EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 31 May 2001

at the request of the Spanish Ministry of the Economy on a draft law introducing amendments to several laws governing the Spanish financial market

(CON/2001/12)

1. On 23 April 2001 the European Central Bank (ECB) received a request from the Spanish Secretary of State of the Economy, Energy and Small and Medium-sized Enterprises for an opinion on a draft law amending several legal acts pertaining to the financial legal framework (hereinafter the "Draft Law").

2. The competence of the ECB to deliver an opinion on the Draft Law does not extend to the entire content of the Draft Law, but is confined to certain areas: securities settlement systems (Article 1, fourth additional provision, and first and second transitory provisions of the Draft Law), collateral for Eurosystem operations (Articles 11, 12 and 15 of the Draft Law), electronic money (Article 19 of the Draft Law), the prudential supervision of credit institutions (Article 30 of the Draft Law) and provisions affecting the powers of the Banco de España (Chapter Six on the Centre for Risk Information, and the Abrogating Provision of the Draft Law). The enumeration of the above areas is based on the third, fifth and sixth indents of 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]. In addition, according to Article 1(2) of the said Council Decision, the ECB does not need to be consulted on draft legislative provisions which serve the sole purpose of transposing Community Directives into the law of Member States. However, when such consultation is effected on a voluntary basis on a topic closely related to ESCB tasks, the ECB is ready to provide its opinion; this is the case in this consultation with regard to the provisions relating to electronic money. Articles of the Draft Law other than those listed above fall outside the advisory competence of the ECB. 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.

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[1] OJ L 189, 3.7.1998, p. 42.

3. The ECB welcomes the legislative methodology chosen to address various needs for the modernisation and enhancement of financial regulation in Spain. The use of a horizontal law which addresses various requirements to upgrade existing legislation is a method which has been used by several Member States to cope with the pace of development of financial markets. Changes in such markets in Europe follow the introduction of the euro and the consequent tendency to replace national markets by the euro market, the globalisation of financial markets, the impact of new technology, and other factors. Since the evolution of such markets will in all likelihood continue, perhaps at an even greater pace, regular legislative adaptation of the overall financial legal framework seems to be the best legislative technique for such a period of change.

4. Article 1 of the Draft Law is aimed at providing a legal basis for the incorporation as a *société anonyme* of the central depository services and at unifying in one single central securities settlement system the various systems existing for the settlement of different kinds of securities. The ECB welcomes all measures aimed at fostering the consolidation of euro securities settlement systems and thus the overall objective of the proposed reform. Within the context of this general support, the ECB would, however, make the following comments.

   (a) The regime which the Draft Law establishes appears to grant to the resulting consolidated system ("*la Sociedad de Sistemas*") exclusive central register rights for securities admitted to trading; (i) on the public debt market; and (ii) on national stock exchanges. For the regional stock exchanges and for securities being traded over-the-counter, other alternatives are permitted. The ECB understands that such exclusive rights are limited to the primary or central registry function to be performed by the Sociedad de Sistemas, as previously performed by two securities settlement systems, which qualify as a "public function" under Spanish Law, and notes that (i) there are no exclusivity rights for secondary registers which may be managed on a free-market basis; and (ii) foreign participation in the capital of the Sociedad de Sistemas is permitted. Following the introduction of the euro, the ECB favours the integration of European financial markets and notes that the Explanatory Memorandum of the Draft Law reflects the aim of such integration and justifies the Draft Law on the basis of the implications of such integration. It thus appears important that national laws do not lend support to a perpetuation of national fragmentation of such markets, but rather allow for such integration. The ECB welcomes the legislative proposal to consolidate the central registry function in Spain into one main system, under terms which will increase the safety and efficiency of securities settlement and thereby contribute to financial stability in Spain. The legislative proposal paves the way for future processes of integration of Spanish securities markets with others in the euro area, as the proposed scheme is more in line with the structure of the majority of euro area securities settlement systems. The ECB notes that the process of consolidation of securities settlement systems in Spain is not completed with the Draft Law, and that autonomous

regional systems continue. Such continued domestic fragmentation does not serve the cause of enhanced efficiency of post-trading structures.

(b) The Draft Law allows the Ministry of the Economy to authorise and to regulate the establishment of one or, exceptionally, several central counterparties for the securities markets. The ECB welcomes this possibility because central counterparties, when properly regulated, enhance the efficiency of the securities markets. However, some comments are necessary:

- The Draft Law subjects the provision of central counterparty services in Spain to government authorisation. Such government authorisation has the function of ensuring that central counterparty services are properly regulated and supervised, but should not be seen as a mechanism to impede the provision of central counterparty services by other central counterparties incorporated in the EU, when properly regulated and supervised, on a cross-border or remote basis. Once more, domestic legislation should not perpetuate the fragmentation of financial markets following the introduction of the euro.

