



EUROPEAN MONETARY INSTITUTE

OPINION OF THE EUROPEAN MONETARY INSTITUTE

at the request of the Swedish 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 on a draft legislative proposal to amend certain legal provisions regarding the status of Sveriges Riksbank

CON/97/26

1. On 8 October 1997 the EMI received a request from the Swedish Ministry of Finance for an opinion on a draft legislative proposal to amend certain legal provisions regarding the status of Sveriges Riksbank (the “legislative proposals”). The legislative proposals are set out in a report submitted to the Swedish Council on Legislation by the Swedish Government on 2 October 1997 and entitled “The status of the Riksbank” (“Lagrådsremiss - Riksbankens ställning”) (the “Report”). On 13 October 1997 the EMI received an unofficial English translation of the Report from the Swedish Ministry of Finance.
2. The EMI’s competence to deliver an opinion is based on Article 1.1, second indent, of the Council Decision (93/717/EC) of 22 November 1993 on the consultation of the EMI by the authorities of the Member States on draft legislative provisions, as the legislative proposals contain new provisions concerning the status of Sveriges Riksbank (the “Bank”), inter alia, in view of the need to implement provisions of the Treaty and in particular Article 108 thereof.
3. The EMI welcomes the timely adaptation of the legal provisions governing the status of the Bank. As mentioned in the EMI’s 1995 and 1996 reports on “Progress towards convergence” (the “1995 and 1996 Convergence Reports”), timely adaptation is necessary to enable 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 of EMU. A reference is also made to the EMI report on “Legal convergence in the Member States of the European Union as at August 1997”, which was published on 27 October 1997 (the “1997 Report”).
4. The EMI notes with satisfaction the comprehensive fashion in which the adaptation of the Sveriges Riksbank Act (1988:1385) (the “Act”) and other relevant legal provisions, including

articles of the Constitution, is addressed in the Report. However, the EMI would like to comment on certain aspects of central bank independence. In addition, the Report indicates in Chapter 3 that the legislative proposals are limited to Treaty obligations “with respect to the second stage of [...] EMU” and the EMI would like to make some comments arising from the need to ensure the integration of the Bank into the European System of Central Banks (the “ESCB”) in Stage Three of EMU upon Sweden’s adoption of the single currency, as required, inter alia, by Article 14.3 of the Statute of the European System of Central Banks and of the European Central Bank (the “ESCB Statute”), which will entail further amendments to Swedish law.

5. Central bank independence needs to be achieved at the latest by the date of the establishment of the ESCB. The timetable for the adaptation of national legislation regarding the independence of national central banks (“NCBs”) in view of Articles 107 and 108 of the Treaty is addressed in the 1995 Convergence Report (pages 89-90):

“[...] NCBs should become effectively independent by the date of the establishment of the ESCB. Clear support for this view can be found in Article 109e (5) [of the Treaty], which expressly states that the process leading to NCB independence should be commenced during the second stage. [...] Before the start of Stage Three, the ECB’s Governing Council will have to decide upon the policy framework of the ESCB. At this crucial stage, it is important that the Governors, who will sit on the Governing Council [of the ECB], come from fully independent NCBs.”

This requirement is not reflected in the date of entry into force of the legislative proposals, which is set for 1 January 1999. In Sweden there is a need to amend not only the statutory provisions regarding the Bank which are contained in the Act, but also the Swedish Constitution. In this respect, the EMI has taken note that “[a]mendments to the Constitution cannot enter into force before 1 January 1999 as such amendments require the endorsement of two consecutive Parliaments” (page 140 of the 1996 Convergence Report).

