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EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 18 July 2007

at the request of the German Ministry of Finance

on a draft law amending the Law on investment and other laws

(CON/2007/21)

Introduction and legal basis

On 14 June 2007 the European Central Bank (ECB) received a request from the Federal Ministry of Finance for an opinion on the draft law amending the Law on investment and other laws *(Gesetz zur Änderung des Investmentgesetzes und zur Anpassung anderer Vorschriften)* (hereinafter the 'draft law').

The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community and the third, fourth 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], as the draft law relates to national central banks (NCBs), the collection, compilation and distribution of monetary, financial, banking, payment systems and balance of payments statistics, as well as to rules applicable to financial institutions insofar as they 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, the Governing Council has adopted this opinion.

1. Purpose of the draft law

1.1 The draft law aims at enhancing competitiveness of the investment fund industry in Germany. To this end, it envisages a large number of measures, in particular, deregulation, modernisation of open-ended property funds, promotion of product innovation and improved investor protection and corporate governance.

1.2 The draft law will align the Law on investment with Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)[2]. As a consequence, investment management companies (*Kapitalanlagegesellschaften*) will no longer qualify as credit institutions or be subject to the German Law on banking. This entails important changes in their regulation and supervision. Henceforth, investment management companies will be exclusively

1 OJ L 189, 3.7.1998, p. 42.

2 OJ L 375, 31.12.1985, p. 3.

subject to supervision by the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin*)) as sole regulator and supervisory authority, since the draft law abolishes the Deutsche Bundesbank's supervision of investment management companies, as well as their supervisory reporting requirements vis-à-vis the Bundesbank.

1.3 For instance, investment management companies will no longer be obliged to report their intention of forming a branch in another Member State or member of the European Economic Area[3]. The same would apply to changes related to branches[4]. Furthermore, investment management companies would no longer be required to provide the Deutsche Bundesbank with annual financial statements, management reports, audit reports[5] and to notify reductions in their start-up capital[6]. Similarly, investment management companies would not have to transmit their prospectus[7], interim reports, annual, semi-annual and dissolution reports on the funds under their management[8]. Moreover, the Deutsche Bundesbank would no longer be informed of the nomination of an auditor[9], and the auditors of the investment management companies would no longer have any duties towards the Deutsche Bundesbank[10]. As far as queries and investigatory powers regarding the prosecution of unauthorised investment deals by investment management companies are concerned, the supervisory powers rest with the BaFin and the Deutsche Bundesbank would not play any role in this context[11].

1.4 The draft law also restricts the rules concerning information exchange between the BaFin and the Deutsche Bundesbank. The amended § 18 of the Law on investment provides that the BaFin must provide the Deutsche Bundesbank with information and documents which it has received on the basis of the Law on investment only if this information is indispensable for the Deutsche Bundesbank to comply with its obligation of ensuring the stability of the financial system and if the Deutsche Bundesbank cannot obtain such information in another manner.

1.5 Furthermore, the draft law intends to abolish the need for prior consultation of the Deutsche Bundesbank by the Ministry of Finance with regard to the issue of the latter's statutory regulations containing more specific rules in the fields of accounting, valuation of any unit classes or any sub-funds[12], interim reports[13], derivatives[14], nature of risk management systems[15] etc.

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3 Article 1 of the draft law amending first sentence of § 12(1) of Law on investment.
4 Article 1 of the draft law amending first and third sentences § 12(4) of the Law on investment.
5 Article 1 of the draft law amending § 19 of the Law on investment.
6 Article 1 of the draft law amending § 97 of the Law on investment.
7 Article 1 of the draft law amending § 42(6) of the Law on investment
8 Article 1 of the draft law amending § 45 of the Law on investment.
9 Article 1 of the draft law amending § 19 of the Law on investment.
10 Article 1 of the draft law amending § 19 of the Law on investment.
11 Article 1 of the draft law amending § 19 of the Law on investment.
12 Article 1 of the draft law amending first sentence of § 34(3) of the Law on investment.
13 Article 1 of the draft law amending § 44 of the Law on investment.
14 Article 1 of the draft law amending the first sentence of § 51(1), (2), (3) of the Law on investment.
15 Article 1 of the draft law amending the first sentence of § 119 of the Law on investment.

1.6 In addition, several constraints deriving from the German Law on stock corporations (*Aktiengesetz*) would no longer apply to investment stock companies.

