



EUROPEAN CENTRAL BANK

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## LEGAL WORKING PAPER SERIES

NO 9 / NOVEMBER 2009

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### **THE LEGAL DUTY TO CONSULT THE EUROPEAN CENTRAL BANK**

### **NATIONAL AND EU CONSULTATIONS**

by Simona Elena Lambrinoc

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by Simona Elena Lambrinoc<sup>1</sup>



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# CONTENTS

|  |    |
|--|----|
| Abstract   | 4  |
| 1 Introduction   | 5  |
| 2 Legal basis for the obligation to consult the ECB  | 6  |
| 2.1 General provisions   | 6  |
| 2.2 Specific provisions  | 8  |
| 2.2.1 Specific provisions requiring<br>a national consultation of the ECB  | 8  |
| 2.2.2 Specific provisions requiring<br>ECB consultation by Community<br>institutions and bodies                                  | 11 |
| 2.3 Case-law of the Court of Justice   | 11 |
| 3 Initiation of the consultation procedure:<br>National authorities and Community<br>institutions and bodies                     | 14 |
| 3.1 National authorities   | 14 |
| 3.2 Community institutions and bodies<br>required to consult the ECB   | 17 |
| 3.3 The ECB's initiative   | 18 |
| 4 Legal instruments falling under the duty<br>to consult the ECB:<br>Draft legislative provisions<br>and proposed Community acts | 19 |
| 4.1 Draft legislative provisions   | 19 |
| 4.2 Proposed Community acts  | 20 |
| 4.3 Amendments to proposed Community<br>acts and draft national legislative provisions   | 24 |
| 5 Fields of competence   | 25 |
| 6 Timing and procedural steps  | 30 |
| 6.1 Timing   | 30 |
| 6.1.1 Appropriate time to consult the ECB  | 30 |
| 6.1.2 Time limit for the ECB<br>to adopt an opinion  | 32 |
| 6.2 Procedural steps   | 35 |
| 6.2.1 The request for an opinion   | 35 |
| 6.2.2 Establishing the drafting panel  | 36 |
| 6.2.3 Acknowledgment of receipt  | 36 |
| 6.2.4 Preparing the opinion  | 36 |
| 6.2.5 Adopting the opinion<br>as an ECB legal act  | 37 |
| 6.2.6 Transmission of the opinion<br>and its further consideration   | 38 |
| 6.2.7 Publication  | 39 |
| 6.2.8 Impact assessment  | 40 |
| 7 Failure to consult the ECB   | 40 |
| Conclusion   | 43 |
| Bibliography   | 44 |
| European Central Bank Legal Working Paper Series   | 45 |

## **Abstract**

*This paper analyses the European Central Bank's (ECB) advisory role related to proposed Community and national legislation falling within ECB's fields of competence, with a particular focus on the consultation procedure. The consultation procedure involves parties that are under an obligation to consult the ECB on draft legislation within certain time limits, at the end of which the ECB adopts a non-binding legal act. Non-compliance with the duty to consult the ECB has important legal consequences under Community law. This paper elaborates on these aspects starting with the legal basis and a summary of the case-law of the Court of Justice of the European Communities in the area of consultations. Furthermore, the range of authorities and bodies required to consult the ECB and the scope of draft legislation falling within the ECB's fields of competence are described. The procedural steps are also described from a practical perspective, with the aim of providing a useful guide to the consultation procedure.*

## 1 INTRODUCTION

The European System of Central Banks (ESCB) comprises the European Central Bank (ECB) and the national central banks (NCBs) of the EU Member States, a framework which, in 2008, reached its tenth year of operations. The ECB and each of the NCBs perform ESCB-related tasks in accordance with the primary objective of price stability, as defined by the ECB's Governing Council. One important aspect of the setup for the ESCB is the ECB's advisory function.

Between 1995 and 2008, the ECB and its predecessor, the European Monetary Institute (EMI), adopted in total 580 opinions, of which 463 were national opinions and 117 EU opinions<sup>1</sup>. Since 1998, the ECB alone has adopted some 417 national opinions and 97 EU opinions. While the average annual number of EU opinions remains relatively low (approximately 10 opinions a year)<sup>2</sup>, the number of national opinions has increased in recent years together with the increase in the number of Member States, especially following the accession of the 10 new Member States in 2004.

Before further examining the ECB's advisory function, two interrelated questions should be addressed: (i) why is there a legal duty to consult the ECB, and (ii) what role does the ECB play in the legislative process. According to the Court of Justice of the European Communities in *Commission v ECB* ('OLAF')<sup>3</sup>, the underlying rationale for the duty to consult the ECB is the fact that 'by virtue of the specific functions that [the ECB] exercises in the Community framework in the area concerned and by virtue of the high degree of expertise that it enjoys, [the ECB] is particularly well placed to play a useful role in the legislative process'<sup>4</sup>. The ECB is in a position to accumulate expertise and share such expertise through opinions in its fields of competence.

The Treaty establishing the European Community confers advisory functions on the ECB in its fields of competence, which are aimed at enhancing the quality of legislation. Through the consultation process, the ECB plays a significant role in ensuring that both national legislation and Community legislation is compatible with the EC Treaty. In turn, the pursuit of such compatibility and conformity is intended to facilitate the achievement of the primary objective of price stability and the secondary objective of sustaining general economic policies in the Community.

The consultation procedure is important for a number of reasons, which include:

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<sup>1</sup> The term 'national opinion' refers to opinions adopted by the ECB which concern draft national legislative provisions, while the term 'EU opinion' refers to opinions adopted by the ECB which concern proposed Community acts.

<sup>2</sup> There were only two EU consultations in 2002 compared to 15 in 1998.

<sup>3</sup> Case C-11/00 *Commission v European Central Bank* ('OLAF') [2003] ECR I-7147. For commentary and analysis, see Odudu, Elderson and Weenink, and Zilioli and Selmayr (2007), p. 363 et seq.

<sup>4</sup> OLAF, paragraph 110.

- Member States and the Community institutions and bodies benefit from the ECB's expertise in furtherance of the general objectives of the EU;
- It promotes information-sharing and communication among Community institutions and bodies as well as between the ECB and the general public<sup>5</sup>;
- It ensures the compatibility and consistency of national legislation and Community legislation with the ESCB's legal framework and ECB policies, thereby improving the quality of the legislative process and increasing legal harmonisation in areas falling within the ECB's fields of competence. According to Zilioli and Selmayr, as a general rule, 'the ECB must be consulted whenever it has, in view of the specialised tasks entrusted to it by the EC Treaty and the Statute, a specialised knowledge that needs to be taken into account to ensure the quality of Community and national legislation'<sup>6</sup>. In addition, Smits regards the obligation to consult the ECB as a tool for ensuring consistency in legal developments<sup>7</sup>. He writes: '[i]t was considered necessary to involve the ECB in the regulation of matters which fall within its fields of competence so as to ensure consistency of new rules with the effective exercise of monetary policy, with an efficient payment system and with stability in the financial sector'.

The importance of the consultation process became even more evident in 2008 and continues to be apparent in 2009 where, due to the financial crisis, Member States are required to coordinate their activities as regards measures taken to ensure financial stability. In this context, ECB opinions contribute to ensuring a consistent approach towards such measures with the common principles aimed at preserving confidence and stability in the financial markets as agreed during the Ecofin Council meeting of 7 October 2008.

