



EUROPEAN CENTRAL BANK
EUROSYSTEM

Guide to consultation of the European Central Bank by national authorities regarding draft legislative provisions

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Foreword



For many years the *Guide to consultation of the European Central Bank by national authorities regarding draft legislative provisions* has served as a useful tool for national authorities and the general public. The Guide gives detailed information on the process of consulting the European Central Bank (ECB). It has become necessary to update the original Guide, published in 2005, to reflect developments in Union law and the latest experience of the ECB of such consultations. As with all other ECB publications, this Guide expresses the ECB's commitment to the principles of openness and transparency and contributes to making the ECB's aims and activities more widely known.

The Treaty on the Functioning of the European Union requires Member States to seek the ECB's advice on draft legislative provisions falling within the ECB's fields of competence. Given the enlargement of the EU, the number of actors involved in the consultation process is increasing. The ECB has therefore updated this Guide to inform and provide assistance to national authorities about the obligation to consult the ECB. To this end, the Guide explains the objectives and scope of consulting the ECB and clarifies the procedure to be followed.

I trust that this updated Guide will continue to both raise awareness of the rights and obligations of all parties concerned and lead to an even better understanding of the ECB's advisory function. In this regard, the Guide is also intended to encourage greater use of the consultation procedure and hence to contribute to the harmonisation of Member States' legislation within the ECB's fields of competence.

Finally, I would like to emphasise the continued importance of ensuring close cooperation between the national authorities involved in the legislative process and the European System of Central Banks/Eurosystem. I am confident that this publication will continue to support such close cooperation in the mutual interest of all parties involved.

Frankfurt am Main, October 2015

Yves Mersch
Member of the ECB Executive Board

1 Background to the ECB's advisory function with regard to draft legislation

The Treaty on the Functioning of the European Union ('Treaty') confers on the ECB an advisory function with regard to proposed Union acts and draft legislative provisions within its fields of competence. Article 127(4) and Article 282(5) of the Treaty, which are reproduced in Article 4 of the Statute of the European System of Central Banks and of the European Central Bank ('ESCB Statute'), form the legal basis for the ECB's advisory function.

The framework for consultation of the ECB by national authorities is set out in Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions¹, which has been in force since 1 January 1999. Decision 98/415/EC applies to all Member States except the United Kingdom, which is exempted from the obligation to consult the ECB by the Protocol on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland, annexed to the Treaty. Until 2004, the ECB issued an average of 30 opinions per year in response to consultations by national authorities. With the increase in the number of Member States since 2004 and due to the turmoil in the financial markets from 2008, the number of ECB opinions on draft legislative provisions has grown substantially, reaching a peak of 95 in 2012.

Accordingly, the consultation process has become even more important in recent years, when Member States have been required to coordinate their activities on measures to ensure financial stability due to the financial crisis. In this context, the ECB's opinions have contributed to ensuring consistency throughout the Union on measures aimed at preserving confidence and stability in the financial markets.

Article 127(4) of the Treaty:

'4. The European Central Bank shall be consulted:

- on any proposed Union act in its fields of competence,
- by national authorities regarding any draft legislative provision in its fields of competence, but within the limits and under the conditions set out by the Council in accordance with the procedure laid down in Article 129(4).

The European Central Bank may submit opinions to the appropriate Union institutions, bodies, offices or agencies or to national authorities on matters in its fields of competence.'

¹ OJ L 189, 3.7.1998, p. 42. The text of Decision 98/415/EC is reproduced in the Annex.

Article 282(5) of the Treaty:

'5. Within the areas falling within its responsibilities, the European Central Bank shall be consulted on all proposed Union acts, and all proposals for regulation at national level, and may give an opinion.'

Article 4 of the ESCB Statute:

'In accordance with Article 127(4) of the Treaty on the Functioning of the European Union:

(a) the ECB shall be consulted:

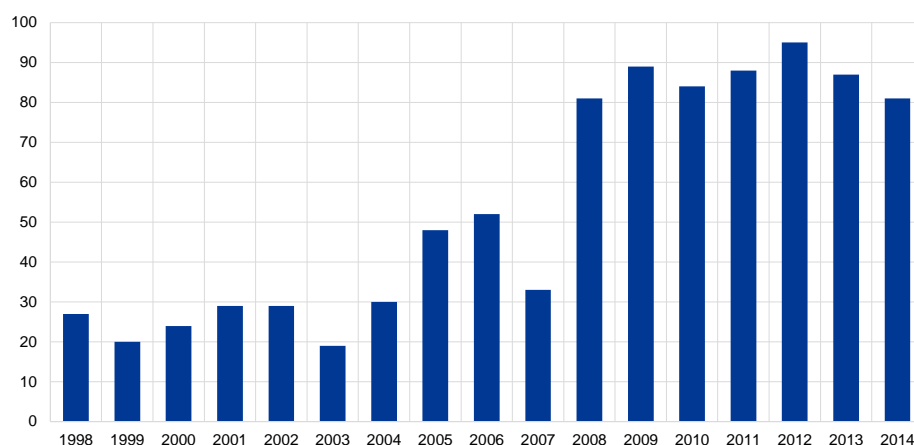
- on any proposed Union act in its fields of competence;
- by national authorities regarding any draft legislative provision in its fields of competence, but within the limits and under the conditions set out by the Council in accordance with the procedure laid down in Article 41;

(b) the ECB may submit opinions to the Union institutions, bodies, offices or agencies or to national authorities on matters in its fields of competence.'

Decision 98/415/EC is drafted in quite general terms and, in order to ensure that it is fully effective, national authorities need to have a thorough understanding of: (a) its objectives; (b) the scope of the obligation to consult the ECB; (c) the procedure to be followed; and (d) the effect that a failure to consult might have on the legality of the legislation in question. Drawing on the experience of applying Decision 98/415/EC since 1999, this Guide aims to inform all national authorities involved in the preparation of legislative provisions about these four aspects so that they are fully aware of their rights and obligations. This Guide also contains a number of recommendations to ensure the efficiency of the consultation procedure.

Chart 1

Number of ECB opinions in response to consultations by national authorities



Source: ECB.

2 The objectives of Council Decision 98/415/EC

In the *OLAF* judgment², the Court of Justice of the European Union (the ‘Court’) clarified the objectives of Article 127(4) of the Treaty in terms of the obligation to consult the ECB on any proposed Union act within its fields of competence. According to the Court, this obligation is intended ‘essentially to ensure that the legislature adopts the act only when the body has been heard, which, by virtue of the specific functions that it exercises in the Community framework in the area concerned and by virtue of the high degree of expertise that it enjoys, is particularly well placed to play a useful role in the legislative process envisaged.’

