EUROPEAN CENTRAL BANK

**OPINION OF THE EUROPEAN CENTRAL BANK**

**of 5 June 2003**

**at the request of the Austrian Federal Ministry of Finance**
**on a draft Federal law**
**(i) repealing the existing Foreign Exchange Act of 1946 and replacing it by the Foreign Exchange Act 2003, and (ii) amending the Federal Act on cross-border transfers**

**(CON/2003/8)**

1. On 16 May 2003 the European Central Bank (ECB) received a request from the Austrian Ministry of Finance for an opinion on a draft Federal law (the draft law) (i) repealing the existing Foreign Exchange Control Act of 1946 (Devisengesetz) and replacing it by the Foreign Exchange Act 2003 (Devisengesetz 2003), and (ii) amending the Federal Act on cross border transfers (Überweisungsgesetz).

2. The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community ('Treaty'), the first indent of Article 4(a) of the Protocol on the Statute of the European System of Central Banks and of the ECB ('Statute') and the first, second, third, fourth and fifth indents of Article 2(1) of Council Decision No 415/98/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions[1], since the draft law contains provisions (i) putting in place a new regime for foreign exchange transactions by repealing the existing Foreign Exchange Control Act and replacing it with the Foreign Exchange Act 2003, (ii) conferring rights and obligations on the Oesterreichische Nationalbank (OeNB) concerning the collection, compilation and distribution of balance of payments statistics, and (iii) implementing penalty provisions in the Federal Act on cross border transfers in accordance with Council Regulation (EC) No 2560/2001 of the European Parliament and of the Council on cross-border payments in euro[2]. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank[3], the Governing Council of the ECB has adopted this opinion.

3. The ECB notes that the draft law has two main purposes.

   First, Article I of the draft law will repeal the Foreign Exchange Control Law currently in force and replace it with the Foreign Exchange Act 2003. The provisions of the existing Foreign Exchange

1 OJ L 189, 3.7.1998, p. 42.
2 OJ L 344, 28.12.2001, p. 13.
3 OJ L 125, 19.5.1999, p. 34.

Control Law, which essentially originate from 1946, are no longer appropriate to deal with today's situation taking into account both Austria's membership of the European Union and in particular the introduction of the euro. The current position is that the principle of free movement of capital in Articles 56 to 60 of the Treaty has substantially been achieved in Austria by means of OeNB regulations. However, the existing Foreign Exchange Control Law itself is still based on the principle of restricting foreign exchange transactions and the need for the OeNB to monitor cross-border movement of capital and payments in general. Also, conversion to the euro has not yet been formally carried out in the Foreign Exchange Control Law. Finally, Article I of the draft law contains provisions conferring rights and obligations on the OeNB regarding the balance of payments and international investment position (b.o.p./i.i.p.) statistics.

Second, Article II of the draft law contains provisions amending the Federal Act on cross-border transfers in order to meet the requirement to comply with Regulation (EC) No 2560/2001. To this end, Article II of the draft law inserts penalty provisions into the Federal Act on cross-border transfers.

4. The ECB welcomes Article I of the draft law, which confers rights and obligations on the OeNB as regards balance of payments and international investment position (b.o.p./i.i.p.) statistics. These provisions are of particular importance in view of the fact that Austria plans to change its current data collection system, which is at present largely based on indirect reporting by monetary financial institutions (MFIs) on own transactions and positions and also on behalf of their clients, to a system largely based on direct reporting by economic agents (including MFIs) of their transactions and positions in relation to non-resident counterparts. In particular, the ECB welcomes the following provisions.

   - Under Article I § 7(1) of the draft law, the OeNB will remain the Austrian b.o.p./i.i.p. compiler. In addition to national statistics, Article I of the draft law also mentions those b.o.p./i.i.p. statistics required by Community law. As explained in the explanatory notes to the draft law, Community law imposes an obligation in relation to the ECB and the Commission (Eurostat). In this context, the explanatory notes refer to the Guideline ECB/2000/4 of 11 May 2000 on the statistical reporting requirements of the ECB in the field of balance of payments statistics, the international reserves template and international investment position statistics[4]. It is noted that Guideline ECB/2000/4 has already been repealed and replaced by Guideline ECB/2003/7 of 2 May 2003 on the statistical reporting requirements of the ECB in the field of balance of payments and international investment position statistics, and the international reserves template[5]. As a result, the reference should be corrected in the explanatory memorandum. Furthermore, the ECB notes that the explanatory notes to the draft law recommend the use of the international standards laid down in the IMF Balance of Payments Manual, 5th edition (BPM5) and that Article I § 7(3)

4 OJ L 168, 23.6.2001, p. 25.

5 OJ L 131, 28.5.2003, p. 20.

of the draft law obliges the OeNB to stipulate its reporting requirements to the reporting agents (i.e. deadlines, breakdown, etc.) in line with the aforementioned Community law.

