

I

(Resolutions, recommendations, guidelines and opinions)

OPINIONS

EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 15 February 2007

at the request of the Council of the European Union on eight proposals amending Directives 2006/49/EC, 2006/48/EC, 2005/60/EC, 2004/109/EC, 2004/39/EC, 2003/71/EC, 2003/6/EC and 2002/87/EC, as regards the implementing powers conferred on the Commission

(CON/2007/4)

(2007/C 39/01)

Introduction and legal basis

On 29 and 31 January 2007 the European Central Bank (ECB) received requests from the Council of the European Union for an opinion on eight proposals for directives ⁽¹⁾ in the financial field (hereinafter 'the proposals') whose main objectives are to amend the comitology provisions of eight existing directives to incorporate provisions on a new comitology procedure (the 'regulatory procedure with scrutiny'), following the adoption of Council Decision 2006/512/EC of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission ⁽²⁾, and to repeal the provisions of the eight existing directives that provide for a time limit for the delegation of implementing powers to the Commission (the so-called 'sunset clauses'). The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community. 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. Observations

1.1 The ECB welcomes the new agreement on comitology reached between the European Parliament, the Council and the Commission, which is of great importance for the continued functioning of the Lamfalussy process.

⁽¹⁾ (1) Proposal for a Directive of the European Parliament and of the Council amending Directive 2006/49/EC on the capital adequacy of investment firms and credit institutions, as regards the implementing powers conferred on the Commission (COM(2006) 901 final); (2) Proposal for a Directive of the European Parliament and of the Council amending Directive 2006/48/EC relating to the taking up and pursuit of the business of credit institutions, as regards the implementing powers conferred to the Commission (COM(2006) 902 final); (3) Proposal for a Directive of the European Parliament and of the Council amending Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, as regards the implementing powers conferred on the Commission (COM(2006) 906 final); (4) Proposal for a Directive of the European Parliament and of the Council amending Directive 2004/109/EC relating to the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market as regards the implementing powers conferred on the Commission (COM(2006) 909 final); (5) Proposal for a Directive of the European Parliament and of the Council amending Directive 2004/39/EC relating to markets in financial instruments as regards the implementing powers conferred on the Commission (COM(2006) 910 final); (6) Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/71/EC relating to the prospectus to be published when securities are offered to the public or admitted to trading, as regards the implementing powers conferred on the Commission (COM(2006) 911 final); (7) Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/6/EC on insider dealing and market manipulation (market abuse), as regards the implementing powers conferred on the Commission (COM(2006) 913 final); (8) Proposal for a Directive of the European Parliament and of the Council amending Directive 2002/87/EC relating to the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate as regards the implementing powers conferred on the Commission (COM(2006) 916 final).

⁽²⁾ OJ L 200, 22.7.2006, p. 11.

- 1.2 The ECB has no specific comments on the proposals which are in line with the joint statement of the European Parliament, the Council and the Commission on the introduction of the new 'regulatory procedure with scrutiny' into the comitology framework ⁽³⁾.
- 1.3 Having regard to the importance of the role played by implementing measures in EU legislation in the financial services field, the ECB takes this opportunity to underline the importance of its advisory role under Article 105(4) of the Treaty, which requires the ECB to be consulted 'on any proposed Community act in its fields of competence'. As recently noted ⁽⁴⁾, 'the ECB considers that proposed Level 2 acts constitute "proposed Community acts" within the meaning of Article 105(4) of the Treaty' ⁽⁵⁾. Therefore the Treaty provision which requires the ECB to be consulted on any proposed Community act in its field of competence includes an obligation for it to be consulted on these implementing acts ⁽⁶⁾.

Done at Frankfurt am Main, 15 February 2007.

The President of the ECB
Jean-Claude TRICHET

⁽³⁾ Statement by the European Parliament, the Council and the Commission concerning the Council Decision of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission (2006/512/EC), (OJ C 255, 21.10.2006, p. 1).

⁽⁴⁾ ECB Opinion CON/2006/57 of 12 December 2006 on a draft Commission Directive implementing Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards the clarification of certain definitions.

⁽⁵⁾ Under the Lamfalussy framework the implementing acts are referred as 'Level 2 acts'.

⁽⁶⁾ The lack of consultation between Community institutions has been the subject of several judgments by the Court of Justice. On the obligation to consult the European Parliament, see Case 138/79 *Roquette Frères* [1980] ECR 3333 and Case C-21/94 *Parliament v Council* [1995] ECR I-1827, paragraph 17. On the obligation of the High Authority to consult the Council and the Consultative Committee under the ECSC Treaty, see Case 1/54 *France v High Authority* [1954-56] ECR 1, at p 15 and Case 2/54 *Italy v High Authority* [1954-56] ECR 37, at p 52, which was confirmed by Case 6/54 *Netherlands v High Authority* [1954-56] ECR 103, at p 112. As far as Article 105(4) of the Treaty is concerned, in Case C-11/00 *Commission v European Central Bank* [2003] ECR I-7147, Advocate General Jacobs emphasised that: 'Consultation of the ECB on proposed measures in its field of competence is a procedural step, required by a provision of the Treaty, which is clearly capable of affecting the content of the measures adopted. Failure to comply with such requirement must, in my view, be capable of leading to the annulment of the measures adopted', Opinion of Advocate General Jacobs given on 3 October 2002, paragraph 131.