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First exchange of views on the amendment to Article 22 of the ECB Statute in joint meeting of the AFCO and the ECON Committees

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The ECB issued on 22 June 2017 a recommendation for a decision of the European Parliament and the Council regarding the article 22 of its statute.

It proposed to amend its statute by adding to article 22 an explicit reference to “clearing systems for financial instruments”.

In so doing, it follows a simplified amendment procedure, which is set out in article 129 (3) TFEU and in article 40.1 of the statute, and according to which some articles of the statute, including article 22, may be amended by the co-legislators, European Parliament and Council, acting upon a proposal from the ECB.

This proposal was issued as a complement to the Commission proposal of 13 June amending EMIR as regards the supervision of CCPs, which is introducing a more European approach to the supervision of CCPs and extending the scope of the powers of ESMA over third country CCPs.

This new proposal would foresee quite an important role for the central banks of issue, of which the Eurosystem as the central bank issuing the euro.

The reasons for this important role of central banks are threefold.

First, the increase in the scale and importance of CCPs in the Union makes it necessary to enhance their supervision. Since some actions taken by CCPs have an impact on market liquidity and the implementation of monetary policy, central banks should be involved in some aspects of this supervision.

Then, central banks are likely to have to step in as lenders of last resort in cases of distress of a CCP, which calls for giving them a role ex ante in supervision, in order to monitor risks.

Finally, in the particular case of the Eurosystem, the ECB noted in the recitals to its recommendation that the withdrawal of the United Kingdom from the EU will have a major impact on the Eurosystem's performance of its tasks as central bank of issue for the euro. Significant volumes of euro-denominated transactions are currently cleared by CCPs established in the UK, which will become third country CCPs after the United Kingdom leaves the Union. Those CCPs might no longer, everything else being equal, be subject to the same regulatory arrangements as EU CCPs while they will clear instruments issued in the main currency in the Union and their actions will therefore affect Union clearing members, clearing clients and financial markets, as well as potentially the transmission of the monetary policy of the Eurosystem.

Concretely, under the Commission proposal, central banks would need to give binding consent to a set of supervisory decisions, either from national authorities or from ESMA. They would also need to certify that systemic third country CCPs comply with any requirement that the central bank deems appropriate to fulfil its monetary policy tasks so that those third country CCPs may be recognised in the Union.

The issue was that the current statute of the European system of central banks and of the European Central Bank would not, in its current shape, allow the Eurosystem to take up the type of powers foreseen in the Commission's proposal.

Article 22 of the Statute currently states 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 other countries."

In 2015, the European Court of Justice, in a ruling concerning a Eurosystem Policy Framework that recommended a location of CCPs clearing euro-denominated instruments in the euro area, ruled that this sentence did not give the ECB regulatory powers over clearing systems for financial instruments, that is, CCPs. The ECJ consequently annulled the Policy Framework.

Therefore, the statute had to be modified in order to clarify that the regulatory powers of the ECB over payment systems included 2clearing systems for financial instruments", that is, CCPs.

The Commission acts in the procedure that was launched last June to amend article 22 of the statute as an opinion-giver, and has delivered its opinion on 3 October 2017.

It issued a favourable opinion to the amendment to the statute. It however suggested to amend the ECB's recommended amendment to Article 22 of the statute of the ECB and the ESCB to clarify the following elements.

The first element to clarify is that the ECB's new regulatory and decision-making powers would aim at achieving the objectives of the ESCB and the performance of its basic tasks.

In addition, it needs to be clarified that there can be no regulatory conflicts between, on the one hand, regulations adopted by the ECB under Article 22 and, and on the other hand, legal acts adopted by the co-legislators or other acts related to those related legal acts adopted by the co-legislators.

It is to be noted that since the Statute of the ESCB and the ECB is an Annex to the Treaty on the Functioning of the European Union (Protocol 4), this file bears not only importance for the regulation and supervision of CCPs but also a constitutional dimension since this amendment of EU primary law expands the ECB's powers over new grounds.

We are now holding a first exchange of views on this amendment to the statute of the European system of central banks and of the ECB.

In order to introduce and guide the discussions, I would like to make three main considerations from the constitutional perspective:

The first relates to the institutional balance that we need to preserve. As pointed by the Commission in its opinion, the change of the statute might give the ECB powers to regulate in areas where other institutions, not least the co-legislators, also have powers to make regulations (ie. exercise their powers in parallel to those granted to ECB). We should therefore be mindful of respecting the competences of all actors and of creating more certainty, in order to avoid parallel or conflicting rules. In

so doing, we should also be mindful of not introducing any hierarchy between the powers of the different institutions.

The second point is that we should keep the outcome of the negotiations on the ECB statute consistent with the outcomes of the negotiations on the EMIR amendment. This is very clear and this is why we have chosen a timeline that would allow the EMIR discussions to feed into the discussions on the amendment to the statute.

The two texts absolutely need to be compatible and coherent. However, consistency cannot in the case we are dealing with mean full alignment, because we are dealing here with two different legal norms.

The last point is that we should be mindful of the hierarchy of norms in the constitutional sense. The statute is the primary law, the highest norm governing the exercise of the powers of the ECB and as such can be functionally considered, in our context, as "lex generalis", providing a framework. EMIR is in that context a "lex specialis", dealing with a specific subject matter, that is, the supervision of CCPs.
Therefore, should we think, for reasons of legal certainty, about materially limiting the scope of the regulatory powers of the ECB under the statute, this would be a reasonable approach but it cannot be done in the statute by way of a prescriptive closed list. Such an closed list could maybe be fine for the EMIR amendment, but the statute has to retain the necessary high-level and flexible nature that would allow EMIR to be compatible with it and remain compatible with it whatever the developments of EMIR are in the future.

I would then like to say that, generally speaking, we find ourselves, on the issue of the amendment to article 22 of the statute of the ESCB and the ECB, faced with a trade-off, classical in law-making, between flexibility and predictability, rules and discretion. The more legal certainty we want to give, by framing the powers of the central bank, the less responsive the system will be to unforeseen situations.
Finding the right balance, institutionally and materially, will be key and I look forward to discussing and exchanging with all of you in order to progress on this file.

Let me finally outline a few recommendations I would like to make going forward.

First, we should clarify that the new powers conferred on the ECB should be exercised in a manner which is consistent with the acts adopted by the co-legislators

Then, we could think of materially limiting the scope of powers of the ECB by including a broad list of areas in which the central bank would be involved. This would be a broad list, and non-exhaustive, in order to allow any potential subsequent changes to EMIR to be compatible with the statute

Finally, we would need to include a provision on emergency powers for the central bank.