EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 15 April 2008

at the request of the Luxembourg Minister for the Treasury and the Budget
on a draft law improving the legislative framework for Luxembourg as a financial centre and
on a draft law relating to social insurance contributions

(CON/2008/17)

Introduction and legal basis

On 12 February 2008 the European Central Bank (ECB) received a request from the Luxembourg Minister for the Treasury and the Budget for an opinion on a draft law improving the legislative framework for Luxembourg as a financial centre and amending the provisions on bonds in the Law of 5 April 1993 on the financial sector, as amended, the Law of 15 June 2004 on the company investing in risk capital, the Law of 23 December 1998 creating a commission for the prudential supervision of the financial sector, as amended, and the Law of 23 December 1998 on monetary status and on the Banque centrale du Luxembourg, as amended (hereinafter referred to as 'the first draft law').

On 20 February 2008, the ECB received a second request from the Luxembourg Minister for the Treasury and the Budget for an opinion on a draft law amending the Law of 28 July 2000 on the coordination of the statutory pension schemes, as amended, the Code of social insurance contributions, the Law of 26 May 1954 governing State agents' pensions, as amended, the Law of 27 August 1977 on the status of agents entering into the service of international institutions, as amended, the Law of 3 August 1998 on the special pension schemes for the communes' State agents as well as for the agents of the Luxembourg national railway company, as amended and the Law of 23 December 1998 on monetary status and on the Banque centrale du Luxembourg, as amended (hereinafter referred to as 'the second draft law').

In view of the convergence between the provisions contained in the first and second draft laws amending the rules governing the pension scheme of the agents of the Banque centrale du Luxembourg (BCL), the following opinion addresses both draft laws.

The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community and the third indent 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 both draft laws amend the BCL's role as a pension agency. In addition, the first draft law contains provisions on the increase of the BCL's capital, its national regulatory powers and the rules it

1 OJ L 189, 3.7.1998, p. 42.

applies to minimum reserves. 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.

1. Purposes of the first and second draft laws

The first draft law modernises the legislative framework for Luxembourg as a financial centre. For this purpose, it amends the rules governing banks issuing bonds, the Law relating to the investment company in risk capital (SICAR), the Commission de surveillance du secteur financier (CSSF) as well as the Law of 23 December 1998 on the BCL (hereinafter the 'Law on the BCL'). More particularly, the BCL's capital may be increased by incorporating reserves, following a proposal by the BCL, under a grand-ducal regulation. In addition, the imposition by the BCL of minimum reserve requirements, which is currently presented as an option, will become an obligation. Furthermore, the first draft law will confer on the BCL a general regulatory power. Finally, the first draft law will authorise the BCL to have recourse to the decision-making bodies and services of the Luxembourg pension agencies. This latter amendment has to be read in conjunction with the amendments contained in the second draft law. In order to remedy the practical problems encountered in the day-to-day management of the BCL pension's fund which had been designed separately from the other Luxembourg pension agencies, the second draft law brings the BCL into the scope of the Law of 28 July 2000 on the coordination of statutory pension schemes. In addition, the second draft law organises the financial transfers to be operated between the BCL's pension fund and the other pension agencies, if a State or private agent transfers from or to the BCL. This opinion concentrates on the aspects of the draft laws concerning the BCL and its powers.

2. Provisions on the BCL's capital increase

2.1 By virtue of the draft law, the BCL's capital, which currently amounts to EUR 25 million, may be increased by incorporating reserves on a proposal by the BCL under a grand-ducal regulation. The BCL's capital could therefore be periodically rebalanced, by incorporating reserves, without resorting to the legislator, the latter's intervention being however maintained for an increase in capital through new funds.

2.2 The ECB notes that although the reinforcement of BCL's financial position had been presented as priority during the legislative works leading to the adoption of the Law on the BCL in 1998[2], the BCL had advised at that time[3] that the capital of EUR 25 million would be insufficient to cover its costs and operations. The BCL had therefore proposed increasing its capital to EUR 150 million and providing for the creation of a general reserve fund, to which the net profits of its activities would be transferred, up to a limit equal to 100% of the capital (as such is the case under Article 33(1)(a) of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'ESCB Statute')). The BCL's proposal has been partially followed.

