



EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 31 October 2002

at the request of the Finnish Ministry of Finance
on a proposal to amend the Emergency Powers Act

(CON/2002/27)

A. Background

1. On 16 September 2002 the European Central Bank (ECB) received a request from the Finnish Ministry of Finance for an opinion on a draft government proposal amending the Emergency Powers Act (*Valmiuslaki 1080/1991*) and certain other related acts (the 'proposal').

The Emergency Powers Act aims, in accordance with its Section 1(1), to secure the livelihood of the population and the national economy, to maintain legal order and constitutional and human rights, and to safeguard the territorial integrity and independence of Finland in emergency conditions. The purpose of the proposal is to insert new provisions in the Emergency Powers Act regarding the regulation of the Finnish financial markets as well as the insurance industry in emergency conditions.

2. The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community and on 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 proposal contains provisions on matters concerning the core competencies of the ECB and the European System of Central Banks (ESCB) as well as on Suomen Pankki. 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.

B. Description of the proposal.

3. According to the Statement of Reasons of the proposal, the emergency powers currently envisaged in the Emergency Powers Act do not sufficiently provide for regulating the financial

¹ OJ L 189, 3.7.1998, p. 42.

markets in emergency situations. Therefore, it is proposed to give the Finnish Government wide powers to regulate the financial markets in such situations.

The Government would be empowered to exercise, through its decrees, new competencies enumerated in the amended version of Section 12 of the Act, and in a new Section 12a. Furthermore, it would be entitled to empower Suomen Pankki or another Finnish state authority to implement such decrees. In addition, according to the amended version of Section 13 of the Act the Government is also entitled to extend the existing tasks of Suomen Pankki to the extent necessary to implement the decrees. The ECB notes that this would inevitably mean that Suomen Pankki would be subject to the instructions of the Finnish Government.

4. The emergency powers are to be exercised, according to Sections 2 and 3 of the Emergency Powers Act, only when the following three cumulative conditions are met: (a) an emergency situation occurs; (b) the established authorities cannot control the situation using their regular powers; and (c) the President of the Republic adopts a decree recognising the situation and authorising the use of the powers provided for in the Emergency Powers Act.

The emergency situations within the meaning of the Emergency Powers Act are exhaustively enumerated in its Section 2 and comprise:

- an armed attack against Finland, as well as war or the aftermath of war,
 - a serious violation of the territorial integrity of Finland or a threat of war against the country,
 - war or a threat of war between foreign countries or a serious international crisis constituting a threat of war, requiring immediate action to increase Finland's defences, or other specific circumstances outside Finland having a comparable effect, if they may pose a grave danger to the underlying foundations of society and the population's well-being, as referred to in Section 1(1) of the Act,
 - a serious threat to the livelihood of the population or to the foundations of the national economy brought about by hampered or interrupted import of indispensable fuels and other sources of energy, raw materials and goods or by a comparable serious disruption of international trade, and
 - a catastrophe.
5. The new competencies to be attributed to the Government by the proposal would include, in particular, the power:
 - to prohibit or impose conditions and other requirements on the export and import of foreign currency and other means of payment, securities or bonds,

- to oblige a natural or legal person resident in Finland to repatriate, against compensation, to Finnish state authorities different currencies, securities or bonds located or administrated abroad,
 - to prohibit transactions altering the amount or nature of foreign means of payment, securities or bonds owned or administered by a natural or legal person resident in Finland,
 - to regulate the interest rates applicable in the financial markets,
 - to regulate and restrict lending and deposit-taking activities by credit institutions,
 - to prohibit or restrict issuance and trade of securities and book-entry securities,
 - to suspend or restrict the functioning of clearing and settlement systems,
 - to restrict and regulate payment transfers and payment systems. According to the Statement of Reasons, this power could cover also the Finnish component of TARGET,
 - to lay down provisions concerning the accounting and financial statements of credit institutions,
 - to impose restrictions on the application of provisions on the activities and pricing policies of credit institutions.
6. Concerning the possible extension of the tasks of Suomen Pankki, the Statement of Reasons of the proposal states that new tasks can be justified on the basis of Article 14.4 of the Statute of the European System of Central Banks and of the European Central Bank. According to that Article a national central bank (NCB) may perform functions other than those specified in the Statute. Furthermore, according to the Statement of Reasons, the requirement of independence of Suomen Pankki as provided for in Article 108 of the Treaty and Article 7 of the Statute would not apply to any additional tasks performed under Article 14.4, since they would not be regarded as being part of the functions of the ESCB.

