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EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 14 May 2009

on broadening the Banque Centrale du Luxembourg's oversight role by a draft law on payment services, electronic money institutions and settlement finality in payment and securities settlement systems

(CON/2009/46)

Introduction and legal basis

On 9 April 2009 the European Central Bank (ECB) received a request from the Banque Central du Luxembourg (BCL) for an opinion on a draft law on payment services, electronic money institutions and on settlement finality in payment and securities settlement systems (hereinafter the 'draft law'), which also amends the Law of 23 December 1998 on monetary status and on the Banque Centrale du Luxembourg (hereinafter the 'Organic Law of the BCL').

The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community and the second, third 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 contains provisions on means of payment, the BCL and 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 provisions

1.1 The main purpose of the draft law is to implement in national law Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC[2]. In addition:

(a) Article 58(3) of the draft law requires the BCL to notify the Conseil de la concurrence (the Competition Council) when it detects any infringement of competition rules related to access to payment systems;

(b) Articles 107 to 110 of the draft law broaden the scope of the BCL's oversight role in respect of payment instruments and payment and settlement systems;

1 OJ L 189, 3.7.1998, p. 42.

2 OJ L 319, 5.12.2007, p. 1.

(c) Article 124(1) and (4) of the draft law emphasises the BCL's responsibility for promoting the smooth operation of payment systems under Article 105(2) of the Treaty; and

(d) Article 124(3) and (5) of the draft law relates to the appointment of an independent auditor for the BCL and removes the reciprocity requirement with respect to the exchange of confidential information between the BCL, the Commission de surveillance du secteur financier (CSSF, the Financial Sector Supervisory Commission), the Commissariat aux Assurances (the Insurance Commission) and the Service central de la statistique et des études économiques (STATEC, the National Statistical Institute).

1.2 This opinion only addresses the provisions of the draft law relating to the BCL and payment and settlement systems that go beyond the strict implementation of Community directives. While acknowledging the importance of Directive 2007/64/EC for the establishment of the Single European Payments Area (SEPA), implementation of this Directive in national law is not addressed in this opinion. Similarly, the implementation 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] and of Directive 2000/46/EC of the European Parliament and of the Council of 18 September 2000 on the taking up, pursuit of and prudential supervision of the business of electronic money institutions are not considered in this opinion[4].

2. General observations

The ECB welcomes the draft law which will comprehensively govern payment services, electronic money, and payment and settlement systems in Luxembourg. Also, implementation of Directive 2007/64/EC will fulfil the regulatory preconditions for the introduction of SEPA.

3. Specific observations

3.1 *Notification by the BCL to the Conseil de la Concurrence*

Regarding the requirement for the BCL to inform the Conseil de la Concurrence of any infringement of competition rules related to access to payment systems[5], it should be made clear that the BCL is not responsible for the enforcement of competition policy, which remains exclusively within the competence of the Conseil de la Concurrence.

3.2 *The BCL's role with respect to payment instruments and payment and settlement systems*

The BCL's role with respect to payment instruments and to payment and settlement systems is broadened in the two following respects.

3 OJ L 166, 11.6.1998, p. 45.

4 OJ L 275, 27.10.2000, p. 39. See also the proposal for a Directive of the European Parliament and of the Council on the taking up, pursuit and prudential supervision of the business of electronic money institutions, amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC (COM(2008) 627 final).

5 Article 58(3) of the draft law.

First, the CSSF is currently the authority responsible for the prudential supervision of payment and securities systems. This responsibility is without prejudice to the tasks and competences of the European System of Central Banks pursuant to the Treaty and the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB'). As a result, all systems in which the BCL participates are considered to be designated as 'systems' from the moment the BCL gives notice of such systems to the European Commission. Under the draft law, the BCL is given the exclusive power to designate systems as payment and settlement systems and the Ministry of Finance is responsible for their notification to the Commission[6].

Second, under Article 124 of the draft law, the BCL is competent to 'ensure the efficiency and safety of payment systems and securities settlement systems, as well as the safety of payment instruments' and 'the means of coordination and cooperation employed for the performance of these tasks [is] subject to agreement between the BCL and the CSSF, respecting the legal competences of the parties'. In addition, under the draft law, the BCL may require payment systems, securities settlement systems and issuers of payment instruments to provide any information relating to the operation of these systems or relating to payment instruments that would be necessary in order to assess their efficiency and safety.

