EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 25 May 2001

at the request of the Austrian Ministry of Finance on a draft Article of the Federal law establishing and organising the financial market supervisory authority and amending the laws relating to banking, securities supervision, investment funds, equities funds, savings banks, building societies, mortgage banks, mortgage bonds, the IAPL, the stock exchange (1989), insurance supervision, motor vehicle third party liability insurance (1994), pension funds, capital markets, the Commercial Code, companies limited by shares, limited liability companies and the National Bank (1984) (*Finanzmarktaufsichtgesetz – FMAG)*

(CON/2001/10)

1. On 19 April 2001 the European Central Bank (ECB) received a request from the Austrian Federal Ministry of Finance for an opinion on a draft Federal law establishing and organising the financial market supervisory authority and amending the laws relating to banking, securities supervision, investment funds, equities funds, savings banks, building societies, mortgage banks, mortgage bonds, the IAPL, the stock exchange (1989), insurance supervision, motor vehicle third party liability insurance (1994), pension funds, capital markets, the Commercial Code, companies limited by shares, limited liability companies and the National Bank (1984) (*Finanzmarktaufsichtgesetz – FMAG*). The intention of this draft Law is the reorganisation of prudential supervision in Austria and the grant to the Oesterreichische Nationalbank (OeNB) of the oversight function of payment systems (hereinafter referred to as the "draft 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"), Article 3.1 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter referred to as the Statute), and the third, 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[1], as the draft Law contains provisions concerning a national central bank, payment and settlement systems as well as rules applicable to financial institutions which could materially influence the stability of financial

1 OJ L 189, 3.7.1998, p. 42.

institutions and markets. 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. One aim of the draft Law is to concentrate the capacities of those authorities which are currently involved in Austria in the various fields of supervision, namely the Federal Ministry of Finance, the securities supervisory authority and the OeNB, in a newly established authority, the "*Finanzmarktaufsichtsbehörde*" (FMA), which is not bound by instructions. The FMA will be established as a public law entity with legal personality and will, as a global-finance supervisory authority, be competent for banking, insurance, securities and pension funds supervision. The Federal Ministry of Finance will be entrusted with supervision of the overall fulfilment of the legal obligations of the FMA. The FMA will be funded by the supervised entities themselves as well as by an annual contribution of the federal government. The official explanatory memorandum accompanying the draft Law argues that the establishment of a stand-alone financial regulatory agency in Austria *inter alia* pursues the objectives of ensuring operational independence of the regulatory agency and regulatory flexibility. The operational independence and freedom from instruction of the FMA corresponds fully to Principle 1 of the "Core principles for effective banking supervision" of the Basel Committee on Banking Supervision.

4. As a general observation, the ECB notes that the role of the OeNB in the field of prudential supervision will diminish as a result of the adoption of the draft Law. This contrasts with the position expressed by the ECB in the note on "The role of central banks in prudential supervision"[2]. The ECB considers that maintaining a close involvement of national central banks in prudential supervision is a condition necessary to allow the Eurosystem to contribute adequately to monitoring the risks to financial stability in the euro area. This is of particular importance in a context in which the nature and scope of these risks are affected by the introduction of the single currency and the consequent enhanced integration of financial markets. In addition, it safeguards the smooth coordination between the central banking functions exercised at the Eurosystem level and the supervisory functions carried out at the national level. In the ECB's opinion, the objective of achieving more effective coordination between the conduct of supervisory functions in all segments of financial activity could be pursued also with means that do not imply a reduced role of the central bank in this field. In support of a continued and even reinforced involvement of the OeNB in prudential supervision, it may be argued that also the Treaty contains a provision relying on the central bank to address supervisory issues which may arise in increasingly integrated financial markets. In fact, Article 105(6) of the Treaty envisages a simplified procedure to confer upon the ECB specific tasks in the context of supervision of credit institutions and other financial institutions with the exception of insurance firms. Furthermore, Article 105(5) of the Treaty entrusts the Eurosystem

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2 Published on the ECB's website (http://www.ecb.int); see the ECB press release of 22.3.2001.

with the task of contributing to the smooth conduct of policies pursued by the competent authorities relating to prudential supervision of credit institutions and the stability of the financial system. A reduced role of the OeNB in prudential supervision could generally make compliance with the obligations arising from this provision more difficult. In the opinion of the ECB, the draft law does not provide sufficient safeguards for the OeNB to assume its full responsibilities in the context of the prudential functions which the Eurosystem has been entrusted with in the interest of financial system stability and soundness.

