EUROPEAN CENTRAL BANK

# OPINION OF THE EUROPEAN CENTRAL BANK

**of 9 July 2002**

**at the request of the Belgian Ministry of Finance**
**on a draft for a new Article 879 of the Companies Code, introduced by the Programme Law, as well as several articles interpreting and amending the Organic Law of the Nationale Bank van België/Banque Nationale de Belgique, introduced by paragraphs 6 to 10 of Article 141 of the draft law on the prudential supervision of the financial sector and financial services**

**(CON/2002/18)**

1. On 19 June 2002 the European Central Bank (ECB) received a request from the Belgian Ministry of Finance for an opinion concerning a draft for a new Article 879 of the Companies Code, introduced by the programme law, as well as paragraphs 6 to 10 of Article 141 of the draft law on prudential supervision of the financial sector and financial services (the 'draft law'). The draft provisions clarify the relationship between the specific institutional framework of the Nationale Bank van België/Banque Nationale de Belgique and the general rules on public limited liability companies, which apply supplementarily to the Nationale Bank van België/Banque Nationale de Belgique.

2. The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community and the third 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 proposal contains provisions concerning the Nationale Bank van België/Banque Nationale de Belgique. 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 welcomes the fact that Article 141(6) of the draft law enhances legal certainty by explicitly stating how the supplementary nature of the provisions concerning public limited liability companies should be understood. It should be noted that this interpretation of Article 2(2) of the Organic Law on the Nationale Bank van België/Banque Nationale de Belgique (the 'Organic Law') coincides with the assumptions used by the European Monetary Institute (EMI)when assessing the compatibility of Belgian legislation, including the statutes of

1 OJ L 189, 3.7.1990, p. 42.

the Nationale Bank van België/Banque Nationale de Belgique, with Community law[2]. The ECB recalls that although Member States are free to subject their national central banks (NCBs) to either public or private law, the provisions governing the legal status of an NCB – in the present case company law – may not infringe the requirements of the Treaty or the Statute of the European System of Central Banks and of the European Central Bank. In the opinion of the ECB, any other interpretation of Article 2(2) would not be compatible with the requirements of the Treaty and the Statute, in particular those concerning independence contained in Article 108 of the Treaty and Article 7 of the Statute. In this context, the ECB also takes note of the new article introduced into the Companies Code which deals with the entering of the Nationale Bank van België/Banque Nationale de Belgique on the list of companies the shares of which may be offered to the public. In the ECB's opinion, the provision concerning the inclusion of an explicit comment in this list drawing the public's attention to the fact that the provisions concerning limited liability companies apply to the Bank only supplementarily rightly underlines the specific institutional framework of the Nationale Bank van België/Banque Nationale de Belgique.

4. Article 141(7) of the draft law introduces an Article 9a into the Organic Law which confirms the legal status of the official foreign reserves held by the Nationale Bank van België/Banque Nationale de Belgique. Article 105(2) of the Treaty states that one of the fundamental tasks of the European System of Central Banks (ESCB) is 'to hold and manage the official foreign reserves of the Member States'. The ECB welcomes the fact that this fundamental task is correctly reflected in Belgian legislation by the draft Article 9a of the Organic Law.

   The new article should however be more explicit as to the fact that the Belgian government cannot influence the management of the official foreign reserves held by the Nationale Bank van België/Banque Nationale de Belgique, which is carried out independently by the Nationale Bank van België/Banque Nationale de Belgique as an integral part of the Eurosystem.

5. Article 141(8) of the draft law makes more specific an article which deals with the auditing of legal entities entrusted with the performance of tasks which do not fall within the domain of the ESCB. In principle this provision does not call for any specific comments of the ECB as it concerns a matter which does not fall within the field of competence of the ECB. However, the ECB would like to underline that the auditing of such entities must not affect the independence of the Nationale Bank van België/Banque Nationale de Belgique. Therefore the Nationale Bank van België/Banque Nationale de Belgique should maintain some form of control over such legal entities, which should be of a sufficient degree in order for it to safeguard its independence.

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2 A copy of the 1998 Convergence Report can be found on http://www.ecb.int/emi/pub/pdf/converg/english.pdf. In the 1997 Convergence Report the EMI noted that 'General company law is explicitly recognised as a supplementary statutory source'.

6. Article 141(9) of the draft law concerns interpretation of a provision on the right of the Nationale Bank van België/Banque Nationale de Belgique to issue banknotes. The ECB recalls that, under Article 106(1) of the Treaty as well as Article 16 of the Statute, the ECB and the NCBs may issue euro banknotes. Primary Community law has therefore foreseen a system of a plurality of issuers of euro banknotes, which has been confirmed by Article 2 of Decision ECB/2001/15 of 6 December 2001 on the issue of euro banknotes. This provides that 'The ECB and the NCBs shall issue euro banknotes'. This interpretation of Article 31(2) of the Organic Law, which is an explicit confirmation of the right to issue of the Nationale Bank van België/Banque Nationale de Belgique, is fully in line with these provisions of Community law. This explicit confirmation is welcomed by the ECB as it enhances legal certainty.

7. In the tenth and last paragraph of Article 141 of the draft law, the Belgian legislator further clarifies the accounting rules applicable to the Nationale Bank van België/Banque Nationale de Belgique by reinstating Article 33 of the Organic Law, which consists of two separate paragraphs. The first paragraph provides that the accounts of the Nationale Bank van België/Banque Nationale de Belgique and, where appropriate, consolidated accounts, 'shall be drawn up (1) in accordance with this Law and the binding rules laid down in implementation of Article 26.4 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank; (2) for the remainder, in accordance with the rules laid down by the Council of Regency. Articles 2 to 4, 6 to 9 and 16 of the Law of 17 July 1975 concerning company accounts and the decrees implementing them shall be applicable to the Bank with the exception of the decrees implementing Articles 4, sixth subparagraph, and 9(2)'. The ECB welcomes this provision, which follows the recommendation of Article 2(2) of Guideline ECB/2000/18 of 1 December 1998 on the legal framework for accounting and reporting in the European System of Central Banks which states: 'In order to achieve consistency and comparability between ESCB and national regimes, it is recommended that NCBs should, to the extent possible, follow the rules set out in this Guideline for their national reports and accounts.'

8. The second paragraph of Article 33 of the Organic Law further introduces the control of the accounts of the Nationale Bank van België/Banque Nationale de Belgique by one or more auditors whose appointment, resignation or dismissal is governed by the Companies Code. The ECB underlines the importance of respecting the specific institutional framework of the Nationale Bank van België/Banque Nationale de Belgique. Any implementation of control mechanisms must take into account that within this framework it is the Council of Regency and not the General Meeting that approves the annual accounts in accordance with Article 20(4) of the Organic Law. Such implementation should not negatively affect the good functioning of the Nationale Bank van België/Banque Nationale de Belgique as an integral part of the ESCB.

9. 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 9 July 2002.

*The President of the ECB*

[signed]

Willem F. DUISENBERG