N^os 4695[1]
4696[1]

CHAMBRE DES DEPUTES

Session ordinaire 2000-2001

PROJET DE LOI

concernant la circulation de titres et d'autres instruments financiers

PROJET DE LOI

- **relative au transfert de propriété à titre de garantie**
- **modifiant et complétant la loi du 21 décembre 1994 relative aux opérations de mise en pension effectuées par des établissements de crédit**
- **modifiant et complétant la loi modifiée du 5 avril 1993 relative au secteur financier**
- **modifiant et complétant la loi du 21 juin 1984 relative aux marchés à terme traités en Bourse de Luxembourg et aux marchés à terme dans lesquels intervient un établissement de crédit**

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AVIS DE LA BANQUE CENTRALE EUROPEENNE

(9.10.2000)

1. On 4 August 2000, the European Central Bank (ECB) received a request from the Luxembourg Ministry of Finance for an ECB opinion on: 1. a draft law pertaining to the circulation of securities and other financial instruments *(„Draft Law 1")*; and 2. a draft law: a) concerning transfer of title intended to serve as security; b) amending and completing the law of 21 December 1994 concerning repurchase transactions carried out by credit institutions; c) amending and completing the amended law of 5 April 1993 concerning the financial sector; and d) amending and completing the law of 21 June 1984 concerning the options and futures markets of the Luxembourg exchange and concerning the forward markets in which a credit institution operates *(„Draft Law 2")*.

2. The ECB's competence to deliver an opinion is based on the second indent of Article 105 (4) of the Treaty establishing the European Community and on Article 2 (1) of Council Decision 98/415/EC of 29 June 1998 on the consultation of the ECB by national authorities regarding draft legislative provisions[1], as the legislative proposal contains provisions concerning means of payment. 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.

Draft Law 1

1. The ECB welcomes the Luxembourg initiative to further modernise its law of 1971 governing ownership and pledging of interests in securities held through intermediaries by allowing investors

1 OJ L 189, 3.7.1998, pp. 42-43.

and secured creditors to be certain that they have a distinct package of rights that cannot successfully be attached by adverse claimants and by simplifying pledging and realisation procedures.

2. With respect to Article 3, the definition of „dépositaire“ encompasses all institutions dealing with securities without making a clear difference between the activities related to securities settlement systems (SSSs) and the ones related to other financial intermediaries. The two types of activities have different business objectives, and have different roles in the organisation of the securities market infrastructure. It is the ECB's understanding that services that focus on issuers of securities and participants in SSSs, rendered by operators of SSSs, on the one hand, and services towards investors, mutual funds, SSSs and own activity rendered by other financial intermediaries, on the other, are not similar; and that, when performed in a single institution, the corresponding pools of assets ought to be segregated, in particular in case of loss-sharing and for the definition of their operational environment. In this respect, the current wording of Draft Law 1 may generate a certain confusion when reading Articles 4, 10, 11 and 14.

3. With respect to Article 4, the ECB understands that the transfer of securities from one account to another, with the same depository or with another depository, would be carried out upon the initiative of the „déposant“ and not the „dépositaire“.

4. With respect to Article 7, the ECB notes the importance of specifying the nature of entitlement to securities held on account with an intermediary or through several tiers of intermediaries. The ECB is also of the view that interests in securities held through one or several financial intermediaries can be defined or otherwise interpreted as a type of pro rata co-ownership right over the fungible pool of securities, or interests in securities, of the same issue held by the intermediary with whom the person entitled to the securities has a direct contractual relationship and evidenced solely by this person's account with the intermediary, and not as a traceable property right in individual securities or a mere contractual claim.

5. With respect to Article 13, the ECB favours the proposal to increase legal certainty and predictability in case of a holding of securities through a chain of account. This would seem to take account of the development of the system for holding, transferring and pledging interests in securities by book-entry to accounts with financial intermediaries. As a result, the selection of the law governing the characterisation, transfer and pledge of interests in securities represented or effected by book-entry to accounts with a financial intermediary is determined by reference to where the office of the financial intermediary maintaining such accounts is located or otherwise by reference to the intermediary's jurisdiction.

6. With respect to Article 15, the ECB welcomes the introduction of the non-seizability (with the exception of realisation of collateral) of the securities accounts opened in the books of an intermediary operating principally a payment system or a SSS. It is noted at the same time that this Article 15 is somewhat broader than Article 9 of the Belgian Royal Decree No. 62 of 10 November 1967, on which Article 15 is based. Indeed, such Article 9 provides that no attachment may be carried out on securities current/settlement accounts opened in the books of the interprofessional organisation. The ECB understands that the objective of this provision is to further reduce the systemic risk inherent in payment and SSSs which is a concern shared by the central bank community. At the same time, the ECB is inclined to think that the objective of reducing systemic risk can be achieved by limiting the non-seizability to securities settlement accounts rather than extend the scope to any securities account.

   In the first sentence of Article 15, the wording „de l'accord du dépositaire“ seems to suggest that the enforcement and/or the creation of a collateral arrangement over a securities interest is subject to the consent of the depository. This requirement seems peculiar since according to Article 9 of the Draft Law 1, pledges created in accordance with the requirements set out in the first sentence of the said Article are valid and enforceable and may be realised, without any further formalities. Hence, such requirement seems not to be in line with the aim of Draft Law 1 to simplify pledging and realisation procedures. It would be, moreover, questionable to confer a discretionary right to a depository to authorise the creation of a collateral arrangement over deposited securities.

