



EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK**of 11 May 2004****at the request of the Italian Ministry of Economic Affairs and Finance
on a draft law on the protection of savings****(CON/2004/16)**

1. On 30 March 2004 the European Central Bank (ECB) received a request from the Italian Ministry of Economic Affairs and Finance for an opinion on a draft law on the protection of savings (hereinafter the 'draft law').
2. The ECB's competence to deliver an opinion is based on the third and sixth indents of Article 2(1) of Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions¹, as the draft law contains (i) provisions concerning a national central bank as well as; (ii) 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, the Governing Council has adopted this opinion.
3. The draft law was adopted by the Italian Government on 3 March 2004 and subsequently submitted to the Parliament. It is currently being discussed by the competent committees of the Chamber of Deputies, which prepared a new draft on 5 May 2004. The present opinion is based on this most recent text, which has been informally sent to the ECB by the consulting authority. The ECB appreciates that the preparation of the draft law is a dynamic process where amendments may be introduced at any time. It stands ready to comment on any such amendments to the extent possible. This is particularly important where amendments fundamentally change draft legislation in areas in which the ECB has a specific interest.
4. The draft law has two main aims:

The first aim is to strengthen the safeguards for the integrity of financial markets and institutions. In this context, it revises corporate governance mechanisms regarding listed companies such as those relating to independent directors (Article 1), statutory auditing (Article 2), liability of company's administrators (Article 3), and transparency of cross-border complex corporate structures (Article 5). It also introduces provisions dealing with conflicts of interest with regard to

¹ OJ L 189, 3.7.1998, p. 42.

companies that have recourse to capital markets, financial intermediaries and collective investment vehicles (Articles 6 to 8). In addition, it includes provisions dealing with the protection of investors, notably with regard to the sale to retail investors of financial instruments initially placed with institutional investors (Article 9), transparency of contractual conditions (Article 10), and criteria for the placement of financial products with retail investors (Article 11). Furthermore, the draft law contains provisions concerning the implementation of the 'Market Abuse Directive' (Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)²) and provides more stringent rules with regard to auditing companies.

The second aim is to reform the institutional framework in Italy for the regulation and supervision of financial markets and intermediaries. In particular, it envisages the allocation of regulatory and supervisory tasks according to their objectives, thus refining and extending to all financial sectors a model already partially adopted in the Italian framework. The central bank will be responsible for the safeguard of financial stability and the prudential regulation and supervision of credit institutions, insurance companies, investment firms and other financial intermediaries. A newly established authority – the Authority for the Financial Markets (*Autorità per i mercati finanziari*, AMeF) – will be responsible for conduct of business regulation and supervision. This includes consumer protection issues, market confidence, the transparency and fair business practices of financial intermediaries, and more generally financial markets' transparency and corporate disclosure practices. As a result of this approach, the current Italian supervisory authorities will be reduced in number and reorganised. The insurance supervisory authority (*Istituto per la vigilanza sulle assicurazioni private e di interesse collettivo*) and the pension funds regulator (*Commissione di vigilanza sui fondi pensione*) will be dissolved and their tasks transferred to the Banca d'Italia and the AMeF. The AMeF will take over the competencies and responsibilities of the current financial markets regulator (*Commissione Nazionale per le Società e la Borsa*), as well as those related to the transparency of banking activities currently belonging to the Banca d'Italia. The tasks of the Italian Foreign Exchange Office (*Ufficio Italiano dei Cambi*, UIC) concerning anti-money laundering policies will be attributed to a new Agency for Financial Investigation (*Agenzia per l'investigazione finanziaria*, AIF), whilst those concerning the management of the Italian official foreign reserves, collection of data for the preparation of statistics on the balance of payments and the fight against usury, will be transferred to the Banca d'Italia.

The draft law also foresees that responsibility for competition policy in the banking sector will be transferred from the Banca d'Italia to the Italian competition authority (*Autorità Garante della Concorrenza e del Mercato*, AGCM). The Banca d'Italia will be consulted with regard to measures concerning the financial institutions under its responsibility. In addition, mergers and acquisition giving rise to a dominant position may also be authorised if the Banca d'Italia deems them necessary for the stability of the institution concerned (Article 59).

² OJ L 96, 12.4.2003, p. 16.

5. The ECB welcomes the reinforcement of specific safeguards for the integrity of financial markets. This is in line with the concerns which have emerged at the international and European Union (EU) levels as a result of recent corporate failures in the U.S. and in Europe. In particular, the draft law addresses current shortcomings with respect to corporate governance, financial disclosure, the monitoring role of financial and reputational intermediaries, and the control of offshore structures. The ECB considers that the arrangements envisaged in the draft law are likely to help to build a better system of checks and balances on corporate behaviour against the background of recent cases.

