



EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 2 December 2003

at the request of the Austrian Federal Ministry of Finance

on a draft Federal law

on the National Foundation for Research, Technology and Development

(CON/2003/27)

Introduction

1. On 13 November 2003 the European Central Bank (ECB) received a request from the Austrian Federal Ministry of Finance for an opinion on Article 1 of the draft *Wachstums- und Standortgesetz 2003* (Growth and Location Act 2003) adopting the *Bundesgesetz über die Nationalstiftung für Forschung, Technologie und Entwicklung* (Federal Law on the National Foundation for Research, Technology and Development) (hereinafter the ‘draft law’). The ECB has not been consulted on the other draft laws that will be presented to the Austrian Parliament as part of the Growth and Location Act 2003.
2. The ECB’s competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community, the first indent of Article 4(a) of the Statute of the European System of Central Banks and of the European Central Bank and the third indent of Article 2(1) of Council Decision 415/98/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions¹, since the draft law contains provisions enabling the Oesterreichische Nationalbank (OeNB) to restructure its free reserves and to make annual financial contributions to the proposed National Foundation for Research, Technology and Development (hereinafter the ‘Foundation’). 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. On 24 November 2003, the ECB received from the OeNB copies of two letters from the OeNB’s *Direktorium* (Governing Board) to the Austrian Minister of Finance, both dated 5 November 2003, which anticipate the adoption of the draft law. The first of these letters determines in detail, in the form of a declaration of intent that may be seen as a unilateral commitment, how the OeNB plans to implement various provisions of the draft law. The second letter deals with the funds that, according to the draft law, can be transferred from one of the OeNB’s reserves to another. As the

¹ OJ L 189, 3.7.1998, p. 42.

commitments set out in these letters supplement the provisions of the draft law, where they are of relevance to the assessment of the draft law they are referred to below, as appropriate.

The ESCB's financial independence

4. § 4(5) lines 1 and 2 of the draft law allow the OeNB to allocate funds to the Foundation. The question arises as to whether the draft law, read together with the declaration of intent contained in the first letter from the OeNB's Governing Board to the Austrian Minister of Finance, duly preserves the OeNB's discretion to contribute to the Foundation. This becomes all the more relevant as this letter of intent could potentially be interpreted as an unilateral commitment by the OeNB (although it is acknowledged that the OeNB's Governing Board alone could not commit the OeNB to implement the proposed structure, but would require resolutions to that effect to be passed by the OeNB's shareholders in general meeting. According to the draft law the Foundation will be established as a *gemeinnützige Stiftung* (foundation of benefit to the public) with the sole purpose of sponsoring research, technology and development in Austria. It is intended that the Foundation will be funded by annual contributions from (i) the European Recovery Program (ERP) Fund and (ii) the OeNB. According to § 4(5) lines 1 and 2 of the draft law, the OeNB will be entitled to transfer EUR 1.5 billion from its general reserve fund and its free reserves to the *Jubiläumsfonds* (a fund for sponsoring scientific research and teaching tasks) and to make an annual contribution of EUR 75 million to the Foundation. Read together with the first of OeNB's letters of 5 November 2003, the impression could be created that the OeNB is committed to make an annual contribution of EUR 75 million to the Foundation. The letter states that the OeNB will make an annual contribution of EUR 75 million to the Foundation, and that if the income on investment of the EUR 1.5 billion is less than EUR 75 million, then the difference will be made up from the OeNB's surplus profits pursuant to a resolution of its shareholders in general meeting or from other own funds held by the OeNB (for example by drawing on the general reserve fund).
5. The requirement of ESCB independence as laid down in Article 108 of the Treaty is further elaborated on in the convergence reports of the ECB and its predecessor, the European Monetary Institute. In these reports a distinction is made between different features of central bank independence, and amongst others, financial independence. Concerning the notion of financial independence it is stated, *inter alia*, that '*NCBs should be in a position to avail themselves of the appropriate means to ensure that their ESCB-related tasks can be properly fulfilled*'. Formally, in view of the size of the OeNB's balance sheet, annual contributions of EUR 75 million by the OeNB to the Foundation are unlikely to impede the proper fulfilment of the OeNB's ESCB-related tasks, particularly if such donations are offset against the profits to be distributed to the State. However, as a matter of principle, it would not be consistent with the Treaty for a member of the ESCB to be under a legal obligation to provide financial support, potentially by drawing on its own funds, for activities that are normally sponsored by the State.

With a view to the compatibility of the envisaged structure with the ESCB's financial independence, the ECB considers it of utmost importance that the OeNB will be under no

obligation to contribute to the Foundation, either under the draft law or otherwise. This may, however, be unclear since the explanatory notes to the draft law state that the Foundation is established to enable sustained financing of long-term, interdisciplinary research projects (which implies the continuity of contributions by the OeNB). Therefore, the wording of § 4(5) lines 1 and 2 of the draft law should state clearly and explicitly that the OeNB has a discretion to resolve to make contributions to the Foundation, which means that any commitment deriving from the first of the OeNB's letters of 5 November 2003 (once its provisions have been endorsed by the OeNB's shareholders in general meeting) may be withdrawn at any point in time, the amount of the contributions reviewed or the method for its funding revised.

