EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 4 January 2002

at the request of the Finnish Ministry of Finance
on a draft proposal concerning the revision of the Credit Institution Act

(CON/2002/1)

1. On 21 May 2001 the European Central Bank (ECB) received a request from the Finnish Ministry of Finance for an opinion on a draft Government proposal concerning the revision of the Finnish Credit Institution Act (hereinafter referred to as the "proposal"). The revision concerns in particular (i) credit institutions specialising in the issuance of electronic money and transfer of payments; (ii) providing companies other than credit institutions with the right to receive refundable funds from the public; and (iii) using an agent or other outsourcing of banking services.

2. The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community (hereinafter referred to as the "Treaty") and on the second, fifth and sixth indents of Article 2(1) of Council Decision 98/415/EC of 29 June 1998 on the consultation of the ECB by national authorities regarding draft legislative provisions[1], as the proposal contains provisions concerning means of payment, payment and settlement systems and rules applicable to financial institutions which could materially influence the stability of financial institutions and markets. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, this opinion has been adopted by the Governing Council of the ECB.

3. The proposal is intended to ensure that the Finnish legislation concerning the core banking services is updated with regard to the technological developments enabling the use of different means in the provision of these services. It also intends to ensure that banking services are widely available in all parts of Finland in spite of the different reorganisation measures in the banking sector. The intentions of the proposal will be attained by three different means. First, the proposal introduces into the Finnish Credit Institution Act (*luottolaitostoiminnasta annettu laki* 1607/1993) new provisions relating to the credit institutions specialising in the issuance of electronic money and/or in transfer of payments. Secondly, the proposal provides, under certain conditions, a right for all limited liability companies and cooperatives, which are not credit institutions, (hereinafter referred to as the "other companies") to receive into so-called "client accounts" funds from the public

1 OJ L 189, 3.7.1998, p. 42.

refundable on demand as well as to issue electronic money to a certain limited extent. Thus all of the other companies regardless of their field of business activity would be provided with a right to receive funds into these client accounts and to issue electronic money for limited purposes. According to the proposal, even though the intention is to provide retail businesses and chains with a right to receive funds into client accounts this right would not be restricted to retail business and therefore companies providing other services would also be able to provide such client accounts. Thirdly, the proposal gives credit institutions as well as investment service companies the right to carry out business through an agent.

4. Regarding the first means of attaining the intentions of the proposal, the proposal would widen the scope of application of the Finnish Credit Institution Act in such a way that transfer of payments and issuance of electronic money would both be considered as activities of a credit institution. According to the proposal, since both the transfer of payments and the issuance of electronic money are activities that are based on the receipt of funds from the public and investment of these funds on a short-term basis, they should both be regulated according to the same principles. Therefore, the proposal provides rules on a new type of credit institution, a "payment transaction society", the activities of which would be limited to general transfer of payments and the issuance of electronic money. The ECB notes that these rules are intended to implement into Finnish legislation Directive 2000/46/EC of the European Parliament and of the Council of 18 September 2000 on the taking up, pursuit of and prudential supervision of the business of electronic money institutions[2]. The ECB would like to recall that, although the competent authority for verifying the implementation of Community directives into national law is the Commission, it nevertheless appreciates the opportunity to comment on such draft national legislative provisions when they concern its field of competence.

5. The ECB notes this widening of the scope of application of the Finnish Credit Institution Act and the application of the provisions of Directive 2000/46/EC to payment transaction societies in Finland. In this regard, the ECB observes that according to Article 1(5)(a) of Directive 2000/46/EC the business activities of electronic money institutions other than the issuing of electronic money shall be restricted to the provision of closely related financial and non-financial services such as the administering of electronic money by the performance of operational and other ancillary functions related to its issuance, and the issuing and administering of other means of payment. According to the proposal the business activities of a payment transaction society can be the following: (i) obtaining refundable assets other than deposits from the public and other acquisitions of funds; (ii) payment transactions in general and other payment traffic; (iii) issuance of electronic money, associated data processing and the storing of data on an electronic device on behalf of another company; and (iv) currency exchange. Taking into account the above-mentioned restrictions in Directive 2000/46/EC, the ECB submits that some further thought may be required regarding the

