EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

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
(CON/2002/13)

1. On 18 March 2002 the European Central Bank (ECB) received a request from the Belgian Ministry of Finance for an opinion on a draft proposal for a law on prudential supervision of the financial sector and financial services (hereinafter referred to as 'the draft proposal'). The draft proposal will introduce a comprehensive system for the supervision of the financial sector, including provisions on the coordination of the supervisory function. In addition, it provides specific rules on secondary markets for financial instruments.

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 sixth indent of Article 2(1) of Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank (ECB) by national authorities regarding draft legislative provisions[1], as the draft proposal contains provisions concerning 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.

3. The ECB notes that Article 2, 10° g) includes in the definition of "qualified intermediary" also the European Central Bank, the National Bank of Belgium (NBB) as well as the other central banks of the other Member States of the European Economic Area. The definition is used in the draft proposal in Article 6 §1, which lists the subjects entitled to be admitted as members of the Belgian regulated markets (provided that they satisfy the conditions laid down in Article 6 §2). Moreover, it is noted that according to Article 27 §1, qualified intermediaries active in Belgium are requested to adopt an internal code of conduct for ensuring the respect of the provisions of Article 24 and 25. In addition, the definition is used in Article 31, concerning a right of priority over financial instruments and funds. The ECB notes that, in principle, national law cannot impose obligations on the ECB and Eurosystem central banks with regard to operations conducted as part of the Eurosystem's tasks and it could be helpful if Belgian law explicitly confirms this point.

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1 OJ L 189, 3.7.1990, p. 42.

4. In order to ensure proper external, public and independent control, as well as to provide market undertakings with the appropriate means to operate under private law and without any public status constraints, the ECB understands that the draft proposal envisages a further increase in the separation between the supervision of compliance with legislation concerning public policy conferred upon the Commissie voor het Bank- en Financiewezen/Commission Bancaire et Financière (BFC) and the activities of private market undertakings. To this effect, and in line with the ECB opinion of 22 November 2001 on the proposal for a directive on insider dealing and market abuse[2], the ECB would like to express the need to clearly limit and define the possible delegation of powers to market operators in order to avoid the problems identified in the statement of reasons of the draft Belgian law (lack of efficiency of the supervisory structure, the confidential nature of public service activities and the risk of conflict of interest). Therefore, the proposal that public authorities assume final responsibility for supervising compliance with Community and national legislation is welcomed by the ECB. This approach is also consistent with the views expressed by the Commission in its recently revised orientations on the review of the Investment Services Directive.

5. The ECB notes that the competence of the NBB to ensure the proper, efficient and sound operation of clearing and payment systems, as mentioned in Article 8 of the NBB's Organic Law, has been expressly recognised by Article 33 of the draft proposal. The ECB also notes that Articles 22 and 23 of the draft proposal, which provide for a general framework regarding clearing and settlement, give the King the competence to issue more detailed legislation by means of royal decrees. In accordance with the Council Decision 98/415/EC. The ECB would need to be consulted on such royal decrees as well.

6. The draft proposal sets up a comprehensive framework to combat market abuse. Aside from Articles 39 and 40 which provide for criminal sanctions, Article 25 enumerates various infringements related to the financial markets which give rise to administrative sanctions imposed by an independent administrative body, namely the BFC. The draft proposal sets out rules according to which no specific evidence of the use of fraudulent means is required to establish the infringements and therefore impose sanctions, whilst still providing the person who has conducted a suspect transaction with sufficient safeguards. The effectiveness of the legal framework in the fight against market abuse is further enhanced by the fact that the draft proposal also allows the King to extend the scope of the prohibitions in order to adapt to rapid developments of the markets. It is furthermore noted that these provisions partly anticipate the Commission proposal for a directive on insider dealing and market manipulation, in particular as the draft proposal appoints the BFC as the single administrative authority competent to handle infringements related to the financial markets in Belgium. The ECB welcomes these provisions, as they enhance investor

2 ECB Opinion CON/2001/38, OJ C 24, 26.01.2002, p.8.

confidence in the financial markets and therefore contribute to the financial stability of these markets.

7. Moreover, as regards the provisions on market abuse, the ECB notes that the draft proposal exempts the ECB, the NBB and the NCBs of the Eurosystem from the scope of the rules regarding infringements which give rise to administrative sanctions (Article 25 §1, 1°). An identical exemption is foreseen for the provisions regarding infringements giving rise to criminal sanctions (Article 40 §6, 1°). In line with the Commission proposal for a directive on insider dealing and market manipulation, the exemption could be extended to all the NCBs of the Member States of the European Communities, including those of Member States which have not yet adopted the euro. Moreover, it is noted that the ECB's opinion on the above mentioned proposal requested that the exemption be extended to cover not only monetary policy and foreign exchange operations, but also operations carried out by the central banks, or on their behalf, relating to foreign reserve management, in order to enable the ESCB to carry out those basic tasks as part of Article 105(2) of the Treaty. In the ECB's view the exemption included in the draft proposal should be amended accordingly.

