



15 December 1997

OPINION OF THE EUROPEAN MONETARY INSTITUTE

at the request of the Austrian 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 law amending the Central Bank Act and other related laws (the “Draft Law”)

CON/97/30

1. On 21 November 1997 the EMI received a request from the Austrian Ministry of Finance for an opinion on the Draft Law.
2. The EMI’s competence to deliver an opinion is based on Article 1.1, first and second indent, of the Council Decision of 22 November 1993 (93/717/EC) on the consultation of the EMI by the authorities of the Member States on draft legislative provisions, as the Draft Law contains provisions concerning currency legislation, the status and powers of the Oesterreichische Nationalbank (the “Bank”) and the instruments of monetary policy, inter alia, in view of the need to implement provisions of the Treaty and in particular Article 108 thereof.
3. In accordance with Article 108 of the Treaty, the Draft Law is intended to adapt the Statute of the Bank to meet the requirements of the Statute of the European System of Central Banks and of the European Central Bank (the “ESCB Statute”) and the Treaty. The EMI notes that most of the provisions which are aimed at achieving the institutional independence of the Bank will enter into force even before the European System of Central Banks (the “ESCB”) is established, namely on the day following confirmation by the Council in accordance with Article 109j(4) of the Treaty, of which Member States fulfil the necessary conditions for the adoption of the single currency. The EMI also notes that those provisions relating to the integration of the Bank in the ESCB will enter into force on the first day on which the Republic of Austria participates in Stage Three of Economic and Monetary Union (“Stage Three”) without a derogation according to Article 109k of the Treaty. Furthermore, the Draft Law contains transitional provisions some of which relate to institutional independence, which are aimed at covering the period of time between the establishment of the ESCB and the start of Stage Three, during which Member States will retain their powers in the field of monetary policy.

4. The EMI notes with satisfaction the comprehensive approach which has been adopted for the adaptation of the Statute of the Bank and other related provisions including the Coinage Act and the Law on the Schilling (“Schillinggesetz”), and the fact that a complete reorganisation of the structure of the Bank is foreseen for Stage Three, which is aimed at ensuring compliance with the requirements of the ESCB Statute and the Treaty.

5. However, the EMI would like to comment on certain aspects of central bank independence. Chapter II, Section 2.3, of the EMI’s Report on “Progress towards Convergence 1996”, states that *"NCBs in Stage Three operate in a framework whose objectives are determined by Article 105(1) of the Treaty and Article 2 of the Statute (the core element of which is the primacy of maintaining price stability) and statutes of N[ational]C[entral]B[ank]s should unambiguously reflect this situation"*. Article 105(1) of the Treaty and Article 2 of the ESCB Statute state that *"[t]he primary objective of the ESCB shall be to maintain price stability."* Article 2(2) of the Draft Law states that the Bank has to ensure fulfilment of the objective of price stability and must take the macroeconomic requirements into account with regard to economic growth and employment trends. This means, that consideration of certain aspects of the economy is defined as an objective of the Bank which is accorded equal weight to the objective of maintaining price stability. The EMI notes that this wording does not reflect the primacy of maintaining price stability and is therefore incompatible with Article 105(1) of the Treaty and Article 2 of the ESCB Statute.

6. The timetable for the adaptation of national legislation regarding the independence of national central banks (“NCBs”) pursuant to Articles 107 and 108 of the Treaty is addressed in the EMI’s report on “Legal Convergence in the Member States of the European Union - As at August 1997”, dated October 1997. The final paragraph of the Introduction (p.2) states that *"In order to comply with Article 108, the national legislative procedures must be accomplished in such a way that the compatibility of national legislation is ensured at the latest at the date of the establishment of the ESCB. Moreover, adaptations of NCB statutes in the field of central bank independence need also to be fully effective at the latest by the date of the establishment of the ESCB, whilst adaptations aiming at the integration of NCBs in the ESCB would need to become effective only at the start of Stage Three for Member States without a derogation or at the start of their full participation in Monetary Union for Member States with a derogation or with a special status."* Until the Republic of Austria participates in Stage Three without a derogation, the General Council of the Bank will remain its decision-making body in the field of ESCB-related tasks. The General Council is largely composed of representatives of various branches of industry, who perform their duties for the Bank on a non-exclusive basis, and a State Commissioner with the right to raise objections to its decisions with suspensive effect. However, it is noted that the President of the General Council of the Bank and his deputy will represent the Bank in the European Central Bank (the “ECB”)

until a new Governor has been appointed and that they cannot be bound by decisions of the Board of Executive Directors or the General Council of the Bank and are not allowed to take or receive instructions from any party (see Article 34(1) and 86 Section 3 of the Draft Law).

