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From: General Secretariat of the Council

To: Permanent Representatives Committee (Part 1)

Subject: 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

- Confirmation of the final compromise text with a view to agreement

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**

2017/0810(COD)

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 of 3 October 2017 on the Recommendation of the European Central Bank for a decision of the European Parliament and the Council amending Article 22 of the Statute of the European System of Central Banks and the European Central Bank (OJ C340, 11.10.2017, p.121-124),

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. In addition, safe and efficient financial market infrastructures, in particular clearing systems, contribute to the financial stability of the Union, of the Member States and of the global financial system.

(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 currently provide facilities, and the ECB may make regulations, to ensure efficient and sound clearing and payment systems within the Union and with third countries.

(3) On 4 March 2015, the General Court delivered its judgment in *United Kingdom v ECB*, Case T-496/11¹, which held that "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' cannot be understood as according it such a power in respect of all clearing systems, including those relating to transactions in securities" and therefore that "the ECB does not have the competence necessary to regulate the activity of securities clearing systems". The General Court stated that Article 129(3) TFEU enables the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and on a recommendation from the ECB and after consulting the Commission, or a proposal from the Commission and after consulting 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 therefore 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". This decision responds to this judgement.

¹ ECLI: EU:T:2015:133.

(4) Significant developments at both global and European level are expected to increase the risk that disturbances affecting clearing systems for financial instruments, in particular central counterparties (CCPs), threaten 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.

(5) 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, including the euro area. This is reflected in Regulation (EU) No 648/2012 of the European Parliament and of the Council², 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.

(6) In order to address the increasing cross-border nature and systemic importance of clearing services for financial instruments, Regulation (EU) no 648/2012 has been amended on [please insert: date of adoption of EMIR 2.2] to ensure financial stability and the safety and soundness of CCPs that are of systemic importance for the financial stability of the Union or one or more of its Member States. In order to ensure that the Eurosystem as central bank of issue for the euro can carry out the role envisaged by that Regulation, it is of utmost importance that it has the relevant powers under the Treaty and the Statute of the ESCB.

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).

(7) The ECB should have powers, in relation to clearing systems for financial instruments located in third countries that are systemically important or likely to become systemically important to the financial stability of the Union or of one or more of its Member States, to require the submission of information, to require full cooperation with the ECB in the context of the ECB's contribution to the assessment of the clearing systems' resilience to adverse market conditions and to require clearing systems to open overnight deposit accounts with the ECB in accordance with relevant access criteria and requirements.

(8) The ECB should also have powers in exceptional situations and in close cooperation with relevant Union authorities, in relation to clearing systems for financial instruments located in third countries that are systemically important or likely to become systemically important to the financial stability of the Union or of one or more of its Member States, to adopt requirements of limited duration aimed at addressing temporary systemic liquidity risks affecting the transmission of monetary policy or the smooth operation of payment systems. Such requirements should aim at ensuring the efficiency, soundness and resilience of clearing systems for financial instruments. Such exceptional situations may include, for instance stressed markets (especially money and repurchase markets) on which a clearing system for financial instruments relies to obtain liquidity, situations where operations of clearing systems for financial instruments contribute to the drying up of liquidity in the market, or serious malfunctions in payment or settlement arrangements that impede the ability of the clearing system for financial instruments to meet its payment obligations or increase its liquidity needs. The requirements should be related to the areas of liquidity risk control, margin requirements, collateral, settlement arrangements or interoperability arrangements and might include, in particular, enhancements to the liquidity risk management of the clearing system for financial instruments, such as an increase in the liquidity buffer, an increase in the frequency of the collection of intraday margins, limits to cross-currency exposures or specific modalities for depositing cash with the ECB and settling payments in euro.

(9) The ECB should have, upon request and limited to matters relating to the euro, the power to take part in procedures assessing whether clearing systems for financial instruments located in third countries or some of their clearing services are of such substantial systemic importance for the financial stability of the Union or of one or more of its Member States that they should not be recognised.

(10) For these reasons, the ECB should be granted powers over clearing systems for financial instruments, which are located in third countries and that are systemically important or likely to become systemically important to the financial stability of the Union or of one or more of its Member States, by means of an amendment to Article 22 of the Statute of the ESCB.

(11) It is recalled that in order to carry out the tasks entrusted to it, the ECB can use any of the legal acts provided for by the general provisions of the Statute, in particular Article 34 thereof. The choice of the appropriate type of act should be made in accordance with Article 296 TFEU. The ECB should be able to lay down a general internal framework for the application of the specific requirements applicable to clearing systems for financial instruments located in third countries.

(12) 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.

(13) The ECB is subject to an obligation to ensure full transparency and accountability towards the European Parliament and the Council regarding the exercise of its powers and tasks under Article 22 of the Statute. In particular all activities related to decisions taken and regulations adopted on the basis of that Article should be reported on in a specific chapter of its annual report, unless such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved. Such disclosure should not contain personal data within the meaning of Regulation (EC) No 45/2001 or confidential information, except in summary or aggregate form so as to ensure that an individual CCP or any other individual natural or legal person cannot be identified.

(14) The new powers of the ECB regarding clearing systems for financial instruments will be exercised alongside the powers exercised by other Union's and Member States' institutions and bodies. Legislative 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 measures adopted pursuant to those acts, 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. The ECB should exercise its powers to impose requirements concerning clearing systems for financial instruments located in third countries that are systemically important or likely to become systemically important to the financial stability of the Union or one or more of its Member States independently pursuant to Article 130 TFEU to the extent necessary to achieve the ESCB's primary objective and to carry out its basic tasks. It should in any case exercise such powers in a manner which takes due regard to, and which is aligned with, the aforementioned general legal framework including by respecting the powers of other Union's and Member States' institutions and bodies and the procedures set out in that framework.

(15) Regulation (EU) No 648/2012 will be reviewed as required under Regulation [PO please insert Regulation No for EMIR 2.2] amending Regulation (EU) No 648/2012 of [PO please insert date of adoption of EMIR 2.2] to take into account, in particular the potential evolution in the role of Union's and Member States' institutions and bodies regarding CCPs. In the context of that review, and without prejudice to the current role, powers and tasks of the ECB, the Statute of the ESCB and of the ECB should also be reviewed, as appropriate, to enable the performance of any necessary additional tasks in relation to Union and third-country CCPs in light of market developments.

HAVE ADOPTED THIS DECISION

Article 1

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

"Article 22

Payment systems and clearing systems for financial instruments

22.1. 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.

22.2. In order to achieve the objectives of the ESCB and to carry out its tasks and without prejudice to the independence of the ECB in accordance with Article 7, with due regard to and in alignment with legislative acts of the European Parliament and the Council and measures adopted under such acts, the ECB may, in relation to clearing systems for financial instruments located in third countries that are systemically important or likely to become systemically important to the financial stability of the Union or of one or more of its Member States:

(a) require such clearing systems to:

(i) submit information;

(ii) cooperate in the assessment of their resilience to adverse market conditions;

(iii) open overnight deposit accounts; and

(iv) in exceptional situations, comply with requirements limited to a duration of up to one year regarding liquidity risk control, settlement arrangements, margins, collateral or interoperability arrangements aiming at addressing temporary systemic liquidity risks affecting the transmission of monetary policy or the smooth operation of payment systems. Those requirements shall also aim at ensuring the efficiency, soundness and resilience of clearing systems for financial instruments.

(b) take part in procedures under Union law related to the recognition of such clearing systems for financial instruments."

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.
