EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK
of 30 March 2000

at the request of the Portuguese Ministry of Finance on a draft decree law that aims to implement, in the Portuguese legal system, Directive 98/26/EC of 19 May 1998 on settlement finality in payment and securities settlement systems

(CON/00/04)

1. The European Central Bank (ECB) received on 4 February 2000 a request from the Portuguese Ministry of Finance for an ECB Opinion on a draft decree law (hereinafter referred to as the "Draft Law") implementing in Portugal Directive 98/26/EC on settlement finality in payment and securities settlement systems (hereinafter referred to as the "Directive").

2. To the extent that the Draft Law represents the implementation of the Directive in the Portuguese legal system, the Portuguese authorities were not, strictly speaking, legally obliged to consult the ECB under Article 1 (2) of Council Decision (EC) 98/415 of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions. However, the ECB is seeking to promote proactively a harmonised EU-wide implementation of the Directive in the legislation of the Member States, in order to foster maximum transparency and legal certainty for the closely connected payment and securities settlement systems, and to ensure a level playing-field throughout the European Union. In view thereof, the ECB very much welcomes the opportunity to give its opinion on the Draft Law.

3. The ECB understands that this Draft Law deals only with the implementation of provisions related to payment systems, while the part of the Directive dealing with securities settlement systems was implemented by Decree-Law 486/99, of 13 November 1999, and entered into force on 11 December 1999 in the part where general provisions and provisions dealing with insolvency proceeding of participants are concerned (Title V, Chapters I and III). For the remaining parts of Title V, one comes into force only after approval of operational regulations of the securities settlement systems to be registered with the Securities Market Commission until 1 September 2000 (Chapter II, Operations); and the other comes into force on 1 March 2000 (Chapter IV, Management). Even though Member States are not bound to use any particular form or methodology when implementing

EC Directives (Article 249 of the EC Treaty), the ECB is of the view that this split-up in the implementation of the Directive 98/26/EC between issues related to securities settlement systems and payment systems is somewhat artificial, especially in light of the fact that the Draft Law also covers securities given as collateral but not securities settlement systems. In particular, taking into account that the definitions used in the Directive 98/26/EC are common to payment systems and securities settlement systems, the fact that definitions used in Decree-Law 486/99 of 13 November 1999 are not coincident with the definitions used in the Draft Law is a matter of legal concern. It is the opinion of the ECB that consistency between the two laws should be envisaged, as there is a strong connection between the securities settlement systems and the payment systems. Using different definitions and applying different principles on similar activities and procedures may increase the legal uncertainty and operational risks.

In particular, it should be noted that the definition of securities in the Draft Law reproduces section B of the Annex to Directive 93/22/EEC, as mentioned in Article 2(h) of the Directive, whilst the same is not true for the definition of securities contained in Decree-Law 486/99 of 13 November 1999, thus giving rise to potential doubts in interpretation and application of legal concepts and definitions.

Is also not entirely clear to the ECB how the definition of netting contained in Article 2(k) of the Directive was implemented into Portuguese law since it is used both in the Draft Law (Article 3) and in Decree-Law 486/99 of 13 November 1999 (Article 283) but never defined. The ECB is aware that Portuguese law contains a definition of netting (Article 847 of the Civil Code), which is common to other continental systems. However, the wider scope of netting as foreseen in Article 2(k) of the Directive is not covered by such definition and by the corresponding regime. Therefore, the ECB considers that existing civil law provisions would not provide for the appropriate implementation of Article 2(k) of the Directive. For that reason, it is the understanding of the ECB that proper implementation of the Directive would require a special definition of netting attached to a special regime.

4. With respect to article 1(b) of the Draft Law, the ECB notes that the Draft Law introduces a new definition of “credit institution” rather than referring to the definition already contained in the legal framework for credit institutions and financial companies laid down in Decree-Law 298/92, of 31 December, implementing Article 1 of the First Banking Co-ordination Directive (77/780/EEC). This is particularly relevant since for the definition of “investment firm” in article 1(c), a reference is made to the Investment Services Directive (93/22/EEC). The proposed definition of “credit institution” comprises “any bank integrated in the European System of Central Banks and any postal money order service”. The ECB prefers that this part be taken out of the definition also considering that, where necessary, the ESCB is already mentioned separately and that the institutions set out in

the list of Article 2(2) of the First Banking Co-ordination Directive (77/780/EEC) do not comprise Portuguese institutions. It could also be considered to make reference to Article 1 of the First Banking Co-ordination Directive (77/780/EEC) or otherwise to Article 2 of Decree-Law 298/92, of 31 December.

5. With regard to Article 1(l) of the Draft Law and the definition of 'transfer order' in connection with Article 3(1) where reference is made to the State and other public persons, it would be beneficial to reproduce more literally the text of article 2(i), first indent of the Directive, since Article 3(1) of the Draft Law could be interpreted in the sense that private persons would not fall under its scope.

6. With regard to article 1(m) of the Draft Law and the definition of "insolvency proceeding" the ECB notes that a reference is made to "obligations or associated collateral securities" where the Directive mentions "payments". The distinction between "obligations" and "payments" is that the latter is a discharge of the former; a payment being the correct and complete fulfilment of a pecuniary obligation (by way of a final transfer of the absolute availability of the money due to the creditor). As a result, the ECB would prefer that the text of the Draft Law would correspond more closely to the text of the Directive.

7. With regard to article 1(o) of the Draft Law and the definition of "collateral security" the ECB would prefer that also repurchase or similar agreements be mentioned, as it is the case in Article 284(3) of Decree-Law 486/99. Indeed, for reasons of consistency between the two laws implementing the Directive and to avoid legal uncertainty associated with the use of repurchase or similar agreements for purposes other than securing rights and obligations potentially arising in connection with a system, as defined in Article 2(a) of the Directive, it would be advisable that repurchase or similar agreements are expressly mentioned in the Draft Law, as it is the case in Article 284(3) of Decree-Law 486/99, thus avoiding a vague formulation as currently drafted.

   In addition, the ECB notes that the definition of "collateral security" contained in the Draft Law limits the cause of granting collateral to "credit provided to participants and to banks integrating the European System of Central Banks" whereas the Directive more broadly states "for the purpose of securing rights and obligations potentially arising in connection with a system, or provided to central banks of the Member States or to the future European central bank." In this particular, the ECB would prefer that the text of the Draft Law would correspond more closely to the text of the Directive.

8. On article 6, the ECB is of the view that this represents a partial implementation of article 9 of the Directive that is due to the dual implementation of the Directive as mentioned above (article 9(2) of

the Directive has been implemented by Article 284(4) of Decree Law 486/99, of 13 November 1999).

9. The ECB confirms that it has no objection to this ECB Opinion being made public by the competent national authorities at their discretion. In the light of the general application of the observations made, and the importance to the international financial markets of a uniform application of Community law in this field, the ECB will arrange for this Opinion to be copied to the competent national authorities of Member States responsible for implementing the Directive.

Done in Madrid on 30 March 2000.

The Vice-President of the ECB

[signed]

Christian Noyer