



OPINION OF THE EUROPEAN CENTRAL BANK

of 17 June 2010

on a draft law relating to the restructuring of the Central Bank and Financial Services Authority of Ireland

(CON/2010/48)

Introduction and legal basis

On 7 April 2010, the Governing Council of the European Central Bank (ECB) adopted an opinion¹ (hereinafter the ‘draft heads opinion’) on draft heads, relating to a proposed draft law on the restructuring of the Central Bank and Financial Services Authority of Ireland (CBFSAI). The purpose of the draft heads was to provide a framework pursuant to which the draft law would be prepared. The draft heads and the draft law implement a decision of the Irish Government of 16 June 2009 approving the reform of the internal structures of the CBFSAI².

On 9 April 2010, the ECB received a request from the Irish Minister for Finance (hereinafter the ‘Minister’) for an opinion relating to the abovementioned draft law, entitled the ‘Central Bank Reform 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 provisions³, as the draft law relates to the 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 law

The purpose of the draft law is to provide for the reform of the internal structures of the CBFSAI, in particular the Irish financial regulatory structures. The draft law implements this restructuring by way of various amendments to the Irish Central Bank Acts 1942 to 1998 (hereinafter the ‘CBAs’). The ECB welcomes the fact that the draft law follows the form and content of the draft heads

¹ Opinion CON/2010/30.

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

³ OJ L 189, 3.7.1998, p. 42.

2. General observations

Consolidation of Ireland's CBAs and reform of supervision in Ireland

The ECB reaffirms its general observations set out in paragraphs 2.1 and 2.2 of the draft heads opinion, in relation to (a) the consolidation of Ireland's CBAs; and (b) the reform of supervision in Ireland. In particular, the ECB points out that the current CBAs are not consolidated and that a consolidation is urgently needed.

3. Specific observations

3.1 Central bank independence

As stated in the draft heads opinion, the ECB had a number of reservations as regards whether the draft heads ensure full independence for Ireland's central bank (hereinafter the 'Bank') in compliance with (a) the central bank independence principle; and (b) the role of the central bank as part of the European System of Central Banks (ESCB), including the principle that, when it is entrusted with ESCB-related tasks as well as with other tasks, the latter should not interfere with the ESCB's tasks. More particularly, the ECB stated that the Bank must be a fully independent institution with a precisely defined mandate. As regards ESCB-related tasks and their performance, the Governor, the Bank, the Commission and its individual members must all be independent and must not seek or take instructions from the Government as far as those tasks are concerned⁴. The ECB called for stringent respect of the Bank's independence in the draft law and for clarification of the roles of the Governor and the Commission. In this regard, the ECB welcomes the fact that the draft law retains Section 19A(2) of the Central Bank Act (CBA) 1942 which provides that the Governor has sole responsibility for the performance of ESCB-related tasks. However, the ECB notes that this provision contradicts other provisions of the draft law whereby the Commission is entrusted with ESCB-related tasks (see details in paragraph 3.1.3 of this opinion). Therefore, the ECB reiterates its comment that the new set-up must clarify the roles of the Commission and the Governor.

Furthermore, the ECB welcomes the draft law's insertion of subsections (1A) and (1B) after subsection (1) of Section 6 of the CBA 1942, which is intended to underline the independence of the Bank, the Governor and the Commission, as required by the TFEU and the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB'). While the ECB agrees with the clear intention of these insertions, it remains to be seen whether in practice they will be able to ensure that the Bank and the members of its decision-making bodies will be fully independent with a view to their ESCB-related tasks. In any event, the ECB recommends that subsection (1A) should be further strengthened in order to make clear that, where any provision of the CBAs could involve a contradiction of the independence principle, the

⁴ See the ECB Convergence Report of May 2008, pp. 17-18.

independence principle is to have supremacy. Any contradictory provision of the CBAs is to be interpreted with due regard to that overriding principle. The ECB welcomes the more substantive nature of subsection (1B) and recommends that it should be further enhanced, along the following lines. According to its current formulation, only the Bank, the Governor and the Commission are protected from being directed or required by any person or authority to act in a manner inconsistent with the TFEU and the Treaty on European Union (TEU) (hereinafter the ‘Treaties’) or the Statute of the ESCB. The ECB recommends that this protection should also extend to any individual member of the Commission, either an *ex officio* member or a member appointed by the Minister, who may be concerned in the performance of ESCB-related tasks. Subsection (1B) should also specifically provide that no member of the Commission shall seek to influence or give instructions to the Governor in his capacity as the sole member of the Commission responsible for the performance of the Bank’s ESCB-related tasks. In addition, the ECB understands that the provision encompasses instructions from both national and foreign institutions in line with Article 130 of the TFEU and Article 7 of the Statute of the ESCB. For legal certainty reasons, this provision should be brought fully in line with Article 130 of the TFEU and Article 7 of the Statute of the ESCB⁵.

