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COMMISSION OPINION

of 3.10.2017

on the Recommendation of the European Central Bank 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

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1. INTRODUCTION

1. On 22 June 2017, the European Central Bank (ECB) submitted a Recommendation (ECB/2017/18) for a decision of the European Parliament and of the Council amending Article 22 of Protocol No 4 on the Statute of the European System of Central Banks and of the European Central Bank (ESCB and ECB Statute)¹. On 12 July 2017, the Council consulted the Commission on that Recommendation.
2. The Commission's competence to deliver an opinion is based on Article 129(3) of the Treaty on the Functioning of the European Union (TFEU) and Article 40.1 of the ESCB and ECB Statute.
3. The Commission strongly welcomes the initiative of the ECB to recommend to the legislator an amendment of Article 22 of the ESCB and ECB Statute in order to allow the ECB to regulate "clearing systems for financial instruments" for monetary policy purposes, as it complements the Commission's legislative proposal of 13 June 2017 to amend Regulation (EU) No 648/2012 by adapting the legal framework applicable to the ECB. This would enable the ECB to perform fully the responsibilities being granted to the central banks of issue under the aforementioned Commission proposal as concerns clearing systems for financial instruments denominated in euro.

2. GENERAL COMMENTS

4. The Commission shares the view of the ECB that central counterparties (CCPs) are of key importance to the Union and concurs with the ECB that central clearing is becoming increasingly cross-border in nature and systemically important. Since the adoption of Regulation (EU) No 648/2012 and as a result of both market-driven and regulatory factors the volume of CCP activity in the Union and globally has grown rapidly in scale and scope. Central clearing contributes to systemic risk reduction through robust counterparty risk management, greater transparency and more efficient use of collateral. Mandatory central clearing of standardised OTC derivatives was a commitment made by G20 leaders already in 2009 and implemented in the European Union and globally. Since then the share of over-the-counter derivatives cleared centrally has increased, and that expansion is set to continue in the coming years with the introduction of additional clearing obligations for other types of instruments and the rise in voluntary clearing by counterparties not subject yet to a clearing obligation. The Commission's legislative proposal of 4 May 2017 to amend Regulation (EU) No 648/2012 in a targeted manner, to improve its effectiveness and proportionality, will create further incentives for CCPs to offer central clearing of derivatives to counterparties and facilitate access to clearing to

¹ OJ C 212, 1.7.2017, p.14.

small financial and non-financial counterparties. Moreover, clearing markets are well integrated across the Union but highly concentrated in certain asset classes and highly interconnected. But inevitably the increased share of central clearing means there is greater risk concentration in CCPs. The Commission agrees that this needs to be properly addressed and has already proposed regulatory measures to that end.

5. The Commission therefore agrees with the ECB that the increasing systemic importance of CCPs could give rise to risks that could affect clearing systems, which may have a negative bearing on the smooth operation of payment systems and the implementation of the single monetary policy, ultimately affecting the primary objective of maintaining price stability.
6. The Commission also agrees with the ECB that the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union, as notified on 29 March 2017, confronts the Union with an additional significant challenge because the requirements of Regulation (EU) No 648/2012 will no longer be applicable to CCPs established there and the amount of financial instruments denominated in currencies of the Member States which are cleared in third countries will substantially increase.

3. SPECIFIC COMMENTS

7. It is recalled that pursuant to Article 127(1) TFEU, the primary objective of the ESCB is to maintain price stability. Article 127(2) TFEU determines that the definition and implementation of monetary policy and the promotion of the smooth operation of payment systems are included among the basic tasks to be carried out through the ESCB. Those basic tasks are also recalled in Article 3(1) of the ESCB and ECB Statute. They serve the primary objective of the ESCB of maintaining price stability; hence their exercise needs to contribute to its achievement.
8. Article 22 of the ESCB and ECB Statute, headed "Clearing and payment systems" provides that the 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 third countries. Article 22 is situated in Chapter IV of the ESCB and ECB Statute regarding "Monetary functions and operations of the ESCB", together with other provisions which enable the ECB to exercise the basic tasks of the ESCB.
9. The Commission understands the ECB's recommended amendment to Article 22 of the ESCB and ECB Statute in the light of the judgment of the General Court in *United Kingdom v. ECB*, Case T-496/11 of 4 March 2015². The General Court held that the power to adopt regulations pursuant to Article 22 of the ESCB and ECB Statute is one of the means available to the ECB for performing the task, entrusted to the Eurosystem by Article 127(2) TFEU, of promoting the smooth operation of payment systems. That task itself serves the primary objective set out in Article 127(1) TFEU. In the same judgment the General Court also held that the term 'clearing and payment systems' that is used in Article 22 of the ESCB and ECB Statute must be interpreted in the light of the task of promoting the 'smooth operation of payment systems', hence the ability which the ECB is granted by Article 22 of the Statute to adopt regulations 'to ensure efficient and sound clearing and payment systems' should not be understood as according it such a power in respect

² ECLI: EU:T:2015:133.

of all clearing systems, including those relating to transactions in securities, but must rather be regarded as limited to payment clearing systems alone.

