



[Draft report to the EMI Council. WGLE members are requested to review the overall format and the specific wording, so as to advance in the drafting of the final draft. The report will include country assessments, the first description of which has been distributed to the Group.]

Fiche III.1

STATUTORY REQUIREMENTS TO BE FULFILLED FOR NCBS TO BECOME AN INTEGRAL PART OF THE ESCB

I INTRODUCTION

Article 108 of the Treaty¹, as reproduced in Article 14.1 of the ESCB/ECB Statute¹, states that Member States shall ensure, at the latest at the date of the establishment of the ESCB, that their national legislation including the statutes of their NCBS is compatible with the Treaty and the Statute. The (progress towards the) fulfilment of this requirement has to be assessed by the EMI in reports prepared under Article 7 of the Statute of the EMI and Article 109j of the Treaty. As a preparation for the first Article 7 Report of November 1995 (the "Article 7 Report"), legal experts, the Editorial Group, the Committee of Alternates and eventually also the Council of the EMI, undertook an initial review of statutory requirements to be fulfilled by NCBS to become an integral part of the ESCB. The present memorandum intends to lay the basis for the second stage of the identification of the implications of Article 108 and, thus, for the next Article 7 and Article 109j reports. Its main aim is to propose benchmark criteria for an assessment of progress made towards the fulfilment of requirements on integration of NCBS in the ESCB. The Working Group of Legal Experts did not reach consensus on the scope and nature of all benchmark criteria discussed in this memorandum. Some of its members feel that the Treaty and the Statute should be applied restrictively and that only explicit requirements (e.g. the minimum term of office for a Governor) may give rise to the need for adaptation. In their view, an elaboration of benchmark criteria should not lead to the creation of a kind of secondary Community legislation without a basis in the Treaty. It should, therefore, be indicated whether benchmark criteria are based on a statutory obligation or merely on desirability. Other members of the Working Group are of the opinion that the history of the Treaty and the Statute and a reasonable application thereof plead for a more functional approach entailing that those adaptations

are required, also from a legal point of view, which are necessary to safeguard the integrity of the ESCB and the fulfilment of its mandate, whether they are the consequence of explicit provisions in the Treaty and/or the Statute or not. In addition, to the enumeration of the above benchmark criteria, the Working Group also undertook a tentative assessment of the situation on a country-by-country basis of which the results are contained in this note.

II BASIC ASSUMPTIONS

In the framework of the preparation of the EMI's Article 7 Report², the following basic assumptions (in summary) were agreed upon between NCBS.

- Article 108 does not require harmonisation of NCBS' statutes, but merely implies that national legislation and statutes of NCBS need to be adjusted in order to eliminate inconsistencies with the Treaty and the Statute.
- Timely adaptation requires the legislative process to be initiated during Stage Two. This would also allow the EMI and other Community institutions to assess progress made towards the fulfilment of the requirements for Stage Three.
- In relation to the application of Article 107 of the Treaty on central bank independence (see Chapter III below) and Article 108 of the Treaty on adaptation of national legislation and statutes of NCBS, the Treaty and the Statute do not make a distinction between Member States with and without a derogation. A derogation implies that the respective NCB retains its powers in the field of monetary policy and participates in the ESCB on a restrictive basis until the date on which the Member State joins Monetary Union.
- In accordance with Article 2 of Protocol no. 12, Denmark will be treated as a country with a derogation. The implications thereof have been elaborated in a Decision taken by the Heads of State or Government at their Edinburgh Summit meeting on 11th and 12th December 1992. This Decision states that Denmark will retain its existing powers in the field of monetary policy according to its national laws and regulations, including the powers of Danmarks Nationalbank in the field of monetary policy. In the event that the United Kingdom will not participate in Stage Three, Article 2 of Protocol no. 11 will exempt the United Kingdom from the impact of, inter alia, Articles 107 and 108 of the Treaty.

¹ Reference to (Articles of) the Treaty and the Statute are references to (Articles of) the Treaty establishing the European Community and the Statute of the ESCB/ECB, unless otherwise indicated.

² See pages XV, XVI and 88 to 94.

- For the purpose of identifying those areas where adaptation of statutes is necessary, a distinction may be made between independence of NCBs and integration of NCBs in the ESCB - the former, incidentally, being a particular feature of the latter.

