



**EUROPEAN CENTRAL BANK**

**OPINION OF THE EUROPEAN CENTRAL BANK**

**at the request of the Austrian Federal Ministry of Finance under Article 105 (4), second indent, of the Treaty establishing the European Community and Article 4 (a) of the Statute of the European System of Central Banks and of the European Central Bank on a draft Federal Act amending the Bankwesengesetz (Banking Act), the Wertpapieraufsichtsgesetz (Securities Supervision Act), the Investmentfondgesetz (Investment Fund Act), the Beteiligungsgesetz (Equity Fund Act), the Sparkassengesetz (Savings Bank Act), the Bausparkassengesetz (Building Society Act), the Hypothekbankengesetz (Mortgage Bank Act), the Pfandbriefgesetz (the Mortgage Bond Act), the Postsparkassengesetz (Postal Savings Bank Act), the Nationalbankgesetz 1984 (Central Bank Act), the Gewerbeordnung 1994 (Industrial Code) (Bankenaufsichtsbehördengesetz – BABG (Banking Supervisory Authority Act)) (hereinafter referred to as the “Draft Law”).**

**CON/99/05**

1. On 12 May 1999 the European Central Bank (ECB) received a request from the Austrian Federal Ministry of Finance for an ECB Opinion on the Draft Law.
2. The ECB’s competence to deliver an Opinion is based on Article 2 of Council Decision (98/415/EC) of 29 June 1998 on the consultation of the ECB by national authorities regarding draft legislative provisions, as the Draft Law contains provisions on the Oesterreichische Nationalbank and rules applicable to financial institutions which have a significant influence on the stability of financial institutions and markets. In accordance with Article 17.5, first sentence, of the Rules of Procedure of the ECB, this ECB Opinion has been adopted by the Governing Council of the ECB.
3. The Draft Law addresses the organisational structure of banking supervision and combines the banking supervision powers of the Austrian Federal Ministry of Finance and the assisting supervisory functions of the Oesterreichische Nationalbank. The latter becomes the sole banking supervisory authority and takes over the existing resources from the Austrian Ministry of Finance, particularly in terms of staff. The objective of the Draft Law is, inter alia, to increase

the speed and the enforceability of statutory supervision measures. In this respect, the Draft Law stipulates, for example, that supervisory measures may be taken as soon as dangerous business practices are identified, rather than waiting until creditors are actually at risk. Furthermore, the Draft Law is aimed at enhancing the effectiveness of the contribution of external auditors to the supervision of credit institutions by defining more stringent requirements for auditors than this was previously the case.

4. The ECB notes that, according to Section I, Article 141 of the Draft Law (new Article 79 (1) of the Austrian Banking Act), the Oesterreichische Nationalbank shall become the sole banking supervisory authority in Austria. The performance of this function by a central bank forming part of the Eurosystem does not interfere with the objectives and tasks of the ESCB. In this context the ECB notes that Article 105 (5) of the Treaty obliges the ESCB to contribute to the smooth conduct of policies relating to the prudential supervision of credit institutions and other financial institutions and the stability of the financial system. The ECB furthermore welcomes the fact that the Oesterreichische Nationalbank also in its capacity as supervisory authority shall have full autonomy in the execution of these duties and shall not be bound by any directives or instructions in this respect. The ECB notes that the Oesterreichische Nationalbank will be authorised to issue both orders and decisions in fulfilling its banking supervisory tasks. The new authoritative powers of the Oesterreichische Nationalbank cover all operational and analytical activities undertaken by authorities, which are presently undertaken by the Austrian Federal Ministry of Finance (sometimes in co-operation with the Oesterreichische Nationalbank). These also include all supervision functions, in particular the granting of licences to credit institutions as well as their revocation.
5. The ECB notes that according to Section I, Article 141 of the Draft Law (new Article 79 (2) of the Austrian Banking Act), the Oesterreichische Nationalbank will also be responsible for enforcing the decisions issued in the fulfilment of its banking supervisory tasks, except for administrative penal decisions. In administrative penal proceedings the parties will have the right to appeal against decisions by the Oesterreichische Nationalbank at the Vienna Independent Administrative Senate. Apart from that, the decisions of the Oesterreichische Nationalbank will not be subject to reversal or amendment through administrative proceedings.
6. The ECB notes that Section I, Article 142 of the Draft Law (new Article 79a of the Austrian Banking Act) stipulates that civil servants presently engaged in banking supervision at the Federal Ministry of Finance will be seconded by official notice to the personnel office set up at the Oesterreichische Nationalbank. The civil servants concerned will have the option of entering into a contract of employment with the Oesterreichische Nationalbank. Contractual employees

presently engaged in banking supervision at the Federal Ministry of Finance will be assigned on permanent service to the Oesterreichische Nationalbank on the basis of an employer's declaration, thereby becoming employees of the Oesterreichische Nationalbank. The personnel office to be set up at the Oesterreichische Nationalbank shall be directly subordinate to the Austrian Federal Ministry of Finance and will be managed by the member of the Executive Board of the Oesterreichische Nationalbank in charge of banking supervision matters. In this capacity this member of the Executive Board will be bound by the instructions of the Austrian Federal Minister of Finance. The ECB recommends to state in the explanatory memorandum such power of the Austrian Minister of Finance to issue instructions is limited to matters in the context of the personnel office. This would avoid giving the impression that the proposed new Article 79a (2) of the Austrian Banking Act is in contradiction of Section I, Article 141 of the Draft Law (new Article 79 (1), last sentence, of the Austrian Banking Act), where it is stated that the Oesterreichische Nationalbank shall not be bound by any instruction in fulfilling its banking supervisory tasks. However, the ECB acknowledges that Section I, Article 141 of the Draft Law is intended to be adopted as constitutional provision and will therefore prevail Section I, Article 142 of the Draft Law (new Article 79a of the Austrian Banking Act).

