EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 14 December 2001

at the request of the Portuguese Ministry of Finance on a draft decree-law amending the foreign exchange legal framework

(CON/2001/39)

1. On 23 October 2001 the European Central Bank (ECB) received a request from the Portuguese Ministry of Finance for an opinion on a draft decree-law amending the existing foreign exchange legal framework, with a view to simplifying the existing framework and adjusting it to the statistical requirements on foreign exchange operations established by the IMF and the OECD (hereinafter called the 'draft decree-law').

2. The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community (hereinafter referred to as the 'Treaty') and the first and fourth 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[1], as the legislative proposal contains provisions concerning statistical and foreign currency matters. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, this opinion has been adopted by the Governing Council of the ECB.

3. The draft decree-law seeks to bring together into a single law the existing Portuguese foreign exchange legislation, which is currently divided between two legal acts. As a result, the proposed new legislation regulates external economic and financial operations; foreign exchange operations and foreign currency trading; the import, export and re-export of means of payment and securities; operations involving gold and foreign exchange offences.

4. First, the ECB welcomes the definitions of 'resident′ and 'non-resident' established in Article 4 of the proposed decree-law. These definitions are perfectly consistent with the concept of 'residency' as adopted internationally and used for statistical purposes. In particular, the

1 OJ L 189, 3.7.1998, p. 42.

definition of residency laid down in the draft decree-law in question fully complies with the statistical parameters established in the *1993 System of National Accounts,* the *1995 European System of Accounts,* the fifth – and most recent – edition of the *International Monetary Fund Balance of Payments Manual (September 1993)* and in Council Regulation (EC) No 2533/98 of 23 November 1998 concerning the collection of statistical information by the European Central Bank[2].

5. Secondly, the ECB further welcomes the definition of foreign currency as laid down in Article 5 of the draft decree-law, as it is based on a legally correct and rigorous criterion, namely that of non-participation in the euro area. The ECB also notes that the concept of foreign currency, as laid down in the first part of Article 5(1) of the draft decree-law, refers to metal coins. The ECB notes that the reference to metal coins is not maintained in Article 1(2)(b) of the proposed draft decree-law, meaning that the coherence of the definition established in Article 5(1) may be undermined. The ECB thus proposes to add the expression 'metal' to Article 1(2)(b).

6. Thirdly, and still on the subject of the definition of foreign currency given in Article 5(1) of the draft decree-law, the reference to electronic money at the end of the paragraph is made in such a way as to suggest that such currency is necessarily legal tender. However, Directive 2000/46/EC of the European Parliament and of the Council of 18 September 2000 on the taking up, pursuit of and prudential supervision of the business of electronic money institutions[3], makes no reference as to whether such money is legal tender. In fact, Article 1(3)(b)(iii) of this Directive merely refers to electronic money as a monetary value accepted as a means of payment. Electronic money does not need to be legal tender in order to be accepted as a means of payment. The ECB therefore considers that the reference to legal tender should be deleted from the end of Article 5(1) of the draft decree-law, in order to prevent the legal reference to electronic money from becoming redundant.

7. Finally, the ECB notes that the draft decree-law repeatedly associates the characteristic of legal tender with foreign currency. This association is made specifically in Article 1(2)(b), in Article 5(1) and in Article 19(1) and (3) of the draft decree-law in question. Without wishing to cast doubt on the correctness of the concept of legal tender, the ECB is obliged to draw attention to the fact that this concept fails to cover all the forms of foreign currency in circulation. The fact is that, although such situations are exceptional, there are cases in which the currency in circulation and accepted between the parties as a means of payment is not actually legal tender (for instance, in Scotland and Northern Ireland, only coins made by the Royal Mint are legal tender, although the paper money issued by both the Bank of England and the local banks circulates and is accepted for payments). In view of this, the ECB would like to observe that by treating foreign currency as legal tender, the draft decree-law will not cover foreign exchange

2 OJ L 318, 27.11.1998, p. 8.

3 OJ L 275, 27.10.2000, p. 39.

operations involving foreign currency which, although it is not legal tender, is in circulation and is accepted by the parties as a means of payment.

However, if the Portuguese legislator intends to exclude notes and coins denominated in foreign currency which are not legal tender from the scope of application of the draft decree-law, the ECB considers that this intention should be made clear in the preamble. This would avoid considering the situation of such currencies as being a legal lacunae and instead consider, on the basis of a teleological interpretation, as being excluded from the scope of application of the draft decree-law.

8. The ECB confirms that it has no objection to the competent national authorities making this opinion publicly available at their discretion.

Done at Frankfurt am Main on 14 December 2001.

The President of the ECB

[signed]

Willem F. DUISENBERG