2. Financial stability and prudential role of a central bank

2.1 *General observations*

2.1.1 Article 105(5) of the Treaty establishing the European Community assigns to the European System of Central Banks the task of contributing to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system. The ECB has consistently favoured the involvement of central banks in prudential supervision due to their pivotal role in the financial system, in particular regarding implementing monetary policy and ensuring the proper functioning of payment systems[16]. Moreover, maintaining a close involvement by NCBs in prudential supervision is an important condition for allowing the Eurosystem to contribute adequately to monitoring the risks to financial stability in the euro area, in accordance with Article 105(5) of the Treaty, and to safeguard a smooth coordination between the central banking functions exercised at the Eurosystem level and the supervisory functions carried out at national level.

2.1.2 In this respect, the access of central banks to prudential information and cooperation between financial supervisory authorities and central banks are essential[17]. In particular from a financial stability perspective, the central bank would inevitably need to be involved in any crisis in financial markets. In that context, the ready availability of relevant information and the ability to interpret it are crucial.

2.1.3 In view of these considerations, the ECB supports the coordination and cooperation framework currently in force between the BaFin and the Deutsche Bundesbank, encompassing matters relating to the stability of the German financial system, the development of supervisory practice, as well as aspects of the day-to-day supervision of credit and financial services institutions. This is in line with the ECB's view that maintaining the close involvement of NCBs in prudential supervision is a mandatory condition to allow the Eurosystem to contribute adequately to monitoring the risks to financial stability in the euro area[18].

2.2 *Specific observations*

2.2.1 The ECB notes with concern that the draft law – particularly with regard to the abolishment of the direct reporting of information to the Deutsche Bundesbank and the prior consultation of the Deutsche Bundesbank by the Ministry of Finance – would introduce considerable legal

16 See, e.g. paragraph 2.1.2 of ECB Opinion CON/2006/15 of 9 March 2006 at the request of the Polish Minister of Finance on a draft law on the supervision of financial institutions and ECB Opinion CON/2006/20 of 25 April 2006 on the Dutch draft law concerning financial sector supervision.

17 See, e.g. paragraph 2.3 and 2.4 of ECB Opinion CON/2006/15 and paragraph 2.4 and 2.5 of ECB Opinion CON/2006/20.

18 See e.g. paragraph 5 of ECB Opinion CON/2001/35 of 8 November 2001 at the request of the German Ministry of Finance on a draft law establishing an integrated financial services supervision.

impediments to the Deutsche Bundesbank's access to information and information sharing on all matters relating to financial stability. Given the enhanced integration of financial services, the ECB deems that it is necessary to maintain the Deutsche Bundesbank's involvement in the definition of the scope of information to be reported by institutions and its up-to date access to the information that may be needed to perform its functions. The central bank should have the means to assess possible systemic implications for the money and capital markets as well as for payment and settlement systems stemming from cross-sectoral linkages and from the behaviour of complex financial groups.

2.2.2 The ECB is not in favour of the introduction of the condition in § 18 of the draft law that the Deutsche Bundesbank may acquire information from the BaFin only if there are no other means available to obtain such information. The introduction of this condition could materially impair the Deutsche Bundesbank's discharge of its obligations covered by its ESCB-related tasks, in particular in the field of financial stability[19]. In addition, the ECB proposes clarifying in the draft law that the information currently reported to the Deutsche Bundesbank is necessary and appropriate for the fulfilment of its tasks and that this information should continue to be received from the BaFin under § 18.

3. Statistical reporting requirements

The draft law does not have an impact on the Deutsche Bundesbank's statistical reporting requirements. In this regard, the ECB understands that the amendment made to § 18 of the Law on the Deutsche Bundesbank, which acknowledges the role of the Deutsche Bundesbank in the collection of statistics from investment companies and investment stock companies, is a mere technical adaptation since these companies would no longer qualify as credit institutions.

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

Done at Frankfurt am Main, 18 July 2007.

[signed]

The President of the ECB

Jean-Claude TRICHET

19 Moreover, even the explanatory memo attached to the amendment of § 18 of the law does not specify how the term 'by other means' has to be interpreted, i.e. whether it requires the Deutsche Bundesbank to seek the information from 'public sources' only or whether Deutsche Bundesbank has to liaise with other public authorities who might possess the information in question.