Although the *OLAF* judgment relates to the obligation of the Union institutions to consult the ECB on proposed Union acts, it also helps to clarify the obligation of Member States to consult the ECB on their draft legislative provisions. One can extrapolate from the *OLAF* judgment that the principal objective of Decision 98/415/EC is to enable the ECB to provide national legislators, at an appropriate time, with expert advice on draft legislative provisions concerning matters within the ECB’s fields of competence. This advice is intended to ensure that the national legal framework: (a) contributes to the achievement of the objectives of the ECB and/or the European System of Central Banks (ESCB); (b) is compatible with the legal framework of the Eurosystem/ESCB and of the ECB; and (c) is in line with Eurosystem/ESCB and ECB policies.

The obligation to consult the ECB under Decision 98/415/EC is designed to operate as a preventive system, to forestall problems with potentially incompatible or inconsistent national legislation. The consultation must therefore take place when the legislative provision is still at a draft stage and more particularly at a stage when the ECB’s opinion can usefully be taken into consideration by the national authorities involved in the preparation and adoption of the legislation concerned.

In practice, the obligation to consult the ECB has enabled Member States to ensure that national legislation, including the statutes of their national central banks (NCBs), remains compatible with the Treaty and the ESCB Statute.

The consultation procedure established by Decision 98/415/EC has a number of further advantages. It is valuable for promoting the sharing of information and expertise. Consultations are an important means of keeping the ECB informed about legislative developments in the Member States within the ECB’s fields of competence. The expertise that the ECB gains by examining the draft legislative

² Case C-11/00 *Commission of the European Communities v European Central Bank*, EU:C:2003:395, in particular paragraphs 110 and 111 of the judgment. In that case the Court upheld the Commission’s action and annulled Decision ECB/1999/5 of the European Central Bank of 7 October 1999 on fraud prevention (OJ L 291, 13.11.1999, p. 36). The judgment is significant for its clarification of the ECB’s advisory function since the Court, in response to a request by the ECB, examined the objectives of Article 127(4) of the Treaty for the first time.

provisions on which it is consulted is an asset for the formulation of the ECB's own position, for instance in Union or international fora where similar matters are discussed. Furthermore, ECB opinions foster harmonisation of Member States' legislation within the ECB's fields of competence and contribute to enhancing the quality of national legislation, since they are based on the expertise that the ECB has acquired in the exercise of its tasks³. ECB opinions may also constitute a source which the Court can take into account in proceedings related to the compatibility of the legislative provisions concerned with the Treaty, or national courts can take into account in proceedings on the interpretation or validity of the legislative provisions concerned.

In common with the opinions of other Union institutions, ECB opinions have no binding force. In other words, national legislators are not obliged to follow the ECB's opinion. However, the system established by Decision 98/415/EC is designed to ensure that national legislation is adopted only after due consideration of the ECB's opinion. This system has proved to be effective and national legislators have generally agreed to amend or even withdraw draft legislative provisions rather than adopt legislation that conflicts with the ECB's position.

Finally, the obligation to consult the ECB contributes to the ECB's external communication with the general public and the markets. It is general ECB policy to encourage transparency and, to this end, opinions in response to consultations by national authorities are as a rule published on the ECB's website immediately after their adoption and subsequent transmission to the consulting authority.

³ See paragraph 140 of the Advocate-General's Opinion in Case C-11/00, which was endorsed in paragraph 110 of the Court's judgment.

3 The scope of the obligation to consult the ECB

3.1 The consulting authorities

Article 2(1) and (2) of Decision 98/415/EC:

'1. The authorities of the Member States shall consult the ECB on any draft legislative provision within its field of competence pursuant to the Treaty (...).

2. In addition, the authorities of Member States other than participating Member States shall consult the ECB on any draft legislative provisions on the instruments of monetary policy.'

3.1.1 The range of authorities covered

Article 2(1) of Decision 98/415/EC makes clear that the obligation to consult the ECB on legislative provisions within its fields of competence is incumbent on 'the authorities of the Member States'. As Decision 98/415/EC applies to all Member States except the United Kingdom, the authorities concerned are not only those of the Member States whose currency is the euro ('euro area Member States'), but also those of the Member States whose currency is not the euro ('non-euro area Member States'), other than the UK authorities.

Article 3(1) of Decision 98/415/EC clarifies that the authorities of the Member States are '[t]he authorities (...) preparing a legislative provision'. In addition, it follows from Article 4 of Decision 98/415/EC that the consulting authority can be different not only from 'the adopting authority', but also from 'the authority initiating the draft legislative provision'.

In practice, the ECB is consulted by a wide variety of authorities. In the case of legislation going through a national parliament, the ECB has generally been consulted by the minister responsible for preparing draft legislation falling within the ECB's fields of competence. When the legislation is initiated by a member of a national parliament rather than by the government, the obligation to consult the ECB lies with the parliament as detailed below⁴. Occasionally consultations are channelled through NCBs, either acting on behalf of the regulatory authority or as an authority with its own regulatory powers.

⁴ See section 3.1.2 of this Guide.

In the case of legislation adopted by some other procedure, the ECB is generally consulted by the authority which is competent to adopt the act concerned, for instance a member of the national government or an NCB with regulatory powers.

Finally, the ECB has also been consulted by national authorities which were de jure or de facto involved in the adoption process, e.g. NCBs, supervisory authorities, competition authorities, anti-money laundering authorities and specific bodies such as euro changeover boards. In these cases, the ECB has taken the view that the consultation is valid if it is apparent that such authorities are acting on behalf of the initiating or adopting authority.

3.1.2 The role of national parliaments

National parliaments can also be authorities 'preparing a legislative provision' for the purposes of Decision 98/415/EC when they debate draft legislative provisions within the ECB's fields of competence which have been proposed by one or more of their members⁵. National parliaments have to decide on the basis of their own rules of procedure how to comply with the obligation to submit for the ECB's prior opinion draft legislative provisions which have been proposed by one or more of their members and which fall within the ECB's fields of competence. It is also acceptable if the ECB is consulted by a national government, acting on its own initiative, on draft legislative provisions proposed by members of its national parliament in accordance with national law.

3.2 The draft legislative provisions covered

Article 1(1) of Decision 98/415/EC:

'1. For the purpose of this Decision:

(...)

'draft legislative provisions' shall mean any such provisions which, once they become legally binding and of general applicability in the territory of a Member State, lay down rules for an indefinite number of cases and are addressed to an indefinite number of natural or legal persons.'

