

Mario DRAGHI
President

Mr George Ciamba
Minister Delegate for European Affairs
Aleea Alexandru nr. 31
Sector 1
011822 Bucharest

Frankfurt am Main, 20 March 2019

L/MD/19/078

Re: Withdrawal of the Recommendation of the ECB 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

Dear Mr Ciamba,

It is with regret that I wish to inform you that on 20 March 2019, the Governing Council of the ECB decided to withdraw its Recommendation of 22 June 2017 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 Bank¹ (the 'Recommendation'). The ECB considers that the changes which the Council and the Parliament propose to introduce seriously distort its proposal, interfere with some fundamental principles of the Treaty, with the institutional balance and with the independent exercise by the ECB of its monetary policy competence.

Let me mention from the outset that the ECB welcomes, in line with ECB Opinion CON/2017/39, the overall objectives of the amendments to Regulation (EU) No 648/2012. These changes will, in particular, strengthen the regulatory and supervisory framework for third country CCPs, in view of the growing global importance of clearing, and especially in view of the withdrawal of the United Kingdom from the European Union. The ECB would not expect the withdrawal of its recommendation to prevent or delay the adoption or the operationalisation of these amendments to Regulation (EU) No 648/2012. The ECB remains fully committed to contribute, in its capacity as central bank of issue for the euro, and to the extent legally possible, to the

¹ OJ, C 212, 1.7.2017, p. 14.

implementation of the amendments to Regulation (EU) No 648/2012. In particular the ECB considers that the tools provided by the amendments to Regulation (EU) No 648/2012 should be used as appropriate to lower the risk that disturbances affecting clearing systems for financial instruments, in particular central counterparties (CCPs), disrupt the smooth operation of payment systems and the implementation of the single monetary policy, ultimately affecting the Eurosystem's primary objective of maintaining price stability.

You will recall that the ECB considered that the grant to it of the power to regulate clearing systems, in particular CCPs, would be necessary for the proper performance of its basic tasks referred to in the first and fourth indents of Article 127(2) of the Treaty. The Recommendation referred to three main developments in this context: first, it explicitly referred to the "dramatic increase in the scale and importance of CCPs in the Union and globally" by virtue of the cross-border nature and systemic importance of central clearing, to explain that there is a need to grant the Eurosystem the power to monitor and assess risks posed by CCPs clearing significant amounts of euro-denominated transactions. This need applies regardless of the CCPs place of establishment. Second, the withdrawal of the United Kingdom from the European Union would adversely affect the Eurosystem's ability to monitor and manage the risks by UK CCPs, because following the withdrawal of the United Kingdom from the European Union, those CCPs would no longer be subject to the regulatory and supervisory framework for Union CCPs. Third, the legislative proposal presented by the Commission on 13 June 2017² sought to introduce further responsibilities for central banks of issue.

Against this background, the ECB considered that it was of utmost importance that it has the relevant powers under the Treaty and the Statute of the ESCB. The Recommendation noted that the Eurosystem should be able to monitor and assess risks posed by CCPs clearing significant amounts of euro-denominated transactions. This should include, in particular, 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, the ECB explained that 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. It should also be recalled that in adopting this Recommendation, the ECB followed the suggestion of the General Court in point 109 of the Judgement in Case T-496/11, which was simply to add "an explicit reference to securities clearing systems", in such a manner as to establish a general competence for the ECB in that area.

On 3 October 2017, the Commission published its opinion on the ECB Recommendation. On 25 June 2018, the European Parliament published its Report on the draft Decision to amend Article 22, while on 27 November 2018 the Council published the Presidency compromise proposal for a negotiating mandate with the European Parliament. Following the trilogue discussions between the Commission, European Parliament

² 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).

and the Council in February and March 2019, to which the ECB, despite being the institution which adopted the recommendation, has regrettably not been invited, the ECB understands that the final text of the draft Decision of the European Parliament and of the Council to amend Article 22 is expected to include a number of amendments to the text recommended by the ECB, with which the ECB has serious concerns. The ECB has expressed these concerns throughout the process for the amendment of Article 22, in particular during the meetings of the Council working party, which were attended by the Commission and the ECB, and in numerous discussions and correspondence with the rapporteurs of the European Parliament. On all occasions, the ECB has sought to engage with the institutions, also taking into account their concerns, with a view to finding a satisfactory way forward.

I would like to repeat the ECB's concerns with the amendments to the text recommended by the ECB. First, under these amendments, the ECB would not enjoy regulatory powers in respect of CCPs established within the European Union. This means that one of the overarching objectives of the Recommendation cannot be fulfilled, namely, to ensure that the Eurosystem would have binding powers to monitor and assess risks posed by CCPs clearing significant amounts of euro-denominated transactions, regardless of their place of establishment, given the increased cross-border nature and systemic importance of central clearing both globally and within the Union. The Recommendation noted that this should include, in particular, the regulatory powers to require remedial action, in close cooperation with other Union authorities, in response to risks affecting the Eurosystem's primary objective and basic tasks. In line with the suggestion of the General Court, the ECB sought to ensure it would enjoy the same powers as it does for payment systems. More generally, restricting the ECB's competence to certain third-country CCPs is not consistent with the ECB's mandate as central bank of issue for the euro.