III INDEPENDENCE OF NCBS

1. Introduction

The principle of central bank independence has been elaborated in different Articles of the Treaty and the Statute, from which various features of central bank independence may be deduced. Such features are of an institutional, personal, functional and financial nature and they will be elaborated below. A distinction is made between features which:

- have already been dealt with in the Article 7 Report (paragraphs A below)
- have been considered but not included in the Article 7 Report (paragraphs B below);³
- have not been considered yet (paragraphs C below).

2. Institutional independence

A Article 7 Report

The Article 7 Report contains the following observations on institutional independence.

- Article 107 of the Treaty prohibits the ECB, the NCBs and members of their decision-making bodies from seeking or taking instructions from Community institutions or bodies, from any government of a Member State or from any other body. It also prohibits Community institutions and bodies and the governments of the Member States from seeking to influence the members of the decision-making bodies of the ECB or of the NCBs.
- According to Article 107, the prohibition on instructions and attempts to influence applies to the exercise of powers and the performance of the tasks and duties conferred by the Treaty upon the ESCB and its components. The reference in Article 107 to the tasks and functions of the ESCB implies that the independence requirement is restricted to all ESCB-related tasks.
- The prohibition on instructions and attempts to influence covers all sources of external influence on NCBs, particularly on their decision-making bodies, which might prevent them

from complying with the Treaty and the Statute. This should not be interpreted in such an extensive way that it would preclude a dialogue between NCBs on the one hand and Government and other state bodies (Parliament, etc.) on the other. An imposition upon NCBs of complete isolation from national institutions is not justified. The crucial issue is whether a national institution has any mechanism at its disposal to ensure that its views influence the final decision, either through the right to interfere with any decision reached or the right to vote on decisions.

B Features of institutional independence which have been considered but not included in the Article 7 Report

The following more detailed elaboration of features of institutional independence was discussed at various levels (legal experts, Editorial Group, Committee of Alternates and the Council) but eventually not included in the Article 7 Report.

- Rights of Government or Parliament to give instructions or to suspend, annul or defer a NCB's decisions are incompatible with the Treaty and the Statute, whether exercised directly or via representatives of Government or Parliament within the governing body of the NCB.⁴
- Reservations may also exist vis-à-vis any right to censor decisions on legal grounds. Whilst it may sometimes be difficult to distinguish "legal grounds" from aspects of policy, the necessity of such procedures may be questioned. NCBs may be deemed to be able to assess for themselves the legality of their means, whilst the legal system of each Member State is expected to provide sufficient possibilities of recourse against ultra vires acts of the relevant NCBs.
- Participation of representatives of other bodies (e.g. Government or Parliament) in decision-making bodies of a NCB with a right to vote on matters concerning the exercise by the NCB of its tasks and duties, even if this vote is not decisive, is incompatible with the Treaty and the Statute.
- Explicit obligations for a NCB to consult political bodies may also be deemed questionable. In Stage Three, the primary responsibility for the fulfilment of the ESCB's tasks is vested in the Governing Council of the ECB. Dialogue with political authorities then takes place at a Community level. Thus, the justification for consultation between NCBs and national bodies

³ Non-incorporation in the Article 7 Report does not necessarily mean that the issues concerned were controversial, but formally they would still need to be endorsed.

⁴ These features of institutional independence were not controversial, but have nevertheless not been incorporated in the final version of the Article 7 Report for reasons of a redactional nature.

will be reduced and it might, in some cases, be appropriate to review such mechanisms irrespective of any Treaty obligation to do so.

C Features of institutional independence which have not been considered yet

The features mentioned in points A and B above seem to be broad enough to cover all peculiarities in statutes of NCBs and a need for further elaboration of features of institutional independence does not therefore seem to exist unless the Council would feel otherwise.

3. Personal independence

A Article 7 Report

The Article 7 Report contains the following observations with regard to personal independence:

- Article 14.2 of the Statute states that the statutes of NCBs shall provide for a minimum term of office of a Governor of five years.
- It also gives protection against arbitrary dismissal of Governors by stating that a Governor may be relieved from office only if he/she no longer fulfils the conditions required for the performance of his/her duties or if he/she has been guilty of serious misconduct, with the possibility of appeal to the European Court of Justice.
- This form of independence would be further enhanced if the same rules were also applied to other members of the decision-making bodies of NCBs dealing with ESCB-related tasks.