2 Report of the Commission des Finances et du Budget (Luxembourg's Commission of Finances and Budget, 10.12.1998) on draft law No 4468/07, p. 2.

3 See the opinion addressed to the President of the Luxembourg Chamber of deputies on 6 November 1998, draft law 4468/2, 4469/2, ordinary session 1998/99.

Article 31 of the Law on the BCL provides for the creation of a general reserve fund and the BCL's duty to transfer into it its profits, so long as the total of the capital and the reserve fund falls short of the total of its assets which do not yield freely-available income, after deducting liabilities which form the direct counterpart to such assets.

2.3 In this perspective, the ECB welcomes the possibility offered to the BCL to increase its capital by incorporating reserves, which will indirectly contribute to reinforcing its financial position. The ECB would, nevertheless, recommend that it should be verified whether the BCL's capital, as increased by incorporating such reserves, would be sufficient to effectively perform all its tasks and cover properly its administrative and operational expenses, as they have evolved since its establishment.

3. Provisions on minimum reserves

3.1 By virtue of Article 23 of the Law on the BCL, the Central Bank is the custodian of sums which the professionals of the financial sector may if necessary be required to deposit by virtue of monetary control measures, in particular under the terms of Article 19 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank. The draft law substitutes the words 'shall be required to deposit' for the current wording 'may if necessary be required to deposit', hence transforming an option into an obligation. The preparatory work advises in this respect that 'the terms proposed to be replaced in this area, having been appropriate in 1998, are no longer [appropriate] since compulsory reserves have become a common ECB monetary policy instrument'.

3.2 It should be recalled that, under Article 19.1 of the ESCB Statute, the ECB 'may require' credit institutions to hold minimum reserves on accounts with the ECB and national central banks (NCBs) in pursuance of monetary policy objectives. Pursuant to Article 2 of Council Regulation (EC) No 2531/98 of 23 November 1998 concerning the application of minimum reserves by the European Central Bank[4], which is binding *erga omnes*, 'the ECB may, on a non-discriminatory basis, exempt institutions from minimum reserves in accordance with criteria established by the ECB'. In addition, Article 2 of Regulation ECB/2003/9 of 12 September 2003 on the application of minimum reserves[5], which is also applicable *erga omnes*, lists the categories of institutions that 'shall be subject' to reserve requirements and specifies that the ECB 'may exempt' certain institutions from these requirements. Furthermore, Article 6 provides that an institution 'shall hold its minimum reserves on one or more reserve accounts with the national central bank in each participating Member State in which it has an establishment, in relation to its reserve base in the corresponding Member State'. In line with the provisions referred to above, the ECB would,

4 OJ L 318, 27.11.1998, p. 1.

5 OJ L 250, 2.10.2003, p. 10.

however, recommend replacing the words 'financial sector professionals'[6] by 'credit institutions' and deleting the word 'in particular' before 'under the terms of Article 19 of the ESCB Statute', which gives the false impression that the BCL could impose minimum reserves.

4. Provisions on regulatory powers

4.1 Article 34 of the Law on the BCL provides that 'the Executive Board shall be authorised, within the framework of the tasks of the ESCB, to enforce ECB decisions and to implement the sanctions imposed by the ECB'. By virtue of the first draft law and based on the new Article 108bis of the Luxembourg constitution[7], Article 34 would now contain a second paragraph, conferring regulatory powers on the BCL 'within the limits imposed by its competences and tasks', the corresponding regulations being published in the *Mémorial.*

4.2 The ECB very much welcomes this amendment to the Law on the BCL, which will allow the latter to effectively enforce ECB legal acts. Prior to examining how such regulatory powers would, in practice, be implemented, the ECB wishes to stress that, for the sake of efficiency, this regulatory power should be combined with a sanctioning power, which forms an integral part of regulatory power and ensures due compliance with the regulatory requirements[8]. Such sanctioning power, at the national level, would, nevertheless, be without prejudice to the ECB's sanctioning power. The types of infractions and sanctions, as well as the procedure leading to the imposition and review of such sanctions, should, however, be set forth in a law. In addition, for the sake of flexibility, it could also be appropriate for the draft law to expressly authorise the BCL to continue adopting circulars, if deemed more appropriate to leverage its moral suasion rather than its regulatory powers.

