



**EUROPEAN CENTRAL BANK**

**OPINION OF THE EUROPEAN CENTRAL BANK**

**at the request of the French Ministry of the Economy, Finance and Industry under Articles 109I (2) and 109f (6) of the Treaty establishing the European Community and Article 1.1, fourth indent, of the EU Council Decision 93/717/EC on a draft Title VIII of the General Regulation of the Financial Markets Council**

**CON/98/52**

1. On 10 October 1998 the European Central Bank (ECB) received a request from the French Ministry of the Economy, Finance and Industry for an ECB Opinion on a draft Title VIII of the General Regulation of the Financial Markets Council (hereinafter referred to as the “Draft Regulation”).
2. In accordance with Article 109I (2) of the Treaty establishing the European Community (hereinafter referred to as the “Treaty”), the ECB has taken over the advisory functions of the European Monetary Institute (EMI), which went into liquidation upon the establishment of the ECB on 1 June 1998. The ECB’s competence to deliver an opinion is based on Article 1.1, fourth indent, of the Council Decision (93/717/EC) of 22 November 1993 on the consultation of the EMI by the authorities of the Member States on draft legislative provisions, as the Draft Regulation contains provisions concerning central securities depositories and securities settlement systems. In accordance with Article 17.5, first sentence, of the Rules of Procedure of the ECB, this ECB Opinion has been adopted by the Governing Council of the ECB.
3. The ECB notes that the Draft Regulation supplements the legislative provisions of Article 22 of Law 98-546 of 2 July 1998. In its Opinion (CON/98/09) dated 19 February 1998, the EMI stated that it welcomed the provisions of the said Law as they “*will improve the smooth and efficient functioning of payment systems and securities settlement systems*”. The same Law vested the Financial Markets Council with regulatory powers in the fields of central depositories and systems for settlement and for the delivery of financial instruments.
4. The ECB’s opinion is only requested on Chapter 4 of Title VIII, which contains provisions relating to (i) the central depository (“*dépositaire central*”) and (ii) the systems for settlement

and for the delivery of financial instruments (“*systèmes de règlement et de livraison d’instruments financiers*”).

5. With regard to the provisions of Section 1 concerning the central depository, Article 8-4-1 of the Draft Regulation lists the functions which the central depository notably performs. The ECB notes that these functions are explicitly stated as carried out “*within the scope of the provisions of (...) decrees 49-1105 of 4 August 1949 and 83-359 of 2 May 1983*”. Given the fact that the two decrees only refer to the role of one specific French central depository, Sicovam S.A., the ECB questions whether other depositories could be bound by these decrees.

Moreover, having regard to the provisions of the Law of 2 July 1998, the ECB notes that the Law vested the Financial Markets Council with the power to define the conditions of authorisation of central depositories, whereas the Draft Regulation only refers to **the** central depository (as opposed to Section 2 of the same Chapter 4, where reference is made to **systems** for settlement and delivery). Having regard to the fact that there are at least, for the time being, two central depositories in France (the Banque de France being the central depository for Treasury bills, according to *Ordonnance* 45-679 of 13 April 1945, although it has delegated the account holding to Sicovam S.A.), the ECB understands that the function of a central depository is not legally restricted to one single commercial firm. If the purpose of the Draft Regulation is to make it possible for other central depositories to operate under French jurisdiction, one could question the need to maintain provisions relating to only one specific depository, such as the two above-mentioned decrees.

6. According to the list of functions provided by Article 8-4-1, the function of the central depository entails, by definition, the management of a system for the delivery of financial instruments between the accounts it holds in the name of its members (see indents 2 and 3 of the list). As a consequence, the ECB suggests the following drafting for Article 8-4-1, last paragraph: ‘*The central depository may organise and manage any system the aim of which is the delivery of financial instruments amongst its members and, moreover, if appropriate, make the settlement of the corresponding cash in compliance with the provisions of Section 2 of this Chapter*’.
7. The ECB would also suggest the Financial Markets Council to develop the articulation between Article 8-4-1-1° (according to which the function of the central depository consists in: ‘*recording in a specific account all the financial instruments making up each issue admitted to its operations*’) and Article 8-4-1 § 2 (‘*A central depository may admits to its operations*

*financial instruments not falling within the remit referred to in the previous paragraph, first indent*’).

8. The ECB notes that, according to Article 8-3-11, Chapter 3, a central depository can be subject to more obligations than those stated in Chapter 4, when sub-delegated in the tasks of a ‘registrar’. Under the Draft Regulation, a ‘registrar’ (“*domiciliataire de titres de créance négociables*”) is a credit institution responsible for the bookkeeping of an issue of negotiable bills – or certificates of deposit – and for the matching of the amount of the issue and the total amount registered in its books (Article 8-3-10). ‘Registrars’ can also perform the function of transferring the rights on the bills by transfers between accounts opened in their books. Article 8-3-11 provides the possibility for the issuer of negotiable bills to transfer the responsibility of account holding of its issue to a central depository and to delegate the registrar the power to give instructions to the central depository. In that case, the central depository becomes responsible for the matching between the number of instruments issued and the number registered in its books (Art 8-3-11). Although the provisions of Chapter 3 do not fall within the scope of the present consultation, the ECB questions whether this transfer of account holding of an issue preserves a direct link between the issuer and the central depository and if adequate procedures for safeguarding against any possible custody risk are considered.

