the systemic risk buffer should not increase where there has been no increase in the macroprudential or systemic risks associated with the institution. In such cases, the institution's competent	'(44) Similarly, upon becoming bound by the output floor, the nominal amount of an institution's CET1 capital required under the systemic risk buffer **may** ~~should not~~ increase. ~~where there has been no increase in the macroprudential or systemic risks associated with the institution~~. ~~In such cases, the~~

Text proposed by the European Commission	Amendments proposed by the ECB[2]
or designated authority, as applicable, should review the calibration of the systemic risk buffer rates and make sure that they remain appropriate and do not double-count the risks that are already covered by virtue of the fact that the institution is bound by the output floor. More in general, competent and designated authorities, as applicable, should not impose systemic risk buffer requirements for risks which are already fully covered by the output floor.	~~institution's competent or designated authority, as applicable, should review the calibration of the systemic risk buffer rates and make sure that they remain appropriate and do not double-count the risks that are already covered by virtue of the fact that the institution is bound by the output floor. More in general,~~ **As a rule,** competent and designated authorities, as applicable, should not impose systemic risk buffer requirements for risks which are already fully covered by the output floor**, regardless of whether or not an institution is bound by the output floor**.
(45) Furthermore, when an institution designated as an 'other systemically important institution' becomes bound by the output floor, its competent or designated authority, as applicable, should review the calibration of the institution's O-SII buffer requirement and make sure that it remains appropriate.'	~~(45) Furthermore, when an institution designated as an 'other systemically important institution' becomes bound by the output floor, its competent or designated authority, as applicable, should review the calibration of the institution's O-SII buffer requirement and make sure that it remains appropriate.~~'

Explanation

The ECB has strong concerns in relation to the requirement to review the calibration of the SyRB, which includes a dynamic cap on the buffer, freezing it at pre-output floor levels until such a review has been concluded and the outcome published. The ECB has similar concerns regarding the requirement to review the calibration of the other systemically important institutions (O-SII) buffer when the output floor becomes binding. The proposed mandatory review would increase the complexity of the framework and the administrative burden. Furthermore, a mandatory review is not justified by any double counting of risks, given that the output floor and the buffers target different risks. Finally, a temporary cap on the SyRB would also lead to an inequality of treatment among the credit institutions affected by a SyRB, since it would only benefit credit institutions becoming bound by the output floor.

Therefore, the ECB proposes amending recital 44 to clarify that there should not be any double counting of risks between the systemic risk buffer requirements and the output floor, regardless of whether an institution is bound by the output floor or not. The ECB also proposes the deletion of recital 45, as well as to make the necessary changes in Articles 104a, 131 and 133 of the CRD (see Amendments 40 to 42 relating to the operative provisions). Although the ECB considers it sufficient simply to amend recital 44 as proposed, if an amendment also to the operative provisions is considered desirable, the ECB offers in Amendment 42 a corresponding amendment to Article 133(8)(c) of the CRD

Text proposed by the European Commission	Amendments proposed by the ECB[2]
Although not strictly necessary, if desired, the ECB is of the view that a recital could be inserted or recital 44 could be complemented to clarify that there is no double-counting of risks also in relation to O-SII buffers.	
Amendment 9 Point (1)(g) of Article 1 of the proposed directive (Article 3(1)(68) CRD)	
'[…] (68) "periodic penalty payments" means daily penalties, aimed at ending ongoing breaches and compelling legal or natural person to return to compliance with their obligations under this Directive and Regulation (EU) No 575/2013; […]'	'[…] (68) "periodic penalty payments" means daily penalties, aimed at ending ongoing breaches and compelling legal or natural person to return to compliance with their obligations under **national provisions transposing** this Directive**, obligations under** ~~and~~ Regulation (EU) No 575/2013**, or obligations arising from a decision issued by the competent authority**; […]'
Explanation *Article 67(1)(s) in conjunction with Article 67(2)(b) of the proposed directive provide for the application of periodic penalty payments where an institution or natural person fails to comply with an obligation arising from a decision issued by the competent authority.* *However, this possibility is not covered by the definition of 'periodic penalty payments' in point (68) of Article 3(1) of the proposed directive which solely refers to obligations under that directive and Regulation (EU) No 575/2013. The ECB therefore proposes to extend the definition accordingly.* *In addition, the ECB proposes to align the wording of the provision more closely with that of paragraphs (1) and (2) of Article 65 of the proposed directive, by including 'national provisions transposing' before the reference to 'this Directive'.*	
Amendment 10 Article 21a(2), first subparagraph, Article 21a(3), point (c) and Articles 21a(4) and (10) of the CRD (new)	
No text	'(2) For the purposes of paragraph 1, financial holding companies, and mixed financial holding companies referred to therein shall provide the consolidating supervisor **determined in accordance with Article 111** and, where different, the competent authority in

Text proposed by the European Commission	Amendments proposed by the ECB[2]
	the Member State where they are established with the following information: […] (3) […] (c) the criteria **regarding shareholders and members of credit institutions** set out in Article 14 and the requirements laid down in Article 121 are complied with. (4) ~~Approval of t~~**T**he financial holding company or mixed financial holding company **may seek exemption from approval** under this Article ~~shall not be required~~ **which shall be granted** where all of the following conditions are met: […] (10) Where approval **or exemption from approval** of a financial holding company or mixed financial holding company pursuant to this Article is refused, the consolidating supervisor shall notify the applicant of the decision and the reasons therefor within four months of receipt of the application, or where the application is incomplete, within four months of receipt of the complete information required for the decision.'
Explanation *The ECB proposes a new amendment to Article 21a(2), first subparagraph, of the CRD to clarify that the consolidating supervisor is the one determined in accordance with Article 111 (Determination of the consolidating supervisor).* *In addition, the ECB proposes a new amendment to Article 21a(3), point (c), to clarify that compliance with the criteria set out in Article 14 refers to the existing suitability requirements for shareholders and members of the credit institutions existing within the group below the financial holding company, and does not establish new, wider suitability requirements for the shareholders of the financial holding company itself. In the latter case, such new requirements would lead to a new type of qualifying holding procedure whenever changes (e.g. acquisitions or increases) occurred at the level of the qualifying shareholders of the financial holding company itself. This is due to the fact that the qualifying shareholders of the financial holding company may not be the same as those of the credit institutions that exist within the group below the financial holding company.* *Further, the ECB proposes a new amendment to Article 21a(4) to clarify that an exemption from approval requires a decision by the supervisor.*	

Text proposed by the European Commission	Amendments proposed by the ECB[2]
Finally, the ECB proposes a new amendment to Article 21a(10) to clarify that the deadlines apply both to procedures involving approvals and procedures involving exemptions from approval.	
Amendment 11 Point (4)(b) of Article 1 of the proposed directive (Article 21a(2) of the CRD)	
‘(b) […] (ii) the second subparagraph is replaced by the following: “Where the approval of a financial holding company or mixed financial holding company takes place concurrently with the assessment referred to in Article 22 and Article 27a, the competent authority for the purposes of that Article shall coordinate, as appropriate, with the consolidating supervisor and, where different, the competent authority in the Member State where the financial holding company or mixed financial holding company is established. In that case, the assessment period referred to in Article 22(3), second subparagraph, and Article 27a(6) shall be suspended for a period exceeding 20 working days until the procedure set out in this Article is complete.”;’	‘(b) […] (ii) the second subparagraph is replaced by the following: “Where the approval **or the exemption from approval** of a financial holding company or mixed financial holding company **referred to in paragraphs 3 and 4** takes place concurrently with the assessment referred to in **Article 8,** Article 22 ~~and~~ **or** Article 27a, the competent authority for the purposes of that Article shall coordinate, as appropriate, with the consolidating supervisor and, where different, the competent authority in the Member State where the financial holding company or mixed financial holding company is established. ~~In that case, t~~**T**he assessment period referred to in Article 22(**2**~~3~~), second subparagraph, and Article 27a(**3**~~6~~) shall be suspended for a period exceeding 20 working days until the procedure set out in this Article is complete.”;’
Explanation *The ECB proposes several amendments to Article 21a(2), second subparagraph. To clarify that the suspension of the assessment period applies equally to approval and exemption procedures, the relevant wording is added. The expression ‘In that case’ is deleted to avoid the impression that the suspension only applies to procedures where joint decisions are to be adopted, i.e. where the consolidated supervisor is different from the competent authority in the Member State where the (mixed) financial holding company is established (as provided for in Article 21a(8)), which are mentioned at the end of the first sentence. Moreover, when citing the assessment period referred to in Article 22, it appears more appropriate to specify paragraph 2 (where the assessment period is set out) and not paragraph 3 (where the suspension period is set out). The same reasoning applies to the assessment period referred to in Article 27a. Finally, a reference to Article 8 of the CRD is added to reflect the need to also coordinate with authorisation procedures, given that there is an*	

