



EUROPEAN MONETARY INSTITUTE

29 October 1997

OPINION OF THE EUROPEAN MONETARY INSTITUTE

at the request of the Department of Finance of Ireland under Article 109f(6) of the Treaty establishing the European Community (the “Treaty”) and Article 5.3 of the Statute of the EMI concerning a draft bill enacting provisions relevant to the role of the Central Bank of Ireland in the European System of Central Banks and connected matters (“the draft bill”)

(CON/97/20)

1. On 10 September 1997 the EMI received a request for an opinion on a draft bill enacting provisions relevant to the role of the Central Bank of Ireland (“the Bank”) in the European System of Central Banks and connected matters from the Department of Finance of Ireland. No explanatory memorandum was submitted to the EMI.
2. The EMI’s competence to deliver an opinion is based on Article 1.1 of the Council Decision (93/717/EC) of 22 November 1993 on consultation of the EMI by the authorities of the Member States on draft legislative provisions, as the draft bill contains inter alia provisions concerning currency legislation, the status and powers of the Central Bank of Ireland and connected matters.
3. The EMI welcomes the timely adaptation of the statutory regime applicable to the Bank as currently set out in the Central Bank Acts 1942 to 1997 (respectively referred to in this opinion as “the 1942/1971/1989/1997 Act”). That statutory regime includes the Central Bank Act 1997, upon a draft of which the EMI was consulted and delivered its opinion on 28th May 1996 (CON/96/04). Such adaptation assists the EMI and other Community institutions to assess, in accordance with their reporting obligations under the Treaty, progress made towards the fulfilment of the legal requirements for Stage Three.
4. The EMI notes in particular that the draft bill addresses almost all of the matters that the EMI had identified as requiring consideration in the context of timely adaptation towards fulfilment of the legal requirements for Stage Three as mentioned in the EMI’s publication, “Legal Convergence in the Member States of the European Union as at August 1997” (October 1997) (and in the November 1996 Convergence Report). The EMI would, however, like to raise the following detailed comments as set out in the subsequent paragraphs of this opinion.

5. *(Section 3 of the draft bill)* The EMI notes that although provision is made for how the proposed sections contained in the bill should be brought into effect, there are no provisions about the time or times when that will be, nor for what periods. The EMI assumes that additional measures are intended in this regard. The reference to the Irish pound as a subdivision of the euro, for example, requires to be limited in its application to the transitional period.
6. *(Section 6 of the draft bill)* A general provision is proposed by way of a new section 5A to the 1942 Act by which it is stated at subsection (1) that it shall be lawful for the Bank to comply with its obligations in the Treaty and Statute. However, a proposed subsection 5A(2) states that the Bank “shall have regard” to the Treaty and Statute when exercising any power or performing any function or duty referred to in the new section 5A. It is not clear whether the mandatory nature of the Treaty and Statute is thus unambiguously expressed. A positive statement that such exercise or performance is to be subject to the provisions of the Treaty and Statute would be preferable.
7. *(Section 7 of the draft bill)* Article 2 of the ESCB/ECB Statute states that the primary objective of the ESCB shall be to maintain price stability. The primary statutory objective of the Bank is proposed to be “to maintain price stability in the interests of the welfare of the people as a whole.” The direct juxtaposition of these two concepts does not unambiguously correspond to Article 2 of the Statute.. While recognising that the maintenance of price stability is in the interests of the welfare of the people as whole, it would be necessary not to seek to alter the requisite statement of the Bank’s primary objective.
8. *(Section 7 of the draft bill)* The draft bill proposes a new subsection 6(2) of the 1942 Act dealing with the Bank’s secondary objectives. These do not appear to be directly derived from the secondary objectives mentioned in Article 2 of the ESCB/ECB Statute and, by being described as the Bank’s “other objectives”, may be read as excluding those derived from the ESCB/ECB Statute.
9. *(Section 7 of the draft bill)* In the proposed subsection 6(3) the protocol referred to is in fact a protocol annexed to the Treaty establishing the European Community rather than the Treaty on European Union.
10. *(Section 7 of the draft bill)* Clause 7 of the draft bill proposes a new section 6(4) of the 1942 Act under which the Minister for Finance is proposed to have the power to oblige the Governor on behalf of the Board or the Board to consult with him on the execution and performance of such functions, powers and duties as are entrusted to the Bank by law. This formulation appears to include the performance of ESCB-related tasks. This explicit statutory mechanism is one which the EMI considers might be used to influence the decision-making process within the

Bank and, more seriously, within the ESCB, and is, therefore, considered to be incompatible with the requirement of central bank independence.

