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EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 21 February 2008

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

(CON/2008/9)

Introduction and legal basis

On 9 November 2007 the European Central Bank (ECB) received a request from the German Federal Ministry of Finance (hereinafter the 'Ministry of Finance') for an opinion on a draft law on the reorganisation and modernisation of federal civil service law (hereinafter the 'draft law').

The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community 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], as the draft law relates to the Deutsche Bundesbank. 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

Article 12 of the draft law amends § 31 of the Law on the Deutsche Bundesbank, which concerns the legal relationships between the Deutsche Bundesbank and its civil servants, employees and workers. The current § 31(4) and (6) of the Law on the Deutsche Bundesbank provides, as an exception to provisions on Federal civil servants which generally apply to the civil servants of the Bundesbank, that the Executive Board of the Deutsche Bundesbank (hereinafter the 'Executive Board') may regulate autonomously certain features of these relationships concerning, *inter alia*, the careers of Bundesbank staff by adopting Staff Regulations (*Personalstatut*) and other regulations (*Laufbahn-*, *Ausbildungs- und Prüfungsordnungen*). These regulations require the approval of the Federal Government (hereinafter the 'Government'), or, depending on the aspect being regulated, the agreement of the Ministry of the Interior. Under the amended § 31(4) and (6) of the Law on the Deutsche Bundesbank, the Government will be authorised to regulate the abovementioned legal relationships either by adopting regulations itself, or by delegating the power to adopt regulations to the Executive Board. In the event that the Government

1 OJ L 189, 3.7.1998, p. 42.

delegates this power, the regulations adopted by the Executive Board will require the agreement of the Ministry of the Interior alone or in agreement with the Ministry of Finance, as the case may be.

The difference between the current legislation and the proposed amendments is that under the current § 31(4) and (6) of the Law on the Deutsche Bundesbank, upon the approval of the Government, the Executive Board can itself regulate certain matters concerning the Deutsche Bundesbank's staff, and the Government is bound by its previous decisions to approve such regulations. The proposed amendments will allow the Government to decide whether to delegate its regulatory power to the Executive Board and, if it does, it will be possible for it to withdraw the delegation at any moment. This implies that the Government could indirectly revoke an approval it has given in the past.

Apart from the abovementioned amendments, the draft law also provides that the Bundesbank's Staff Regulations currently in force will cease to apply after a transitional period, at the latest on 31 December 2008.

2. General observations

2.1 The ECB welcomes this consultation request by the Ministry of Finance on the amendments to the Law on the Deutsche Bundesbank. As a matter of principle, any draft legislative provisions amending the statute of a national central bank (NCB) should be the subject of a formal consultation of the ECB under the third indent of Article 2(1) of Council Decision 98/415/EC. This consultation obligation also applies to amendments to special public sector employment regulations which only apply to NCB staff.

2.2 Such regulations must not impair the ability of an NCB to employ and retain the qualified staff necessary for the performance of the tasks conferred upon it by the Treaty, the Statute of the European System of Central Banks (hereinafter the 'ESCB Statute') and national legislation in an independent manner. The ECB has noted that Member States may not put their NCBs in a position where they have insufficient financial resources to carry out their ESCB- or Eurosystem-related tasks[2]. Similarly, an NCB may not be put into a position where it has limited or no control over its staff, or where a government of a Member State seeks to influence it in the performance of its tasks, as has been stressed in various opinions of the ECB in recent years[3].

2.3 In this context, the ECB notes that the amendments to the Law on the Deutsche Bundesbank, according to the draft law's explanatory memorandum, are of a technical nature and are not intended to change the substance of the provisions applicable to the staff of the Deutsche Bundesbank. Furthermore, the explanatory memorandum stresses that the Government intends to make full use of the power to delegate to the Executive Board its power to regulate the

2 See ECB Convergence Report 2007, p. 19.

3 See ECB Convergence Report 2007, p. 20, footnote 7, referring, *inter alia*, to ECB Opinion CON/2004/1 of 20 January 2004 at the request of the Economic Committee of the Finnish Parliament on a draft government proposal to amend the Suomen Pankki Act and other related acts, which concerned the reduction of primary capital of the Suomen Pankki and a limitation on Suomen Pankki's right to create financial provisions.

legal relationships between the Deutsche Bundesbank and its staff. The ECB is also aware that the proposed amendments may be deemed necessary to make the legal situation compliant with the case law of the Federal Administrative Court[4].

2.4 The ECB considers that there is no need to amend § 31(4) and (6) of the Law on the Deutsche Bundesbank. The ECB is concerned about the Government's discretionary powers to grant and withdraw the delegation, and to regulate directly the legal relationships of the Deutsche Bundesbank with all categories of staff as well as the careers of such staff. Although the Government's approval is currently required for the adoption of regulations by the Executive Board, the ECB considers that the proposed amendments will give the Government increased discretion in this context, which will reduce the Deutsche Bundesbank's autonomy in taking decisions concerning its staff regulations. With a view to the principle of central bank independence, the ECB would like to point out that the threat of withdrawing such delegated powers is a potential tool to influence an NCB unduly in fulfilling its tasks and thus limits that NCB's independence. In this regard, it is useful to note that the ECB defines its staff policy autonomously and that this autonomy forms part of the ECB's independence as guaranteed by Article 108 of the Treaty and Article 36 of the ESCB Statute.

2.5 As the proposed amendments entail a withdrawal of the Deutsche Bundesbank's authority to determine the legal relationships and career polices for all categories of staff and a transfer of this authority to the Government, the ECB considers them to be a reduction of the independence of the Deutsche Bundesbank. The ECB therefore recommends that the new rules which will apply to the Deutsche Bundesbank should contain sufficient safeguards to ensure that the Deutsche Bundesbank's ability to carry out all its tasks, particularly ESCB-related tasks, will not be affected. The intention of the Government to delegate some of these powers to the Executive Board creates insufficient safeguards in terms of independence, as the permanent threat of a withdrawal of such delegated powers constitutes a potential and ongoing means of influencing the relevant policies in all respects.

4 Federal Administrative Court, judgment of 1 June 1995 - 2 C 16/94.

2.6 Against that background, the ECB would welcome a revision of the proposed amendments, extending the powers of the Executive Board to adopt staff regulations. Finally, the ECB underlines that the Government should consult the ECB on any future amendment to the specific rules applicable to the Deutsche Bundesbank's staff in accordance with Council Decision 98/415/EC.

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

Done at Frankfurt am Main, 21 February 2008.

[signed]

The President of the ECB

Jean-Claude TRICHET