EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 25 March 2010

on independence, confidentiality and the prohibition of monetary financing

(CON/2010/25)

Introduction and legal basis

On 25 February 2010 the European Central Bank (ECB) received a request from the Bulgarian Minister of Finance for an opinion on a draft law amending the Law on Българска народна банка (Bulgarian National Bank) [1] (hereinafter the 'Law on BNB'), the Law on the prevention and disclosure of conflicts of interest[2] (hereinafter the 'Law on conflicts of interest') and the Administrative Procedure Code[3] (hereinafter the 'Code') (hereinafter the 'draft law').

The ECB's competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union and the third indent of Article 2(1) of Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions[4], as the draft law relates to Българска народна банка **(**Bulgarian National Bank) (BNB). In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

1. Purpose of the draft law

The main purpose of the draft law is to address the observations made in the ECB's Convergence Report of May 2008[5] on legal convergence, the European Commission's Convergence Report of 2008[6] and Opinions CON/2008/73 and CON/2009/13[7]. In particular, the draft law:

(a) aligns the Law on BNB with the institutional and personal independence requirements in Article 130 of the Treaty, and Article 7 and Article 14.2 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB'), with the

1 Published in *Darjaven vestnik* No 46, 10.6.1997.
2 Published in *Darjaven vestnik* No 94, 31.10.2008 (in force as of 1.1.2009).
3 Published in *Darjaven vestnik* No 30, 11.4.2006.
4 OJ L 189, 3.7.1998, p. 42.
5 See the ECB's Convergence Report, May 2008, pp. 229-231.
6 COM(2008) 248 final, available on the Commission's website at www.ec.europa.eu.
7 All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

confidentiality requirement in Article 37 of the Statute of the ESCB and with the prohibition of monetary financing in Article 123 of the Treaty;

(b) updates the references in the Law on BNB to reflect the wording of the Treaty;

(c) brings the Law on conflicts of interest into line with the requirements for dismissal of members of BNB's decision-making bodies, as set out in Article 14.2 of the Statute of the ESCB.

2. General observations

2.1 The ECB welcomes the Bulgarian authorities' efforts to achieve the required level of legal convergence by following the recommendations in the ECB's Convergence Report of May 2008. Bulgaria is a Member State with a derogation as referred to in Article 139 of the Treaty and must therefore comply with Article 131 of the Treaty[8]. In the Convergence Report of May 2008, the ECB identified incompatibilities and inconsistencies between Bulgarian legislation, on the one hand, and the Treaty and the Statute of the ESCB, on the other hand. The draft law relates to these incompatibilities and inconsistencies in the areas of central bank independence, confidentiality and the prohibition of monetary financing.

2.2 The draft law does not address the other identified incompatibilities relating to monetary policy, the collection of statistics, official foreign reserve management, payment systems, the issue of banknotes and coins, the appointment of independent auditors, financial reporting, exchange rate policy and international cooperation. In this respect, the Law on BNB requires further adaptation to ensure BNB's full integration into the Eurosystem.

3. Specific observations

3.1 *Institutional independence*

The proposed amendment to Article 44 of the Law on BNB brings this provision into line with Article 130 of the Treaty and Article 7 of the Statute of the ESCB regarding the principle of institutional independence.

8 See the ECB's Convergence Report, May 2008, p. 26: 'To comply with Article [131] of the Treaty, national legislation had to be adjusted to ensure its compatibility by the date of establishment of the ESCB (as regards Sweden) and by 1 May 2004 or 1 January 2007 (as regards the Member States which joined the EU on these dates). Nevertheless, statutory requirements relating to the full legal integration of an NCB into the Eurosystem need only enter into force at the moment that full integration becomes effective, i.e. the date on which the Member State with a derogation adopts the euro'.

3.2 *Personal independence*

Grounds for dismissal of Governing Council members

The proposed amendment to Article 14(1) of the Law on BNB on the grounds for dismissal of a Governing Council member[9] fully aligns this Article with Article 14.2 of the Statute of the ESCB. The ECB also welcomes proposed Article 3(2) of the Law on conflict of interests, since it removes the grounds for dismissal of BNB's Governing Council members that are inconsistent with the grounds for removal set out in Article 14.2 of the Statute of the ESCB.

Minimum term of office for Governing Council members

The proposed amendment to Article 14(2) of the Law on BNB removes the incompatibility with the Statute of the ESCB regarding the minimum term of office for the members of BNB's Governing Council and is in line with Article 14.2 of the Statute of the ESCB.