No distinction has been made in the EMI's Convergence Reports between the independence of the decision-making body of an NCB in the performance of ESCB-related tasks and the independence of the representative of this NCB in the ECB. Although the provision of Article 34 (1) of the Draft Law is very clear in its wording and the transitional provision of Article 87 (2) Section 5, of the Draft Law states that "*[t]he General Council shall, in performing its tasks, observe the preparations for exercising its powers adopted by the ECB in accordance with Article 109l paragraph 1 of the Treaty*", the solution described in the Draft Law for the period between the establishment of the ESCB and the day on which the Republic of Austria adopts the single currency may give rise to questions as regards the fulfilment of the independence criteria as required by the Treaty and the ESCB Statute¹.

7. Article 33 (3), last sentence, of the Draft Law provides that the members of the Board of Executive Directors may not be involved in any other activity which might cast doubts on their impartiality. The EMI notes that this provision is to be understood as an additional tool to guarantee the personal independence of the members of the Board of Executive Directors of the Bank. Article 33 (4), first sentence, of the Draft Law states that "*[t]he members of the Board of Executive Directors of the Bank may be removed from office only should they no longer fulfil the conditions for holding their office (paragraph 3)*". The EMI notes that dismissal based on mere doubts about impartiality would in itself not be compatible with the grounds for dismissal set out in Article 14.2 of the ESCB Statute.
8. Article 20 (2) of the Draft Law provides for that the General Council of the Bank has an obligation to advise the Board of Executive Directors on monetary policy matters. As monetary policy matters will certainly have to be considered to be ESCB-related tasks, it should not be possible for any party to influence the decision-making body of an NCB in this area. A right/obligation to give advice can entail the possibility of seeking to influence the decision of the advised person/body. The EMI notes therefore, that Article 20 (2) of the Draft Law gives rise to concerns regarding the fulfilment of the independence criteria as required by the Treaty and the ESCB Statute.

¹ Deutsche Bundesbank and De Nederlandsche Bank are of the opinion that this construction is incompatible with the Treaty and the ESCB Statute. They point out that the decision making body of the Bank for the period of time between the establishment of the ESCB and the moment at which the Republic of Austria will enter Stage Three without derogation does not, because of its composition, fulfil the independence requirements of the Treaty and the ESCB Statute. This is particularly relevant as NCBs will have to take important decisions with regard to Stage Three and therefore decision making bodies of NCBs have to fulfil the independence requirements of the Treaty and the ESCB Statute on the day of the establishment of the ESCB at the latest.

9. The EMI welcomes the proposed modification to the structure of the Bank and the allocation of responsibilities which the Draft Law foresees for Stage Three. As from the first day on which the Republic of Austria participates in Stage Three without a derogation, according to Article 109k of the Treaty, all competencies in the field of ESCB related tasks will be transferred to the Board of Executive Directors. The Bank will be represented on the Governing Council and the General Council of the ECB by the Governor or his deputy (after a new Governor has been appointed - see the transitional provision in Article 86 Section 3 of the Draft Law) who will be members of the Bank's Board of Executive Directors. In this function, neither the Governor nor the Deputy Governor is bound by the decisions of the Board of Executive Directors or those of the General Council of the Bank nor may the Governor or the Deputy Governor take or receive instructions from an party. The General Council of the Bank will loose its competence in the field of ESCB-related tasks in Stage Three. In this context the EMI welcomes Article 21(5) of the Draft Law, according to which "*[t]he power of the General Council to approve and take decisions [...] shall be restricted in such a way that decisions taken by the General Council shall not interfere with the tasks of the ESCB.*" This provision seems to be important given the fact that the General Council of the Bank has the power to decide on the dismissal of members of the Board of Executive Directors (except the Governor and the Deputy Governor), the authorisation of items of expenditure not provided for in the cost estimates for the year in question, and the rules of procedure for the Board of Executive Directors, etc. Finally, the EMI notes with satisfaction that Article 33 (2) of the Draft Law foresees a minimum term of office of five years for all members of the Board of Executive Directors of the Bank.
10. Article 32 (5) of the Draft Law requires that the Governor and the Deputy Governor will have an obligation to report to Parliament, at least twice a year, on the situation and development of monetary policy. Such an obligation is not contained in the existing Central Bank Act. The EMI notes that this provision in order to be compatible with the Treaty should be redrafted in such a way as to indicate clearly that such a duty is to be understood as an obligation to inform ex post and that the provisions of Article 38 of the ESCB Statute on professional secrecy must be respected.
11. Article 40 of the Draft Law provides for the institution of a State Commissioner as a government representative, who will be entitled to attend - albeit in an advisory capacity - the meetings organised by the General Council of the Bank. The State Commissioner will also have full access to confidential ESCB-related information. As Article 45 of the Draft Law, which deals with professional secrecy, does not seem to apply to the State Commissioner, the EMI suggests that the scope of this provision should be extended to include the State Commissioner.

