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(Preparatory acts)

EUROPEAN CENTRAL BANK

Recommendation for a Decision of the European Parliament and of the Council amending Article 22 of the Statute of the European System of Central Banks and of the European Central Bank**(ECB/2017/18)**

(presented by the European Central Bank)

(2017/C 212/04)

EXPLANATORY MEMORANDUM

I. INTRODUCTION

On 4 March 2015, the General Court delivered its judgment in Case T-496/11 *United Kingdom of Great Britain and Northern Ireland v European Central Bank* ⁽¹⁾. The General Court held that the European Central Bank (ECB) does not have the competence necessary to regulate the activity of clearing systems, including central counterparties (CCPs). For that reason, the General Court annulled the Eurosystem Oversight Policy Framework, published by the ECB on 5 July 2011, in so far as it set a requirement for CCPs to be located within a euro area Member State.

However, the General Court noted that Article 129(3) of the Treaty on the Functioning of the European Union provides for a simplified amendment procedure in respect of certain articles of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB'). This enables the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and on a recommendation from the ECB or a proposal from the Commission, to amend Article 22 of the Statute of the ESCB. The General Court considered it would be for the ECB to request the European Union legislature to amend Article 22, should the ECB consider that having the power to regulate CCPs is necessary for the proper performance of the task referred to in the fourth indent of Article 127(2) of the Treaty.

Significant developments at both global and European level are expected to increase the risks posed by clearing systems, in particular CCPs, to the smooth operation of payment systems and implementation of the single monetary policy, ultimately affecting the Eurosystem's primary objective of maintaining price stability.

In view of the above, the ECB submits the present recommendation for a Decision of the European Parliament and of the Council amending Article 22 of the Statute of the ESCB. In accordance with Article 40.3 of the Statute of the ESCB, the Governing Council has adopted the recommendation by unanimity. It will be published in the *Official Journal of the European Union*.

II. GENERAL CONSIDERATIONS

Disturbances affecting CCPs can have an impact on the Eurosystem's primary objective of maintaining price stability through several channels. First, such disturbances can affect the liquidity position of euro area credit institutions, potentially disrupting the smooth functioning of euro area payment systems. This could lead to increased demand for central bank liquidity and possible challenges in implementing the Eurosystem's single monetary policy. Second, such disturbances can impair the functioning of financial market segments that are key for the transmission of monetary policy.

In 2012, the European Parliament and the Council adopted Regulation (EU) No 648/2012 ⁽²⁾ setting out, inter alia, the regulatory and supervisory framework to ensure that CCPs are safe and sound and comply at all times with stringent organisational, business conduct and prudential requirements. This regulatory framework includes collective supervisory arrangements in the form of colleges, which provide for the involvement of the Eurosystem, including under situations

⁽¹⁾ ECLI: EU:T:2015:133.

⁽²⁾ Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1).

of stress in which the stability of the currency may be at risk. Moreover, in the light of the growing systemic importance of CCPs, the European Commission has adopted a proposal for a Regulation on a framework for the recovery and resolution of CCPs ⁽¹⁾.

Significant developments at both global and European level are expected to increase the risks posed by clearing systems, in particular CCPs, to the smooth operation of payment systems and implementation of the single monetary policy, ultimately affecting the Eurosystem's primary objective of maintaining price stability.

First, the withdrawal of the United Kingdom from the European Union will have a major impact on the Eurosystem's ability to carry out its tasks as central bank of issue for the euro. At present, CCPs established in the United Kingdom clear significant volumes of euro-denominated transactions: the estimated daily values of euro-denominated repos and open positions in euro-denominated interest rate swaps are respectively EUR 101 billion and EUR 33 trillion (around 99 % of the Union market) ⁽²⁾. Thus, a significant disturbance affecting a major UK CCP could lead to a severe decrease in liquidity within the euro area. The Eurosystem's ability to monitor and manage the risks posed by UK CCPs will be adversely affected if UK CCPs are no longer subject to the regulatory and supervisory framework for Union CCPs under Regulation (EU) No 648/2012. Moreover, the current arrangements between the ECB and the Bank of England for information exchange and cooperation regarding UK CCPs with significant euro-denominated business build upon, but cannot replace, collective supervisory arrangements in the form of colleges established under Regulation (EU) No 648/2012. In the future, UK CCPs may instead be subject only to the regime applicable to third-country CCPs under that Regulation.

Second, central clearing has become increasingly cross-border in nature and systemically important. At the September 2009 summit in Pittsburgh, G20 leaders agreed that all standardised OTC derivative contracts should be cleared through a CCP. This commitment was reaffirmed by the G20 leaders in June 2010, and implemented in the Union by Regulation (EU) No 648/2012. Moreover, the integration of Union financial markets has meant that CCPs have evolved from primarily serving domestic needs and markets to constituting critical infrastructures in Union financial markets. These developments have led to a dramatic increase in the scale and importance of CCPs in the Union and globally.

Third, on 13 June 2017, the European Commission presented its legislative proposal to ensure financial stability and the safety and soundness of CCPs that are of systemic relevance for financial markets across the Union ⁽³⁾. The Commission's proposal seeks to introduce more integrated supervision by the supervisors and responsibilities for the central bank of issue in order to support the development of deeper and better integrated capital markets. It also seeks to address the issues raised by the withdrawal of the United Kingdom from the Union and to ensure that CCPs playing a key systemic role for Union financial markets are subject to safeguards provided by the Union legal framework.