- Central counterparties have a pivotal role with regard to the stability of financial markets; they operate at the centre of trading, and should be able to cope with the failures of market participants in order to avoid systemic risks. The solvency and liquidity of central counterparties need to be ensured; they should be supervised and have access to central bank liquidity and to real-time payment systems. The ECB recalls that, in choosing whether to establish a central counterparty, CPSS-IOSCO Recommendation 4 should always be followed, according to which a central counterparty, where introduced, should be subject to a rigorous requirement to control the risks it assumes. Within the regime to be adopted for a central counterparty, it may be worth considering the advantages of requiring any new central counterparty to adopt the form of a credit institution which satisfies such requirements, in which case such a basic criterion may be established in the Draft Law, rather than leaving it to ministerial regulation.

- The Draft Law attributes the supervision of the central counterparty to the National Securities Market Commission and to the Banco de España, without specifying the respective competences. In this regard, it is necessary to recall that, following CPSS-IOSCO Recommendation 18, (i) central counterparties should be subject to public regulation and oversight; (ii) the responsibilities and objectives of the securities regulator and the central bank with respect to the central counterparty should be clearly defined; (iii) their roles and major policies should be publicly disclosed; and (iv) they should have the ability and the resources to perform their responsibilities, including assessing and promoting the implementation of these CPSS-IOSCO Recommendations. In taking account of the above, it should be borne

in mind that the solvency risks, liquidity risks, access to RTGS and the resulting systemic risks imply that central banks have a direct interest in the good functioning and supervision of central counterparties. The ECB would therefore advise that CPSS-IOSCO Recommendation 18, as stated above, be duly followed.

5. The Draft Law modifies Article 36(7)(b) of the Securities Market Law in order to allow loans of securities only if the securities are the property of the lender. The ECB considers that such a provision prohibits on-lending activities and thus introduces an important limitation to the securities loan market. In this regard, it should also be recalled that CPSS-IOSCO Recommendation 5 affirms that securities lending and borrowing should be encouraged as a method for expediting the settlement of securities transactions and that barriers which inhibit the practice of lending securities for this purpose should be removed.

6. Article 12 introduces a sixth additional provision to Law 13/1994 on the Autonomy of the Banco de España which establishes the legal regime for collateral for ESCB operations. The ECB welcomes the proposal, which is aimed at simplifying the formalities required for the creation and enforcement of the collateral, including cash collateral; this proposal provides a legal basis for margin maintenance and top-up provisions, and for assigning bank loans under simplified formal requirements. While those reforms improve the existing regime, one observation may be made: the regime for assigning bank loans seems to continue to require cumbersome formalities; namely, paper form, registration with two public registries and handover of the loan contract. The ECB would favour, if legally possible, further simplification of such a procedure with an enhanced use of computerised systems.

7. Article 12 further introduces a seventh additional provision to Law 13/1994 on the Banco de España which provides for collateral for Treasury cash management operations. This provision supplements the introduction in Article 11 of the Draft Law of a Treasury power to perform repo and loan operations in the management of its liquidity. Article 12 provides for a specific procedure for the execution of pledges in favour of the Treasury of collateral placed with the Banco de España by credit institutions in the context of monetary policy operations, following which the relevant assets would be re-attached as collateral for the Banco de España once the obligations of the Treasury have been discharged. The ECB welcomes the proposed procedure for the collateralisation of the temporary transfers to credit institutions of the liquidity balances until now held by the Treasury with the Banco de España, optimising the use of available collateral.

8. Article 13 introduces a new kind of security: the “cédulas territoriales”. These are securities issued by credit institutions and backed by claims on public administrations. The ECB welcomes such innovation, which is aimed at introducing a new and sound instrument for the capital markets, in line with similar instruments successfully existing in other Member States, and which will contribute to increasing the volume of collateral available in Spain.

9. Article 15 of the Draft Law modifies the tenth additional provision of Law 37/1998 amending the Securities Market Law of 1988, which provided for the legal validity and enforceability of the close-out and netting provisions included in the standard documentation of the repo markets, securities loans and other trading in securities. The new wording satisfies the need for clarity arising from the current provision and is thus welcomed.

10. Article 19 of the Draft Law relates to electronic money (e-money). The ECB understands Article 19 of the Draft Law as aiming principally at implementing Directive 2000/28/EC of the European Parliament and of the Council of 18 September 2000 amending Directive 2000/12/EC relating to the taking-up and pursuit of the business of credit institutions[2] (of which the latter is referred to as "the Banking Directive") and Directive 2000/46/EC of the European Parliament and of the Council of 18 September 2000 on the taking-up, pursuit of and prudential supervision of the business of electronic money institutions[3] ("the E-money Directive"). The ECB would like to make the following comments:

– According to Article 19(5), the Ministry of the Economy, following a report from the Banco de España, will be in charge of authorising the creation of e-money institutions. The control and inspection of all e-money institutions and their registration on the register created for this purpose will be incumbent upon the Banco de España. The ECB welcomes the powers therefore conferred upon the Banco de España. In this respect, the ECB would like to emphasise the interest of the Eurosystem in e-money. This interest stems from monetary policy concerns and the primary objective of maintaining price stability, as well as from the Eurosystem's role in contributing to the smooth conduct of policies pursued by the competent authorities in relation to the prudential supervision of credit institutions and the stability of the financial system. This interest also relates to the Eurosystem's basic task of promoting the smooth operation of payment systems as stated in Article 105 (2)[4] of the Treaty and Article 3.1[5] of the Statute of the ESCB. These provisions provide the legal basis for the oversight activities of the Eurosystem. As part of its oversight task, the Eurosystem pursues the objectives of soundness and efficiency of e-money schemes and pays specific attention to their technical security, in order to ensure confidence in the currency. Against this general background, the ECB suggests that the competence of the Banco de España, as stated in Article 19 of the Draft Law, be extended to the functioning and security of the e-money schemes themselves, as distinct from the e-money institutions.

