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TO THE COUNCIL OF THE EMI

Please find enclosed a note dated 23 August 1996 on “Statutory requirements to be fulfilled for NCBs to become an integral part of the ESCB: progress report”, which has been prepared by the Working Group of Legal Experts.

This item is scheduled to be discussed (agenda item III.6) at the forthcoming EMI Council meeting on Tuesday, 3 September 1996.

Yours sincerely,

H. K. Scheller.

Enc(s)

**STATUTORY REQUIREMENTS TO BE FULFILLED FOR NCBS TO BECOME
AN INTEGRAL PART OF THE ESCB - PROGRESS REPORT**

Fiche [III.1]

I EXECUTIVE SUMMARY**1. Progress report**

The Working Group of Legal Experts (the "WGLE") has further advanced with work already initiated in preparation of the EMI's 1995 Article 7 Report¹: the identification of statutory requirements to be fulfilled for NCBS with a view to their integration in the ESCB in Stage Three of EMU. Its efforts have been directed towards the collection of information which may be used, firstly, to increase in-depth knowledge of the institutional features of NCBS and, secondly, for the preparation of Article 7 and Article 109j reports. The present memorandum contains a progress report.

2. Basic assumptions

The EMI's 1995 Article 7 Report contains several basic assumptions on which the WGLE's present efforts are based :

- The Treaty establishing the European Community² and the Statute of the ESCB/ECB³ (the "Treaty" and "Statute") do not require harmonisation of NCBS' statutes; national peculiarities may continue to exist. However, the Treaty and the Statute do imply that national legislation and statutes of NCBS need to be adjusted in order to eliminate inconsistencies with the Treaty and the Statute and to ensure the necessary degree of integration of NCBS in the ESCB. The supremacy of the Treaty and the Statute over national legislation does not discharge Member States from this obligation to adapt their legislation.
- Timely adaptation requires the legislative process to be initiated during Stage Two.⁴ This enables the EMI and other Community institutions to assess, in their reporting obligations under the Treaty, progress made towards the fulfilment of the legal requirements for Stage Three.⁵

¹ Report on "Progress towards convergence" published in November 1995.

² In particular Articles 5, 107 and 108.

³ In particular Articles 7 and 14.

⁴ See also Article 109e(5) of the Treaty.

⁵ In relation to the application of Article 107 of the Treaty on central bank independence (see Chapter II of this memorandum) 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

- Adaptations of statutes in the field of central bank independence need to be fully effective at the latest by the date of establishment of the ESCB, whilst adaptations aiming at the integration of NCBs in the ESCB would need to become effective at the starting date of Stage Three for Member States without a derogation and at the starting date of their full participation in Monetary Union for Member States with a derogation or with a special status.

3. Central bank independence

Building further on the EMI's 1995 Article 7 Report, the WGLE established a list of features of central bank independence, distinguishing between features of an institutional, personal, functional and financial nature. In doing so, the WGLE acknowledged at the same time that:

- central bank independence is required for the performance of ESCB-related tasks⁶ and that features of central bank independence should therefore be considered from that perspective;
- central bank independence is not a matter which can be expressed in arithmetical formulae and that the independence of individual NCBs should be assessed on a case-by-case basis in the institutional context in which an NCB operates.

3.1 Institutional independence

Against this background the WGLE considers that the following rights of third parties (e.g. government, parliament) are incompatible with the Treaty and/or Statute and thus require adaptation:

- a) Rights of third parties to **give instructions** to decision-making bodies of NCBs as far as ESCB-related tasks are concerned.
- b) Rights of third parties to **approve, suspend, annul or defer** decisions of NCBs as far as ESCB-related tasks are concerned.
- c) Rights of third parties to **censor** ESCB-related decisions **on legal grounds**.
- d) Rights of third parties to participate in decision-making bodies of an NCB with a right to **vote** on matters concerning the exercise by the NCB of ESCB-related tasks.
- e) Rights of third parties to be **ex ante consulted** on an NCB's decisions as far as ESCB-related tasks are concerned.

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 and Articles 7 and 14 of the Statute.

⁶ The main tasks of the ESCB are defined in Article 105(2) of the Treaty as repeated in Article 3 of its Statute:

- to define and implement the monetary policy of the Community;
- to conduct foreign exchange policy operations consistent with the provisions of Article 109 of this Treaty;
- to hold and manage the official foreign reserves of the Member States;
- to promote the smooth operation of payment systems.

Dialogue between NCBs and third parties, in particular their respective political authorities, which may also be based on statutory obligations to provide information and exchange views, is not incompatible with the Treaty and the Statute, provided that:

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

The two latter requirements seem to plead for a certain degree of a harmonised approach across NCBs/Governors and it may therefore be felt appropriate to develop at some point in time a set of basic guidelines in this field.

