EN

EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 11 December 2006

at the request of the Luxembourg Ministry of Finance

on a draft law on markets in financial instruments

(CON/2006/56)

Introduction and legal basis

On 26 October 2006 the European Central Bank (ECB) received a request from the Luxembourg Ministry of Finance for an opinion on a draft law on markets in financial instruments (hereinafter the 'draft law').

The ECB competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community and on the third, fourth and fifth 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], as the draft law relates to a national central bank (NCB), to the collection, compilation and dissemination of monetary, financial, banking, payment systems and balance of payments statistics and 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

1.1 While the main purpose of the draft law is to transpose Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC[2], it also amends the Law of 23 December 1998 on the monetary status of the Grand Duchy of Luxembourg (hereinafter the 'BCL law') in respect of (a) the use of claims as securities for loans granted by the Banque centrale du Luxembourg (BCL); and (b) the protection of the accounts held with the BCL in the context of common monetary or exchanges policies; and (c) the exchange of information required in the European System of Central Bank (ESCB) context with the Commission de surveillance du secteur financier (Commission for Supervision of the Financial Sector, hereinafter the 'CSSF'), the Commissariat aux assurances (Insurance Commission)

1 OJ L 189, 3.7.1998, p. 42.

2 OJ L 145, 30.4.2004, p. 1.

and the Service central de la statistique et des études économiques (Central Service for Statistics and Economic Studies (STATEC)).

1.2 In accordance with the consultation request by the Ministry of Finance of Luxembourg, this opinion is limited to Article 172 of the draft law, which exclusively contains the changes to be made to the BCL Law, without relating to the transposition of Directive 2004/39/EC.

2. The use of claims as security for loans granted by the BCL

2.1 Article 172 of the draft law introduces an Article 22-1 in the BCL Law which creates a specific *sui generis* method of perfection and enforceability for pledges of claims as security for loans granted by the BCL[3]. The draft law creates a register where pledges of claims in favour of the BCL are recorded, which is kept, organised and made accessible to third parties according to rules to be laid down by the BCL. The sole entry in the register of a pledge on a claim in favour of the BCL renders the pledge effective against all third parties and ensures that the BCL's rights in respect of such claim have priority over any other rights created in favour of third parties after such entry. If a third party receives a payment from the debtor of a claim previously pledged to the BCL through an entry in the registry this third party must transfer the amount to the BCL. In addition, no set-off may have the effect of undermining the security in favour of the BCL in respect of its claims.

2.2 The ECB welcomes this new provision as it will facilitate the use of credit claims as security for BCL loans, in line with the single list of eligible collateral for the Eurosystem's credit operations, which will include credit claims from 1 January 2007[4]. The ECB understands that without this special regime, the creation of a pledge on a credit claim would be governed by Article 5(3) of the Law of 5 August 2005 on financial collateral arrangements, under which the creation of a pledge over a credit claim is only valid and effective against third parties on notification to or acceptance by the debtor of the pledged credit claim. Under the new regime, such notification to the debtor would no longer be required, since the sole entry in the register would ensure that the pledge is valid and effective against 'third parties', including the debtor.

2.3 The ECB understands from the new Article 22-1(3) and (4) that credit claims may be pledged by means of an entry into the register only in favour of the BCL and that Article 5(3) of the Law of 5 August 2005 remains applicable to pledging of credit claims to any other entity falling within the ambit of the latter law. While the draft law provides for the precedence of the BCL's security interest over any subsequent security interest concerning the pledged claims, it does not specifically address

---

3 For a similar legal provision see also ECB Opinion CON/2006/40 of 3 August 2006 at the request of the Belgian Ministry of Finance on a draft law amending the Organic Statute of the National Bank van België/Banque Nationale de Belgique.