## 2 LEGAL BASIS FOR THE OBLIGATION TO CONSULT THE ECB

### 2.1 General provisions

Article 105(4)<sup>8</sup> of the EC Treaty and Article 4 of the Statute of the European System of Central Banks and of the European Central Bank (the 'Statute of the ESCB')<sup>9</sup> concerns the ECB's advisory function,

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<sup>5</sup> 'Guide to consultation of the European Central Bank by national authorities regarding draft legislative provisions', pp. 10-11, available on the ECB's website at [www.ecb.int](http://www.ecb.int).

<sup>6</sup> Zilioli and Selmayr (2006), p. 29.

<sup>7</sup> Smits, p. 210.

<sup>8</sup> Article 105(4) of the EC Treaty reads: 'The ECB shall be consulted:

- on any proposed Community act in its fields of competence,
- by national authorities regarding any draft legislative provision in its fields of competence, but within the limits and under the conditions set out by the Council in accordance with the procedure laid down in Article 107(6). The ECB may submit opinions to the appropriate Community institutions or bodies or to national authorities on matters in its fields of competence.'

according to which the ECB is to be consulted on draft legislation, either at the Community level ('EU consultations') or at the national level ('national consultations'), in its fields of competence.

In addition, under the second sentence of Article 105(4) of the EC Treaty, the ECB is given an independent right to adopt own-initiative opinions addressed to Community institutions and bodies and to national authorities on matters within its fields of competence.

Under Article 25.1 of the Statute of the ESCB, the ECB may be consulted by the Council, the Commission and the competent authorities of the Member States on the scope and implementation of Community legislation relating to prudential supervision of credit institutions and to the stability of the financial system. However, such consultation remains optional, while the ECB retains the right to deliver an own-initiative opinion on such matters.

The Treaty of Lisbon<sup>10</sup> incorporates the existing provisions on ECB consultations without substantial amendment. Article 105(4) of the EC Treaty will become Article 127(4)<sup>11</sup> of the Treaty on the Functioning of the European Union (TFEU), while Article 4<sup>12</sup> of the Statute of the ESCB maintains its position in Protocol No 4 annexed to the EU Treaty and the TFEU. However, in Chapter 1 (the institutions), Title I (institutional provisions), Part Six (institutional and financial provisions) of the TFEU, the new Treaty in Article 282(5)<sup>13</sup> reiterates the duty to consult the ECB, thereby underlining the institutional importance of ECB consultations for the proper functioning of Economic and Monetary Union.

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<sup>9</sup> This is a protocol annexed to the EC Treaty and thus part of primary Community law, according to Article 311 of the EC Treaty.

<sup>10</sup> The Treaty of Lisbon, which was ratified by all 27 Member States, is expected to enter into force in December 2009.

<sup>11</sup> Article 127(4) of the TFEU reads: 'The European Central Bank shall be consulted:

- on any proposed Union act in its fields of competence,
- by national authorities regarding any draft legislative provision in its fields of competence, but within the limits and under the conditions set out by the Council in accordance with the procedure laid down in Article 129(4).

The European Central Bank may submit opinions to the appropriate Union institutions, bodies, offices or agencies or to national authorities on matters in its fields of competence.'

<sup>12</sup> Article 4 reads: 'In accordance with Article 127(4) of the Treaty on the Functioning of the European Union:

(a) the ECB shall be consulted:

- on any proposed Union act in its fields of competence;
- by national authorities regarding any draft legislative provision in its fields of competence, but within the limits and under the conditions set out by the Council in accordance with the procedure laid down in Article 41;

(b) the ECB may submit opinions to the Union institutions, bodies, offices or agencies or to national authorities on matters in its fields of competence.'

<sup>13</sup> Article 282(5) states '[w]ithin the areas falling within its responsibilities, the European Central Bank shall be consulted on all proposed Union acts, and all proposals for regulation at national level, and may give an opinion.'



## 2.2 Specific provisions

### 2.2.1 Specific provisions requiring a national consultation of the ECB

Council Decision 98/415/EC of 29 June 1998 on the consultation of the ECB by national authorities regarding draft legislative provisions<sup>14</sup> is addressed to all Member States and supplements the primary law legal framework on the duty to consult the ECB. In addition, the *Guide to consultations of the ECB by national authorities regarding draft legislative provisions* (the ‘Guide’<sup>15</sup>) published by the ECB, although not a legal act, provides assistance to national authorities when fulfilling their obligations to consult the ECB.

Some Member States have adopted supplementary rules regarding their internal arrangements related to consulting the ECB for the purposes of ‘customising’ the consultation procedure to national particularities or determining the appropriate stage in the national legislative process for a consultation of the ECB. Where such rules exist they must be without prejudice to the principle of Community loyalty (or duty of loyal cooperation) enshrined in Article 10 of the EC Treaty, which requires Member States to take all measures necessary to guarantee the application and effectiveness of Community law and refrain from contrary measures. Consequently, if national rules regarding national consultations are developed, Article 10 of the EC Treaty, read in conjunction with Article 105(4) thereof, requires such rules to serve in achieving the purposes of Decision 98/415/EC and its effective application. According to the Court of Justice, ‘[t]he application of national law must not affect the scope and effectiveness of Community law’ and ‘national law must be applied in a manner which is not discriminatory’ compared to procedures governing similar, purely national situations<sup>16</sup>. If, for example, a consultation of other national or Community institutions and bodies is required by the law of a Member State, and those opinions are mentioned in the explanatory memorandum submitted to the parliament or included in the preamble to the national legal act, the ECB opinion, likewise, should also be mentioned. For example, in the Netherlands, in most cases the ECB opinion is mentioned in the explanatory memorandum to the draft law and, in Slovenia, the fact that the ECB was consulted on a draft law is occasionally mentioned in the explanatory memorandum.

In some Member States the need for coordination with respect to draft legislative provisions that are subject to Decision 98/415/EC has resulted in (a) specific Government rules (e.g. in the Czech Republic, Slovakia and Finland), and/or (b) specific NCB rules (e.g. in the Czech Republic and

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<sup>14</sup> OJ L 189, 3.7.1998, p. 42. Decision 98/415/EC mirrors to a certain extent the provisions of the previous Council Decision 93/717/EC of 22 November 1993 on the consultation of the European Monetary Institute by the authorities of the Member States on draft legislative provisions, (OJ L 332, 31.12.1993, p. 14), which referred to the EMI and was repealed at the beginning of the third stage of Economic and Monetary Union when the ECB took over the EMI’s tasks.

<sup>15</sup> Available in the publications section of the ECB’s website at [www.ecb.europa.eu](http://www.ecb.europa.eu).

<sup>16</sup> Joined Cases 205 to 215/82 *Deutsche Milchkontor and others v Germany* [1983] ECR 2633, paragraph 22 et seq.

Slovakia) on the organisation of consultations with the ECB. These can be summarised as set out in the following.

### Government rules

In the Czech Republic, the ‘Legislative Rules of the Government, approved by Government Resolution No 188 of 19 March 1998, as amended’<sup>17</sup> establish the stage in the national legislative process and the body that should engage in the consultation procedure with the ECB with respect to draft laws, regulations and decrees drafted by the ministries or other central administrative bodies, which are subject to consultation under Decision 98/415/EC. Under the rules, the authority that has prepared the draft must take the decision to consult the ECB and send the consultation request.

