



EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 7 August 2003

at the request of the Banca d'Italia

on a draft regulation on payment systems, payment infrastructures and payment instruments

(CON/2003/14)

1. On 10 June 2003 the European Central Bank (ECB) received a request from the Banca d'Italia for an opinion on a draft regulation to be issued by it on payment systems, payment infrastructures and payment instruments (the 'draft regulation').
2. The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community and on the third and fifth indents of Article 2(1) of Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions¹ since the draft regulation relates to a national central bank (NCB) and to clearing and payment systems. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council of the ECB has adopted this opinion.
3. The ECB very much welcomes the opportunity to give its opinion on the draft regulation, as it addresses matters which directly pertain to the core fields of competence of the Eurosystem. According to the explanatory note provided by the Banca d'Italia, the draft regulation has three main purposes: first, to provide the necessary regulatory framework to allow the Banca d'Italia to carry out its oversight function, i.e. *'to ensure the efficiency and reliability of clearing and payment systems'*² in accordance with the Eurosystem policy stance on payment systems oversight; secondly, to give guidelines and principles to be followed by all payment system operators (including non-financial ones), summarising the experience gained by the Banca d'Italia in the field of payment systems oversight over the last years; and, thirdly, to increase the transparency of the oversight policy followed by the Banca d'Italia.
4. Oversight is one of the core competencies attributed to the Eurosystem by the Treaty. Indeed, the oversight of payment systems had always been recognised as one of the main functions of the NCBs, although this was not always based on a specific and clearly formulated legal basis. The

¹ OJ L 189, 3.7.1998, p. 42.

² Article 146 of Legislative Decree 385 of 1 September 1993, *Supplemento ordinario Gazzetta Ufficiale*, No 230, 30.9.1993.

framework for this function, although informal, was effective and successful, since it was based on the technical experience and on the moral suasion of the NCBs. Moreover, the international consistency and effectiveness of this function were ensured through co-ordinated action among central banks on the basis of principles established either at the G-10 or European Union level.

5. Article 105(2) of the Treaty and Article 3.1 of the Statute of the European System of Central Banks and of the European Central Bank provide the legal basis for the oversight function of the Eurosystem, together with Article 22 of the Statute, which reads: ‘The ECB and national central banks may provide facilities, and the ECB may make regulations, to ensure efficient and sound clearing and payment systems within the Community and with other countries’. In general, within the Eurosystem oversight activities are performed by the NCBs, in line with the common oversight policy stance defined by the Governing Council of the ECB. The aims of the oversight of clearing and payment systems are the maintenance of systemic stability, the promotion of efficiency and the safeguarding of the transmission channel for monetary policy. The above excludes the interference in the field of the Eurosystem’s oversight competence by any Community or national body other than a central bank acting within the framework of the European System of Central Banks (ESCB)/Eurosystem.
6. Article 146 of Legislative Decree 385 of 1 September 1993 (the ‘Banking Law’), which entitles the Banca d’Italia to promote the regular operation of payment systems, reflects at national level the framework that has been created at the European level, as described above. The ECB notes that the Banca d’Italia sees a benefit in formalising its oversight role in accordance with Article 146 of the Banking Law, which entitles it to issue regulations to promote the regular operation of payment systems. The majority of NCBs carry out this function on the basis of their statutes/organic laws without any explicit and detailed legal provisions. In this respect, the ECB would like to recall that it has not so far issued a regulation on the conduct of oversight under Article 22 of the Statute. Such a regulation would be directly applicable and binding on the addressees, therefore effectively repealing all corresponding NCB rules.
7. The draft regulation proposes to entrust the Banca d’Italia with the carrying out of specific oversight activities. In this respect, as described in the abovementioned explanatory note, it addresses in particular issues related to (i) the operation of a payment system or of individual phases thereof; (ii) the operation of infrastructure services; (iii) payment instruments; and (iv) disclosure requirements. As explained in Recital 3 the draft regulation ‘*[takes] into account the positions expressed within the Eurosystem and those emerging in the fora of international cooperation*’. In this respect, the explanatory note specifies that the draft regulation implements in Italy the ‘Core Principles for systemically important payment systems’³, which the Governing Council adopted on 25 January 2001 (the ‘Core Principles’), included in the set of minimum standards used by the Eurosystem for its common oversight policy on payment systems, as well as the Eurosystem’s ‘Oversight standards for euro retail payment systems’ (the ‘Retail Standards’)

³ Bank for International Settlements, January 2001.