Second, by contrast to the Recommendation, the ECB would only be conferred with an exhaustive list of specific and circumscribed powers in respect of individual third country CCPs that are systemically important to financial stability in the Union as decided by a Union agency. We understand that this list would be identical to the list elaborated in the amendment to Regulation (EU) No 648/2012. Not only is this detailed enumeration of targeted requirements uncharacteristic of a Treaty-level text, this restriction would mean that a further objective of the Recommendation cannot be fulfilled, namely to ensure that, 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. Indeed, this detailed specification of powers and addressees would deprive the ECB of discretion to adopt measures which are necessary to carry out the Eurosystem's basic tasks, and would thus violate the ECB's functional independence, established in the Treaties.

By the same token, ECB measures would be restricted by a requirement for measures to be 'in alignment with' legislative acts of the European Parliament and of the Council. Even if in the text one were to declare this requirement as being 'without prejudice to the independence of the ECB under the Treaties', in fact, other features of the text would still entail that the ECB's measures are limited by and subordinated to Regulation

Address

European Central Bank
Sonnemannstrasse 20
60314 Frankfurt am Main
Germany

Postal Address

European Central Bank
60640 Frankfurt am Main
Germany

Tel. +49-69-1344-0
Fax: +49-69-1344-7305
Website: www.ecb.europa.eu

(EU) No 648/2012. First, the amendments to the text means that the ECB would have to rely on a determination by ESMA, in accordance with Regulation (EU) No 648/2012, that the relevant third country CCP would be systemically important to the financial stability of the Union. This would limit the scope of the ECB's competence to address risks to monetary policy or the smooth functioning of payment systems, in a way that infringes its independence, as the ECB's competence would be based on decisions taken by another authority (ESMA) on the basis of criteria which are distinct from the ECB's primary mandate. Second, the powers of the ECB in exceptional situations must be adopted for a limited duration of up to one year. The ECB should enjoy discretion to apply measures for any duration it deems appropriate, where it identifies continuing risks to its monetary policy or to the smooth functioning of payment systems. Third, the ECB notes that the final text of Article 22 requires that measures adopted in exceptional situations "shall also aim at ensuring the efficiency, soundness and resilience of clearing systems for financial instruments". This is a partial replication of Article 25(2b)(b) of the final text of the amended Regulation (EU) No 648/2012, which requires that central bank measures "shall ensure the efficiency, soundness and resilience of CCPs and be aligned with those set out in Article 16 and in Titles IV and V of this Regulation". The ECB has concerns about the interaction of these various provisions. The combination may imply that the ECB must prioritise the objectives of the prudential supervisory framework when carrying out its own tasks, notwithstanding its central banking objectives under the Treaties. The ECB recalls that neither the simplified amendment procedure, nor secondary legislation can amend the objectives conferred on the ECB under the Treaties.

The ECB considers that these amendments distort the Recommendation in a manner which prevents achievement of the objectives pursued by the Recommendation and which, therefore, deprives the Recommendation of its *raison d'être*.

Moreover, for the reasons explained above, the ECB has serious concerns that the amendments to the text recommended by the ECB could interfere with certain fundamental principles under the Treaties. These principles cannot be amended by means of the simplified amendment procedure under Article 129(3) TFEU. Indeed, the features of the amendments mentioned above could undermine the ECB's independence under Article 130 TFEU in the pursuit of its objectives, and the carrying out of the tasks and duties conferred upon it under the Treaties and the principle of institutional balance, since the ECB would be deprived of discretion to make choices of a technical nature and to undertake forecasts and complex assessments in its field of competence.

Furthermore, the amendments would create, *de facto*, a hierarchy between measures adopted in pursuit of the Union's objective to establish an internal market, and the measures to pursue the Union's objective to establish an economic and monetary union, whose currency is the euro, and in particular the Eurosystem's objective to maintain price stability. This hierarchy is not foreseen in the Treaty and does not reflect the equality and complementarity of the objectives of the European Union under Article 3 TEU.

Address

European Central Bank
Sonnemannstrasse 20
60314 Frankfurt am Main
Germany

Postal Address

European Central Bank
60640 Frankfurt am Main
Germany

Tel. +49-69-1344-0
Fax: +49-69-1344-7305
Website: www.ecb.europa.eu

For these reasons, the Governing Council of the ECB has decided to withdraw its Recommendation of 22 June 2017. The ECB stands ready to revisit this issue in the future, in full cooperation with the other institutions, if a way forward can be found that does not raise such concerns.

Yours sincerely,

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

Mario Draghi

Cc:

Mr Donald Tusk, President of the European Council,

Mr Eugen Orlando Teodorovici, Minister of Public Finance of Romania,

Mr Jeppe Tranholm-Mikkelsen, Secretary-General of the Council of the European Union,

Mr Jean-Claude Juncker, President of the European Commission,

Mr Valdis Dombrovskis, Vice-President of the European Commission for the Euro and Social Dialogue, also in charge of Financial Stability, Financial Services and Capital Markets Union

Address

European Central Bank
Sonnemannstrasse 20
60314 Frankfurt am Main
Germany

Postal Address

European Central Bank
60640 Frankfurt am Main
Germany

Tel. +49-69-1344-0
Fax: +49-69-1344-7305
Website: www.ecb.europa.eu