



EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 15 April 2005

at the request of the Belgian Ministry of Finance

on a draft royal decree concerning the status of securities settlement and assimilated institutions

(CON/2005/9)

Introduction

1. On 10 February 2005 the European Central Bank (ECB) received a request from the Belgian Ministry of Finance for an opinion on a draft royal decree concerning the status of securities settlement and assimilated institutions (hereinafter the 'draft decree').
2. The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community and 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 provisions¹, since the draft decree concerns settlement systems and rules applicable to financial institutions in so far as they 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 decree will implement Article 23 of the Law of 2 August 2002 on the supervision of the financial sector and financial services². It regulates and organises the supervision by the Commissie voor het Bank, Financier- en Assurantiewezen/Commission bancaire, financière et des assurances (CBFA) (the Belgian Banking, Finance and Insurance Commission) of:
 - (i) certain securities settlement institutions that are not credit institutions established in Belgium (Article 1(4); hereinafter the 'securities settlement institutions'); and
 - (ii) certain institutions assimilated with securities settlement institutions (Article 1(5)), i.e. institutions established in Belgium the business of which consists completely or partially in the operational management of settlement institutions' services, including where these settlement institutions are credit institutions established in Belgium (hereinafter the 'assimilated institutions').

¹ OJ L 189, 3.7.1998, p. 42.

² See in relation to this Law: ECB Opinion CON/2002/13 of 24 April 2002 at the request of the Belgian Ministry of Finance on a draft proposal for a law on prudential supervision of the financial sector and financial services.

4. The institutions covered by the draft decree will be subject to licensing and business operation requirements which are largely inspired by the requirements that either currently already apply, or will apply in the near future, to credit institutions and investment undertakings. The draft decree is without prejudice to oversight by the Nationale Bank van België/Banque Nationale de Belgique (NBB) over securities settlement systems.

General considerations

5. There is currently no Community legislation that specifically regulates or supervises institutions which only provide settlement services in the Community. The ECB refers in this context to the Commission's Communication entitled 'Clearing and Settlement in the European Union – The way forward'³, in which the Commission notes that, in order to create 'EU Securities Clearing and Settlement Systems that are efficient and safe and which ensure a level playing field among the different providers of Clearing and Settlement services', the adoption of 'a common regulatory and supervisory framework that ensures financial stability and investor protection, leading to the mutual recognition of systems' needs to be pursued⁴. The Commission further notes that 'a common regulatory/supervisory framework will also create a level playing field by eliminating the existing disparities as regards access rights and capital requirements between clearing and settlement service providers that are licensed as banks and those that are not'⁵. While the ECB strongly supports the Commission's intention to propose a Directive on Clearing and Settlement⁶, it welcomes the adoption in the meanwhile of national legislation on the regulation and supervision of securities settlement institutions that are not credit institutions. Of course, on the entry into force of any future Community legislation in this area, national legislation such as the draft decree will need to be aligned with Community legislation. The ECB also welcomes the purpose of the draft decree to align, to the extent possible, the rules applicable to securities settlement and assimilated institutions with the rules applicable to credit institutions. This will facilitate the tasks of supervisors, amongst others, as well as limit distortions in the regulatory framework applicable to all these institutions.
6. The ECB also draws attention to the 'Standards for Securities Clearing and Settlement in the European Union' that it published jointly with the Committee of European Securities Regulators (CESR)⁷ (hereinafter the 'ESCB-CESR Standards'). Standard 18 states, amongst other things, that 'entities providing securities clearing and settlement services should be subject to, as a minimum, transparent, consistent and effective regulation and supervision'. Although 'regulatory, supervisory and oversight activities should have a sound basis, which may or may not be based on statute, depending on a country's legal and institutional framework'⁸, the ECB nonetheless considers legislation to be beneficial for reasons of legal certainty and clarity. The ECB therefore welcomes

³ COM(2004) 312 final (hereinafter the '2004 Communication').

⁴ See the 2004 Communication, p. 8.

⁵ See the 2004 Communication, p. 10.

⁶ See the 2004 Communication, p. 11.

⁷ Available on www.ecb.int and www.cesr-eu.org.

⁸ See paragraph 191 of the September 2004 ESCB-CESR report, available on www.ecb.int and www.cesr-eu.org.

the draft decree. Of course, once the ESCB-CESR Standards apply, the decree might need to take these standards into account.

7. As regards the draft decree's objective to also regulate and organise the supervision of assimilated institutions, the ECB in Opinion CON/2004/27 welcomed the fact that Belgian law 'extends the supervisory regime of the CBFA for settlement institutions ... to institutions established in Belgium carrying out ... operational management services.' The ECB took particular note that 'the intention is to designate institutions that provide substantial and critical operational and intellectual services to settlement institutions'. Although the ECB understands that the rules regarding assimilated institutions are only meant to concern institutions that provide settlement services of substantial and critical importance, it could be helpful to explicitly specify this in the draft decree itself. This will prevent legal uncertainty as to whether the draft decree applies to any institution established in Belgium that provides settlement services, even if these services are not of substantial or critical importance.

