



EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

at the request of the Luxembourg Minister for Relations with Parliament under Articles 109l(2) and 109f(6) of the Treaty establishing the European Community (hereinafter referred to as the “Treaty”) and Article 5.3 of the Statute of the European Monetary Institute (hereinafter referred to as the “EMI”) on : 1) a law proposal concerning the monetary status and the Banque centrale du Luxembourg, and 2) a law proposal concerning the creation of a commission charged with the surveillance of the financial sector (CON/98/39).

CON/98/39

1. On 6 August 1998 the European Central Bank (hereinafter referred to as the “ECB”) received a request from the Luxembourg Minister for Relations with Parliament for an opinion on 1) a law proposal concerning the monetary status and the Banque centrale du Luxembourg (hereinafter referred to as “Law Proposal 1”), and 2) a law proposal concerning the creation of a commission charged with the surveillance of the financial sector (hereinafter referred to as “Law Proposal 2”).
2. In accordance with Article 109l (2) of the Treaty, the ECB has taken over the advisory functions of the EMI, which went into liquidation upon the establishment of the ECB on 1 June 1998. The ECB’s competence to deliver an opinion on Law Proposal 1 is based on Article 1.1, second indent, of the Council Decision (93/717/EC) of 22 November 1993 on the consultation of the EMI by the authorities of the Member States on draft legislative provisions. The ECB’s competence to deliver an opinion on Law Proposal 2 is based on Article 1.1, fifth indent, of the Council Decision (93/717/EC) of 22 November 1993 on the consultation of the EMI by the authorities of the Member States on draft legislative provisions. In accordance with Articles 12.4 and 47.1, second indent, of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter referred to as the “Statute”), this Opinion has been adopted by the Governing Council of the ECB with the contribution of the General Council of the ECB.
3. The ECB notes that the objective of Law Proposal 1 is to address, in the perspective of Article 108 of the Treaty, the imperfections in Luxembourg monetary law identified by the EMI in its Convergence Report of March 1998, prepared under Article 109j of the Treaty (hereinafter

referred to as the “Convergence Report”). At the same time, Law Proposal 1 takes account of the decision by the Luxembourg Government to assign the task of prudential supervision of the financial sector to an authority which is distinct from the Banque centrale du Luxembourg, i.e. the “Commission de surveillance du secteur financier”. According to the Explanatory Memorandum, such decision aims at safeguarding the independence of the Banque centrale du Luxembourg (hereinafter referred to as the “BCL”) by avoiding conflicts of interest which might otherwise arise between monetary tasks and a mission of prudential supervision.

4. The ECB notes with satisfaction that Law Proposal 1 addresses the issues raised in the Convergence Report with respect to Luxembourg. As such:

- Independence: *1. Institutional independence*: The scope of Art. 5.2 of Law Proposal 1, which reproduces the first part of the prohibition on seeking or taking instructions as laid down in Art. 107 of the Treaty, is no longer limited to the monetary realm but extends to all functions of the ESCB; *2. Personal independence*: Art. 12.3 of Law Proposal 1 provides that the Government, having previously consulted the Council of the BCL, may propose to the Grand-Duc that a member of the Management of the BCL be relieved of his/her functions if he/she no longer fulfils the conditions required for the performance of his/her duties or if he/she is found guilty of serious misconduct. Such a provision reproduces the literal grounds for dismissal as laid down in Art. 14.2 of the Statute; Art. 7.3 of Law Proposal 1 addresses the concern raised in the Convergence Report with respect to conflicts of interest. The new article stipulates that no one can be appointed a member of the Council of the BCL or remain member of the Council of the BCL if he/she has professional responsibilities outside the BCL which are in conflict with the requirements of Art. 5.2 or with the provisions concerning professional secrecy applicable to the ESCB.
- Legal integration in the ESCB: *1. Statutory objective*: Art. 2 of Law proposal 1 now reflects the primacy of the ESCB’s statutory objective and confirms the integration of the BCL into the ESCB. The article provides that the BCL will form an integral part of the ESCB and that it will act in accordance with the guidelines and instructions of the ECB. The article further states that the principal mission of the BCL is to participate in the execution of the tasks of the ESCB with a view to attaining the objectives of the ESCB. The BCL will pursue its secondary objectives only to the extent that their pursuit is compatible with its principal mission; *2. Tasks*: The new Art. 6 of law Proposal 1 no longer contains any allocation of competences to the Council of the BCL beyond the scope of the execution of monetary policy, as defined by the Governing Council of the ECB and implemented by the Executive Board of the ECB; Art. 17-20 which regroup the

provisions pertaining to the issuance of monetary tokens address the comments contained in the Convergence Report and, consequently, reflect the prerogatives of the ECB in this field; 3. *Instruments*: Art. 22-23 define the BCL's instruments in the monetary field in relation to BCL's objective and missions which, in accordance with Art. 2 of Law Proposal 1, is to participate in the execution of the missions of the ESCB with a view to attaining the objectives of the ESCB; Art. 25 of Law Proposal 1 no longer makes reference to the provision of "credit facilities" but only to the provision of "facilities" to ensure efficient and sound clearing and payment systems.