4.3 The BCL's regulatory power, potentially combined with a sanctioning power, is especially welcome in the collection, compilation and reporting of statistical data. The ECB notes that in particular, the BCL will especially be able to implement Guideline ECB/2004/15 of 16 July 2004 on the statistical reporting requirements of the European Central Bank in the field of balance of payments and international investment position statistics, and the international reserves template[9], Guideline ECB/2002/7 of 21 November 2002 of the European Central Bank on the statistical

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6 According to national law (Article 1.27 read in conjunction with Article 1.28 and Article 13.1 of the Law of 5 April 1993 on the financial sector), the term 'financial sector professional' covers credit institutions as well as natural and legal persons which exercise, under certain conditions, financial sector activities, including those of investment firms.

7 'La loi peut créer des établissements publics, dotés de la personnalité civile, dont elle détermine l'organisation et l'objet. Dans la limite de leur spécialité le pouvoir de prendre des règlements peut leur être accordé par la loi qui peut en outre soumettre ces règlements à l'approbation de l'autorité de tutelle ou même en prévoir l'annulation ou la suspension en cas d'illégalité, sans préjudice des attributions des tribunaux judiciaires ou administratifs.' [unofficial translation: 'the Law may establish public institutions, endowed with legal personality, for which it determines the organisation and purpose. Within the limit of their specialisations, these institutions may be conferred a regulatory power by the Law, which may, in addition, require the approval of the supervisory authority or even provide for the invalidity or suspension in case of breach of law, without prejudice to the jurisdiction of the judicial or administrative courts'].

8 See in this sense, ECB Opinion CON/2002/23 of 18 September 2002 at the request of the Finnish Ministry of Finance on a draft proposal concerning a revision of the Act on Financial Supervision Authority.

9 OJ L 354, 30.11.2004, p. 34. Guideline as amended by Guideline ECB/2007/3 (OJ L 159, 20.6.2007, p. 48).

reporting requirements in the field of quarterly financial accounts[10] and Guideline ECB/2005/5 of 17 February 2005 on the statistical reporting requirements of the European Central Bank and the procedures for exchanging statistical information within the European System of Central Banks in the field of government finance statistics[11]. The Luxembourg Government's grant of a regulatory power to the BCL is, however, without prejudice to the overall obligation of the Grand-Duchy of Luxembourg to cooperate with the BCL[12] to ensure an effective allocation of work between the BCL and the national statistics institute (STATEC) and avoid overlaps or inconsistencies in the reporting requirements imposed on economic agents. For this latter purpose, cooperation between the STATEC and the BCL similar to that organised for the collection of the balance of payments statistics by the Law of 28 June 2000 might be considered.

4.4 Regulatory powers, possibly combined with a sanctioning power, would also be very much welcome in the field of financial stability and in particular with resepect to payment and securities settlement systems, payment instruments and e-money schemes. Under the current Law on the BCL, the BCL has been empowered to oversee the systems falling within the scope of the Settlement Finality Directive, as implemented by the Luxembourg Law of 12 January 2001 amending the Law of 5 April 1993 on the financial sector, as amended, provided that the BCL participates in such systems[13].

The BCL's new regulatory power would apply in particular to Clearstream Banking Luxembourg, as a securities settlement system, and TARGET2-LU, as a payment system. The BCL's new regulatory power should, however, not be limited to these systems. It should be recalled, however, that Article 105(2) of the Treaty and Article 3.1 of the Statute include as a basic Eurosystem central bank task the promotion of the smooth operation of 'payment systems'. Further, according to Article 22, the ECB and NCBs may provide facilities, and the ECB may make regulations, to ensure efficient and sound clearing and payment systems within the Community and other countries.

These Articles provide a legal basis for the oversight activities generally performed at NCB level, in line with the common oversight policy defined for the Eurosystem by the ECB's Governing Council. It is also understood that in its capacity of promoting the smooth operation of payment systems, the Eurosystem is keen on gathering information related to new developments in connection with payments. Furthermore, the Governing Council's policy statement regarding the 'Role of the Eurosystem in the field of payment systems oversight'[14] confirms that the scope of the Eurosystem's oversight competence embraces also systems such as e-money schemes and payment instruments. To allow the BCL to duly comply with the Governing Council's common oversight policy, it would be advisable to bring all systems, regardless of whether they are protected by the