Text proposed by the European Commission	Amendments proposed by the ECB[2]
overlap in the assessment criteria for authorisation and (mixed) financial holding company procedures similar to the overlap in the assessment criteria for qualifying holdings (Articles 22 and 23) and (mixed) financial holding companies procedures, where this coordination is already established.	
Amendment 12 Point (6) of Article 1 of the proposed directive (Article 21c(2) of the CRD)	
‘(6) […] 2. … Without prejudice to intragroup relationships, where a third country undertaking, including through an entity acting on its behalf or having close links with such third-country undertaking or any other person acting on behalf of such undertaking, solicits clients or potential clients in the Union, it shall not be deemed to be a service provided at the own exclusive initiative of the client. […]’	‘(6) […] 2. … ~~Without prejudice to intragroup relationships,~~ **W**~~w~~here a third country undertaking, including through an entity acting on its behalf or having close links with such third-country undertaking or any other person acting on behalf of such undertaking, solicits clients or potential clients in the Union, it shall not be deemed to be a service provided at the own exclusive initiative of the client. […]’
Explanation *The ECB proposes that in the provisions governing solicitation by third country undertakings there should be no exemption for intragroup relationships, so as to ensure that the offering of intragroup transactions across Member States cannot be considered as solicitation and fall under the exception specified in Article 21c(2). This amendment aims also to improve the alignment with the new Article 48c(3)(d), which requires the authorisation for a third country branch to expressly prohibit such branch from offering or conducting the activities for which it was authorised in other Member States on a cross-border basis.*	

Text proposed by the European Commission	Amendments proposed by the ECB[2]
Amendment 13 Article 22(2), second subparagraph, of the CRD (new)	
No text	'**By way of derogation from the previous subparagraph, when the proposed acquisition referred to in paragraph 1 is deemed complex by the competent authorities, acknowledgment of the receipt of the notification or of any further information shall be done promptly and in any event within ten working days following the receipt of that notification or of the additional information.**'
Explanation *Against the background of the ECB's proposed amendments to Article 27a (see Amendment 15) distinguishing 'qualifying' and 'material' holdings, the provision of Article 27a(2) concerning the complexity of the proposed acquisition should be mirrored in Article 22(2) and inserted as a second subparagraph in order to ensure consistency in the legislative framework.*	
Amendment 14 Article 23 of the CRD (new)	
No text	'1. In assessing the notification provided for in Article 22(1) and the information referred to in Article 22(3), the competent authorities shall, … assess the suitability of the proposed acquirer … in accordance with the following criteria: […] (e) whether there are reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering or terrorist financing … is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof. **For the purposes of assessing the criterion laid down in paragraph 1, point (e), competent authorities shall consult, in the context of their**

Text proposed by the European Commission	Amendments proposed by the ECB[2]
	verifications, the authorities competent for the supervision of the undertakings in line with Directive (EU) 2015/849. 2. The competent authorities may oppose the proposed acquisition only if there are reasonable grounds for doing so on the basis of the criteria set out in paragraph 1 or if the information provided by the proposed acquirer is incomplete. **For the purpose of this paragraph and with regard to the criterion laid down in paragraph 1, point (e), an objection in writing by the authorities competent for the supervision of the undertakings in line with Directive (EU) 2015/849 shall constitute a reasonable ground for opposition.** […] **6. EBA shall develop draft regulatory technical standards specifying the minimum list of information to be provided to the competent authorities at the time of the notification referred to in paragraph 1.** **For the purpose of the first subparagraph, EBA shall take into consideration Directive (EU) 2017/1132 of the European Parliament and of the Council.** **EBA shall submit those draft implementing technical standards to the Commission by [OP please insert the date = 18 months from the date of entry into force of this amending Directive].** **Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1093/2010.**'
Explanation *Against the background of the ECB's proposed amendments to Article 27b (see Amendment 16) distinguishing 'qualifying' and 'material' holdings and deleting references to Article 23 in that provision, to ensure that the*	

Text proposed by the European Commission	Amendments proposed by the ECB[2]
substance of the Commission's proposal is maintained, the ECB considers it desirable to insert the corresponding amendments in the existing Article 23 of the CRD.	
Amendment 15 Point (7) of Article 1 of the proposed directive (Article 27a of the CRD)	
'(7) […] CHAPTER 3 Acquisition or divesture of a qualifying holding Article 27a Notification and assessment of the acquisition 1. Member States shall require any institution, parent financial holding companies in a Member State, parent mixed financial holding companies in a Member State, EU parent financial holding companies and EU parent mixed financial holding companies, or other financial holding companies or mixed financial holding companies required to seek for approval in accordance with Article 21a(1) on a subconsolidated basis (the "acquirer") to notify their competent authority where they intend to acquire, directly or indirectly, a qualifying holding which exceeds 15% of the eligible capital of the acquirer (the "proposed acquisition"), indicating the size of the intended holding and the relevant information, as specified in Article 27b(5). 2. […] By way of derogation from the paragraph 2 of this Article, and of Article 22(2), when the proposed	'(7) […] CHAPTER 3 Acquisition or divesture of a ~~qualifying~~ **material** holding Article 27a Notification and assessment of the acquisition 1. Member States shall require any institution~~, parent financial holding companies in a Member State, parent mixed financial holding companies in a Member State, EU parent financial holding companies and EU parent mixed financial holding companies, or other financial holding companies or mixed financial holding companies required to seek for approval in accordance with~~ **or any financial holding company or mixed financial holding company within the scope of** Article 21a(1) ~~on a subconsolidated basis~~ (the "acquirer") to notify their competent authority where they intend to acquire, directly or indirectly, a ~~qualifying~~ holding which exceeds 15% of the eligible capital of the acquirer **on a consolidated basis** (the "proposed acquisition"), indicating the size of the intended holding and the relevant information, as specified in Article 27b(5). 2. […] By way of derogation from the **previous sub**paragraph ~~2 of this Article, and of Article 22(2)~~, when the proposed acquisition referred to in

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acquisition referred to in paragraph 1 of this Article or in Article 22(1) is deemed complex by the competent authorities, acknowledgment of the receipt of the notification of any additional information shall be done promptly and in any event within ten working days following the receipt of that notification.	paragraph 1 ~~of this Article~~ ~~or in Article 22(1)~~ is deemed complex by the competent authorities, acknowledgment of the receipt of the notification **or** of any additional information shall be done promptly and in any event within ten working days following the receipt of that notification.
3. The competent authorities shall have 60 working days from the date of the written acknowledgement of receipt of the notification and from the receipt of all documents, including those required by the Member State to be attached to the notification in accordance with Article 27b(4) (the "assessment period"), to carry out the assessment provided for in Article 27b(1) (the "assessment"). If the proposed acquisition consists in a qualifying holding in a credit institution as referred in Article 22(1), the acquirer shall also still be subject to the notification requirement and the assessment under that Article. […]	3. The competent authorities shall have 60 working days from the date of the written acknowledgement of receipt of the notification and from the receipt of all documents, including those required by the Member State to be attached to the notification in accordance with ~~Article 27b(4)~~ **Article 27b(5)** (the "assessment period"), to carry out the assessment provided for in Article 27b(1) (the "assessment"). If the proposed acquisition consists ~~in~~ **of** a qualifying holding in a credit institution as referred in Article 22(1), the acquirer shall also still be subject to the notification requirement and the assessment under that Article. **In this event, the period for the competent authority to carry out both assessments referred to in the first subparagraph and in Article 22(2) shall expire only when the later of the relevant assessment periods expires.** […]
8. Where the approval of a financial holding company or mixed financial holding company pursuant to Article 21a takes place concurrently with the assessment referred in this Article, the competent authority for the purposes of that Article shall coordinate, as appropriate, with the consolidating supervisor and, where different, the competent authority in the Member State where the financial holding company or mixed financial holding	~~8. Where the approval of a financial holding company or mixed financial holding company pursuant to Article 21a takes place concurrently with the assessment referred in this Article, the competent authority for the purposes of that Article shall coordinate, as appropriate, with the consolidating supervisor and, where different, the competent authority in the Member State where the financial holding company or mixed financial holding company is established. In that case, the assessment period shall be suspended~~