adopted by the Governing Council on 26 June 2003. Furthermore, reference is made to the ECB policy statement issued on 21 June 2000 on the 'Role of the Eurosystem in the field of payment systems oversight'⁴. Although the proposal is in line with the payment systems oversight competence of the Eurosystem, the ECB takes the view that it would be useful if the draft regulation itself reflected the role of the Eurosystem more clearly and clarified that the Banca d'Italia would continue to conduct oversight within the framework of the Eurosystem. This could be achieved, for example, by making an explicit reference in a recital of the draft regulation to the aforementioned ECB policy statement, the adoption by the Governing Council of the Core Principles and the Retail Standards, and to the adoption by the Governing Council on 23 May 2003 of the ECB's report on 'Electronic money system security objectives'.

8. As a general point, the ECB notes that on a number of occasions the draft regulation regulates oversight activities and policies that have not been agreed upon at Eurosystem level. This is not a problem per se. In line with the provisions of the Treaty and the Statute, the Governing Council formulates the common policy stance. In areas not specifically covered by a common Eurosystem oversight policy framework, policies defined at the NCB level apply within the framework of the objectives and principles defined at the Eurosystem level. Furthermore, it is noted that a national extension of oversight policies and activities beyond the agreed Eurosystem policies will have to be carefully considered from a level playing field perspective. Against this background, the ECB underlines that, if the Eurosystem's oversight policy changes owing to developments in the payment and settlement field, the Banca d'Italia will have to align its oversight policies and activities accordingly. In order to provide for flexibility in the Banca d'Italia's regulatory oversight framework to accommodate possible further developments at the Eurosystem level, it would be useful for the draft regulation to include a reference to this matter in a recital. Such a recital could be worded as follows: 'Whereas, the Eurosystem's oversight policies and activities may be subject to changes owing to developments in the field of payment and settlement systems'.
9. Oversight is included among the activities of financial agencies that are covered by the 'IMF Code of good practices on transparency in monetary and financial policies'. Against this background and in view of the general transparency practices of the Eurosystem the ECB considers it to be important that the Banca d'Italia conduct public consultations on oversight legislation. The Banca d'Italia may also inform or alert the market with respect to future developments in the Eurosystem oversight policies.
10. More specifically, as regards the content of the draft regulation the ECB has a number of comments on the individual articles. First of all, the ECB understands that the recitals are intended to summarise the main principles guiding the methodology used by the Banca d'Italia in conducting its oversight function. The recitals rightly recognise the contribution of an efficient and reliable payment system to financial stability and the preservation of public confidence in the currency,

⁴ These documents are published on the websites of the ECB (www.ecb.int) or the Bank for International Settlements (www.bis.org).

underline the relevance of clear and transparent rules, procedures and practices in order to foster market discipline and development, and list the most relevant aspects to be taken into consideration by the Banca d'Italia in carrying out its oversight function. It might, however, be useful to introduce an additional recital or even a separate article to explain the concept and the objectives of oversight as such. It could be mentioned that oversight is a task of central banks, principally intended to promote the smooth functioning of clearing and payment systems to protect the financial system from possible 'domino effects' which may occur when one or more participants in the payment or clearing system incur credit or liquidity problems and to foster the efficiency and soundness of clearing and payment systems.

11. Article 1 sets forth a number of definitions of terms and concepts that are used throughout the draft regulation. In general, the ECB finds it very useful to include definitions of those concepts that are most relevant and widely used in the draft regulation in order to ensure a common understanding. Nevertheless, it would recommend that the terminology and definitions used be brought in line with those agreed upon at the ESCB/Eurosystem level (cf. definitions of payment systems concepts in the report on 'Payment and securities settlement systems in the European Union' (Blue Book))⁵. More specifically, definition (a) on reliability refers to 'the limitation of systemic risks and other risks that may jeopardize or negatively affect the proper and continuous operation of the payment system and public confidence in payment instruments'. In this context, it might be worthwhile to state the 'other risks' explicitly, such as, in particular, credit, liquidity, operational and legal risks. Finally, the ECB notes that definition (l) defines 'payment system' and 'system'. Taking into account that the Banca d'Italia is also entrusted with the oversight of securities settlement systems, the use of a definition close to that in Article 2(a) of the Settlement Finality Directive⁶ should be considered in order to obtain a Community-consistent definition.
12. Article 2 of the draft regulation aims to define its scope. It specifies that the provisions apply to (a) payment systems operated by the Banca d'Italia; (b) systems that settle in central bank money; (c) other systems considered important by the Banca d'Italia because of specific parameters; and (d) systems that effect the transfer and withdrawal of money with the use of payment instruments. The ECB welcomes the scope of the draft regulation and the conduct of oversight with respect to both systems run by the Banca d'Italia and the private sector, as this is fully in line with the agreed Eurosystem oversight policy. It will also contribute to enhancing the credibility of central banks carrying out oversight over both systems run by central banks and privately run systems. However, regarding the scope of the draft regulation, it is not entirely clear to the ECB whether the draft regulation intends to comprise also the operators and the oversight of securities clearing and settlement systems. In this respect, the ECB notes that, in particular, Recitals 1, 2 and 3 refer to both clearing and payment systems and clearing and settlement systems and Article 2 does not explicitly exclude securities clearing and settlement systems from the scope of this draft regulation.

