

## Circular

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### **Circular on special mechanisms (unofficial translation)**

#### Scope

*Credit institutions, stockbroking firms, insurance and reinsurance companies, payment institutions and electronic money institutions, central counterparties, central securities depositories and institutions supporting central securities depositories operating in Belgium.*

#### Summary/Objectives

*Financial institutions are prohibited under the various supervisory laws from setting up special mechanisms with the aim or effect of enabling or facilitating tax fraud by third parties. The prohibition on setting up a special mechanism was made explicit in the supervisory laws by the Law of 2 June 2021 on miscellaneous financial provisions on combating fraud. The existence of a “special mechanism” in respect of which the NBB may set a time limit for remedying it and for which remedial measures may be taken, should be determined on a case-by-case basis and by means of an a posteriori investigation. However, it is considered appropriate to clarify the provisions in the light of a number of typical transactions. This Circular elaborates on the prohibition on setting up special mechanisms. The annexed document contains an updated list of practices that are considered prohibited special mechanisms.*

Dear Sir,  
Dear Madam,

1. Credit institutions, stockbroking firms, insurance and reinsurance companies, payment institutions and electronic money institutions, central counterparties, central securities depositories and institutions supporting central securities depositories operating in Belgium are prohibited under the various supervisory laws from setting up special mechanisms<sup>1</sup>.

A “special mechanism” refers to a process that meets the following four cumulative conditions<sup>2</sup>:

- 1° it has the aim or effect of enabling or facilitating tax fraud by third parties;
- 2° it is initiated by the institution or company itself or the institution or company clearly takes an active part in it, or it results from gross negligence on the part of the institution or company;
- 3° it involves a pattern of conduct or omission;
- 4° it is of a special nature, i.e. the institution or company knows or should know that the mechanism deviates from the standards and normal practices for banking, insurance and financial operations.

2. As in the past, the provisions of the supervisory laws in relation to special mechanisms do not fall under tax law. Article 36/4 of the Law of 22 February 1998 establishing the organic statute of the National Bank of Belgium<sup>3</sup> explicitly stipulates in this regard that the NBB, in carrying out its tasks referred to in Articles 12bis and 36/2 of the same Law (particularly the supervision of financial institutions), has no competence in respect of tax matters. The provisions of the supervisory laws continue to be part of the administrative status of the institutions and companies. These provisions aim to prevent financial intermediaries from carrying out operations that would enable or facilitate tax fraud by clients and that cannot be justified in the context of normal and proper operations or services provided. As these operations could damage the financial position and the reputation of the institution or company concerned, they are justified from a prudential perspective.

The NBB may impose coercive measures if it becomes aware of a special mechanism within the above-mentioned meaning. In that case, it will set a deadline by which the practices in question should cease. If the institution or company concerned does not comply with this, the NBB may adopt special remedial measures such as appointing a special commissioner, ordering the replacement of members of the governing body, suspending or prohibiting the performance of all or part of the institution’s activities and revoking its authorisation. The NBB may also impose administrative fines in this context.

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<sup>1</sup> The prohibition on setting up a special mechanism was explicitly inserted in the supervisory laws by the Law of 2 June 2021 on miscellaneous financial provisions on combating fraud. For a detailed explanation of this provision and its conditions of application, see the preparatory works and, in particular, the explanatory memorandum of this Law (Parl. Doc., Chamber, 2020-2021, doc 55, 1900/001, p. 4 et seq.).

<sup>2</sup> A long-standing concept in financial law, the term “special mechanism” was inserted by the Law of 30 June 1975 in the legal status of banks, private savings banks and certain other financial intermediaries. The Banking Commission’s Annual Report 1974-1975 states that “special mechanisms” should be understood as systematic processes involving a repetition of operations carried out under conditions alien to normal banking practice with the aim of facilitating tax fraud by third parties, mainly clients.

<sup>3</sup> Hereinafter referred to as “the NBB”.

3. The existence of a “special mechanism” in respect of which the NBB may set a time limit for remedying it and for which remedial measures may be taken, should be determined on a case-by-case basis and by means of an a posteriori investigation. However, it is considered appropriate to clarify the provisions in the light of a number of typical transactions<sup>4</sup>.

