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Subject: Your request for the EBA to initiate a breach of Union law investigation concerning ECB and Bank of Italy

Dear Sirs,

We refer to your letter dated 3 May 2018 and subsequent correspondence requesting the EBA to open an investigation into what you allege to be a breach of Union law by the European Central Bank and the Bank of Italy ('BUL Request').

Summary of BUL Request

In your BUL Request, you refer to "*the incorrect regulatory capital treatment derived by Unicredit S.p.A. ("Unicredit") from a transaction known as Convertible And Subordinated Hybrid Equity-Linked Securities (commonly referred to as "CASHES")*." You state that this transaction predates Regulation (EU) No 575/2013 ('the CRR'), that it was the responsibility of Bank of Italy to ascertain the correct treatment of the transaction on implementation of the CRR, and "*that the Bank of Italy failed to correctly apply Union law, and that this failure has been perpetuated by the ECB SMM*." In this regard as outlined further below, you are referring mainly to Article 28(1) of the CRR which provides conditions for the classification of instruments as Common Equity Tier 1 (CET 1) instruments.

As regards the regulatory treatment applied, you state: "*We believe UniCredit currently discloses €609m of the proceeds received under the CASHES as eligible as Tier 2 capital under the fully loaded application of the CRR, and the remaining €2,374m as CET1 [w]e believe that we believe the proceeds derived from the CASHES are ineligible as CET1 instruments and their existence also makes the ordinary shares of UniCredit ineligible as CET1 instruments*." You add that "*[w]e do not believe it matters whether one considers the treatment as a simple issuance of ordinary shares that underlie the securities, or take into consideration the wider transaction, that the current treatment is incorrect*."

You state that "*the CASHES transaction exhibits a multitude of features that either make the proceeds from the transaction or all UniCredit ordinary shares ineligible as CET1 instruments under the CRR. Importantly, the conclusion is the same whether the underlying issuance of shares is considered as the capital instrument, or the wider transaction is examined*." In particular, you state that "*when considering the underlying share issue*" there have been breaches of Article 28(1), specifically subparagraphs (d), (h)(vii), (i), (j), and Article 62 of the CRR, and that "*when considering the wider transaction*" there have also been breaches of Article 28(1), specifically paragraphs (a), (h)(i), (h)(iii), (h)(iv), (h)(vi), (i).

You add that "*Bank of Italy and ECB SSM's permission for UniCredit to treat the CASHES as currently disclosed undermines the European level playing field, and risks weakening the perceived quality of CET1 across the EU*."

You also claim that disclosure of the abovementioned usufruct agreement is "*required under Article 437 of the CRR, as [Unicredit] have indicated it is the constituent of a Tier 2 instrument*" and "*UniCredit have declined to make such a disclosure which we believe is a breach of Article 437, we trust that the ECB SSM, as the competent authority, will correctly apply relevant Union Law on the matter but would of course alert the EBA if we felt that did not occur*."

EBA Assessment of BUL Request

The EBA has considered your BUL Request in the context of the exercise of its discretion to open an own-initiative BUL investigation under Article 17 of Regulation (EU) No 1093/2010 (the EBA's founding Regulation). In this regard, we wish to inform you of the following.

In 2008, Unicredit approved a paid-in capital increase of some €3 billion (approx. €483 million of new shares plus approx. €2.5 billion of share premium) ('the Cashes shares'). In 2011, Unicredit capitalised the share premium reserve pertaining to the Cashes shares. In 2012, the EBA's Board of Supervisors considered this restructuring and the CASHES in the context of the recapitalisation exercise following the first EBA stress test. The EBA's Board of Supervisors was concerned at the time that the whole structure was complex and from a technical perspective raised several concerns.

Nevertheless, on the basis that the capitalisation of the share premium under Italian law had already taken place and was no longer distinguishable from ordinary reserves, that amount was accepted by the Board as Core Tier 1 capital (CT1) on a one-off basis, while the remaining nominal amount of the instrument itself was not. The amount which was accepted as CT1 subsequently qualified as CET1 under the CRR. The EBA understands that the remaining nominal amount is currently treated as Additional Tier 1 (AT1) and reported as such in Unicredit's accounts and Pillar 3 disclosures.

In addition, as part of the EBA's own funds monitoring role, the EBA on an ongoing basis pursuant to Article 26 and 80 of CRR coordinates reviews of instruments, including those issued prior to CRR. Competent authorities under their supervisory remit may request the inclusion of specific own fund instruments in this review on the basis of their analysis in the context of their ongoing supervision.

Under Article 17 of its founding Regulation, the EBA has discretion whether or not to commence an investigation, and exercises this discretion in accordance with its published procedure on EBA breach of Union law investigations (EBA/DC/2016/174, Decision of the European Banking Authority adopting rules of procedure for investigation of breach of Union law). While the alleged breach could have a significant, direct impact on the EBA's objectives, in particular as regards achieving a sound, effective and consistent level of regulation and supervision, ensuring the transparency of financial markets, and promoting equal conditions of competition, the EBA Procedure sets out some important factors which weigh against the commencement of an investigation, including in particular that a request is either "*more suitable to be dealt with by another person or body, such as inter alia, the European Commission, another European Supervisory Authority, a national competent authority, a national complaints scheme or a court*" or "*is more suitable to be dealt with by other means*".

Taking into account the information gathered during the EBA's preliminary enquiries, the position previously adopted by the EBA, and the degree of discretion available to competent authorities in determining their annual supervisory examination programmes, the EBA does not consider that there are clear grounds to believe that the ECB has failed to carry out its supervisory responsibilities in a way which breaches its obligations under Union law.

For these reasons the EBA does not intend to open an investigation in relation to the matters raised in your BUL Request.

Yours faithfully

Adam Farkas

Executive Director