



OPINION OF THE EUROPEAN CENTRAL BANK

of 7 April 2010

on the restructuring of the Central Bank and Financial Services Authority of Ireland

(CON/2010/30)

Introduction and legal basis

On 22 February 2010 the European Central Bank (ECB) received a request from the Irish Minister for Finance (hereinafter the ‘Minister’) for an opinion on draft heads (hereinafter the ‘draft heads’) relating to a proposed draft law entitled ‘the Central Bank of Ireland Bill 2010’ (hereinafter the ‘draft law’).

The ECB’s competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union (TFEU) and the third indent 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 law relates to the Central Bank and Financial Services Authority of Ireland (CBFSAI). In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

1. Purpose of the draft heads

The purpose of the draft heads is to provide a framework pursuant to which the draft law will be prepared. The draft heads implement a decision of the Irish Government of 16 June 2009 approving the reform of the internal structures of the CBFSAI².

The draft law will amend certain provisions of the Central Bank Act 1942 (CBA) to provide, among other things, that: (a) the CBFSAI will be renamed the Central Bank of Ireland (hereinafter the ‘Bank’); (b) the Bank will be a single fully-integrated structure, replacing the two-pillar structure of the existing CBFSAI with a unitary board called the Central Bank Commission (hereinafter the ‘Commission’), which will be chaired by the Governor; (c) the Irish Financial Services Regulatory Authority (IFSRA) which is a constituent part of the CBFSAI and responsible at present for the regulation of financial institutions, will be dissolved; (d) the posts of Chief Executive of the IFSRA and Consumer Director will be abolished; and (e) two new posts, Head of Financial Regulation, responsible for the regulatory and supervisory functions and objectives of the Bank, and Head of Central Banking, responsible for the performance of

¹ OJ L 189, 3.7.1998, p. 42.

² See Opinion CON/2009/89, paragraph 2.1.1, which specifically anticipated the present proposed reform of the internal structures of the CBSFAI. All ECB opinions are published on the ECB’s website at www.ecb.europa.eu.

central banking functions, will be established and there will be new enhanced accountability and oversight mechanisms. The Commission is to consist of a minimum of 10 and maximum of 12 members. 4 members are to be ex-officio members: (i) the Governor of the Bank; (ii) the Head of Central Banking (who is to be appointed by the Commission with consent of the Minister); (iii) the Head of Financial Regulation (who is to be appointed by the Commission with consent of the Minister); and (iv) the Secretary General of the Irish Department of Finance. The other members (at least 6 and up to 8 in number) are to be appointed by the Irish Minister of Finance from amongst people who, in his opinion, have relevant knowledge of accountancy, banking, consumer interests, corporate governance, economics, financial regulation, financial services, law, and social policy.

According to the draft heads, sections 19, 20, 21 and 22 of the CBA, as regards the Governor's appointment and tenure of office, prohibition on shareholding and removal from office, continue to apply³. The current Chief Executive of the Office of the Financial Regulator is specifically stated to be the first Head of Financial Regulation. As regards the current Head of Central Banking, the draft heads state that there should be a transition arrangement for the present Director General.

The procedures of the Commission (relating to meetings and procedural issues) are to be the same as currently apply to the Board of the CBFSAI. The Governor remains solely responsible for the functions related to the European System of Central Banks (ESCB). The Bank will be responsible for the prudential supervision of credit institutions and the stability of the financial system. Moreover, Head 8 of the draft heads states that the Bank will 'assume the functions and powers of the Consumer Director', so the Bank will be responsible for the protection of consumer interests, noting that such powers are already contained in the CBA.