In Slovakia, any draft legislative provisions adopted by the ministries must comply with the Legislative Rules of the Slovak Government<sup>18</sup>, in particular Article 10 (Intra-Community Consultation Procedure) which, if the draft legislative provisions fall within the ECB’s fields of competence, explicitly requires consultation of the ECB following approval of the draft by the Legislative Council and before the session of the Slovak Government. The draft of a generally binding legal act falling within the ECB’s fields of competence must be submitted to the ECB for consultation by the competent authority which, under the rules mentioned above, is either the Minister, the head of another central State authority or the Governor of Národná Banka Slovenska.

In Finland, the Ministry of Finance has published guides to the legislative process and preparatory measures. The *Legal Drafter’s Guide to the European Union* (2004)<sup>19</sup>, in paragraph 6.2 on the consultation of Community institutions, mentions the requirement to consult the ECB, stating: ‘In certain cases, the European Commission or, for instance, the European Central Bank must be consulted before adopting national legal acts’. The standard template for government proposals submitted to the parliament includes a chapter concerning preparatory work and opinions. The purpose of this chapter is to explain which authorities or other parties were consulted and the consideration given to such

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<sup>17</sup> Legislative Rules of the Government, approved by Government Resolution No 188 of 19 March 1998, as amended, (*Legislativní Pravidla Vlády schválená usnesením vlády ze dne 19. března 1998 č. 188 a změněná usnesením vlády ze dne 21. srpna 1998 č. 534, usnesením vlády ze dne 28. června 1999 č. 660, usnesením vlády ze dne 14. června 2000 č. 596, usnesením vlády ze dne 18. prosince 2000 č. 1298, usnesením vlády ze dne 19. června 2002 č. 640, usnesením vlády ze dne 26. května 2004 č. 506, usnesením vlády ze dne 3. listopadu 2004 č. 1072, usnesením vlády ze dne 12. října 2005 č. 1304 a usnesením vlády ze dne 18. července 2007 č. 816*), available on the Czech Government’s website at [http://www.vlada.cz/assets/ppov/lrv/legislativn\\_\\_pravidla\\_vl\\_dy.pdf](http://www.vlada.cz/assets/ppov/lrv/legislativn__pravidla_vl_dy.pdf).

<sup>18</sup> Legislative Rules of the Slovak Government (adopted by Resolution of the Slovak Government No 241 of 8 April 1997 and last amended by Resolution No 751 of 22 October 2008 (*Legislatívne pravidlá vlády Slovenskej republiky schválené uznesením vlády SR z 8. apríla 1997 č. 241 v znení uznesenia vlády SR zo 16. decembra 1999 č. 1118 a uznesenia vlády SR z 28. novembra 2001 č. 1130 a uznesenia vlády SR z 19. novembra 2003 č. 1097 a uznesenia vlády SR z 28. septembra 2005 č. 736, uznesenia vlády SR z 26. marca 2008 č. 188 a uznesenia vlády SR z 22. októbra 2008 č. 751*).

<sup>19</sup> Ministry of Justice publication 2004:6, Helsinki 2004, (*Lainlaattijan EU-opas*), available on the Ministry of Justice’s website at [www.om.fi/1146646930588](http://www.om.fi/1146646930588).

opinions in the draft law. In case of extensive consultation, the ministry responsible for the preparatory work may also publish a separate document on the opinions received.

In Estonia, a cooperation agreement was drawn up on 21 December 2007 between Eesti Pank, the Financial Supervision Authority, and the Ministry of Finance with the purpose of ‘ensuring the reliability and stability of the Estonian financial system as well as the appropriate regulation of financial services and the financial market’<sup>20</sup>. The agreement concerns draft legislation submitted to the Parliament of Estonia (*Riigikogu*) as a Government proposal. Although this agreement does not expressly refer to the ECB, paragraph 4.5 which states ‘[if] there is a need to ask for the opinion of third parties to the cooperation agreement (e.g. market participants), respective consultations shall be planned, if possible, in such a way that they can be completed prior to the submission of the draft to the Government of the Republic’ should apply also in the case of draft legislation within the scope of national consultations of the ECB.

### NCB rules

Internal rules adopted by Národná Banka Slovenska (NBS) provide for the duty to consult the ECB pursuant to Decision 98/415/EC.

Aside from these examples, there are, to the best of the author’s knowledge, in the majority of Member States, no specific legal provisions on the application of Decision 98/415/EC.

Generally speaking, Member States have well-developed practices or traditions governing the legislative process and, accordingly, even when no specific national rules supplementing Decision 98/415/EC exist, national authorities are generally aware of their duty to consult and the relevant time constraints. Nevertheless, such rules could be useful to new Member States in the first few years following EU accession, in the absence of established practice in this area and where, consequently, the risk of non-compliance with the ECB consultation requirements is higher<sup>21</sup>. However, the dialogue and cooperation of other national authorities with the NCBs (most often exposed to the consultation procedure with the ECB because their Governors, in their capacity as members of the ECB’s General Council, are required to contribute to the written procedures for the adoption of ECB opinions) and the ECB is of considerable importance as it is the existence of such informal contacts which, in many cases, averts non-consultation situations from arising.

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<sup>20</sup> Available on the Eesti Pank’s website at [www.eestipank.info/pub/en/ylidine/pank/finantskeskkond/stabiilsus/lepe\\_1207.html](http://www.eestipank.info/pub/en/ylidine/pank/finantskeskkond/stabiilsus/lepe_1207.html)

<sup>21</sup> For the legal consequences of failure to consult the ECB see Section 7 of this paper.

## 2.2.2 Specific provisions requiring ECB consultation by Community institutions and bodies

In addition to the general provisions in Article 105(4) of the EC Treaty, there are several specific provisions in the Treaty on European Union (TEU) and the EC Treaty requiring a consultation of the ECB in relation to proposed Community acts. Consultations are as a rule, therefore, based on those specific provisions or, if no specific provisions apply and the Community act falls within the ECB's fields of competence, on the general provision of Article 105(4) of the EC Treaty. Specific provisions are to be found in Article 48 of the TEU and in the following Articles of the EC Treaty: 59, 104(14), 105(6), 106(2), 107(5) and (6), 111(1) to (4), 112(2)(b), 114(3), 123(4) and (5), and Articles 10.6 and 25.1 of the Statute of the ESCB<sup>22</sup>.

In addition, regard should be had to Article 253 of the EC Treaty, which establishes that Community regulations, directives and decisions must refer to any opinions that were required to be obtained pursuant to the EC Treaty. Therefore, the citations to the Community acts concerned should refer to the relevant ECB opinion.

## 2.3 Case-law of the Court of Justice

*Commission v ECB ('OLAF')* is the only judgment of the Court of Justice clarifying matters related to the scope of the obligation to consult the ECB. It concerns EU consultations, but the issues discussed are relevant also for national consultations. The Commission, supported by the Netherlands, the European Parliament and the Council of the European Union, sought to annul Decision ECB/1999/5 of 7 October 1999 on fraud prevention<sup>23</sup>, which established the ECB's own anti-fraud investigation framework without reference to the powers of the European Anti-Fraud Office, OLAF<sup>24</sup>. The ECB opposed the application arguing, *inter alia*<sup>25</sup>, that its decision could not infringe Regulation (EC) No 1073/1999 concerning investigations by OLAF as that Regulation was itself invalid because no consultation of the ECB was effected prior to its adoption. In the ECB's view, the European Parliament

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<sup>22</sup> Section 5 of this paper sets out these provisions in more detail.