3.2 Personal independence

The following features of personal independence are agreed upon:

- a) Statutes of NCBs must, in accordance with Article 14.2 of the Statute, contain a minimum term of office for a Governor of five years. This does not preclude longer or even indefinite terms of office. A large majority of the members of the WGLE feel that an implicit indefinite term of office does not require adaptation of statutes if the grounds for dismissal of a Governor are in line with those of Article 14.2 of the Statute (see point b below).
- b) NCB's statutes must ensure that Governors may not be dismissed for other reasons than those mentioned in Article 14.2 of the Statute (no longer fulfilling the conditions required for the performance of duties or guilty of serious misconduct).
- c) It follows from the Treaty and the Statute that members of decision-making bodies of NCBs who are involved in the performance of ESCB-related tasks should have the same security of tenure as Governors are granted under Article 14.2 of the Statute, i.e. a minimum term of office of five years and (a) comparable (limitation of the) grounds for dismissal.⁷ Some members of the WGLE are, however, of the opinion that this general principle would not exclude differentiation in terms of office and in grounds for dismissal in those cases where some members of decision-making bodies and/or the body itself are less involved in the performance of ESCB-related tasks than other members and/or bodies or are not involved in all ESCB-related tasks.
- d) Personal independence also entails that no conflicts of interests should arise between duties of members of decision-making bodies of NCBs vis-à-vis their respective NCB (and of Governors, additionally, vis-à-vis the ECB) and other functions they may have. As a matter of principle,

⁷ Other members of decision-making bodies of NCBs will, however, not have the right of appeal to the European Court of Justice, which Article 14.2 of the Statute grants to Governors.

membership of a decision-making body involved in the performance of ESCB-related tasks is incompatible with the exercise of other functions which might imply the representation of interests of third parties in such bodies.⁸

3.3 Functional independence

It was already agreed in the framework of the EMI's 1995 Article 7 Report that statutes of NCBs should unambiguously reflect the primary objective of price stability as laid down in Article 2 of the Statute. Several members of the WGLE are of the opinion that a "national translation" of the ESCB's objective is not enough. In their view, statutes of NCBs should also contain a clear recognition of the fact that NCBs will be an integral part of the ESCB in Stage Three.⁹ Other members feel, on the basis of the fact that harmonisation of statutes is not required, that the removal of inconsistencies between statutes of NCBs and the Treaty and the Statute suffices. Several members also feel that there is no clear-cut distinction between functional independence and other requirements ensuring integration of NCBs in the ESCB. In the EMI's 1995 Article 7 Report it was also mentioned as a feature of functional independence, intended to safeguard the necessary degree of integration in the ESCB, that NCBs under Article 14.4 of the Statute may continue to 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.

3.4 Financial independence

The WGLE agrees that NCBs should be in the position to avail themselves of the appropriate means to ensure that its ESCB-related tasks can be properly fulfilled. In those countries where government and/or parliament are in the position to directly or indirectly exercise influence on the determination of an NCB's budget or the distribution of profit, the relevant statutory provisions should contain a safeguard clause that this may not impede the proper performance of ESCB-related tasks.

4. Other statutory requirements for integration of NCBs in the ESCB

The WGLE has also developed further thoughts on other statutory requirements to be fulfilled for NCBs with a view to their integration in the ESCB which necessitate adaptation of statutes of NCBs. In doing so, the WGLE agreed that the EMI's role in this respect should, at this juncture, mainly be to provide a forum to exchange views between NCBs. It is also generally agreed that the Treaty and the Statute, as in the future elaborated in ECB-rules, will require further adaptation of statutes of all NCBs (other than those with a derogation or with a special status). Areas of particular attention are statutory

⁸ Sveriges Riksbank is of the opinion that members of Parliament are not to be regarded as representatives of Parliament and that membership of Parliament is therefore not necessarily incompatible with membership of the Bank's Governing Board.

⁹ For example, draft statutes of the National Bank of Belgium contain, where appropriate, clear references to its role as part of the ESCB. See CON/96/10.

obstacles for compliance by NCBs with rules from the ECB (e.g. on the implementation of monetary policy) and for the fulfilment of duties of Governors as members of the highest decision-making body of a Community organ, whilst the ECB's prerogatives (e.g. on the issue of banknotes) should also be respected in national legislation. However, views on the appropriate scope of adaptations differ. For example, on one side of the spectrum, one NCB - recognising that its ESCB-related tasks will in Stage Three be governed by the Treaty and the Statute as well as by ECB rules - does not exclude that its statute will eventually be reduced to provisions of a primarily organisational nature. Several other NCBs are thinking more along the lines that Articles in the Treaty and the Statute could, for reasons of completeness and legal certainty, be copied into their statutes. On the other side of the spectrum, several NCBs emphasise that national peculiarities may continue to exist and adaptations may therefore be restricted to those which are explicitly required under the Treaty and Statute.

