EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 21 September 2001

at the request of the Finnish Ministry of Finance
on a draft proposal concerning legislation
on the reorganisation and winding-up of credit institutions

(CON/2001/27)

1. On 21 May 2001 the European Central Bank (ECB) received a request from the Finnish Ministry of Finance for an opinion on a draft Government proposal concerning legislation on the reorganisation and winding up of credit institutions (hereinafter referred to as the "proposal"). The proposal contains three different elements. First, it intends to introduce in Finland a new Law on the temporary suspension of the activities of a deposit bank (hereinafter to as the "draft law"). Secondly, it intends to amend certain related provisions in the existing laws governing the different legal forms of credit institutions in Finland as well as in a number of other related laws. Thirdly, the proposal also consolidates the existing laws on the different legal forms of credit institutions, i.e. the laws on commercial banks and other credit institutions in the form of a limited company, on cooperative banks and other cooperative-based credit institutions, and on saving banks.

2. The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community (hereinafter referred to as the "Treaty") and the fifth and sixth indents of Article 2(1) of Council Decision 98/415/EC of 29 June 1998 on the consultation of the ECB by national authorities regarding draft legislative provisions[1], as the proposal contains provisions concerning payment systems and 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, this opinion has been adopted by the Governing Council of the ECB.

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1 OJ L 189, 3.7.1998, p. 42.

3. The proposal mainly intends to complement Finnish legislation concerning the voluntary reorganisation measures in the Finnish banking sector by extending the application of general company law provisions on voluntary reorganisation measures, such as mergers, divisions and transfers of business, to cover also all credit institutions in Finland. However, in order to take into account the specific features of the banking sector, the proposal introduces the draft law. In addition, the proposal will harmonise the rules applied to different legal forms of credit institutions with regard to their reorganisation and winding-up. These uniform rules will ensure that the same principles for safeguarding the rights of creditors will apply to all such measures, and that they will be equal irrespective of the legal form of credit institution concerned. The rights of depositors in Finland are safeguarded by specific legislation on the Deposit Guarantee Fund. The proposal does not intend to change this legislation. The ECB welcomes the proposal in general as it aims to facilitate through voluntary reorganisation measures the developments in the banking sector and in general in the financial markets.

4. The ECB notes that according to the Finnish legislation currently in force, the voluntary reorganisation measures concerning credit institutions require the authorisation of the Finnish Ministry of Finance. As the preconditions for granting such an authorisation are at the moment not covered by legislation, the Ministry of Finance has until now had a wide discretionary power in considering the authorisation and safeguarding the creditors' rights in different reorganisation measures. The proposal intends to abolish this role of the Ministry of Finance. As a result, the existing control exercised by the Ministry of Finance in safeguarding creditors' rights would be replaced by a procedure for creditor consultation following the provisions of general company law in Finland. These provisions provide the creditors with the right to oppose the planned reorganisation measures. The Finnish Trade Register Authority approves the execution of the planned reorganisation measures only if none of the creditors opposes the measures. The ECB welcomes the fact that in such a consultation procedure the Finnish Financial Supervisory Authority (FSA) will also be consulted in order to ensure that the conditions regarding the authorisation of a credit institution are not endangered. The FSA would have the right to oppose the reorganisation measures if it considers that the measures would have negative effects on such conditions, *inter alia*, as liquidity, solvency, or procedures for controlling the risk exposure of the credit institution concerned. In such case, the Finnish Trade Register Authority cannot approve the execution of the planned reorganisation measures. If there were appeals against the opposition of the FSA, the Supreme Administrative Court would take the final decision.

5. The ECB would like to recall that the Treaty and the Statute of the European System of Central Banks and of the European Central Bank (hereinafter referred to as the "Statute") entrust the Eurosystem[2] and Suomen Pankki, as a component member of the Eurosystem, with, *inter alia*,

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2 The Eurosystem comprises the ECB and the national central banks of the Member States which have adopted the euro as their single currency.

the tasks of defining and implementing the monetary policy of the Community. Furthermore, the Treaty and the Statute entrust the Eurosystem with the task of overseeing payment systems in order to promote the smooth operation of payment systems and thus contribute to financial stability. The Eurosystem may provide facilities, and the ECB may make regulations, to ensure efficient and sound clearing and payment systems within the Community and with other countries.

