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EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 3 November 2005

at the request of the Belgian Ministry of Finance
on a draft law abolishing bearer securities and a draft royal decree concerning dematerialised corporate securities

(CON/2005/43)

1. On 18 July 2005 the European Central Bank (ECB) received a request from the Belgian Ministry of Finance for an opinion on a draft law abolishing bearer securities (hereinafter the 'draft law') and a draft royal decree concerning dematerialised corporate securities (hereinafter the 'draft decree').

2. The ECB's competence to deliver an opinion is, for both the draft law and the draft decree, based on Article 105(4) of the Treaty establishing the European Community and on the third, 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], since:

   - the draft law: (i) abolishes bearer securities, *inter alia* to enhance the protection of the integrity of the financial system against possible abuses; (ii) modernises the Belgian legal framework regarding the holding of dematerialised corporate securities and the settlement of transactions therein; and (iii) changes the regime applicable to certain types of collateral provided to the Nationale Bank van België/Banque Nationale de Belgique (NBB).

   - the draft decree designates and imposes certain requirements on the entities that are authorised to hold dematerialised corporate securities accounts, and designates the entities that are authorised to settle transactions in such securities, with the NBB being a designated entity in both cases (although only for corporate bonds in the latter case).

3. The first objective of the draft law is to abolish bearer securities (e.g. corporate and public debt securities) through a gradual phasing-out of such securities. Under current Belgian law, securities are issued in registered, bearer or dematerialised form, such forms being mutually exclusive. In summary, the abolition is effected through the prohibition of new issuances of bearer securities from 1 January 2008 onwards and through the conversion of existing bearer securities into either registered or dematerialised securities by 1 January 2014. The abolition applies to bearer securities issued by Belgian issuers. Subject to restrictions regarding their physical delivery[2], certain bearer

1 OJ L 189, 3.7.1998, p. 42.

2 Article 4 of the draft law.

securities (e.g. commercial paper or corporate bonds) that are exclusively issued outside Belgium or are governed by foreign law do not fall within the scope of this abolition[3]. Moreover, since the draft law applies only to bearer securities issued by entities incorporated under Belgian law, and since there is no limitation on the categories of securities that may be issued under Belgian law, the draft law does not prevent foreign entities from issuing certain categories of bearer securities in Belgium under Belgian law, subject only to the restriction that such securities are not physically deliverable in Belgium[4].

4. The ECB notes that the revised Forty Recommendations of the Financial Action Task Force on Money Laundering[5] (hereinafter the 'FATF Recommendations'), setting out international standards for safeguarding the integrity of the financial system, emphasise the importance of customer identification and specifically refer to the risks associated with bearer securities[6]. Furthermore, the effective implementation of FATF Recommendation 5 ('financial institutions should undertake customer due diligence measures, including identifying and verifying the identity of their customers') might also be of relevance in this context. Under Belgian law the holders of registered and dematerialised securities can be easily identified, which is, for instance, useful in the context of payments made in relation to securities, e.g. dividends or redemptions, and for ascertaining the capital ownership of legal persons, including financial institutions. A regime under which only registered or dematerialised securities can be issued might contribute to the protection of the integrity of the financial system, and could therefore be an important factor in safeguarding that system's stability. The ECB therefore welcomes the first objective of the draft law. Furthermore, the ECB notes that the abolition of bearer securities could assist the compilation of statistical data[7], since statistical authorities in Member States are also often unable to identify the ultimate beneficial owners of bearer securities. In addition, the ECB underlines the usefulness, including for statistical purposes, of systematically allocating a unique and official identification number, preferably the International Securities Identification Number (ISIN, which respects ISO Standard 6166), to securities issued.

5. The second objective of the draft law is to modernise the current legal framework, laid down in the Belgian Companies Code (*Wetboek van Vennootschappen/Code des Sociétés*), regarding dematerialised and, to a lesser extent, registered securities (e.g. shares, bonds and subscription rights) issued by a *naamloze vennootschap/société anonyme* (NV/SA) or a *commanditaire vennootschap op aandelen/société en commandite par actions* (Comm.VA/SCA) incorporated under Belgian law. Under the draft law, dematerialised corporate securities may be held not only with authorised account holders, as is already currently provided for in the Companies Code, but