Moreover, the Statement of Reasons states that even if such additional tasks to be performed by an NCB could not be justified under Article 14.4 and would contradict the acts and instruments adopted by the ECB in its field of competence, a Member State would in any case have the right to take unilateral measures of this kind under Articles 58 and 297 of the Treaty, when the conditions for their application are met. In particular, the proposal states that under the emergency conditions mentioned in Article 297, such as serious internal disturbances affecting the maintenance of law and order, or in the event of war, a Member State could even be entitled to control all of the foreign reserves held and managed by its NCB.

C. The emergency situation

7. As regards the condition described under (a) in paragraph 4 above, concerning the emergency situations, the ECB submits that the events enumerated in Section 2 of the Emergency Powers Act are not identical to those referred to in Article 297. The circumstances justifying the invocation of Articles 58 and 297 must be construed and interpreted strictly as has been established by the consistent case law of the Court of Justice of the European Communities. The ECB notes that Section 10 of the Emergency Powers Act significantly limits the application of the emergency powers provided for by the Act. According to that Section, the application of the emergency powers under the Act ‘shall be subject to the restrictions on the scope of the law of Finland based on international agreements binding on Finland and on the generally accepted rules of international law’. In this context the ECB submits that, from the perspective of the operation of the financial markets, the most significant such obligations binding Finland are to be found in the Treaty and the Statute. However, the Statement of Reasons indicates that no clear demarcation line may be drawn between crises and disturbances in normal conditions and in emergency conditions, therefore giving the impression that the emergency powers in the proposal may also apply in circumstances not expressly mentioned in Community law. To the extent that the emergency events contemplated in the proposal diverge from the events foreseen in the Treaty, they cannot be legally justified by it. In particular, the ECB would like to emphasise that purely economic reasons neither justify exceptions to the application of Treaty provisions nor fall within the scope of circumstances under which Articles 58 or 297 can be invoked².

D. The regular exercise of powers by the established authorities

8. As regards the condition described under (b) in paragraph 4 above concerning the authorities’ inability to control the situation using regular powers, the ECB submits that both the ECB and Suomen Pankki, as component members of the ESCB, are the established and competent authorities, in accordance with Finnish legislation, responsible in Finland for the tasks conferred on the ESCB by the Treaty and the Statute. Consequently, both of them should be understood as being included in the definition of ‘authorities’ in the Emergency Powers Act. Therefore, to the extent that emergency events would not deprive them of the capacity to perform their tasks by using their statutory powers, this second condition would not be met and the Emergency Powers Act could not apply to them with regard to the ESCB field of competence. A different interpretation, following which the Emergency Powers Act could be applied with regard to the tasks of the ESCB, even if the ECB and Suomen Pankki retained intact their operational and

² See e.g. Case C-120/95 *Decker vs. Caisse de Maladie*, Case C-398/98 *Commission vs. Greece*, Case C-158/96 *Kohl vs. Union des Caisses de Maladie*.

decision-making capabilities, would neither be justifiable under nor consistent with Community law.

9. By adopting the euro as the single currency Finland has transferred, irreversibly, to the Community level the competencies enumerated in the Treaty and the Statute with regard to the tasks of the ESCB. The decision-making for those tasks belongs exclusively, under Article 8 of the Statute, to the decision-making bodies of the ECB. The decisions taken by those bodies apply to the whole euro area, and this is as it should be because in a monetary union measures that were to be adopted unilaterally by one participating Member State would be bound to have immediate consequences in the other participating Member States. Conversely, common action by the whole ESCB, decided by the Governing Council of the ECB, may provide for better remedies to local economic disruptions. For example, allowing Suomen Pankki, together with other ESCB members to manage foreign reserves abroad rather than compulsorily repatriating such assets to Finland could better contribute to the efficient managing of an emergency situation in Finland. Therefore, the proposal could perhaps impose, rather than repatriation, an obligation to transfer to Suomen Pankki foreign assets held by the private sector abroad.

The resolution of any crisis situation affecting the money supply and price stability of one part of the euro area should therefore primarily take place in the context of the ESCB institutional framework, as provided for by the Treaty and the Statute. Although the scenarios may differ, the example of the joint ESCB action together with international cooperation proved very effective in preventing and solving temporary liquidity shortages in the aftermath of the 11 September terrorist attacks, and protected the stability of the global financial system. Thus, unless the emergency events impeded the ESCB from performing its tasks, action by national authorities could be justified neither on economic grounds nor under Community law.