2. General observations

2.1 Consolidation of Ireland's central bank statutes

As stated in previous opinions⁴, without a consolidated central bank statute the legal structure for Ireland's central bank is lacking in transparency. The requirements for legal clarity and transparency suggest that the Irish Government should take the first suitable opportunity for a consolidation exercise, and the ECB welcomes the indication from the consulting authority that such an exercise is envisaged. Consolidation of Ireland's central bank statutes would greatly assist the ECB in responding to consultations from the Irish authorities on draft legislative provisions within the ECB's field of competence as well as ensuring that Irish legislation, including the statutes of Ireland's central bank, is compatible with the Treaty on European Union (TEU) and the TFEU (hereinafter together the 'Treaties'), as well as the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB').

³ With one small amendment, however, to section 21(2) of the CBA, involving the deletion of the words 'if the other members have passed a unanimous resolution requesting the President to remove the Governor from office'. The effect is that the Government may ask the President to remove the Governor for stated serious misconduct on its own initiative.

⁴ See, for example, paragraph 17 of Opinion CON/2002/16 and paragraph 9 of Opinion CON/2003/24.

2.2 *Reform of supervision in Ireland*

- 2.2.1 The ECB understands that the draft law is the first step in the legislative reform of the Irish central banking and financial regulatory regime, and that further legislation will be introduced to: (a) enhance the regulatory powers and functions of the Bank, and (b) consolidate all legislation relating to the Bank. The ECB notes that the draft law and such further legislation should be the subject of separate consultations.
- 2.2.2 The ECB welcomes the purpose of the draft heads. The ECB has consistently favoured the involvement of central banks in prudential supervision. Previous ECB opinions on draft national legislation to reform the institutional framework for prudential supervision in Member States have noted that central banks have been closely involved in the prudential supervision of credit institutions, due to their pivotal role in the financial system, in particular regarding the implementation of monetary policy and ensuring the proper functioning of payment systems⁵. Previous ECB opinions have also noted that maintaining the close involvement of national central banks (NCBs) in prudential supervision is an important condition for allowing the Eurosystem to contribute adequately to monitoring the risks to financial stability in the euro area, in accordance with Article 127(5) of the TFEU, and to safeguard smooth cooperation between the central bank functions exercised at Eurosystem level and the supervisory functions carried out at national level⁶. Such involvement should not prejudice the primary objective of the ESCB of price stability.
- 2.2.3 The ECB welcomes the establishment of institutional frameworks in Member States that recognise the essential role of NCBs in promoting the soundness and security of credit and financial institutions and the stability of the financial system as a whole. Thus, the ECB welcomes the proposed restructuring of the CBFSAI so as to make the Bank fully and directly responsible for the supervision of credit and financial institutions.

3. **Specific observations**

3.1 *Central bank independence*

The new framework should ensure that the central bank will be a fully independent institution functioning in compliance with the central bank independence principle and with the role of the central bank as part of the ESCB. The draft heads are not sufficiently clear as to whether Ireland's central bank will be a fully independent institution entrusted with ESCB-related tasks as well as with other tasks that should not interfere with the ESCB's objectives and tasks. Therefore, the ECB has concerns as regards the new design of the Irish central bank which should be clarified once the proposed bill has been published. As stated in the ECB's convergence reports, the central bank must be a fully independent institution with a precisely defined mandate. In particular, the central

⁵ See Opinion CON/2003/23, paragraph 6.

⁶ See Opinion CON/2006/39, paragraph 2.3; Opinion CON/2006/15, paragraph 2.1.2; Opinion CON/2001/10, paragraph 4; and Opinion CON/2001/35, paragraph 5.

bank, its decision-making bodies and their members must be independent and must not seek or take instructions from the Government as far as the ESCB-related tasks and objectives are concerned⁷. More specifically, for ESCB-related tasks not only the Governor, but Ireland's central bank as a whole as an institution, and the Commission which will be responsible and accountable for the Bank in the achievement of its primary objective of price stability, and for managing and controlling the Bank, must be independent and not take instructions from the Government. Any other member of the central bank's decision-making bodies involved in the performance of ESCB-tasks should also enjoy the same personal independence safeguards as the Governor. Although the draft heads provide for an independent governor solely responsible for the ESCB-related tasks, the Governor may not be seen in isolation from the central banking structure. Therefore, the new setup must ensure respect of the central bank's independence and must clarify the roles of the Commission and the Governor.