B Features of personal independence which have been considered but not included in the Article 7 Report

- The observation that personal independence would be further enhanced if the same rules for Governors were also applied to other members of decision-making bodies of NCBs has not been motivated in the Article 7 Report. The underlying thought of this observation was the following. Article 14.2 of the ESCB Statute makes clear that the minimum period of office of NCB Governors is only an example of an area where NCB statutes should protect the integrity of their decision-making bodies. In referring to the minimum term for Governors, the words “in particular” are used. Article 107 of the Treaty and Article 7 of the Statute explicitly refer, inter alia, to “members of the decision-making bodies of the national central banks”. Therefore, similar measures relating to other members of NCB decision-making bodies would be wholly consistent with Article 14.2 of the Statute. They would be particularly appropriate where a NCB statute provides that the Governor is merely one member of a decision making body, each

of the other members of which having equivalent voting rights. Another ground for the extension of the security of tenure to other members of NCB decision-making bodies is the fact that they may have to deputise for the Governor in the Governing Council of the ESCB (see Article 10.3 of the Statute).

- Personal independence is also at stake when members of decision-making bodies of the NCBs exercise their duties on a part-time basis while at the same time performing political or commercial activities. Depending on the nature of such activities, conflicts of interest may arise and jeopardise the personal independence of part-time members. Hence, membership in a decision-making body of the NCB dealing with monetary policy decisions is a priori incompatible with the exercise of external activities which could give rise to conflicts of interest for the person concerned.

C Features of personal independence which have not been considered yet

Features of personal independence seem to have been sufficiently covered in points A and B above and a need for further elaboration does therefore not seem to exist unless the Council would feel otherwise.

4. Functional independence

A Article 7 Report

In connection with functional independence of NCBs, the Article 7 Report mentions, that there are, in addition to the above institutional and personal features of independence, also functional features. For example, these would include appropriate adaptations of the statutes of NCBs which do not unambiguously reflect the primary objective of the ESCB (maintaining price stability).

B Features of functional independence which have been considered but not included in the Article 7 Report

Further features of functional independence have not yet been considered.

C Features of functional independence which have not been considered yet

Under Article 14.4 of the Statute, a NCB may perform tasks and functions other than those related to the ESCB unless these are deemed to interfere with the objectives and tasks of the ESCB. Such a protection of the integrity of the system may be regarded as a feature of functional independence. A

comprehensive survey on incompatibilities between existing tasks and functions of NCBs on the one hand and the objectives and tasks of the ESCB on the other has not been undertaken yet. It may be deemed appropriate to initiate such a survey in due course in order to enable NCBs to abolish those functions which the Governing Council of the ECB might consider to interfere with the objectives and tasks of the ESCB in a timely and efficient manner. It does, at the same time, not seem to be necessary to deal with this matter in the 1996 Article 7/Article 109j report pending further discussion within the framework of the EMI, unless the Council would feel otherwise.

5. Financial independence

A Article 7 Report

The Article 7 Report did not contain any paragraphs on financial independence of NCBs.

B Features of financial independence which have been considered but not included in the Article 7 Report

It was agreed between NCBs during the preparation of the Article 7 Report that the financial independence of NCBs should be a factor in the overall assessment of their independence alongside institutional, personal and functional independence. Indeed, in extremis, if a NCB is fully independent from an institutional and functional point of view, but at the same time not in the position to autonomously avail itself of the appropriate means to fulfil its mandate, its overall independence would be undermined.

C Features of financial independence which have not been considered yet

For the assessment of a central bank's financial independence, the following features would seem to be relevant:

- legal form of incorporation;
- determination of budget;
- accounting rules;
- distribution of profit.

The main question is whether, in the above areas, third parties (e.g. Government, Parliament, private shareholders) have an ex ante possibility to directly or indirectly exercise influence on a central

bank's means to fulfil its mandate rather than an ex post possibility of a review thereof.⁵ Such an ex ante influence might infringe upon a central bank's independence, whereas an ex post review may be regarded as reflecting a central bank's accountability towards the relevant state organs.⁶

Legal form of incorporation

The majority of NCBs are legal entities organised under by public law, whilst a minority is organised under private law. The question arises as to whether third parties may, under public or private law or directly under the statutes of a NCB, on the mere basis of the NCB being a public entity or on the basis of their financial interest in a NCB, exercise influence on matters which in the future could affect ESCB-related tasks as well. For example, if an NCB is organised under private law, would company law attribute any rights to shareholders which infringe on the NCB's financial independence? Such sources of external influence would need to be adjusted as incompatible with the Treaty and the Statute.

