



EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

at the request of the Austrian Federal Ministry of Finance on a Draft Law constituting the Austrian implementation of Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers and Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and security settlement systems

(CON/99/07)

1. On 21 May 1999 the European Central Bank (ECB) received a request from the Austrian Federal Ministry of Finance for an ECB Opinion on a draft Federal Act by which a Federal Act on cross-border credit transfers (Überweisungsgesetz) and a Federal Act on payment and securities settlement systems (Finalitätsgesetz) shall be enacted and by which the Bankruptcy Act (Konkursordnung), the Settlement Act (Ausgleichsordnung), the Stock Exchange Act (Börsegesetz) the Securities Supervision Act (Wertpapieraufsichtsgesetz), and the Banking Act (Bankwesengesetz) shall be amended (hereinafter referred to as the “Draft Law”). The Draft Law is intended to constitute the Austrian implementation of Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers (hereinafter referred to as the “Cross-border Credit Transfers Directive”) and Directive 98/26/EC of the European Parliament and the Council of 19 May 1998 on settlement finality in payment and security settlement systems (hereinafter referred to as the “Settlement Finality Directive”). The Draft Law was submitted in the German language only.
2. The purpose of the Draft Law is to provide for the implementation of the Cross-border Credit Transfers Directive and the Settlement Finality Directive in the Austrian legal system. Consequently, the Austrian authorities were not legally obliged to consult the ECB under Article 1.2 of Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions. However, the ECB seeks to proactively promote harmonised implementation of the Settlement Finality Directive, in particular, 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 issue its opinion on the Draft Law, which addresses matters pertaining directly to the core fields of competence of the European System of Central Banks (ESCB), since the Draft Law contains provisions purported to ensure the smooth conduct of cross-border credit transfers and the smooth operation of payment and securities settlement systems.

(A) Section I of the Draft Law – implementation of the Cross-border Credit Transfers Directive

3. The ECB notes that Section I, Article 1 of the Draft Law aims at providing for a guarantee, in particular for private persons and companies (particularly small and medium-sized enterprises), that their credit transfers from one part of the Community to another will be transacted swiftly, reliably and at reasonable costs. As a consequence, the Cross-border Credit Transfers Directive shall not be applicable to credit institutions, other institutions and financial institutions which normally act as “executors” of credit transfers if the institutions themselves act as mandators. The reason for this given in the explanatory memorandum is that a need to protect these institutions is not assumed.
4. The Draft Law states in Section I, Article 2 that credit institutions or other institutions are obliged to notify their customers with regard to the information on the conditions of cross-border transfers contained in Article 3 of the Cross-border Credit Transfers Directive, either in writing or by electronic means. The ECB welcomes this provision as it implements an essential objective, namely to make the cross-border credit transfers sector more transparent. However, the ECB is of the opinion that whenever Member States are implementing Directives, it is neither sufficient nor necessary to make reference to the relevant Community provisions; rather, there should be explicit exposition of the contents of the Community provision in national legislation.

(B) Section II of the Draft Law – implementation of the Settlement Finality Directive

5. The ECB notes that Section II, Article 1 of the Draft Law defines the systems to which the Draft Law shall be applicable. Both national and cross-border payment and securities settlement systems are included. All systems of the European Union, including any securities offered in connection with participation in the systems, can be affected by the Draft Law. It is of no importance in this context whether participants in the system are from within the European Union or from third countries. Furthermore, it is of no importance which currency or currencies

are used in the systems, or whether the operation of the systems requires conversion from one currency to another. Any securities which are used by the Oesterreichische Nationalbank in the context of its special role as a central bank, above all in the area of monetary policy, shall also be covered by the Draft Law.

6. The ECB takes note of the provision of Section II, Article 7 (3) of the Draft Law stating that, on a case-by-case basis, the Oesterreichische Nationalbank may, for a system governed by national law and on application by a participant, agree that an indirect participant is regarded as a participant if this is justified on grounds of systemic risk and if the indirect participant is a credit institution (cf. Article 8) and is known to the system. The ECB welcomes this provision to the extent that concerns about systemic risk are taken into consideration in the rules and functioning of the system. Moreover, consideration may be given to widening the scope of application to indirect participants by making this a general rule without limitations, thus increasing legal certainty and consistency with respect to the holding and transfer of securities in a multi-layered chain of holding.
7. The ECB welcomes the fact that the Draft Law contains – in Section II, Article 12 – a clear definition of netting.
8. The ECB welcomes the broad definition of securities in Section II, Article 14 of the Draft Law. This provision determines that securities shall be understood as marketable assets (inclusive of a credit balance) made available for securing obligations deriving in the context of the participation in a system, in the form of pledge, as a repurchase transaction, as a comparable agreement or in any other form or which are made available to the central bank of a signatory state of the European Economic Area agreement.
9. The ECB takes note that Section II, Article 15 of the Draft Law implements Article 3.1 of the Settlement Finality Directive. This provision states that payment and transfer orders received prior to the opening of insolvency proceedings against the assets of a participant of the system shall not cease to be valid with the commencement of the insolvency proceedings. In Section II, Article 15 (3) of the Draft Law it is stated that any claims under civil law with regard to legal transactions outside the systems, including an appeal in accordance with the Bankruptcy Act (Konkursordnung), shall remain unprejudiced. In this respect the ECB notes that Recital 13 of the Settlement Finality Directive states that actions relating to underlying transactions may not lead to *“the unwinding of netting [or] to the revocation of the transfer order in the system”*. The ECB recommends that this requirement be addressed explicitly in the Draft Law.

10. Section II, Article 17 of the Draft Law implements Article 9.1 of the Settlement Finality Directive. In the last sentence of this provision it is stated that any claims under civil law with regard to legal transactions outside the system, including an appeal in accordance with the Bankruptcy Act (Konkursordnung), shall remain unprejudiced. In this respect the ECB notes that Recital (13) of the Settlement Finality Directive states that actions related to underlying transactions may not lead to *“the unwinding of netting [or] to the revocation of the transfer order in the system.”* The ECB recommends that this requirement be addressed explicitly in the Draft Law.
11. The ECB takes note that Section III, Article 18 of the Draft Law aims at implementing Article 9.2 of the Settlement Finality Directive. The ECB welcomes the fact that the Draft Law aims at establishing a general rule of conflict law which is in principle not limited in its application. However, the ECB recommends reconsidering the limitation of the scope of this provision to “participants”, which does not seem to include “indirect participants” as defined in Section II, Article 8 of the Draft Law.
12. The ECB confirms that it has no objections to this ECB Opinion being made public by the competent national authorities at their discretion. In the light of the general observations made, and the importance to the international financial markets of a uniform application of Community Law in this field, the ECB is arranging for this Opinion to be copied to the competent national authorities of Member States responsible for implementing the Settlement Finality Directive.

Done at Frankfurt am Main on 23 July 1999.

The President of the ECB

[signed]

Willem F. Duisenberg