5. The ECB notes, moreover, that the draft Law also intends to maintain some of the advantages stemming from the institutional framework in place, including the current involvement of the OeNB in prudential supervision – with the fundamental and objectively unfounded exception of limiting on-site inspections to market risk (see paragraph 9 below). Such involvement, according to the explanatory memorandum, should be supported regardless of the organisational form chosen for the attribution of supervisory responsibilities. This, in practice, is reflected in the provisions of the draft Law concerning *inter alia* the procedures for the nomination of the members of the FMA's executive board (*Vorstand*) and supervisory board (*Aufsichtsrat*), the composition of the FMA's advisory board (*Beirat*), the composition of the Financial Market Committee (*Finanzmarktkomitee*), the possible operational involvement of the OeNB in supervisory tasks, the institutional exchange of information between the two bodies, and the consultative role of the OeNB vis-à-vis the FMA and the Federal Minister of Finance.

6. Against this background, the ECB believes that improvements in the draft legislative provisions in defining the role of the OeNB with regard to financial stability and the conduct of prudential supervision tasks are required. This would comply with the meaning and intention of the relevant provisions of the Treaty establishing the European Community.

7. First, the specific role of the OeNB in financial stability and prudential supervision. The draft Law should make it clear that the OeNB has responsibility for the overall stability of the financial system as a whole, as a separate function from hands-on supervision and financial regulation. The express attribution of such a role seems particularly useful, given the formal attribution of the responsibility for prudential supervision of individual institutions to the FMA. This would prove beneficial to the institutional framework being proposed in the draft Law. Central banks are in general in an advantageous position to fulfil the responsibility for financial stability, given their insight into money and financial market developments and involvement in payment systems and monetary policy operations. This is both on an ongoing basis and in crisis management situations. In this context, the ECB welcomes the establishment of the Financial Market Committee as a body fostering cooperation and information sharing among the authorities jointly responsible for financial market stability. Moreover, in view of its financial stability role, the OeNB should be expressly assigned the task of contributing to the conduct of prudential supervision of financial intermediaries, in close cooperation with the FMA.

8. Secondly, while the draft Law responds in various ways to the need to bridge the supervisory and the central banking functions, the ECB considers that it could be useful to insert in the draft Law the *basic principle* that a smooth interaction between the FMA and the OeNB warrants close cooperation between them in all fields of common interest. This principle, which is for instance reflected in the draft provisions for Articles 79 and 80 of the Banking Act (*Bankwesengesetz*) contained in Section II of the draft Law, should be further reflected in a general provision stipulating a duty of cooperation, whose ultimate purpose would be to have in place effective and practical arrangements for cooperation and information sharing between the FMA and the OeNB. Such a provision could go beyond the proposed provisions in Article 1 of the draft Law concerning Article 21(2) of the Financial Market Law.

9. Thirdly, it follows that the issue of access to information and information sharing in general could be further specified in the draft Law than as provided in the amendments to Articles 79 and 80 of the Banking Act contained in Section II of the draft Law. In this context, the ECB notes first that in Article 43 of the National Bank Act, as in Article 77 of the Banking Act and in the provisions proposed in Article II of the draft Law concerning Article 21(2) of the Financial Market Law, there are indeed provisions in this regard. The ECB would however welcome for the following reasons further clarification of the access to information and information exchange. In particular, the exchange of information would not be dependent on the occurrence of specific events, as currently foreseen in these draft provisions, but would occur on an on-going basis, which would imply regular flows of information. Furthermore, the ECB would welcome the express removal of possible legal obstacles to information sharing between the FMA and the OeNB. The relevant provisions of the "post-BCCI Directive"[3], which were incorporated in all sectoral directives, stipulate that information subject to confidentiality and professional secrecy requirements may be shared between supervisory authorities and central banks, and vice versa, for the purposes of the exercise of their respective tasks. In view of the fact that the draft Law will establish a new supervisory authority, the ECB would welcome the express inclusion of such a principle both in the Law establishing the FMA and in the OeNB Act. Central banking is a valuable input to the supervisory process, while access by central banks to supervisory resources benefits the conduct of monetary policy operations, the oversight of payment systems and the pursuance of financial stability. It may be noted that information sharing may entail a cross-border dimension, since information concerning Eurosystem-related tasks might need to be conveyed to other national central banks of the Eurosystem and the ECB. A provision reflecting this aspect would be welcome. This suggestion is in line with the recommendations put forward by the recent Economic and Financial Committee's "Report on