5. Future work

Most NCBs are presently discussing adaptations of their statutes with their respective legislative authorities and the current activities of the EMI in this field may be conducive to these discussions. As the above features of central bank independence are generally rather straightforward, the assessment of the (non-)fulfilment of these features in the framework of the preparation of Article 7 and Article 109j reports and of adaptations of statutes in consultation procedures under Article 109f(6) of the Treaty and Article 5.3 of the EMI Statute is likely to be so too. The situation is more complicated with regard to other statutory requirements with a view to the integration of NCBs in the ESCB. This requires the statutes of individual NCBs to be scrutinised, recognising at the same time that future rules of the ECB, which are not known yet, may also lead to the need to adapt statutes. The WGLE will continue its efforts to develop, in a similar manner as with regard to central bank independence, a list of concrete examples where adaptation may be deemed appropriate and which may thus serve as guidance for NCBs and their legislative authorities.

II CENTRAL BANK INDEPENDENCE

1. Introduction

Central bank independence is a subject which has already been addressed in the EMI's 1995 Article 7 Report.¹⁰ That Report contains several basic assumptions which are repeated below in summary form in order to put the WGLE's present efforts in their context.

¹⁰ In particular on pages XV, XVI and 88 to 94.

- The Treaty establishing the European Community¹¹ and the Statute of the ESCB/ECB¹² (the “Treaty” and “Statute”) do not require harmonisation of NCBs’ statutes; national peculiarities may continue to exist. However, the Treaty and the Statute do imply that national legislation and statutes of NCBs need to be adjusted in order to eliminate inconsistencies with the Treaty and the Statute and to ensure the necessary degree of integration of NCBs in the ESCB. The supremacy of the Treaty and the Statute over national legislation does not discharge the Member States from this obligation to adapt their legislation.
- Timely adaptation requires the legislative process to be initiated during Stage Two.¹³ This enables the EMI and other Community institutions to assess, in their reporting obligations under the Treaty, progress made towards the fulfilment of the legal requirements for Stage Three.¹⁴
- For the purpose of identifying those areas where adaptation of statutes is necessary, a distinction may be made between issues related to the independence of NCBs from political bodies and requirements for the integration of NCBs in the ESCB.
- Adaptations of statutes in the field of central bank independence need to be fully effective at the latest by the date of establishment of the ESCB, whilst adaptations aiming at the integration of NCBs in the ESCB would only need to become effective at the starting date of Stage Three for Member States without a derogation and at the starting date of their full participation in Monetary Union for Member States with a derogation or with a special status.

This progress report contains an elaboration of various features of central bank independence and particularly the prohibition of external influence on the decision-making process within NCBs, as laid down in Article 107 of the Treaty¹⁵. These features should not be seen as a kind of secondary Community legislation going beyond the scope of the Treaty and the Statute, but as tools to facilitate an overall assessment of the independence of individual NCBs on a case-by-case basis in the context of the institutional framework in which an NCB operates, whilst it is at the same time recognised that central bank independence is not a matter which can be expressed in arithmetical formulae nor applied in a mechanical manner.¹⁶ Whereas some provisions in statutes of NCBs are clearly incompatible with the Treaty and the Statute, others may require further analysis before a final assessment may be made.

¹¹ In particular Articles 5, 107 and 108.

¹² In particular Articles 7 and 14.

¹³ See also Article 109e(5) of the Treaty.

¹⁴ In relation to the application of Article 107 of the Treaty on central bank independence (see Chapter II of this memorandum) 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 and Articles 7 and 14 of the Statute.

¹⁵ As reproduced in Article 7 of the Statute of the ESCB/ECB.

¹⁶ See also page 93, paragraph 2.2.2, of the EMI’s 1995 Article 7 Report.

Furthermore, the EMI's 1995 Article 7 Report acknowledged that the requirement of central bank independence extends, but is at the same time limited to, ESCB-related tasks and the features should, therefore, be seen in conjunction with these tasks¹⁷. Finally, the features below are to a large extent based on concrete examples derived from statutes from NCBs. They are, therefore, not necessarily exhaustive and do, in particular, not prejudice future developments which might give rise to additional features.

Examples derived from statutes of NCBs have been added by way of illustration and do not prejudice forthcoming or future adaptations of statutes of NCBs, nor ad hoc assessments to be done by the EMI at a later stage under its reporting obligations.

