



EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 18 July 2002

at the request of the Austrian Ministry of Finance

on a draft Federal act amending the Austrian Banking Act, Austrian Gambling Act and the Austrian Capital Markets Acts

(CON/2002/19)

1. On 14 June 2002 the European Central Bank received a request from the Austrian Ministry of Finance for an opinion on a draft Federal act amending the Austrian Banking Act, Austrian Gambling Act and the Austrian Capital Markets Acts (hereinafter referred to as the 'draft act').
2. The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community and the second, 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 provisions¹, as the draft act concerns, *inter alia*, means of payments and may affect the stability of financial institutions and markets and the efficiency of payment systems. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council of the ECB has adopted this opinion.
3. The draft act implements the Special Recommendations on Terrorist Financing of the Financial Action Task Force on Money Laundering of 31 October 2001 (hereinafter referred to as the 'FATF Special Recommendations'), which are part of the international efforts to combat terrorism. The draft act concentrates on Special Recommendations IV, VI and VII, the implementation of which falls within the powers of the Austrian Ministry of Finance. The draft act, *inter alia*, includes provisions regarding the reporting of transactions suspected of being related to terrorism and determines that in case of wire transfers and other cash transfers, the originator information must be verified at every step along the wire transfer chain and during money transfers. Furthermore, the draft act implements Council Directive 91/308/EEC of 10 June 1991 on the prevention of the use of the financial system for the purpose of money laundering², as amended by Directive 2001/97/EC of the European Parliament and of the

¹ OJ L 189, 3.7.1998, p. 42.

² OJ L 166, 28.6.1991, p. 77.

Council³. The Austrian consulting authority is not under an obligation to formally consult the ECB on its implementation of Directive 91/308/EEC, as Member States are not required to consult the ECB concerning the transposition of Community Directives into national laws (Article 1(2) of Decision 98/415/EC). This opinion, therefore, focuses on the implementation of the FATF Special Recommendations referred to above.

4. First, the ECB would like to recall the commitment of the Eurosystem to contribute to the adoption, implementation and execution of measures preventing the use of the financial system for terrorist activities, as expressed in the Governing Council's public statement of 1 October 2001. In order to maintain public confidence in the integrity of the financial system, it is of the utmost importance that financial systems do not benefit persons and organisations associated with terrorist activities. As a consequence, the ECB welcomes the intention of the draft act of combating the financing of terrorism more efficiently. In this context, the ECB would like to put forward some specific comments on the provisions of the draft act.
5. The draft act adds a new paragraph 10 to Article 40 of the Austrian Banking Act. According to the explanatory notes, this provision implements FATF Special Recommendation VII, which states that originator information must be retained at every step along the wire transfer chain and during money transfers. Paragraph 10 provides that in the case of wire transfers and other cash transfers, credit and financial institutions must verify the name, address and, if appropriate, the account number of the originator on acceptance of the instruction, and must forward this information to the next receiving institution during the completion of the instruction, so that the information on the originator can be verified at every step in the wire transfer or transfer chain. The ECB notes that this provision could affect payments systems, as the amended Article 40 of the Austrian Banking Act, in case funds are transferred via a payment system, requires the payment system to transmit all relevant information.

With a view to fostering the adoption of measures to combat terrorist activities, the ECB supports and promotes any initiatives for harmonisation in the area of payment messaging, in particular with a view to making the inclusion of certain fields in a payment message mandatory. However, the task of payment systems operators is to ensure the secure transmission of information contained in a payment message. The information provided by the participants is checked before processing, but is limited to checking that the relevant mandatory fields in the payment message are properly filled in. The contents are not verified. Payment systems operators need to rely in this respect on the information provided to them by the originator of the payment. The ECB understands that the provisions of the draft act do not imply any requirement for payment system operators to ensure that the originator information is meaningful. The ECB welcomes this approach since such an obligation on payment systems operators would not improve current procedures imposed by the banking supervisory and anti-

³ OJ L 344, 28.12.2001, p. 76.

money laundering authorities on banks and non-bank financial institutions and other entities under the FATF Special Recommendations. In addition the impact that such a requirement could have on the smooth functioning and efficiency of the payment systems would need to be carefully considered.

6. In addition, it should be borne in mind that at present originator and recipient information can be transmitted directly from the sending bank to the receiving bank. As mentioned above, the presence of mandatory originator and recipient information can be checked automatically by a payment system before a payment message is accepted for processing. During the transmission and processing of a payment, the originator and recipient information does not necessarily have to be forwarded to the settlement part of the payment system. Whether all or only part of the data included in a payment message are forwarded to this part depends on the nature of the payment system. Therefore, the provision requiring the originator to be identified at every step in the wire transfer or transfer chain should be understood as not necessarily involving the settlement of the payment itself.
7. The amendments to Article 41(1) included in the draft act impose reporting obligations when the originator information for wire transfer orders or other money orders amounting to at least EUR 2 000 forwarded by another credit or financial institution has not been included or is incomplete. If the originator information is merely incomplete and there is no suspicion of money laundering or terrorist financing, the order may nevertheless be forwarded and at the same time, the competent authority is informed. The ECB understands that the reporting obligations contained in the draft act apply to credit institutions and financial institutions only, to the exclusion of payment systems operators. The ECB is in agreement with this approach since it believes that payment systems operators should not be subjected to any requirement to report missing information to the competent authorities. The payment system operator is not the beneficiary of the payment but only in charge of processing the transfer order between participants. Moreover, a requirement at the level of the payment system operator would duplicate the notifications already received by the competent authorities from credit and financial institutions.
8. The ECB understands that the FATF plans to re-examine Recommendation VII in the months to come, in order to make it more specific and facilitate its implementation. There is currently no threshold in Recommendation VII and this will probably be one of the issues to be discussed. Since harmonised implementation is important, the Austrian consulting authority might consider waiting for the results of the FATF's re-examination before incorporating any threshold in implementing the Recommendation.
9. The ECB welcomes the addition of sentences 21 and 22 to Article 1(1) of the Austrian Banking Act. By these provisions (i) over-the-counter purchases of foreign instruments (*inter alia* notes and coins) and over-the-counter sales of foreign notes and coins as well as traveller cheques; and (ii) the transfer of cash amounts by transporting them from the originator to the receiver, or

by receiving the cash amount from the originator and paying the receiver in cash, except for interbank transactions are regulated as banking business requiring a licence.

10. 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 18 July 2002.

The President of the ECB

[signed]

Willem F. DUISENBERG