In addition, the ECB notes that at the same time the new subsections (3) and (5) of Section 6A of the CBA 1942 indicate that for the Bank’s non-ESCB-related tasks the Commission and the Governor must comply with the requests for a consultation or information of the Minister for Finance. In this context, to ensure that the Bank and members of its decision-making bodies are fully independent in the performance of their ESCB-related tasks⁶, the Governor should have the explicit competence to organise the ESCB-related tasks in such a way that they are performed in an independent manner⁷.

On the assumption that the above recommendations are followed, the ECB makes the following additional specific comments regarding the draft law:

- 3.1.1 The draft law does not affect the current Section 6A(1) of the CBA 1942, which states that the primary objective of the Bank is to maintain price stability. A substituted Section 6A(2) of the CBA 1942 lists the other objectives of the Bank, which were referred to in the draft heads opinion as the ‘secondary objectives’ of the Bank. The ECB stated in the draft heads opinion that the draft law should provide that the Bank’s secondary objectives should be expressed to be without prejudice to its primary objective, as set out in Articles 127(1) and 282(2) of the TFEU and Article 2 of the Statute of the ESCB. Furthermore, the ECB stated that the draft law should provide that the secondary objectives must be consistent and not interfere with the Bank’s obligation pursuant to Section 6A(6) 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

⁵ Similarly, see, for example, the ECB Convergence Report of May 2008, pp. 229, 236 and 246.

⁶ Under Article 127(5) of the TFEU, one of the tasks of the ESCB is to contribute to the smooth conduct of policies relating to the prudential supervision of credit institutions and the stability of the financial system.

⁷ See also paragraph 3.1 of Opinion CON/2010/30; in particular: ‘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’.

the TFEU, which is itself an objective expressed to be without prejudice to the primary objective of maintaining price stability. As these comments do not appear to have been addressed, the ECB restates its remarks in respect of Section 6A(2). In addition, the ECB notes that Section 6A(1) of the CBA 1942 seems to limit the primary objective of the central bank to the context of performance of its ESCB-related tasks. In line with the ECB's comments in this paragraph, Section 6A(1) of the CBA 1942 should ensure that the objective of price stability is an objective of the Bank in the performance of any of its tasks, ESCB-related or non-ESCB-related.

3.1.2 The substituted Section 6A(2)(e) of the CBA 1942 provides that one of the Bank's other objectives will be 'the discharge of such other functions and powers as are conferred on it by law'. The ECB reminded the consulting authority in the draft heads opinion that the Bank's functions must be performed in a manner that is fully compatible with the Treaties and the Statute of the ESCB. This substituted Section 6A(2)(e) has to be considered together with subsection (10) of the substituted Section 5A, which states that the Bank is required to perform its functions and exercise its powers in a manner consistent with the Treaties and the Statute of the ESCB. For legal certainty reasons, the ECB continues to recommend that the draft law clarifies 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 and that practical precautions ensure that they are not compromised.

3.1.3 The substituted Sections 18B(1) and 18B(2) of the CBA 1942 provide that, except as expressly provided otherwise by the CBA 1942, the affairs and activities of the Bank shall be managed and controlled by the Commission. Although Section 19A(2), which provides that the Governor is solely responsible for the performance of ESCB-related tasks, is retained along with subsection (10) of the substituted Section 5A and even on the assumption that the recommendations specified in paragraph 3.1 above are implemented, the ECB is not satisfied that its comments in the draft heads opinion as regards the interaction between (a) the Commission's management and control of the Bank's affairs and activities; and (b) the Governor's sole responsibility for the performance of the Bank's objectives relating to ESCB-related tasks, have been adequately addressed and, thus, the ECB would like to reiterate these comments as follows.

