EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 2 August 2001

at the request of the German Ministry of Finance on a draft Seventh Law amending the Deutsche Bundesbank Act

(CON/2001/17)

1. On 20 June 2001, the European Central Bank (ECB) received a request from the German Ministry of Finance for an opinion on a draft Seventh Law amending the Bundesbank Act (hereinafter referred to as the 'draft Act').

2. The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community (hereinafter referred to as the 'Treaty') 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[1]. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, this opinion has been adopted by the Governing Council of the ECB.

3. The express intention of the draft Act is mainly the design of the structure of the Deutsche Bundesbank in such a way that it is better suited to the current and future requirements of the European System of Central Banks (ESCB). Therefore, the draft Act is intended to strengthen and centralise the decision-making structure and management of the Deutsche Bundesbank and to strengthen the position of its President. This is justified as a consequence of the start of Stage III of economic and monetary union on 1 January 1999 and the transfer of monetary policy and exchange rate policy decision-making powers to the Eurosystem. In this respect, the draft Act provides for the following amendments: (i) the abolition of the Central Bank Council (*Zentralbankrat*), the Directorate (*Direktorium*) and the Executive Boards of the main offices of the Deutsche Bundesbank (*Vorstände der Landeszentralbanken*) including their independent decision-making powers (known as reserved spheres of responsibility) and the appointment of a Bundesbank Executive Board (*Vorstand*) (hereinafter referred to as the 'Board') consisting of the President, the Vice-President and four other members; and (ii) the repeal of the right of members of the Federal Government to attend the meetings of the Central Bank Council and their right to propose motions.

---

1 OJ L 189, 3.7.1998, p. 42.

4. The ECB very much welcomes these amendments as they enhance the ability of the Deutsche Bundesbank to act efficiently as an integral part of the Eurosystem and of its President, in particular, as a member of the Governing Council and the General Council.

5. The draft Act furthermore clarifies for the first time that the tasks of holding and managing the foreign reserves of the Federal Republic of Germany, as well as contributing to the stability of payment and clearing systems, fall to the Deutsche Bundesbank. The draft Act also stipulates that the Deutsche Bundesbank's transactions with credit institutions will no longer be limited to counterparties that are established in the Federal Republic of Germany. The ECB takes note of these amendments and welcomes them in so far as the powers of the Deutsche Bundesbank are clarified and the wording of the Bundesbank Act has been brought further in line with the Statute of the European System of Central Banks and of the European Central Bank (hereinafter referred to as the 'Statute'). In addition, regarding the Deutsche Bundesbank's transactions with public authorities, the provision referring to the involvement of the Deutsche Bundesbank in the issuance of federal debt securities (paragraph 2 of Section 20 of the Bundesbank Act) has been repealed. The ECB understands that this repeal does not impair the competence of the Deutsche Bundesbank to act as a fiscal agent of the Government.

6. The ECB notes that the expanded definition of the functions of the Deutsche Bundesbank under the second sentence of Section 3 of the draft Act does not include the responsibilities of the Deutsche Bundesbank with regard to the pursuance of financial stability. The ECB considers that, in view of the express intention of the draft Act of optimising the central banking functions of the Deutsche Bundesbank in the Eurosystem context, the draft Act is the appropriate legal instrument in which to clarify that the Deutsche Bundesbank has the *responsibility for contributing to the overall stability of the financial system* as a whole, as a separate function from hands-on supervision and financial regulation. This clarification would, first, confirm the concrete role played by the Deutsche Bundesbank in the institutional framework for financial stability in the Federal Republic of Germany. Secondly, the formal attribution of such responsibility to the Deutsche Bundesbank would support the role of the Eurosystem in monitoring the risks to financial stability in the euro area. In this context, it is recalled that, in accordance with Article 105(5) of the Treaty, the Eurosystem is entrusted with the task of contributing to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system. Thirdly, considering the envisaged integration of supervision of financial intermediaries in the Federal Republic of Germany, it would contribute to a smooth interaction between central banking and supervisory functions.

7. The ECB understands that the definition of the responsibilities of the Deutsche Bundesbank with regard to prudential supervision will be specifically dealt with in the German Government's forthcoming proposal for legislation to set up integrated supervision of financial intermediaries. Without prejudice to the opinion which will be given in that context, the ECB

suggests that assignation to the Deutsche Bundesbank in the draft Act of the statutory responsibility *of contributing to the prudential regulation and supervision of financial intermediaries* might be considered. This would follow from the clarification that the Deutsche Bundesbank has a clear mandate regarding achievement of financial stability as mentioned above. With regard to the more specific operational involvement of the Deutsche Bundesbank in prudential supervision, the ECB will present its views once it has been consulted on the German Government's proposal.

8. The draft Act strengthens the position of the President of the Deutsche Bundesbank by empowering him to nominate, with the exception of the Vice-President, the four other members of the Board, in addition to his right to appoint civil servants within the Deutsche Bundesbank. In addition, he is granted a right of veto with regard to the annual accounts and, particularly importantly, the standard costs account and the investment plan.

