



EUROPEAN CENTRAL BANK

EUROSYSTEM

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ECB-PUBLIC

OPINION OF THE EUROPEAN CENTRAL BANK

of 16 March 2016

on the acquisition of the legal ownership of the Institut d'Émission des Départements d'Outre-Mer
by the Banque de France

(CON/2016/14)

Introduction and legal basis

On 15 February 2016 the European Central Bank (ECB) received a request from the French Ministry of Finance and Public Accounts for an opinion on a draft legislative provision (hereinafter the 'draft law') amending the statute of the *Institut d'Émission des Départements d'Outre-Mer* (IEDOM, Issuing Institution of the Overseas Departments).

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 first and third indents of Article 2(1) of Council Decision 98/415/EC¹, as the draft law relates to currency matters and to a national central bank (NCB). 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

- 1.1 The IEDOM conducts monetary policy operations for the European System of Central Banks (ESCB) in the outermost regions of France (Martinique, Mayotte, Guadeloupe, French Guiana, La Réunion and Saint Martin) as well as in the French overseas countries and territories that use the euro (Saint Barthélemy² and Saint-Pierre-and-Miquelon³) (hereinafter referred to as the 'geographical zone of activity').
- 1.2 Under the current legal framework, the IEDOM is a national public law legal entity (*établissement public national*), the status of which is governed by the French Monetary and Financial Code (hereinafter the 'CMF'). The entity is fully owned by the French State. However, for the implementation of ESCB tasks in its geographical zone of activity, the IEDOM is an agent of the Banque de France (BdF) acting in the name and on behalf of the BdF and under its direction.

¹ Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (OJ L 189, 3.7.1998, p. 42).

² The legal basis for the use of the euro in Saint Barthélemy is the monetary agreement between the European Union and the French Republic on keeping the euro in Saint-Barthélemy following the amendment of its status with regard to the European Union – Council Decision 2011/433/EU of 12 July 2011 on the signing and conclusion of the Monetary Agreement between the European Union and the French Republic on keeping the euro in Saint Barthélemy following the amendment of its status with regard to the European Union (OJ L 89, 20.7.2011, p. 1).

³ The euro is used in Saint-Pierre-et-Miquelon on the basis of Council Decision 1999/95/EC of 31 December 1998 concerning the monetary arrangements in the French territorial communities of Saint-Pierre-et-Miquelon and Mayotte (OJ L 30, 4.2.1999, p. 29). The ECB reiterates its position on the status of the use of the euro in Saint-Pierre-et-Miquelon, as communicated in Opinions CON/1998/64 (OJ C 127, 7.5.1999, p. 5), and CON/2000/19. All ECB opinions are available on the ECB's website at www.ecb.europa.eu.

According to Article L.711-9 of the CMF the IEDOM's accounts are to be consolidated with those of the BdF. However given that the IEDOM is a public law legal entity exclusively owned by the French State, the assets and liabilities of the IEDOM are not consolidated with those of the BdF, but only 'combined' for presentation purposes in the BdF's annual report.

- 1.3 Article L.711-2 of the CMF provides that the IEDOM acts for and on behalf, and under the authority, of the BdF when exercising the tasks laid down in Articles L.122-1 and L.141-1 to L.141-5-1 and L.141-6-1 of the CMF in its geographical zone of activity. When the BdF performs services requested by the State or carried out for third parties with the agreement of the State, these services must be remunerated in order to cover the BdF's expenses⁴. The ECB notes that the performance of such tasks by the IEDOM in its geographic zone of activity is remunerated under the same conditions as tasks performed by the BdF in metropolitan France (reference is made to Article L. 711-3 of the CMF, which remains as is).
- 1.4 The purpose of the draft law is to allow the BdF to acquire the ownership of the IEDOM, with a view to strengthening the latter's independence vis-à-vis the French State. According to the draft law, the IEDOM would become a private law legal entity incorporated as a '*société par actions simplifiée*' (SAS – simplified joint-stock company) and wholly-owned by the BdF. Pursuant to the draft law, this transformation of the IEDOM would not entail the creation of a new legal entity, nor constitute a dissolution (*cessation d'activité*)⁵ but rather would ensure the continuity of the IEDOM. From an accounting standpoint, the ECB understands that as a result of the transfer of ownership of the IEDOM to the BdF, the latter will recognise in its standalone accounts its shareholding in the IEDOM and the financial statements of the two entities will be fully consolidated. Pursuant to paragraph IV Article 44 bis of the draft law, the BdF will indemnify the French State for the transfer of ownership of the IEDOM and its transformation into an SAS.
- 1.5 The governance structure of the IEDOM will also be substantially modified and simplified following its transformation into an SAS. The specificity of an SAS is that, subject to certain limited exceptions, the governance rules are not laid down by law. As an SAS, IEDOM's governance rules will be laid down in its bylaws (see Article L.227-5 of the French Commercial Code) and may also be part of the Decree amending the regulatory part of the CMF. Neither the draft Decree nor the draft bylaws were communicated to the ECB in the context of the present consultation.

2. Observations regarding the transfer of ownership of the IEDOM to the BdF

- 2.1 As indicated in the ECB's previous opinion on the statute and role of the IEDOM⁶, the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB') does not provide for ESCB tasks being carried out by bodies other than the ECB and the ESCB NCBs. The ECB therefore welcomes the transfer of ownership of the IEDOM to the BdF and understands that the continued existence of the IEDOM, as a legal entity that is separate from

⁴ See Article L-141-7 of the CMF.

⁵ See Article 44 bis (I) of the draft law.