2. Institutional independence

The requirement of institutional independence is laid down in Article 107 of the Treaty as reproduced in Article 7 of the Statute. These Articles prohibit 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. In addition, they also prohibit Community institutions and bodies and governments of the Member States from seeking to influence the members of the decision-making bodies of the ECB or of those decision-making bodies of the NCBs whose decisions may have an impact on the fulfilment of its ESCB-related tasks. Against this background, it is agreed that the following rights of third parties (e.g. government, parliament¹⁸) are incompatible with the Treaty and/or the Statute and therefore require adaptation.

A) A right to give instructions

Rights of third parties to give instructions to decision-making bodies of NCBs are incompatible with the Treaty and the Statute as far as ESCB-related tasks are concerned.¹⁹

Example 1: Article 26 of De Nederlandsche Bank Act (1948)

“1. The Minister may, after consultation with the Bank Council, give such directions to the Governing Board as he thinks necessary for the Bank's policy to be properly coordinated with the Government's monetary and financial policies. Except as provided in paragraph (2) below, the Governing Board shall comply with such directions.

¹⁷ See also footnote 6.

¹⁸ The prohibition of instructions and attempts to influence covers all sources of external influence on NCBs in relation to ESCB matters which prevent them from complying with the Treaty and the Statute. See also page 92, paragraph 2.2.1, of the EMI's 1995 Article 7 Report.

¹⁹ See also page 92, paragraph 2.2.1, of the EMI's 1995 Article 7 Report.

2. If the Governing Board has any objections to the directions as referred to in paragraph (1) above, it may communicate said objections to the Crown in writing within three days of receiving directions. The Crown shall decide whether or not the directions are to be complied with.
3. (.....)
4. If the Crown decides that the directions are to be complied with, the Governing Board's objections and the decisions of the Crown shall be published in the Nederlandse Staatscourant, if in the opinion of the Crown this is not contrary to the national interest."

Example 2: Section 4 of the Bank of England Act 1946²⁰

"The Treasury may from time to time give such directions to the Bank as, after consultation with the Governor of the Bank, they think necessary in the public interest".

B) A right to approve, suspend, annul or defer decisions

Rights of third parties to approve, suspend, annul or defer decisions of NCBs are incompatible with the Treaty and the Statute as far as ESCB-related tasks are concerned.²¹

Example: Article 13 (2) of the Bundesbank Act as amended up to 1994

"The members of the Federal Cabinet are entitled to attend the meetings of the Central Bank Council. They have no right to vote, but may propose motions. At their request, a decision shall be deferred for up to two weeks."

C) A right to censor decisions on legal grounds

A right to censor on legal grounds decisions relating to the performance of ESCB-related tasks would be incompatible with the Treaty and the Statute as such execution may not be obstructed at a national level. This is not only an expression of central bank independence but also of the more general requirement of integration of NCBs within the ESCB (see Chapter III below). Also, the statutes of several NCBs provide for a right of the Governor to censor decisions on legal grounds and submit them to political authorities for final decision. Although a Governor is not a "third party", this would be equivalent to seeking instructions from political bodies, which is incompatible with Article 107 of the Treaty.

Example: Article 43 of the Organic Law of the Banco de Portugal

"1. The Governor shall have a casting vote at the meeting which he chairs and may suspend the effectiveness of the decisions taken by the Board of Directors or by executive committees which, in his judgement, are contrary to the law, to the interests of the country or of the Bank.

²⁰ As long as the United Kingdom does not participate in monetary union, this provision would not need to be adapted. See also footnote 5.

²¹ See also pages 92 and 93, paragraph 2.2.1, of the EMI's 1995 Article 7 Report.

2. The suspension shall be notified to the Government, through the Finance Minister, and shall be considered waived, should the Cabinet not confirm it within fifteen days after its imposition.”

D) A right to participate in decision-making bodies of an NCB with a right to vote

Participation of representatives of other bodies (e.g. Government or Parliament) in decision-making bodies of an NCB with a right to vote on matters concerning the exercise by the NCB of ESCB-related tasks, even if this vote is not decisive, is incompatible with the Treaty and the Statute.

Example: Article 15 of the Act on the Bank of Finland

“The administration of the Bank and management of the affairs thereof shall be under the surveillance of the Parliamentary Supervisory Board in accordance with this Act and the Regulations confirmed by Parliament”.

Article 17 of same Act:

“It is the duty of the Parliamentary Supervisory Board to fix the base rate of the Bank and other rates of interest applied by the Bank and the limits thereon”.