According to Article 2(1) of Decision 98/415/EC, the authorities of the Member States are obliged to consult the ECB on 'any draft legislative provisions' within the ECB's

⁵ This also applies to cases where members of parliament propose amendments to draft legislative provisions proposed by the government which have the potential effect of bringing the draft legislation within the ECB's fields of competence.

fields of competence. Article 1(1) of Decision 98/415/EC defines the concept of 'draft legislative provisions'. This definition refers to provisions which, once they become legally binding and of general applicability in the whole (or a geographically distinct territory) of the Member State concerned, lay down rules which will be applicable in 'an indefinite number of cases and are addressed to an indefinite number' of persons. This includes draft legislative provisions prepared by the government, the adoption of which turns them into effective legal provisions regardless of the duration of such effectiveness.

The definition does not include draft legislative provisions the exclusive purpose of which is the transposition of Union directives into national law⁶.

3.2.1 Legally binding provisions

The obligation to consult the ECB is not limited to draft legislative provisions which are to be adopted by a parliament. Decision 98/415/EC covers all types of legally binding provisions, including decree-laws and secondary legislation.

Decree-laws

Decree-laws are laws adopted and made fully effective by a government as a matter of urgency or extraordinary need. Such decree-laws are subject to subsequent ratification by parliament, which can take place shortly or many months after adoption. Draft decree-laws are thus 'draft legislative provisions' on which the ECB must be consulted prior to their adoption by the Government, irrespective of the urgency or extraordinary need⁷.

Secondary legislation

The ECB does not have to be consulted on all secondary legislation, including acts of general applicability of NCBs or supervisory authorities, which implements primary legislation falling within the ECB's fields of competence. Given the objectives of Decision 98/415/EC, the ECB's opinion on draft secondary legislation should only be sought if the subject matter is closely related to the ECB's tasks and if the impact on areas within the ECB's fields of competence is different from that resulting from the primary legislation itself. For example, as a rule, Member States are not obliged to consult the ECB on matters connected with procedure.

The obligation to consult the ECB on amendments to draft legislative provisions which have already been submitted to the ECB for an opinion applies to substantive

⁶ See section 3.4 of this Guide.

⁷ It is noted that given the urgency and extraordinary need inherent in the adoption of the Decree-laws, pursuant to Article 3(2) of Decision 98/415/EC (see section 4.3 of this Guide) the consulting authority may reduce a time limit for the ECB to deliver its opinion.

amendments which affect the essence of the draft legislation. It is useful to distinguish between two different scenarios. The first is where substantive amendments are proposed at a stage when the ECB has not yet adopted its opinion. In such situations the ECB expects the consulting authority to submit the amended draft legislative provision to it as soon as possible, so that the opinion can be based on the most recent text. The second situation is where substantive new provisions are proposed after adoption of the ECB opinion. In the latter situation, the ECB should be consulted in relation to those amendments. However, no further consultation is required if the amendments in essence aim to accommodate the view expressed by the ECB in its opinion. The ECB nevertheless welcomes being kept informed about the response to its opinions and receiving details of such amendments for information purposes.

3.3 The ECB's fields of competence

Article 2(1) of Decision 98/415/EC requires that national authorities consult the ECB on any draft legislative provision 'within its field of competence pursuant to the Treaty'. This obviously includes draft legislative provisions affecting the basic tasks to be carried out through the ESCB pursuant to Article 127(2) of the Treaty (i.e. the definition and implementation of the monetary policy of the Union, the conduct of foreign exchange operations, the holding and management of the official foreign reserves of the Member States and the promotion of the smooth operation of payment systems) and Article 16 of the ESCB Statute (issuance of euro banknotes). It also includes draft legislative provisions affecting a variety of other tasks attributed to the ESCB pursuant to the Treaty, including those specific tasks concerning policies relating to the prudential supervision of credit institutions conferred upon the ECB pursuant to Article 127(6) of the Treaty.

Article 2(1) of Decision 98/415/EC lists a number of categories of matters which are explicitly considered to be within the ECB's fields of competence. The ECB must be consulted by national authorities on draft legislative provisions relating to these matters.

Article 2(1) of Decision 98/415/EC:

'1. The authorities of the Member States shall consult the ECB on any draft legislative provision within its field of competence pursuant to the Treaty and in particular on:

- currency matters,
- means of payment,
- national central banks,

- the collection, compilation and distribution of monetary, financial, banking, payment systems and balance of payments statistics,
 - payment and settlement systems,
 - rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets.'
-

Non-exhaustive overview of the ECB's fields of competence

The wording of Article 2(1) and recital 3 of Decision 98/415/EC makes clear that the list in Article 2(1) is not exhaustive.

Furthermore, Article 2(2) of Decision 98/415/EC states that the authorities of non-euro area Member States (other than the UK) must consult the ECB on any draft legislative provisions concerning the instruments of monetary policy.

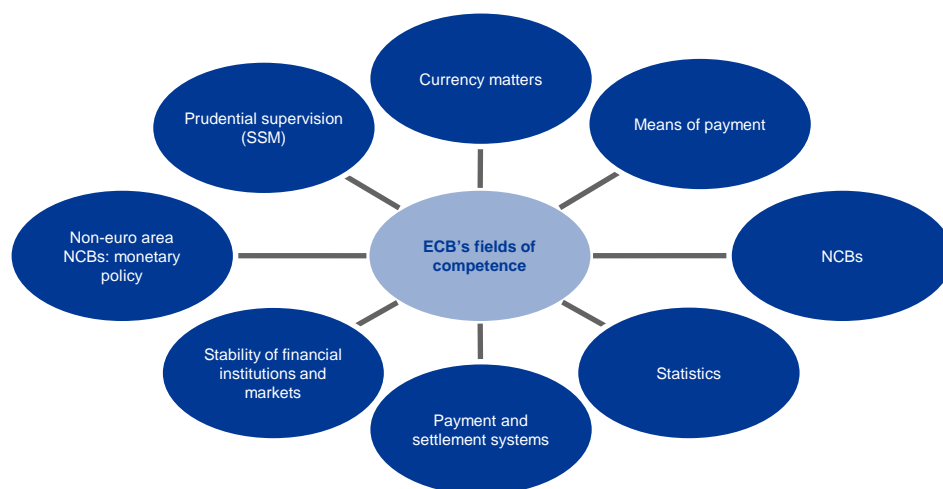
Article 2(2) of Decision 98/415/EC:

'2. In addition, the authorities of Member States other than participating Member States shall consult the ECB on any draft legislative provisions on the instruments of monetary policy.'