9. While realising that the Treaty and the Statute are silent on the organisational structure of the decision-making bodies of the national central banks, the ECB wishes to point out that, in the case that a decision is made in favour of a collegiate body, a right of veto given to the President, who is also a Member of the Board, with regard to the standard cost account, the investment plan and the annual accounts could, in particular, be regarded as being in conflict with the collegiate nature of the Board. By providing that the Board is to take its decisions by simple majority voting, the draft Act establishes the principle of collegiate responsibility. This principle is based on equal participation by the Board members in the adoption of decisions, from which it follows in particular that decisions are adopted on the basis of collective deliberations and that all members of the Board bear collective responsibility at a political level for adopted decisions.

10. Finally, it is particularly significant that the draft Act introduces for the first time compulsory preparation of a budget including a cost estimate (standard cost account) and an investment estimate (investment plan) for the Deutsche Bundesbank (following the practice in the past), specific veto rights of its President (see Section 7 of the draft Act) and the right of the German Federal Parliament to propose recommendations to improve the efficiency of the Deutsche Bundesbank. The details of the new regime are as follows: (i) the Board of the Deutsche Bundesbank prepares the annual accounts; (ii) in order to support its management and administration, the Deutsche Bundesbank prepares a standard cost account; (iii) for each financial year, the Deutsche Bundesbank draws up a standard cost account and an investment plan before the beginning of each financial year and a comparative analysis of the budgeted figures and the actual costs and investment (hereinafter referred to as the "comparative analysis") at the end of each financial year. The comparative analysis is to be reviewed separately by the auditors; (iv) the annual accounts, the standard cost account, the investment plan, the comparative analysis and the reports of the auditors are to be forwarded to the Federal Ministry of Finance and the Federal Court of Auditors; (v) the German Federal Parliament will be provided with the annual accounts, the comparative analysis and the reports of the auditors;

(vi) the Federal Court of Auditors is to report its findings to the German Federal Parliament; and finally (vii) the German Federal Parliament may use the report of the auditors and the report of the Federal Court of Auditors as a basis for recommendations to improve the efficiency of the Deutsche Bundesbank.

11. The ECB is concerned that the new Bundesbank Act will carry risks for the current high level of independence of the Deutsche Bundesbank. The ECB notes, however, that the draft Act, which has been submitted to the ECB for consultation, differs from the draft published on the website of the Federal Ministry of Finance in April 2001. This previous version provided that the German Federal Parliament could not only adopt recommendations concerning expenditure of the Deutsche Bundesbank but could also decide on the discharge of the Board of the Deutsche Bundesbank on the basis of the report by the auditors and the report of the Federal Court of Auditors. The ECB is pleased to note that the draft Act submitted to the ECB no longer foresees such a discharge procedure. Article 108 of the Treaty requires that the Member States and, in particular, the Governments of the Member States, undertake to respect the independence of the national central banks and not seek to influence the members of their decision-making bodies in the performance of their ESCB-related tasks. The ECB considers that such a discharge procedure or similar procedures would lead to an increase in external political influence, enabling pressure to be exercised over the members of the Board and, in particular, the President. This would be incompatible with the independence of decision-making bodies required by Article 108 of the Treaty. The draft Act submitted at this stage assigns a right to the German Federal Parliament to adopt recommendations. This formulation is justified in the Explanatory Memorandum on the grounds that it is modelled on relevant provisions under Community Law. According to Article 248 of the Treaty, the European Court of Auditors reports to the European Parliament. However, an explicit statutory right of the European Parliament to issue recommendations concerning possible improvements in the efficiency of the ECB is clearly not foreseen. Furthermore, the scope of the recommendations that could be adopted by the German Federal Parliament is particularly wide, since their objective is ‘an improvement in the efficiency of the Deutsche Bundesbank’ in general and, therefore, could also cover Eurosystem-related activities, for instance the implementation of monetary policy decisions. Although recommendations adopted by the German Federal Parliament are by definition not legally binding on the Deutsche Bundesbank, it will be virtually impossible in practice for the Deutsche Bundesbank to ignore them, given the political pressure which would be exercised over the Board. Such external political pressure would also affect the President's position as a member of the Governing Council of the ECB and, as a consequence, the independence of a decision-making body of the ECB. Therefore, the right of the German Federal Parliament as foreseen in the present draft Act to adopt recommendations to improve the efficiency of the Deutsche Bundesbank is incompatible with the independence of the Deutsche Bundesbank and the ECB. Moreover, such a provision will send negative and incorrect signals. Traditionally, the Deutsche Bundesbank has always been a model of central

bank independence. In preparation for the Maastricht Treaty, Germany always took a particularly strong position as regards extensive central bank independence and insisted that the new ESCB and the ECB enjoy the same degree of independence as the Deutsche Bundesbank. If the amendments are now adopted as proposed, this might be interpreted by the financial markets and the general public as a fundamental change in approach. The simple reference to Article 108 of the Treaty in the relevant provision of the draft Act, without further clarification, does not allow for any other conclusion.

Done at Frankfurt am Main on 2 August 2001.

The President of the ECB

[signed]

Willem F. DUISENBERG