⁶ See Opinion CON/99/20.

the BdF, is justified by the special situation of the Union's outermost regions of France and of the French overseas countries and territories that use the euro.

- 2.2 The ECB understands that an agreement regarding the precise terms and conditions governing the transformation of IEDOM from a public law legal entity into an SAS is to be concluded between the French State and the BdF before the draft law enters into force. This agreement will, in particular, provide for an indemnity to be paid by the BdF to the French State. In this regard, the ECB emphasises that any provision of funds from an NCB to a Member State needs to comply with the limitations imposed by the Treaty, in particular with the prohibition on monetary financing laid down in Article 123 TFEU. From the documents at its disposal the ECB is not in a position to assess the way in which the indemnification provided for in the draft law will be agreed upon. The ECB would therefore appreciate receiving a copy of the draft agreement between the French State and the BdF prior to its entry into effect and execution.
- 2.3 As a general matter, any indemnity to be paid by the BdF to the French State as a result of the transfer of ownership of the IEDOM should be based on a prudent and fair valuation as confirmed by an independent expert.
- 2.4 In addition, the ECB understands that the change in the status of the IEDOM that took place in 2000 following the transfer of national monetary policy powers to the ECB on 1 January 1999 did not entail any indemnification of the French State by the BdF, nor did it give rise to any claim to that effect. The ECB clearly stressed on that occasion⁷ that the result of any ESCB-related financial transactions should be recorded immediately and directly in the financial statements of the BdF. Against this background, the ECB emphasises that no indemnity should be paid by the BdF to the French State for any profits and losses (including undistributed dividends or reserves) related to ESCB tasks which were generated from 1 January 1999 onwards, including any which may be generated after the completion of the transfer of ownership of the IEDOM to the BdF.
- 2.5 As regards non-Eurosystem related assets and liabilities that will be transferred to what will become the BdF's subsidiary as a result of the draft law, the ECB does not exclude such indemnification in principle, but stresses the importance of a prudent valuation on the basis of which such indemnification should be based. In that respect, the valuation should amount to the fair value of the assets and liabilities effectively transferred to the BdF (taking due account of all transferred liabilities, including in particular pension scheme-related liabilities). Given the complexity of such a valuation exercise, an independent expert should be tasked with its verification.

3. Observations regarding the IEDOM's new statute

- 3.1 The draft law does not materially change the current framework as regards the IEDOM's tasks and role (see paragraph 1.3 above) and no new tasks will be attributed to it as a result of the transfer of its ownership from the French State to the BdF. Furthermore, the tasks in the interest of the French State that the IEDOM will continue to perform in its geographical zone of activity will continue to be

⁷ See Opinion CON/99/20.

- remunerated by the French State. The IEDOM's tasks of general interest are also identical in nature to those performed by the BdF in the BdF's own geographical zone of activity⁸.
- 3.2 Financial independence is a key aspect of the principle of central bank independence (Article 130 TFEU) for the members of the ESCB. The ECB emphasises that any task undertaken by the IEDOM as the BdF's wholly-owned subsidiary must be compatible with the BdF's institutional and financial independence, to safeguard the proper performance of its tasks under the Treaty and the Statute of the ESCB, as well as its national tasks. Thus, following the transfer of ownership of the IEDOM to the BdF, any tasks undertaken in the interests of the French State may be performed by the IEDOM on the condition that the IEDOM continues to receive appropriate remuneration for such tasks from the French State.
- 3.3 As regards the governance of the IEDOM, in accordance with its new statute, the ECB understands that choosing the SAS as the most appropriate form of corporate structure was justified by the flexible organisational and governance rules associated with the SAS structure. The ECB also understands that the choice of the SAS structure will allow the IEDOM to continue to act as the BdF's agent while maintaining the IEDOM's separate legal personality. However, the ECB notes that specific governance and organisational rules will be laid down in the bylaws of the SAS which are not part of the present consultation. Pursuant to Article L.711-12 of the CMF the arrangements regarding the organisation and the bylaws of the IEDOM are to be laid down by a Decree that will be adopted following the adoption of the draft law. In view of the fact that the IEDOM will become a wholly-owned subsidiary of the BdF it would appear that Article L.711-12 of the CMF will become redundant and could therefore be repealed. If, however, any Decree on the arrangements for the operation of IEDOM were to be adopted, the ECB would welcome being consulted on it. Furthermore, the ECB expects to be provided with any other corporate arrangements relating to the organisation and operation of the IEDOM as an SAS.
- 3.4 As regards the status of the IEDOM's staff, the ECB notes that the proposed transformation will not have a direct impact on the legal regime applicable to anyone having an employment contract with the IEDOM. The ECB further observes that Article L.711-11 of the CMF, in accordance with which staff members seconded to the IEDOM by the *Agence Française de Développement* (AFD, the French Development Agency) remain subject to the provisions applicable to them as staff members of the AFD, is not amended by the draft law. The ECB underlines that, in line with Article 130 TFEU, the legal regime applicable to the IEDOM must ensure its full independence vis-à-vis other offices, bodies or agencies of the French State. The ECB understands that any of the IEDOM's staff that are on secondment from the AFD work entirely under the direction, control and supervision of the IEDOM during their secondment, both from an organisational and functional perspective, and that, in relation to their ESCB-related duties at the IEDOM, they are subject to

⁸ See Article L.141-7 of the CMF.

Article 37 of the Statute of the ESCB.

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

Done at Frankfurt am Main, 16 March 2016.

[signed]

The President of the ECB

Mario DRAGHI