<sup>23</sup> OJ L 291, 12.11.1999, p. 36.

<sup>24</sup> OLAF was established by Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999 establishing the European Anti-fraud Office (OLAF), (OJ L 136, 31.5.1999, p. 20), adopted on the basis of Article 162 of the EC Treaty (now Article 218 EC), Article 16 of the ECSC Treaty and Article 131 of the Euratom Treaty. OLAF had been in operation since 1 June 1999 when Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), (OJ L 136, 31.5.1999, p. 1), entered into force. Although OLAF is part of the Commission and reports to the Commissioner responsible for budget, it acts independently in conducting administrative anti-fraud investigations. Article 2(1) of Decision 1999/352, which sets out OLAF's functions, provides that OLAF 'shall exercise the Commission's powers to carry out external administrative investigations for the purpose of strengthening the fight against fraud, corruption and any other illegal activity adversely affecting the Community's financial interests, as well as any other act or activity by operators in breach of Community provisions'.

<sup>25</sup> A full analysis of the judgment in *OLAF* and the scope of Regulation (EC) No 1073/1999 and ECB Decision 1999/726/EC would go beyond the scope of this paper. For more information, see Elderson and Weenink, and Odudu.

and the Council should have consulted the ECB under Article 105(4) of the EC Treaty before adopting the regulation on OLAF investigations because of its likely impact on the ECB's internal structure and staff relations. The Court rejected that argument. It held that 'Article 105(4) EC is placed in Chapter 2, devoted to monetary policy, of Title VII, Part Three of the EC Treaty and that the obligation laid down in that provision to consult the ECB on any proposed act in its field of competence is intended, as the Advocate General points out at paragraph 140 of his Opinion, essentially to ensure that the legislature adopts the act only when the body has been heard, which, by virtue of the specific functions that it exercises in the Community framework in the area concerned and by virtue of the high degree of expertise that it enjoys, is particularly well placed to play a useful role in the legislative process envisaged. That is not the case as regards the prevention of fraud detrimental to the financial interests of the Community, an area in which the ECB has not been assigned any specific tasks'<sup>26</sup>.

Although there is only one Court of Justice judgment related to the ECB consultation, its case-law on the advisory competences of other Community institutions and bodies is more extensive. A consistent line of reasoning on the obligation to consult, especially in cases related to the consultation of the European Parliament, but also in those related to the consultation of the Council and the Consultative Committee under the Treaty establishing the European Coal and Steel Community (ECSC Treaty) and the Economic and Social Committee<sup>27</sup> can be discerned. Five main propositions follow from that case-law:

- (a) Due consultation of the European Parliament constitutes an essential procedural requirement of the EC Treaty, breach of which renders the measure concerned void<sup>28</sup>. An 'essential' procedural requirement is also the consultation of the Council and Consultative Committee by the High Authority under the ECSC Treaty, which is 'intended to ensure that the measures concerned were formulated with all due care and prudence'<sup>29</sup>. The consultation of the Economic and Social Committee was considered an essential procedural requirement for the adoption of a Commission decision under Article 118 of the Treaty establishing the European Economic Community<sup>30</sup>.

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<sup>26</sup> *OLAF*, above footnote 3, paragraphs 110-111.

<sup>27</sup> Joined Cases 281, 283, 284, 285 and 287/85 *Germany and others v Commission* [1987] ECR 3203, paragraph 38: '[T]he function of the Economic and Social Committee, which is made up of representatives of socio-economic groups, is to advise the Council and Commission on the solutions to be adopted with regard to practical problems of an economic and social nature and to deliver opinions based on its specific competence and knowledge'.

<sup>28</sup> Case C-392/95 *Parliament v Council* [1997] ECR I-3213, paragraph 24; Case C-65/90 *Parliament v Council* [1992] ECR I-4593, paragraph 21; Case C-65/93 *Parliament v Council* [1995] ECR I-643, paragraph 21; Case C-417/93 *Parliament v Council* [1995] ECR I-1185, paragraph 9; and Case C-388/92 *Parliament v Council* [1994] ECR I-2067, paragraph 19.

<sup>29</sup> Case 6/54 *Netherlands v High Authority* [1955] ECR 103, p. 112. See also Case 1/54 *France v High Authority* [1954] ECR I, p. 15 and Case 2/54 *Italy v High Authority* [1954] ECR 37, p. 52.

<sup>30</sup> *Germany and others v Commission*, above footnote 27, paragraph 38 et seq.

- (b) Proper consultation of the Parliament where required by the EC Treaty is one of the mechanisms allowing that institution to participate actively in the Community legislative process; an essential factor in the institutional balance intended by the EC Treaty<sup>31</sup>. Observance of that institutional balance requires each of the EU institutions to exercise its powers with due regard for the powers of the other institutions<sup>32</sup>.
- (c) The consultation requirement is not satisfied by simply requesting an opinion<sup>33</sup>.
- (d) Amendments to the text submitted for consultation should trigger a new consultation request, except when the amendments correspond to the wishes of the Parliament<sup>34</sup>. However, there is no re-consultation requirement in relation to the implementing provisions of an act on which the Parliament was already consulted<sup>35</sup> or for technical adjustments that do not constitute substantial changes to the text on which the Parliament and the Economic and Social Committee were consulted<sup>36</sup>.
- (e) Inter-institutional dialogue, on which the consultation procedure is in particular based, is subject to the same mutual duties of sincere cooperation as those that govern relations between Member States and the Community institutions<sup>37</sup>.

These propositions can be said to apply, *mutatis mutandis*, to the ECB. The consultation of the ECB may, in those cases where a duty to consult applies, be seen as an essential procedural requirement as emphasised in *OLAF* by Advocate General Jacobs: '[c]onsultation of the ECB on proposed measures in its field of competence is a procedural step, required by a provision of the Treaty, which is clearly capable of affecting the content of the measures adopted. Failure to comply with such requirement

<sup>31</sup> Cases C-21/94 *Parliament v Council* [1995] ECR I-1827, paragraph 26; Case C-392/95 *Parliament v Council*, above footnote 28, paragraphs 14-16 and 22, Case C-65/90 *Parliament v Council*, above footnote 28, paragraphs 8 and 14; Case C-65/93 *Parliament v Council*, above footnote 28, paragraph 21; Case C-417/93 *Parliament v Council*, above footnote 28; Case 138/79 *Roquette Frères v Council* [1980] ECR 3333, paragraph 33; Case 139/79 *Maizena v Council* [1980] ECR 3393, paragraph 34 and Case C-316/91 *Parliament v Council* [1994] ECR I-625, paragraphs 16 and 17: 'The right to be consulted in accordance with a provision of the Treaty is a prerogative of the Parliament. Adopting an act on a legal basis which does not provide for such consultation is liable to infringe that prerogative, even if there has been optional consultation. Proper consultation of the Parliament where required by the Treaty is one of the means allowing it to play an actual part in the legislative process of the Community'.

<sup>32</sup> See Case C-70/88 *Parliament v Council* [1990] ECR I-2041, paragraph 22 et seq.

