

## OPINION OF THE EUROPEAN MONETARY INSTITUTE

on a consultation from the Belgian Ministry of Finance under Article 109f(6) of the Treaty establishing the European Community (the “Treaty”) and Article 5.3 of the Statute of the EMI as elaborated in the Council Decision of 22nd November 1993 (93/717/EC) on a proposed reform of the National Bank of Belgium’s Organic Law

### CON/96/10

1. The consultation was initiated on 1st August 1996 by the Belgian Ministry of Finance which requested an opinion from the EMI within one month of receipt of the consultation, i.e. by 6th September 1996. For this purpose, the Ministry of Finance submitted the text of the draft legislation together with explanatory memoranda to the EMI.
2. The EMI’s competence to deal with the request for consultation is based on Article 1, second indent, of the Council Decision of 22nd November 1993 (93/717/EC), as the draft legislation concerns the statute of the National Bank of Belgium (the “Bank”).
3. In accordance with Article 108 of the Treaty, the draft legislation intends to adapt the statute of the Bank to the requirements of Stage Three of EMU. The main elements of the draft legislation are the following:
  - The introduction of the principle that the Bank in Stage Three will be an integral part of the ESCB and will be subject to guidelines and instructions from the ECB.
  - A reference to the primary objective of price stability and the secondary objectives mentioned in Article 2 of the Statute of the ESCB/ECB.
  - An enumeration of the main tasks to be pursued within the framework of the ESCB under the auspices of the ECB and a description of the instruments which may be used to that effect.
  - The lightening of the organisational structure of the Bank which up until now includes five organs: the Governor, the Direction Committee (Executive Board), the Council of Regency, the College of Censors and the General Council. It is felt that this structure, which finds its roots in the history of the Bank, may now be adjusted to the Bank’s future role as an integral part of the ESCB. The draft legislation entails that the General Council will be dissolved and that its tasks will be assigned to the Council of Regency and the College of Censors.
  - The possibility for the Bank to perform non-ESCB-related tasks. The Bank may decide to establish 100% owned or majority controlled subsidiaries for the accomplishment of these tasks. The agreement of the Government on the establishment of such entities will be required if a task has been attributed to the Bank by law.

- The right of the Government's Commissioner to review the legality of the Bank's activities will be suppressed as far as ESCB-related tasks are concerned. However, a representative of the Ministry of Finance will remain in charge of the supervision of the legality of the Bank's activities with regard to non-ESCB-related tasks.
- A revision of the regime of allocation of monetary income between the Bank and the State in order to maintain the existing financial autonomy of the Bank.
- The insertion of a provision on the Bank's role as overseer of payment systems and securities settlement systems.
- A provision on secrecy and communications between the relevant authorities in order to implement provisions of the European Parliament and Council Directive of 29th June 1995 (95/26/EC), the "post-BCCI Directive".

4. The EMI welcomes the draft legislation both in terms of timing as well as content. Article 109e(5) calls for a timely adaptation of statutes of NCBs in order to comply with the requirements for Stage Three of EMU. The draft legislation meets this requirement. The draft also correctly recognises that there are in fact three stages in the process of legal convergence with a view to Stage Three.

- It follows from Articles 108 and 109e(5) of the Treaty that central bank independence needs to be achieved at an early stage and at the latest at the date of establishment of the ESCB. This is, inter alia, to ensure that a Governor in his/her capacity as member of the Governing Council of the ECB will be independent upon the establishment of the ESCB/ECB, i.e. at the moment that important policy decisions need to be taken by the Governing Council of the ECB in preparation of Stage Three.
- Other statutory provisions ensuring the necessary degree of integration of the Bank in the ESCB would need to become effective from the starting date of Stage Three onwards.
- Finally, certain provisions would only need to become effective once the transition to monetary union in all its relevant aspects has been completed. For example, provisions on banknotes need to acknowledge that the transition from national banknotes to euro banknotes will occur later than the starting date of Stage Three.

The draft legislation accommodates these three stages of legal convergence through Article 46 which allows Government, on a proposal from the Bank, to decide on the appropriate moment of effectiveness of individual provisions in a gradual and flexible manner. The EMI notes that this Article does not yet define the provisions which need to become effective from the date of the establishment of the ESCB/ECB onwards. As stated above, these should be all provisions with an impact on the Bank's independence.

