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(Preparatory acts)

EUROPEAN CENTRAL BANK

Opinion of the European Central Bank**of 11 April 2018****on a proposal for a regulation on the establishment of the European Monetary Fund****(CON/2018/20)**

(2018/C 220/02)

INTRODUCTION AND LEGAL BASIS

On 1 February 2018 the European Central Bank (ECB) received a request from the Council of the European Union for an opinion on a proposal for a Council Regulation on the establishment of the European Monetary Fund ⁽¹⁾ (hereinafter the 'proposed regulation').

The ECB's competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union since the proposed regulation is relevant to the primary objective of the European System of Central Banks (ESCB) to maintain price stability, as referred to in Articles 127(1) and 282(2) of the Treaty and Article 2 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB'), and contains provisions concerning the ECB's involvement in the governance structure and tasks of the European Monetary Fund.

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 supports the European Commission's initiative to bring the European Stability Mechanism (ESM) into the Union legal framework ⁽²⁾. As noted in the Report of the Five Presidents on Completing Europe's Economic and Monetary Union ⁽³⁾, prepared by the Presidents of the European Commission, the European Council, the European Parliament, the Eurogroup and the ECB, this initiative is an important step towards the completion of Europe's economic and monetary union. The establishment of the ESM as a body of the Union would allow it to better achieve its objective of contributing to safeguarding the financial stability of the euro area, as well as of the Member States participating in the banking union. To achieve its objective, the ESM can mobilise funding and provide stability support to the benefit of Member States which are experiencing, or are threatened by, severe financing problems.

The ECB also notes that, should the ESM remain outside the Union legal order as an intergovernmental body, any future discussion of the tasks that could be conferred on the ESM in the field of economic governance must respect the existing competences conferred on the Union and on its institutions under Union law ⁽⁴⁾.

The ECB emphasises that the proposed regulation is an important first step, and that further reforms of the ESM will be essential. First, the ESM should be provided with the financial instruments necessary to achieve its objectives and to fulfil its tasks. The ECB recommends that these financial instruments should be further reviewed, to ensure that these are adequate to effectively address the causes of financial instability and contagion in situations of acute market instability ⁽⁵⁾ and to support the Banking Union. In particular, the precautionary financial assistance instruments, with adequate conditionality, should be improved in order to better contribute to crisis prevention. Second, in order to effectively apply these instruments, it is important to enhance the ESM's governance arrangements, in order to achieve swift and credible decision-making procedures, based on high quality independent technical advice.

⁽¹⁾ COM(2017) 827 final.

⁽²⁾ See paragraph 8 of Opinion CON/2011/24. All ECB opinions are published on the ECB's website at www.ecb.europa.eu

⁽³⁾ See European Commission, 'Completing Europe's Economic and Monetary Union', Report by Jean-Claude Juncker, in close cooperation with Donald Tusk, Jeroen Dijsselbloem, Mario Draghi and Martin Schulz, 22 June 2015, available on the Commission's website at www.ec.europa.eu

⁽⁴⁾ See 'Commission of the European Communities v French Republic', 7-71, ECLI:EU:C:1971:121, paragraph 20; Opinion 1/92, 'Opinion of the Court of 10 April 1992, ECLI:EU:C:1992:189, paragraph 41; Thomas Pringle v Government of Ireland and Others', C-370/12, ECLI:EU:C:2012:756, paragraph 158.

⁽⁵⁾ See paragraph 6 of Opinion CON/2011/24.