12. As regards the integration of the Bank in the ESCB, the EMI would like to make the following comments. Item 5, above, states that the objectives of the Bank, as defined in Article 2 (2) of the Draft Law, do not reflect the primacy of maintaining price stability and are therefore incompatible with Article 105(1) of the Treaty and Article 2 of the ESCB Statute. With regard to the tasks and operations of the Bank, the EMI notes with satisfaction the comprehensive approach which has been applied in preparing the Draft Law.

With regard to Article 45 (1) of the Draft Law, the EMI would prefer to see inclusion in this provision of a reference to Article 38 of the ESCB Statute in order to make it clear that professional secrecy is covered by a directly applicable provision of the ESCB Statute.

With regard to the issuance and the redemption of banknotes (see Articles 62 and 86, sections 4. to 8. of the Draft Law), the EMI notes that not only does the Draft Law recognise the competence of the ECB in this field but it also puts forward a comprehensive solution for the transitional period, during which euro banknotes and national banknotes will circulate in parallel.

Concerning Article 52 of the Draft Law on minimum reserves, the EMI notes that paragraph 2 of this provision aims to reflect the directly applicable provision of Article 19.2 of the ESCB Statute by using a form of wording which is not exactly the same as that used in the Statute itself. As the EMI has pointed out in previous opinions, it would be desirable for reasons of legal clarity to avoid addressing issues in one way in the Treaty and in another way in Statutes of NCBs. Therefore, consideration should be given to redrafting this provision. The EMI notes that this statement applies also for other provisions in the Draft Law.

As for the accounting obligation of the Bank, the EMI welcomes the fact that Article 67 (2) of the Draft Law states that in drawing up the balance sheet and profit and loss account, “[t]he regulation laid down by the Governing Council of the ECB in accordance with Article 26 (4) of the ESCB/ECB Statute shall be taken into consideration” and in Article 69 (1) that the total earnings of the Bank for each year shall be derived “in observance of the provisions of Article 32 and 51 of the ESCB/ECB Statute and the provisions of Article 33 of the ESCB/ECB Statute on the allocation of net profits and losses of the ECB,[...]”.

With regard to Article 75, last sentence of the Draft Law the EMI notes that this provision does not make it clear that Article 35.6 of the ESCB Statute refers exclusively to intra ESCB-disputes concerning the fulfilment by an NCB of obligations under the ESCB Statute and not to disputes between NCBs and third parties, whilst the Austrian legislation may also not assume responsibility for the attribution of competencies to the European Court of Justice.

The EMI notes that according to Article 83 of the Draft Law, ERP financial operations may be entered into by the Bank outside the framework of the "General Documentation on ESCB Monetary Policy Instruments and Procedures" (the "General Documentation") whereas such operations will not be subject to the collateral requirements of the General Documentation. The EMI points out that in Stage Three NCBs will have only the possibility to provide liquidity outside the scope of the General Documentation subject to the provisions of a guideline issued by the Governing Council of the ECB stipulating the rules for such operations.

The EMI is in the process of preparing such rules to be adopted within the framework of the ESCB in order to ensure the unobstructed implementation and execution of the single monetary policy in Stage Three.

Concerning Article 86 Section 5 of the Draft Law, which states that banknotes denominated in Austrian Schillings will cease to be legal tender on a date set out specifically by federal law, the EMI notes that this provision has to be interpreted in the light of the fact that the latest date on which banknotes will cease to be legal tender will be defined by directly applicable Community legislation.

13. The EMI welcomes the fact that the Draft Law is also intended to amend other legislation with a view to ensuring compliance with the Treaty and the ESCB Statute. However, concerning the proposed amendment of Article 3(1) of the Austrian Coinage Act (Article III, Section 2 of the Draft Law), the EMI would like to make the following comment. The second sentence of this provision states that from the first day on which Austria participates in Stage Three without a derogation, the euro shall be "*also unit of account in Austria*". This wording does not reflect the point in time at which the euro will be the only unit of account in Austria, and seems to characterise it as another currency. The EMI recommends that the wording should refer to or be made fully consistent with, the Community monetary law.
14. The present opinion does not prejudge reports which the EMI is required to draft under Article 109(j) of the Treaty and Article 7 of its Statute.
15. The EMI agrees to this opinion being made public by the consulting authorities.

15 December 1997