In this context, in order to ensure that the Eurosystem as central bank of issue for the euro can carry out the role envisaged by the legislative proposal, it is of utmost importance that it has the relevant powers under the Treaty and the Statute of the ESCB. The Eurosystem should have the power to monitor and assess risks posed by CCPs clearing significant amounts of euro-denominated transactions. This should include, in particular, the regulatory powers to adopt binding assessments and require remedial action, in close cooperation with other Union authorities, in response to risks affecting the Eurosystem's basic tasks and primary objective. Moreover, where necessary to protect the stability of the euro, the ECB should have the regulatory powers outside the framework of Regulation (EU) No 648/2012 to adopt additional requirements for CCPs involved in the clearing of significant amounts of euro-denominated transactions.

In the light of the above, the ECB considers that the grant to it of the power to regulate clearing systems, in particular CCPs, is necessary for the proper performance of its basic tasks referred to in the first and fourth indents of Article 127(2) of the Treaty.

⁽¹⁾ Proposal for a Regulation of the European Parliament and of the Council on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, and (EU) 2015/2365 (COM(2016) 856 final).

⁽²⁾ LCH.Clearnet Ltd CPMI-IOSCO public quantitative disclosure information, January 2017.

⁽³⁾ Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority) and amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs (COM(2017) 331 final).

Recommendation for a
‘DECISION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
amending Article 22 of the Statute of the European System of Central Banks and of the European Central Bank

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 129(3) thereof,

Having regard to the Statute of the European System of Central Banks and of the European Central Bank, and in particular Article 40.1 thereof,

Having regard to the recommendation of the European Central Bank,

Having regard to the opinion of the European Commission (*),

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The basic tasks to be carried out through the European System of Central Banks (ESCB) include the definition and implementation of the monetary policy of the Union and the promotion of the smooth operation of payment systems. Safe and efficient financial market infrastructures, in particular clearing systems, are essential for the fulfilment of these basic tasks.
- (2) In order to achieve the objectives of the ESCB and to carry out its tasks, the European Central Bank (ECB) and national central banks may provide facilities, and the ECB may make regulations, to ensure efficient and sound clearing and payment systems within the Union and with other countries.
- (3) On 4 March 2015, the General Court delivered its judgment in *United Kingdom v ECB*, Case T-496/11 ⁽¹⁾, which held that the ECB does not have the competence necessary to regulate the activity of clearing systems. The General Court stated that Article 129(3) of the Treaty enables the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and on a recommendation from the ECB, to amend Article 22 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the ‘Statute of the ESCB’). The Court concluded that ‘it would be for the ECB, should it consider that the grant to it of a power to regulate infrastructures clearing transactions in securities is necessary for proper performance of the task referred to in the fourth indent of Article 127(2) TFEU, to request the EU legislature to amend Article 22 of the Statute, by the addition of an explicit reference to securities clearing systems.’
- (4) Significant developments at both global and European level are expected to increase the risk that disturbances affecting clearing systems, in particular central counterparties (CCPs), threaten the smooth operation of payment systems and implementation of the single monetary policy, ultimately affecting the Eurosystem’s primary objective of maintaining price stability.
- (5) On 29 March 2017, the United Kingdom of Great Britain and Northern Ireland notified the European Council of its intention to withdraw from the European Union. The withdrawal of the United Kingdom will lead to a fundamental change in how certain systemically important euro-denominated clearing activities are regulated, overseen and supervised, thereby adversely affecting the Eurosystem’s ability to monitor and manage risks to the smooth operation of payment systems, and implementation of the Eurosystem’s monetary policy.
- (6) Central clearing is becoming increasingly cross-border in nature and systemically important. Given their diverse membership and the pan-European nature of the financial services they provide, CCPs are of key importance to the Union as a whole, and in particular to the euro area. This is reflected in Regulation (EU) No 648/2012 of the European Parliament and of the Council ⁽²⁾, which establishes collective supervisory arrangements in the form of colleges, composed of the relevant national and Union authorities, including the Eurosystem in its role as central bank of issue for the euro.
- (7) In order to address these issues, on 13 June 2017 the Commission presented its legislative proposal to ensure financial stability and the safety and soundness of CCPs that are of systemic relevance for financial markets across the Union. In order to ensure that the Eurosystem as central bank of issue for the euro can carry out the role

(*) Not yet published in the Official Journal.

⁽¹⁾ ECLI: EU:T:2015:133.

⁽²⁾ Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1).

envisaged by the legislative proposal, it is of utmost importance that it has the relevant powers under the Treaty and the Statute of the ESCB. In particular, the Eurosystem should have regulatory powers to adopt binding assessments and require remedial action, in close cooperation with other Union authorities. Moreover, where necessary to protect the stability of the euro, the ECB should also have the regulatory powers to adopt additional requirements for CCPs involved in the clearing of significant amounts of euro-denominated transactions.

- (8) Article 22 of the Statute of the ESCB is part of Chapter IV 'Monetary functions and operations of the ESCB'. The tasks conferred therein should accordingly only be used for monetary policy purposes.
- (9) For these reasons, the ECB should be granted regulatory competence over clearing systems, in particular CCPs, by means of an amendment to Article 22 of the Statute of the ESCB,

HAVE ADOPTED THIS DECISION:

Article 1

Article 22 of the Statute of the ESCB is replaced by the following:

'Article 22

Clearing systems and payment systems

The ECB and national central banks may provide facilities, and the ECB may make regulations, to ensure efficient and sound clearing and payment systems, and clearing systems for financial instruments, within the Union and with other countries.'

Article 2

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

Done at Frankfurt am Main, 22 June 2017.

The President of the ECB

Mario DRAGHI