The substituted Section 18B(3) provides that the Commission shall ensure the proper exercise and discharge by the Bank of the powers and functions conferred on it by, *inter alia*, the substituted Section 5A (*General functions and powers of the Bank*). This appears to include *clearly* ESCB-related tasks such as, for example, in the substituted Section 5A(1)(b), (c), (g) and (h). In this sense, Article 6.1 of the Statute of the ESCB provides that in the field of international cooperation involving tasks entrusted to the Eurosystem, the ECB decides how the ESCB is represented. To the extent that the substituted Section 5A(1)(b) and (c) allow the central bank to participate in international monetary institutions, the draft law should make such participation subject to the ECB's approval in accordance with Article 6.2 of the Statute of the ESCB. Also, the collection of statistical information, which is provided for in the substituted Section 5A(1)(g) and (h), is related

to the performance of ESCB-related tasks and, according to Article 5.1 of the Statute of the ESCB, in order to undertake such tasks, the ECB is assisted by the national central banks (NCBs) in the collection of necessary statistical information. In this regard, the ECB's powers in this field should be recognised.

Therefore, the draft law contains provisions whereby the Commission is responsible for *clearly* ESCB-related tasks and this is in direct conflict with the requirement for the Governor to be the sole authority with responsibility for such tasks which clearly underscores the observations in paragraph 3.1.

- 3.1.4 Head 8 of the draft heads stated that 'subject to certain exceptions, the functions and powers ... of the Governor (excluding ESCB functions) ... are to be transferred to the Bank'. In its draft heads opinion, the ECB stated that it was unclear which of the Governor's functions and powers were intended to be transferred to the Bank. The draft law does not appear to have implemented this element of draft head 8 and therefore, assuming that this is not reintroduced, the ECB has no further concerns in this regard.
- 3.1.5 Subsection (11) of the substituted Section 5A of the CBA 1942 states that the bank shall perform its functions and exercise its powers in a way that is consistent with (a) the orderly and proper functioning of financial markets; and (b) the prudential supervision of providers of financial services. This subsection has to be considered together with subsection (10) of the substituted Section 5A. For legal certainty reasons, the ECB continues to recommend that subsection (11) is clarified with regard to the scope of the functions covered by it, and its reference to ESCB-related tasks.
- 3.1.6 Head 17 of the draft heads stated that the draft law would provide that the Governor would assign the Heads of Function their responsibilities. According to the new Section 23A inserted in the CBA 1942 by the draft law, it is the Commission which will assign the Heads of Function their responsibilities. The ECB notes that, pursuant to the new Section 32A(1), it is the Governor who will propose a plan of assignment of responsibility for specified powers and functions of the Bank to, *inter alia*, the Heads of Function. The ECB further notes that, pursuant to the new Section 32A(3), the Heads of Function are accountable to the Governor for the performance of an assigned function (although they may also be accountable to any other person specified for the purpose in the assignment). However, the ECB recommends a clarification regarding the Head of Central Banking with regard to Subsection (4) of Section 23D to ensure that the Minister for Finance cannot use powers under this rule to compromise independence in the performance of ESCB-related tasks. It would like to point out that, to the extent that the power of the Governor to assign responsibilities under the new Section 32A(1) concerns ESCB-related tasks, the draft law should ensure that the Governor exercises this power independently.
- 3.1.7 Head 13 of the draft heads stated that certain provisions relating to membership of the Commission were to be the same in the draft law as those that currently apply to the board of the CBSFAI. In its draft heads opinion, the ECB recommended that in the event of any conflict between the conditions

applicable to all members of the Commission and those applicable to the Governor, the Governor should be bound by the provisions applying specifically to him or her. In relation to the provisions of the draft law in this regard, the ECB is satisfied that no such conflict arises and it has no further concerns in this regard.

- 3.1.8 The draft law retains without modification the current Section 19(6) and (7) of the CBA 1942 which provide for the automatic termination of office of the Governor for various reasons including bankruptcy, imprisonment or holding shares in a financial institution. The draft law also retains the current Section 21 of the CBA 1942⁸. 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. In its draft heads opinion, the ECB stated that, in order 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 that Article 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'. As the draft law does not appear to have addressed these specific recommendations, the ECB would like to restate them.
- 3.1.9 As regards the Heads of Function, draft head 18 made it clear that the draft law would provide that the current Chief Executive of the Irish Financial Services Regulatory Authority (IFSRA) would be the first Head of Financial Regulation and that his first term would run for the remainder of his contract with the IFSRA. In its draft heads opinion, the ECB recommended that the draft law should have similar clarity as regards the position of Head of Central Banking, as draft head 18(3) simply stated that 'there should be a transition arrangement for the present Director General of the Bank'. The ECB notes that the draft law does not appear to contain a transitional arrangement for the current Director General of the Bank. The ECB welcomes the clear provision in the draft law whereby the office of Director General of the Bank is replaced by the office of Head of Central Banking, and welcomes the retention of Section 22A of the CBA 1942, whereby the Head of Central Banking will now carry out the Governor's ESCB-related tasks whenever: (a) the Governor is unable to carry out those responsibilities because of absence, ill-health or any other reason; or (b) the office of Governor is vacant. In this regard, the draft law should expressly provide that the current Director General of the Bank will remain to see out his full term of office. In addition, the ECB restates its reminder to the consulting authority from the draft heads opinion that, in the context of personal independence, the same safeguards for personal independence (minimum term of office, grounds for dismissal, security of tenure, right of judicial review, safeguards against conflicts of interests) provided for the Governor must apply equally to all members of NCB decision-making bodies who are involved in the performance of ESCB-related