⁵ ECB, June 2001.

⁶ Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems, OJ L 166 11.6.1998, p. 45.

However, the ECB understands that the draft regulation would apply to payment systems only. In addition, according to Article 2 the provisions of the draft regulation apply to ‘systems’ only. However, as Article 5 of the draft regulation refers also to the issuers and managers of payment instruments, the ECB proposes to clarify in Article 2 that they would also fall within its scope, as well as infrastructure operators mentioned in Article 4. The ECB also considers it important that the draft regulation be applied to other payment arrangements, e.g. quasi-systems, and that a reference or clarification is therefore included. The specific aim of Article 3 of the draft regulation is the implementation of the ten Core Principles. The ECB notes that the draft regulation does not seem to be limited to systemically important payment systems; however, it would seem to be useful that, in particular, the wording follows more closely the requirements set out in the Core Principles.

13. Article 4 aims to make the draft regulation applicable to infrastructure service operators which permit data management for the transfer of funds or the netting, in whole or in part, of reciprocal debit obligations. The draft regulation gives specific importance to ‘significant infrastructure services’ i.e. service operators handling a high number of data or data with specific characteristics or performing specific activities when gathering and sorting the data for transmission to the payment system. According to Article 4(2) significant infrastructure services operators will have to comply with more stringent requirements. By making the draft regulation applicable to infrastructure service operators the Banca d’Italia widens the scope of the Core Principles to such entities. It justifies the broad scope of application of the draft regulation by explaining that the concern about the smooth functioning of payment systems implies the specific control of infrastructure services. The ECB notes the widening of the scope of the Core Principles to infrastructure service operators. Indeed, the latter play a pivotal role in the operation of clearing and payment systems as disruptions in the regular operation of network infrastructures could seriously and adversely affect the smooth functioning of systems. Furthermore, Article 4(1)(b) of the draft regulation requires, *inter alia*, that the infrastructure service provider ‘shall ensure security measures and controls’ that ‘can ensure [...] traceability and an appropriate level of confidentiality of information’. The ECB would like to point in this context to the fact that certain types of electronic money schemes may not allow for the traceability of information. If this requirement is upheld it might interfere with the development and operation of certain types of such schemes. The same comment applies as regards the requirement of traceability of any payment transaction (cf. Article 5(b)). In particular, regarding the usually rather small values transferred via electronic money schemes, a general traceability requirement would not be necessary from a money laundering perspective either. Finally, the ECB notes that according to Article 4(2)(c) significant infrastructure services operators ‘shall [...] favour interconnection with other infrastructures’. The obligation contained in this rule needs to be further clarified as its exact content and application are not fully clear.
14. Article 6 of the draft regulation is of particular importance as it provides the Banca d’Italia with the power to collect all data and information that support the effective conduct of oversight function

from the entities falling within its scope. In addition, the Banca d'Italia may also take adequate measures to ensure the general availability of information held to be significant. The ECB welcomes the fact that the draft regulation will give the Banca d'Italia the power to gain access to all information and data relevant for the performance of its oversight task. The draft regulation should clearly state the powers conferred on the Banca d'Italia and, to the extent possible, the consequences of not complying with its requests for the operators.

15. Finally, the ECB notes that Article 7 confers on the Banca d'Italia the power to issue general and specific rules implementing the draft regulation. If such rules of general application should concern aspects of relevance for the Eurosystem, the ECB's opinion should be requested.
16. The ECB confirms that it has no objection to the competent national authorities making this opinion publicly available at their discretion. This opinion will be published on the ECB's website six months after the date of its adoption.

Done at Frankfurt am Main on 7 August 2003.

Member of the Executive Board of the ECB

Member of the Executive Board of the ECB

[signed]

[signed]

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