The reason why Decision 98/415/EC differentiates between euro area and non-euro area Member States in this way is that the instruments of monetary policy (for example, the minimum reserve system) are no longer decided by national authorities in euro area Member States. However, recital 5 of Decision 98/415/EC clarifies that the obligation to consult the ECB does not include decisions taken by the authorities of non-euro area Member States in the context of the implementation of their monetary policy (for example, decisions setting interest rates).

Chart 2

Non-exhaustive overview of the ECB's fields of competence



Source: ECB.

All ECB opinions on draft legislative provisions are published on the ECB's website. They are categorised according to the relevant sections of the ECB's fields of competence (statistics, payment and settlement systems etc.). The titles and subject matters of all ECB opinions provide useful guidance in cases of doubt as to whether or not a draft legislative provision falls within the scope of the obligation to consult the ECB as laid down in Decision 98/415/EC.

3.3.1 Currency matters and means of payment

ECB opinions on currency matters and means of payment cover draft legislative provisions on a variety of topics, for example measures related to the introduction of the euro (redenomination of the national currency, redenomination of public and private debt, dual pricing, rounding rules, the replacement of national reference rates, etc.), legal tender, commemorative coins, copyright in relation to banknotes and coins, the prevention of counterfeiting, denominations, technical specifications, recycling, authenticity and fitness checking of banknotes and coins, limitations on cash payments and issuance of electronic money.

3.3.2 National central banks

A large number of ECB opinions are adopted on draft legislative provisions related to NCBs. They concern legislative provisions which affect the status of NCBs or their board members, in particular linked to the various aspects of central bank independence. Several opinions also concern the tasks and monetary policies of NCBs, including compliance with the prohibition of monetary financing under Article 123 of the Treaty, NCBs' foreign reserves and the minimum reserve requirements of the NCBs of non-euro area Member States. Other opinions have, for

example, dealt with institutional changes to NCBs, their accounting, reporting and auditing, participation in international monetary institutions, privileged access, prudential supervision, professional secrecy and any other aspect of the regulation of NCBs' activities that is covered in the statutes of the NCBs. The ECB has also frequently been asked to issue opinions on draft legislative provisions covering non-ESCB-related NCB tasks, particularly with a view to assessing whether these tasks are compatible with the objectives and tasks of the ESCB⁸.

3.3.3 Collection, compilation and distribution of monetary, financial, banking, payment systems and balance of payments statistics

The ECB's powers in relation to the collection of statistical information are set out in Article 5 of the ESCB Statute. Article 4 of Council Regulation (EC) No 2533/98 of 23 November 1998 concerning the collection of statistical information by the European Central Bank⁹ requires all Member States to 'organise themselves in the field of statistics and (...) fully cooperate with the ESCB in order to ensure the fulfilment of the obligations arising out of Article 5 of the Statute'. The ECB is aware that reporting provisions differ between Member States. As a result, when the ECB is consulted on draft national reporting provisions it tends to make comments that are of a general nature and are intended to draw attention to aspects that could be made more explicit in the draft legislative provision. Relevant consultations concerned, for example, balance of payments statistics, the transmission of statistical data between the ECB and the ESCB and non-euro area NCBs, national statistical reporting requirements on various financial instruments and investment positions, as well as the role of non-euro area NCBs in the collection of statistical data.

3.3.4 Payment and settlement systems

Past consultations on payment and settlement systems have concerned draft legislative provisions related to several aspects of the functioning of payment and settlement systems, such as their oversight, central counterparties, settlement finality, the net or real-time gross settlement basis, netting and collateral aspects and the zero-hour rule.

3.3.5 Rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets

The sixth indent of Article 2(1) of Decision 98/415/EC refers to 'rules applicable to financial institutions insofar as they materially influence the stability of financial

⁸ Under Article 14.4 of the ESCB Statute, NCBs are permitted to perform functions other than those specified in the ESCB Statute, unless the Governing Council finds that these interfere with the objectives and tasks of the ESCB.

⁹ OJ L 318, 27.11.1998, p. 8.

institutions and markets'. Recital 3 of Decision 98/415/EC makes clear that this category 'is without prejudice to the present assignment of competences for policies relating to the prudential supervision of credit institutions and the stability of the financial system'. The sixth indent of Article 2(1) of Decision 98/415/EC should also be considered in conjunction with Article 25.1 of the ESCB Statute, which provides that the competent authorities of Member States 'may' consult the ECB on the 'implementation of Union legislation relating to the prudential supervision of credit institutions and to the stability of the financial system.' In addition, by virtue of Article 2(1) of Decision 98/415/EC, Member States 'shall' consult the ECB when the proposed legislative provisions 'materially influence' financial stability unless, as stated in Article 1(2), the provisions are exclusively intended to transpose Union directives.

The number of opinions adopted by the ECB pursuant to the sixth indent of Article 2(1) of Decision 98/415/EC has substantially increased in recent years. The ECB has adopted several opinions in response to consultations on proposed amendments to the institutional structure of supervision in the Member States. It has also regularly been consulted on major amendments to the supervisory regime for credit institutions and financial institutions, as well as on rules to combat money laundering and terrorist financing, financial collateral arrangements, and reorganisation and winding-up of financial institutions. The ECB has frequently been consulted on draft legislation which could potentially have an important impact on the markets, for example legislation concerning securitisation regimes and the dematerialisation of securities, as well as legislation affecting both financial markets and the ECB's primary goal of price stability (for example, provisions on inflation-indexed loans).

The ECB has also adopted a number of opinions in the context of the recent financial markets crisis, where national legislative provisions were aiming at enhancing the deposit guarantee schemes or to ensuring or strengthening the stability of the financial market.

Finally, the ECB has been consulted on various draft legislative provisions potentially affecting the free movement of capital, exchange-rate policy (for example, taxing financial transactions, etc.) and other draft legislative provisions of economic importance.

As regards the legal basis for the consultations with the ECB on draft national Single Supervisory Mechanism (SSM) related provisions, the wording of the sixth indent of Article 2(1) of Decision 98/415/EC and, in particular, the reference to cases which 'materially influence' financial stability, should not be considered as restricting the obligation to consult the ECB. As mentioned above, recital 3 and Article 2 of Decision 98/415/EC make it clear that the list of areas included in Article 2(1) of Decision 98/415/EC is not exhaustive. So far, the ECB's opinions on draft legislative provisions related to the prudential supervision of credit institutions (including the creation of a national legal framework to reflect the establishment of the SSM) have been based on the sixth indent of Article 2(1) of Decision 98/415/EC. With the establishment of the SSM, supervisory tasks are now also included in the fields of

competence of the ECB for the purposes of its advisory function pursuant to Article 127(4) of the Treaty.