Assuming that the above interpretation will be clarified in the proposed bill and expecting to be consulted thereon, in the interim the ECB has a number of reservations regarding the draft heads.

- 3.1.1 Head 7 of the draft heads proposes the replacement of Section 6A(1) and (2) of the CBA as regards the objectives of the Bank. The draft law should expressly provide that the secondary objectives of the Bank set out in the new Section 6A(2) (hereinafter the 'secondary objectives'), including the new objective to support national economic policy development, should be without prejudice to the primary objective of maintaining price stability set out in Articles 127(1) and 282(2) of the Treaty and Article 2 of the Statute of the ESCB. Furthermore, the draft bill should expressly provide that the secondary objectives must be consistent and not interfere with the Bank's obligation to support the general economic policies of the European Union with a view to contributing to the achievement of the objectives of that Union as laid down in Article 3 of the Treaty on European Union (TEU), which is itself an objective expressed to be without prejudice to the objective of maintaining price stability.
- 3.1.2 According to Head 7, the new Section 6A(2)(e) will provide that one of the other objectives of the Bank will be 'the discharge of such other functions and powers as are conferred on it by law'. The ECB reminds the consulting authority that functions of the Bank must be performed in a manner that is fully compatible with the Treaties and the Statute of the ESCB. The ECB recommends that the draft law should clarify that the Bank's objective to discharge 'such other functions and powers as are conferred on it by law' is subject to the requirements of the Treaties and the Statute of the ESCB.
- 3.1.3 The new Section 6A(2) will state that 'the Commission is to be responsible and accountable for the performance of the Bank in the achievement of its objectives'. In order to eliminate any legal risks associated with the independent discharge of the Bank's ESCB-related tasks, the Commission's responsibility and accountability should be specified to be without prejudice to the Governor's sole

⁷ See ECB Convergence Report of May 2008, pp. 17-18.

responsibility for the performance of the Bank’s objectives relating to ESCB-related obligations and functions and should not compromise the ability to fulfil those obligations and functions independently. The draft law should expressly clarify that no member of the Commission, other than the Governor, has decision-making powers on ESCB-related matters.

- 3.1.4 Head 8 states that ‘subject to certain exceptions, the functions and powers ... of the Governor (excluding ESCB functions) ... are to be transferred to the Bank’. While the ECB welcomes the clarification that the Governor’s ESCB-related functions will not be transferred to the Bank (as further clarified by the statement in Head 14 that ‘the Governor will continue to be solely responsible for all ESCB-related functions’), it is unclear which of the Governor’s functions and powers⁸ (albeit outside of his ESCB-related functions) are intended to be transferred to the Bank. Therefore, at this stage, the ECB is not able to properly assess the full impact of this draft head. Moreover, this provision should be amended as it might give the impression that the Bank is a dependent supervisory authority entrusted with ESCB-related tasks and objectives.
- 3.1.5 Head 8 contains a further statement that ‘the Commission is to ensure that the existing powers and functions of the Bank under Section 5A and Section 5B (the core functions of the Bank under the existing provisions) are properly discharged by the Bank’. As stated above at paragraph 3.1.2, and according to Section 5A(4) of the CBA, ‘the Bank is required to perform its functions and exercise its powers in a manner consistent with the [Treaties] and the ESCB Statute’. The ECB trusts that Section 5A(4) of the CBA will continue to apply. Also, the ECB recommends that it should be clarified that the Commission’s responsibility for ensuring the proper discharge by the Bank of its ESCB-related functions is without prejudice to the Governor’s sole responsibility for the performance of the functions imposed, and the exercise of powers conferred, on the Bank under the Treaties or the Statute of the ESCB and should not compromise the ability to fulfil those functions and the obligations under the Treaties or the Statute of the ESCB independently. For reasons of legal certainty, the last sentence should be clarified with regard to the scope of the functions covered by it, and its reference to ESCB-related tasks.
- 3.1.6 Head 11 proposes that only a minority of the members of the Commission will exercise their function ex officio, the remaining (at least six) members being appointed by the Minister. Head 13 states that the current provisions of the CBA regarding removal from membership are to be the same as currently apply to the Board of the CBFSAI. According to Section 25(4) of the CBA, the Minister of Finance may remove from office a director (being any of the (at least 6) directors appointed by him as above) for proven misconduct or incompetence, or in order to enable the Board to function effectively, or in order to facilitate a restructuring of the Board and IFSRA so as to enable a closer working relationship between them. Of the ex officio members of the Commission, one will be the Secretary General of the Department of Finance, and the other two will be the Head of Central Banking and the Head of Financial Regulation, both to be appointed by the Commission with the consent of the Minister. As a result the Minister’s influence over the