6. The overall assessment of the legislative proposals on the general position of the Bank, the primary objective of the Bank and the new proposed structure of the Bank and its decision-making bodies, in order to achieve central bank independence, is positive (and the EMI notes the references in the Report, inter alia, to Articles 107 and 108 of the Treaty and Articles 7 and 14.2 of the ESCB Statute, as well as to the 1995 and 1996 Convergence Reports). In this context, the EMI welcomes the division of responsibilities between the Bank’s Governing Council and its new Executive Board, as set out in the proposed amended wording of Section 41 of the Act, and the legislative proposal on personal independence for members of the Bank’s Executive Board, as contained in the proposed new Section 33a of the Act. The EMI notes that the area of responsibility of the Bank’s Executive Board shall cover all matters which are not to be decided

by its Governing Council (whereby the proposed amended wording of Section 41 of the Act provides an enumeration of matters to be decided by the Governing Council) and that a member of the Executive Board of the Bank (as opposed to a member of the Governing Council) may not be a member of Parliament. In view of the restricted area of responsibility of the Bank's Governing Council, the legislative proposals address satisfactorily the inconsistency with the Treaty and the ESCB Statute concerning the possibility of having members of Parliament as members of the Bank's Governing Board, to which reference was made in the 1996 Convergence Report and the 1997 Report (page 140 and page 56 respectively).

7. The proposed provisions on the personal independence of members of decision-making bodies of the Bank, including the legislative proposals concerning the term of office and grounds for dismissal of members of the Bank's Executive Board, receive the EMI's general support. However, the transitional provisions to the proposed amendments to the Act provide that the first group of appointees to the Executive Board will include one member whose first term of office will be four years, and that three other members will be appointed for three years, two years and one year respectively. Moreover, the proposed second paragraph of Section 32 of the Act raises the possibility that terms of office of members of the Executive Board replacing a resigning member will also be below the minimum term of office of five years stated in Article 14.2 of the ESCB Statute and the 1995 and 1996 Convergence Reports. The EMI appreciates the fact that the initial term of office may be influenced by the wish to create a staggered appointment scheme and that the replacement arrangement envisaged for use in the event of resignations is designed not to upset such a scheme. At the same time, the EMI would like to emphasise that each individual member of a decision-making body involved in the performance of the tasks and duties conferred upon the ESCB by the Treaty and the ESCB Statute ("ESCB-related tasks") should have the same security of tenure in accordance with Article 14.2 of the ESCB Statute as stated in the 1995 and 1996 Convergence Reports.
8. The EMI also notes the arrangement referred to in the proposed amended wording of the third paragraph of Article 12 of Chapter 9 of the Constitution Act, according to which a member of the Bank's Executive Board is severed from his appointment before his term of office has expired if the Riksdag does not grant him discharge from liability. Whilst the suggested wording of the legislative proposal regarding the grounds on which a member of the Executive Board of the Bank can be dismissed by the Bank's Governing Council (in the same paragraph of the Constitution Act) is compatible with the ESCB Statute, the grounds on which the Riksdag can deny such a member discharge from liability, as contained in the legislative proposal for Section 49 of the Act, do not conform with Article 14.2 of the ESCB Statute.
9. The proposed amended wording of Article 12 of Chapter 9 of the Constitution Act also states that the Bank is an authority under the Riksdag, and the EMI notes that the Report indicates that

the independence granted to the Bank through the prohibition against instructions in the said Article of the Constitution Act and the proposed new Section 41a of the Act, as read against the background of Articles 2 and 7 of Chapter 11 of the Constitution Act, would ensure the protection of the Bank against instructions from the Riksdag and public authorities, including the Government, with respect to the Bank's exercise of monetary policy. The substantive area where independence is required, however, is formulated in Article 107 of the Treaty to cover all ESCB-related tasks, and not only "issues relating to monetary policy" (as in the proposed Article 12 of Chapter 9 of the Constitution Act) or "monetary policy duties" (as in the proposed Section 41a of the Act). This distinction is noted in Chapter 7.9 of the Report and the ESCB-related tasks are indicated in Chapter 7.6 of the Report, but the scope of Article 107 of the Treaty is not fully reflected in the suggested wording for the legislative proposals on the prohibition against instructions.