Determination of budget

Influence of third parties on the determination of a NCB's budget could, at least as far as the decision on the appropriate means for the fulfilment of ESCB-related tasks is concerned, infringe on a NCB's independence as required by Article 107 of the Treaty and Article 7 of the Statute. Statutory provisions to this effect would need to be adjusted as incompatible with the Treaty and the Statute.

Accounting rules

Accounting rules of NCBs may adhere to general accounting practices (as, at least to a certain extent, determined by Community Directives) or may be governed by rules specifically designed for NCBs. A mixture of these two approaches may also exist, whilst the establishment of accounting rules is, in some cases, left to the discretion of a NCB itself.

Adherence to normal accounting practice or a large margin of discretion on the side of a NCB may be seen as a sign of financial independence. However, the mere existence of specific rules does not in itself infringe on central bank independence. The crucial question is as to whether Government has

⁵ Observations in this paragraph of financial independence follow the same principle as with regard to the other features of independence in the sense that they are only relevant to the extent that (a lack of) financial independence of NCBs may have an impact on the fulfilment of the ESCB's mandate.

⁶ However, as stated in paragraph 2, fourth indent, above, it is questionable whether accountability for ESCB-related tasks at a national level is compatible with the fact that such accountability will already exist at a Community level.

any mechanism at its disposal to influence the accounting process within a NCB and the outcome thereof. The statutes of several NCBs provide for (i) the possibility that Government (through, for example, the Government Commissioner) reviews whether a NCB's annual accounts have been established in a lawful manner, i.e. in accordance with the statutory rules applicable to accounting within the NCB concerned and (ii) a procedure for the settlement of disputes between Government and a NCB on this point. As stated above in Chapter III, paragraph 2B, second indent, it may be questionable whether a right of third parties to censor an NCB's decisions on legal grounds is compatible with the notion of central bank independence, as NCBs may be deemed to be able to assess for themselves the legality of their means, although provisions such as the above emphasise the accountability of a central bank. The above doubts apply even stronger to the possibility for Government to assess the appropriateness of a NCB's annual accounts. It may, on the one hand, be defended that budgetary freedom (ex ante) requires a system of checks and balances with as countervailing power the (ex post) possibility for a NCB's "owner" to assess the appropriateness of expenses.⁷ This is, however, more a matter of general accountability - which may have various manifestations - than of accounting procedures. The only genuine infringement on financial independence seems to be a possibility for Government to, at its discretion, influence the accounting process and the outcome thereof.

Distribution of profit

The above observations on accounting rules apply to a large extent also to the distribution of profit to Government. If profit is calculated and distributed at a NCB's discretion or in accordance with statutory provisions, infringements on financial independence do not seem to occur. However, if Government could, at its discretion, influence the calculation and/or distribution of profit, this would be in contradiction with financial independence.

IV OTHER STATUTORY REQUIREMENTS TO BE FULFILLED BY NCBS TO BECOME AN INTEGRAL PART OF THE ESCB

1. Introduction

Member States without a derogation will become an integral part of the ESCB. Integration of the NCBs within the ESCB, in accordance with Article 14.3 of the Statute, may necessitate measures to be taken in addition to those designed to assure a sufficient level of independence, as required by

⁷ See also paragraph 5C above.

Articles 107 and 109e(5) of the Treaty and Article 7 of the Statute. In particular, such measures may be necessary to enable NCBs to execute tasks as members of the ESCB and in accordance with decisions by the ECB. The 1995 Article 7 Report recognised that the nature and content of such adaptations will need to be elaborated further. This Chapter attempts to lay the basis for such further elaboration through suggestions on the:

- basic assumptions for the EMI's analysis of integration requirements;
- the EMI's role with regard to the introduction of integration measures; and, in particular, the scope of the EMI's assessment of progress made towards the fulfilment of integration requirements;

2. Basic assumptions for the EMI's analysis of integration requirements

When assessing progress made towards the fulfilment of other statutory requirements to be fulfilled by NCBs to become an integral part of the ESCB, it is important to repeat⁸/establish several basic assumptions.