Article 83 of the Parliament Act of 13th January 1919 (as amended):

“Parliament shall appoint nine members to the Parliamentary Supervisory Board ... and confirms Regulations governing their actions.”

E) A right to be consulted (ex ante) on an NCB’s decisions

The EMI’s 1995 Article 7 Report²² stated that the prohibition of external influence should not be interpreted in such an extensive way that it would preclude dialogue between NCBs on the one hand and Government and other state bodies (Parliament, etc.) on the other. The crucial issue is whether a national institution has any formal mechanism at its disposal to ensure that its views influence the final decision. An explicit statutory obligation for an NCB to consult political authorities provides for such a mechanism and is therefore incompatible with the Treaty and the Statute

Example: Article 42 of Sveriges Riksbank Act (1988 : 1385)

“Prior to the Riksbank making a monetary policy decision of major importance, the Cabinet Minister appointed by the Government, shall be consulted. If such consultation is not possible and if there is exceptional cause, the Riksbank may make such a decision without consultation.”

The WGLE has also analysed legal obligations for Governors to appear before political authorities to provide information about an NCB’s policies.

Example: Article 10.2 of the Law of Autonomy of the Bank of Spain

²² Pages 92 and 93, paragraph 2.2.1

“The Bank shall regularly inform parliament and the government of its objectives and the implementation of monetary policy, and must report, as relevant, on the obstacles to the maintenance of price stability it encounters. To this end, the governor of the Bank may be asked to appear, in accordance with parliamentary regulations, before any Congress or Senate committee or joint committee of both chambers, or be asked to attend for this purpose cabinet meetings or meetings of its Commission for Economic Affairs. However, neither the government nor any other public authority may give instructions to the Bank regarding either the objectives or the implementation of monetary policy.”

Dialogue between NCBs and their respective political authorities, which may also be based on statutory obligations to provide information and exchange views, is not incompatible with the Treaty and the Statute, provided that:

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

The two latter requirements seem to plead for a certain degree of a harmonised approach across NCBs/Governors, and it may therefore be felt appropriate to develop at some point in time a set of basic guidelines in this field.

3. Personal independence

The requirement of personal independence consists of the following features.

A. Security of tenure for Governors:

- 1) A minimum statutory term of office for a Governor of five years, as required by Article 14.2 of the Statute.

Article 14.2 of the Statute states that “statutes of the national central banks shall, in particular, provide that the term of office of a Governor of a national central bank shall be no less than five years.” This means that statutes with shorter terms of office require adaptation. A large majority of WGLE members feel that statutes, which do not explicitly provide for a minimum term of office of five years, do not require adaptation if the term of office is indefinite and the grounds for dismissal are in line with those of the Statute (see point 2 below). The WGLE has also considered the situation of appointments near retirement age. The majority of its members arrived at the conclusion that the purposes of personal independence are met in such situations and, thus, retirement age is irrelevant for compliance with the requirement of security in the tenure of office.

According to some members of the WGLE, retirement age is only irrelevant in the case of a reappointment or the appointment of a person who is already a member of a decision-making body of that NCB whose members are protected by Article 14.2 of the Statute.

Example 1: Article 29 of the statutes of the Bank of Greece

“The Governor and the Deputy Governors (.....) shall be appointed (.....), by an Act of the Cabinet, for a period of four years on proposal of the Board of Directors of the Bank and shall devote their whole time to the affairs of the Bank, except in cases where, by law, they are on the Board of Directors of legal entities of public law, or of State undertakings, or of State advisory bodies. (.....)

Example 2: Article 7(3) Bundesbank Act:

“The President, the Vice-President and the other members of the Directorate are nominated by the Federal Cabinet and appointed by the President of the Federal Republic. Before making such nominations, the Federal Cabinet shall consult the Central Bank Council. Member of the Directorate are appointed for eight years, or in exceptional cases for a shorter term of office, but not less than two years. Appointments and retirements shall be published in the Federal Gazette.”

- 2) Grounds for the dismissal of a Governor which are in conformity with those laid down in Article 14.2 of the Statute

Article 14.2 of the Statute sets the general principle by establishing as the sole grounds for dismissal that a Governor no longer fulfils the conditions required for the performance of his/her duties or that he/she has been guilty of serious misconduct. The purpose of this requirement is to avoid the dismissal of a Governor being at the discretion of the authorities involved in his/her appointment, particularly Government or Parliament. As statutes of several NCB's detail grounds for dismissal, the question arises which grounds may be regarded as an elaboration within the limits of Article 14.2 and which go beyond the scope of this Article. A large majority of the WGLE's members is of the opinion that the literal text of the Statute's grounds for dismissal should be incorporated into the statutes of NCBs (for reasons of legal clarity) or, alternatively, that any reference to grounds of dismissal should be deleted in statutes of NCBs (as Article 14.2 has in any case direct effect), since it is not left to the discretion of national legislators to define the scope of Article 14.2. This also means that statutes which do not presently contain references to grounds of dismissal do not require adaptation. Two members of the WGLE express reservations on this conclusion. They point out that Article 14.2 of the Statute does not specify the “conditions required for the performance” of a Governor's duties, that such conditions in their view may vary from country to country and that this may thus also be reflected in the various statutes of NCBs.