10 OJ L 334, 11.12.2002, p. 24. Guideline as last amended by Guideline ECB/2007/13 (OJ L 311, 29.11.2007, p. 47).

11 OJ L 109, 29.4.2005, p. 81. Guideline as last amended by Guideline ECB/2007/14 (OJ L 311, 29.11.2007, p. 49).

12 Article 5 of the ESCB Statute.

13 Articles 34-3 and 47-1 of the Law of 5 April 1993 on the financial sector, as amended.

14 The 2000 Governing Council's policy statement is available on the ECB's website at www.ecb.europa.eu.

Settlement Finality Directive, as well as payment instruments, under the BCL's regulatory powers as far as its oversight function is concerned[15]. To support this extension of the scope of application of the regulatory powers, the provisions of the Law on the BCL relating to its competencies should be redrafted accordingly. In particular, the amendment should provide for an express legislative recognition of the BCL's role in financial stability. The BCL would thus be able to monitor and assess the financial system in Luxembourg[16].

4.5 The ECB finally notes that granting the BCL a regulatory power would allow it to replace with a regulation the contractual framework of its general terms and conditions for the implementation of monetary policy operations. When combined with a sanctioning power, such regulation would allow the BCL to impose sanctions, subject to judicial review, thereby avoiding the uncertainties associated in Luxembourg with the imposition of sanctions by contractual means.

5. Provisions on the pension scheme of BCL's agents

5.1 Under Article 14 of the Law on the BCL, the pension benefits of BCL's agents are determined by their status and financed by the BCL pension fund. Such a fund, which is financed by a pure system of capitalisation partly by statutory deductions from agents' salaries, partly by the BCL's contributions, has, however, been designed separately from the other Luxembourg pension agencies. Consequently, practical difficulties have arisen in the day-to-day management of pension benefits of BCL's agents, especially if they transfer from or to other private or public institutions to or from the BCL, as well as if invalidity of a BCL agent for the purpose of an invalidity pension must be declared. These practical difficulties are addressed in both the first and second draft law. Article V(2) of the first draft law provides that the BCL 'may have recourse to the decision-making bodies and services of the pension agencies following the pension regime of the agent in question.' Article 1 of the second draft law also brings the BCL into the scope of the Law of 28 July 2000 on the coordination of statutory pension schemes. Furthermore, it acknowledges the specificity of BCL's agents in respect of pensions so that if a State agent transfers to the BCL, the corresponding administration pays into the BCL's pension fund the necessary amount to subsequently finance pension benefits arising from State service previously performed. In the opposite situation, i.e. a BCL agent moving to another administration or the private sector, the BCL will transfer its contribution to the other relevant scheme or body under such scheme.

5.2 As a rule, the regime governing the staff of central banks should not impair the ability of the latter to employ and retain the qualified staff necessary for the performance of the tasks conferred on it by the Treaty, the ESCB Statute and national legislation in an independent manner[17]. Hence, the

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15 See in this sense, ECB Opinion CON/2003/22 of 15 October 2003 at the request of the Finnish Ministry of Finance on a draft government proposal to amend the Suomen Pankki and other related acts, particularly paragraph 18.

16 See ECB Opinion CON/2007/33 of 5 November 2007 at the request of the Austrian Ministry of Finance on a draft law amending the Law on banking, the Law on savings banks, the Law on the Financial Market Supervisory Authority and the Law on the Oesterreichische Nationalbank, particularly paragraph 2.2.1.

17 See ECB Opinion CON/2008/9 of 21 February 2008 at the request of the German Ministry of Finance on a draft law amending the Law on Deutsche Bundesbank.

ECB very much welcomes these amendments, which will facilitate the management by the BCL of its agents' pension benefits, also if transferring from or to the private or public sector. Ideally, the efficiency achieved at national level in this latter respect should be transposed at cross-border level. For the sake of efficiency and transparency, the practical modalities of the cooperation between the BCL and the pension agencies should be set forth in a cooperation agreement or regulation. Proper attention should be paid, in this last respect, to adequately protect the BCL's independence[18].

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

Done at Frankfurt am Main, 15 April 2008.

[signed]

The President of the ECB

Jean-Claude TRICHET

18 ECB Opinion CON/2008/13 of 19 March 2008 on a draft law concerning the reform of the Greek social security system.