3 Article 4 of the European Parliament and Council Directive 95/26/EC of 29 June 1995 amending Directives 77/780/EEC and 89/646/EEC in the field of credit institutions, Directives 73/239/EEC and 92/49/EEC in the field of non-life insurance, Directives 79/267/EEC and 92/96/EEC in the field of life assurance, Directive 93/22/EEC in the field of investment firms and Directive 85/611/EEC in the field of undertakings for collective investment in transferable securities (Ucits), with a view to reinforcing prudential supervision, OJ L 168 , 18.7.1995 p. 7.

financial crisis management"[4], to remove any legal impediments to the cross-border exchange of information among supervisors and central banks on a cross-border basis. With regard to access to information from financial institutions, the ECB welcomes the proposed amendments to Article 22e and Article 26 of the Banking Act contained in Section II of the draft Law, stipulating that the OeNB will remain a recipient of information from reporting institutions. In the same manner, Article 79(2) and (3) of the Banking Act are also welcome, since they foresee that both the FMA and the OeNB will be able to access the reports which each of them receives from credit institutions. In line with the foregoing given the enhanced integration of financial services, access to supervisory information by the OeNB should not be limited to information on the banking sector but should also include the other sectors of the financial system which may be deemed relevant for the stability of the financial system. The central bank should have the means to assess possible systemic implications of the behaviour of complex financial groups on money and capital markets as well as on payment and settlement systems. This would for instance also be in line with the European Commission's recent proposal for a Community directive on the supervision of financial conglomerates[5], which purports to lift the legal obstacles for supervisory information sharing with central banks.

10. Fourthly, the operational involvement of the OeNB in prudential supervision. The involvement of the OeNB in on-site inspections is substantially reduced by the draft Law as a consequence of the full attribution of supervisory responsibilities to the FMA. The on-site examination powers will be limited to the examination of market risks under the proposed amendments to Article 70 of the Banking Act contained in Section II of the draft Law. The possibility remains, under the proposed amendments to Articles 26b, 27 and 70 of the Banking Act, that the FMA may request the OeNB to carry out inspections in respect of market risks. This is conditional, under draft Article 70 of the Banking Act, on the process being substantially streamlined or being made more expeditious or being in the interests of expediency, simplicity, speed or cost-saving. The ECB would like to note that, in line with the intention of the draft Law, the operational involvement of the OeNB might represent a considerable advantage to the activities of the FMA in view of the experience and expertise of the central bank as well as of the central bank's infrastructure. The possibility of the involvement of the OeNB seems however to be very restricted by the provisions of the draft Law. On the one hand, such involvement may well go beyond the mere assessment of market risks and could include full on-site examination tasks. On the other hand, the conditions set for the FMA to have recourse to the OeNB could be drafted in a broader manner so that the contribution of the central bank would not be envisaged as an exceptional procedure. In addition, it is to be recalled that market and credit risk are

4 The Economic and Financial Committee's "Report on financial crisis management", 17.4.2001, EFC/ECFIN/251/01-en-Final.

5 Article 9(1) of the proposal for a directive of the European Parliament and of the Council on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and the Council, COM (2001) 213 final.

related in many respects. Hence, the specific exchange rate risk does indeed form part of market risk, but it is also an indication of creditworthiness of current issuers in close connection with solvency provisions. It should also be borne in mind that the methods of measurement and management of credit and market risks are continuously growing closer. The ECB therefore considers it to be desirable for the draft Law to create the legal basis to confer on the OeNB not only the procedural limitation of market risk but – in any event – also credit risk. This is particularly significant since provision for the participation of the OeNB in the inspection of credit risk impairs the contributions of the OeNB to new activities arising from the current reworking of the Basle Capital Accord and the EU provisions on capital adequacy.

11. Fifthly, the ECB welcomes the proposed Article 80(2) of the Banking Act contained in Section II of the draft Law, which provides the OeNB with the right to be consulted by the FMA and the Federal Minister of Finance on legal acts issued under the Banking Act. The ECB would suggest that, in view of its financial stability role, the OeNB be provided with an advisory role for all national legislation falling within such field of competence, without any restriction to legal acts in the banking field. The ECB refers in this context to the special meaning of Article 7(3) of the National Bank Act according to which the OeNB has the right to be consulted on all drafts with political implications for the financial market or otherwise the interests of the OeNB.

12. The ECB would welcome the inclusion in the draft Law of a provision stipulating that the FMA will respect all pre-existing commitments to cooperate and share information undertaken by the Federal Minister of Finance in its capacity as former supervisory authority vis-à-vis other supervisory authorities and central banks of the EU Member States.