3.4 Implementing legislation

Article 1(2) of Decision 98/415/EC:

'2. Draft legislative provisions shall not include draft provisions the exclusive purpose of which is the transposition of Community directives into the law of Member States.'

As stated above, pursuant to Article 1(2) of Decision 98/415/EC Member States do not have to consult the ECB on the transposition of Union directives into national law. The rationale for this exemption is that the ECB will already have been consulted on the proposed Union act pursuant to Article 127(4) of the Treaty and it is therefore unnecessary to extend the ECB's advisory function to draft legislative provisions which purely transpose that Union act. The ECB is of the opinion that the same exemption applies to draft legislative provisions aimed at implementing Union regulations, provided that they do not have an impact on matters falling within the ECB's fields of competence which is different from the impact of the regulation itself (on which the ECB will have been consulted by Union institutions).

On a limited number of occasions in the past, the ECB has encouraged national authorities to consult it on draft legislative provisions transposing Union directives which are of particular interest to the ESCB. For instance, this was the case with the Settlement Finality Directive¹⁰, the Collateral Directive¹¹ and their subsequent amendments¹². The ECB's opinions resulting from the large number of consultations on draft provisions aimed at transposing both directives into national law have been useful contributions to reinforcing the legal framework for the Eurosystem's operations, as well as the stability of the financial system.

In the past, the ECB has also issued an own-initiative opinion¹³ on the ratification or implementation of a Postal Payment Services Agreement, and it has encouraged national authorities to consult the ECB if specific national draft legislative provisions go beyond the mere ratification of the Agreement.

¹⁰ Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ L 166, 11.6.1998), p. 45.

¹¹ Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (OJ L 168, 27.6.2002, p. 43).

¹² By Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims (OJ L 146, 10.6.2009, p. 37), this is the amendment on which the ECB encouraged Member States to consult it. In addition to this, two further (short) amendments were adopted in 2010 and 2011.

¹³ CON/2010/85.

Member States sometimes consult the ECB on their own initiative about draft provisions for transposing directives even though they are not obliged or encouraged to do so, for instance in areas where they consider that the ECB has specific expertise. In such cases, the ECB generally stands ready to respond to any formal or informal voluntary national consultation and offer guidance on the draft transposition measures prepared, even if there is no formal obligation to consult the ECB, but only to the extent the draft provisions warrant specific comments in relation to the ECB's fields of competence.

The European Systemic Risk Board (ESRB) was established in December 2010 as a new body mandated to oversee risk in the financial system as a whole. The ESRB can issue, inter alia, recommendations in its fields of competence and, pursuant to Article 17 of Regulation (EU) No 1092/2010 of the European Parliament and of the Council¹⁴, it monitors the follow-up to its recommendations. In view of the ESRB's role in such matters, the ECB does not need to be consulted on draft legislative provisions implementing recommendations of the ESRB.

¹⁴ Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board (OJ L 331, 15.12.2010, p. 1).

4 The consultation procedure

Article 4 of Decision 98/415/EC:

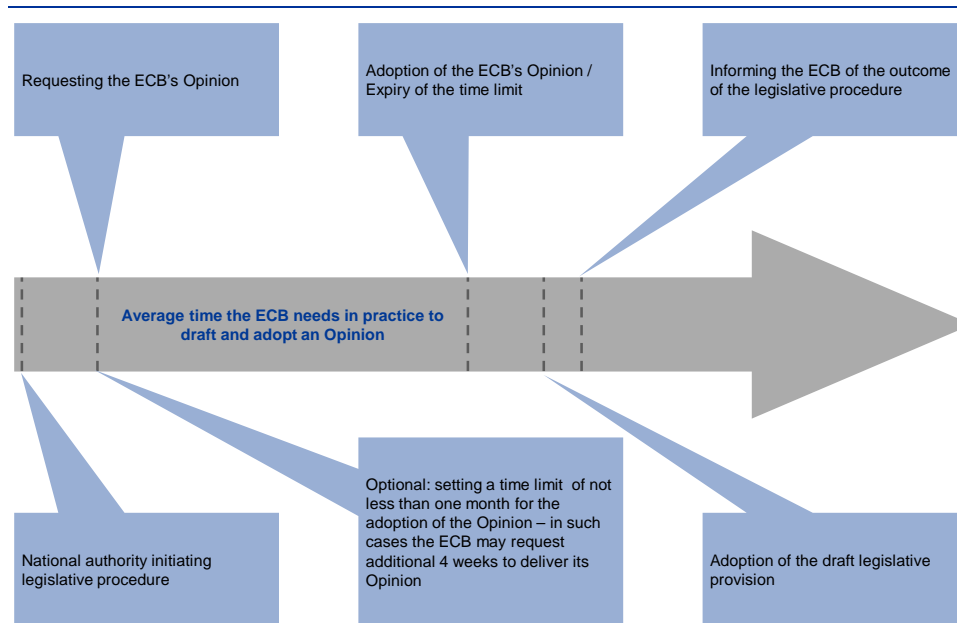
'Each Member State shall take the measures necessary to ensure effective compliance with this Decision. To that end, it shall ensure that the ECB is consulted at an appropriate stage enabling the authority initiating the draft legislative provision to take into consideration the ECB's opinion before taking its decision on the substance and that the opinion received from the ECB is brought to the knowledge of the adopting authority if the latter is an authority other than that which has prepared the legislative provisions concerned.'

4.1 The appropriate time to consult the ECB

According to Article 4 of Decision 98/415/EC, the ECB must be consulted 'at an appropriate stage' in the legislative process. This implies that national procedures should ensure that the consultation takes place at a point in the legislative process which affords the ECB sufficient time to examine the draft legislative provisions (and, where necessary, translate them) and to adopt its opinion in all required language versions. This also enables the relevant national authorities to take the ECB's opinion into consideration before the provisions are adopted.

Chart 3

Process of consultation on draft legislative provisions



Source: ECB.

Where draft legislative provisions are prepared by an authority other than the adopting authority, Article 4 of Decision 98/415/EC requires that consultation on such provisions takes place at a time which enables the authority initiating the draft legislative provisions to consider whether the draft legislative provisions should be amended in order to accommodate the ECB's opinion, i.e. before transmitting the provisions to the adopting authority. At the same time, Article 4 does not preclude national authorities from taking steps in accordance with their legislative procedures that do not affect the substance of the draft legislative provisions.