Specific observations

1. The role of the ECB

- 1.1. The Treaty establishing the European Stability Mechanism (hereinafter the 'ESM Treaty') allocates various tasks of the ESM to be performed by the European Commission, in liaison with the ECB. In particular, the European Commission is allocated the tasks, in liaison with the ECB, to assess requests for stability support, to negotiate a memorandum of understanding detailing the conditionality attached to the financial assistance granted, and to monitor compliance with the conditionality attached to the financial assistance. More specifically, in the context of assessing the request for stability support, the Chairperson of the Board of Governors is obliged to entrust the European Commission, in liaison with the ECB, with the tasks to assess the existence of a risk to the financial stability of the euro area as a whole or of its Member States; to assess whether public debt is sustainable; and to assess the actual or potential financing needs of the Member State concerned. Moreover, both the European Commission and the ECB are allocated the function to assess the urgency of requests for stability support, and to participate as observers in the meetings of the Board of Governors and the Board of Directors.
- 1.2. The Court of Justice of the European Union (CJEU) held in the *Pringle* case⁽¹⁾ that the duties conferred on the European Commission and the ECB by the ESM Treaty, important as they are, do not entail any power to make decisions. Further, the activities pursued by these two institutions within the ESM Treaty solely commit the ESM⁽²⁾. The CJEU also held that, 'As regards the tasks allocated to the ECB by the ESM Treaty, they are in line with the various tasks which the FEU Treaty and the Statute of the ESCB [and of the ECB] confer on that institution'⁽³⁾.
- 1.3. The role of the ECB under the proposed regulation remains largely the same as under the ESM Treaty. In that respect, the ECB considers it important to emphasise that any contribution under both the ESM Treaty and under the proposed regulation would focus on specific issues which are of relevance to the basic task of the ESCB to define and implement monetary policy, and also to the contribution of the ESCB to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system. The ECB's involvement should ensure that the ECB is in a position not only to assess implications for its tasks, but also to provide its expertise for the benefit of the ESM, the European Commission and the Member State concerned. The current formulation according to which the European Commission performs its tasks 'in liaison with' the ECB was developed in the midst of the financial crisis. The ECB recommends that, in the light of further development and enhancement of the Union's permanent crisis management framework in a post-crisis environment, any contributory role of the ECB should be further clarified to better reflect the ECB's tasks and independence under the Treaties and the clear allocation of technical expertise and responsibilities in the future framework of the ESM. Going forward, the ECB may deal, in an appropriate manner and where necessary, in accordance with its competences, with financial sector policies and macro-critical issues, such as headline fiscal targets and sustainability and financing needs.
- 1.4. Finally, the ECB recommends that clarifications should be introduced to the proposed regulation to reflect the role of the ECB under other pieces of legislation, including, in particular, the role of the ECB within the Single Supervisory Mechanism (SSM), which was established in 2013, after the entry into force of the ESM Treaty⁽⁴⁾. Financial assistance instruments addressed to the banking sector should take into account the responsibilities of the ECB for the supervision of credit institutions within the framework of the SSM⁽⁵⁾. In this respect, the proposed regulation should ensure adequate and timely involvement of, or provision of information to, the ECB, as appropriate, in preparation for providing support under those instruments.

2. Support to the Single Resolution Board

- 2.1. The proposed regulation introduces a new task to be carried out by the ESM, in order to achieve its objective of contributing to safeguarding the financial stability of the euro area, as well as of the Member States participating in the Banking Union. The ESM is tasked with providing financial support, in the form of credit lines or guarantees, to the Single Resolution Board (SRB), which was established in accordance with Regulation (EU) No 806/2014 of the European Parliament and of the Council⁽⁶⁾.

⁽¹⁾ See C-370/12 'Pringle'.

⁽²⁾ See C-370/12 'Pringle', paragraph 161.

⁽³⁾ See C-370/12 *Pringle*, paragraph 165. See also paragraph 150 of the Opinion of Advocate General Cruz Villalón in *Peter Gauweiler and Others v Deutscher Bundestag*, C-62/14, ECLI:EU:C:2015:7.

⁽⁴⁾ 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).

⁽⁵⁾ *Landeskreditbank Baden-Württemberg-Förderbank v European Central Bank*, T-122/15, ECLI:EU:T:2017:337, paragraph 63.

⁽⁶⁾ Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, p. 1).