2 OJ L 275, 27.10.2000, p. 39.

compatibility of the activity of currency exchange with the activities that electronic money institutions are allowed to engage in under this Directive. The prudential framework established in Directive 2000/46/EC in order to safeguard the financial integrity and stability of electronic money institutions might not fully take into account the risks involved in the activity of currency exchange. Therefore the ECB considers that, at least, the activity of currency exchange should be clearly separated from the activity of issuing electronic money. This would better comply with the intention of Directive 2000/46/EC, namely achieving a balance between a less cumbersome prudential supervisory regime applying to electronic money institutions and, on the other hand, limitations on the types of activities of these institutions.

6. Moreover, the ECB would like to point out that the explanatory memorandum of the proposal, which contains the government's interpretation of the proposed legislative provisions, introduces an additional limitation regarding the definition of electronic money in Finland, namely that the electronic device in which the value is stored has to be given to a customer. This limitation would in principle exclude electronic money schemes with centralised accounting from the definition of electronic money. The approach in the proposal is therefore not technology-neutral, and since Directive 2000/46/EC does not explicitly provide for such a limitation, the ECB submits that this additional limitation in the explanatory memorandum should be reconsidered (see also paragraph 13 below).

7. Furthermore, the ECB would like to recall that according to Article 19.1 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter referred to as the "Statute") the ECB may require credit institutions established in the Member States to hold minimum reserves on accounts with the ECB and national central banks in pursuance of monetary policy objectives. Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions[3], as amended by Directive 2000/28/EC[4], defines electronic money institutions as credit institutions. Thus the minimum reserve requirements imposed on credit institutions by Regulation ECB/1998/15 of 1 December 1998 on the application of minimum reserves[5], as amended by Regulation ECB/2000/8[6], also apply to electronic money institutions and in view of the present proposal, to the payment transactions societies in Finland.

   Furthermore the statistical reporting requirements imposed on monetary financial institutions by Regulation ECB/1998/16 of 1 December 1998 concerning the consolidated balance sheet of the

3 OJ L 126, 26.5.2000, p. 1.
4 OJ L 275, 27.10.2000, p. 37.
5 OJ L 356, 30.12.1998, p. 1.
6 OJ L 229, 9.9.2000, p. 34.

monetary financial institutions sector[7], as amended by Regulation ECB/2000/8[8], are also applicable to payment transaction societies in Finland.

As the ECB stated in its opinion (CON/98/56)[9] on the proposal for Directive 2000/46/EC, the possibility for the ECB to impose minimum reserve requirements and statistical reporting requirements on all issuers of electronic money is crucial, in particular given the need to ensure that the ECB's monetary policy instruments and procedures are prepared in case of a substantial growth in electronic money, which may have a material impact on monetary policy.

8. Regarding the second means of attaining the intentions of the proposal, the ECB notes that according to the legislation in force in Finland only the so-called "deposit banks" have a right to receive deposits from the public. The differences between a deposit and other repayable funds received from the public as well as between the operation of a deposit bank and the operation of other types of credit institution are more pronounced in Finnish legislation than in the Community banking directives. The Community directives do not provide specific rules regarding the operation of a deposit bank.

   The proposal would retain the existing exclusive right of "deposit banks" in Finland to receive a deposit, but the other companies, as defined in paragraph 3 above, would have a right to receive funds from the public into "client accounts". This new right would also include the right to issue electronic money under certain restrictions and limitations (see paragraphs 9 and 10 below). The term "deposit" would therefore be redefined in the Finnish Credit Institution Act to cover only funds received by a deposit bank. It would therefore not cover the repayable funds received by the other companies. In the case of insolvency a deposit can be reimbursed from the Finnish Deposit Guarantee Fund. However, the other companies cannot participate in the Finnish Deposit Guarantee Scheme and therefore the funds held on a client account would have to be seen as investments carrying risk because they are not covered by this Scheme. In addition, such other companies are not subject to solvency or other requirements applicable to credit institutions.