The ECB observes that all reorganisation measures, as well as the winding-up of credit institutions in Finland, would affect the role of Suomen Pankki, as a component member of the Eurosystem, in assessing the risks involved when undertaking credit operations, both in the context of implementing monetary policy as well as in providing intraday credit for payment system purposes. Furthermore, such measures may have an impact on the smooth functioning of payment systems, and thus affect Suomen Pankki in its roles of both payment systems overseer and provider of payment services.

Therefore, the ECB submits that the proposal and the draft law should enhance and ensure transparency vis-à-vis Suomen Pankki, which should be adequately informed of all measures involved in the reorganisation and winding-up of credit institutions, and should have the right to request all information needed in fulfilling its tasks under the Treaty and the Statute as a component member of the Eurosystem.

6. The ECB notes that, according to the draft law concerning the temporary suspension of the activities of a deposit bank, if the liquidity of a deposit bank is impaired to the extent that it may be unable to fulfil its obligations, the role of the Ministry of Finance would remain strong compared to its role in voluntary reorganisation and the winding-up of credit institutions. The Ministry of Finance would assess whether the liquidation of a deposit bank can be avoided, in particular if the stability of the financial market requires the continuation of the activities of the bank concerned. The draft law lays down the conditions according to which the Ministry of Finance can order a temporary suspension. The activities of a deposit bank would have to be suspended when its financial position is weakened to the extent that the continuation of its activities would jeopardize the position of the depositors and other creditors or the stability of the financial market, or otherwise cause severe distortions to the financial markets. The aim of the suspension is to prevent the bankruptcy of a deposit bank and provide for the continuation of its activities in the future, if the adequate reorganisation measures are feasible. If the reorganisation measures are not deemed possible, the suspension aims to prepare the liquidation of the bank in a controlled way. The activities of a deposit bank may be suspended for a maximum period of six months. The ECB welcomes the possibility for the Ministry to temporarily suspend the activities of a deposit bank, as it could help prevent disturbance to the stability of financial markets due to temporary problems within the bank. Moreover, the ECB welcomes the obligation for the Ministry to consult Suomen Pankki before adopting the decision to order the temporary suspension. This will allow Suomen Pankki to provide the

process with a central banking perspective, in particular on the basis of financial stability concerns.

7. The intended legal effects of the suspension procedure of a deposit bank correspond to a large extent to the legal effects of the company reorganisation measures provided in the Finnish Company Reorganisation Law No 47/1993 (Company Reorganisation Law). Both the suspension of the activities of a deposit bank, and the reorganisation measures according to the Company Reorganisation Law, aim at a continuation of the business by impacting on the position of the creditors to the least possible extent. Therefore, according to the draft law the provisions of the Company Reorganisation Law would apply, with certain restrictions, to the legal effects of initiating the suspension of activities of a deposit bank and control of its assets during the suspension period.

   According to the draft law, and the applicable provisions of the Company Reorganisation Law, during the suspension the bank is not allowed to take deposits or other refundable assets from the public without the permission of the Ministry of Finance. Furthermore, the bank is not allowed to grant or otherwise obtain new loans, or to enter into or otherwise obtain financial agreements. Moreover, during the suspension the liabilities of the bank are frozen, the fulfilment of its obligations towards the depositors and other creditors is prevented, the bank is not allowed to provide any additional collateral and the creditors are not allowed to realise the collateral already provided. These measures are established in order to secure the equal treatment of the creditors irrespective of the outcome of the suspension procedure. In addition, they will help to avoid the risk of sudden large-scale withdrawal of deposits.

8. The ECB notes that the principles of the Finnish Company Reorganisation Law intend to lead to the restructuring of viable enterprises and the avoidance of unnecessary bankruptcies. Such a restructuring procedure is a long-term process lasting possibly several years. Instead, the principal aim of a temporary suspension of the activities of a deposit bank should be to ensure the continued smooth and stable functioning and operation of financial markets. The temporary suspension of the activities of a deposit bank should be an extreme measure by the authorities in order to safeguard the stability of financial markets. Such a suspension should therefore be a short-term measure.