⁸ The legislative provision which specifies the Governor’s functions and powers are set out in Section 19A of the CBA.

central bank's supervisory role will be greatly increased and the operational independence of such supervisory role will be endangered. The legislative framework must be redrafted so as to ensure the operational independence of the central bank's supervisory role, in line with international standards for the operational independence of financial supervisors. In particular, the legislative framework should provide that the members of the Commission have appropriate qualifications and technical expertise, and provide for the avoidance of conflicts of interests. The legislative framework must provide for autonomous decision-making of the Commission's members in fulfilment of the supervisory mandate. Moreover, the nomination of persons implementing the policies of the Commission (Head of Financial Regulation and Head of Central Banking) should be within the autonomous judgement of the Commission.

- 3.1.7 Head 12 proposes that 'The Commission is to manage and control the Bank'. As stated at paragraph 3.1.3 above, the ECB recommends the draft law should clarify that the Commission's obligation to manage and control the Bank is without prejudice to the exclusive authority of the Governor in relation to ESCB-related matters and should not compromise the ability to fulfil obligations in that field independently. Furthermore, it is important that the other members of the Commission do not seek to influence or to give instructions to the Governor in his capacity as the sole member responsible for the performance of Bank's ESCB-related tasks.
- 3.1.8 Head 13 states that certain provisions relating to membership of the Commission are to be the same as those that currently apply to the board of the CBSFAI. To the extent that any provisions in the draft law relating to the Governor differ from those relating to the other Commission members, the ECB recommends that the draft law should clarify that, in the event of any conflict between the conditions applicable to all members of the Commission and those applying to the Governor, the Governor should be bound by the provisions applying specifically to him or her. Moreover, to the extent that the other members of the Commission other than the Governor would be involved in the achievement of the ESCB-related tasks and the primary objective of price stability, the draft bill should provide safeguards for their personal independence similar to those provided for the Governor.
- 3.1.9 Head 14 proposes that 'The Commission will delegate to the Governor such functions and powers relating to the day-to-day management of the Bank, the Heads of Function and staff of the Bank as the Commission deems appropriate to ensure the efficient and effective management of the Bank and the exercise of its powers, functions and obligations'. As stated above at paragraphs 3.1.3 and 3.1.6, the ECB recommends that the draft law should clarify that the Commission's authority to delegate to the Governor is without prejudice to the Governor's exclusive authority in relation to ESCB-related matters and should not compromise the ability to fulfil obligations in that field independently.

3.1.10 Head 15 states that Section 19 of the CBA will continue to apply. Section 19(6) and (7) of the CBA provide for the automatic termination of office of the Governor for reasons such as bankruptcy, imprisonment or holding shares in a financial institution. Head 15 also states that Section 21 of the CBA (regarding removal of the Governor from office) will continue to apply. This Section allows for the Governor's removal from office on grounds of permanent incapacity due to ill-health and for one or more specified grounds of serious misconduct. To ensure compliance with the conditions for dismissal of a Governor in Article 14.2 of the Statute of the ESCB, Sections 19 and 21 need to reflect the language used in Article 14.2 which states that a Governor 'may be relieved from office only if he no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct'.