10. According to the proposed amended wording of Section 41 of the Act, the Governing Council of the Bank shall make proposals to the Riksdag and the Auditors of the Riksdag for the appropriation of the Bank's profit in accordance with Section 48 of the Act. The EMI stated in its 1996 Convergence Report that in situations "where third parties and, particularly, the government and/or parliament are in a position, directly or indirectly, to exercise influence on the determination of an NCB's budget or the distribution of profit, 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" (page 103 of the 1996 Convergence Report). To the extent that the above legislative proposals would provide a means of exercising influence on the determination of the Bank's budget or the distribution of its profit, such a statutory safeguard clause should be considered in respect of the Bank's ESCB-related tasks.
11. The EMI welcomes the introduction of price stability as the objective of the Bank and its formulation in the proposed amendment to Section 4 of the Act. The EMI notes the discussion on other tasks in Chapter 7.3 of the Report and would stress the primacy of the objective of price stability as required by the Treaty and the ESCB Statute; any other objective, such as the inclusion of the promotion of "a safe and efficient payment system" suggested in the legislative proposal for Section 4 of the Act, must be without prejudice to the objective of price stability (as indicated by the wording of Article 105(1) of the Treaty and Article 2 of the ESCB Statute). Incidentally, such an aim may also be achieved by drawing a clear distinction between objectives and tasks in accordance with Chapter II of the ESCB Statute, and this aspect is noted in Chapter 7.3 of the Report (which states that the promotion of a safe and efficient payment system "is a basic duty for the [Bank] and is not a real operational objective"). Moreover, a national definition of the Bank's duties in the field of payment systems may create uncertainty since this is an area in which the ESCB is also competent (Article 105(2), fourth indent, of the Treaty and Article 3.1, fourth indent, of the ESCB Statute). Upon Sweden's full participation in

Stage Three of EMU, the objectives and tasks of the Bank should reflect all elements of the objectives and tasks of the ESCB in Chapter II of the ESCB Statute, and not only the promotion of the smooth operation of payment systems.

12. The EMI also notes the proposed new regime on foreign exchange policy with its distinction between general foreign exchange rate policy issues and decision-making on the exchange rate system, on the one hand, and responsibility for the application of the exchange rate system, on the other; the legislative proposals would place policy aspects under Government control in line with arrangements in other Member States, whereas the application thereof would fall under the authority of the Bank. The EMI has no objection to such a regime provided that the primary objective of price stability is maintained. To enable Sweden to participate fully in Stage Three of EMU, however, the legislative proposals for Article 11 of Chapter 9 of the Constitution Act and for a Foreign Exchange Rate Policy Act (whereby “[t]he Government bears responsibility for general foreign exchange rate policy issues”) will need to acknowledge the competences at the European Community level and of the ECB in Stage Three of EMU in the field of exchange rate policy under Articles 3a and 109 of the Treaty.
13. Moreover, the proposed amended wording of Article 12 of Chapter 9 of the Constitution Act that “[n]o authority may determine the decisions made by the Riksbank on issues relating to monetary policy” does not seem to provide for the necessary integration of the Bank into the ESCB in Stage Three, whereby the Bank shall act in accordance with the guidelines and instructions of the ECB upon Sweden’s full participation in EMU (as stated in Article 14.3 of the ESCB Statute). Unless it is clear, or made clear, that the reference in the proposed provision to “authority” (“myndighet” in Swedish) does not affect the ECB’s authority vis-à-vis the Bank following Sweden’s adoption of the single currency, it will be necessary to review again the proposed constitutional provision on the prohibition against instructions (which could take place at the same time as the further review of the new Section 41a of the Act and other legal provisions which will require amendments to enable the Bank to be integrated into the ESCB). As a general remark, any subsequent legislative adjustments needed with a view to fulfilling the requirements of the Treaty and the ESCB Statute for full participation in EMU by a Member State would be facilitated insofar as the relevant legal provisions would be covered by the more flexible form of statutory law rather than by the Constitution.
14. The Report proposes that Section 42 of the Act be reformulated to provide that “[t]he Riksbank shall prior to every monetary policy decision of importance inform the Minister appointed by the Government”. This legislative proposal would not seem to be fully appropriate in Stage Three, when, following Sweden’s adoption of the single currency, monetary policy decisions of importance will not be taken by the Bank, but instead by the Governing Council of the ECB, which will be composed of the Governors of the NCBs of the participating Member States