It follows from the wording of Article 3(4) of Decision 98/415/EC that Member States are obliged to suspend the process for adoption of the draft legislative provision pending receipt of the ECB's opinion. This does not mean that the whole national legislative process (for example, preparatory work of parliamentary standing committees, discussion of other opinions submitted by national authorities, etc.) should be suspended pending delivery of the ECB's opinion. Instead, it means that the adopting authority has to have the opportunity meaningfully to deliberate the ECB's opinion prior to taking its decision on the substance. If a time limit has been set for submission of the ECB's opinion¹⁵ and this time limit has expired, the national authority concerned may restart the adoption process. Even in such a case, and as long as the legislation has not yet been adopted, the national authorities continue to be obliged to take the ECB's opinion into consideration.

In October 2011, the President of the ECB sent a letter to all national consulting authorities reminding them that they 'should take the measures necessary to ensure

¹⁵ See section 4.3 of this Guide.

effective compliance with Decision 98/415/EC, pursuant to Article 4 thereof, by duly consulting the ECB on draft legislative provisions falling within its field of competence¹⁶ at an appropriate stage of the legislative process'. He also recommended 'putting in place appropriate internal procedures to ensure that consultation of the ECB takes place at an appropriate stage, which enables the consulting and/or adopting authority to take into consideration the ECB's Opinion before the legislative provision in question is adopted. Re-consultation is necessary if the draft provisions are substantially amended during the legislative procedure'.

4.2 The request for an opinion

4.2.1 The form of the request and accompanying documents

A formal request for an opinion must be addressed to the ECB's President in writing¹⁷. The receipt by the ECB's President of the request for an opinion marks the beginning of the procedure for the adoption of an ECB opinion. The ECB welcomes any informal communication at staff level between the national consulting authorities and the ECB's Legal Services. However, the formal consultation procedure only starts upon receipt of the formal request for an opinion by the ECB's President.

The request should contain a version of the draft legislative provisions which is stable enough for the ECB to give an opinion on. If the draft legislation contains a large number of provisions on a variety of matters, the ECB recommends that the consulting authority should indicate the provisions on which the ECB's comments are particularly sought. This is especially relevant when the draft legislative provisions primarily aim at transposing or giving effect to Union legislation, but also include additional provisions which go beyond mere transposition.

The ECB recommends that the consulting authority should enclose a short explanatory memorandum describing the subject matter and the main objectives pursued; the stage reached in the national legislative process; and the name and details of the contact persons available to clarify any questions about the draft legislative provisions which may arise during the ECB's drafting of its opinion. The ECB recommends that the consulting authority should indicate a time limit for the ECB to issue its opinion¹⁸.

¹⁶ This also includes provisions that are not subject to parliamentary approval. Only those draft legislative provisions which exclusively serve to transpose Union law are excluded from the consultation obligation.

¹⁷ The ECB also stands ready to receive requests for an opinion, duly signed and addressed, by fax or, as a scanned attachment, by e-mail to office.president@ecb.europa.eu and ecb.secretariat@ecb.europa.eu.

¹⁸ See section 4.3 of this Guide.

Documentation requirements for national consultations

Required	Recommended	Optional
<p>Written request for an opinion to ECB's President</p> <p>Copy of draft legislative provisions</p>	<p>Short explanatory memorandum stating: subject matter and main objectives of legislation; stage in national legislative process; and details of a contact person.</p> <p>If draft national legislation is long/complicated, an indication of the draft provisions on which ECB comments are particularly sought.</p> <p>If request is made as matter of extreme urgency, an English translation of the explanatory memorandum and the main draft provisions submitted for consultation is desirable.</p>	<p>Indication of time limit for the ECB to deliver its opinion.</p>

4.2.2 The language of the request

The request for an opinion and the accompanying documents may be submitted in the official language of the Member State concerned (or in one of the official languages of the Member State if there is more than one). In particular when a request is made as a matter of extreme urgency¹⁹, the ECB appreciates receiving an English translation of the explanatory memorandum and the main draft legislative provisions submitted for consultation, to ensure a smooth consultation procedure. This takes account of English being the working language of the ECB, as well as the language for adopting the ECB's opinions by the Governing Council with contribution of the General Council. It also allows the ECB to start working on opinions immediately, without having to wait for translations. However, the request for an ECB opinion should not be delayed by the lack of such a translation.

4.3 Time limits

Article 3 of Decision 98/415/EC:

'1. The authorities of the Member States preparing a legislative provision may, if they consider it necessary, set the ECB a time limit for the submission of its opinion which may not be less than one month from the date on which the President of the ECB receives notification to this effect.

2. In case of extreme urgency, the time limit may be reduced. In this case, the consulting authority shall state the reasons for the urgency.

3. The ECB may request in due time an extension of the time limit for up to an additional four weeks. This request shall not be unreasonably declined by the consulting authority.

¹⁹ See section 4.3 of this Guide.

4. Upon expiry of the time limit, the absence of an opinion shall not prevent further action by the consulting national authority. Should the opinion of the ECB be received after the time limit, Member States shall, nevertheless, ensure that it is brought to the knowledge of the authorities referred to in Article 4.'

While Decision 98/415/EC does not lay down a time limit for the adoption of an ECB opinion, experience has shown that the average time taken is around six weeks. However, the process may take longer²⁰ and the time actually required for the adoption of an opinion will obviously vary according to the nature, complexity and sensitivity of the draft legislative provisions concerned.

Pursuant to Article 3(1) of Decision 98/415/EC, '[t]he authorities of the Member States preparing a legislative provision may, if they consider it necessary, set the ECB a time limit for the submission of its opinion'. However, this time limit may not be less than one month from the date of the ECB's receipt of this notification.

Experience has shown that Member States sometimes misinterpret this one-month minimum time limit as a standard maximum time limit. In most cases, the preparation and adoption of ECB opinions requires time for preparing the English version of the draft legislative provisions, coordinating the work of the ECB's competent business areas involved in drafting the opinion, and receiving and taking account of the comments and observations of NCB Governors in the written procedure, as well as from the Supervisory Board, when consulted by the Governing Council.

In practice, a one-month time limit has proven to be rather short. The possibility for consulting authorities to set a time limit should therefore be restricted to cases where there is a pressing need for the national authorities to receive the ECB's opinion within one month. As the ECB often reiterates in its opinions, the fact that the national legislative process has reached an advanced stage is not a sufficient ground for the consulting authorities to require the urgent adoption of the ECB's opinion.