3.1.11 Head 18 relates to the Head of Central Banking and the Head of Financial Regulation. Although it is clear from this head that the current Chief Executive of the Office of the Financial Regulator is to be the first Head of Financial Regulation and that his first term is to run for the remainder of his contract with IFSRA, the ECB recommends that the draft law should have similar clarity as regards the position of Head of Central Banking, as Head 18(3) simply states that 'there should be a transition arrangement for the present Director General of the Bank'. According to Section 22A of the CBA (relating to the Director General of the Bank carrying out certain responsibilities of the Bank), the Director General is required to carry out the Governor's ESCB-related responsibilities whenever: (a) the Governor is unable to carry out those responsibilities because of absence because of ill-health or any other reason, or (b) the office of Governor is vacant. The ECB reminds the consulting authority that, in the context of personal independence, the rules on security of tenure of office of the Governor apply equally to other members of NCB decision-making bodies who are involved in the performance of ESCB-related tasks⁹, so the Director General has the same independence as the Governor in the performance of ESCB-related tasks. The ECB therefore emphasises that the present Director General must remain and must be able to see out his full term of office. In order to safeguard the independent exercise of the Bank's ESCB-related functions, the ECB recommends that the draft law retains Section 22A of the CBA, so that the Head of Central Banking will continue to carry out the Governor's ESCB-related responsibilities when the Governor is unable to do so or when the Governor's office is vacant.

Head 18(7) also proposes that the Governor should be able to engage in other remunerative employment with the consent of the Commission. The draft law should provide for safeguards against conflicts of interest that could jeopardise the personal independence of the Governor. As stated in the ECB Convergence Report of May 2008, 'as a matter of principle, membership of a decision-making body involved in the performance of ESCB-related tasks is incompatible with the exercise of other functions that might create a conflict of interest. In particular, members of such decision-making bodies may not hold an office or have an interest that may influence their

⁹ See Opinions CON/2006/44, CON/2004/16, CON/2006/32, CON/2004/35 and CON/2007/6.

activities, whether through office in the executive or legislative branches of the state or in regional or local administrations, or through involvement in a business organisation'¹⁰.

3.1.12 Head 22 states that the Bank prepares annual accounts in accordance with Section 6H, which stipulates that the form of statement of accounts must be approved by the Minister after consulting the Bank. Head 22, and consequently Section 6H, should reflect the Bank's obligation to comply with the Eurosystem's regime for financial reporting of the Bank operations pursuant to Article 26 of the Statute of the ESCB. Moreover, under Section 6H, the Comptroller and the Auditor General will have the power to audit the Bank's accounts. Such powers should be without prejudice to the audit by the Bank's external auditors.

3.1.13 Head 23 states that 'The Bank is to prepare an annual estimate of income from levies, subvention from the Bank and any other income and expenditure in relation financial regulation. This is to be submitted to the Minister not later than 2 months before the end of the preceding year. The Minister is to approve these'. As noted in the 1998 European Monetary Institute (EMI) Convergence Report, and reiterated in paragraph 8 of Opinion CON/2002/16, where third parties, and particularly the government, are in a position, directly or indirectly, to exercise influence on the determination of an NCB's budget, the relevant statutory provisions should contain a safeguard clause to ensure that this does not impede the proper performance of the NCB's ESCB-related tasks. More specifically, in order to eliminate the potential exposure of the Bank to liabilities resulting from funding and budgetary decisions in respect of financial regulation (including in respect of the Registrar of Credit Unions¹¹), the ECB recommends that the draft law should clarify that the Governor has the sole right to determine any funding and budgetary decisions pertaining not only to the Bank's ESCB-related tasks and their implementation, but also to financial regulation (including in respect of the Registrar of Credit Unions), which may have implications for the Bank's independence, in particular its institutional and financial independence, or which may be deemed otherwise incompatible with the exercise by the Governor of the Bank's ESCB-related functions. The Governor could be granted an explicit right to oppose any funding, budgetary and staffing decisions in respect of financial regulation (including in respect of the Registrar of Credit Unions) which might have such implications.