10. With its Recommendation, the ECB seeks an amendment of the scope of Article 22 of the ESCB and ECB Statute to include clearing systems for financial instruments under its regulatory competence. Such a recommended change would thus imply an extension of the ECB's regulatory powers and enable the ECB to adopt regulations regarding clearing systems for financial instruments. It should however be noted that, in accordance with Article 34.1 of the ESCB and ECB Statute, regulations can be made by the ECB only to the extent necessary to implement Article 22 of the ESCB and ECB Statute.
11. With its legislative proposal of 13 June 2017 to amend Regulation (EU) No 648/2012, the Commission seeks to strengthen the responsibilities of the central banks of issue with regard to CCPs authorised or recognised to operate in the Union. The proposal to strengthen the responsibilities of the central banks of issue is due to the potential risks that the malfunctioning of a CCP could pose to the smooth operation of payment systems and the implementation of the single monetary policy, both basic tasks of the ESCB, ultimately affecting the achievement of the primary objective of maintaining price stability. The enhanced role for the central banks of the ESCB under the Commission's legislative proposal is therefore consistent with the primary objective of the ESCB and the carrying out by the ECB of the ESCB's basic tasks.
12. In absence of an explicit reference to clearing systems for financial instruments or CCPs in the Treaty or the ESCB and ECB Statute, for the sake of legal certainty it is of the utmost importance that the ECB is clearly empowered under Article 22 of the ESCB and ECB Statute to adopt the necessary measures regarding clearing systems for financial instruments in order to achieve the objectives of the ESCB and to carry out its basic tasks. Such an empowerment is in particular necessary to enable the ECB to fully carry out the role envisaged for central banks of issue by the Commission's legislative proposal of 13 June 2017 to amend Regulation (EU) No 648/2012.
13. The Commission notes that the ECB is of the opinion that it should be granted regulatory powers (recital 7 Recommendation ECB/2017/18). In that respect, the Commission recalls that its legislative proposal to amend Regulation (EU) No 648/2012 requires the central banks of issue to participate in taking (binding) decisions on a number of matters in the process of authorising Union CCPs or recognising third country CCPs as well as in the ongoing supervision of CCPs. Moreover, the Commission's legislative proposal of 13 June 2017 also takes as a basis that central banks of issue may be able to impose additional requirements on Union CCPs and systemically important third country CCPs (Tier 2 CCPs) in relation to the carrying out of their monetary policy tasks (see in particular Article 21a(2) for Union CCPs and Article 25(2b)(b); Article 25(b)(1) and (2) for third country CCPs). The latter may be interpreted as going beyond mere oversight by central banks of issue of the infrastructures of securities clearing systems, and may qualify legally as partaking in the regulation of their activity. Within the framework set forth in its legislative proposal, the Commission is therefore of the view that it is appropriate for the ECB to be empowered to take decisions and to make regulations to the extent necessary regarding clearing systems for financial instruments.

14. The new powers of the ECB regarding CCPs under Article 22 of the ESCB and ECB Statute would interact with the powers of other Union institutions, agencies and bodies on the basis of provisions relating to the establishment or functioning of the internal market provided for in Part III TFEU, including acts adopted by the Commission or by the Council pursuant to the powers conferred upon them. In the Commission's view it is paramount to clearly determine and distinguish the scope of (regulatory) powers of the different Union institutions in order to avoid parallel or conflicting rules applying to CCPs.
15. Legal acts of the European Parliament and the Council adopted on the basis of provisions relating to the establishment or functioning of the internal market provided for in Part III TFEU, including acts adopted by the Commission or by the Council pursuant to the powers conferred upon them, should establish the general legal framework for clearing systems of financial instruments and in particular for the authorisation, recognition and supervision of CCPs in Union law. While the ECB's participation in decision-making regarding Union and third country CCPs and the exercise of its regulatory powers to impose requirements on CCPs in relation to its basic tasks would be undertaken independently pursuant to Article 130 TFEU to the extent necessary to achieve the ESCB's primary objective, its newly granted responsibilities should be exercised in a manner which is consistent with the aforementioned general framework for the internal market established by the European Parliament and the Council or by the Commission or by the Council acting on the basis of such empowerments and should, where applicable, respect the institutional responsibilities and procedures set out in that framework.
16. In view of those considerations, the Commission is of the opinion that the ECB's recommended amendment to Article 22 of the ESCB and ECB Statute would benefit from further clarifications and should be rephrased to emphasise that the ECB's regulatory and decision-making powers aim at achieving the objectives of the ESCB and the performance of its basic tasks. Furthermore, the amendment should emphasise that those powers are to be exercised in a manner which is consistent with any acts adopted by the European Parliament and the Council on the basis of provisions relating to the establishment or functioning of the internal market provided for in Part III TFEU, and with delegated acts adopted by the Commission and implementing acts adopted by the Council or the Commission pursuant to the powers conferred upon them.

4. CONCLUSION

The Commission hereby issues a favourable opinion on the ECB's recommendation that Article 22 of the ESCB and ECB Statute be amended, subject to the adjustments set out in points 10-16 of this opinion.

In the annex to this opinion, the amendment proposed by the Commission is provided in a tabular form. That table should be read together with the text of this opinion.

This opinion shall be forwarded to the European Parliament and the Council.

Done at Strasbourg, 3.10.2017

For the Commission
Jean-Claude JUNCKER
President of the Commission