5. On the substance, the EMI notes with particular satisfaction that the draft legislation contains a clear and unambiguous recognition of the Bank's status as an integral part of the ESCB in Stage Three. Although Article 108 of the Treaty requires the removal of inconsistencies between

statutes of national central banks and the Treaty and the Statute of the ESCB/ECB, the draft legislation shows that legal clarity is enhanced if a statute of a national central bank refers, where appropriate, to a central bank's integration within the ESCB and the consequences thereof.

On the independence of the Bank, the EMI notes with satisfaction that features of central bank independence of an institutional, personal, functional and financial nature have been accomplished through the following provisions:

- The prohibition of instructions as laid down in Article 107 of the Treaty and Article 7 of the Statute of the ESCB/ECB is incorporated in Article 4 of the draft legislation. Although the Treaty and Statute Articles are directly applicable on this point, incorporation in the draft legislation nevertheless increases the legal clarity thereof.
- The role of the Council of Regency, which is partly composed of representatives of different sectors of society, is restricted to advisory tasks without an ex ante right of consultation on ESCB-related tasks.
- A right of the Government's Commissioner to review the legality of the Bank's activities on ESCB-related tasks is suppressed.
- The private shareholders of the Bank will not have the possibility of influencing the performance of ESCB-related tasks.
- The grounds for dismissal of the Governor which are derived from Article 14.2 of the ESCB/ECB Statute have been extended to other members of the Executive Board, whilst their respective terms of office are also in line with Article 14.2.
- The incompatibilities of functions of the Governor and other members of the Executive Board as laid down in Articles 32 and 33 of the draft legislation are broad enough to prevent the risk of conflicts of interests.
- The draft legislation unambiguously reflects the statutory objective of the ESCB and the Bank's role in the achievement thereof.
- The draft legislation acknowledges explicitly in Article 20 that the performance of non-ESCB-related tasks is, in accordance with Article 14.4 of the Statute of the ESCB/ECB, subject to the ECB's Governing Council's views on their compatibility with ESCB-related tasks. Again, although the latter Article prevails over national legislation, incorporation of this provision in national legislation certainly contributes to legal clarity.

The above construction aims at ensuring the independence of the Bank as required by the Treaty and the Statute of the ESCB/ECB. The fact that a representative of the Ministry of Finance will be able to review the legality of the Bank's activities undertaken in the performance of non-ESCB-related tasks is not incompatible with the Treaty and the Statute of the ESCB/ECB, whilst the possibility to assign non-ESCB-related tasks to separate legal entities may even be regarded as emphasising the independence of the Bank as far as ESCB-related tasks are concerned. Such

assignment does, of course, not affect the ECB's powers under Article 14.4 of its Statute to assess the compatibility of the former tasks with the latter.

6. Furthermore, the EMI notes with satisfaction that the draft legislation also elaborates on individual tasks which the Bank will perform as an integral part of the ESCB and that it closely follows, where appropriate, the text of the Treaty and the ESCB/ECB Statute in this respect. Such an elaboration serves completeness and legal clarity and in particular avoids confusion which may arise if the same issues are addressed in different manners in the Treaty on the one hand and in the statute of an NCB on the other hand, although it is at the same time recognised that the Treaty and the ESCB/ECB Statute do not require harmonisation of statutes of NCBs and national peculiarities may continue to exist.
7. The EMI has several remarks on individual provisions of the draft legislation.

#### Article 4

The EMI understands the reference to Articles 7 to 9 to be to the objectives and the tasks of the ESCB and therefore also to embrace Chapter II of the draft Legislation. The question arises whether it would not be appropriate to refer to Chapter II in its totality in order to avoid confusion.

#### Article 17

The general reference to "agreements on international monetary cooperation" raises the question whether it would not be appropriate to make clear that this Article can only cover those agreements which do not fall under the competence of Community institutions and organs.

#### Article 26

It might clarify the draft legislation to add that the Board determines the general policy of the Bank "with due respect to the provisions of Chapter II" of the draft legislation or similar words.

#### Article 35

The EMI confirms accounting rules and standards within the ESCB under Article 26 of the Statute of the ESCB/ECB and methods for the determination of monetary income under Article 32 of the Statute of the ESCB/ECB are still under consideration and will be adopted by the Governing Council of the ECB. The EMI therefore welcomes the caution in the above Article on matters addressed in the draft legislation where such ECB decisions may have an impact.

Article 39

It should be recalled that Article 15.2 of the Statute of the ESCB/ECB requires the publication of consolidated financial statements of the ESCB on a weekly basis.

8. The present opinion does not prejudge reports which the EMI is required to draft under Article 109j of the Treaty and Article 7 of its Statute.
9. The EMI agrees that this opinion may be made public by the consulting authority.

9th September 1996