– Article 19(7) of the Draft Law implements Article 8 of the E-money Directive, according to which Member States may allow their competent authorities to waive the application of some or all provisions of the same Directive and of the Banking Directive. The paragraph

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2 OJ L 275, 27.10.2000, p.37.

3 OJ L 275, 27.10.2000, p. 39

4 "The basic tasks to be carried out through the ESCB shall be: […] to promote the smooth operation of payment systems."

5 "In accordance with Article 105 (2) of the Treaty, the basic tasks to be carried out through the ESCB shall be: […] to promote the smooth operation of payment systems."

provides for a waiver with regard to the e-money institutions specified more specifically in Article 8(1)(b) of the E-money Directive. Paragraph 7 covers the cases where the e-money issued by this institution is accepted as a means of payment only by a subsidiary of the institution performing operational or other auxiliary functions relating to e-money issued or distributed by the institution, by any parent undertaking or by any other subsidiary of that parent undertaking. Paragraph 7 states that such e-money institutions may be exempt from the application of the provisions of this Law and the norms developing it "*according to the procedure to be determined by the Government*". As indicated above, the development of e-money raises issues relating to monetary policy, payment systems oversight and the prudential supervision of financial intermediaries. In order for the regulatory framework currently being implemented in the EU to provide adequate safeguards, the ECB regards it as important that the waiving of regulatory requirements under Article 8 of the E-money Directive be implemented into the national legislation with prudence and in a restrictive manner. In this respect, the ECB would recommend, *inter alia*, that the national legislation should not grant the possibility of waiving Article 3 of the E-money Directive on redeemability.

– Finally, the last sub-paragraph of Article 8(1) of the E-money Directive states that "[*t*]*he underlying contractual arrangements must provide that electronic storage device at the disposal of bearers for the purpose of making payments is subject to a maximum storage amount of not more than EUR 150.*" The ECB notes that this protective provision of the E-money Directive, which applies when a national authority implements the possibility of a waiver under Article 8, is not stated in the Draft Law.

11. Article 30 of the Draft Law authorises the Banco de España, acting as a prudential supervisor of credit institutions (and the Securities Commission with respect to investment firms), to entrust to external auditors the performance of specific supervisory tasks in certain cases of complex groups, the international activity of credit institutions, as well as in other cases. Such external auditors are roughly equivalent to bank inspectors of the Banco de España in the execution of such tasks. The ECB welcomes such a possibility for an enhanced prudential supervision capacity on the part of the Banco de España, namely in the current climate in which a surge of conglomerates in the context of the internationalisation of financial markets is giving a new dimension to the supervision function.

12. Chapter Six of the Draft Law establishes a revised regime for the Central Risk Information system (CRI) of the Banco de España. The ECB generally welcomes the proposed regime, in particular as regards the aims, *inter alia*, of facilitating the use of information stored in the CRI for supervisory purposes and enhancing supervisory co-operation on a cross-border basis, both with authorities of other Member States and third countries. The ECB further welcomes the proposed Article 43, which will enhance the possibilities for co-operation between the CRI and central credit registers based in other countries. The proposed Article 43 will allow the CRI to

exchange information on relevant borrowers on a cross-border basis, within a regime of reciprocity and on terms to be determined by the Banco de España. This possibility will be particularly relevant for those EU Member States which operate central credit registers of a similar nature, and with similar functions, to the CRI. Such information-sharing will, however, only be possible if the recipient central credit register or a reporting institution is subject to rules on the use of data, confidentiality and data protection which are comparable to those stipulated in Spanish law. The ECB expects that practical solutions will be elaborated in the ongoing co-operation among central credit registers in the EU.

13. The Abrogatory Provision of the Draft Law abrogates Article 15.3 of Law 13/1994 on the Autonomy of the Banco de España. This Article 15.3 refers to the regime for those banknotes withdrawn from circulation but not yet returned to the Banco de España. The abrogation allows the ECB to establish the regime which will apply to such banknotes in a harmonised manner throughout the Eurosystem, namely within the forthcoming cash changeover. The proposed abrogation is thus most welcome.

14. The ECB confirms that it has no objection to the publication of this opinion by the competent national authorities at their discretion.

Done at Frankfurt am Main on 31 May 2001.

The President of the ECB

[signed]

Willem F. DUISENBERG