- With regard to the right to collect the relevant data, Article I § 7(2) of the draft law provides that the OeNB is entitled to collect a wide range of detailed information from all natural and legal persons and other institutions with regard to those operations covered by the draft law in Article I § 5(4) and Article 7(2), which essentially cover all cross-border transactions/positions that could be relevant for b.o.p./i.i.p. statistics.

- Since the indirect reporting by MFIs of clients' cross-border transactions/positions will be discontinued, it is important to have a source for identifying those economic agents that are relevant for b.o.p./i.i.p. statistics. In this respect, Article 1 § 7(6) of the draft law obliges those institutions which maintain public registers to provide the OeNB with the information necessary to create and maintain the sample population for surveys and direct reporting, including the identification of potential reporting agents or alternative sources.

- The draft Law provides that infringements will be punishable by a maximum fine of EUR 2 000.

- Finally, Article I, § 7(4) and (5) of the draft law deal with confidentiality of the statistical data collected. The transmission of information by the OeNB to third parties must, in principle, be carried out so as to preserve confidentiality, i.e. due care has to be taken that the information remains anonymous and that the economic agents concerned cannot be identified. However, it is noted that under the provisions of Community law, information necessary for the compilation of consolidated statistics by the Commission (Eurostat) or the ECB can also be transmitted in a non-anonymous way.

5. More generally, the ECB welcomes Article I of the draft law with regard to the compilation of b.o.p./i.i.p. statistics by the OeNB considered necessary to enable the OeNB to fulfil its obligations to contribute to the euro area b.o.p./i.i.p. statistics. The OeNB will remain the b.o.p./i.i.p. compiler and the Foreign Exchange Act 2003 will enable it to collect all necessary direct information from reporting agents selected on the basis of business registers and administrative information. Article I of the draft law effectively sets out the means for the OeNB to update and maintain the business register so as to ensure the high quality data needed for Community statistics, whilst also minimising the reporting burden for individual respondents. The ECB welcomes the fact that the explanatory notes to Article I, § 7 of the draft law refer to Council Regulation (EC) No 2533/98 of 23 November 1998 concerning the collection of statistical information by the ECB[6] which defines the framework for statistics compiled by the ECB with the assistance of the national central banks. The ECB is of the opinion that the level of fines that can be imposed in case of breach of reporting obligations is adequate to constitute an effective deterrent, on the understanding that it relates to individual breaches in relation to the reporting of each transaction/position. Finally, the ECB notes

6 OJ L 318, 27.11.1998, p. 8.

with satisfaction that Article I of the draft law explicitly mentions Austria's Community tasks with regard to the ECB's and Commission's (Eurostat) requirements.

6. The ECB notes that Article I of the draft law determines in § 5 that the OeNB will be entitled, by means of regulation, to impose restrictions on free movement of capital and payments to satisfy Austria's obligations under international law, subject to obtaining either the Federal Government or the Federal Chancellor's consent. The explanatory notes state that, as measures restricting the free movement of capital and payments are important to foreign policy, either the Federal Government or the Federal Chancellor's consent is required to adopt them. It is furthermore explained that this complies with Community law and is substantially in line with § 33a(3) of the existing Foreign Exchange Control Act. As the necessary Federal Government or Federal Chancellor's consent refers to legal acts of the OeNB intended to regulate cases falling under Articles 57(2), 59, 60(1), 60(2), the first sentence of the Treaty in order to satisfy Austria's international obligations, and as the role entrusted to the OeNB in this context does not concern ESCB-related tasks but must be subsumed under Article 14.4 of the Statute, the ECB is of the opinion that this does not compromise the OeNB's independence.

7. The ECB, thus, welcomes the fact that Article I of the draft law is intended to make Austrian law comply formally with Articles 56 to 60 of the Treaty by replacing the outdated Foreign Exchange Control Act with the Foreign Exchange Act 2003. The ECB also welcomes the explicit clarification made in Article I, § 15(3) of the draft law that the Foreign Exchange Act 2003 respects the independence of the OeNB in all ESCB-related matters in line with Article 108 of the Treaty.

8. The ECB takes note that Article II of the draft law will amend the Federal Act on cross-border transfers. Article II of the draft law covers all relevant issues and aspects required by Regulation (EC) No 2560/2001 with respect to the level of charges for cross-border electronic payment transactions and credit transfers, the transparency of charges, and the measures for facilitating cross-border transfers, as set out in Articles 3 to 5 of the Regulation. In particular, the draft law introduces penalty provisions in the Federal Act on cross-border transfers in order to ensure, by means of appropriate legislative measures, compliance with Article 7 of the Regulation, which requires that "Compliance with this Regulation shall be guaranteed by effective, proportionate and deterrent sanctions".

9. The ECB confirms that it has no objections 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 5 June 2003.

*The President of the ECB*

[signed]

Willem F. Duisenberg