3.1.14 Head 24 states that 'The Bank is to have the power to impose levies and fees for the purpose of funding the regulation of financial service providers as set out in Sections 33J and 33K. The proceeds of the levies and fees are to be applied to the associated costs and overheads of those functions set out in Schedule 2 of the Central Bank Act 1942 and functions previously carried out by the Consumer Director and currently carried out by the Registrar of Credit Unions'. The ECB recommends that the draft law should clarify that proceeds from such levies and fees raised will not be applied so as to apply central bank funding to non-central banking functions, thereby having a negative impact on the performance of ESCB-related obligations and functions.

¹⁰ CR 2008 p. 20.

¹¹ See head 33 of the draft heads.

3.1.15 Head 26 states that ‘where the proceeds of the levies and fees are likely to be insufficient to meet the total costs of the financial regulation functions, then the Bank may provide additional funds from the general fund to subsidise the funding of the financial regulation functions. The same safeguards are to apply as do currently, i.e. approval of the Minister and confirmation by the Governor that such subsidisation will not affect the exercise of his ESCB functions’. In addition, as stated in Section 5A(4) of the CBA, the Bank is required to perform its functions and exercise its powers in a manner consistent with [the Treaties] and the ESCB Statute. Although it is proposed that the draft law will contain these safeguards, the ECB reiterates the concerns expressed in paragraph 7 of ECB Opinion CON/2002/16 as regards central bank independence and the uncertainty as to whether the Governor would enjoy a sufficient degree of control over any decisions by the Bank to provide funding for the financial regulation functions, and whether this would affect the performance of the ESCB-related tasks. The ECB therefore repeats its recommendation under paragraph 3.1.13 of this opinion that the Governor should be granted an explicit right to oppose any funding, budgetary and staffing decisions in respect of financial regulation (including in respect of the Registrar of Credit Unions) which might have such implications.

3.1.16 Head 27 (dealing with Co-operation in the Collection of Levies) states that ‘the Bank may co-operate with a list [of] persons to be prescribed by the Minister (including the Pensions Board, The Financial Services Ombudsman and the National Consumer Agency) for the collection of levies under the Central Bank Acts, the Pensions Board legislation and any other legislation. This means that the Bank or a prescribed body may collect the various industry levies as the agent of the others. The purpose of this is to encourage administrative efficiencies for both the regulators and the industry. Costs associated with the collection of levies on behalf of other bodies are to be met by the Principal.’ The ECB recommends that the draft law should clarify that proceeds from such levies and fees raised will not be applied in such a way as could result in applying central bank funding to non-central banking functions, thereby having a negative impact on the performance of ESCB-related obligations and functions.

3.2 *Monetary financing*

3.2.1 As set out in paragraph 3.1.14, Head 24 states that ‘the Bank is to have the power to impose levies and fees for the purpose of funding the regulation of financial service providers as set out in Sections 33J and 33K. The proceeds of the levies and fees are to be applied to those functions set out in Schedule 2 of the Central Bank Act 1942 and functions previously carried out by the Consumer Director and currently carried out by the Registrar of Credit Unions, and associated costs. This is to include overheads and other associated costs’. The ECB understands that the draft head proposes that the Bank may impose such levies and fees for funding its regulatory activities. In this regard, the ECB reminds the consulting authority that the tasks performed by the Bank must comply with the monetary financing prohibition in Article 123(1) of the TFEU which prohibits, among other things, overdraft facilities or any other type of credit facility with the national central

banks in favour of ‘bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States’. The ECB recommends that the draft law should clarify that proceeds from such levies and fees will not be applied in such a way as might constitute monetary financing as prohibited under Article 123(1) of the TFEU.