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company is established. In that case, the assessment period shall be suspended for a period not exceeding 20 working days until the procedure set out in Article 21a is complete. […] 12. Member States may not impose requirements for notification to, or approval by, competent authorities of direct or indirect acquisitions or capital that are more stringent than those set out in Article 89 of Regulation (EU) No 575/2013.'	~~for a period not exceeding 20 working days until the procedure~~ ~~set out in Article 21a is complete.~~ […] 12. Member States may not impose requirements for notification to, or approval by, competent authorities of direct or indirect acquisitions ~~or capital~~ that are more stringent than those set out in **this** Article ~~89 of Regulation (EU) No 575/2013~~.'
Explanation *The ECB proposes that the term 'qualifying holding' should be deleted from the chapter title and replaced with 'material holding' for accuracy reasons and to avoid confusion with qualifying holdings in credit institutions. Moreover, the ECB proposes the deletion of the term 'qualifying' in relation to holdings in Article 27a(1) and (6), Article 27b(6), Article 27d and Article 27e. The definition of 'qualifying holding' in Regulation (EU) No 575/2013 of the European Parliament and of the Council[4] (the 'CRR') is focused on the impact on the target entity, i.e. the entity which is being acquired. However, by referring to a holding exceeding 15% of the eligible capital of the acquirer, Article 27a aims instead at assessing the impact the acquisition will have on the acquirer. According to the wording of this Article as proposed by the Commission, the provision could be interpreted in a way that an acquisition not representing a qualifying holding (from the perspective of the target entity) but representing a material percentage of the eligible capital of the acquirer is not included within the provision's scope. The amendments proposed by the ECB aim at avoiding such interpretation. It is not apparent that the risk of such a restrictive interpretation of this scope is compensated by any possible advantages resulting from the use of the term 'qualifying holding'.* *Also in relation to paragraph 1, the ECB proposes that the term 'acquirers' covered by this provision is clarified by making a clear reference to Article 21a. Moreover, the ECB proposes that the threshold of 15% of the eligible capital of the acquirer is calculated on a consolidated basis to ensure an approach more in line with the consolidated approach for supervising banking groups and to ensure that only the most relevant transactions are subject to notification.* *In relation to paragraph 2, the ECB proposes a redraft clarifying that the 10 working days for notification constitute a derogation from the first subparagraph of the same paragraph (Article 27a(2)) and that this derogation also applies to the first notification. Also, in the interests of good legislative practice, the content of Article 27a(2) insofar as it refers to qualifying holdings should be expressly set out in Article 22 itself (see*	

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

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Amendment 13) and not simply by way of cross-reference. *In paragraph 3, first subparagraph, the reference to Article 27b(4) should read Article 27b(5). This seems to be an editorial mistake.* *In paragraph 3, second subparagraph, the ECB proposes to align the deadline with the qualifying holdings assessment in credit institutions if the notifications for these two different types of procedures have not been submitted in parallel. As these powers will very likely be exercised in parallel, this connection of the procedures should be reflected in a common timeline This issue may arise also in relation to other procedures (e.g. when preparing a merger by absorption, one bank may first acquire another bank and thereby trigger a qualifying holdings procedure, i.e. a procedure under Article 27a and a procedure under Article 27k).* *The provision proposed as Article 27a(8) appears to be included in the proposal for Article 21a(2), second subparagraph. To avoid the duplication of provisions, the ECB proposes the deletion of Article 27a(8). Furthermore, the ECB observes that the two provisions are not fully aligned. While Article 27a(8) suspends the proceedings for a 'period not exceeding 20 working days', Article 21a(2), second subparagraph, refers to a suspension 'exceeding 20 working days'.* *In paragraph 12, the reference to Article 89 of the CRR may give rise to interpretative doubts because the scope of Article 89 of the CRR is not consistent with the scope of Article 27a of the CRD. The ECB therefore proposes that reference is made instead to Article 27a of the CRD.*	
Amendment 16 Point (7) of Article 1 of the proposed directive (Article 27b of the CRD)	
'(7) […] 2. For the purposes of assessing the criterion laid down in paragraph 1, point (c), and criterion laid down in Article 23(1), point (e), competent authorities shall consult, in the context of their verifications, the authorities competent for the supervision of the undertakings in line with Directive (EU) 2015/849. 3. […] For the purpose of this paragraph and Article 23(2), and with regard to the criterion laid down in paragraph 1, point (c), an objection in writing by the	'(7) […] 2. For the purposes of assessing the criterion laid down in paragraph 1, point (c), ~~and criterion laid down in Article 23(1), point (e),~~ competent authorities shall consult, in the context of their verifications, the authorities competent for the supervision of the undertakings in line with Directive (EU) 2015/849. 3. […] For the purpose of this paragraph ~~and Article 23(2)~~, and with regard to the criterion laid down in paragraph 1, point (c), an objection in writing by the authorities

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authorities competent for the supervision of the undertakings under Directive (EU) 2015/849 shall constitute a reasonable ground for opposition. […] 6. Notwithstanding Article 27a, paragraphs 2 to 7, where two or more proposals to acquire qualifying holdings in the same entity have been notified, the competent authority shall treat the acquirers in a non-discriminatory manner. 7. EBA shall develop draft regulatory technical standards specifying: (a) the minimum list of information to be provided to the competent authorities at the time of the notification referred to in Article 23(1), Article 27a(1), Article 27f(1) and Article 27k(1); […]'	competent for the supervision of the undertakings under Directive (EU) 2015/849 shall constitute a reasonable ground for opposition. […] 6. Notwithstanding Article 27a, paragraphs 2 to 7, where two or more proposals to acquire ~~qualifying~~ holdings in the same entity have been notified, the competent authority shall treat the acquirers in a non-discriminatory manner. 7. EBA shall develop draft regulatory technical standards specifying: (a) the minimum list of information to be provided to the competent authorities at the time of the notification referred to in ~~Article 23(1),~~ Article 27a(1), Article 27f(1) and Article 27k(1); […]'
Explanation *As the assessments provided for in Articles 23 and 27b have both a different scope and objective, the ECB proposes to delete the references to Article 23 in the context of Article 27b. However, in the interests of legal clarity and to ensure that the substance of the Commission's proposal is maintained, the ECB considers it desirable to insert the corresponding amendments in Article 23 (see Amendment 14). In line with the ECB's amendment to Article 27a (see Amendment 15), the term 'qualifying' in relation to holdings should be deleted also in Article 27b(6).*	
Amendment 17 Point (7) of Article 1 of the proposed directive (Article 27c(2) of the CRD)	
'(7) […] 2. The competent authorities shall seek to coordinate their assessments and ensure the consistency of their decisions. To this end, the decision by the competent authority of the acquirer shall indicate any views or reservations made by the competent authority that	'(7) […] 2. The competent authorities shall seek to coordinate their assessments and ensure the consistency of their decisions. To this end, the decision by the competent authority of the acquirer shall indicate any views or reservations made by the **other relevant** competent