To assess what appropriate follow-up could be given to the recommendations of the Parliamentary Committee of Inquiry with regard to Optima Bank and the Special Committee on international tax fraud and the Panama Papers, a joint working group was established in 2018 with representatives of the Cabinet of Finance, the Special Tax Inspectorate, the NBB and the FSMA<sup>5</sup>. One of the recommendations of the Committee on international tax fraud and the Panama Papers related to the updating of the existing circulars and the communication on special mechanisms (recommendation 4).

In accordance with the advice of the above-mentioned joint working group, a new list was therefore drafted of practices that are considered prohibited special mechanisms<sup>6</sup>. In this context, it was determined what mechanisms could be removed from the existing lists, what mechanisms had to be reformulated, if any, and what mechanisms should be added. Furthermore, the legislative references were amended. Finally, the scope of the list was expanded: it is now also aimed at payment institutions, electronic money institutions, central counterparties, central securities depositories and institutions supporting central securities depositories<sup>7</sup>.

The annexed document was subject to a consultation of the sector (Febelfin, Assuralia, IREFI/IRAIF and the Compliance Forum).

Like the previous documents, the annexed text constitutes a non-exhaustive list of typical transactions that are considered administrative/prudential special mechanisms.

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<sup>4</sup> By way of the Circulars of 2 February 1976 and 25 January 1977, the former Banking Commission provided banks with a list of practices to be considered “special mechanisms”. These two documents were updated and replaced by Circulars D1 97/9 to credit institutions and D4 97/4 to investment firms of the former Banking and Finance Commission (BFC) of 18 December 1997. In addition, the former Insurance Supervision Office (Office de Contrôle des Assurances/Controledienst voor de Verzekeringen) issued Communication No D. 207 of 30 November 2001 to insurance companies.

<sup>5</sup> The “Special Mechanisms” Document was finalised following the entry into force of the Law of 2 June 2021 on miscellaneous financial provisions on combating fraud, so that this Law could also be taken into account.

<sup>6</sup> Circulars D1 97/9 to credit institutions and D4 97/4 to investment firms as well as Communication No D. 207 to insurance companies are replaced by this Circular.

<sup>7</sup> Inter alia pursuant to the Law of 2 June 2021 on miscellaneous financial provisions on combating fraud, which also inserted or amended the concept of special mechanism in the supervisory laws relating to these institutions.

4. Finally, it should be noted that the supervisory laws will hence also provide for criminal sanctions for anyone who intentionally sets up a special mechanism<sup>8</sup>. Regarding criminal sanctions, it is up to the public prosecutor's office, which is in charge of prosecutions, to assess whether or not there are grounds to initiate a judicial enquiry which, where appropriate if all constituent elements of a criminal offence are present, will lead to an indictment and a criminal sanction (to be pronounced by the criminal court). In accordance with Article 36/4 of the Law of 22 February 1998 establishing the organic statute of the National Bank of Belgium, as amended by the Law of 2 June 2021 on miscellaneous financial provisions on combating fraud, the NBB should report to the judicial authorities if it has concrete evidence of special mechanisms, the setting up of which is subject to criminal sanctions, in an institution or company falling under its (shared) supervision.

A copy of this Circular will be sent to your institution's accredited statutory auditor(s).

Yours faithfully,

Pierre Wunsch  
Governor

Annex: 1

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<sup>8</sup> Pursuant to the Law of 2 June 2021 on miscellaneous financial provisions on combating fraud, the intentional setting up of a special mechanism is hence punishable by law. The material element of this criminal offence is therefore the setting up of a special mechanism. This is a well-known concept in financial law, the constituent elements of which have remained unchanged. In addition, there must be a moral element present, namely general intent. This moral element requires two essential components: actual knowledge ("sciens") and the will to commit the offence ("volens"), i.e. the perpetrator knows that his conduct is punishable under criminal law, but deliberately behaves in such a way regardless. In essence, this means that the perpetrator intentionally sets up a special mechanism, in the knowledge that this is punishable under criminal law. The notion of "general intent" comprises both positive acts and culpable omissions. For more details on this subject, see the explanatory memorandum of the Law of 2 June 2021 on miscellaneous financial provisions on combating fraud (Parl. Doc., Chamber, 2020-2021, doc 55, 1900/001, p. 12 et seq.).