13. The ECB welcomes the provisions directed at enhancing and reinforcing the supervisory framework for credit institutions. In particular the ECB welcomes the proposed provisions for the Banking Act allowing for the possibility of the FMA to inform the public about the licence status and about supervisory measures that are taken vis-à-vis an institution (proposed amendments in Section II of the draft Law to Article 4, new paragraph 7 and Article 70, new paragraph 7), the strengthening of the credit institutions' advisory boards (*Aufsichtsräte*) (proposed new Article 63a of the Banking Act), and the rotation principle of bank auditors (proposed amendments to Article 62 of the Banking Act), according to which auditors of banks must be changed after a certain number of years in order to ensure their impartiality and independence.

14. In addition to the issues described above, the draft Law proposes changes to the National Bank Act dealing with payments systems oversight. According to these draft provisions, the OeNB will be the competent authority in Austria for the oversight of payment systems. Section XIX of the draft Law (proposed new Article 44a(1) of the National Bank Act) provides that the OeNB will be competent to oversee (i) payment systems to which Austrian law applies; (ii) participants

in payment systems which are located in Austria and to which Austrian laws applies; and (iii) participants in payment systems which are located in Austria, which are not subject to Austrian law. Section XIX of the draft Law (proposed new Article 44a(5) of the National Bank Act) provides that the OeNB will be competent to make regulations in order to implement any relevant recommendations of the Committee on Payment and Settlement Systems (CPSS). In the fulfilment of its tasks as overseer of payments systems, the OeNB will also be entitled to request information concerning payment systems, to carry out on-site inspections (either in its own name or via the FMA), and to impose sanctions in cases of non-compliance with its regulations.

15. In this context, the ECB would like to state first of all that payment systems oversight is an essential function of central banks. The aim of the oversight of clearing and payment systems is the maintenance of systemic stability, the promotion of efficiency and the safeguarding of the transmission channel for monetary policy. These concerns are material to both the confidence of the users of the payment systems and of the users of the payment instruments and, ultimately, to the maintenance of public confidence in the currency. Article 105(2)[6] of the Treaty and Article 3.1[7] of the Statute provide for the legal basis for the oversight activities of the Eurosystem. In addition, the competence of the Eurosystem for the system's oversight results from Article 22 of the Statute, which provides: "The ECB and national central banks may provide facilities, and the ECB may make regulations[8], to ensure efficient and sound clearing and payment systems within the Community and with other countries". Within the Eurosystem, the Governing Council of the ECB formulates the common policy stance, determining the objectives and core principles of the common oversight policy of the Eurosystem. The national central banks (NCBs) and the ECB are responsible for the implementation of the common policy stance and for the performance of the regular oversight activities over the systems under their respective responsibility. In addition, for areas not specifically covered by the common oversight policy, policies defined at the level of an individual NCB apply which must be consistent with the objectives and principles defined at the level of the Eurosystem.

16. Against this general background, the ECB welcomes the grant by law to the OeNB of the competence of payment systems oversight in Austria. This step enhances the transparency of the central bank's policies and is in line with the IMF's Code of Good Practices on Transparency in Monetary and Financial Policies. However, the ECB notes that Section XIX of the draft Law (proposed new Article 44a(1) of the National Bank Act) seems to restrict the oversight function of the OeNB to the protection of security of payment systems. Although this task is of primary

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6 "The basic tasks to be carried out through the ESCB shall be: […] to promote the smooth operation of payment systems".

7 "In accordance with Article 105(2) of the Treaty, the basic tasks to be carried out through the ESCB shall be: […] to promote the smooth operation of payment systems".

8 See Article 34.2 of the Statute: "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States".

importance within the oversight function, it is only one aspect of a broader spectrum, as described above. Therefore, the ECB suggests replacing the proposed new Article 44a(1) of the National Bank Act with a more general provision in line with the Treaty. It should provide that the OeNB is under an obligation to ensure the sound and efficient operation of payment systems, which includes the security of the payment instruments, within the framework of the task of the European System of Central Banks (ESCB) relating to the promotion of the smooth operation of payment systems as specified by Article 105(2) of the Treaty.

17. According to Section XIX of the draft Law (proposed new Article 44a(1)1 of the National Bank Act) oversight shall be applicable "to payment systems to which Austrian laws apply". The ECB notes that for systems which have no clear domestic anchorage, the body entrusted with oversight responsibility is the NCB where the system is legally incorporated, unless the Governing Council of the ECB decides otherwise on the basis of the features of the system and entrusts oversight responsibilities to the ECB. Obviously, this can also affect systems that are established and operated on the basis of the laws of individual Member States. Therefore, the ECB suggests clarifying in the draft Law that the proposed new Article 44a(1)1 of the National Bank Act does not interfere with any oversight function of the ECB that has been determined by its Governing Council.