6. The ECB understands that from an accounting perspective, the envisaged transfer of EUR 1.5 billion in accordance with § 4(5) of the draft law is a transfer from one OeNB reserve to another and that these funds, once allocated to the *Jubiläumssfonds*, (i) will remain on the OeNB's balance sheet (ii) will continue to be managed by the OeNB and (iii) will remain fully at the OeNB's disposal. The ECB understands furthermore that the proposed structure would not lead to a reduction of the OeNB's reserves and that consequently the EUR 1.5 billion would continue to be available to cover potential losses of the OeNB. In this context, the second letter from the OeNB to the Austrian Minister of Finance of 5 November 2003 makes it clear that if due to specific circumstances in an economically poor year (and despite other balance sheet provisions) the OeNB makes a loss, recourse could be had to the EUR 1.5 billion transferred to the *Jubiläumssfonds* in order to cover the OeNB's annual losses. The draft law should contain a provision making it clear that contributions to the Foundation by the OeNB are subordinate to any financial needs relating to the ESCB's tasks and functions and to covering potential losses of the OeNB.
7. Finally, the OeNB's income may be subject to Articles 32 and 33 of the Statute. Any distribution of such income to the Foundation in implementation of the draft law and of the OeNB's commitments should respect the priority of the aforementioned articles, which derives from the supremacy of Community over national law.

The financing by central banks of non-central bank activities

8. The ECB takes note that according to the explanatory notes to the draft law, funding the Foundation with interest income from the ERP Fund and the OeNB will not directly affect the Federal budget. However, the funds flowing to the Foundation from the OeNB will influence the level of national central bank (NCB) profits payable to the *Bund* (Federal Government) and therefore will have an indirect effect on the Federal budget. The explanatory notes to the draft law state by way of illustration that estimating OeNB gross profits to be EUR 643 million in 2004, the establishment of the Foundation and the proposed redirection by the OeNB of reserves in the amount of EUR 1.5 billion would lead to a reduction in income for the Federal Government of EUR 44.3 million (for the benefit of the proposed sponsoring of research, technology and development).

9. The ECB notes that the funding of research, technology and development is a field where the State is normally active and where funds are normally provided from budgetary sources. As contributions to research, technology and development do not represent a traditional central bank activity, task or function, the OeNB's funding of the Foundation out of the earnings of the *Jubiläumsfonds* could be seen as sponsoring activities that would otherwise have to be funded at the State's expense, following budgetary procedures, and which are normally financed from democratically controlled budgetary sources. The ECB has therefore investigated whether the proposed financial contributions by the OeNB to the Foundation would be compatible with Article 101 of the Treaty of the Statute prohibiting monetary financing.

Article 101 of the Treaty states that '*[o]verdraft facilities or any other type of credit facilities with the ECB or with the national central banks [...] in favour of [...] central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings [...] shall be prohibited [...]*'. Article 21.1 of the Statute mirrors this provision

- (i) When assessing the proposed structure's compatibility with Article 101 of the Treaty and Article 21.1 of the Statute, not only a strict literal interpretation is of relevance, but also the purpose of these provisions has to be considered. Therefore, the ECB would like to recall that Articles 101 of the Treaty and 21.1 of the Statute have the overall aim of prohibiting NCBs from financing the public sector.
- (ii) The OeNB's annual contributions to the Foundation would not represent an '*overdraft*' or '*any other type of credit facilities*' within the literal meaning of Article 101 of the Treaty and Article 21.1 of the Statute. Indeed, the proposed arrangement provides for a yearly donation rather than a credit facility. Yet, where a credit facility (with the obligation to repay such credit) is prohibited under these provisions, it could perhaps be argued that this prohibition might also apply a fortiori to a donation '*à fonds perdu*'. Whilst it is, of course, in principle not incompatible with Article 101 of the Treaty and Article 21.1 of the Statute for the OeNB to make donations to foster research, technology and development, this may be seen in a different light if it has to be considered that under the proposed structure the donations are construed as a regular and permanent financing mechanism for such activities. As a result, they may be seen as coming in effect rather close to credit facilities². Following this line of argument, even if formally speaking the proposed arrangements would not contradict Article 101 of the Treaty and Article 21.1 of the Statute under a strict literal interpretation, caution is still warranted taking into account the spirit of these provisions and the public nature of financing research, technology and development.

² Article 1(1)(b)(ii) of Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the applications of the prohibition referred to in Article 104 and 104(b)(1) of the Treaty [now Article 101 of the Treaty] defines as 'other type of credit facility' 'any financing of the public sector's obligation vis-à-vis third parties'.