3 Last two indents of Article 2, 1º of the draft law.

4 Article 4 of the draft law.

5 June 2003; available on the FATF's website (www.fatf-gafi.org).

6 See in particular FATF Recommendation 33; see also the explanatory memorandum to the draft law, pp. 2 and 3.

7 See Article 5 of the Statute of the European System of Central Banks and of the European Central Bank.

also directly with securities settlement institutions[8]. Pursuant to the draft law[9], the draft decree designates which securities settlement institutions are authorised to maintain dematerialised corporate securities ('assurer la conservation des titres dématérialisés') and settle transactions therein. The ECB notes that the supervision by the *Commissie voor het Bank, Financie- en Assurantiewezen/Commission bancaire, financière et des assurances* (CBFA; the Belgian Banking, Finance and Insurance Commission) of the securities settlement institutions that are authorised to settle transactions in dematerialised corporate securities is already provided for in Article 23, §2 of the Law of 2 August 2002 on the supervision of the financial sector and on financial services. However, contrary to what the Companies Code currently provides, the draft law explicitly charges these securities settlement institutions with the task of maintaining dematerialised corporate securities in addition to the task of settling transactions therein. The ECB understands that the CBFA's prudential supervision under Article 23, §2 also encompasses these maintenance activities of the securities settlement institutions.

6. The draft law[10] inserts a new provision[11] into the Companies Code, which allows authorised account holders of dematerialised corporate securities to act as the ultimate depository or custodian (i.e. without having to deposit these securities with a securities settlement institution), provided that: (i) these securities are not listed on a regulated market; (ii) the account owner has agreed to this ultimate holding; and (iii) the entire volume of a particular securities issuance is booked with the issuer in the name of one account holder only. The ECB understands that the NBB may exercise its system oversight in respect of the securities holdings falling under this new provision pursuant to Article 8 of the Organic Law on the Nationale Bank van België/Banque Nationale de Belgique, for instance if such holdings are, as a result, *inter alia*, of their nature and volume, of systemic importance. The NBB's ability to exercise such oversight is important in view of the role played by central banks in the oversight of securities settlement systems.

7. Finally, the draft law[12] abolishes two Belgian statutory provisions that prohibit and provide criminal sanctions for: (i) participation in a general meeting vote by registering as an owner of securities which do not, in reality, belong to the participant; and (ii) the delivery of securities in order to allow such participation. The rationale for this abolition is to resolve the legal uncertainty surrounding participation in a general meeting vote with registered shares and bonds that are held through an intermediary[13]. The ECB takes note of this aspect of the draft law, the aim of which is to enhance the efficiency and legal soundness of intermediated book-entry securities.

8 Article 20, §1 of the draft law.
9 Article 20, §2 of the draft law.
10 Article 22 of the draft law.
11 Article 475ter.
12 Article 32 of the draft law.
13 See pp. 23 and 24 of the explanatory memorandum.

8. Another objective of the draft law is to amend two existing legal provisions that particularly concern the NBB. First, the draft law[14] extends the application of the simplified enforcement procedure laid down in Belgian law[15] in relation to *in rem* collateral arrangements and loans for financial instruments, to claims (*schuldvorderingen*/*créances*) provided to the NBB as collateral in the framework of the NBB's credit operations. The ECB welcomes this new provision, which will become particularly relevant when the NBB has to accept large quantities of claims, including bank loans, as adequate collateral within the framework of the Eurosystem's monetary policy operations. The ECB refers in this context to the introduction of a single list of eligible collateral for such operations, which will from 1 January 2007 include bank loans[16]. Second, the ECB also welcomes another provision of the draft law[17], which changes the current reference to 'cash or financial instruments' as the assets underlying 'collateral' within the meaning of the Belgian law[18] implementing 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[19] (hereinafter the 'Settlement Finality Directive') with a new reference to 'all realisable assets (including cash and claims)'. This broader reference is in line with Article 2(m) of the Settlement Finality Directive. Unlike the current reference, it also encompasses assets such as bills of exchange, promissory notes and claims, so that these assets may also benefit from the protection of the Settlement Finality Directive and the Law of 28 April 1999 if they are provided as collateral within payment and securities settlement systems.

9. The ECB has no comments on the draft decree.

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

Done at Frankfurt am Main, 3 November 2005.

[signed]

The President of the ECB

Jean-Claude TRICHET

14 Article 37 of the draft law, inserting a new provision into the Organic Law on the Nationale Bank van België/Banque Nationale de Belgique.

15 Article 8 of the Law of 15 December 2004 on financial collateral and various tax provisions.

16 See, for example, the ECB press release of 22 July 2005 entitled 'Eurosystem collateral framework: Inclusion of non-marketable assets in the Single List' (available at www.ecb.int).

17 Article 39 of the draft law.

18 Article 8, §3 of the Law of 28 April 1999 implementing Directive 98/26/EC on settlement finality in payment and securities settlement systems.

19 OJ L 166, 11.6.1998, p. 45.