Under Article 3(2) of Decision 98/415/EC, the time limit may be reduced in cases of extreme urgency. In these highly exceptional cases, the consulting authority must expressly state the reasons for the urgency of the matter. Consulting authorities are encouraged to follow the guidance in recital 6 of Decision 98/415/EC, which states that a dialogue between the consulting authorities and the ECB should enable the ECB to deliver its opinion in a timely manner in urgent cases without prejudice to it being able to examine the draft legislative provisions in necessary detail. Also, in such cases the ECB appreciates receiving an English translation of the explanatory memorandum and of the main draft legislative provisions submitted for consultation²¹. However, the request for an ECB opinion should not be delayed by the lack of such a translation.

²⁰ See section 4.5 of this Guide.

²¹ Also see sections 4.2.1 and 4.2.2 of this Guide.

Pursuant to Article 3(3) of Decision 98/415/EC, where a time limit has been set by the consulting authority, the ECB may request an extension of this time limit of up to four additional weeks. Article 3(3) states that this request shall not be unreasonably declined by the consulting authority.

Article 3(4) of Decision 98/415/EC states that '[u]pon expiry of the time limit, the absence of an opinion shall not prevent further action by the consulting national authority'. This means that, once the time limit has expired, the relevant authorities can continue the procedure for adopting the draft legislation, which has been suspended during the ECB consultation. However, as long as the legislation has not been finally adopted, the consulting authority continues to be obliged to take into consideration the ECB's opinion (and bring it to the attention of the adopting authority, if the latter is a different body).

4.4 Acknowledgement of receipt

Once the request for an opinion has been received, an acknowledgment of receipt is sent to the consulting authority in the same language as the request for an opinion. Where the Member State is consulting the ECB without a clear obligation to do so, or where the draft legislative provisions only marginally touch on the ECB's fields of competence or contain purely formal or administrative changes to the legal framework, this will be stated in the acknowledgement together with an indication of whether the ECB nevertheless has specific comments which will be channelled via an ECB opinion.

The accompanying documents and the English translation are sent to the members of the Governing Council and the General Council of the ECB. This enables them to familiarise themselves with the consultation dossier from the start and to be in a position to comment promptly when the draft opinion is submitted to them for comments.

4.5 Preparation and Adoption of the ECB's opinion

After receiving the request for an opinion, the ECB establishes a panel to draft an opinion. This panel includes experts from the business areas relevant to the topic of consultation. Depending on factors like the nature, complexity and length of the draft legislative provisions, as well as their availability in English, the drafting varies from a few days to several weeks. Justified reasons for requesting an urgent or extremely urgent adoption of the opinion are also taken into account when preparing the ECB's opinion.

An opinion is a legal instrument of the ECB and, as a rule, the Governing Council is the decision making body responsible for the adoption of ECB opinions. The members of the General Council are also involved in this decision making process in order to contribute to the ECB's advisory function. Therefore, after the drafting is completed and following its endorsement by the Executive Board, the draft opinion is

submitted to the Governing Council for comments and to the members of the General Council for observations. This is a written procedure that normally takes one week.

For ECB opinions to be adopted in relation to the prudential supervision of credit institutions, the Governing Council may also consult the Supervisory Board.

Upon receiving comments and/or observations, the draft opinion is revised by the ECB and referred for any further comments or observations by another written procedure of a few working days. However, the time limit for making comments and observations in this second written procedure may vary, depending on the nature of the consultation and the number and complexity of comments received in the first written procedure. In the second written procedure, the General and Governing Council members will usually only provide comments or observations on the amendments introduced in the revised draft opinion.

The consulting authorities are invited to take into account the complexity of the consultation process when timing their requests for an ECB opinion.

4.6 The language regime

Opinions requested by a national authority are adopted in the official language of the Member State in question (or in the same language as the request for an opinion if the Member State has more than one official language) and in English.

4.7 Transmission of the opinion and its further consideration

Following adoption, the opinion is transmitted to the consulting authority. Article 4 of Decision 98/415/EC states that the consulting authority must 'take into consideration the ECB's opinion before taking its decision on the substance', and it should bring the ECB's opinion to the attention of the adopting authority if the latter is an authority other than the consulting authority.

Following completion of the legislative process, the ECB appreciates receiving a copy of the legislative provisions as finally adopted. The ECB recommends that, where draft legislative provisions have been subject to consultation with the ECB, a copy of or a reference to the adopted legislative provisions should be sent to the ECB's Secretariat by the consulting authority.

4.8 Publication

The Governing Council has gradually extended its policy of transparency with regard to national consultations. Since January 2005, all ECB opinions have been published on the ECB's website immediately after being transmitted to the consulting authority, unless there are specific grounds for refraining from immediate publication. If there

are such specific grounds, the opinion is published at the latest six months after its adoption.

5 Compliance with the obligation to consult the ECB

In order to ensure that the obligation to consult the ECB is fulfilled, Article 4 of Decision 98/415/EC requires Member States to take the necessary measures 'to ensure effective compliance' with Decision 98/415/EC. The ESCB closely monitors domestic legislative developments in draft legislation pertaining to the ECB's fields of competence. The ESCB also regularly monitors and reports on compliance by national authorities with the obligation to consult the ECB on such draft legislative provisions. Furthermore, having established that the obligation to consult the ECB on draft legislative provisions falling within its fields of competence has been breached, the ECB notifies the respective competent national authority and Governor of the NCB of the Member State concerned and the European Commission. Clear cases of non-compliance with the obligation to consult the ECB that are important or repetitive may also be included in the ECB's Annual Report.

6 Legal consequences of non-compliance with the obligation to consult the ECB

Non-compliance with the obligation to consult the ECB on a draft legislative provision within its fields of competence is an infringement of Decision 98/415/EC and could lead to infringement proceedings before the Court. Such proceedings can be brought by the European Commission against the Member State concerned under Article 258 of the Treaty²². The obligation to consult the ECB under Decision 98/415/EC is precise and unconditional, which means that individuals can rely on it before national courts. Therefore, national courts can be asked to rule on the validity or enforceability of a national provision adopted without consulting the ECB, and a request for a preliminary ruling on this can be addressed to the Court.

The Court has repeatedly been asked to rule on the enforceability of a national provision adopted without prior notification to the European Commission, as required by specific Union acts²³. In these cases, the Court has held that a national provision adopted in breach of a substantial procedural requirement is unenforceable against individuals. It is also well-established case law of the Court that all remedies normally available under national law must be open to litigants seeking to enforce claims under Union law²⁴. In those Member States in which individuals have the right to initiate proceedings to annul a national legislative provision on the grounds of a serious procedural defect, individuals should also have the right to seek to annul national legislative provisions adopted in breach of an essential procedural requirement of Union law, such as the prior consultation of the ECB.