7. Article 17, in the perspective of further reducing systemic risk inherent in payment and SSSs, reflects the provisions already included in the Decree of 17 February 1971 and grants intermediaries which operate principally a payment system or a SSS, a statutory lien over securities, claims, cash and other rights which participants hold on account with such intermediaries (as opposed to assets held by participants on behalf and for the account of their customers). The statutory lien secures the obligations of participants in a payment system or SSS arising from the clearing, settlement or netting of securities transactions (in a payment or SSS) vis-à-vis the intermediary. According to Draft Law 1. this statutory lien conferred to the benefit of these intermediaries supersedes all other privileges except those listed in Article 2101 of the Civil Code.

   It should be recalled that the draft legislative proposal implementing Directive 98/26/EC of the European Council and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems[1] (the „Directive“) in Luxembourg by amending the law of 5 April 1993, contains a new Article 61-3 which implements Article 9.1 of the Directive. Article 17 of the Draft Law should not negatively affect the provisions of Article 61-3 above concerning the rights of EU central banks and the ECB. The said Article 61-3 stipulates that the rights of the above central banks to collateral security provided to them shall not be affected by insolvency proceedings against participants or counterparties which provided the collateral security. These provisions should remain unaffected.

   The ECB is further concerned that some uncertainty may subsist for takers of collateral by way of pledge over assets held on account in a Luxembourg SSS. Indeed, the statutory lien granted by this Article 17 to intermediaries which operate principally a payment or a SSS could possibly prevail over contractual pledges with respect to the same assets held on account in a Luxembourg SSS. In this respect, the ECB is of the view that the relationship between the statutory lien and contractual pledges would benefit from further clarification. In order to strengthen legal certainty, in particular with regard to the effectiveness of collateral arrangements, the ECB would be in favour of excluding from the statutory lien any proprietary assets which participants have pledged to third parties.

   In addition, the wording of Article 17 seems to indicate that only obligations of participants arising from the clearing, settlement or netting of securities transactions would be covered to the exclusion of obligations of participants arising from the clearing, settlement or netting of payment transactions. This may seem somewhat peculiar considering that Article 17 covers both payment and SSSs.

8. With respect to Article 18, the ECB would like to express a reservation. This Article would allow depositories which operate principally a payment system or a SSS to credit with finality securities or other financial instruments to the accounts of their participants on the basis of an irrevocable and unconditional commitment 1) of a central bank, 2) of another operator of a payment or SSS authorised and supervised by the competent authorities of a Member State of the OECD, or 3) of a credit institution authorised and supervised by the competent authorities of a Member State of the OECD and authorised as a sub-depository by the above-mentioned intermediairies to credit such securities in their system to an account in the name of such depository or in the name of an intermediary or to otherwise deliver such securities to the depository. The ECB views this provision to be overly broad in scope. The equivalent of this Article 18 in Belgian law, for example, is much more restrictive and cautious. Indeed, the third paragraph of Article 4, 3° of the law of 2 January 1991 (as amended) makes it possible, but only by way of a specific Royal Decree, to authorise institutions which hold accounts in connection with the management of a securities clearing and settlement system to credit securities to the accounts of their participants on the basis of an irrevocable and unconditional commitment of the Nationale Bank van België/Banque Nationale de Belgique that the latter will credit such securities, within the same day and in the securities clearing and settlement system operated by the Nationale Bank van België/Banque nationale de Belgique, to an account in the name of such institution, or, as the cas may be, to an account in the name of an intermediary of such institution (in the securities clearing and settlement system operated by the National Bank van België/Banque Nationale de Belgique). It is also noted that the Banque centrale du Luxembourg does not, as is the case for the National Bank van België/Banque Nationale de Belgique, operate a securities clearing and settlement system.

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1 OJ L 166, 11.6.1998, pp. 45-50.

9. The ECB is of the view that provisional crediting of securities to the accounts of investors in a SSS prior to the final delivery of such securities ought to be avoided to the extent possible considering that doing so is of a nature to increase the systemic risk inherent in such systems. Il may be allowed on a case-by-case basis only and after examination of the identity and financial strength of the entities involved. A general statutory authorisation of such provisional crediting is hence not advisable. System operators who decide to credit a securities account prior to the final delivery of such securities must be fully aware of the risks incurred ans take appropriate safeguards in order to protect the interests of the investors and system participants.

10. Lastly, the ECB is of the view that the opportunity of this Draft Law 1 could be taken to introduce into Luxembourg law a statutory provision on segregation by depositories of clients' accounts and assets similar to the provision of Article 2.1 of Circular 2000/15 of the Commission de Surveillance du Secteur Financier.

Draft Law 2

11. The ECB welcomes the Luxembourg initiative to confirm the validity and enforceability vis-à-vis third parties of the collateralisation technique of fiduciary transfer of title (i.e. transfer of ownership intended to serve as security) used by professionals of the financial sector, both in situations of going concern and of bankruptcy. Outright transfer of title to collateral, as opposed to other forms of security interest, can be an attractive option for collateral takers and is indeed required under certain standard documentation governing securities lending, repurchase transactions and derivatives transactions.

    The ECB confirms that it has no objection to this opinion being made public by the competent national authorities at their discretion.

    Done at Frankfurt am Main on 9 October 2000.

The President of the ECB,
Willem F. DUISENBERG