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has authorised the credit institution controlled by the parent undertaking in which the acquisition is proposed.'	authority. ~~that has authorised the credit institution controlled by the parent undertaking in which the acquisition is proposed.~~'
Explanation *The ECB proposes to reword this provision as the phrase 'controlled by the parent undertaking in which the acquisition is proposed' appears to limit the applicability of the coordination requirement to the cases referred to in paragraph 1(b) and to exclude the cases referred to in paragraph 1(a) and (c).*	
Amendment 18 Point (7) of Article 1 of the proposed directive (Article 27d of the CRD)	
'(7) […] Member States shall require institutions, parent mixed financial holding companies in a Member State, EU parent financial holding companies and EU parent mixed financial holding companies, as well as financial holding companies and mixed financial holding companies, to notify the competent authorities where they intend to dispose, directly or indirectly, of a qualifying holding that exceeds 15% of the eligible capital of the acquirer. That notification shall be made in writing and in advance of the divestiture, indicating the size of the holding concerned.'	'(7) […] Member States shall require **any institution** ~~institutions , parent financial holding companies in a Member State, parent mixed financial holding companies in a Member State, EU parent financial holding companies and EU parent mixed financial holding companies, or other financial holding companies or mixed financial holding companies required to seek for approval in accordance with~~ **or any financial holding company or mixed financial holding company within the scope of Article 21a(1)** to notify the competent authorities where they intend to dispose, directly or indirectly, of a ~~qualifying~~ holding that exceeds 15% of ~~the~~ **their** eligible capital **on a consolidated basis**~~of the acquirer~~. That notification shall be made in writing and in advance of the divestiture, indicating the size of the holding concerned.'
Explanation *The ECB proposes that the term 'disposing entities' covered by this provision is clarified by making a clear reference to Article 21a. Furthermore, as this provision applies to disposals of holdings, no reference should be made to 'acquirers'. In line with the ECB's amendment to Article 27a (see Amendment 15), the term*	

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'qualifying' in relation to holdings should also be deleted. Moreover, the ECB proposes that the threshold of 15% of the eligible capital of the entity that disposes of the holding is calculated on a consolidated basis to ensure an approach more in line with the consolidated approach for supervising banking groups and to ensure that only the most relevant transactions are subject to notification.	
Amendment 19 Point (7) of Article 1 of the proposed directive (Article 27e of the CRD)	
'(7) […] Where the acquirer fails to notify the proposed acquisition in advance in accordance with Article 27a(1) or has acquired a qualifying holding as referred to that Article despite the competent authorities' opposition, Member States shall require those competent authorities to take appropriate measures. Such measures may include injunctions, periodic penalty payments and penalties, in accordance with Articles 65 to 72, against members of the management body and senior management. Where a qualifying holding is acquired despite opposition by the competent authorities, Member States shall, without prejudice to potential penalties, provide either for exercise of the corresponding voting rights to be suspended or for votes cast to be declared null and void.'	'(7) […] Where the acquirer fails to notify the proposed acquisition in advance in accordance with Article 27a(1) or has acquired a ~~qualifying~~ holding as referred to **in** that Article despite the competent authorities' opposition, Member States shall require those competent authorities to take appropriate measures. Such measures may include injunctions, periodic penalty payments and penalties, in accordance with Articles 65 to 72, against members of the management body and senior management. Where a ~~qualifying~~ holding is acquired despite opposition by the competent authorities, Member States shall, without prejudice to potential penalties, provide either for exercise of the corresponding voting rights to be suspended or for votes cast to be declared null and void.'
<u>*Explanation*</u> *In line with the ECB's amendment to Article 27a (see Amendment 15), the term 'qualifying' in relation to holdings should be deleted also in this provision.*	
Amendment 20 Point (7) of the proposed directive (Article 27f of the CRD)	
'(7) […] 2. For the purposes of paragraph 1:	'(7) […] 2. For the purposes of paragraph 1:

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(a) the intended operation shall be deemed material for an institution where it is at least equal to 10 % of its total assets or liabilities, where the intended operation is performed between entities of the same group, the intended operation is deemed material for an institution where it is at least equal to 15 % of its total assets or liabilities;	(a) the intended operation shall be deemed material for an institution where it is at least equal to 10 % of its total assets or liabilities **on a consolidated basis**~~,~~ ~~where the intended operation is performed between entities of the same group, the intended operation is deemed material for an institution where it is at least equal to 15 % of its total assets or liabilities~~;
(b) transfers of non-performing assets, or of assets for the purpose of being included in a cover pool, within the meaning of Article 3(3) of Directive (EU) 2019/2162 of the European Parliament and of the Council*7, or to be securitised, shall not be taken into account for calculating the percentage in point (a);	(b) transfers of non-performing assets, or of assets for the purpose of being included in a cover pool, within the meaning of Article 3(3) of Directive (EU) 2019/2162 of the European Parliament and of the Council*7, or to be securitised, shall not be taken into account for calculating the percentage in point (a);
(c) transfers of assets or liabilities in the context of the use of resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU shall not be taken into account for calculating the percentage referred to in point (a).'	(c) transfers of assets or liabilities in the context of the use of resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU shall not be taken into account for calculating the percentage referred to in point (a).'
Explanation *The ECB proposes, in line with the amendment proposed to Article 27a(1), that the threshold of 10% of total assets or liabilities is calculated on a consolidated basis to ensure an approach more in line with the consolidated approach for supervising banking groups and to ensure that only the most relevant transactions are subject to notification.*	
Amendment 21 Point (7) of Article 1 of the proposed directive (Article 27h(3) of the CRD)	
'(7) […] 3. The competent authorities shall seek to coordinate their assessments, ensure the consistency of their decisions, and shall indicate in their decisions any	'(7) […] 3. The competent authorities shall seek to coordinate their assessments~~,~~ **and** ensure the consistency of their decisions. **Moreover, the competent**

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views or reservations made by the competent authority supervising other entities involved in the intended operation.'	**authorities** ~~and~~ shall indicate in their decisions any views or reservations made by the competent authority supervising other entities involved in the intended operation.'
Explanation *The ECB's amendment aims to improve the readability of this provision.*	
Amendment 22 Point (7) of Article 1 of the proposed directive (Article 27k of the CRD)	
'(7) […] 1. Member States shall require institutions, parent financial holding companies in a Member State, parent mixed financial holding companies in a Member State, EU parent financial holding companies, EU parent mixed financial holding companies, or financial holding companies and mixed financial holding companies required to seek for approval in accordance with Article 21a(1) on a sub-consolidated basis (the 'financial stakeholders') carrying out a merger or division (the "proposed operation"), to notify in advance of the completion of the proposed operation the competent authorities which will be responsible for the supervision of the entities resulting from such proposed operation, indicating the relevant information, as specified in accordance with Article 27l(4). For the purpose of the first sub-paragraph, the ECB shall considered as the competent authority to be notified and in charge the assessment when the entities resulting from the proposed operation would meet on a consolidated bases any of the following conditions: (a) the total value of its assets exceeds EUR 30	'(7) […] 1. Member States shall require **any institution** ~~institutions, parent financial holding companies in a Member State, parent mixed financial holding companies in a Member State, EU parent financial holding companies, EU parent mixed financial holding companies, or financial holding companies and mixed financial holding companies required to seek for approval in accordance with~~ **or any financial holding company or mixed financial holding company within the scope of** Article 21a(1) ~~on a sub-consolidated basis~~ (the 'financial stakeholders') carrying out a merger or division (the "proposed operation"), to notify in advance of the completion of the proposed operation the competent authorities which will be responsible for the supervision of the entities resulting from such proposed operation, indicating the relevant information, as specified in accordance with Article 27l(4). ~~For the purpose of the first sub-paragraph, the ECB shall considered as the competent authority to be notified and in charge the assessment when the entities resulting from the proposed operation would meet on a consolidated bases any of the~~

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billion; (b) the ratio of its total assets over the GDP of the participating Member State of establishment exceeds 20%, unless the total value of its assets is below EUR 5 billion. […]	~~following conditions:~~ ~~(a) the total value of its assets exceeds EUR 30 billion;~~ ~~(b) the ratio of its total assets over the GDP of the participating Member State of establishment exceeds 20%, unless the total value of its assets is below EUR 5 billion.~~ […]
5. The proposed operations shall not be completed before the issuance of a positive opinion by the competent authorities.	5. The proposed operations shall not be completed before the issuance of a**n** ~~positive opinion~~ **approval** by the competent authorities.
6. The competent authorities shall, within two working days from the completion of their assessment, issue in writing a motivated positive or negative opinion to the financial stakeholders. Subject to national law, an appropriate statement of the reasons for the opinion may be made accessible to the public at the request of the financial stakeholders. This shall not prevent a Member State from allowing the competent authority to publish such information in the absence of a request by the financial stakeholder. The financial stakeholders shall transmit the motivated opinion issued by their competent authorities under the first subparagraph to the authorities in charge, under the national law, of the scrutiny of the proposed operation.	6. The competent authorities shall, within two working days from the completion of their assessment, issue in writing a motivated positive or negative ~~opinion~~ **decision** to the financial stakeholders. Subject to national law, an appropriate statement of the reasons for the ~~opinion~~ **decision** may be made accessible to the public at the request of the financial stakeholders. This shall not prevent a Member State from allowing the competent authority to publish such information in the absence of a request by the financial stakeholder. The financial stakeholders shall transmit the motivated ~~opinion~~ **decision** issued by their competent authorities under the first subparagraph to the authorities in charge, under the national **corporate and/or civil** law, of the scrutiny of the proposed operation.
7. When the proposed operation involves only financial stakeholders from the same group, and the competent authorities do not oppose the proposed operation within the assessment period in writing, the opinion shall be deemed to be positive.	7. When the proposed operation involves only financial stakeholders from the same group, and the competent authorities do not oppose the proposed operation within the assessment period in writing, the ~~opinion~~ **proposed operation** shall be deemed to be ~~positive~~ **approved**.