9. According to the proposal, if the repayable funds held on such a client account, or electronic money issued by such other companies, can only be used as payment for goods or services provided by the company itself, this would not be considered as an activity of a credit institution and therefore the Finnish Credit Institution Act would not apply. Nevertheless, according to the proposal the right to receive funds into such a client account would be subject to a ceiling of EUR 3 000 per client. Correspondingly, with regard to the issuance of electronic money, the electronic storage device would be subject to a maximum storage amount of EUR 150. Furthermore, the funds from a client account could also be withdrawn as cash.

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7 OJ L 356, 30.12.1998, p. 7. Regulation ECB/1998/16 has been repealed by Regulation ECB/2001/13 of 22 November 2001 concerning the consolidated balance sheet of the monetary financial institutions sector, which will enter into force on 1 January 2002 (OJ L 333, 17.12.2001, p 1).

8 OJ L 229, 9.9.2000, p. 34.

9 OJ C 189, 6.7.1999, p. 7.

10. The ECB notes that the proposal intends to make full use of the possibility provided for in Article 8 of Directive 2000/46/EC to waive the application of the provisions of this Directive and Directive 2000/12/EC in cases where electronic money, issued by a company other than a credit institution, is accepted as a means of payment by another company belonging to the same group as the issuing company. In the proposal such a group is either a group as defined in the Finnish Accounting Act (*kirjanpitolaki* 1336/1997) or a group of undertakings which can be clearly distinguished by their location or their close financial or business relationship. The application of the waiver has been extended in the proposal to cover also the funds held on the above-mentioned client accounts. According to the proposal, in such cases the Finnish Financial Supervision Authority (FSA) would have the right to decide that a credit institution authorisation is not needed for such a company. In these cases a ceiling of EUR 3 000 per client would also be applied to the funds received into the client account and, regarding the issuance of electronic money, the electronic storage device would be subject to a maximum storage amount of EUR 150.

    The waiver in Article 8 of Directive 2000/46/EC provides a derogation from the main rules of the Directive which are intended to ensure sound and prudent operation and in particular the financial integrity of electronic money institutions. In the interest of smooth functioning of the payments systems as well as for monetary policy reasons in general, the ECB would have welcomed a more restrictive use of the waiver.

11. In addition, the ECB notes that according to the proposal the other companies which issue electronic money and benefit from the waiver would not be regarded as credit institutions. In this respect the ECB would like to stress that Article 1(4) of Directive 2000/46/EC provides that Member States shall prohibit persons or undertakings that are not credit institutions from carrying on the business of issuing electronic money. Furthermore, the Council of the European Union stated in its common position concerning the proposal for Directive 2000/46/EC[10] that even though the Member States have the option to waive the application of some or all of the provisions of Directive 2000/46/EC and the application of Directive 2000/12/EC, this does not affect the nature of the institutions concerned; they remain credit institutions, as defined in Article 1, point 1, first subparagraph of Directive 2000/12/EC. In addition, according to the common position, the competence of monetary authorities to impose minimum reserve requirements is not affected. The question of which types of institution are regarded as credit institutions is important for the ECB notably in the context of the European System of Central Bank's operations. In this context the ECB recalls that competence with regard to credit institutions' access to central banks' payments systems as well as to the standing facilities as instruments of the monetary policy of the Community lies with it.