²² If an NCB endowed with regulatory powers fails to consult in accordance with Decision 98/415/EC, the ECB can itself commence infringement proceedings under Article 271(d) of the Treaty and Article 35.6 of the ESCB Statute.

²³ See, inter alia: Case 174/84, Bulk Oil, EU:C:1986:60; Case 380/87, Enichem Base, EU:C:1989:318; Case C-194/94, CIA Security International, EU:C:1996:172; Case C-226/97, Lemmens, EU:C:1998:296; Case C-235/95, AGS Assedic Pas-de-Calais, EU:C:1998:365; Case C-443/98, Unilever, EU:C:2000:496; Case C-159/00, Sapod Audic, EU:C:2002:343.

²⁴ See, for instance, Case 158/80, Rewe, EU:C:1981:163.

Annex

Council decision of 29 June 1998 on the consultation of the European central bank by national authorities regarding draft legislative provisions (98/415/EC²⁵)

The Council of the European Union,

Having regard to the Treaty establishing the European Community and in particular Article 105(4) thereof and Article 4 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank annexed thereto,

Having regard to the proposal from the Commission²⁶,

Having regard to the opinion of the European Parliament²⁷,

Having regard to the opinion of the European Monetary Institute²⁸,

Acting in accordance with the procedure provided for in Article 106(6) of the Treaty and in Article 42 of the said Protocol,

(1) Whereas the European Central Bank (ECB) will be established as soon as its Executive Board is appointed;

(2) Whereas the Treaty stipulates that national authorities shall consult the ECB regarding any draft legislative provision in its fields of competence; whereas it is for the Council to set out the limits and the conditions of such consultation;

(3) Whereas this obligation on the authorities of the Member States to consult the ECB must not prejudice the responsibility of these authorities for the matters which are the subject of such provision; whereas Member States must consult the ECB on any draft legislation in its fields of competence in accordance with Article 105(4) of the Treaty; whereas the list of particular areas included in Article 2 of this Decision is not exhaustive; whereas the sixth indent of Article 2 of this Decision is without prejudice to the present assignment of competences for policies relating to the prudential supervision of credit institutions and the stability of the financial system;

(4) Whereas the monetary functions and operations of the European System of Central Banks (ESCB) are defined in the Statute of the ESCB and of the ECB; whereas central banks of participating Member States are an integral part of the ESCB and must act in accordance with the guidelines and instructions of the ECB;

²⁵ OJ L 189, 3.7.1998, p. 42.

²⁶ OJ C 118, 17. 4. 1998, p. 11.

²⁷ OJ C 195, 22. 6. 1998.

²⁸ Opinion delivered on 6 April 1998 (not yet published in the Official Journal).

whereas, in the third stage of Economic and Monetary Union (EMU), the authorities of non-participating Member States must consult the ECB on draft legislative provisions on the instruments of monetary policy;

(5) Whereas as long as Member States do not participate in the monetary policy of the ESCB, this Decision does not concern decisions taken by authorities of these Member States in the context of the implementation of their monetary policy;

(6) Whereas consultation of the ECB must not unduly lengthen procedures for adopting legislative provisions in the Member States; whereas the time limits within which the ECB must deliver its opinion must, nevertheless, enable it to examine the texts referred to it with the required care; whereas, in duly justified cases of extreme urgency, for which the reasons will be stated, for example on account of market sensitivity, Member States may set a time limit which is less than one month and which reflects the urgency of the situation; whereas in these cases particularly, dialogue between the national authorities and the ECB should enable the interests of both to be taken into account;

(7) Whereas, in accordance with paragraphs 5 and 8 of Protocol No 11 annexed to the Treaty, this Decision shall not apply to the United Kingdom of Great Britain and Northern Ireland if and so long as that Member State does not move to the third stage of EMU;

(8) Whereas, from the date of the establishment of the ECB until the start of the third stage of EMU, national authorities have to consult the ECB, pursuant to Decision 93/717/EC²⁹ and Article 109(2) of the Treaty,

Has adopted this decision:

Article 1

1. For the purpose of this Decision:

‘participating Member State’ shall mean a Member State which has adopted the single currency in accordance with the Treaty;

‘draft legislative provisions’ shall mean any such provisions which, once they become legally binding and of general applicability in the territory of a Member State, lay down rules for an indefinite number of cases and are addressed to an indefinite number of natural or legal persons.

2. Draft legislative provisions shall not include draft provisions the exclusive purpose of which is the transposition of Community directives into the law of Member States.

²⁹ OJ L 332, 31. 12. 1993, p. 14.

Article 2

1. The authorities of the Member States shall consult the ECB on any draft legislative provision within its field of competence pursuant to the Treaty and in particular on:

- currency matters,
- means of payment,
- national central banks,
- the collection, compilation and distribution of monetary, financial, banking, payment systems and balance of payments statistics,
- payment and settlement systems,
- rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets.

2. In addition, the authorities of Member States other than participating Member States shall consult the ECB on any draft legislative provisions on the instruments of monetary policy.

3. The ECB shall, immediately on receipt of any draft legislative provision, notify the consulting authority whether, in its opinion, such provision is within its field of competence.

Article 3

1. The authorities of the Member States preparing a legislative provision may, if they consider it necessary, set the ECB a time limit for the submission of its opinion which may not be less than one month from the date on which the President of the ECB receives notification to this effect.

2. In case of extreme urgency, the time limit may be reduced. In this case, the consulting authority shall state the reasons for the urgency.

3. The ECB may request in due time an extension of the time limit for up to an additional four weeks. This request shall not be unreasonably declined by the consulting authority.

4. Upon expiry of the time limit, the absence of an opinion shall not prevent further action by the consulting national authority. Should the opinion of the ECB be received after the time limit, Member States shall, nevertheless, ensure that it is brought to the knowledge of the authorities referred to in Article 4.

Article 4

Each Member State shall take the measures necessary to ensure effective compliance with this Decision. To that end, it shall ensure that the ECB is consulted at an appropriate stage enabling the authority initiating the draft legislative provision to take into consideration the ECB's opinion before taking its decision on the

substance and that the opinion received from the ECB is brought to the knowledge of the adopting authority if the latter is an authority other than that which has prepared the legislative provisions concerned.

Article 5

1. This Decision shall apply from 1 January 1999.
2. Decision 93/717/EC shall be repealed with effect from 1 January 1999.

Article 6

This Decision is addressed to the Member States.

Done at Luxembourg, 29 June 1998.

For the Council
The President

R. COOK

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