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8. The positive opinion issued by the competent authority may be limited in time. […]'	8. The ~~positive opinion issued by the~~ competent authority~~y~~**ies** may ~~be limited in time~~ **fix a maximum period for concluding the proposed operation and extend it where appropriate.** […]'

Explanation

The ECB proposes that the term 'financial stakeholders' covered by this provision is clarified by making a clear reference to Article 21a.

In relation to paragraph 1, second subparagraph, the ECB considers the general reference to 'the competent authorities which will be responsible for the supervision of the entities resulting from such proposed operation' in the first subparagraph to provide a sufficient basis for identifying the ECB as the competent authority for the assessment of cases in which the entities resulting from a proposed operation would meet the significance criteria set out in Article 6(4) of Council Regulation (EU) No 1024/2013[5] and further specified in Part IV of Regulation (EU) No 468/2014 of the European Central Bank[6]. In contrast, the proposed wording of the second subparagraph could give rise to uncertainty in this respect because it is not clear why only some of the significance criteria set out in Regulation (EU) No 1024/2013 are listed (notably the requirement for the ECB to supervise the three most significant credit institutions in each participating Member State is not reflected) and how the total value of the assets of the combined entity are to be calculated. Therefore, the ECB proposes the deletion of the second subparagraph.

In relation to paragraphs 5 to 8, use of the term 'opinion' might raise the question whether this act is binding or not. As the ECB understands that the act should be binding, the ECB's amendment replaces 'opinion' with the term 'approval', or, where no reference to a specific outcome is made, with the term 'decision'.

In relation to paragraph 6, second subparagraph, the ECB's amendment clarifies that this provision refers to national corporate and/or civil law.

5 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).

6 Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17) (OJ L, 14.5.2014, p. 1).

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Amendment 23 Point (7) of Article 1 of the proposed directive (Article 27l(3) of the CRD)	
‘(7) […] 3. The competent authorities may issue a negative opinion to the proposed operation only if the criteria set out in paragraph 1 are not met or where the information provided by the financial stakeholder is incomplete despite a request made in accordance with Article 27k. With regard to the criterion laid down in paragraph 1, point (f), an objection in writing by the authorities competent for the supervision of the undertakings in line with Directive (EU) 2015/849 shall constitute a reasonable ground for negative opinion.’	‘(7) […] 3. The competent authorities may ~~issue a negative opinion to~~ **oppose** the proposed operation only if the criteria set out in paragraph 1 are not met or where the information provided by the financial stakeholder is incomplete despite a request made in accordance with Article 27k. With regard to the criterion laid down in paragraph 1, point (f), an objection in writing by the authorities competent for the supervision of the undertakings in line with Directive (EU) 2015/849 shall constitute a reasonable ground for ~~negative opinion~~ **the competent authorities to oppose the proposed operation**.’
Explanation *This amendment rewords paragraph 3 to reflect the binding nature of the competent authorities’ powers relating to mergers and divisions.*	
Amendment 24 Point (7) of Article 1 of the proposed directive (Article 27m(3) of the CRD)	
‘(7) […] 3. The competent authorities shall seek to coordinate their assessments, ensure the consistency of their opinions, and shall indicate in their opinions any views or reservations made by the competent authority supervising other financial stakeholders.’	‘(7) […] 3. The competent authorities shall seek to coordinate their assessments~~,~~ **and** ensure the consistency of their ~~opinions~~ **decisions**. **Moreover, the competent authorities** ~~and~~ shall indicate in their ~~opinions~~ **decisions** any views or reservations made by the competent authority supervising other financial stakeholders.’

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Explanation *This amendment aims to improve the readability of this provision. Moreover, it rewords the paragraph to reflect the binding nature of the competent authorities' powers relating to mergers and divisions.*	
Amendment 25 Point (7) of Article 1 of the proposed directive (Article 27n of the CRD)	
'(7) […] Member States shall require that, where the financial stakeholders fail to provide prior notification of the proposed operation in accordance with Article 27k(1) or have carried out the proposed operation as referred to that Article without prior positive opinion by the competent authorities, the competent authorities shall take appropriate measures. Such measures may consist in injunctions, periodic penalty payments, penalties, subject to Articles 65 to 72, against members of the management body and managers of the financial stakeholders or of the entity resulting from the proposed operation.'	'(7) […] Member States shall require that, where the financial stakeholders fail to provide prior notification of the proposed operation in accordance with Article 27k(1) or have carried out the proposed operation as referred to **in** that Article without prior ~~positive opinion~~ **approval** by the competent authorities, the competent authorities shall take appropriate measures. Such measures may consist in injunctions, periodic penalty payments, penalties, subject to Articles 65 to 72, against members of the management body and managers of the financial stakeholders or of the entity resulting from the proposed operation.'
Explanation *This amendment rewords this article to reflect the binding nature of the competent authorities' powers relating to mergers and divisions.*	
Amendment 26 Point (8) of Article 1 of the proposed directive (Article 48a(1)(a) of the CRD)	
'(8) […] 1. Member States shall classify third country branches as class 1 where those branches meet any of the following conditions: (a) the total value of the assets booked by the third	'(8) […] 1. Member States shall classify third country branches as class 1 where those branches meet any of the following conditions: (a) the total value of the assets booked **or originated**

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country branch in the Member State is equal to or higher than EUR 5 billion, as reported for the immediately preceding annual reporting period in accordance with Section II, Sub-section 4;'	by the third country branch in the Member State is equal to or higher than EUR 5 billion, as reported for the immediately preceding annual reporting period in accordance with Section II, Sub-section 4;'
Explanation *The ECB proposes that the calculation of the classification thresholds should take account not only of the assets that are booked in the branch, but also of the assets that are originated by the branch but booked remotely to another location. The ECB's amendment aims at ensuring that the full size of the activities of a branch is captured and that the booking practices of third country branches are depicted in a complete and transparent manner.*	
Amendment 27 Point (8) of Article 1 of the proposed directive (Article 48i(1) of the CRD)	
'(8) […] 1. Member States shall require third country branches to maintain a registry book enabling those branches to track and keep a comprehensive and precise record of all the assets and liabilities associated with the activities of the third country branch in the Member State and to manage those assets and liabilities autonomously within the branch. … […]'	'(8) […] 1. Member States shall require third country branches to maintain a registry book enabling those branches to track and keep a comprehensive and precise record of all the assets and liabilities **originated by and** associated with the activities of the third country branch in the Member State and to manage those assets and liabilities autonomously within the branch. … […]'
Explanation *The ECB proposes that, for the purposes of reporting and the registry book, not only the assets that are booked in the branch, but also the assets that are originated by the branch but booked remotely to another location, should be taken into account. The ECB's amendment aims at ensuring that the full size of the activities of a branch are captured and that the booking practices of third country branches are depicted in a complete and transparent manner.*	