The ECB also takes note that despite the fact that credit institutions acting as ‘registrars’ perform functions that could be considered as contained in the list of functions performed by a central depository, they will not be submitted to the procedure imposed to central depositories by Chapter 4 of the Draft Regulation.

9. The ECB welcomes the other provisions of Chapter 4, Section 1, of the Draft Regulation, which specifically purport to strengthen technical security in the performance of the functions of a central depository (management of risks) and to improve the supervisory role of the Financial Markets Council (right of communication of data). The ECB invites the Financial Markets Council, when assessing applications for the status of central depository in France, to take into account Standard 9 (backup facilities) formulated by the ESCB in the document ‘*Assessment of EU securities settlement systems against the standards for their use in ESCB credit operations*’, published in September 1998.
10. With regard to the provisions of Section 2 concerning systems for settlement and for the delivery of financial instruments, the ECB welcomes the publication by the Financial Markets Council of the procedure which it will apply in order to declare that the rules of a system are covered by the definition given by the Law of 2 July 1998. Indeed, approval by the Financial

Markets Council is a prerequisite for a system to benefit from the provisions of the said Law prohibiting the bankruptcy administrator or liquidator from challenging payments and deliveries made (Article 8-4-6 §3) and ordered (Article 8-4-11) by a participant on the day on which the reorganisation or winding up procedures commence.

11. With regard to Article 8-4-5, the ECB welcomes the fact that the competences of the Financial Markets Council are recognised as being conducted without prejudice to the powers of the Banque de France concerning payment systems. This flows from the fact that systems for the delivery of securities may also provide payment (settlement) facilities. As previously expressed in the EMI Opinion on the draft law, the ECB considers it appropriate for a reference to Article 22 of the Statute of the European System of Central Banks and of the European Central Bank to be included in Article 8-4-5 of the Draft Regulation.

The ECB notes that, according to the French Banking Law of 1984, any firm that operates a system for the delivery of financial instruments and that wishes to provide cash settlement facilities must rely on a credit institution or on the central bank for the settlement of cash, if it is not itself authorised to operate as a credit institution. The ECB welcomes this rule as improving the security of the relevant systems.

12. The ECB understands that Chapter 4, Section 2, is especially dedicated to deal with systems for settlement and for the delivery of financial instruments that are not managed by a central depository. A definition of system for settlement and for the delivery of financial instruments or a list of functions performed by such system, like what is done in Article 8-4-1 for the central depository, seems necessary to clarify for future applicants to chose if they want to apply for the status of central depository or of system for settlement and for the delivery of financial instruments.
13. With regard to Article 8-4-6, as compared with Article 8-4-2, the ECB notes that the application dossier of a central depository appears to be much more detailed than the application dossier of a system for settlement and for the delivery of financial instruments. Given the fact that the central depository is submitted to ongoing supervision and regulatory oversight whereas only a regulatory oversight by the Financial Markets Council is stated for systems for settlement and for the delivery of financial instruments and, given the fact that any kind of commercial firm can manage a system, the ECB wonders if this difference intends to reflect a different approach in the level of risks between the functions of central depository and of system for settlement and for the delivery of financial instruments. For example, the system for settlement and for the delivery of financial instruments should be asked to justify to the Financial Markets Council

how the function of the central depository is performed for the securities admitted to its operations.

14. As mentioned with regard to central depositories, the ECB welcomes the provisions of Article 8-4-6, which specifically purport to strengthen technical security in the performance of the functions of a system for settlement and for the delivery of financial instruments (management of risks) and to improve the supervisory role of the Financial Markets Council (right of communication of data). Once again, the ECB invites the Financial Markets Council, when assessing applications for the status of a system for settlement and for the delivery of financial instruments, to take into account Standard 9 (backup facilities) elaborated in the publication referred to in paragraph 9.
15. In Article 8-4-7 (agreement between participants and securities settlement systems), the ECB suggests using the words participation agreement ("*convention de participation*") instead of membership agreement ("*convention d'adhésion*"), to clarify the distinction with the agreement signed between the central depository and its members.
16. The ECB particularly welcomes Article 8-4-8, which provides that the manager of a system for settlement and for the delivery of financial instruments shall not engage in any other activity that could create conflicts of interest with the management of the said system. The ECB considers this provision ensures a level of security that goes beyond the one to be met by securities settlement systems used in ESCB credit operations.
17. Article 8-4-10 requires any system to set up risk control measures in order to protect the rights of the participants in the system in case of default in delivery or settlement by one or more other participants. The ECB understands that the only system currently operating in France that do not fulfil this requirement will not be used for ESCB credit operations. Since the said system does not currently benefit from such risk control measures in the event of the default of a participant, the ECB understands that the adoption of the General Regulation will require the manager of the system to set up such measures as soon as possible in order to decrease the systemic risk.
18. The ECB confirms that it has no objection to this ECB Opinion being made public by the competent national authorities at their discretion.

The President of the ECB

[signed]

Willem F. Duisenberg