EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 16 March 2009

at the request of the Cypriot Ministry of Finance
on a draft law amending the Securities and Cyprus Stock Exchange (Central Depository and Central Securities Registry) Laws of 1996 to 2008

(CON/2009/21)

Introduction and legal basis

On 20 February 2009, the European Central Bank (ECB) received a request from the Cypriot Ministry of Finance for an opinion on a draft law amending the Securities and Cyprus Stock Exchange (Central Securities Depository and Central Registry) Laws of 1996 to 2008 (hereinafter the 'draft law').

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 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 the draft law relates to payment and settlement systems. 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. Purpose of the draft law

The ECB understands that the purpose of the draft law is to accommodate specific comments of the ECB made in two of its previous opinions on draft legal acts of relevance to the Cyprus Stock Exchange (CSE) and/or to the CSE's Central Depository and Central Securities Registry (CDCR)[2]. In particular, and in line with recommendations previously made by the ECB[3], the draft law proposes amendments to Sections 3 and 6 of the Securities and Cyprus Stock Exchange (Central Depository and Central Securities Registry) Laws of 1996 to 2008 (hereinafter the 'Basic Law'), which is intended to limit the scope of the CSE Council's decision-making powers to technical issues only[4], thereby avoiding the risk of any undue

1 OJ L 189, 3.7.1998, p. 42.

2 See ECB Opinion CON/2006/9 of 22 February 2006 at the request of the Cypriot Ministry of Finance on a draft law amending the Cyprus Securities and Stock Exchange (Central Depository and Central Securities Registry) Laws of 1996 to 2005 and ECB Opinion CON/2006/37 of 11 July 2006 at the request of the Cypriot Ministry of Finance on two draft regulatory decisions issued by the Cyprus Stock Exchange Council.

3 See paragraphs 4.1 and 5.2 of ECB Opinion CON/2006/9, and paragraphs 3.3 and 3.5 of ECB Opinion CON/2006/37.

4 On the issue of the competences of the CSE Council and of the nature of its rule-making powers see, in particular, paragraphs 1.2, 3.1 and 4.1 of ECB Opinion CON/2006/9.

interference with settlement finality-related issues, and to clarify the scope of the CSE's liability vis-à-vis its clients arising from the operation of the CDCR and with regard to the correct recording of stock exchange data and/or transactions. Subject to its observations below, the ECB is pleased to note the consulting authority's initiative to address expressly the abovementioned outstanding issues.

2. Specific observations

2.1 *Observations on the proposed amendments to Section 6 of the Basic Law*

2.1.1 The ECB understands that the objective of the proposed amendments to Section 6 of the Basic Law is to remove any remaining doubts as to the extent of the liability of the CSE Council arising from the operation of the CDCR. At present, subject to certain exceptions[5], the CSE's liability is not the subject of comprehensive statutory regulation, either in the Basic Law or in the CSE Regulations. To the extent the proposed amendments to Section 6 would confirm that the CSE, in its capacity of owner and operator of the CDCR, is subject to the general principles of the law of tort in Cyprus (*astika adikimata*)[6], whether by way of an action for negligence in the exercise of a statutory power or, alternatively, for breach of statutory duty giving rise to a private, civil cause of action, the ECB has no comments on the overall thrust of the proposed amendments to Section 6.

2.2 *Observations on the proposed amendments to Section 3 of the Basic Law*

2.2.1 The ECB has the following comments on Section 3 of the Basic Law, which currently provides that the CSE has the power to 'establish, manage and operate' the CDCR, as specified in the Basic Law and the Regulations and/or Regulatory Decisions issued thereunder. In line with the ECB's previous opinions and having regard to the implementation of the Settlement Finality Directive (SFD)[7], Section 3 of the Basic Law would benefit from clarification to the effect that the CSE's decision-making powers relate to technical issues only, to be defined within the boundaries of the clearing and settlement framework laid down by national legislation. Moreover, and despite the fact that Sections 17A and 24 of the Basic Law already refer to the national implementation of the SFD[8], the proposed amendments to Section 3 do not, in the ECB's view, go far enough towards addressing unequivocally the concerns previously expressed by the ECB in its opinions. As the differences between Section 3, as it currently stands, and a revised Section 3 would only be very slight and would require deductions to be made in order for conclusions to be drawn regarding the

5 The only express references to liability-related issues are to be found in: (i) Section 17A of the Basic Law, which excludes the liability of the CSE's Director General vis-à-vis any affected party/ies where the Director General has intervened to correct mistaken entries in the CDCR Register, provided that they have acted in good faith; and (ii) Regulations 16(3) and 16(4) of the Securities and Stock Exchange (Registration, Trading and Settlement of Dematerialised Securities) Regulations of 2001 to 2005, excluding the liability of the Director or of the CSE vis-à-vis CSE Members or third parties where the Director has taken measures (or desisted from so doing) with a view to completing the clearing and settlement of a transaction over listed securities or their delivery where the competent CSE Member has failed to fulfil its relevant obligations.

6 See the Civil Wrongs Law (Cap. 148, as amended).

7 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, OJ L 166, 11.6.1998, p. 45.

8 Settlement Finality in Payment Systems and Securities Settlement Systems Law of 2003.

limits to the CSE Council's rule-making powers, the ECB would invite the consulting authority to reflect more expressly in the draft law itself the objectives conveyed in its accompanying explanatory note.

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

Done at Frankfurt am Main, 16 March 2009

[signed]

The President of the ECB

Jean-Claude TRICHET