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Amendment 28 Point (8) of Article 1 of the proposed directive (Article 48k(3)(b) of the CRD)	
‘(8) […] 3. […] (b) Where Article 111 does not apply to the relevant third country group, the competent authority that would become the consolidated supervisor of that third country group in the Union in accordance with that Article, should the third country branches be treated as subsidiary institutions;’	‘(8) […] 3. […] (b) Where Article 111 does not apply to the relevant third country group, the competent authority that would become the consolidated supervisor of that third country group in the Union in accordance with that Article, should the third country branches be treated as subsidiary institutions **of the same consolidated group of entities**;’
Explanation *This amendment aims to clarify that, where no consolidated supervisor exists and where the third country branch needs to be treated as a subsidiary for the purpose of determining the competent authority to assess the systemic importance of third country branches belonging to a third country group, that third country branch should, of course, be treated as a subsidiary of the same third country group to which it actually belongs.*	
Amendment 29 Point (8) of Article 1 of the proposed directive (Article 48k(5) of the CRD)	
‘(8) […] 5. […] For the purposes of point (a), the assets held in both the third country branches and subsidiary institutions of the third country group shall be included in the calculation. […]’	‘(8) […] 5. […] For the purposes of point (a), the assets held **or originated** in both the third country branches and **the assets held in** subsidiary institutions of the third country group shall be included in the calculation. […]’

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Explanation *In line with Amendment 26 on the calculation of assets, the ECB proposes that, in calculating the allocation of voting stakes, not only the assets that are booked in the branch, but also the assets that are originated by the branch but booked remotely to another location, should be taken into account.*	
Amendment 30 Point (8) of Article 1 of the proposed directive (Article 48l(1) of the CRD)	
'(8) […] 1. Member States shall require third country branches to periodically report to their competent authorities information on: (a) the assets and liabilities held on their books in accordance with Article 48i, with a breakdown that singles out…: […]'	'(8) […] 1. Member States shall require third country branches to periodically report to their competent authorities information on: (a) the assets and liabilities held on their books in accordance with Article 48i **or originated by the third country branch**, with a breakdown that singles out…: […]'
Explanation *The ECB proposes that, for the purposes of reporting, not only the assets that are booked in the branch, but also the assets that are originated by the branch but booked remotely to another location, should be taken into account. The ECB's amendment aims at ensuring that the full size of the activities of a branch are reported and that the booking practices of third country branches are depicted in a complete and transparent manner.*	
Amendment 31 Article 48l(2)(g) of the CRD (new)	
No text	'**(g) the direct provision of cross-border investment services in the Union by the head undertaking and by the subsidiaries of the head undertaking established in a third country, and the investment services that are provided in the Union by the head undertaking and by the subsidiaries of the head undertaking established in a third country on the basis of reverse**

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	solicitation.'
Explanation *In order to allow competent authorities responsible for the supervision of third country branches and subsidiaries of third country groups to obtain a comprehensive overview of the activities of the third country group in the Union, the ECB proposes an additional reporting item capturing the direct provision of cross-border investment services by the third country group and the investment services that are provided by the third country group on the basis of reverse solicitation.*	
Amendment 32 Article 48l(4) of the CRD (new)	
No text	'**4. The competent authorities of third country branches shall share with the competent authorities of the EU subsidiaries of the same third country groups the information obtained in accordance with Article 48l(1) and (2).**'
Explanation *The ECB considers it important for the supervisory authorities of both third country branches and subsidiaries of the same third country group to have a comprehensive overview and understanding of the activities of that third country group in the Union.*	
Amendment 33 Article 66(1)(aa) of the CRD (new)	
No text	**'(aa) carrying out any of the activities referred to in Article 4(1), point (1)(b) of Regulation (EU) No 575/2013, meeting at least one of the thresholds indicated in that Article without being authorised as a credit institution;'**
Explanation *To take account of the revised definition of 'credit institution' in Article 4(1), point (1), of Regulation (EU) No 575/2013, the ECB proposes to introduce as an additional breach a new point (aa) in the currently proposed Article 66(1) of the CRD.*	

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Amendment 34 Point (15)(b) of Article 1 of the proposed directive (Article 78(1) of the CRD)	
‘(b) paragraph 1 is replaced by the following: “1. Competent authorities shall ensure all of the following: […] Institutions shall submit the results of their calculations referred to in the first subparagraph together with an explanation of the methodologies used to produce them and any qualitative information, as requested by EBA, that can explain the impact of these calculations on own funds requirements, to the competent authorities at least annually, but with the possibility for EBA to conduct the exercise biennially after the exercise has run five times.”’	‘(b) paragraph 1 is replaced by the following: “1. Competent authorities shall ensure all of the following: […] Institutions shall submit the results of their calculations referred to in the first subparagraph together with an explanation of the methodologies used to produce them and any qualitative information, as requested by EBA, that can explain the impact of these calculations on own funds requirements, to the competent authorities at least annually, ~~but with the possibility for EBA to~~ **unless EBA** conduct**s** the exercise biennially**, while the frequency of the submission may differ in relation to the different approaches referred to in points (a), (b) and (c) of the first subparagraph**. ~~after the exercise has run five times.~~”’
Explanation *This amendment aims to align the institution’s submission of the results of their calculations with the frequency of the conduct of the exercise. The ECB understands that the Commission’s proposal requires institutions to submit their calculations at least annually. At the same time, Article 78(3) requires competent authorities to ‘monitor the range of risk weighted exposure amounts or own funds requirements’ on the basis of those submissions. The ECB considers the reporting burden to be disproportionate in years in which the European Banking Authority (EBA) does not conduct the exercise.* *Furthermore, the Commission’s proposal introduces the term ‘exercise’, which could be understood as the combination of all supervisory benchmarking activities (e.g. from data quality assessment until publication of the EBA report). At the same time, there could be valid reasons for the EBA to conduct the exercise only in parts, i.e. concerning only some of the approaches referred to in points (a), (b) and (c) of Article 78(1), first subparagraph, as those approaches are not necessarily closely related. The ECB’s amendment aims to allow for this.* *Finally, given that the supervisory benchmarking exercise has already been conducted for multiple years with respect to internal approaches for the calculation of risk weighted exposure amounts or own funds requirements, the ECB proposes that the EBA should be given more flexibility in determining whether to move*	

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to a biennial frequency by deleting the condition 'after the exercise has run five times'.	
Amendment 35 Point (17) of Article 1 of the proposed directive (Article 87a(5) of the CRD)	
'(17) […] 5. EBA shall issue guidelines, in accordance with Article 16 of Regulation (EU) No 1093/2010, to specify: […] EBA shall publish those guidelines by [OP please insert the date = 18 months from date of entry into force of this amending Directive]. EBA shall update these guidelines on a regular basis, to reflect the progress made in measuring and managing environmental, social and governance factors as well as the developments of policy objectives of the Union on sustainability.'	'(17) […] 5. EBA shall issue guidelines, in accordance with Article 16 of Regulation (EU) No 1093/2010, to specify: (…) EBA shall publish th~~ose~~ guidelines ~~by [OP please insert the date = 18 months from date of entry into force of this amending Directive]~~ **referred to in point (b) of the first subparagraph by [OP please insert the date = 12 months from date of entry into force of this amending Directive]; the guidelines referred to in point (d) of the first subparagraph [OP please insert the date = 18 months from date of entry into force of this amending Directive]; and the guidelines referred to in points (a) and (c) of the first subparagraph [OP please insert the date = 24 months from date of entry into force of this amending Directive]**. EBA shall update these guidelines on a regular basis, to reflect the progress made in measuring and managing environmental, social and governance factors as well as the developments of policy objectives of the Union on sustainability.'
Explanation *In light of the considerable progress achieved by the EBA on the environmental, social and governance (ESG) agenda and the advanced reflections on the relevance of the business model and strategy for banks included in the EBA Report on management and supervision of ESG risks, the ECB considers that the EBA could deliver more promptly on the mandate established in Article 87a with respect to the content of plans to be prepared in accordance with Article 76. The timing of such delivery will determine the point at which credit*	

