



EUROPEAN CENTRAL BANK

## OPINION OF THE EUROPEAN CENTRAL BANK

of 15 June 2004

**at the request of the French Ministry of Economic Affairs, Finance and Industry  
on certain provisions of a draft order reforming transferable securities issued  
by joint-stock companies**

(CON/2004/22)

1. On 1 April 2004 the European Central Bank (ECB) received a request from the French Ministry of Economic Affairs, Finance and Industry for an opinion on certain provisions of a draft order (*ordonnance*) reforming transferable securities issued by joint-stock companies (hereinafter the 'provisions of the draft order').
2. The ECB's competence to deliver an opinion is based on the fifth and sixth 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 provisions<sup>1</sup>, as the provisions of the draft order relate to payment and settlement systems and rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.
3. As a whole the draft order aims to simplify and modernise the regime applicable to transferable securities (*valeurs mobilières*) issued by joint-stock companies. The ECB notes that this reform is principally intended to facilitate the issuance of transferable securities while maintaining legal certainty as regards the applicable regime. The ECB understands that the final Order will amend the relevant provisions of the French Commercial Code. However, this consultation only concerns the two provisions of the draft order clarifying Articles L.431-2 and L.431-3 of the Monetary and Financial Code (hereinafter the 'Code'). These two Articles of the Code concern rules on the transfer of ownership of financial instruments.
4. The ECB understands that the French Financial Markets Authority (the 'AMF') will complement these amendments to the Code by adopting detailed implementing measures in its General Regulation (*Règlement Général*) (hereinafter the 'AMF's General Regulation'). In this respect, the ECB notes that the French authorities intend to consult the ECB on the relevant provisions of the AMF's General Regulation prior to their adoption. It should, therefore, be stressed that the ECB

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<sup>1</sup> OJ L 189, 3.7.1998, p. 42.

may review its position as stated in this opinion at a later date once it has comprehensively assessed the implementing measures contained in the AMF's General Regulation, taken in conjunction with the relevant provisions of the Code (as amended).

5. Article L.431-2 of the Code provides for different rules depending on whether financial instruments are transferred on or outside a regulated market. Under the current regime, in the case of a transaction on a regulated market, the transfer of ownership of financial instruments results from their being credited to the buyer's account on the date and under the conditions laid down by marketplace rules. For operations outside a regulated market, the Code provides that transfer of ownership results in the irrevocable settlement of the transaction as laid down by the rules governing the functioning of the settlement system. Under the proposed new regime, the transfer of ownership of financial instruments (whether listed or unlisted) would result from their being credited to the buyer's account, with the date and the conditions being laid down by the AMF's General Regulation. The ECB understands that the provisions of the draft order would simplify this dual regime and replace it with a single regime. Furthermore, the ECB notes that the concept of 'regulated market'/'outside a regulated market' would disappear from Article L.431-2 of the Code.
6. The ECB welcomes the French authorities' aim of simplifying the existing transfer of ownership regimes for financial instruments and trusts that the provisions of the draft order will further the continuing integration of clearing and settlement arrangements in the European Union (EU). In the ECB's view, the effectiveness of transfers and the finality of transfers as a result of book-entry debits and credits made within systems are crucial to reduce uncertainty and systemic risk. The ECB assumes that future implementation measures to be included in the AMF's General Regulation, will take full account of these matters, in particular to ensure the finality and irrevocability of transfers of ownership in financial instruments within a system. As mentioned in paragraph 5, Article L.431-2 of the Code makes it clear that the transfer of ownership of financial instruments is effected when the buyer's account is credited; however, the date and the conditions of the transfer will be defined in the AMF's General Regulation. In this respect it would be advisable to ensure specifically that the rules relating to the point in time when securities are credited on an account and the value date for such transfer should not give rise to legal uncertainty that could undermine the smooth operation of securities settlement systems, raising potential systemic concerns.
7. By way of exception from the general rule regarding transfer of ownership, Article L.431-2 of the Code provides that the AMF's General Regulation may, under certain conditions, lay down specific conditions for the transfer of ownership of financial instruments. The ECB understands this provision as meaning that when irrevocable settlement occurs on a real-time basis within a settlement system for financial instruments, a specific regime for the transfer of ownership may be laid down in the AMF's General Regulation. The ECB notes in this respect that this specific regime, as mentioned above, will be subject to ECB consultation and should further clarify the scope of the exception provided for in the fourth paragraph of Article L.431-2 of the Code. The

ECB also notes that the ownership rights of intermediaries where a purchaser of financial instruments has not paid the transaction price are not affected by the proposed amendments of the Code.

8. The ECB understands that the provisions of the draft order concern the following financial instruments: shares, debt instruments, UCITS units and any equivalent financial instruments issued under foreign laws, when they are admitted to the operations of a central securities depository or delivered within a settlement system for financial instruments. In addition, the first paragraph of Article L.431-2 of the Code refers to the settlement systems for financial instruments ‘mentioned in Article L.330-1’ of the Code. For the sake of clarity, the ECB would propose replacing the words ‘mentioned in Article L.330-1’ with the words ‘as defined in Article L.330-1’. The ECB understands in this respect that the definition provided for in Article L.330-1 of the Code covers both systems operating under French law and systems operating under the law of a Member State of the European Economic Area.
9. More generally, the ECB would like to emphasise that it is fundamental to the functioning and creation of a safe, efficient and integrated EU clearing and settlement infrastructure to have clear rules regarding transfer of ownership in the context of securities clearing and settlement systems, applicable to financial instruments held with central securities depositories. The ECB is of the view that this objective, as highlighted in the Second Report on EU Clearing and Settlement Arrangements published by the Giovannini Group in April 2003<sup>2</sup>, and, more recently, in the Commission’s Communication to the Council and the European Parliament regarding clearing and settlement in the EU<sup>3</sup>, should be considered when elaborating any new domestic legislation in this area.
10. 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, 15 June 2004.

[signed]

*The President of the ECB*

Jean-Claude TRICHET

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<sup>2</sup> Published on the Commission’s website at [http://europa.eu.int/comm/internal\\_market/en/finances/mobil/clearing/index.htm](http://europa.eu.int/comm/internal_market/en/finances/mobil/clearing/index.htm).

<sup>3</sup> ‘Clearing and Settlement in the European Union – The Way Forward’ COM/2004/0312/final, 28 April 2004, published on the Commission’s website at [http://europa.eu.int/comm/internal\\_market/en/finances/mobil/clearing/index.htm](http://europa.eu.int/comm/internal_market/en/finances/mobil/clearing/index.htm).