<sup>33</sup> Case C-65/93 *Parliament v Council*, above footnote 28, paragraph 22 and Case 138/79 *Roquette Frères v Council*, above footnote 31, paragraph 34.

<sup>34</sup> Case C-392/95 *Parliament v Council*, above footnote 28, paragraphs 16 and 23; Case C-65/90 *Parliament v Council*, above footnote 28, paragraphs 16 and 19; Case C-417/93 *Parliament v Council*, above footnote 28, paragraph 17; Case C-388/92 *Parliament v Council*, above footnote 28; Case C-408/95 *Eurotunnel and Others* [1997] ECR I-6315, paragraph 46; and Case C-21/94 *Parliament v Council*, above footnote 31, paragraph 18.

<sup>35</sup> Case C-417/93 *Parliament v Council*, above footnote 28.

<sup>36</sup> Case C-58/01 *Océ Van der Grinten* [2003] ECR I-9809, paragraph 100 et seq.

<sup>37</sup> Case C-65/93 *Parliament v Council*, above footnote 28, paragraph 23. See also Case 204/86 *Greece v Council* [1988] ECR 5323, paragraph 16.

must, in my view, be capable of leading to the annulment of the measures adopted'<sup>38</sup>. Academic literature supports the view that consultation of the ECB is an essential procedural requirement, similar to the requirement for consultation of the European Parliament or other Community institutions and bodies<sup>39</sup>. On the question of the institutional balance as interpreted by the Court of Justice in relation to the European Parliament, many authors extend with good reason that approach to the ECB, since the ECB has specific powers and tasks in economic and monetary union-related matters and was entrusted with the Community objective of maintaining price stability. It is appropriate to conclude, therefore, that the ECB constitutes an integral component of the institutional balance within the Community regarding monetary affairs<sup>40</sup>.

### **3 INITIATION OF THE CONSULTATION PROCEDURE: NATIONAL AUTHORITIES AND COMMUNITY INSTITUTIONS AND BODIES**

The actors in the consultation procedure are, on the one hand, the consulting national authority or Community institution or body and, on the other hand, the ECB and its decision making bodies. The EC Treaty and Decision 98/415/EC do not define or limit the range of authorities and institutions that must consult the ECB, thus leaving this matter, in the case of national consultations, for the Member States to determine in accordance with national law and constitutional arrangements or, in the case of Community consultations, to the Community legislative organs.

#### **3.1 National authorities**

Decision 98/415/EC is addressed and applies to Member States that have adopted the euro, as well as to those that have not yet adopted the euro, with the exception of the United Kingdom<sup>41</sup>. The EC Treaty does not define in detail which authorities must consult the ECB, referring simply to 'national authorities'. Decision 98/415/EC sheds further light on this concept in Article 3(1), which refers to 'authorities of the Member States preparing a legislative provision' and in Article 4, which mentions the 'adopting authority' and the 'authority other than that which has prepared the legislative provisions concerned'.

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<sup>38</sup> *OLAF*, above footnote 3, Opinion of Advocate General Jacobs, point 131.

<sup>39</sup> See Zilioli and Selmayr (2001), p. 241 and footnote 284; Arda, pp. 145-146.

<sup>40</sup> See Zilioli and Selmayr (2001), p. 241 and footnote 284; Smits, p. 212; Zilioli and Selmayr (2006), p. 32, footnote 152; Arda, pp. 145-146: 'one could say that the duty to consult the ECB implies respect for the institutional balance within the Community regarding monetary affairs. The ECB is the Community's monetary authority and may refer to its prerogatives pursuant to Article 230 EC, as could the European Parliament at the time. In addition, given the rationale of Article 105(4) EC, consulting the ECB contributes to formulating the provisions concerned with all due care and could induce the authority concerned to alter the content of the measure'.

<sup>41</sup> The United Kingdom is exempted from the consultation obligation pursuant to the Protocol on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland (OJ C 191, 29.7.1992, p. 18), annexed to the EC Treaty.

It follows from these provisions that the obligation to consult the ECB applies not only to authorities initiating draft legislative provisions, but also to Member State authorities that are involved in the process of adopting the draft legislative provisions, even if they do not have the power to initiate such processes or to adopt such provisions. A consulting authority may be also an authority that, according to national rules, is only responsible for issuing an opinion on draft provisions. For instance, in some Member States (e.g. Austria, Greece, Poland, and Romania), at the request of public authorities with regulatory powers, (e.g. the Ministry of Finance), the NCB may issue an opinion prior to the adoption of a legal act on matters related to the NCB's tasks in order to ensure compliance with the Treaties and the Statute of the ESCB and with the NCB's own statute and its non-ESCB-related tasks. Such provisions may be found, for example, in the Statute of the Bank of Greece<sup>42</sup>, the Law on the Oesterreichische Nationalbank<sup>43</sup>, the Law on Narodowy Bank Polski<sup>44</sup>, or in the Law on the Statute of Banca Națională a României<sup>45</sup>. Moreover, in general, NCBs can also play a useful role in the consultation of the ECB by reminding the relevant ministry, either formally or informally depending on whether their involvement in the legislative process is direct or indirect, of the duty to consult the ECB. An example of indirect involvement can be seen in the case of the Banque de France, which is aware of all draft legislative provisions in the banking and financial field prior to their adoption because it

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<sup>42</sup> Article 5B(4) (inserted by resolution of the General Meeting of Shareholders of the Bank of Greece held on 22 December 1997 and ratified by Law 2609/1998 (Government Gazette A 101/11 May 1998)) reads as follows: 'The Bank of Greece shall be consulted on any draft legislative provision concerning the tasks referred to in Article 2 hereof. The Bank of Greece may submit proposals to the government on matters in the fields of competence of the Bank.'

<sup>43</sup> Law on the Oesterreichische Nationalbank, BGBl. (Federal Law Gazette) No 50/1984 as amended by BGBl. Part I No 61/2006, unofficial consolidated version of the Act, in force from 17 May 2006. Article 7(3) of the Law provides that '[d]raft laws which contain provisions of importance for financial market policy or which otherwise affect the interests of the Oesterreichische Nationalbank shall, prior to being introduced before the legislative body, be submitted to the Oesterreichische Nationalbank for its opinion, with an appropriate time period being allowed for this purpose.'

<sup>44</sup> Law of 29 August 1997, as published in *Dziennik Ustaw* of 1997 No 140, item 938. Article 21(3) and (4) provides as follows: 'In discharging its responsibilities, NBP shall collaborate with the appropriate bodies of central government in developing and implementing national economic policy, in so doing striving to ensure the proper performance of monetary policy guidelines, and in particular shall: [...] (3) present its opinion on draft legislation relating to economic policy, (4) present its opinion on draft legislation concerning the operations of banks and on other legislation of significance to the banking system.'

<sup>45</sup> Law No 312 of 28 June 2004, published in *Monitorul Oficial al României*, Part I, No 582, 30.6.2004. Article 3(2) states as follows: 'Any draft legal act adopted by the central public authorities on matters related to Banca Națională a României tasks shall be adopted after previously having sought the Banca Națională a României's opinion. The opinion shall be submitted within 30 days at most from the date on which it was sought.'



provides the General Secretariat to the Committee for financial regulation and legislation (*Comité consultatif de la législation et de la réglementation bancaire, CCLRF*)<sup>46</sup>.