Recent corporate failures have shown how internal and external control mechanisms may be ineffective where complex multinational groups span a number of countries and operate through offshore centres. Given the increasing integration and interlinkages of EU financial markets, the ECB considers that legislative responses should be coordinated at the EU level, as purely nationally-based safeguards for market integrity might be more easily circumvented. The European Commission has already taken various initiatives. It recently proposed an *Action Plan on Modernising Company Law and Enhancing Corporate Governance in the European Union*³. The Action Plan suggests enhancing disclosure of corporate governance structures and practices, strengthening shareholders' rights and introducing several requirements concerning the organisation of company boards. A greater role for independent non-executive and supervisory directors is envisaged, and minimum standards for their nomination and remuneration and for audit committees are set out. Other measures have also been adopted to increase investors' confidence in European capital markets, such as the new proposal for a directive of the European Parliament and of the Council on statutory audit of annual accounts and consolidated accounts and amending Council Directives 78/660/EEC and 83/349/EEC. The Market Abuse Directive is also to be mentioned. The ECB notes that the draft law takes into account these various initiatives developing at the EU level. Moreover, the draft law introduces some innovative tools aimed at tackling the failures in internal and external controls regarding the behaviour of managers and controlling shareholders and at limiting the potential for conflicts of interest. It would seem appropriate that also in these areas enhanced coordination is sought at the EU level.

The ECB also welcomes the fact that the proposed institutional framework is oriented towards recognising the essential role of the central bank in promoting the safety and soundness of financial institutions and the stability of the financial system as a whole. It understands that, after a thorough debate, a wide consensus has emerged to confirm the attribution of responsibility for prudential supervision to the Banca d'Italia and to extend the scope of such supervision to all financial intermediaries. The ECB sees a number of advantages in this choice. *First*, the chosen approach recognises that the nature and scope of systemic risk is widening due to the closer links between credit institutions, insurance companies, investment firms and pension funds. The traditional borders between the banking, insurance and securities segments of the financial system are

³ European Commission Communication, 21 May 2003.

increasingly blurred, as demonstrated by the emergence of hybrid financial products, the increased use of risk transfer instruments and distribution agreements between the three sectors, and the growing role of financial conglomerates. These developments suggest that the integration of micro- and macro-prudential supervisory tools might provide a more effective monitoring of systemic risk, thus contributing to financial stability. *Second*, the approach acknowledges the growing importance of financial groups that combine different types of financial services. This calls for some degree of coordination between the supervisory policies and regulation in all sectors of financial activity in order to address the specific prudential concerns with regard to such groups and ensure an overall level playing field between competing intermediaries. Entrusting one authority with responsibilities for prudential supervision over the whole range of financial intermediaries is considered an appropriate method of addressing the challenges of financial conglomeration. *Third*, the attribution of extensive supervisory responsibilities of both a micro and macro-prudential nature to the central bank is appropriate in view of the changes triggered by the introduction of the euro and the synergies that are achieved between the exercise of central banking and supervisory functions, notably with regard to the assessment of risks for the financial system as a whole. At the same time, it should be noted that financial stability and investor protection are complementary objectives and must be pursued consistently by the authorities to which they are entrusted.

6. Within the above framework, it is essential to ensure that the reform and its actual implementation respect provisions of the Treaty establishing the European Community concerning central bank independence and that due attention is paid to ensuring the operational independence of supervisory authorities.

Central bank independence

7. The ECB notes that Article 24 of the draft law provides that the Governor shall have a non-renewable eight-year term of office and that he may be dismissed only in accordance with Article 14.2 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'ESCB Statute'). The proposed article is in compliance with Treaty requirements.
8. The ECB also notes that the draft law is silent concerning the future status of the existing Governor of the Banca d'Italia. In this context it would like to point out that in order to protect the personal independence of the governors of the national central banks, any reorganisation of such a bank affecting the term of office of its governor should foresee that the existing Governor can continue to perform his duties until the end of the term of office he has been appointed for. The ECB understands that the case of the Governor of the Banca d'Italia is exceptional in that he has been appointed for an indefinite term of office without any compulsory retirement age. For this case the draft law should provide for a transitional regime which is compatible with Article 14.2 of the ESCB Statute. The present formulation of Article 74(5) amounts to an *ex lege* revocation of the appointment of the incumbent governor, without observing the abovementioned provision of the Statute. As regards the appointment procedure, an additional guarantee of independence lies in the

power of appointment by the Board of Directors of the Bank, and not merely in the power of nomination. The appointment is then approved at the political level.

9. The ECB notes that according to Article 72(9) of the draft law the assets and real estate of the Banca d'Italia that are instrumental for the exercise of the tasks transferred to the AMeF may be acquired by the State Property Agency in order to be assigned or leased to the AmeF. The ECB welcomes the fact that such a transfer has to be made in accordance with an agreement between the parties concerned and that, according to Article 72(10), will be applied with due attention to the obligations arising from the Banca d'Italia's membership of the ESCB. Moreover, the ECB notes that the UIC is an instrumental entity of the Banca d'Italia. Article 71 assigns to the new AIF assets currently belonging to the UIC, and thus to the Banca d'Italia. In order to comply with Article 108 of the Treaty it is also necessary that this transfer only take place with the agreement of the Banca d'Italia.