18. The ECB notes that according to Section XIX of the draft Law (proposed new Article 44a(1)3 of the National Bank Act) oversight shall be exercised with regard "to the participants of payment systems based in Austria, which are not subject to Austrian law". The ECB understands that this provision applies to participants located in Austria who participate through remote access in a payment system governed by foreign law and that those participants would fall under Austrian oversight of payment systems. Clarification should be introduced in the draft Law in this respect.

19. The ECB would also like to comment on the proposed new Article 44a(5) contained in Section XIX of the draft Law as well as on the related section in the explanatory memorandum. These provisions specify that OeNB is entitled by means of regulations to officially establish the content of the recommendations made by the CPSS, which is an international standard setting body with the function of elaborating recommendations for clearing and payment transactions and systems.

    On the basis of the Articles of the Treaty and of the Statute referred to in paragraph 15 above, in conjunction with the first paragraph of Article 12.1[9] of the Statute, the Governing Council of the ECB is the decision-making body responsible for the definition of the common policy stance of the Eurosystem in the field of oversight. According to the third paragraph Article 12.1[10] of the

9 "The Governing Council shall adopt the guidelines and take the decisions necessary to ensure the performance of the tasks entrusted to the ESCB under this Treaty and this Statute".

10 "To the extent deemed possible and appropriate and without prejudice to the provisions of this Article, the ECB shall have recourse to the national central banks to carry out operations which form part of the tasks of the ESCB".

Statute, within the Eurosystem, the NCBs shall be available, and the ECB shall have recourse to them to the extent deemed possible and appropriate, for the implementation of the oversight policy stance. Against this background, it will be in the first instance within the competence of the Governing Council of the ECB to decide on any adoption and enforcement of the CPSS's recommendations at the level of the Eurosystem. It is within this general institutional framework and the general appreciation pertaining to the Governing Council of the ECB that the OeNB, like the other NCBs within the Eurosystem, may implement at a national level the CPSS's recommendations. Consequently and more in general, the ECB would appreciate amendment of the proposed new Article 44a(5) contained in Section XIX of the draft Law to make it clear that exercise of the regulatory power of the OeNB in the field of payment systems oversight should be in line with the common policy stance that the Governing Council of the ECB has adopted for the Eurosystem.

20. The ECB welcomes the grant to the OeNB of a regulatory power in the field of payment system oversight. It should, however, be recalled that any ECB regulation would supersede an OeNB regulation adopted by virtue of the regulatory power conferred by the draft Law on the OeNB. Although the ECB has not yet used the possibility provided by Article 22 of the Statute to adopt regulations to ensure efficient and sound clearing and payment systems, as pointed out in the explanatory memorandum to the draft Law, it should be noted that the Governing Council of the ECB can always take an initiative, where necessary. The ECB would therefore appreciate amendment of the explanatory memorandum to the draft Law to avoid the impression of impairing the competencies of the ECB in this field.

21. The proposed new Article 44a(6) contained in Section XIX of the draft Law stipulates that "upon agreement with the FMA, on-site inspections can also be carried out by the auditing divisions of the FMA, on behalf of and at the expense of the Oesterreichische Nationalbank." The ECB understands that for the tasks performed under this provision, and whenever the OeNB makes recourse to the FMA in the performance of its oversight functions, the personnel of the FMA will be accountable to the OeNB only and not be bound by instructions from the FMA or any other third party.

22. According to the new draft Article 69 of the Banking Act contained in Section II of the draft Law, the oversight of securities settlement systems (SSSs), currently a competence of the Federal Ministry of Finance, will be transferred to the FMA. In this respect, it should be recalled that the smooth operation of securities settlement systems is crucial for the smooth functioning of payment systems. It has been recognised by international fora such as the Wise Men Committee, the CPSS and IOSCO that the oversight of securities settlement systems also require the expertise of the central bank, due to the interdependency between the payment systems and the securities settlement systems. Consequently, the OeNB could also be involved in the oversight of securities settlement systems. In addition, as also stated in the

recommendation being finalised by the CPSS-IOSCO Joint Task Force on Securities Settlement Systems of the G10 States (CPSS-IOSCO Recommendation 18), SSSs should be subject to regulation and oversight. In particular, the responsibilities and objectives of the securities regulator and the central bank with respect to SSSs should be clearly defined, and their roles and major policies should be publicly disclosed. In addition, they should have the ability and the resources to perform their responsibilities, including assessing and promoting implementation of these recommendations. The ECB stresses the importance of compliance by the draft Law with the principles of the abovementioned CPSS-IOSCO Recommendation 18.

Done at Frankfurt am Main on 25 May 2001.

The President of the ECB

[signed]

Willem F. DUISENBERG