Right of judicial review

Proposed Article 14(3) of the Law on BNB grants jurisdiction to the Supreme Administrative Court (SAC) over decisions to dismiss any Governing Council member, including BNB's Governor. The ECB welcomes this proposed amendment to the extent that it relates to the Governing Council members other than the Governor[10]. Furthermore, the ECB fully supports the draft law's amendments to the Code, which ensure the SAC's jurisdiction to decide on dismissal issues related to those BNB Governing Council members. Concerning the Governor, the jurisdiction of the SAC under proposed Article 14(3) of the Law on BNB should be without prejudice to the jurisdiction of the Court of Justice of the European Union under Article 14.2 of the Statute of the ESCB[11]. In this context, the ECB notes that Article 14(3) of the Law on BNB, which will become Article 14(4) under the draft law, confirms the competence of the Court of Justice of the European Union with regard to dismissal issues related to the Governor. In addition, Article 14(3) of the Law on BNB constitutes an exception from the proposed Article 14(3) of the draft law, exempting the Governor from the scope of the latter. Therefore, proposed Article 14(3) of the draft law should clarify this point.

3.3 *Confidentiality*

The draft law amends Articles 4(2), 13(1) and 23(2) of the Law on BNB and introduces the requirement of non-disclosure for information that constitutes professional secrets for BNB, its staff

9 In particular, this draft law provision states: 'The competent authority under Article 12 may only remove a member of the Governing Council from office if they no longer fulfil the conditions required for the performance of their duties or if they have been found guilty of serious misconduct'.

10 See the ECB's Convergence Report, May 2008, p. 20: 'National legislation should also provide for a right of review by the national courts of a decision to dismiss any other member of the decision-making bodies of the NCB involved in the performance of ESCB-related tasks. This right can either be a matter of general law or can take the form of a specific provision. Even though it may be said that this right is available under the general law, for legal certainty reasons it could be advisable to provide specifically for such a right of review'.

11 The current Article 14(3) of the Law on BNB will become Article 14(4) of the Law on BNB, should the draft law be adopted.

and the members of its Governing Council, which is in line with Article 37 of the Statute of the ESCB.

However, the proposed amendment to Article 4(2) of the Law on BNB does not remove the exception, in the cases provided for by the Law on the protection of classified information[12], from the obligation not to disclose banking, professional or commercial secret information. As stated in the Convergence Report of May 2008[13], and in view of the proposed amendments to Articles 4(2), 13(1) and 23(2) of the Law on BNB, the ECB assumes that the exception in Article 4(2) in conjunction with Articles 13(1) and 23(2) of the Law on BNB is without prejudice to the confidentiality obligations vis-à-vis the European System of Central Banks and the ECB. The ECB recommends clarifying this explicitly in this provision.

3.4 *Monetary financing*

The ECB welcomes the proposed amendment to Article 45(1) of the Law on BNB to remove the inconsistency with Article 123(1) of the Treaty regarding the range of public sector entities covered by the prohibition of monetary financing. While the range of public sector entities is identical with the list of such entities enumerated in Article 123 of the Treaty, the ECB suggests slightly redrafting the proposed Article 45(1) to ensure that it accurately reflects the prohibition of monetary financing to cover both (a) lending 'to' the range of public sector entities, and (b) purchases of debt instruments 'from' the range of public sector entities.

The prohibition of monetary financing prohibits the direct purchase of public sector debt, but such purchases in the secondary market are allowed, in principle, as long as such secondary market purchases are not used to circumvent the objective of Article 123 of the Treaty. For this reason the word 'direct' should be inserted in the amendment to Article 45(1) of the Law on BNB.

Finally, acknowledging the particularities arising from the currency-board regime, i.e. the prohibition on BNB extending credit to credit institutions other than in the context of emergency liquidity operations, the ECB reiterates[14] the need to bring Article 45(2) of the Law on BNB into line with Article 123(2) of the Treaty. Such alignment would certainly be mandatory on the introduction of the euro in Bulgaria.

This opinion will be published on the ECB's website.

Done at Frankfurt am Main, 25 March 2010. [signed]

The President of the ECB

Jean-Claude TRICHET

12 Published in *Darjaven vestnik* No 45, 30.4.2002.

13 See the ECB's Convergence Report, May 2008, p. 230.

14 See the ECB's Convergence Report, May 2008, p. 230.