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institutions start reporting on ESG risks. Conversely, the EBA could be granted more time for the guidelines on minimum standards and reference methodologies for the identification, measurement, management and monitoring of environmental, social and governance risks.	
Amendment 36 Point (20) of Article 1 of the proposed directive (Article 91a(2) of the CRD)	
‘(20) […] 2. […] However, where it is strictly necessary to replace a member of the management body immediately, the entities may assess the suitability of such replacement members after they have taken up their positions. The entities shall be able to duly justify such immediate replacement.’	‘(20) […] 2. […] However, where it is strictly necessary to replace a member of the management body immediately, the entities may ~~assess the~~ **conduct a lighter** suitability **assessment** of such replacement members ~~after~~ **before** they have taken up their positions. **A complete assessment shall be carried out as soon as possible after the replacement members have taken up their positions. EBA shall issue guidelines specifying the conditions for conducting a lighter assessment, including guidance on the cases that might be considered urgent.** The entities shall be able to duly justify such immediate replacement. ’
<u>*Explanation*</u> *New Article 91a(2), second subparagraph, as proposed by the Commission, allows for the appointment of members of the management body, in urgent contexts, without any kind of suitability assessment. The ECB is concerned that this possibility may lead to the appointment of unsuitable candidates, also due to the ambiguity underlying the interpretation of the terms ‘strictly necessary’ and ‘immediately’.* *Therefore, the ECB proposes that entities should be required to perform a suitability assessment before members of the management body take up their position even in the most exceptional cases. Nevertheless, in such a scenario a lighter assessment might be warranted, under conditions to be specified in guidelines to be developed by the EBA. These guidelines would also give guidance on cases that might be considered urgent, i.e. when it is strictly necessary to immediately replace board members.*	

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Amendment 37 Point (20) of Article 1 of the proposed directive (Article 91b(3) and 91d(3) of the CRD)	
‘(20) […] (3) Competent authorities shall acknowledge in writing the receipt of the application and the documentation required in accordance with paragraph 2 within two working days.’	‘(20) […] (3) Competent authorities shall **complete the suitability assessment within 80 working days (“assessment period”) as from the date of the written acknowledgement of receipt of the complete application and underlying documentation** ~~acknowledge in writing the receipt of the application and the documentation required in accordance with paragraph 2 within two working days~~.’
Explanation *The suggested deadline of only 2 days for the written acknowledgement of receipt in both Articles 91b(3) and 91d(3) would in practice be extremely challenging to meet by all competent authorities involved due to the very high inflow of fit and proper applications and extensive documentation that needs to be checked. Specifically, in the many cases where the application concerns multiple appointees, this deadline might not be achievable for supervisors. Overall, this provision may jeopardise meeting the given deadline for fit and proper procedures.* *The ECB urges the deletion of the 2-day deadline.*	
Amendment 38 Point (20) of Article 1 of the proposed directive (Articles 91b(4) and 91d(4) of the CRD)	
‘(20) […] 4. Competent authorities that request from the entities additional information or documentation, including interviews or hearings, may extend the assessment period for a maximum of 40 working days. … […]	‘(20) […] 4. Competent authorities that request ~~from the entities~~ additional information or documentation~~,~~ **from the entities or other authorities or which conduct** ~~including~~ interviews or hearings, may extend the assessment period for a maximum of 40 working days. … **Failure by the entities to provide the requested information within this deadline shall**

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(4) Competent authorities that request from the entities referred to paragraph 1 additional information or documentation, including interviews or hearings, may extend the assessment period for a maximum of 40 working days. …'	**result in the procedure being closed without any further assessment by the competent authority. The closure of the procedure shall be without prejudice to the possibility for the entity to submit a new application**. […] (4) Competent authorities that request ~~from the entities referred to paragraph 1~~ additional information or documentation~~,~~ **from the entities or other authorities or which conduct** ~~including~~ interviews or hearings, may extend the assessment period for a maximum of 40 working days. … **Failure by the entities to provide the requested information within this deadline shall result in the procedure being closed without any further assessment by the competent authority. The closure of the procedure shall be without prejudice to the possibility for the entity to submit a new application**.'
Explanation *New Articles 91b(4) and 91d(4), as proposed by the Commission, allow for the extension of the assessment period where competent authorities request additional documentation or information from entities, but not where documentation or information is requested from other parties, e.g. judicial authorities and/or other supervisory authorities. The latter is a very common occurrence which often consumes more time.* *The ECB's amendment therefore rewords these provisions to also cover situations in which documentation or information is required from other entities/authorities.* *Separately, the supervisory powers available to supervisors in cases where entities do not reply to requests for additional information within the given deadline do not include the power for the competent authorities to declare the application incomplete requiring, as a consequence, the submission of a new application. The ECB therefore proposes to introduce in Articles 91b(4) and 91d(4) an additional legal basis allowing competent authorities to consider an application incomplete, with the consequent need for its re-submission. This enables that there be a procedural consequence for the breach of the deadlines to provide additional documentation or information, without prejudice to the possibility to submit a new application, thereby initiating a new procedure.*	

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Amendment 39 Point (20) of Article 1 of the proposed directive (Articles 91b(10) and 91d(8) of the CRD)	
‘(20) […] EBA shall develop draft implementing technical standards on standard forms, templates and procedures for the provision of the information referred to in paragraph 2. […]’	‘(20) […] EBA shall develop draft implementing technical standards on standard forms, templates and procedures for the provision of the information referred to in paragraph 2. **When developing the draft implementing technical standards, EBA shall take into account existing practices and tools**. […]’
Explanation *The ECB is responsible for the effective and consistent functioning of the Single Supervisory Mechanism (SSM). In this respect, progress has been made within the SSM as regards the consistent use of forms and IT solutions for the purposes of processing fit and proper applications. The ECB thus underlines that the ITS should be consistent with this harmonisation effort and could possibly leverage the infrastructure already developed.* *In light of the foregoing, this amendment adds a sentence to new Article 91b(10) and 91d(8) requiring the EBA to consider existing tools and practices when developing the implementing technical standards.*	
Amendment 40 Point (27)(b) of Article 1 of the proposed directive (Article 104a(6) of the CRD)	
‘(b) […] 6. Where an institution becomes bound by the output floor, the following shall apply: (a) the nominal amount of additional own funds required by the institution’s competent authority in accordance with Article 104(1), point (a), to address risks other than the risk of excessive leverage shall not increase as a result of the institutions’ becoming bound by the output floor; (b) the institution’s competent authority shall, without	‘(b) […] 6. Where an institution becomes bound by the output floor, the following shall apply: (a) the nominal amount of additional own funds required by the institution’s competent authority in accordance with Article 104(1), point (a), to address risks other than the risk of excessive leverage shall not increase as a result of the institution becoming bound by the output floor; (b) the institution’s competent authority shall, without

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undue delay, and no later than by the end date of the next review and evaluation process, review the additional own funds it required from the institution in accordance with Article 104(1), point (a), and remove any parts thereof that would double-count the risks that are already fully covered by the fact that the institution is bound by the output floor. For the purposes of this Article and Articles 131 and 133 of this Directive, an institution shall be considered as bound by the output floor when the institution's total risk exposure amount calculated in accordance with Article 92(3), point (a), of Regulation (EU) No 575/2013 exceeds its un-floored total risk exposure amount calculated in accordance with Article 92(4) of that Regulation. […]'	undue delay, and no later than by the end date of the next review and evaluation process, review the additional own funds it required from the institution in accordance with Article 104(1), point (a), and remove any parts thereof that would double-count the risks that are already fully covered by the fact that the institution is bound by the output floor. **As soon as the competent authority has completed the review in point (b), point (a) shall no longer apply.** **In subsequent years, competent authorities will take the above into account in the context of the regular supervisory review and evaluation process.** For the purposes of this Article ~~and Articles 131 and 133 of this Directive~~, an institution shall be considered as bound by the output floor when the institution's total risk exposure amount calculated in accordance with Article 92(3), point (a), of Regulation (EU) No 575/2013 exceeds its un-floored total risk exposure amount calculated in accordance with Article 92(4) of that Regulation. **6a. The EBA shall, by 30 June 2023, issue guidelines complementing its guidelines on the Supervisory Review and Evaluation Process, which shall further specify how to operationalise the requirements set out in paragraph 6, and in particular:** **(a) how competent authorities shall reflect in their supervisory review and evaluation process the fact that an institution has become bound by the output floor;** **(b) how competent authorities and institutions shall communicate and disclose the impact on supervisory requirements of an institution becoming bound by the output floor.**