(including the Governor of the Bank) and the members of the Executive Board of the ECB. The topic of consultation and dialogue between NCBs and their respective political authorities is addressed in the 1996 Convergence Report (page 101):

“The crucial issue is whether a national institution has any formal mechanism at its disposal to ensure that its views influence the final decision. An explicit statutory obligation for an NCB to consult political authorities provides for such a mechanism and is therefore incompatible with the Treaty and the [ESCB] Statute.

A dialogue between NCBs and their respective political authorities, even when based on statutory obligations to provide information and exchange views, is not incompatible with the Treaty and the [ESCB] Statute, provided that:

- this does not result in interference with the independence of the members of decision-making bodies of NCBs;*
- the ECB’s competences and accountability at the Community level as well as the special status of a Governor in his/her capacity as a member of its decision-making bodies are respected; and*
- confidentiality requirements resulting from [ESCB] Statute provisions are observed.”*

The arrangements envisaged in the legislative proposal for Section 42 of the Act should be critically assessed in the light of the above considerations since the obligation to inform the Minister *ex ante* may in practice have effects similar to a consultation.

15. For Sweden’s full participation in Stage Three of EMU, and as indicated above, the integration of the Bank into the ESCB will require further legislative amendments. The provision on the Bank’s exclusive right to issue banknotes contained in Article 13 of Chapter 9 of the Constitution Act and the related provisions laid down in Section 5 of the Act (as well as Section 41, first paragraph, item 9, of the Act) will need to be amended in Stage Three. First, and in accordance with the 1995 and 1996 Convergence Reports and the 1997 Report, national provisions on banknote issuance should not prejudice the ECB’s exclusive right to authorise the issue of banknotes in Stage Three under Article 105a (1) of the Treaty and Article 16 of the ESCB Statute. Moreover, in Stage Three, the ECB and the NCBs of participating Member States may also issue euro banknotes with legal tender status within other participating Member States than their own, and thus also in Sweden following Sweden’s adoption of the single currency. The legal monopoly over banknote issuance should be adapted in all participating Member States so as to permit banknote issuance by the ECB and other NCBs of Member States without a derogation (but only such members of the ESCB), without such banknote issuance being contrary to existing national law (see Article 105a of the Treaty and Article 16 of the ESCB

Statute). The legal monopoly over banknote issuance may, however, still be restricted to banknotes in national currency units during the transitional period and such a restriction may be retained until national banknotes lose their legal tender status. The same would apply, *mutatis mutandis*, to the exclusive right granted to the Bank in the said Article of the Swedish Constitution with regard to coins.

16. The EMI would also like to mention that the Act could make it clear that, from the start of Stage Three of EMU (or, should Sweden be a Member State with a derogation at first, from the time that Sweden adopts the single currency), the Bank will form an integral part of the ESCB (as proposed for the central bank legislation of other Member States; for example, the *Bundesbankgesetz* in Germany and the *Bankwet* in the Netherlands).
17. Finally, Section 20 of the Act deals with the imposition of minimum reserves on credit institutions and, in view of, *inter alia*, its specific wording, further amendments can be envisaged for Stage Three of EMU (cf. Article 19 of the ESCB Statute and the proposed draft EU Council Regulation on minimum reserves).
18. The EMI has no objection to this opinion being made public.

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