- National peculiarities may continue to exist and harmonisation of the statutes of NCBs is not required.
- Inconsistencies between statutes of NCBs on the one hand and the Treaty and Statute on the other may have different manifestations such as:
 - provisions are contradictory or ambiguous in the light of the Treaty and the Statute;
 - statutes do not contain enabling provisions ensuring that a NCB is in the position to comply with the requirements of the ESCB such as the execution of tasks of the ESCB and the fulfilment of obligations towards the ESCB;
 - provisions do not respect the powers of the decision-making bodies of the ECB; and/or
 - statutes do not properly reflect prohibitions in the Treaty and the Statute.

Although the Treaty and the Statute prevail over national legislation, inclusive of statutes of NCBs, as a result of the supremacy of Community law over national legislation, this does not discharge the Member States from their obligation under Article 108 of the Treaty to adapt their national legislation and remove inconsistencies.

- The integration of the NCBs of the participating Member States as from the start of Stage Three will, inter alia, imply that they lose their autonomy in the areas covered by the Statute. They will, in other words, have to comply with decisions, guidelines and instructions from the ECB. This may, in practice, give rise to more complicated questions such as the supremacy of

⁸ See above Chapters II and III, as well as pages XV, XVI and 88 to 94 of the Article 7 Report.

guidelines over national legislation. Also, as a consequence of integration requirements, it would have to be ensured that a Governor in his/her capacity as member of the Governing Council of the ECB is free to take whatever stance in the decision-making process within the ECB he/she deems fit. This means that statutes of NCBs, providing for a possibility for other members of decision-making bodies of NCBs to influence the position which their Governor may take within the Governing Council, would need to be assessed on their compatibility with the Treaty and the Statute. It seems that national legislative authorities would, at least in theory, have three options to avoid inconsistencies between national legislation and legal acts of the ECB: either to adjust their national legislation to the ECB's rules, or to copy the wording of the Statute or to remove any provisions from national legislation, which might become an obstacle for the execution of tasks and functions by NCBs in accordance with rules established by the ECB, and make reference to such rules.

3. The EMI's role with regard to the introduction of integration measures

The basic assumption that an obligation to harmonise statutes of NCBs does not exist, seems to have several consequences. Firstly, it will be difficult to develop a common understanding within the EMI with regard to the preferred form and content of statutes of NCBs. Secondly, it will be even more difficult for the EMI to play a coordinating role in this field and to address, for example, recommendations on the preferred form and content of statutes of NCBs to legislative authorities of Member States. For example, some Member States and/or NCBs may, for reasons of efficiency and legal certainty, support the idea that statutes of NCBs should, to the extent possible, refer to the Treaty and the Statute or copy the provisions thereof where appropriate. National peculiarities would then only be expressed in provisions on the administration of a NCB and on non-ESCB related matters. Other Member States and/or NCBs may not share this opinion. It is recognised that this is an area which is, ultimately, in the realm of the legislative authorities of the Member States and it seems that the EMI, for the time being and pending further investigations, should concentrate its efforts on an assessment of statutes of NCBs on inconsistencies with the Treaty and the Statute.⁹ Inconsistencies may not always be easy to detect in advance, as they may only become apparent once specific questions emerge. As stated above in paragraph 2, they may also result from the elaboration of Articles in the Treaty and the Statute in legal acts at a Community level (i.e. secondary Community legislation or regulations, decisions, guidelines and instructions from the ECB) of which the content is not known yet. This may warrant that the EMI in its first combined Article 7 and Article 109j Report

⁹ Several Alternates and Governors expressed their concern during the monthly meeting in January 1996 that the review of statutory provisions to be fulfilled for NCBs to become an integral part of the ESCB should not be an unguided process and should entail interim reports.

concentrates on those clear-cut cases of inconsistencies which, if national rules would continue to be followed, would clearly endanger the functioning of the ESCB and the fulfilment of its mandate.

The above would not preclude individual NCBs to coordinate their efforts in this field and to use the EMI as a forum to exchange information, but such activities would then not need to aim at reports, to be endorsed by the Council, containing an EMI view on the preferred form and content of statutes of NCBs. The above would, of course, also not preclude the EMI Council from deciding on a more proactive role for the EMI at a later stage.

[V COUNTRY ASSESSMENT]

[To be added once replies to questionnaire have been received.]

ECB-PUBLIC