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	[…]'
Explanation *The ECB agrees with the underlying objective and the spirit of these provisions to neutralise unwarranted arithmetic effects on Pillar 2 requirements arising from the introduction of the output floor and stands ready to undertake the necessary steps to neutralise this impact. While the ECB therefore does not see the need for permanently enshrining in Level 1 legislation how the output floor should be taken into account when setting Pillar 2 requirements, it takes note of the specific legislative proposal on this issue and stresses the need to ensure that the proposed provision – including the temporary freeze – does not permanently interfere with both the current Pillar 2 approach and its frequency. EU legislators may also wish to provide the EBA with a specific mandate to develop guidelines on how competent authorities should deal with the impact of the output floor when setting Pillar 2 requirements, as defined in the Commission's proposal for a Regulation amending Regulation (EU) No 575/2013 (Article 465(1)). The suggested amendments also clarify that, as explained in the Commission's explanatory memorandum, the Pillar 2 requirements 'will remain frozen until the respective reviews will be concluded and the relevant decisions on the appropriate calibration of the requirements will be announced'.*	
Amendment 41 Point (31) of Article 1 of the proposed directive (Article 131 of the CRD)	
'(31) Article 131 is amended as follows: (a) in paragraph 5 the following subparagraph is added: "Where an O-SII becomes bound by the output floor, its competent or designated authority, as applicable, shall review the institutions O-SII buffer requirement to make sure that its calibration remains appropriate."; (b) in paragraph 5a, the second sub-paragraph is replaced by the following: … (c) in paragraph 15, the first subparagraph is replaced by the following: "Where the sum of the systemic risk buffer rate as calculated for the purposes of paragraph 10, 11 or 12 of Article 133 and the O-SII buffer rate or the G-SII buffer rate to which the same institution is subject to	~~'(31) Article 131 is amended as follows:~~ ~~(a) in paragraph 5 the following subparagraph is added:~~ ~~"Where an O-SII becomes bound by the output floor, its competent or designated authority, as applicable, shall review the institutions O-SII buffer requirement to make sure that its calibration remains appropriate.";~~ (~~b~~**a**) in paragraph 5a, the second sub-paragraph is replaced by the following: … ~~(c) in paragraph 15, the first subparagraph is replaced by the following:~~ "~~Where the sum of the systemic risk buffer rate as calculated for the purposes of paragraph 10, 11 or 12 of Article 133 and the O-SII buffer rate or the G-SII buffer rate to which the same institution is subject to would be higher than 5 %, the procedure set out in~~

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would be higher than 5 %, the procedure set out in paragraph 5a of this Article shall apply. For the purposes of this paragraph, where the decision to set a systemic risk buffer, O-SII buffer or G-SII buffer results in a decrease or no change from any of the previously set rates, the procedure set out in paragraph 5a of this Article shall not apply.”’	~~paragraph 5a of this Article shall apply. For the purposes of this paragraph, where the decision to set a systemic risk buffer, OSII buffer or G-SII buffer results in a decrease or no change from any of the previously set rates, the procedure set out in paragraph 5a of this Article shall not apply.”’~~
Explanation *The explanation for these amendments is set out in Amendment 8 in respect of recitals 44 and 45 of the proposed directive.* *By this amendment, the ECB proposes to keep the current version of this provision in the CRD.*	
Amendment 42 Point (32) of Article 1 of the proposed directive (Article 133 of the CRD)	
‘(32) […] (b) the following paragraph 2a is inserted: “2a. Where an institution is bound by the output floor, both of the following shall apply: (a) the amount of CET1 capital it is required to have in accordance with the first subparagraph shall be capped by the following amount: $rr_T \cdot E_T^* + \sum_i r_i \cdot E_i^*$ where: E_T= the un-floored total risk exposure amount of the institution calculated in accordance with Article 92(4) of Regulation (EU) No 575/2013’; E_i= the un-floored risk exposure amount of the institution for the subset of exposures i calculated in accordance with Article 92(4) of Regulation (EU) No 575/2013; r_T, r_i = r_T and r_i as defined in the first subparagraph. (b) the competent or designated authority, as	‘(32) […] ~~(b) the following paragraph 2a is inserted:~~ ~~“2a. Where an institution is bound by the output floor, both of the following shall apply:~~ ~~(a) the amount of CET1 capital it is required to have in accordance with the first subparagraph shall be capped by the following amount:~~ ~~$rr_T \cdot E_T^* + \sum_i r_i \cdot E_i^*$~~ ~~where:~~ ~~$E_T$= the un-floored total risk exposure amount of the institution calculated in accordance with Article 92(4) of Regulation (EU) No 575/2013’;~~ ~~E_i= the un-floored risk exposure amount of the institution for the subset of exposures i calculated in accordance with Article 92(4) of Regulation (EU) No 575/2013;~~ ~~r_T, r_i = r_T and r_i as defined in the first subparagraph.~~ ~~(b) the competent or designated authority, as~~

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applicable, shall review without undue delay the calibration of the systemic risk buffer rate or rates, as applicable, to ensure they remain appropriate and do not double-count the risks that are already covered by the fact that the institution is bound by the output floor.	~~applicable, shall review without undue delay the calibration of the systemic risk buffer rate or rates, as applicable, to ensure they remain appropriate and do not double-count the risks that are already covered by the fact that the institution is bound by the output floor.~~
The calculation in point (a) shall apply until the designated authority has completed the revision set out in point (b) and has published a new decision on the calibration of the systemic risk buffer rate or rates in accordance with the procedure set out in this Article. As of that moment, the cap in point (a) shall no longer apply.”;	~~The calculation in point (a) shall apply until the designated authority has completed the revision set out in point (b) and has published a new decision on the calibration of the systemic risk buffer rate or rates in accordance with the procedure set out in this Article. As of that moment, the cap in point (a) shall no longer apply.”;~~
(c) in paragraph 8, point (c) is replaced by the following:	~~(c) in paragraph 8, point (c) is replaced by the following:~~
”(c) the systemic risk buffer is not to be used to address any of the following:	~~”(c) the systemic risk buffer is not to be used to address any of the following:~~
(i) risks that are covered by Articles 130 and 131;	~~(i) risks that are covered by Articles 130 and 131;~~
(ii) risks that are fully covered by the calculation set out in Article 92(3) of Regulation (EU) No 575/2013.”;	~~(ii) risks that are fully covered by the calculation set out in Article 92(3) of Regulation (EU) No 575/2013.”;~~
(d) in paragraph 9, the following point (g) is added:	~~(d) in paragraph 9, the following point (g) is added:~~
“(g) how the calculation set out in Article 92(3) of Regulation (EU) No 575/2013 affects the calibration of the systemic risk buffer rate or rates, as applicable, that the competent authority or the designated authority, as applicable, intends to impose.”;	~~“(g) how the calculation set out in Article 92(3) of Regulation (EU) No 575/2013 affects the calibration of the systemic risk buffer rate or rates, as applicable, that the competent authority or the designated authority, as applicable, intends to impose.”;~~
(e) paragraphs 11 and 12 are replaced by the following …’	(~~e~~**c**) paragraphs 11 and 12 are replaced by the following …’
Explanation *In line with the explanation set out in Amendment 8 for recitals 44 and 45 of the proposed directive, the ECB has strong concerns in relation to the requirement to review the calibration of the SyRB, which includes a dynamic cap on the buffer, freezing it at pre-output floor levels until such a review has been concluded and the outcome published. Therefore, paragraph 2a, paragraph 8, point (c), and paragraph 9, point (g), should be deleted.*	

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Regarding the clarification that the SyRB should not cover risks that are already fully covered by the output floor, regardless of whether an institution is bound or not by the output floor, the ECB considers it sufficient to amend recital 44 as proposed (see Amendment 8). If an amendment to the operative provisions is also considered desirable, the ECB suggests, as an alternative to deleting paragraph 8, point (c), a clarification is inserted instead. Point (c) would then only clarify that the SyRB is not to be used to address risks that are already fully covered by the output floor, regardless of whether an institution is bound or not by the output floor. *Such revision would be an alternative to the ECB's preferred option, which is deleting paragraph 8, point (c). Paragraph 2a and paragraph 9, point (g), should be deleted independently of which option is chosen.*	