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EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 16 March 2004

at the request of the Belgian Ministry of Finance

on certain provisions of the draft law amending, in the field of insolvency procedures, the Law of 22 March 1993 on the legal status and supervision of credit institutions and the Law of 9 July 1975 on the supervision of insurance undertakings

(CON/2004/9)

1. On 24 February 2004 the European Central Bank (ECB) received a request from the Belgian Ministry of Finance for an opinion on certain provisions of the draft law amending, in the field of insolvency procedures, the Law of 22 March 1993 on the legal status and supervision of credit institutions and the Law of 9 July 1975 on the supervision of insurance undertakings (hereinafter the 'draft law').

2. The ECB's competence to deliver an opinion is based on the fifth 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 provisions[1], as the draft law contains provisions concerning, among other things, payment and settlement systems and rules applicable to financial institutions that 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 of the ECB has adopted this opinion.

3. The main purpose of the draft law is to implement into Belgian law Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding-up of insurance undertakings[2] and Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions[3]. The provisions on which the ECB is consulted relate to the following aspects which are not harmonised by these directives: (i) the mandatory prior consultation of the Belgian Banking, Finance and Insurance Commission (CBFA) by the President of the Commercial Court when collective proceedings are opened against certain financial intermediaries and (ii) improved protection from the attachment of funds to be transferred to Belgian payment and securities settlement systems.

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1 OJ L 189, 3.7.1998, p. 42.

2 OJ L 110, 20.4.2001, p. 28.

3 OJ L 125, 5.5.2001, p. 23.

4. Articles 11, 23 and 29 of the draft law provide that the President of the Commercial Court shall request the opinion of the CBFA, before passing judgment on a petition or summons for judicial composition, on the opening of bankruptcy proceedings or on the provisional withdrawal of management regarding credit institutions, clearing institutions or investment undertakings. These Articles also state that consultation of the CBFA suspends delivery of a judgment for not more than 15 days. If the CBFA considers that a case is likely to pose significant systemic risk implications or requires prior coordination with foreign authorities, this period can be extended, but it may never exceed 30 days. The draft law's explanatory memorandum clearly states that the need to consult the CBFA results primarily from the difficulty that judicial authorities have in initiating judicial composition and bankruptcy procedures on the basis of possibly incomplete information that takes no account of the possibility of the supervisory authorities intervening or of the existence of interprofessional solidarity mechanisms (i.e. the possible preventive intervention of the Fund for the protection of deposits and financial instruments).

5. The introduction of such a consultation procedure is broadly welcomed by the ECB since it may reinforce the financial stability framework by allowing judicial authorities to consider the assessment of the competent supervisory authority when deciding on the insolvency of credit institutions, clearing institutions and investment undertakings. This is also in line with the spirit of Directive 2001/24/EC, which provides for the consultation of competent authorities. Nevertheless, the ECB considers that certain aspects of the consultation procedure could be clarified.

6. The first clarification that the ECB suggests relates to the involvement of the Nationale Bank van België/Banque Nationale de Belgique (NBB). In this context, the explanatory memorandum notes that 'It is self-evident that with regard to this competence of providing an opinion the CBFA will of course make any appropriate contacts be it with the Fund for the protection of deposits and financial instruments or the NBB with which channels for the exchange of information exist…'.

   The ECB also notes that the Treaty establishing the European Community and the Statute of the European System of Central Banks and of the European Central Bank entrust the Eurosystem and the NBB, as an integral part of the Eurosystem, with the tasks of defining and implementing the monetary policy of the Community, promoting the smooth operation of payment systems and contributing to the stability of the financial system. Considering that the Eurosystem members have a crucial role in preventing financial crises and, if preventive efforts fail, in the management of such crises, the NBB should be involved in the CBFA consultation procedure. Amongst other, the NBB should be informed by the judicial authorities of the initiation of the proceedings at the same time as the CBFA and the law should provide for the involvement of the NBB during the consultation procedure. Finally, the ECB also sees merit in the NBB receiving a copy of the CBFA opinion at the same time as the President of the Commercial Court.

7. The ECB also underlines certain consequences of the CBFA consultation procedure. According to the current version of the draft law, consultation of the CBFA automatically suspends bankruptcy proceedings. For credit institutions such an automatic suspension might have significant and

possibly undesirable side effects considering certain provisions of the master agreements governing financial transactions concluded between a credit institution and its counterparties. These agreements often provide for an automatic termination of all outstanding transactions in the event of a so-called 'insolvency event', which includes bankruptcy proceedings that are not dismissed or stayed within 15 or 30 days following the institution of such proceedings. Such termination might have potentially significant spillover effects on other financial institutions and, thus, for the stability of the financial system as a whole.

In the same vein, the ECB notes that Article 7 of Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes[4] provides that deposits must be covered up to EUR 20 000 in the event of deposits being unavailable. According to Article 1(3) of Directive 94/19/EC a deposit is, *inter alia*, considered as being unavailable at the latest 21 days after the competent authorities have satisfied themselves that a credit institution has failed to repay deposits which are due and payable. An extension of the suspension period as provided for in the draft law, combined with a suspension of the activities decided by the CBFA, should not lead to a situation where the intervention of the guarantee fund is automatically triggered.

8. According to the explanatory memorandum the CBFA may, during the suspension period, take exceptional administrative measures on the basis of Article 57 of the Banking Law of 22 March 1993, such as the total or partial suspension of activities which can eventually result in the 'closure of the counters'. In the situations covered by the draft law the CBFA could be obliged to take such administrative measures urgently in order to protect the rights of depositors. However, under the current Banking Law, the CBFA must first request a rectification of the credit institution's situation within a fixed time limit before being able to take such exceptional measures. The ECB proposes empowering the CBFA to take these measures immediately if the rights of creditors are exposed to serious risks.

9. The ECB is also consulted on the amendment of Article 9 of the Law of 28 April 1999, which aims to ensure that operators and settlement agents of payment and securities settlement system in Belgium may freely process payments received from their correspondent banks to their participants' settlement accounts, as the amounts to be transferred to such settlement accounts will not be subject to attachment by third parties. This amendment makes clear that the existing protection, which settlement accounts in payment and settlement systems already enjoy, also applies to cash transfers via any local or foreign bank to those accounts. Article 9 offers broader protection from attachment to cash settlement accounts held in payment and securities settlement systems in Belgium than the provisions of Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems[5]. As the explanatory memorandum notes, Article 9 has not provided sufficient legal certainty since recent Belgian case-law has prevented securities settlement systems from processing payments on

4 OJ L 135, 31.5.1994, p. 5.

5 OJ L 166, 11.6.1998, p. 45.

certain securities held in those systems. While is not clear whether such case-law would survive any future legal challenge, the adoption of the draft law nevertheless eliminates such uncertainty under Belgian law. In that respect, the draft law enhances legal certainty in relation to payments through payment and settlement systems and thus fosters the safety and efficiency of payment and settlement systems.

10. The ECB confirms that it has no objection to the competent national authorities making this opinion publicly available at their discretion. This opinion will be published on the ECB's website six months after the date of its adoption.

Done at Frankfurt am Main, 16 March 2004.

[signed]

The President of the ECB

Jean-Claude TRICHET