The ECB has been consulted by a variety of authorities, including: (i) national governments (usually by the ministry of finance, and in some cases by the ministries of justice, of economic affairs or of industry and trade), (ii) the NCBs<sup>47</sup> either acting on behalf of the regulatory authority, (e.g. the ministry of finance<sup>48</sup>) or as an authority with its own regulatory powers, and less commonly, (iii) national statistical offices<sup>49</sup>, (iv) supervisory authorities such as financial and capital markets authorities<sup>50</sup>, (v) competition authorities<sup>51</sup>, (vi) anti-money laundering authorities<sup>52</sup>, (vii) ministries of defence, (viii) ministries of labour, social affairs and the family<sup>53</sup>, and (ix) specific bodies such as a euro changeover board<sup>54</sup>.

With respect to authorities preparing draft legislation initiated by members of parliament, the ECB has been consulted by the competent specialised parliamentary commission responsible for the legislative project<sup>55</sup>.

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<sup>46</sup> The CCLRF provides opinions to the Ministry for Economic Affairs on all draft legislative provisions in the fields of banking, finance and insurance.

<sup>47</sup> Although in our view NCBs with regulatory powers in the ECB's fields of competence may always consult the ECB, Smits' approach is more guarded. He considers (p. 213) that for the purposes of Article 105(4) of the Treaty NCBs do not constitute national authorities because they are part of the ESCB, except where they have a dual function, both as part of the ESCB and 'as part of the national administration which implements Community legislation and possibly further national rules in the field of banking supervision'.

<sup>48</sup> See the discussion above.

<sup>49</sup> Opinion CON/2004/36 of 5 November 2004 at the request of the Czech Statistical Office on a draft decree laying down the programme of statistical surveys for the year 2005.

<sup>50</sup> Opinion CON/2005/40 of 28 October 2005 at the request of the French Financial Markets Authority on draft amendments to its General Regulation; and Opinion CON/2003/2 of 28 February 2003 at the request of the Danish Financial Supervisory Authority on a draft law replacing the Financial Business Act and a draft law on the Mortgage Loans and Mortgage Bonds Act.

<sup>51</sup> Opinion CON/2005/15 of 31 May 2005 at the request of the Danish Competition Authority on a proposal for a law amending the Act on certain means of payment.

<sup>52</sup> Opinion CON/2007/36 of 15 November 2007 at the request of the Slovenian Office for money laundering prevention on a draft decree implementing Regulation (EC) No 1781/2006 of the European Parliament and of the Council of 15 November 2006 on information on the payer accompanying transfers of funds.

<sup>53</sup> Opinion CON/2008/40 of 2 September 2008 at the request of the Slovak Ministry of Defence and the Slovak Ministry of Labour, Social Affairs and Family on draft laws laying down further detailed rules on the euro changeover falling within their field of competence.

<sup>54</sup> Opinion CON/2000/13 at the request of the Euro Changeover Board of Ireland on draft Ministerial Orders issued under the Economic and Monetary Union Act, 1998.

<sup>55</sup> Opinion CON/2008/72 of 19 November 2008 at the request of the Romanian Parliament on a legislative proposal regarding the use of Banca Națională a României's foreign reserves for tourism development and modernization.

### 3.2 Community institutions and bodies required to consult the ECB

Community institutions and bodies that have the power to propose Community acts in the ECB's fields of competence are required to consult the ECB. This refers primarily to the Council, the Commission and the European Parliament, but applies to 'all' Community institutions and bodies having the power to propose legislation. This interpretation is supported by Article 249 of the EC Treaty which lists acts that can be categorised as Community acts within the meaning of Article 105(4) of the EC Treaty and which are adopted by the European Parliament acting jointly with the Council, by the Council or the Commission. This view is taken also in the academic literature by Smits, Arda and Würtz, with the latter also making reference to the opposing view<sup>56</sup> expressed, for example, by Rideau<sup>57</sup> who considers that consultation of the ECB on draft Community acts under Article 105(4) of the EC Treaty is a task for the Council as consultations relate to decisions to be adopted by the Council especially on monetary matters. In comparing the EC Treaty provisions on the EMI, under which only the Council was required to consult, with the provisions on the ECB, which do not contain similar restrictions, Smits<sup>58</sup> argues that '[t]he Commission and, as the case may be, the European Parliament, also have this consultative obligation [...] nothing in Article 105(4), first indent, prevents the Commission from approaching the ECB for its opinion on a draft Community act.' Arda observes,<sup>59</sup> in addition, the lack of precision in the drafting of Article 105(4) of the EC Treaty and assumes that the provision applies to 'any institution or organ which has the power to propose or adopt Community acts'. All the same, he notes that 'the Commission has a general responsibility concerning compliance with Community law'<sup>60</sup> in accordance with the first indent of Article 211<sup>61</sup> of the EC Treaty in its role as the 'guardian' of the Treaties.

To avoid any uncertainty in commencing the consultation process, several authors recommend<sup>62</sup> that the Community institutions and bodies clarify amongst themselves who is to consult the ECB. In practice, the dilemma appears to have been resolved, as most EU consultations of the ECB were requested by the Council, with the exception of 14 (of a total of 117) that were requested by the Commission. Moreover, the majority of the EC Treaty provisions establishing a duty to consult the

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<sup>56</sup> Würtz, pp. 290-291.

<sup>57</sup> Rideau, p. 609.

<sup>58</sup> Smits, p. 212.

<sup>59</sup> Arda, p. 125.

<sup>60</sup> Arda, p. 140.

<sup>61</sup> The first indent of Article 211 of the EC Treaty provides: 'In order to ensure the proper functioning and development of the common market, the Commission shall: ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied.'

<sup>62</sup> Arda, p. 140. Smits, p. 212: 'For efficiency's sake, it may be helpful that the institutions agree amongst themselves who is to consult the ECB. Based on the current experience, consultation by the (Ecofin) Council would seem to be appropriate'.

ECB designate the Council as the organ competent to launch the consultation procedure. Article 25.1 of the Statute of the ESCB is the only Community law provision that refers to both the Council and the Commission and establishes a discretionary power for both bodies to consult the ECB.

### **3.3 The ECB's initiative**

The legal basis for ECB own-initiative opinions is the second sentence of Article 105(4) of the EC Treaty, which provides that '[t]he ECB may submit opinions to the appropriate Community institutions or bodies or to national authorities on matters in its fields of competence'. In substance, this results in a scope for own-initiative opinions that is effectively the same as for national and EU consultations on draft legislative acts. That is, the opinions delivered at the ECB's initiative have to concern a proposed Community act or a draft legislative provision in the ECB's fields of competence. Although the EC Treaty provision is unclear, it must be interpreted as referring not to a situation where the ECB is consulted and, after determining whether or not it is competent to act, it issues its opinion, but to the discretion of the ECB to take the initiative on matters within its fields of competence to give advice to appropriate Community institutions or bodies or to national authorities. 'Appropriate' refers here to the respective authority or institution that has the power to take account of the ECB's opinion on a proposed Community act or draft legislative provision.