⁸ With one small amendment, however, to Section 21(2) of the CBA 1942, 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.

tasks⁹ and in particular to those who may substitute the Governor. The new Section 25 of the CBA 1942 does not seem to reflect this aspect.

3.1.10 Draft head 18 stated that the draft law would provide that the Governor would be able to engage in other remunerative employment with the consent of the Commission. In its draft heads opinion, the ECB stated that 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 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. The draft law does not appear to have implemented this element of draft head 18 in respect of the Governor. In this regard, the ECB welcomes the retention of Section 19(6) and (7) of the CBA 1942 which protect against conflicts of interest. However, it recommends that the draft law state more clearly the precise conditions which create a conflict of interest for the Governor. This also applies to all members of the Commission who are involved in the performance of ESCB-related tasks and in particular to those who may substitute the Governor.

3.1.11 The new Section 32B of the CBA 1942 provides that the Bank shall prepare and submit to the Minister at specified intervals a strategic plan specifying the Bank’s objectives, activities, policies, strategies and policies for the relevant period. The ECB notes that, pursuant to the new Section 32B(5), the Minister shall have any such plan laid before the Houses of the Oireachtas (the Irish Parliament). The ECB recommends that the new Section 32B should contain a safeguard for the observance of the Bank’s independence, in respect of the preparation, approval and implementation of any such strategic plan.

3.1.12 The draft law provides in the new Section 32C of the CBA 1942 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 to financial regulation. This is to be submitted to the Minister not later than two months before the end of each financial year. It is unclear from the draft law whether the Minister’s approval is required, as was explicitly foreseen in draft head 23, although such a requirement for approval may be implicit in the new Section 32C.

In its draft heads opinion, the ECB stated that, where third parties and particularly the government are in a position, directly or indirectly, to exercise influence on the determination of the budget of an NCB, 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 tasks¹¹. The ECB recommended

⁹ See Opinions CON/2004/16, CON/2004/35, CON/2006/32, CON/2006/44 and CON/2007/6. See also the comments made at paragraph 3.1 above in relation to central bank independence.

¹⁰ See the ECB Convergence Report of May 2008, p. 20.

¹¹ As noted in the 1998 European Monetary Institute Convergence Report, and reiterated in paragraph 8 of Opinion CON/2002/16.

that the Governor should be granted an explicit right to oppose any funding and budgetary decisions in respect of financial regulation which could cause such impediments. In this regard, the ECB notes and welcomes the drafts law's inclusion of the strengthened substituted Section 19B in the CBA 1942. This provides for the Governor's final determination of budgetary or funding issues being considered by the *Commission*, which in the Governor's opinion have implications for the independence of the Bank or the Governor's performance of the functions conferred on the Governor and the Bank by or under the Treaties and the Statute of the ESCB. In order to avoid any possible ambiguity, the ECB recommends that the substituted Section 19B is extended to encompass budgetary and funding issues being considered by the *Minister* in this regard. In addition, Section 19B should provide that the Commission is obliged to ensure that the Bank has the financial means necessary for carrying out its ESCB-related tasks.

In addition, the draft law should make clear that Section 19B should take precedence over the new Section 32C.

3.1.13 The new Section 32F(4) of the CBA 1942 provides that any claims on, or liabilities to, the ECB are to be treated as assets or liabilities of the general fund or any other fund the Minister establishes by order for that purpose. The ECB would welcome clarification as to what is intended by this rule.