3.2.2 As set out in paragraph 3.1.16, Head 27 provides for cooperation in the collection of levies, with the Bank acting as the agent for the collection of levies on behalf of other public bodies, with the costs associated with the collection of levies on behalf of other bodies to be met by the principal. Under Article 21.2 of the Statute of the ESCB, the ECB and the national central banks may act as fiscal agents for public sector bodies.¹² The Bank may therefore act as fiscal agent through cooperation with public sector bodies in the collection of levies, on an agency, but not on a principal basis. Taking the above into account, the ECB has two comments. First, the Bank may only act as fiscal agent for public sector bodies. The ECB therefore recommends that the draft law should clarify that the Minister may only prescribe parties who fall within the definition of ‘public sector bodies’ as persons for whom the Bank, as fiscal agent, may cooperate in the collection of levies. Second, the ECB notes that Head 27 also refers to the cooperation by the Bank with persons for ‘the collection of levies under the Central Bank Acts’. The ECB understands that levies and fees collected under the CBAs will be collected in connection with the performance of central banking tasks only, and not in connection with the performance of the tasks of other public bodies. The monetary financing prohibition in Article 123 TFEU applies to Head 27 in this respect. As supplemented, in particular, by Article 1(b)(ii) of Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b (1) of the Treaty¹³, the financing by an NCB of (a) the performance of functions by other public sector bodies, or (b) the public sector’s obligations vis-à-vis third parties, is prohibited. Therefore, national legislation authorising or requiring NCBs to finance such functions, without any corresponding activity or function on the part of the NCB, would not be compatible with the prohibition on monetary financing.¹⁴ Moreover, under Article 271(d) TFEU the ECB is responsible for ensuring the compliance by NCBs with their obligations under the Treaties, which includes compliance with the prohibition of monetary financing. For these reasons, in order to avoid any risk of a breach of the prohibition of monetary financing by the Bank, the draft law will need to clarify that any levies collected by the Bank for other public bodies, whether under the CBAs or otherwise, are collected by the Bank as agent for and on behalf of such other bodies. In particular, Irish law needs to clarify that such other public bodies, acting as principals, have the

¹² Public sector bodies are to be understood within the meaning of Article 21.1 of the Statute of the ESCB which reads as follows: ‘In accordance with Article 123 of the Treaty on the Functioning of the European Union, overdraft facilities and any other type of credit facility with the European Central Bank or with the national central banks of the Member States (hereinafter referred to as ‘national central banks’) in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments’.

¹³ OJ L 332, 31.12.1993, p. 1.

¹⁴ See Opinions CON/2005/50 and CON/2005/1.

necessary power to impose levies and fees for the purpose of performing their respective tasks, to avoid any possible ambiguity as to whether funds belonging to the Bank are used to finance other public sector bodies and/or their obligations vis-à-vis third parties.

3.2.3 Head 28 relates to the transfer to the National Consumer Agency (NCA) of the specific function of the Consumer Director to give information to consumers relating to financial services. Head 30 proposes for the secondment and potential transfer of IFSRA staff to the NCA in order to implement the transfer of that function. Head 30 further provides that ‘the seconded staff currently contribute to a Central Bank superannuation scheme and provision is to be made for the preservation of the rights of staff transferring to the employment of the Agency’. In order to ensure full compliance with the prohibition of monetary financing, the ECB recommends that the draft law should clarify that no resources of the Bank will be applied towards the payment of pensions in respect of Bank staff seconded or transferred to the NCA pursuant to Head 30 following such secondment or transfer, other than solely in respect of ensuring rights and entitlements already accrued by those Bank staff up to the time of secondment or transfer.

4. Final observations

The ECB notes that the publication of the draft law would require a further ECB consultation by the consulting authority under Article 2(1) of Council Decision 98/415/EC. The ECB reserves its position to further opine on the draft legislative provisions of the proposed bill when it is published.

This opinion will be published on the ECB’s website.

Done at Frankfurt am Main, 7 April 2010.

[signed]

The President of the ECB

Jean-Claude TRICHET