In general the ECB welcomes Law Proposal 1 as it remedies, in the perspective of Article 108 of the Treaty, the imperfections in Luxembourg monetary law identified by the EMI in its Convergence Report.

Moreover, the ECB notes with satisfaction that, in the perspective of Art. 105a of the Treaty and Art. 16 of the Statute, Art. 36(2) of Law Proposal 1 abrogates (on 1 January 1999) all statutory and regulatory provisions conferring legal tender to the banknotes issued by the BIL (Banque Internationale à Luxembourg).

Notwithstanding the foregoing, the ECB would like to invite the Luxembourg legislator to take account of the following comments and suggestions:

- in respect of article 2 of Law Proposal 1, paragraph (3) states that the performance by the BCL of its secondary functions is subject to compliance with the "BCL's principal mission". In order to bring such a stipulation more into line with Art. 14.4 of the Statute, the ECB would like to suggest that the current wording be revised so as to state that the performance by the BCL of its secondary functions is subject to compliance with the Treaty and the Statute;
- in respect of the financial independence of the BCL: The ECB takes note of the fact that, in its start-up phase, the BCL will not have substantial reserves while at the same time it will be imperative for the BCL to dispose of an appropriate financial endowment sufficient to ensure the satisfactory performance of its tasks and the pursuit of its objectives resulting from participation in the ESCB. To this end the Luxembourg legislator may wish to bolster the BCL's financial soundness, particularly in view of the new rule (laid down in Art. 31) concerning the transfer of the BCL's net profit to the Luxembourg Treasury and owing to the absence of any provisions outlining the ways in which the BCL's potential losses will be covered. On this subject, the ECB would also like to recall that the EMI, in its Convergence Report (p.295), stressed the importance of

national central banks being in a position to avail themselves of the appropriate means to ensure that their ESCB-related tasks can be properly fulfilled.

- in respect of Art. 7 and 12: The ECB would like to point out that Art. 108 of the Treaty, in combination with Article 109e (5) of the Treaty, require that central bank independence, including the personal independence of the members of the decision-making bodies of national central banks involved in the performance of ESCB related tasks, be achieved at the latest at the date of the establishment of the ESCB/ECB. This implies that the adoption itself of Law Proposal 1 might not affect the security of tenure of the present members of such bodies which would be incompatible with the Treaty;
- in respect of Art. 13: In light of the reference to collegial decision taking, the ECB would like the personal independence of the “directeur général” of the BCL to be highlighted by starting this article with wording along the lines of (cf. Art. 6(a)): “Sans préjudice de l’indépendance du directeur général par rapport à toute instruction en sa qualité de membre du conseil des gouverneurs de la BCE et sans préjudice des dispositions relatives au secret professionnel applicables au SEBC...”;
- in respect of Art. 23: The ECB questions whether the reference to measures of exchange controls in this article is appropriate;
- in respect of Art. 32(1): The ECB is of the view that the last sentence of Art. 32(1) ought to recognise Community legislation as well as the competencies of the ESCB in this area;

5. The ECB notes that the twofold objective of Law Proposal 2 is: 1) to create an authority which is distinct from the Banque centrale du Luxembourg, i.e. the “Commission de surveillance du secteur financier” and 2) to assign to such authority the tasks of i) the prudential supervision of credit institutions, other professionals in the financial sector, organisations of collective investment and exchanges, and ii) the surveillance of markets of financial assets. Law Proposal 2 thus achieves the separation of central banking and prudential supervision as well as the bringing together of public control attributions with regard to certain parts of the financial sector. The ECB welcomes Law Proposal 2 to the extent that it purports to increase the stability of financial institutions and markets.

Notwithstanding the above-mentioned views, the ECB submits that it may be advisable, in order to avoid any misunderstanding, for Law Proposal 2 explicitly to exempt the BCL from supervision by the “Commission de surveillance du secteur financier”.

6. The ECB confirms that it has no objection to this Opinion being made public by the competent Luxembourg authorities at their discretion.

Done at Frankfurt am Main on 23 September 1998

The Vice-President of the ECB

[signed]

Christian Noyer