Specific considerations

8. The draft decree defines securities settlement institutions by reference to the institutions in Article 23(1) of the Law of 2 August 2002 (except credit institutions established in Belgium). As a result of this cross-reference, the institutions referred to in Article 23(1)(5°) of the Law of 2 August 2002, which are by definition not established in Belgium, could arguably also be considered as being subject to the business operation requirements laid down in Chapter III of the draft decree. However, in view of the nature of those business operation requirements which seem to be specifically designed for companies incorporated under Belgian law (see e.g. Articles 6 and 11), the ECB understands that this would conflict with the draft decree's purpose to only submit securities settlement institutions that are established in Belgium to these requirements. It would therefore be helpful if Chapter III could specify that the securities settlement institutions covered by it are those incorporated under Belgian law, as is expressly provided for in the case of assimilated institutions.
9. The ECB welcomes the obligation imposed on the securities settlement and assimilated institutions to also comply at all times with financial ratios that the CBFA may establish by regulation so that their solvency and liquidity may be supervised (Article 13). Furthermore, the ECB notes with interest that the draft decree incorporates, by referring to the Law of 22 March 1993 on the status and supervision of credit institutions, several key requirements for all these institutions that already apply to credit institutions, including requirements for the CBFA to (i) be notified of any intended acquisition or disposal of a holding in such institutions that would directly or indirectly provide at least 5% (or multiples thereof) of the capital or voting power; and (ii) approve mergers and acquisitions involving these institutions; and (iii) be notified of the establishment of foreign branches by such institutions, with the possibility for the CBFA to oppose the intended activities; and (iv) be notified of the institutions' annual accounts, including on a consolidated basis.

10. The ECB particularly welcomes Article 19, which addresses the eventuality that non-compliance by participants in a securities settlement institution with its rules would have a negative impact on this institution's condition, in which case this institution must promptly inform the CBFA thereof, which must, in turn, inform the NBB. The ECB is aware of the fact that the draft decree only concerns the CBFA's prudential supervision of securities settlement institutions and that the NBB is responsible for oversight of the securities settlement systems managed by these institutions. The ECB nonetheless notes that the Eurosystem and the NBB, as an integral part of the Eurosystem, are entrusted with the tasks of, amongst others, promoting the smooth operation of payment systems and contributing to the stability of the financial system. Article 19 could therefore stress that the CBFA should exchange with the NBB *in a timely fashion* all relevant information that the CBFA has received from the institution concerned. This would, for instance, avoid information deficiencies that might occur in case of uncertainty as to whether certain information concerns the institution's condition, thus falling under the CBFA's supervision, or the system's condition, thus falling under the NBB's oversight. Of course, this timely information exchange between the CBFA and the NBB could be detailed in the arrangements in Article 23(4) of the Law of 2 August 2002.
11. The CBFA's prudential supervision of securities settlement and assimilated institutions includes these institutions' foreign branches and services (Article 21). Pursuant to Article 48 of the Law of 22 March 1993, which by reference applies to this supervision (second paragraph of Article 21), the CBFA may, amongst other things: (i) carry out inspections at a branch established in another Member State after prior notification of the authorities supervising the credit institutions in that Member State; and (ii) request these foreign authorities to carry out the inspections. The ECB raises the question as to how these provisions would apply in the case of institutions that might not be credit institutions, given that not all Member States provide for the supervision of such institutions. For the same reason, the draft decree could clarify how Article 49 of the Law of 22 March 1993, which refers in the context of the supervision on a consolidated basis of credit institutions to other Member States' supervisory authorities, would apply by virtue of Article 23 to the CBFA's supervision on a consolidated basis of groups of securities settlement and assimilated institutions.
12. The ECB notes with interest that, as a consequence of the application to securities settlement and assimilated institutions of Article 55 of the Law of 22 March 1993 regarding the external audit of credit institutions (Article 24 of the draft decree), the CBFA may, at the request of the ECB or the NBB, instruct the securities settlement and assimilated institutions' auditors to confirm that the information these institutions are obliged to provide to the ECB or the NBB is complete, accurate and complies with existing rules.
13. By virtue of Article 28 of the draft decree, Chapters II to V are rendered entirely applicable to assimilated institutions operating in Belgium as branches of foreign institutions that are not credit institutions. These branches cannot benefit from the 'EU-passport' rules under the Community legislation applicable to credit institutions and investment undertakings. As regards the requirement that it must be possible for the CBFA and the institution's home country authorities to exchange

information, the wording of Article 28(2^o) could clarify that it is not the institution concerned that must satisfy this requirement, but rather the legal framework of the jurisdiction where this institution is incorporated. As regards branches of foreign institutions, the ECB refers to the September 2004 ESCB-CESR Report, which states that ‘issues raised by the operation of cross-border systems should be addressed in a way that delivers regulation/supervision/oversight consistent with each relevant authority’s responsibilities and avoids gaps and duplication, and hence unnecessary costs’ and which recommends cooperation between the relevant authorities ‘in order to minimise the regulatory burden’⁹. The ECB refers in this context also to the future Community legislation on settlement and custody, which might contain rules on the regulation and supervision of branches of foreign institutions.

14. Finally, the CBFA is required to consult the NBB before authorising exceptions to the requirement that securities settlement and assimilated institutions have sufficient liquidity at their disposal to continue their activities (Article 29). There is no comparable requirement for the CBFA to consult the NBB before authorising exceptions to the requirement that securities settlement and assimilated institutions communicate to the CBFA their financial positions on a monthly basis, their detailed statement of services (including financial data) on a quarterly basis, as well as the relevant management and audit reports (Article 30), although this information could also be relevant for monitoring these institutions’ observance of Article 29. If, notwithstanding the foregoing, the draft decree maintains the absence of prior consultation of the NBB under Article 30, it could be helpful for the draft report to the King to clarify the reason for this divergence with respect to the consultation of the NBB under Article 29.
15. This opinion will be published on the ECB’s website.

Done at Frankfurt am Main, 15 April 2005.

[signed]

The President of the ECB

Jean-Claude TRICHET

⁹ See paragraphs 192 and 193 of the September 2004 ESCB-CESR report.