Example: Article 12 (3) of the Act of 20th May 1983 on the establishment of the Institut Monétaire Luxembourgeois
“The Government may propose to the Grand-Duke the dismissal of the members of the Management if there is a fundamental disagreement between the Government and the Management over the policy of the Institut and the performance of its tasks. In this event, the proposal of dismissal shall relate to the Management collectively.
Likewise, the Government may propose to the Grand-Duke the dismissal of a member of the Management who becomes permanently unable to perform his duties. Before transmitting a proposal to the Grand-Duke, the Government shall consult the Council of the Institut.”

B. Security of tenure for other members of decision-making bodies

Personal independence could be jeopardised if the same rules for security of tenure of office of the Governors did not apply to other members of the decision-making bodies of NCBs involved in the performance of ESCB-related tasks²³. A requirement to confer comparable security of tenure provisions for such other members follows from Article 14.2 of the Statute, which does not restrict the security of tenure of office to Governors, and Article 107 of the Treaty and 7 of the Statute, which refer to “any members of decision-making bodies of NCBs”, rather than “Governors”, particularly where a Governor is “primus inter pares” between colleagues with equivalent voting rights or where such other members may have to deputise for the Governor within the Governing Council.²⁴ Some members of the WGLE are, however, of the opinion that this general principle would not exclude differentiation in terms of office and in grounds for dismissal in those cases where some members of decision-making bodies and/or the body itself are less involved in the performance of ESCB-related tasks than other members and/or bodies or are not involved in all ESCB-related tasks.

Second Schedule to the Bank of England Act 1946²⁵

**“1. The term of office of the Governor and of the Deputy Governor shall be five years.
2. The term of office of the directors shall be four years, and four of them shall retire each year on the anniversary of the appointed day.”**

C. Avoidance of conflicts of interests which may hamper the required personal independence.

The prohibition of external influence entails that no conflicts of interests may arise between the fulfilment of duties vis-à-vis an NCB (and, for Governors, additionally vis-à-vis the ECB) and any other functions which members of decision-making bodies involved in the performance of ESCB-related tasks may have and which may jeopardise their personal independence. As a matter of principle, membership of a decision-making body involved in the performance of ESCB-related tasks

²³ As stated in the EMI’s 1995 Article 7 Report (page 93, paragraph 2.2.2)

²⁴ Other members of decision-making bodies of NCBs will, however, not have the right of appeal to the European Court of Justice, which Article 14.2 of the Statute grants to Governors.

²⁵ As long as the United Kingdom does not participate in monetary union, this provision would not need to be adopted. See also footnote 5.

is incompatible with the interests of third parties in such bodies. The latter might be implied by the exercise of certain functions: for example, simultaneous membership of an NCB's decision-making body involved in the performance of ESCB-related tasks and of a Board of Directors in the financial industry would be incompatible with the principle of personal independence, whereas there would be no problem, for instance, with a part-time professorship.²⁶

Example 1: Article 24 Organic Law of the National Bank of Belgium of 24th August 1939

“Two regents shall be chosen on the proposal of the most representative labour organisations. Three regents shall be chosen on the proposal of the most representative industry, commerce and agriculture organisations.”

Article 5 of the Royal Order of 5th October 1948:

“When an appointment has to be made upon proposal of the most representative labour organisations and on the proposal of the most representative organisations of industry, commerce and agriculture, the competent Minister, at the request of the Minister of Finance, invites each of these organisations to submit a list with double number of candidates.”

Example 2: Article 22 of the Oesterreichische Nationalbank Act 1984 (as of September 1990)

“(3) Only persons holding Austrian citizenship who are not debarred from voting in elections for the National Council (Nationalrat) may be members of the General Council. The members of the General Council shall be persons prominent in some branch of economic activity or jurists or economists. They shall include representatives of:

- 1. credit institutions;**
- 2. industry;**
- 3. trade and small businesses;**
- 4. agriculture; and**
- 5. salaried employees and wage-earners.**

(4) No person who is in the active service of the Republic or of a Land or who is a member of the Nationalrat, the Federal Council (Bundesrat), a Parliament of a Land (Landtag), the Federal Government or the government of a Land may be a member of the General Council. The restriction with regard to persons in the active service of the Republic shall not apply to university professors in law and economics. Not more than four members of the General Council may in their main occupation be members of the management of banks; such persons may not be President or Vice President of the Bank.”²⁷

²⁶ Sveriges Riksbank is of the opinion that members of Parliament are not to be regarded as representatives of Parliament and that membership of Parliament is therefore not necessarily incompatible with membership of the Bank's Governing Board.