Whereas national authorities and Community institutions and bodies have an obligation to consult the ECB under the EC Treaty, the ECB does not have an obligation, but a discretionary power to take the initiative to deliver an opinion when the parties subject to the obligation to consult remain passive. This discretion needs to be exercised carefully by the ECB on the basis of a case-by-case analysis on the importance and relevance for the ECB's views to be expressed in the situation concerned. The timing of the opinion is critical. It should not be too early (because a consultation request might still be submitted to the ECB) nor too late (so as not to miss the opportunity when its opinion will be most effective and to influence the content of the legislative proposal). The ECB's initiative should not be used to compensate for the inactivity of the consultation authorities and their obligation to consult the ECB is unaffected by the possibility for the ECB to issue own-initiative opinions.

The ECB has had recourse to this possibility three times, twice with respect to draft legislative provisions of the Member States (Opinions CON/2006/20 and CON/2008/13) and once with respect to a Commission directive (Opinion CON/2006/57). The limited number of these opinions suggests that the ECB is indeed careful in the use of its discretion. Both opinions on national legislation are addressed to the national authorities.

In the first case (Opinion CON/2006/20<sup>63</sup>), the ECB was consulted only on the first part of a draft law on financial sector supervision. The Dutch Minister of Finance considered that the second part did not fall under the scope of the duty of consultation because it concerned prudential supervision and the conduct of business by financial institutions. The ECB delivered its own-initiative opinion where it commented on issues concerning De Nederlandsche Bank, payment and settlement systems and rules applicable to financial institutions in so far as they materially influence the stability of financial institutions and markets.

In the second case (Opinion CON/2008/13<sup>64</sup>), the ECB's own-initiative opinion addressed draft Greek provisions affecting central bank independence and having implications for monetary financing.

As regards Opinion CON/2006/57<sup>65</sup> on draft Community legislation, the opinion was submitted to the Commission and adopted on the basis of Article 105(4) of the EC Treaty. The ECB stated<sup>66</sup> that it 'would [...] have expected the Commission to take initiative to formally consult the ECB on the proposed directive, in accordance with the relevant EC Treaty provisions'.

#### **4 LEGAL INSTRUMENTS FALLING UNDER THE DUTY TO CONSULT THE ECB: DRAFT LEGISLATIVE PROVISIONS AND PROPOSED COMMUNITY ACTS**

##### **4.1 Draft legislative provisions**

The concept of 'draft legislative provisions' is defined in Article 1(1) of Decision 98/415/EC as 'any such provisions which, once they become legally binding and of general applicability in the territory of a Member State, lay down rules of an indefinite number of cases and are addressed to an indefinite number of natural or legal persons'. The obligation to consult the ECB on draft legislative provisions only arises with regard to binding provisions, and not for recommendations, opinions or other non-binding legal acts. The duty to consult the ECB is not limited to primary legislation but also covers secondary legislation, except when such legislation simply implements rules of primary legislation.

Draft legislative provisions the exclusive purpose of which is to transpose Community directives into national law are excluded from the scope of the obligation to consult the ECB<sup>67</sup>. However, draft legislation transposing a Community directive, which contains provisions that go beyond mere transposition and fall within the ECB's fields of competence, must be the subject of consultation with

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<sup>63</sup> Opinion CON/2006/20 of 25 April 2006 on the Dutch draft law concerning financial sector supervision.

<sup>64</sup> Opinion CON/2008/13 of 19 March 2008 on a draft law concerning the reform of the Greek social security system.

<sup>65</sup> Opinion CON/2006/57 of 12 December 2006 on a draft Commission Directive implementing Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards the clarification of certain definitions, (OJ C 31, 13.2.2007, p. 1).

<sup>66</sup> For details on the substance of the opinion see Section 4.2 of this paper.

<sup>67</sup> Article 1(2) of Decision 98/415/EC. See also Section III.4 of the Guide.

the ECB (Comité consultatif de la législation et de la réglementation bancaire, CCLRF)<sup>68</sup>. The exception applies also to national implementation of Community regulations where the implementing rules go beyond simple transposition of the Community provisions.

As regards the types of acts on which the ECB should be consulted, Arda<sup>69</sup> and Würtz<sup>70</sup> add the national implementing rules of framework decisions, the latter being third pillar<sup>71</sup> acts adopted by the Council for the purpose of approximation of the laws and regulations of the Member States<sup>72</sup>.

## 4.2 Proposed Community acts

The proposed Community acts covered by Article 105(4) of the EC Treaty are those draft acts adopted by the Community institutions and bodies required to consult the ECB for the purposes of fulfilling their tasks under the Treaties. However, this concept is not free from ambiguity; two questions that arise are (i) does ‘Community act’ include non-binding acts, and (ii) is a ‘Community act’ limited to the measures listed in Article 249<sup>73</sup> of the EC Treaty.

Although Article 105(4) of the EC Treaty is broadly drafted, i.e. ‘any’ proposed Community act, principles of good administration might sensibly exclude from the scope of Community consultations those Community acts which, although they produce legal effects, do not have legally binding force<sup>74</sup>, that is, do not create rights and obligations for their addressees, on which those persons may rely before the EU’s judicial authorities. To consult acts that are non-binding could be seen as an unnecessary burden on the adopting authorities, lengthen the adoption process and reduce administrative efficiency.

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<sup>68</sup> See Opinion CON/2006/56 of 11 December 2006 at the request of the Luxembourg Ministry of Finance on a draft law on markets in financial instruments. While the main purpose of the draft law was to transpose Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, (OJ L 145, 30.4.2004, p. 1), the draft law also affected the Banque centrale du Luxembourg, the collection, compilation and dissemination of monetary, financial, banking, payment systems and balance of payments statistics and payment and settlement systems. Note also Opinion CON/2008/11 of 26 February 2008 at the request of the Portuguese Ministry of Finance and Public Administration on two draft decree-laws transposing Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual and consolidated accounts, concerning the supervision of auditors. The draft national legislation was submitted for consultation as it widened the statutory tasks of Banco de Portugal.

<sup>69</sup> Arda, p. 132.

<sup>70</sup> Würtz, p. 296.

<sup>71</sup> Provisions on police and judicial cooperation in criminal matters established in the TEU.

<sup>72</sup> Article 32(2)(b) of the TEU.

<sup>73</sup> Article 249 of the EC Treaty provides: ‘In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety upon those to whom it is addressed. Recommendations and opinions shall have no binding force.’

<sup>74</sup> See Case C-322/88 *Grimaldi v Fonds des maladies professionnelles* [1989] ECR 4407, paragraphs 16 and 18.

Acts falling into this category are recommendations and opinions. As opinions are *per se* legal acts expressing the adopting authority's views based on their expertise, consultation on an opinion appears to contradict the reasons underlying the issuance of an opinion. On the other hand, the nature of recommendations, which are acts indicating a course of action, points towards their classification as appropriate for consultation.

The symmetry to be found in Article 105(4) of the EC Treaty, which refers both to 'any' proposed Community act and to 'any' draft national legislative provisions<sup>75</sup> appears to indicate the same scope for both forms of consultation. Accordingly, as the latter (national) category includes only legally binding acts, by analogy, the scope for Community consultations ought to be the same. This approach has been adopted in practice, with formal consultation of the ECB taking place only in relation to acts with legally binding force, except where Community law expressly requires non-binding legal acts to be submitted for ECB consultation. In that context, it may be observed that the ECB must be consulted on certain recommendations where these relate to matters particularly central to the ECB, for example, under Article 112(2)(b) of the EC Treaty concerning the appointment of ECB's Executive Board members.