Operational independence of supervisory authorities

10. Operational independence of supervisory bodies vis-à-vis the political authorities is an essential and internationally recognised standard for supervision of financial markets. In this respect, the ECB notes that a previous version of the draft law provided for extensive powers of oversight of supervisory activities to be held by the Interdepartmental Committee for Credit and Savings (*Comitato interministeriale per il credito e il risparmio, CICR*), which could give rise to some concerns regarding the appropriate safeguard of the operational independence of supervisory authorities. The ECB welcomes the fact that the latest version of the draft law, on which this opinion is based, no longer provides for such a role for the CICR, but rather reverts to the framework currently in place.
11. In accordance with Article 18, the supervisory authorities and the AGCM, while respecting each other's independence, will be under the obligation to exercise their competencies in a coordinated manner, namely through a coordination committee, so that the risk of overlaps and duplications of responsibilities over the financial industry is mitigated to the extent possible. The ECB fully recognises the need for coordination and welcomes the fact that this provision is consistent with the responsibility and independence of each authority in the exercise of its supervisory functions.
12. Finally, the ECB notes that a number of provisions in the draft law specifically refer to the transparency and accountability of the Banca d'Italia and the AMeF as regards their supervisory activities. In particular, in accordance with Article 17, the authorities shall deliver a yearly report on the results of their supervisory activity to the Presidents of the Parliamentary Chambers and to a newly instituted Parliamentary Commission for the protection of savings and the financial markets (*Commissione per la tutela del risparmio e i mercati finanziari*), together with any opinion or recommendation on regulatory intervention. Such reports, opinions and recommendations are also transmitted to the Government which, in turn, may adopt any initiative falling under its competence. The ECB considers such provisions consistent with the transparency and

accountability requirements, that are the natural complement of the operational independence of supervisory authorities.

Further aspects relating to the institutional framework for financial supervision and regulation

13. The ECB also notes that Article 41(2) of the draft law attributes to the AMeF the right to ask the Banca d'Italia to propose to the Treasury Minister the initiation of a special administration procedure or compulsory administrative liquidation concerning a bank (Articles 70 and 80 of the Banking Law), and to adopt supervisory measures, such as provisional management (Article 76) and special measures (Articles 78 and 79). It is understood that this provision could apply in extreme cases, in which the violation of conduct of business and transparency regulations suggests the exit from the market of an otherwise solvent entity. Close *ex ante* coordination of the AMeF with the Banca d'Italia, which is generally warranted, is particularly required with regard to such measures, as the Banca d'Italia is entrusted not only with the responsibility of preserving the solvency and liquidity of the bank concerned but also with safeguarding the stability of the financial system as a whole. If such coordination was lacking, the activation of such a measure by the AMeF could trigger a serious instability. The ECB welcomes the proposed procedure, which ensures adequate coordination between the AMeF and the Banca d'Italia.
14. Finally, in transferring the responsibilities for the enforcement of competition policy in the banking sector from the Banca d'Italia to the AGCM the draft law introduces procedures aimed at ensuring a smooth interplay between the measures taken by the two authorities. While coordination is highly needed to avoid an overly complex framework for supervised entities, it would seem appropriate to maintain a clear distinction between procedures that are pursuing distinct public interests, taking due account of the importance that the Italian legal system assigns to the stability of financial intermediaries and of the financial system as a whole. In particular, the requirement to notify also to the AGCM the mergers and acquisitions as foreseen by the regulatory framework for banking supervision and to incorporate the assessment for supervisory and competition purposes into a single act by the AGCM might raise delicate issues. The procedure foreseen in the Directive 2000/12/EC aims at ascertaining the compatibility of the acquisition of qualifying holdings in a credit institution with the sound and prudent management and may require access to information that are not directly relevant for competition policy purposes. It would seem appropriate that national measures implementing these Community provisions and defining the criteria for the fulfilment of the related responsibilities should refer *only* to the authority entrusted with prudential supervisory tasks. Some separation between the two procedures seems warranted also for practical reasons, as the thresholds for communication and the notion on control are not entirely overlapping in Community legislation. Such procedural separation may be compatible with establishing *ex ante*, as the draft law foresees, criteria to be used regarding the clearance of mergers and acquisitions by both authorities. The ECB would welcome such *ex ante* criteria as a tool to enhance the transparency and objectivity of such clearance decisions by either of the two authorities concerned.

15. This opinion will be published on the ECB's website.

Done at Frankfurt am Main, 11 May 2004.

[signed]

The President of the ECB

Jean-Claude TRICHET