



EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 23 December 2004

at the request of the Spanish Ministry for Economic Affairs and Finance on the draft State Budget Law for 2005 amending Law 41/1999 of 12 December 1999 on payment and securities settlement systems and Law 13/1994 of 1 June 1994 on the autonomy of the Banco de España
(CON/2004/39)

1. The European Central Bank (ECB) received on 5 November 2004 a request from the Spanish Ministry for Economic Affairs and Finance for an opinion on some provisions of the draft State budget law for 2005¹ (the draft law) amending Law 41/1999 of 12 December 1999 on payment and securities settlement systems (Law 41/1999) and Law 13/1994 of 1 June 1994 on the autonomy of the Banco de España (the Banco de España Statute).
2. The ECB's competence to deliver an opinion on the draft law is based 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 provisions². 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. The draft law amongst others sets up a new management structure for the Sistema Nacional de Compensación Electrónica (National Automated Clearing System; hereinafter 'SNCE'), the domestic clearing system for retail payments. SNCE resulted from a concentration of all the provincial clearing houses into a single and decentralised electronic clearing system, due to technology improvements. It clears current account cheques and promissory notes, credit transfers, direct debits, commercial bills, whether bills of exchange or otherwise and fuel and travel cheques.
4. In addition, the draft law amends the Banco de España's Statute, laying down in detail the Banco de España's powers to regulate and oversee payment clearing and settlement systems.

Amendments to *Ley 41/1999, de 12 de noviembre, sobre sistemas de pagos y de liquidación de valores* (Law 41/1999 of 12 November 1999 on payment and securities settlement systems)³

¹ *Boletín Oficial de las Cortes Generales*, 30.9.2004.

² OJ L 189, 3.7.1998, p. 42.

³ B.O.E., Spanish Gazette, of 13 November 1999.

5. The Banco de España has managed the SNCE since 1987. The draft law provides that a public limited company (Sociedad Española de Sistemas de Pago, Sociedad Anónima; hereinafter the 'Company') will take over SNCE's management from the Banco de España. Ley 41/1999, which implements the Settlement Finality Directive⁴, is amended for this purpose. The draft law renames the public limited company, Servicio de Pagos Interbancarios, Sociedad Anónima (the Servicio), which becomes the Company. In addition, the Servicio's purpose is modified to cover a wide range of payment services activities including, *inter alia*, facilitating clearing and settlement of transfer orders among credit institutions regardless of their support, facilitating processing of any means of payment, providing technical assistance and any other activity that the Government, following a report from the Banco de España, may attribute to it.
6. As part of the transformation of the Servicio into the Company, the Servicio's capital shares will be redistributed: the draft law provides that the entities participating in SNCE, which accept obligations resulting from settlements, may become initial shareholders of the Company. This initial distribution of capital will be proportional to the volume of their activity in SNCE. The Company's internal rules will need to provide for the periodical review of this distribution. The Ministry for Economic Affairs and Finance, on a proposal from the Banco de España, may allow for extension of the participation in the Company's capital share to participants in SNCE that are not settling members. Finally, if the Company in the future manages other systems than SNCE, its internal rules will need to provide for participation in the capital share of the Company of the participants in such other systems.
7. The ECB takes note of these developments.
8. A consequence of the privatisation of SNCE's management is that the Company, subject to authorisation by the Banco de España, will establish the basic operating rules for SNCE and for the other systems that it may manage in the future.
9. However, the draft law (new Article 17(2) of Ley 41/1999) imposes, *inter alia*, a limit on the Company when establishing the rules for participation in SNCE or in the other systems it manages. This participation is limited by the draft law to credit institutions operating in Spain and registered with Banco de España's compulsory Official Registers.
10. As to the meaning of the expression 'operating in Spain', the ECB understands that, in addition to credit institutions operating on the Spanish market through a branch in Spain, all credit institutions in the EU can be considered as 'operating in Spain' for as long as they have recourse, in respect of the Spanish market, to the regime of free provision of services established in Articles 18 and 21 to 22 of Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions⁵. This interpretation would theoretically allow for direct remote participation in SNCE, which the ECB considers should in

⁴ Directive 98/26/EC of 19 May 1998 of the European Parliament and of the Council on settlement finality in payment and securities settlement systems, OJ L 166, 11.6.1998, p. 45.

⁵ OJ L 126, 26.5.2000, p. 1.

principle be possible, while at the same time recognising the existence of presently different national technical and operational standards.

11. In this regard, the ECB recalls that a very important Eurosystem objective and European banking industry project is the creation of a Single Euro Payments Area (SEPA). The SEPA project means that all euro area payments should become domestic at the euro area level and reach a level of reliability and efficiency at least on par with the current best performing national payment systems by 2010. As part of the SEPA, Pan-European Automated Clearing Houses (PEACH) will cover the entire euro area. Decisions related to the next generation of national systems should in future be made from a pan-European perspective to ensure compliance with SEPA instruments and standards and the overall SEPA infrastructure.
12. In addition, the interpretation of the above limitation on participation in SNCE or in the other systems managed by the Company is also relevant to the possibility of participating in the Company's share capital. Credit institutions in the EU participating remotely in SNCE or the other systems managed by the Company should have the possibility of participating in the Company's share capital, which is only open to participants in SNCE or such other systems.
13. The ECB welcomes the option given to the Company by the draft law (final subparagraph of new Article 17(1) of Ley 41/1999) to establish relations with other organisations or entities carrying out similar functions, and to manage other clearing and settlement systems, within or outside Spain as it opens up for pan-European activities in line with the SEPA.
14. Finally, the ECB welcomes the draft law's inclusion (new Article 8(b) of Ley 41/1999) of SNCE as a system recognised under the Settlement Finality Directive. The ECB notes, however, that the law (new additional eighth disposition of Ley 41/1999) introduces a special regime in the finality of the transfer orders sent to SNCE to allow refunds that may occur under SNCE's rules. The ECB understands that this provision is intended to clarify the Spanish implementation of the Settlement Finality Directive in respect of SNCE.

Amendment to Law 13/1994 of 1 June on the Banco de España's autonomy

15. The new Article 16 of the Banco de España's Statute empowers Banco de España to regulate clearing and settlement systems by way of circulars, in order to comply with the objective of promoting the smooth functioning of payment systems, and as part of its functions as a member of the European System of Central Banks. Under the draft law, the Banco de España may, in particular (but not limited to), develop or complete the legal acts adopted by the ECB. In addition, such circulars may also incorporate recommendations by international organisations. Without prejudice to this clarification of the Banco de España's regulatory powers in this field, the ECB notes that the Banco de España retains the possibility of managing, where appropriate, clearing and settlement systems.
16. In addition, the new Article 16 of the Banco de España's Statute grants it detailed supervisory powers over the functioning of payment and settlement systems. The Banco de España may gather

as much information and documentation as it considers necessary to evaluate their efficiency and reliability. In particular, the new Article 16 expressly empowers the Banco de España to suspend, if necessary, the application of the decisions adopted by the entity managing a payment system and to adopt the necessary measures.

17. The ECB particularly welcomes the new Article 16 as it mirrors some of the ESCB's powers under the Treaty and the ESCB Statute in the field of payment and settlement systems.
18. This opinion will be published on the ECB's website.

Done at Frankfurt am Main, 23 December 2004.

[signed]

The President of the ECB

Jean-Claude TRICHET