- 2.2. As emphasised in the Report of the Five Presidents on Completing Europe's Economic and Monetary Union, the ECB supports the initiative to assign the ESM with the task to provide a credible common backstop to the Single Resolution Fund (SRF). As the ECB has noted previously ⁽¹⁾, it welcomes the proposal to establish additional backstop arrangements that could be activated in exceptional circumstances, in the event that the SRF's *ex ante* contributions are not sufficient and the *ex post* contributions are not immediately accessible to cover its expenses, by contracting borrowings or other forms of support from credit and financial institutions or other third parties. Such a backstop should be implemented as soon as possible, and at the latest before the end of the transition period on 1 January 2024 provided for under Regulation (EU) No 806/2014.
- 2.3. It is very important that the backstop supports all possible measures by the SRB, including the provision of both solvency support and liquidity support to institutions under resolution. Such liquidity support presents a far smaller risk that losses will be incurred, and is by definition temporary in nature. Backstop arrangements which facilitate the provision of liquidity by the SRB are particularly important, because the volumes of liquidity support to an institution under resolution may be high, thus exceeding the SRF's capacity.
- 2.4. The ECB agrees that the backstop should be fiscally neutral over the medium term by ensuring that public assistance is recouped by means of *ex post* levies on the financial industry. This requirement preserves one of the main rationales for establishing a Single Resolution Mechanism, namely to resolve banks without incurring permanent costs for taxpayers. It would be important to carefully calibrate the time horizon for recouping these funds from the financial sector so as to avoid overly pro-cyclical levies ⁽¹⁾.
- 2.5. The ECB notes a certain incongruence in the decision-making processes on support to the SRB. On the one hand, the non-euro area Member States participating in the SSM, and the euro area Member States, through the ESM, will jointly provide financial support to the SRB. For that reason, decisions on support to the SRB will be taken by the Board of Governors, acting in agreement with the non-euro area Member States participating in the SSM. However, when it comes to the subsequent approval of such decisions by the Council, all members of the Council may participate in the vote ⁽²⁾. This includes non-euro area Member States that do not participate in the SSM.
- 2.6. Finally, the ECB emphasises the need to ensure that the whole procedure regarding such support to the SRB can be completed rapidly and does not delay the adoption and execution of the SRB's decision on the resolution scheme. Decisions on ESM disbursements should be as automatic, swift and efficient as possible. In this respect the ECB welcomes the fact that the proposed regulation provides for a rapid procedure in respect of ESM decisions on drawdowns. The Managing Director has the authority to decide on the drawdown, and must adopt this decision, at the latest, 12 hours after the receipt of a request from the SRB ⁽³⁾.

3. Renaming the European Stability Mechanism

- 3.1. The European Commission's initiative to rename the ESM could be misleading, as regards both the objectives of the ESM and the instruments available to it. The ECB suggests that the existing name of the ESM should be maintained, as this will ensure clarity and continuity for the public. In this respect, the use of the term 'monetary' in the new name of the Union body under the proposed regulation is inaccurate, in particular as the objectives and tasks of the ESM are not 'monetary' in nature. In accordance with the Treaties, economic policy is based on the close coordination of Member States' economic policies, on the internal market, and on the definition of common objectives, while the basic tasks to define and implement the monetary policy of the Union and to conduct foreign exchange operations are conferred on the ESCB, which is governed by the decision-making bodies of the ECB.
- 3.2. The CJEU held in the *Pringle* case that the establishment of the ESM falls within the area of economic policy ⁽⁴⁾. The Court noted that the objective pursued by the ESM, which is to safeguard the stability of the euro area as a whole, is clearly distinct from the objective of maintaining price stability, which is the primary objective of the Union's monetary policy. Even though the stability of the euro area may have repercussions on the stability of the currency used within that area, an economic policy measure cannot be treated as equivalent to a monetary policy measure for the sole reason that it may have indirect effects on the stability of the euro ⁽⁵⁾.

⁽¹⁾ See paragraph 2.8 of Opinion CON/2013/76.

⁽²⁾ Article 3(4) of the proposed Regulation and Articles 22 and 23 of the Annex to the proposed Regulation.

⁽³⁾ Articles 22(7) and 23(2)(b) of the Annex to the proposed Regulation.

⁽⁴⁾ See C-370/12 *Pringle*, paragraph 60.

⁽⁵⁾ See C-370/12 *Pringle*, paragraph 56.

- 3.3. The ECB understands that the choice of the proposed new name may have been inspired by the International Monetary Fund (IMF). However, the IMF was established under different circumstances and with different objectives and tasks. The IMF was established by means of Articles of Agreement of the IMF adopted in 1944 and charged with monitoring members' adherence to the 'par value' exchange rate system — also known as the Bretton Woods system — to avoid a repetition of the competitive devaluations that had contributed to the Great Depression in the 1930s. Its purposes include, inter alia, to promote international monetary cooperation; facilitate the expansion and balanced growth of international trade; promote exchange stability, maintain orderly exchange arrangements among members, and avoid competitive exchange depreciation; and make the general resources of the IMF temporarily available to its members under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments ⁽¹⁾.

Done at Frankfurt am Main, 11 April 2018.

The President of the ECB

Mario DRAGHI

⁽¹⁾ See Article I(i), (ii), (iii) and (v) of the Articles of Agreement of the International Monetary Fund.