8. The provisions contained in Chapters III to V of the draft proposal concerning the reform of the structure of financial supervision in Belgium are broadly welcomed by the ECB. The aim of these provisions is to ensure a flexible and up-to-date supervisory framework taking into account *inter alia* the principle of sound corporate governance of supervisory authorities and the need for supervisory cooperation and information-sharing. One of the main merits of the new structure perceived by the ECB is the envisaged reinforcement of the cooperation mechanisms among supervisory authorities, and between them and the central bank. The draft proposal rightly points to the need to achieve synergy when addressing the systemic risk to financial stability and (macro) prudential supervision. This synergy is indeed an important condition to allow central banks to adequately monitor risks to financial stability at the national level and to enable the Eurosystem in turn to contribute adequately to the monitoring process from the perspective of an area. In this context, the ECB has four specific observations to make.

9. First, the overall effectiveness of the coordination process. The separation of the financial supervisory institutions is preserved as both the BFC and the Insurance Control Office (ICO) remain separate legal entities distinct from the NBB. However, the new structure entails the establishment of two bodies to promote coordination: the 'Supervisory Board of the Financial Services Authority' and the 'Financial Stability Committee', each having members from the NBB, the BFC and the ICO. The ECB understands that the establishment of these two bodies is intended to assure effective coordination among the three institutions in light of the dynamic environment in which banks and other financial institutions operate as well as to make the international dimension of supervision possible. The ECB would like to point out that the provisions concerning the two bodies could clarify better their particular advisory and decision-making competencies. This is in order that the effectiveness of the coordination process is not affected by possible uncertainties

regarding the precise respective roles of each body. In particular, the competencies and responsibilities of the two bodies as well as their contribution to supervisory cooperation should be clearly distinguishable. It might be worth noting that the word 'Authority' in the former's name could be misleading since no financial services authority as such is intended to be established.

10. Second, the nature of the Financial Stability Committee. The ECB understands that this committee is presented as a platform for discussion and consensus building among the three institutions in matters relating to financial stability. However, some uncertainty could possibly arise over the existence or non-existence of decision-making competencies of this committee from the combined reading of the relevant articles of the draft proposal and the comments on these articles. The articles refer to deliberations of this committee that are without prejudice to the responsibilities of one or the other of the management committees for the issue that is the subject of the deliberations. This provision seems to indicate that the committee's tasks are short of decision-making functions. On the other hand, in the comments on the articles, the notion of a 'double majority', referring to the committee itself and the management boards of the NBB, BFC and ICO, is introduced. This could be interpreted as attributing decision-making competencies to the committee, which could, under specific but possibly unlikely circumstances, result in a blocking of decisions in cases where the committee's view diverged from that of the management boards of its sponsoring institutions. The ECB would appreciate a clarification of this issue with a view to assuring effective and transparent decision-making processes.

11. Third, the tasks of the central bank. The ECB notes that the matters of common interest which may be subject to the attention of the Financial Stability Committee, in accordance with Article 117 §3, relate to the pursuance of the statutory tasks of each of the authorities participating in the committee. Whilst recognising the merit of the establishment of the Financial Stability Committee as a policy coordination body, the ECB considers that it should be clarified by means of a specific provision that the tasks attributed to this committee must not compromise the independent pursuance of the competencies of the central bank, in accordance with its statute. This is relevant, first, with regard to the preservation of the 'stability of the financial system as a whole' and 'crisis management', which may directly concern certain functions of the central bank. In this context, the ECB would also see value in attributing to the central bank the statutory task of contributing to the stability of the financial system. The explicit inclusion of such a task in the NBB's Statute and Organic Law would prove beneficial to the institutional framework proposed in the draft proposal. Central banks are in general in an advantageous position to contribute to the pursuance of financial stability, both on an ongoing basis and in crisis management situations, given their insight into monetary and financial market developments and involvement in payment systems and monetary policy operations. This would also clarify the contribution of the central bank to the activities of the Financial Stability Committee. Second, the above consideration is also relevant with regard to the Financial Stability Committee's task of working on issues relating to the interaction between prudential control and the 'oversight' of payment systems. The ECB notes that this should be

without prejudice to the exclusive responsibility of the NBB, under its Organic Law, to ensure the proper, efficient and sound operation of clearing and payment systems, which is in line with the provisions laid down in Article 105(2) of the Treaty. Lastly, the ECB considers that the pooling of personnel resources to the activities of the Financial Stability Committee, as foreseen by Article 118, should be done in a manner that does not compromise the central bank's autonomy in the pursuance of its statutory tasks, including its desirable contribution to the pursuance of financial stability. In this context, it is noted that the draft proposal contains references to future royal decrees, which could be used to introduce far-reaching amendments to the intended institutional structure and its coordination mechanisms. The ECB understands that the Belgian authorities will consult the ECB when such measures are proposed provided that that they fall within the ECB's fields of competence.

12. Fourth, the corporate governance of the supervisory authorities. The ECB recognises the desirability and necessity of enhancing the BFC's and ICO's organisational structures, through the establishment within these two institutions of the 'Supervisory Board', the 'Management Board, the 'Chairman' and the 'Secretary General'. The draft proposal is intended to reshape the current structures in light of the requirements of sound corporate governance to assure efficient, transparent and predictable intra-institutional procedures in the future. To that end, the draft proposal aims at establishing a clear separation between management and controlling tasks as well as a clear allocation of responsibilities regarding inquiries and decisions taken as a result thereof. Against this background, the ECB emphasises the need to insert in the draft proposal a provision according to which the members of the management boards would act freely in their personal capacity. This would avoid any inter-institutional coordination burden prior to decision-making that could arise otherwise.

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 24 April 2002.

The President of the ECB

[signed]

Willem F. DUISENBERG