3.1.14 The new Section 32G(1) of the CBA 1942 provides that the Bank shall pay its surplus income as and when determined into the Exchequer and may, at any time pending such determination, pay into the Exchequer such sums on account of surplus income as may be agreed between the Minister and the Bank. Also, the new Section 32G(2) provides for the powers of the Minister to make regulations providing for the periodic determination of the Bank's surplus income and in particular regulations regarding reserves and other financial buffers and regulations providing for any matter arising from the implementation of Chapters VI (financial provisions of the ESCB), VIII (amendment of the Statute and complementary legislation), and IX (transitional provisions and other provisions for the ESCB) of the Statute of the ESCB. The ECB reminds the consulting authority that any transfers of financial resources by an NCB to a Member State's budget, either in the form of a profit distribution scheme or in any equivalent form, need to comply with the limitations imposed in this respect by the TFEU, in particular with the principle of central bank independence and the prohibition on monetary financing under Articles 130 and 123 thereof¹². In the absence of precise provisions in an NCB statute of how profits are allocated, the decision on allocation of profits should be taken by the NCB's decision-making bodies on professional grounds, and should not be subject to the discretion of third parties unless there is an express safeguard clause stating that this is without prejudice to the financial means necessary for carrying out the NCB's tasks related to the ESCB¹³. Moreover, compliance with the principle of central bank independence under Article 130 of the TFEU includes a requirement to ensure the central bank's financial independence. To ensure such compliance, the Member States should establish

¹² Concerning the prohibition on monetary financing, see paragraph 3.2 below.

¹³ See paragraph 2.2(b) of Opinion CON/2009/29 and p. 21 of the ECB Convergence Report of May 2008.

legal frameworks for NCB profit distributions which allow for an arm's length assessment of the financial needs of the relevant NCB to be appropriately taken into account. Such assessments should be based on the professional judgement of the relevant NCB's independent decision-making body rather than on the financial needs of the State, so that the NCB does not become dependent for its finances on the government, the parliament or any other third party¹⁴. The principle of central bank independence requires that no third party should be able to exercise direct or indirect influence, over the performance of the NCB's tasks, or over its ability, both operationally in terms of manpower, and financially in terms of appropriate financial resources, to fulfil its mandate, i.e. to perform its national tasks, to meet its international obligations and to properly cover its administrative and operational expenses¹⁵. Profits may be distributed to the State budget only after any accumulated losses from previous years have been covered and financial provisions deemed necessary to safeguard the real value of the NCB's capital and assets have been created. Indeed, it is of the utmost importance to allow a sufficient provision of reserves to allow the NCB to face possible losses without lessening its financial means to implement the monetary policy of the Union. Similarly, the NCB must also be free to independently create financial provisions to safeguard the real value of its capital and assets. Furthermore, Articles 28.1 and 30.4 of the Statute of the ESCB provide for calls on the NCBs to make contributions to the ECB's capital and to make transfers of foreign reserves. The principle of financial independence requires that compliance with these provisions leaves an NCB's ability to perform its functions unimpaired¹⁶.

In respect of the new Section 32G(3), the ECB notes that the same safeguards are to apply as do currently, in that the Minister must have regard to the functions imposed and the powers conferred on the Bank by the Treaties and the Statute of the ESCB. As stated in paragraph 3.1.12 above, it appears that the current safeguards do not sufficiently secure the Governor's final determination of budgetary or funding issues contained in the substituted Section 19B. There may be conflicts between the substituted Section 19B and the new Section 32G, or another provision of the CBAs¹⁷, which cast a doubt over the Governor's right of final determination of budgetary or funding issues and could have implications for the Bank's independence or the performance of ESCB-related tasks. In this respect, the draft law should make clear that Section 19B should take precedence over the new Section 32G.

3.1.15 The draft law provides in a new Section 32H of the CBA 1942 that where it appears to the Commission that the proceeds from levies and fees imposed in respect of financial regulation are likely to be insufficient to enable the Bank to properly perform its regulatory functions, the Bank may provide additional funds to subsidise the shortfall. The new Section 32H(3) and (4) contains

14 Ibid.

15 Ibid and see the ECB Convergence Report of May 2008, p. 20.

16 See the ECB Convergence Report of May 2008, p. 20.

17 See also Section 32H(3) and (4) (discussed in paragraph 3.1.15 below) of the CBA 1942.

the same safeguards as currently apply¹⁸: (a) the Minister is competent to approve such subsidisation; (b) the Minister must consult the Governor before deciding thereon; the latter may express his opinion thereon, in so far as it could affect (i) the Bank's performance of its obligations with respect to promoting the State's financial stability; and (ii) the performance of the Bank's functions in its capacity as a member of the ESCB; and (c) the Minister must have regard to the functions and powers of the Bank under the Treaties and the Statute of the ESCB when approving such subsidisation. As stated in paragraph 3.1.14 above, it appears that the current safeguards do not sufficiently secure the Governor's final determination of budgetary or funding issues contained in the substituted Section 19B. The ECB restates its recommendations at paragraph 3.1.14 in this regard.