11. *(Section 10 of the draft bill)* It is proposed in the draft bill to amend section 32 of the 1942 Act so as to add a provision excluding from voting those directors who are in the permanent service of the State on matters relating to ESCB-related tasks. However, no similar or other proposal is made in respect of the remaining non-executive directors which would ensure that no conflicts of interest might arise in their involvement in the performance of ESCB-related tasks. It was pointed out in the EMI's publication, "Legal Convergence in the Member States of the European Union as at August 1997" (October 1997) (and in the November 1996 Convergence Report) that this is a matter requiring to be dealt with in order to satisfy the compatibility requirements of Article 108 of the Treaty.
12. *(Section 11 of the draft bill)* It is proposed to widen the scope of those subject to reporting obligations to include reporting agents designated by the ECB. However, section 18(1) of the 1971 Act, as amended by section 37 of the 1989 Act, restricts the scope of activities in relation to which such reporting is to take place to those activities there listed. This list of activities - to which no amendment is proposed - may not be sufficiently comprehensive to cover all the ECB's likely statistical requirements in that none of the existing heads (section 18(1) (a) to (f)) clearly embraces statistics on transactions undertaken on behalf of others or by reporting agents designated by the ECB which are not financial institutions.
13. *(Section 16 of the draft bill)*

13.1 The draft bill proposes to substitute section 24 of the 1989 Act with new wording. Section 24 of the 1989 Act currently provides for the monetary unit of the State as being the Irish pound, and makes provisions for exchange rates. The legislative intention of the draft bill appears to be to repeat parts of the draft Council Regulation on the introduction of the euro to be adopted under Article 109I (4), third sentence, of the Treaty establishing the European Community (OJ No.C 236/8, 2 August 1997) ("the euro regulation"). However, the approach adopted in the draft bill is not without difficulties.

13.2 National implementation of regulations is not usually necessary and is indeed impermissible where it disguises from those subject to the proposed law the Community source of their rights and obligations (Case 39/72 [1973] E.C.R. 101; Case 34/73 [1973] E.C.R. 981). Legislative duplication of the euro regulation is inconsistent with Community law unless Community regulations require implementation by national measures (which is not the case with those parts of the euro regulation that state the nature of the new currency) such that the incorporation of

the texts of such regulations may be justified for the sake of coherence and in order to make them comprehensible by the persons to whom they apply (Case 272/83 [1985] E.C.R.).

13.3 And even if the legislative repetition of the euro regulation were acceptable under Community law, there are features of the proposed section 24 that must require alteration in any event.

13.4 There are inherent difficulties in referring to an item of proposed Community law which remains in draft form, and will not be enacted until 1998. In this context, it may be noted that the draft bill proposes references (at sections 24(1)(3) and 25(2) of the 1989 Act) to “the Council Regulation” without stating that it has been published only as a draft.

13.5 The wording taken from the euro regulation does not exactly track the original (for example, the draft bill refers to “cent” where the euro regulation has “cents”). Nor is the wording taken from the euro regulation complete (for example, the draft bill provides for the division of the euro into one hundred cent[s] and that the Irish pound shall be a national currency unit subdivision of the euro. It does not refer, however, to the contents of Article 6, paragraph 1, first sentence, of the euro regulation which provides that “the euro shall also be divided into the national currency units ...”).

13.6 Whilst the EMI accepts the need for legal clarity in the totality of legislation which amounts to the monetary law of a participating Member State and recognises the practice and need to refer in national legislation to the lawful currency of the state, it would recommend that no such attempt should be made to repeat or reflect the detailed wording of the euro regulation, which will have direct effect in all participating Member States.

- 14 Under Article 105a of the Treaty certain competences in relation to banknotes are provided to the ECB. No provision is made in the draft bill to address the fact that the wording of section 44 of the 1971 Act as inserted by section 120 of the 1989 Act, which states that issuance of banknotes shall be lawful if they are issued against certain assets, and thereby implies that issuance on any other terms would not fall within the powers of the Bank, is not restricted to the issuance of national banknotes and may therefore be inconsistent with Article 105a. Issuance of euro banknotes under Article 105a of the Treaty must be effected under uniform conditions in all participating Member States. The provision in the 1971 Act may therefore be contrary to the Treaty provisions in that it unduly restricts the Bank’s ability to perform ECSB related tasks.
- 15 No provision is made in the draft bill to address the wording of sections 10 (1) and 13(1)(b) of the 1997 Act, which provide that the consent of the Minister for Finance is required before the Bank may refuse to approve the rules of a payment system or subsequently revoke such an

approval. The existence of such a requirement for ministerial consent is inconsistent with the ESCB's tasks in relation to payment systems and the competence of the ECB to make regulations in that regard.

- 16 No provision is made in the draft bill to address the wording of section 134 of the 1989 Act, which empowers the Minister for Finance to direct that certain business transactions be suspended if he considers it necessary in the national interest or for the purpose of safeguarding the currency of the State. Such direction may only be made after having consulted the Bank. The existence of this power does not recognise the competence of the ESCB in the field of monetary policy and the transfer to Community level of all monetary powers of participating Member States. It is suggested that the power should be restricted to business transactions which are not related to the performance of ESCB-related tasks and that the exercise of the power should not be referable to safeguarding the currency of the State.
17. The EMI notes that detailed provisions have not been included in the draft bill concerning the amendments required to recognise ECB and Community competences in the areas of the issuance of banknotes and coins respectively.
- 18 The EMI has no objection to this opinion being made public.

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