²⁷ In order to avoid confusion with regard to future adaptations of the Statute of the Oesterreichische Nationalbank, it should be noted that it is not intended to change the wording of Article 22 thereof, but to adapt the function of the General Council in order to conform with the Treaty upon the establishment of the ESCB. The General Council will not be involved in the performance of ESCB-related tasks in Stage Three and will therefore cease to be a decision-making body in this respect. Therefore, no conflict of interests can arise that jeopardises the participation of the Oesterreichische Nationalbank in the ESCB. Hence, leaving the wording of Article 22 unchanged should not be incompatible with the Treaty and the Statute.

4. Functional independence

It was already agreed in the EMI's 1995 Article 7 Report that NCBs in Stage Three operate in a framework of which the objectives are determined by Article 2 of the Statute. The core element of this Article is the primacy of "maintaining price stability. This requires appropriate adaptation of those statutes of NCBs which do not unambiguously reflect such primary objective."²⁸ Several members of the WGLE point out that a "national translation" of the ESCB's objective is not enough. In their view, statutes of NCBs should also contain a clear recognition of the fact that NCBs will be an integral part of the ESCB in Stage Three.²⁹ Other members of the WGLE are, however, of the opinion - on the basis of the fact that harmonisation of statutes is not required - that the removal of inconsistencies between statutes of NCBs and the Treaty and the Statute suffices. Several members also feel that there is no clear-cut distinction between functional independence and other requirements ensuring integration of NCBs in the ESCB (see also Chapter IV below).

Example 1: Article 1 Act n. 116 on Danmarks Nationalbank of 7th April 1936

"Danmarks Nationalbank shall have the object to maintain a safe and secure currency system in this country, and to facilitate and regulate the traffic in money and the extension of credit."³⁰

Example 2: Article 1 Act 93-980 of the Statute of the Banque de France of 4th August 1993³¹

The Banque de France shall formulate and implement monetary policy with the aim of ensuring price stability. It shall carry out these duties within the framework of the Government's overall economic policy.

Example 3: Article 6.1 of the Irish Central Bank Act 1942 Section 6.-(1)

"... the Bank shall have the general function and duty of taking (within the limit of the powers for the time being vested in it by law) such steps as the Board may from time to time deem appropriate and advisable towards safeguarding the integrity of the currency and ensuring that, in what pertains to the control of credit, the constant and predominant aim shall be the welfare of the people as a whole."

Example 4: Article 1 of the Statute of the Banca d'Italia

"[The Bank of Italy] shall carry out banking functions, may issue bearer instruments and shall, as the sole issuing institution, issue banknotes within the limits and according to the rules laid down by law."³²

²⁸ See page 93, paragraph 2.2.3, of the EMI's 1995 Article 7 Report.

²⁹ For example, draft statutes of the National Bank of Belgium contain, where appropriate, clear references to its role as part of the ESCB. See CON/96/10.

³⁰ As long as Denmark does not participate in monetary union, this Article is not relevant in this context. See also footnote no. 5.

³¹ The statute of the Banque de France guarantees the independence of the Banque de France through various provisions for Stage Two (which is also confirmed by the French Constitutional Court in a decision of 3rd August 1993), but the wording of the statutory objective would need to be adjusted to the new situation in Stage Three. The Banque de France considers this as a matter relating to integration rather than central bank independence.

In addition, it was also mentioned in the EMI's 1995 Article 7 Report that, under Article 14.4 of the Statute, an NCB may perform tasks and functions other than those related to the ESCB, unless these are deemed, by the Governing Council of the ECB, to interfere with the objectives and tasks of the ESCB. This should also be regarded as a feature of functional independence protecting the integrity of the system.

