DECISION (EU) 2021/1441 OF THE EUROPEAN CENTRAL BANK

of 3 August 2021

amending Decision (EU) 2019/322 on delegation of the power to adopt decisions regarding supervisory powers granted under national law (ECB/2021/37)

THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions ([1]), and in particular Article 4(1)(d) and (e), and Articles 4(3) and 9(1) thereof,

Having regard to Decision (EU) 2017/933 of the European Central Bank of 16 November 2016 on a general framework for delegating decision-making powers for legal instruments related to supervisory tasks (ECB/2016/40) ([2]), and in particular Article 4 thereof,

Whereas:

(1) Decision (EU) 2019/322 of the European Central Bank (ECB/2019/4) ([3]) specifies the criteria for the delegation of decision-making powers to the heads of work units of the European Central Bank (ECB) for the adoption of national powers decisions. The experience gained in the application of that Decision has shown that certain clarifications and technical amendments are necessary, in particular for reasons of consistency and certainty in the application of those criteria.

(2) The procedure for delegating decision-making powers should be clarified in respect of national powers decisions where heads of work units have concerns with regard to the interconnectedness of such a decision with one or more other decisions requiring supervisory approval. This may be the case where the outcome of the relevant supervisory assessment directly impacts one or more of those other decisions and therefore the decisions should be considered simultaneously by the same decision-maker in order to prevent conflicting outcomes.

(3) On 24 June 2020, the Governing Council decided to establish close cooperation between the ECB and the Republic of Bulgaria ([4]), and between the ECB and the Republic of Croatia ([5]). Article 7(1) of Regulation (EU) No 1024/2013 provides that to carry out certain tasks in relation to credit institutions established in a Member State whose currency is not the euro, where close cooperation has been established in accordance with that Article, the ECB may address instructions to the national competent authority of the relevant Member State. It is therefore appropriate to include such instructions among the acts that the ECB may adopt by means of delegation to heads of work units pursuant to the relevant provisions of Decision (EU) 2019/322 (ECB/2019/4).

(4) A national powers decision in a case where the complexity of the assessment so requires is not adopted by means of a delegated decision, but is adopted instead under the non-objection procedure. It should be clarified that, in addition, there may be cases in which the sensitivity of the matter – in terms of impact on the ECB's reputation and/or on the functioning of the Single Supervisory Mechanism – may require that a national powers decision should be adopted under the non-objection procedure and not by means of a delegated decision.

([1]) OJ L 287, 29.10.2013, p. 63.
([2]) OJ L 141, 1.6.2017, p. 14.
([3]) Decision (EU) 2019/322 of the European Central Bank of 31 January 2019 on delegation of the power to adopt decisions regarding supervisory powers granted under national law (ECB/2019/4) (OJ L 55, 25.2.2019, p. 7).
([4]) Decision (EU) 2020/1015 of the European Central Bank of 24 June 2020 on the establishment of close cooperation between the European Central Bank and Българска народна банка (Bulgarian National Bank) (ECB/2020/30) (OJ L 224I, 13.7.2020, p. 1).
([5]) Decision (EU) 2020/1016 of the European Central Bank of 24 June 2020 on the establishment of close cooperation between the European Central Bank and Hrvatska Narodna Banka (ECB/2020/31) (OJ L 224I, 13.7.2020, p. 4).

(5) Regulation (EU) 2019/876 of the European Parliament and of the Council ([6]) has introduced the possibility for credit institutions, subject to certain conditions, to classify as Common Equity Tier 1 instruments subsequent issuances of a form of Common Equity Tier 1 instruments for which they have already received permission, without specific supervisory approval. In that connection, it is appropriate to allow for delegation of decisions approving amendments to statutes of credit institutions in relation to the issuance of such instruments where the applicable conditions are deemed by the ECB to have been met.

(6) A merger or a demerger of a significant supervised entity may require amendments to the entity's statutes to reflect the situation of that entity as a result of the merger or demerger. In such cases, the supervisory assessment of the merger or demerger also considers the resulting amendments to the entity's statutes, notwithstanding that the approval of those amendments is the subject of a separate supervisory procedure. It is therefore appropriate to allow for delegation of decisions approving amendments to statutes in cases where those amendments result from a merger or demerger.

(7) Therefore, Decision (EU) 2019/322 (ECB/2019/4) should be amended accordingly,

HAS ADOPTED THIS DECISION:

Article 1

Amendments

Decision (EU) 2019/322 (ECB/2019/4) is amended as follows:

1. Article 1 is amended as follows:

(a) point (2) is replaced by the following:

'(2) "acquisition of a holding" means: (a) the acquisition of a direct or indirect holding of capital or of voting rights in another entity, including as a result of the establishment of a new entity, other than the acquisition of a qualifying holding within the meaning of Article 22 of Directive 2013/36/EU of the European Parliament and of the Council (*); and (b) any transaction that is equivalent under the relevant national law to such an acquisition;

(*) Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).';

(b) point (17) is replaced by the following:

'(17) "non-core support services" means ancillary services supporting the principal business of a credit institution including administrative services, customer services, debt collection services, e-signatures or other similar services;';

([6]) Regulation (EU) 2019/876 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, and Regulation (EU) No 648/2012 (OJ L 150, 7.6.2019, p. 1).

(c) the following point (19) is added:

'(19) "regulated entity" means a regulated entity as defined in point (4) of Article 2 of Directive 2002/87/EC of the European Parliament and of the Council (*).