3.1.16 The draft law provides in the new Section 32I of the CBA 1942 for the Bank's preparation of annual accounts. Section 32I(3) provides that the form of statement of accounts must be approved by the Minister after consulting the Bank. In its draft heads opinion, the ECB stated that the draft law should reflect the Bank's obligation to comply with the Eurosystem's regime for financial reporting of the Bank's operations pursuant to Article 26 of the Statute of the ESCB. In line with its convergence reports, the ECB also stated that the power of the Comptroller and the Auditor General to audit the Bank's accounts (provided for in the draft law as the new Section 32I(5) of the CBA 1942) should be expressed to be without prejudice to the audit by the Bank's external auditors. As the draft law does not appear to have addressed these specific recommendations, the ECB restates its remarks in this regard.

3.2 *Monetary financing*

3.2.1 According to the draft law, the National Consumer Agency (NCA) will assume the previous role of the Consumer Director of providing information to consumers in relation to financial services. The draft law provides in its Section 6 for arrangements in respect of Bank employees who may be seconded or transferred to the NCA in order to implement the transfer of that function. According to the draft heads, provision was to be made in the draft law for the preservation of the rights of any seconded staff who had contributed to a central bank superannuation scheme up until transfer to the NCA. The ECB repeats its recommendation contained in the draft heads opinion in this respect, namely that in order to ensure full compliance with the prohibition on monetary financing under Article 123 TFEU¹⁹ the draft law should clarify that no Bank resources will be applied towards the payment of pensions, or any other remuneration, in respect of Bank staff, once seconded or transferred to the NCA, other than solely in respect of ensuring the rights and entitlements already accrued by those Bank staff up to the time of secondment or transfer.

¹⁸ See the current Section 33L of the CBA 1942.

¹⁹ The monetary financing prohibition as laid down in Article 123 TFEU is further clarified in Council Regulation EC (No) 3603/93 of 13 December 1993 specifying definitions for the application of prohibitions in Article 104 and 104b(1) of the Treaty [establishing the European Community] [now Articles 123 and 125 TFEU], OJ L 332, 31.12.1993, p. 1, according to which overdraft facilities or any other type of credit facility with the ECB or the NCBs of Member States in favour of Community institutions or bodies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States are prohibited, as is any purchase directly from these public sector entities by the ECB or NCBs of debt instruments.

3.2.2 As set out above at paragraph 3.1.14, the new Section 32G(1) of the CBA 1942 provides that the Bank shall pay its surplus income as and when determined into the Exchequer and may, at any time pending such determination, pay into the Exchequer such sums on account of surplus income as may be agreed between the Minister and the Bank. The ECB reminds the consulting authority that any such transfers of financial resources by an NCB to a Member State's budget, either in the form of a profit distribution scheme or in any equivalent form, need to comply with the limitations imposed in this respect by the TFEU, in particular with the prohibition on monetary financing under Article 123 thereof. More specifically, in order to comply with this prohibition, it is of crucial importance that the distribution of profits does not imply advances on future or provisional profits but is rather the result only of profits that are fully realised, accounted for and audited, which in turn requires due calculation of profits and losses. Otherwise, such distribution of profits may result in advance profit distribution to the State, which would constitute credit to the public sector in breach of the monetary financing prohibition²⁰. Thus, in order to ensure that the schedule for distribution of the Bank's profits to the Exchequer complies with the monetary financing prohibition, in full or through instalments, it may not imply advances on future or provisional profits but only result in annual profit distributions that are fully realised, accounted for and audited, which in turn requires due calculation of profits and losses for the relevant reporting period²¹.

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

Done at Frankfurt am Main, 17 June 2010.

[signed]

The Vice-President of the ECB

Vítor CONSTÂNCIO

²⁰ See e.g., paragraph 3.3 of Opinion CON/2008/82, paragraph 2.4 of Opinion CON/2009/26, and paragraph 2.4 of Opinion CON/2009/53.

²¹ See paragraph 2.2(b) of Opinion CON/2009/59.