5. Financial independence

If an NCB is fully independent from an institutional and functional point of view, but at the same time unable to autonomously avail itself of the appropriate economic means to fulfil its mandate, its overall independence would nevertheless be undermined. It is appreciated that the owner or shareholder of an NCB ought to have a certain power to control the finances of the NCB, since the alternative would entail the reverse situation of an owner/shareholder becoming dependent on the entity in which its capital is invested. The main question is whether third parties, as owners of all or a controlling portion of an NCB (e.g. government, parliament, private shareholders) have an ex ante possibility directly or indirectly and at their own discretion, to exercise influence on an NCB's means rather than an ex post possibility of a review thereof. Whereas an ex post review may be regarded as reflecting an NCB's accountability towards its owners, ex ante influence may infringe upon an NCB's independence if such influence could impede the proper performance of ESCB-related tasks. This has to be assessed on a case-by-case basis, analysing the degree of dependence that might exist for ESCB-related tasks. The WGLE agrees that NCBs should be in the position to avail themselves of the appropriate means to ensure that its ESCB-related tasks can be properly fulfilled. In those countries where government and/or parliament are in the position, directly or indirectly, to exercise influence on the determination of an NCB's budget or the distribution of profit, the relevant statutory provisions should contain a safeguard clause that this may not impede the proper performance of ESCB-related tasks.

Example: Article 4.2 of the Law of Autonomy of the Banco de España

“The Bank’s draft budget for operating expenses and investments, once approved by its Governing Council according to article 21.1g), shall be submitted to the Government, which will send it to the Spanish parliament for approval. The Bank’s budget shall be prospective in nature, and shall not be consolidated with other state public sector budgets.”

³² Article 47 of the Italian Constitution states that “The Republic encourages and protects the savings of every kind, and disciplines, coordinates and controls credit activities”. This provision is deemed to imply the objective of monetary stability in Banca d’Italia’s performance of monetary policy.

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

The full participation of the NCBS in the ESCB necessitates measures to be taken in addition to those designed to assure independence. In particular, such measures may be necessary to enable such NCBS to execute tasks as members of the ESCB and in accordance with decisions by the ECB.³³ Since national peculiarities may continue to exist and harmonisation of statutes of NCBS is not required³⁴, it does not seem appropriate for the EMI to try to develop a common understanding with regard to the preferred form and content of statutes of NCBS or to play a coordinating role. This would not prevent individual NCBS coordinating their efforts in this field and using the EMI as a forum to exchange information nor prevent the EMI Council deciding on a more pro-active role for the EMI at a later stage.

As far as the need for adaptation is concerned, the main areas seem to be those where statutory provisions may form an obstacle for an NCBS to comply with the requirements of the ESCB or for a Governor to fulfil his/her duties as a member of the Governing Council of the ECB or where statutory provisions do not respect the prerogatives of the ECB. Several members of the WGLE are of the opinion that statutes of NCBS should contain a clear recognition of the fact that NCBS will be an integral part of the ESCB in Stage Three. Other members feel that the removal of inconsistencies between statutes of NCBS and the Treaty and the Statute suffices. In addition, there should be no statutory obstacles for a Governor in his/her capacity as member of a decision-making body of a Community organ to take whatever stance in the decision-making process within the ECB he/she deems fit. Also, some NCBS's statutes provide for a regime for the issuance of banknotes which will differ from the situation arising from the application of Articles 105a(1) of the Treaty and 16 of the Statute, either by establishing competences or by creating compulsory steps in the process of issuing banknotes. Avoidance of inconsistencies with the Treaty and the Statute would require appropriate amendments.

A description given by the members of the WGLE of envisaged adaptations of the statutes of their NCBS shows that such adaptations are in almost all NCBS a point of attention. Recognising that legislative processes tend to have a long lead-time, a considerable number of NCBS have initiated discussions with their respective legislative authorities on adaptation of their statutes. In the majority of cases, the attention focuses on obvious inconsistencies between statutes and the Treaty/Statute, whilst it is acknowledged that the elaboration of provisions of the Treaty/Statute in legal acts of the ECB may have an impact on statutes as well and may require further adaptation once the content of these legal acts has become clear. There are several ways under consideration to construe adaptations.

³³ See also page 94, Chapter 3, of the EMI's 1995 Article 7 Report.

³⁴ See also Chapter I.2 of this memorandum and page 89, paragraph 1.2.2, of the EMI's 1995 Article 7 Report.

One NCB - recognising that its tasks in Stage Three will to a large extent be governed by the Treaty, Statute and ECB rules - does not exclude that its statutes will be reduced to provisions of a mere organisational nature. Several NCBs intend to propose, or already proposed, to their Ministries of Finance to adhere for reasons of legal clarity as much as possible to the text of the Treaty/Statute which could also decrease the need for further adaptations for which not much time will be left just in advance of the starting date of Stage Three. A third group of NCBs is in favour of keeping adaptations of statutes limited to those which are explicitly required under the Treaty and the Statute. The WGLE will continue its efforts to develop, in a similar manner as with regard to central bank independence, a list of concrete examples where adaptation may be deemed appropriate and which may thus serve as guidance for NCBs and their legislative authorities.

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