- (iii) The ECB has also considered whether the Foundation could come close to being a ‘*regional, local or other public authority, other body governed by public law, or public undertaking*’ within the meaning of Article 101 of the Treaty and Article 21.1 of the Statute. The explanatory notes to the draft law (specific part, note on §§ 1, 2 and 4 of the draft law) state in this context that the Foundation would be a body *sui generis* and not a foundation established under the *Privatstiftungsgesetz* (Federal Law on Private Foundations) or under the *Bundes-Stiftungs- und Fondsgesetz* (Federal Law on Federal Foundations and Funds). § 16 of the draft law provides that the Foundation shall only constitute a public foundation for tax-law purposes, which seems to indicate that it is not the overall intention to establish the Foundation as a public entity. In conclusion, it appears that the Foundation in terms of its legal nature appears to be a body *sui generis* with more elements of a private foundation, although with certain public elements. However, as stated under point (i) above, caution is still warranted, since the Foundation’s sole purpose is to provide financial means for the (public) activity of financing research, technology and development.
- (iv) According to the draft law, the Foundation will not allocate sponsored funds directly to the applicants, but instead to *Einrichtungen* (institutions) borne by the Federal Government, which then will further distribute the money to individual applicants in accordance with their *Förderrichtlinien* (sponsoring guidelines). Therefore, the ECB has also considered whether these institutions could qualify as public entities within the meaning of Article 101 of the Treaty and Article 21.1 of the Statute. It is important to assess whether these institutions are entities to which the OeNB would be prohibited from allocating funds directly (for instance by means of its present annual sponsoring of economics-oriented research via the *Jubiläumsfonds* which will cease once the Foundation has been established). If this were the case, an indirect allocation of OeNB funds to these institutions via the Foundation (even if the Foundation does not hold itself out as a ‘public’ institution) would indeed represent a circumvention of the Treaty.

The explanatory notes to the draft law (specific part, note on § 3 of the draft law) mentions the following as potential beneficiaries of the Foundation: the *Forschungsförderungsfonds* (the Research and Development Fund), the *Austria Wirtschaftsservice Gesellschaft*, the *Österreichische Akademie der Wissenschaften* (the Austrian Academy of Sciences), the *Ludwig Boltzmanngesellschaft* and other research associations. No detailed information has been provided to the ECB concerning these entities, but the fact that they are borne by the Government seems to indicate that their institutional nature lies in the public sphere. The OeNB has clarified that the ultimate beneficiaries of the funds distributed by the Foundation will without exemption be private beneficiaries. Furthermore, the OeNB has already in the past directly contributed to some of these institutions via its *Jubiläumsfonds*. Nonetheless, the ECB strongly recommends carefully assessing this aspect before adopting the draft law.

The ESCB's functional independence

10. It was also assessed whether the proposed structure would interfere with the ESCB's objectives and tasks. Indeed, if this were to be the case (*quod non* as explained below), Article 14.4 of the Statute would perhaps become relevant. This Article states that '*[n]ational central banks may perform functions other than those specified in this Statute unless the Governing Council finds [...] that these functions interfere with the objectives and tasks of the ESCB*'.

According to Article 105(1) of the Treaty and Article 2 of the Statute, the primary objective of the ESCB is 'to maintain price stability'. The question is therefore whether the investment of the EUR 1.5 billion in the framework of the *Jubiläumsfonds* or the annual transfer of up to EUR 75 million to the Foundation (and the use of this amount for research, technology and development) could have an impact on the objective of maintaining price stability. From a purely monetary-policy perspective, the draft law would not necessarily have an impact on liquidity and interest rate developments different from the one prevailing under the current system of profit transfer. Transferring EUR 1.5 billion from the OeNB's general reserve fund and its free reserves to the *Jubiläumsfonds* (both of which are liabilities on the OeNB's balance sheet) and distributing some of the proceeds from this investment to the Foundation rather than to the Federal Government (by way of profit allocation) would not per se constitute a different net liquidity injection to the euro area economy. In any case, any possible effects of the proposed structure on liquidity would need to be taken into account, and such effects on liquidity could be offset, like any other shock to autonomous factors, by adjusting the amount of liquidity provided via regular open-market operations, leaving interest rates and liquidity conditions unchanged.

The ECB notes that the proposed structure does not conflict with the ESCB's tasks as defined in Article 105(2) of the Treaty and Article 3 of the Statute, as neither the investment of EUR 1.5 billion in the framework of the *Jubiläumsfonds* nor the annual transfer of up to EUR 75 million to the Foundation seem to be activities that could have any negative impact on the implementation of any of the ESCB's tasks as defined in the Treaty and the Statute.

Conclusion

11. In view of the above, the ECB does not oppose the arrangements envisaged by the draft law enabling the OeNB to contribute to the Foundation. However, for the reasons stated above, the ECB is of the opinion that vigilance should be applied as to the way in which the envisaged arrangements will be implemented in practice and that a regular review of these arrangements would be warranted.

Publication

12. The ECB confirms that it has no objection to the competent national authorities making this opinion publicly available at their discretion. This opinion will be published on the ECB's website six months after the date of its adoption.

Done at Frankfurt am Main on 2 December 2003.

The President of the ECB

[signed]

Jean-Claude TRICHET