4 See *Decisions taken by the Governing Council of the ECB (in addition to decisions setting interest rates) July 2005* and the related press release of 22 July 2005 entitled 'Eurosystem collateral framework; Inclusion of non-marketable assets in the Single List', available on the ECB's website at www.ecb.int.

the potential conflict which may arise between the BCL's security interest resulting from an entry into the register and a third party's security interest resulting from the prior application of Article 5(3) of the Law of 5 August 2005. Unless the Luxembourg legislator intends to grant an absolute priority to the BCL, on entry in the registry of the pledge over credit claims, regardless of the date of such entry, which, for reasons of legal clarity should be expressly spelled out in the draft law, such conflict would be solved by application of the rule '*prior tempore potior iure*'. Consequently, the prior pledge created by application of the Law of 5 August 2005 would prevail over the BCL's pledge. Therefore, the ECB would encourage the BCL to obtain assurance from the debtor or from the credit institution/pledgor that the claim subject to an entry into the BCL register has not been previously pledged in favour of a third party.

2.4 Concerning the draft law's scope of application, the ECB understands that it is only applicable where the BCL uses such credit claims as security for the loans it grants itself. The ECB would recommend also encompassing situations where the BCL is acting as agent for other Eurosystem central banks for the cross-border collateralisation of credit claims in the framework of Eurosystem credit operations.

3. The immunity from seizure for accounts held with the BCL in the context of common monetary or exchange policies

3.1 Article 172 of the draft law provides for the insertion in the BCL Law of an Article 27-1 containing two paragraphs.

3.2 The first paragraph takes over the substance of the former Article 4(4) of the BCL Law and grants a lien to the BCL, the ECB and other NCBs forming an integral part of the ESCB over the assets held by the debtor 'either with the central bank or with a system for the settlement of securities transactions or with another counterparty in Luxembourg' and which guarantees 'the claims deriving from operations in the context of common monetary or exchange policies', such lien having 'the same rank as the pledgee's charge'.

3.3 The second paragraph, which is new, provides: 'No account with the central bank intended to be used in the context of monetary or exchange policies may be subjected to any seizure, sequestration or blocking order'. As the euro is increasingly used as an international reserve currency and in line with recent changes made to the laws of other Member States[5], the ECB would recommend that this provision clarifies in an unambiguous manner the protection usually granted to foreign reserves held by the BCL by inserting the words "as well as of the management of foreign reserves assets held for foreign central banks or foreign States' after 'no account with the Central Bank intended to be used in the context of common monetary or exchange policies'.

---

5 For instance, Article L.153-1 inserted in the French Monetary and Financial Code by Act No 2005-842 of 26 July 2005; Article 22.a of Banka Slovenije's Statute; seventh Additional Provision added to the Law 13/1994 on the autonomy of the Banco de España (Banco de España's Statute) by Law 22/2005 of 18 November 2005.

4. Exchange of information between BCL, the CSSF, STATEC and the Commissariat aux assurances

4.1 Article 33 of the draft law currently provides that breaches by the BCL's agents and auditors of their professional secrecy may be criminally sanctioned. Article 33(2) authorises nonetheless the communication of information between the BCL and the CSSF, such communication being however 'without prejudice to the rules of professional secrecy applicable to the ESCB'. Article 172(d) of the draft law amends this provision in the two following respects. First, it no longer refers to the rules of professional secrecy applicable to the ESCB. Second, the BCL may now exchange information 'to the extent necessary for the performance of its tasks' not only with the CSSF, but also with the insurance commission and the STATEC 'subject to reciprocity'.

4.2 The ECB generally welcomes the possibility for information to be exchanged between the BCL and the authorities supervising financial institutions and insurance undertakings, as well as other authorities compiling national statistics and contributing to European statistics. These authorities' tasks are increasingly complementary and a proper exchange of information among them undoubtedly benefits all, not only by limiting the administrative burden but also by promoting an efficient performance of their respective tasks and in the interest of financial stability in general. For the sake of clarity, the ECB recommends that the draft law continues to refer to the rules of professional secrecy applicable to the ESCB. In the area of statistics, the confidentiality regime is ensured by Council Regulation 2533/98/EC[6]

4.3 Finally, the ECB understands that reciprocity does not apply to individual data exchange between authorities in view of their differing tasks, but instead implies the existence of a general bilateral exchange of information.

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

Done at Frankfurt am Main, 11 December 2006.

[signed]

The President of the ECB

Jean-Claude TRICHET

6 Council Regulation 2533/98/EC of 23 November 1998 concerning the collection of statistical information by the ECB (OJ L 318, 27.11.1998, p. 8).