7. The ECB suggests that the possibility for an unlimited regress against the Oesterreichische Nationalbank granted to the Federal Republic, stipulated in Section I, Article 141 of the Draft Law (new Article 79 (3) of the Austrian Banking Act) be reconsidered since this could potentially endanger the fulfilment of the functions of Oesterreichische Nationalbank as defined in the Treaty and the ESCB Statute.
8. The ECB welcomes the fact that the Draft Law is also aimed at enhancing the effectiveness of the contribution of external auditors to the supervisory process by defining more stringent requirements for auditors than was previously the case. This includes both the personal qualifications required of bank auditors and the introduction of a rotation principle to ensure that auditors are reliable.
9. The ECB notes that the position of the supervisory board of credit institutions will be reinforced by the Draft Law. In this respect the Draft Law states that, as a backup to its supervisory duties, the supervisory board of credit institutions will have the right to initiate audits. Furthermore, the exchange of information is made easier for all institutions engaged in the monitoring and supervision of credit institutions, whilst procedural responsibility for statutory supervision is to be borne by the Oesterreichische Nationalbank as the banking supervisory authority.

10. The ECB takes note that Draft Law states in Section I, Article 118 (new Article 71 (1) of the Austrian Banking Act) that the banking supervisory authority shall notify to the institution concerned the audits only when the audit operation starts. Unless it is anticipated that advance notice will defeat the objective of the audit, and if advance notice is advisable in order to perform the audit more easily and quickly on the basis of organisational preparations, the audit may be notified at most one week before it commences.
  
11. The ECB notes that Section I, Article 120 of the Draft Law (new Article 71a of the Austrian Banking Act) stipulates that the Oesterreichische Nationalbank is, as the banking supervisory authority, also obliged to supervise payment systems. The supervisory tasks cover not only conventional payment systems (large amounts and bulk payment transactions), but also other payment systems and means of payment, such as points of sale, credit cards and electronic money (e-money). Not only credit institutions are governed by the standards of this provision, but also corporate bodies or companies operating a payment system commercially. This provision supplements the national implementation of Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems by transferring “the supervision” of payment systems to the Oesterreichische Nationalbank. In the explanatory memorandum to the Draft Law reference is made only to Article 22 ESCB Statute, whereas, no reference is made to Article 105 (2) of the Treaty and Article 3 of the ESCB Statute, where it is stated that one of the basic tasks of the ESCB shall be “*to promote the smooth operation of payment systems*”. Thus, Section I, Article 120 of the Draft Law (new Article 71a of the Austrian Banking Act) gives the impression that the oversight of payment systems is within the exclusive competence of the Austrian legislator and is allocated by the Draft Law as part of banking supervision to the Oesterreichische Nationalbank. The ECB recommends therefore, (i) to identify and to refer explicitly to the different nature of the oversight of payment systems, on the one hand, and banking supervision, on the other hand, and (ii) to make explicit reference to the basic task of the ESCB to promote the smooth operation of payments system as determined by Article 105 (2) of the Treaty and Article 3 of the ESCB Statute. This could be done in the explanatory memorandum to the Draft Law.
  
12. The ECB takes note that Section I, Article 139 of the Draft Law (new Article 77a of the Austrian Banking Act) makes it easier for the Oesterreichische Nationalbank as banking supervisory authority to enter into agreements with the competent authorities of other states outside the European Economic Area concerning collaboration in questions of banking supervision. In the explanatory memorandum it is stated in this respect that this provision is aimed at following recommendations of the Basle Committee.

13. The ECB welcomes the fact that Section X, Article 7 of the Draft Law (new Article 81 of the Austrian Central Bank Act) provides that the issue and use for payment purposes of banknote-type documents denominated in euro and intended for circulation constitute an administrative violation and are punishable by the competent district administrative authority with a fine of up to E3,000.00. This provision is aimed at transposing a recommendation of the ECB of 7 July 1998 on the adoption of certain measures to enhance the legal protection of euro banknotes and coins (ECB/1998/7), Official Gazette C No. 11 of 15 January 1999, stating that Member States shall, in particular, render more difficult and strictly monitor the issue of euro banknotes and coins which do not constitute legal tender.
14. The ECB notes that the Draft Law refers partly to Austrian Schillings (e.g. in Section I, Article 133) and partly to Euro (e.g. in Section X, Article 7) as the denomination of thresholds expressed in monetary amounts. A consistent denomination may be considered.
15. In conclusion, the ECB welcomes the Draft Law and is of the opinion that the Draft Law enhances the effectiveness of banking supervision in Austria, as it is aimed, inter alia, at increasing the speed and the enforceability of statutory supervision measures.
16. The ECB confirms that it has no objections to this Opinion being made public by the competent national authorities at their discretion.

Done at Frankfurt am Main on 14 July 1999.

The President of the ECB

[signed]

Willem F. Duisenberg