(*) Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council (OJ L 35, 11.2.2003, p. 1).';

(d) the following point (20) is added:

'(20) "ECB Guide on the supervisory approach to consolidation in the banking sector" means a document with this title containing the principles underpinning the prudential supervisory approach followed by the ECB when determining whether the arrangements implemented by a credit institution resulting from a consolidation ensure the sound management and coverage of its risks, adopted and amended from time to time in accordance with the non-objection procedure and published on the ECB's website;';

(e) the following point (21) is added:

'(21) "sensitivity" means a characteristic or factor that may have a negative impact on the ECB's reputation and/or on the effective and consistent functioning of the Single Supervisory Mechanism, including but not limited to any of the following: (a) the relevant supervised entity has previously been, or is currently, subject to severe supervisory measures such as early intervention measures; (b) the draft decision once adopted will set a new precedent that could bind the ECB in the future; (c) the draft decision once adopted may attract negative media or public attention; or (d) a national competent authority that has entered into close cooperation with the ECB communicates its disagreement with the proposed draft decision to the ECB.';

2. Article 3 is amended as follows:

(a) paragraph 3 is replaced by the following:

'3. National powers decisions shall not be adopted by means of a delegated decision if national law requires supervisory approval of credit institutions' strategic measures or if the complexity of the assessment or sensitivity of the matter requires that they are adopted under the non-objection procedure.';

(b) the following paragraph 3a is inserted:

'3a Heads of work units shall submit a national powers decision that fulfils the criteria for the adoption of delegated decisions set out in Articles 4 to 14 to the Supervisory Board and the Governing Council for adoption under the non-objection procedure if the supervisory assessment of that national powers decision has a direct impact on the supervisory assessment of another decision which is to be adopted under the non-objection procedure.';

(c) paragraph 4 is replaced by the following:

'4. The delegation of decision-making powers pursuant to paragraph 1 shall apply to:

(a) the ECB's adoption of supervisory decisions;

(b) the ECB's approval of positive assessments where a supervisory decision is not required under national law;

(c) the ECB's approval of replies or reports issued by the ECB at the request of authorities of participating Member States in respect of national powers;

(d) the ECB's adoption of instructions addressed, pursuant to Article 7 of Regulation (EU) No 1024/2013, to the national competent authorities with which the ECB has established close cooperation.';

3. in paragraph 1 of Article 4, the introductory phrase of point (a) is replaced by the following:

'(a) the impact on the own funds of the acquiring significant supervised entity, on both a consolidated and an individual basis, is limited, which means that:';

4. in paragraph 1 of Article 5, the introductory phrase of point (a) is replaced by the following:

'(a) the impact on the own funds of the acquiring significant supervised entity as a result of the acquisition, on both a consolidated and an individual basis, is limited, which means that:';

5. in paragraph 1 of Article 6, the introductory phrase of point (a) is replaced by the following:

'(a) the impact on the own funds of the selling significant supervised entity, on both a consolidated and an individual basis, is limited, which means that:';

6. in paragraph 1 of Article 7, the introductory phrase of point (a) is replaced by the following:

'(a) the impact on the own funds of the selling significant supervised entity as a result of the sale of assets or liabilities, on both a consolidated and an individual basis, is limited, which means that:';

7. Article 8 is amended as follows:

(a) in paragraph 1, the introductory phrase of point (a) is replaced by the following:

'(a) the impact on the own funds of the significant supervised entity resulting from the merger, on both a consolidated and an individual basis, is limited, which means that:';

(b) paragraph 3 is replaced by the following:

'3. The assessment of mergers shall be carried out in accordance with the relevant provisions of national law, also taking into consideration any applicable ECB guides, including the ECB Guide on the supervisory approach to consolidation in the banking sector, as well as national competent authorities' policy stances, guidance or similar acts.';

8. in paragraph 1 of Article 9, the introductory phrase of point (a) is replaced by the following:

'(a) the impact on the own funds of the significant supervised entity or entities resulting from the demerger, on both a consolidated and an individual basis, is limited, which means that:';

9. in paragraph 1 of Article 11, point (b) is replaced by the following:

'(b) the service provider is a regulated entity that is established in the Union and authorised to perform the outsourced services; or';

10. paragraph 1 of Article 12 is amended as follows:

(a) point (d) is replaced by the following:

'(d) amendments concerning the share capital of a significant supervised entity where:

(i) the related own funds decision, e.g. on the classification of capital instruments as Common Equity Tier 1 instruments or the reduction of own funds, is also delegated; or

(ii) the significant supervised entity has classified an issuance in accordance with the provisions of the second subparagraph of Article 26(3) of Regulation (EU) No 575/2013 and the ECB deems that the notification made by the significant supervised entity in accordance with point (b) of that subparagraph complies with the notification requirements.';

(b) the following point (f) is added:

'(f) amendments that exclusively reflect changes resulting from a merger or a demerger previously approved by the ECB.'.

Article 2

Transitional provision

The provisions of Decision (EU) 2019/322 (ECB/2019/4) shall continue to apply, as unamended, in cases where the application requesting approval for any of the operations referred to in Article 3(1) of that Decision, as unamended, was submitted to the ECB prior to the entry into force of this Decision.

Article 3

Entry into force

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, 3 August 2021.

The President of the ECB
Christine LAGARDE