12. Moreover, the ECB notes that the explanatory memorandum of the proposal considers that the maximum storage amount of EUR 150 is only meant to be applied to electronic money which is

10 Common Position of the Council with a view to adopting Directive 2000/46/EC, OJ C 26, 28.1.2000, p. 9.

stored on an electronic device given to the customer. From this it follows that the storage limit of EUR 150 laid down in Article 8(1) of Directive 2000/46/EC would not be applied to electronic money schemes with centralised accounting. Furthermore, according to the explanatory memorandum, if the amount of electronic money given to the customer was tracked customer-by-customer within an accounting system of the issuer, the maximum amount of electronic money would be the customer specific limit of EUR 3 000 in a client account. The ECB recalls that Directive 2000/46/EC requires that when electronic money is issued under the waiver the storage device should be subject to the maximum storage amount of EUR 150, irrespective of whether the storage device has been given to the customer or whether any centralised features are in place for tracking the amount of electronic money given to the customer. Therefore, the ECB would welcome an amendment to the proposal extending the application of the storage limit of EUR 150 to all electronic money issued under the waiver irrespective of whether electronic money has been given to the customer or whether centralised tracking facilities are in place.

13. Regarding the third means of achieving the intentions of the proposal, the ECB notes that the legislation in force in Finland does not provide rules on banking services provided via an agent or on other outsourcing of operations, even though in practice this has been possible. According to the proposal a credit institution or an investment service company would have the right to use an agent in its business operations. For example, loan or other financing agreements between a credit institution and its client as well as agreements relating to the provision of investment services could be carried out via an agent. The provisions of the proposal concerning the use of an agent would also apply to other types of outsourcing that could be relevant to the risk management and internal control of a credit institution. An example of outsourcing of operations that are significant to the stability of a credit institution would be the outsourcing of operations concerning the analysis of information relevant to the risk management of a bank.

    According to the proposal, when passing on its business to be managed by an agent, the credit institution or investment service company shall ensure that it obtains continuously from the agent the information necessary for the supervision of its operations, risk management and internal control. Furthermore, it shall be ensured that this information is passed on to the FSA. A credit institution or investment service company must notify the FSA before passing on the business to be managed by an agent. The FSA may prohibit the use of an agent or other type of outsourcing if it considers that this endangers the risk management and internal control of the credit institution.

14. The proposal as a whole may have implications for the smooth functioning of payments systems and the stability of the financial markets. The ECB notes that the Treaty and the Statute entrust the Eurosystem[11] and Suomen Pankki, as its component member, with, *inter alia*, the task of payment systems oversight in order to promote the smooth operation of payment systems and thus contribute

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11 The Eurosystem comprises the ECB and the national central banks of the Member States that have adopted the euro as their single currency.

to financial stability. The ECB and national central banks of the Eurosystem may also provide facilities, and the ECB may make regulations, to ensure efficient and sound clearing and payment systems within the Community and with other countries. Moreover, the Treaty and the Statute provide that the Eurosystem shall contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system. Therefore, the ECB would welcome the introduction into the proposal of provisions concerning adequate means and procedures for informing Suomen Pankki of any issue that may have such implications.

The ECB would furthermore like to draw attention to the fact that central banks' traditional focus on systemic risk, together with their knowledge of money and securities markets and market infrastructures and their function in the oversight of payment and settlement systems, places them in a unique position to identify threats to the stability of the financial system. In this context, information sharing with Suomen Pankki, as a component member of the Eurosystem, will contribute to the monitoring and pursuit of systemic stability in the Community.

15. In addition the ECB observes that according to the proposal the provisions on the receipt of funds from the public are without prejudice to the right of Suomen Pankki to receive funds from the public. Directive 2000/46/EC shall not apply to the institutions referred to in Article 2(3) of Directive 2000/12/EC, which in turn excludes the central banks of Member States from its scope of application. Therefore, the ECB would welcome a provision stating that rules on the issuance of electronic money are also without prejudice to the right of Suomen Pankki to issue electronic money.

16. The ECB confirms that it has no objection to the competent national authorities making this opinion publicly available at their discretion.

Done at Frankfurt am Main on 4 January 2002.

The President of the ECB

[signed]

Willem F. DUISENBERG