   Furthermore the ECB notes the differences between the nature of activities of a credit institution, on the one hand, and the nature of activities of companies in general, on the other hand. In particular, the debt structure of a credit institution is by definition of a special nature compared to any other company in general. The ECB understands that the Company Reorganisation Law does not take into account the special features, as a consequence of such differences, inherent in the resolution of financial problems of credit institutions, and that the Company Reorganisation Law is therefore designed to govern general company restructuring measures and procedures.

Therefore, the ECB considers that the application of the Company Reorganisation Law with regard to the temporary suspension of the activities of credit institutions pursuant to the draft law might be problematic.

9. The ECB would see the need for the draft law to better take into account the role of the Eurosystem, and in particular the role of Suomen Pankki as a component member of the Eurosystem, on certain issues, as addressed below.

The ECB would like to point out that the Statute requires that all credit operations extended by the ECB or the national central banks of the Eurosystem to credit institutions and other market participants be based on adequate collateral. Following this primary law requirement, Article 9 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[3] (the Settlement Finality Directive, SFD) provides that the rights of a national central bank of the Member States or of the ECB to collateral security provided to them "shall not be affected by insolvency proceedings" against the credit institution or another market participant which has provided the collateral security. Such collateral may always be realised for the satisfaction of these rights.

The ECB notes that this provision of Community law has been implemented in Finland by a specific law on netting in clearing and settlement systems (*Laki eräistä arvopaperi- ja valuuttakaupan sekä selvitysjärjestelmän ehdoista* 1084/1999) (the Netting law). Section 10 provides that the rights relating to the collateral provided to the central bank in connection with central bank operations may be realised notwithstanding the initiation of an insolvency procedure or any other comparable procedure thereto. However, in order to avoid any misunderstandings with regard to the application of this provision also to all cases of temporary suspension of the activities of a deposit bank in Finland, as well as any reorganisation procedure started as a consequence of such suspension, the ECB considers it essential that the priority of the provision of Section 10 of the Netting law over the rules of the draft law be guaranteed by necessary clarifications in the proposal.

Furthermore, the ECB submits that in order to be in line with the above, the draft law should also entitle Suomen Pankki to require additional collateral according to the risk management provisions of the Eurosystem or to call in its credit contracts irrespective of the rules of the draft law.

10. The ECB would also like to draw attention to the minimum reserve requirements imposed on credit institutions by Regulation ECB/1998/15 of 1 December 1998 on the application of minimum reserves[4], as amended by Regulation ECB/2000/8[5], and to the statistical reporting requirements imposed on monetary financial institutions by Regulation ECB/1998/16 of

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3 OJ L 166, 11.6.1998, p. 45.

4 OJ L 356, 30.12.1998, p. 1.

5 OJ L 229, 9.9.2000, p. 34.

1 December 1998 concerning the consolidated balance sheet of the monetary financial institutions sector, as amended by Regulation ECB/2000/8[6]. The ECB's statistical requirements will need to be fulfilled also during a temporary suspension of the activities of a deposit bank, in case a bank continues to hold its authorisation to act as a deposit bank. According to Regulation ECB/1998/15, the ECB may exempt from minimum reserve requirements an institution subject to winding-up proceedings or reorganisation measures.

11. Regarding the draft amendment of the Credit Institution Act No 1607/1993, the ECB notes that the Ministry of Finance, when granting authorisation to a credit institution, will provide this new authorisation for registration to the Finnish Trade Register and for information to the FSA. Since the new credit institution would be entitled to become a monetary policy counterparty and participate in payment systems, it would be preferable that also Suomen Pankki, as the monetary policy and payment systems oversight authority in Finland, be promptly informed thereof.

12. Finally, the ECB recalls 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[7], which provides for mutual recognition of such proceedings. While the national implementation of this Directive does not need to take place before May 2004, the ECB suggests, without having made an assessment in this regard, that the proposal should already now be brought broadly in line with the provisions of this Directive in order to avoid any abrupt regime changes when the Directive is formally implemented in Finnish law.

13. The ECB confirms that it has no objection to the competent national authorities making this opinion publicly available at their discretion.

Done at Frankfurt am Main on 21 September 2001.

The President of the ECB

[signed]

Willem F. DUISENBERG

6 OJ L 229, 9.9.2000, p. 34.

7 OJ L 125, 5.5.2001, p. 15.