3.2.1 The ECB welcomes these amendments since (a) they clarify the division of competencies between the CSSF and the BCL as far as payment instruments, payment systems and securities settlement systems are concerned, in line with Article 105(2) of the Treaty and Article 3.1 of the Statute of the ESCB, and (b) they broaden the BLC's oversight role to cover all payment and settlement systems, regardless of their designation under Directive 98/26/EC. The draft law takes into account the ECB's recommendations in Opinion CON/1999/19, Opinion CON/2008/42 and Opinion CON/2008/17[7] and by doing so, further facilitates the BCL's effective performance of its financial stability role, which is supported by its authority to supervise the liquidity management of market operators[8].

3.2.2 For the sake of clarity, an express reference to the concept of 'oversight', which is recognised as a separate function under the Maastricht Treaty[9] could be made in Article 2(5) of the Organic law of the BCL[10]. In addition, since the scope of the BCL's oversight role is broadened, it is necessary to ensure that the BCL is provided with sufficient human and financial resources, both in terms of

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6 Articles 107 to 110 of the draft law.

7 All ECB opinions are available on the ECB's website at www.ecb.europa.eu/ecb/legal/opinions/html/index.en.html. In Opinion CON/1999/19, the ECB stated that the division of competence between the CSSF and the BCL would directly infringe the payment system oversight competence of the ECB and would create a situation of conflict between the BCL and the CSSF in relation to the oversight function. The ECB also stated that this would not allow for an adequate distinction to be made between the function of prudential supervision, on the one hand, and those of payment systems oversight, on the other hand. See also paragraph 4.8 of Opinion CON/2008/42 and paragraph 4.4 of Opinion CON/2008/17.

8 See paragraph 4.3 of Opinion CON/2008/42.

9 See the 'Eurosystem Oversight Policy Framework' of February 2009, and in particular its Section 3, available on the ECB's website at www.ecb.europa.eu.

10 In Article 27(3) of the Organic law of the BCL, the reference to Article 2(6) should be to Article 2(5).

quantity and quality, to carry out its new tasks without affecting its capacity to carry out its other Eurosystem-related tasks[11].

3.2.3 According to the explanatory memorandum to the draft law[12], the agreements to be entered into between the BCL and the CSSF under Article 2(5) of the Organic Law of the BCL concern the financing of the BCL's oversight activities, as the BCL, unlike the CSSF, is not able to levy taxes on the financial institutions subject to its oversight. As stated in Opinion CON/2009/7[13], the BCL's overall independence would be jeopardised if it could not autonomously avail itself of sufficient financial resources to fulfil its mandate. While the ECB notes that, in the context of its oversight role over payment systems, securities settlement systems and payment instruments, the BCL may request information and undertake site visits to collect such information, the ECB regrets that, despite the recommendations in Opinion CON/2008/17[14], the BCL does not yet have the power to impose sanctions.

3.3 *Appointment of the BCL's external auditor*

Under Article 124(3) of the draft law, an external auditor is appointed for five financial years. This provision follows the principles adopted by the ECB's Governing Council[15].

3.4 *The exchange of information between the BCL, the CSSF, STATEC and the Commissariat aux Assurances*

Article 124(5) removes the reciprocity requirement with respect to the exchange of information between the BCL, the CSSF, STATEC and the Commissariat aux Assurances. In Article 124(5) of the draft law, the phrase 'subject to reciprocity' is deleted. The explanatory memorandum explains that deletion of this condition is necessary in order to enable regular exchanges of information between the competent authorities under normal circumstances, and most importantly, in a crisis situation. In the current environment, it is crucial that the relevant authorities are able to exchange information on any difficulties faced by financial institutions (including payment and securities settlement systems) that may endanger their financial soundness and ability to discharge their obligations in the normal course of business. The ECB welcomes this change, which indirectly follows up on the recommendation expressed in Opinion CON/2009/7[16] as regards the harmonisation of the rules governing the exchange of confidential information between the BCL, on the one hand, and STATEC, on the other hand.

11 See paragraph 3.1 of Opinion CON/2009/27.

12 Explanatory memorandum to the draft law, p. 88.

13 See paragraph 3.2.

14 See paragraphs 4.2 and 4.3.

15 Good Practices for the selection and mandate of External Auditors according to Article 27.1 of the Statute, as approved by the Governing Council of the ECB on 23 October 2008, which is available on the ECB's website at www.ecb.europa.eu.

16 See paragraph 3.3.

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

Done at Frankfurt am Main, 14 May 2009.

[signed]

The President of the ECB

Jean-Claude TRICHET