EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 28 June 2001

at the request of the Luxembourg Ministry of Finance on a draft Act concerning
1. approval of the International Convention for the Suppression of Counterfeiting Currency, signed in Geneva on 20 April 1929, and the Protocol thereto; and
2. modification of certain provisions of the Penal Code and the Code of Criminal Procedure

(CON/2001/16)

1. On 7 May 2001 the European Central Bank (ECB) received a request from the Luxembourg Ministry of Finance for an opinion on a draft Act (hereinafter referred to as the 'draft Act') concerning (1) approval of the International Convention for the Suppression of Counterfeiting Currency, signed in Geneva on 20 April 1929 (hereinafter referred to as the 'Geneva Convention'), and the Protocol thereto; and (2) modification of certain provisions of the Penal Code and the Code of Criminal Procedure.

2. The ECB's competence to deliver an opinion is based on Article 2 of Council Decision (EC) 98/415 of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions[1], as the draft Act contains provisions concerning currency matters. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the ECB, this opinion has been adopted by the Governing Council of the ECB.

3. Under Article 2 of the Council framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro (hereinafter referred to as the 'framework Decision')[2], the Member States that have not yet done so undertake to accede to the Geneva Convention and its Protocol. The ECB understands that, in terms of the first Article of the draft Act, Luxembourg approves the Convention and its Protocol. However, the ECB notes that under Luxembourg law, in order to bring the Convention and its Protocol into force in Luxembourg, this approval has to be supplemented by deposit of the ratifying instrument signed by the Grand-Duke. The ECB further recalls that a text evidencing the transposition of the Convention and its Protocol into

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1 OJ L 189, 3.7.1998, p. 42.
2 OJ L 140, 14.6.2000, p. 1.

Luxembourg law has to be transmitted to the ECB not later than 29 May 2001 in accordance with Article 11(2) of the framework Decision.

4. Article 3(2) of the framework Decision requires each Member State to take the necessary measures to ensure that participating in and instigating the conduct referred to in Article 3(1), and attempting the conduct referred to in points (a) to (c) of Article 3(1), are punishable. The ECB notes that apart from specific provisions of the draft Act, provisions of general Luxembourg criminal law are also relevant in so far as they provide that attempts to commit, or the commission of the said offences, are punishable. These general provisions therefore have to be transmitted to the ECB not later than 29 May 2001 in accordance with article 11(2) of the framework Decision. However, as far as the offence of instigating is concerned, the present wording of the draft Act does not seem to make this offence punishable at all. There is furthermore no indication in the statement of reasons that such offences would be punishable on the grounds of any provision of general Luxembourg criminal law.

5. Furthermore, the present draft Act does not foresee a specific provision on the liability of legal persons. The ECB recalls that under Article 8 of the framework Decision, each Member State shall take the necessary measures to ensure that legal persons can also be held liable for counterfeiting offences.

6. The ECB notes that at present the draft Act does not ensure that conduct referred to in Articles 3 and 4 of the framework Decision is punishable if it relates to banknotes and coins in national currency units of Member States which will lose their status as legal tender with the introduction of the euro banknotes and coins. Indeed, the Luxembourg draft Act limits criminal conduct to coins and banknotes that are legal tender in Luxembourg or in a foreign country or whose issue is authorised by a law of a foreign State or by virtue of a provision having the force of law in such a State. In accordance with Article 15(1) of Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro[3], banknotes and coins denominated in a national currency unit lose their status as legal tender after the end of the transitional period. In Luxembourg, the end of the transitional period for Luxembourg and Belgian francs has been set at 28 February 2002. However, any Luxembourg and Belgian francs remaining in the public's hands after that date will continue to be exchanged after 28 February 2002, without charge, against euro notes and coins at the Banque centrale du Luxembourg (BCL) and certain credit institutions established in Luxembourg. Similar provisions exist in the other Member States participating in the euro for the banknotes and coins denominated in their respective national currency units. The ECB shares the concern expressed in this respect by the Luxembourg State Council in its opinion of 29 May 2001. It therefore considers that the draft Act should include fraudulent conduct in relation to the old banknotes and coins since, although no longer legal tender themselves, they will be directly exchangeable with euro banknotes and coins. The

3 OJ L 139, 11.5.1998 p. 1.

principle of legality indeed requires the inclusion of such an express provision. Taking into account the ease with which old banknotes can be converted into euro banknotes, the draft Act should provide for the same effective, proportionate and dissuasive criminal penalties as for offences relating to banknotes being legal tender. Such a provision should be formulated sufficiently broadly in order to also encompass the possible scenario whereby euro banknotes were no longer legal tender.

7. The ECB suggests that the fines mentioned in Articles 10, 178 and 214, currently expressed in Luxembourg francs, should be expressed in euro.

8. The ECB further notes that the present draft Act does not include any provisions on the involvement of the BCL in the fight against counterfeiting. Specific provisions on such involvement would be desirable to facilitate the fulfilment of obligations undertaken by Luxembourg under Article 14 of the Geneva Convention and Articles 4 and 5 of the draft Council Regulation laying down the measures necessary for the protection of the euro against counterfeiting, which is about to be adopted.

9. This opinion does not cover Articles 174, 175, 184, and 187 of the Penal Code, which are introduced by the draft Act, as these Articles do not fall within the competence of the ECB.

10. This opinion shall be without prejudice to the obligation of Luxembourg to transmit to the ECB the text of the provisions transposing into Luxembourg law the obligations imposed on it under Article 11(2) of the framework Decision.

11. The ECB confirms that it has no objection to publication of this opinion by the competent national authorities at their discretion.

Done at Frankfurt am Main on 28 June 2001.

The President of the ECB

[signed]

Willem F. DUISENBERG