For reasons of legal certainty and clarity, the ECB suggests that the proposal explicitly stipulates that both the ECB and Suomen Pankki come within the definition of ‘authorities’ in Section 2 of the Emergency Powers Act. Such clarification is needed as the proposal contemplates a certain role for Suomen Pankki in the case of an emergency, but to the extent that Suomen Pankki could use its regular powers, the Emergency Powers Act could not apply to it. Only in the event of either the ECB or Suomen Pankki being rendered unable to function because of an emergency event could the provisions of the Emergency Powers Act apply with respect to their statutory tasks.

E. The granting of emergency powers by the President of the Republic

10. As regards the condition described under (c) in paragraph 4 above concerning the President of the Republic adopting a decree recognising an emergency situation and authorising the use of the emergency powers in accordance with the Emergency Powers Act, the ECB submits that fundamental principles and provisions of Community law must be respected.

In this context the ECB recalls that according to Article 10 of the Treaty the Member States have a duty to facilitate the achievement of the Community's tasks and must abstain from any measure which could jeopardise the attainment of the objectives of the Treaty. The Court of Justice has held in cases where Member States acted due to urgency on matters of exclusive Community competence³ that 'Member States may act only as trustees of the common interest', and that 'Member States cannot bring into force any interim measure which may be required by the situation except as part of a process of collaboration with the Commission' (in the case of ESCB tasks the reference to the Commission is to be read as a reference to the ECB). Therefore, the ECB recalls that Community law envisages the priority of Community actions in emergency situations⁴. If the ECB and Suomen Pankki were capable of functioning in an emergency situation, there would be no basis under Community law not to apply this principle. In the field of competence of the ESCB such priority has to be read as referring to emergency decision-making of the Governing Council of the ECB.

Moreover, the ECB recalls the consistent Community case law according to which provisions of the Treaty providing for exceptions must be construed and interpreted strictly. In the domain of exchange controls, the concepts of 'public policy' and 'public security' used in Article 58 of the Treaty must be interpreted restrictively⁵. Such Treaty provisions should not be used in an improper manner⁶ and their application must respect the principles of proportionality and non-discrimination. The Court of Justice may review the use of such provisions by a Member State⁷.

Finally, the ECB recalls that exceptions provided for by the Treaty must be of a temporary nature.

The ECB therefore suggests that the proposal acknowledges that the granting of emergency powers by the President has to comply with the abovementioned fundamental principles and rules of Community law.

11. The proposal should moreover provide that the ECB should be consulted before the adoption of any draft for such a Presidential decree, using, if needed, an urgency procedure. That would be in line not only with Community law provisions on consultation of the ECB (Article 105(4) of the Treaty), but also with the duties to which the abovementioned Article 10 of the Treaty refers.

In addition, the ECB submits that the obligation of mutual consultation referred to in Article 297 of the Treaty should be read in this context and, as regards the tasks of the ESCB,

³ See e.g., Case 804/79 *Commission vs. UK*, paragraph. 30.

⁴ See e.g. Articles 59, 100(2) and 120 EC.

⁵ See e.g. Case 95/81 *Commission vs. Italy*, Case C-394/97 *Heinonen*, and Case C-423/98 *Albore*.

⁶ See Article 298 EC.

⁷ See Article 298 EC.

that it should be taken as referring to consultation among the ECB and the NCBs as component members of the ESCB.

12. With regard to the material content of the emergency powers that a Presidential decree may vest in the Finnish Government, such as the power to extend the tasks of Suomen Pankki as discussed in paragraphs 3 and 6 above, the ECB has the following views. Tasks clearly falling within the core competencies of the ESCB, such as the setting of interest rates, the holding and managing of foreign reserves and the operation of payment systems, cannot fall within the scope of Article 14.4 of the Statute. Thus Article 14.4 does not provide a correct legal basis for the proposal in this regard. Such tasks should remain within the competence of the ESCB to the extent that the emergency situation allows its functioning. Furthermore, the ECB recalls that the application of Article 14.4 is always subject to the possibility of the Governing Council of the ECB to find that it interferes with the objectives and tasks of the ESCB.

F. General

13. This request for an ECB opinion concerns for the first time since the beginning of the third stage of economic and monetary union a national act on emergency powers that would affect ESCB tasks. The ECB understands that pre-existing national legislation on emergency powers in other Member States, if any, has to be interpreted and applied in consistency with the principles and rules of Community law as it stands after the adoption of the Treaty of Maastricht.
14. Since the proposal affects some very core principles of Community law, the ECB would like to suggest that the Commission of the European Communities, as the guardian of the Treaties, is also given an opportunity to express its opinion thereon.

Done at Frankfurt am Main on 31 October 2002.

The President of the ECB

[signed]

Willem F. DUISENBERG