However, the scope for Community consultation for non-binding acts within the ECB's fields of competence is broader. Such non-binding acts are subject to consultation not only when expressly required by an EC Treaty provision but also where their purpose and expected impact in the relevant field is sufficiently significant to require the ECB's view. Therefore, when determining the Community acts in the ECB's fields of competence that require consultation, three issues should be considered:

- (a) the binding force of the Community act;
- (b) express requirement in the Treaties. Provisions requiring ECB consultation in specific cases usually identify not only the Community institution responsible for the consultation but also the act that is the subject of the consultation. A further example of this principle can be found in the consultation of the ECB on the opening of a conference of representatives of the governments of the Member States to draw up a Treaty amending the existing Treaties (Reform Treaty). The ECB's competence in this case was based on Article 48 of the TEU<sup>76</sup>, which requires consultation of the ECB where Treaty amendment proposals envisage institutional changes in the monetary area;

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<sup>75</sup> According to Arda (p. 130), '[t]he fact that the wording of this provision concerning both Community acts and national draft legislative provisions is the same in this regard [i.e. 'any'], seems to justify the assumption that the said restriction holds true for both types of rules'.

<sup>76</sup> Opinion CON/2007/20 of 5 July 2007 at the request of the Council of the European Union on the opening of an Intergovernmental Conference to draw up a Treaty amending the existing Treaties, (OJ C 160, 13.7.2007, p. 2).

- (c) the purpose and expected impact of the Community act in the relevant field. For example, a non-binding Community act such as a recommendation of the Commission related to the introduction of the euro or in the context of financial crisis qualifies for consultation with the ECB.

Given that consultation of the ECB is expected to serve a useful function, if the Community legislature wishes to obtain the ECB's views on opinions and recommendations or other non-binding acts, it may request an opinion from the ECB. There is no provision of Community law that precludes a Community institution from specifically consulting the ECB on such acts having regard to the specific expertise of the ECB in a particular field<sup>77</sup>.

In academic literature, the majority of authors share the broader and less pragmatic view that non-binding legal acts should be submitted for consultation to the ECB. Smits considers the subject open to discussion, but defends the broader view, arguing that such acts 'can perform a useful function in the coordination of hitherto divergent national or sectoral practices'<sup>78</sup>. This interpretation is also favoured by Zilioli and Selmayr who consider that the scope of Community consultation is very broad and that it 'extends to all Community institutions and bodies whenever they intend to adopt an act intended to produce legal effects, in particular regulations, directives, decisions, recommendations and opinions'<sup>79</sup>.

On a separate point, the scope of Community acts subject to consultation should not be limited to the Community acts identified in Article 249 of the EC Treaty. In *France v Commission*<sup>80</sup>, the Court appears to suggest that all acts intended to produce legal effects, that is, 'any measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects' are Community acts, subject to judicial review. This view is supported by Article 230 of the EC Treaty, which establishes the jurisdiction of the Court of Justice to review the legality of acts of the institutions 'intended to produce legal effects vis-à-vis third parties', other than recommendations and opinions.

In addition, international agreements<sup>81</sup> concluded by the Community or the Community and Member States (joint agreements<sup>82</sup>) with third countries or international organisations, in accordance with Article 300 of the EC Treaty, constitute Community acts that must be submitted to the ECB for consultation under Article 105(4) of the EC Treaty when they fall within the ECB's fields of competence. Accordingly, the ECB was asked to give its advice to the Council on a proposed decision authorising signature of the Hague Convention on the Law applicable to certain rights in respect of

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<sup>77</sup> See Würtz, p. 289, footnote 6, adopting the view of Smits.

<sup>78</sup> Smits, p. 211.

<sup>79</sup> Zilioli and Selmayr (2001), p. 100.

<sup>80</sup> Case C-366/88 *France v Commission* [1990] ECR I-3571, paragraph 8.

<sup>81</sup> For a detailed analysis see Würtz, pp. 294 and 295.

<sup>82</sup> In particular, the part binding on the Community.

securities held with an intermediary<sup>83</sup>. In the introductory paragraphs of its opinion (Opinion CON/2005/7<sup>84</sup>), where the ECB analysed and confirmed its competence to advise, following a reference to *Haegeman v Belgian State*<sup>85</sup> and to *French Republic v Commission of the European Communities*<sup>86</sup>, it concluded that '[t]he proposed decision is a 'proposed Community act' within the meaning of Article 105(4) of the EC Treaty because an international agreement is binding on the Community and an integral part of Community law; and a Community institution's decision authorising, on behalf of the Community, the signature of an international agreement that is intended to have legal effects in the Community is itself a Community act'.

In *Haegeman*, the Court of Justice expressly held that an agreement concluded under Article 300 of the EC Treaty constitutes 'so far as concerns the Community, an act of one of the institutions of the Community within the meaning of subparagraph (b) of the first paragraph of Article 177 [now Article 234 of the EC Treaty]' and that 'the provisions of the agreement, from the coming into force thereof, form an integral part of Community law'<sup>87</sup>. *France v Commission* takes that proposition further<sup>88</sup>, establishing that for the purposes of judicial review draft Community decisions for the conclusion of legally binding agreements under Article 300 of the EC Treaty between the Community and one or more States or international organisations also constitute Community acts.

It follows from that case-law<sup>89</sup> that any other international agreements<sup>89</sup> concluded by the Community under Article 300 of the EC Treaty that are legally binding on the Community and within the ECB's fields of competence must be submitted to the ECB for consultation.

Furthermore, the scope of Community acts subject to consultation must be interpreted to include proposed Community implementing acts, referred to under the Lamfalussy procedure for financial regulation as 'Level 2 acts' implementing 'Level 1 legislation'. The ECB, on the rare occasions when it has expressed a position on its own advisory function, has underlined that consultation is not optional in such cases and emphasised that proposed Level 2 acts constitute proposed Community acts within the meaning of Article 105(4) of the EC Treaty. In its own-initiative Opinion CON/2006/57<sup>90</sup>, the ECB stated that '[t]he ECB's competence to deliver an opinion on the proposed directive is based on Article

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<sup>83</sup> See also Zilioli and Selmayr (2006), p. 86 et seq.

<sup>84</sup> Opinion CON/2005/7 of 17 March 2005 at the request of the Council of the European Union on a proposal for a Council decision concerning the signing of the Hague Convention on the Law applicable to certain rights in respect of securities held with an intermediary, (OJ C 81, 2.4.2005, p. 10).

<sup>85</sup> Case 181/73 *Haegeman v Belgian State* [1974] ECR 449, paragraph 5.

<sup>86</sup> Case C-327/91 *France v Commission* [1994] ECR I-3641, paragraphs 15-17.

<sup>87</sup> *Haegeman*, above footnote 84, paragraphs 4-5.

<sup>88</sup> *France v Commission*, above footnote 86, paragraphs 14-15.

<sup>89</sup> Above footnote 88.

<sup>90</sup> Above footnote 65.



105(4) of the Treaty establishing the European Community, since the proposed directive is linked to the implementation of the monetary policy of the euro area, particularly with regard to the functioning of European money markets<sup>91</sup>.

Smits adds to the list of proposed Community acts ‘measures of a *sui generis* character, such as resolutions of the Council’ that should be submitted to the ECB for consultation ‘where their purport is more than the mere recording of the good intentions of the institution adopting the resolution’<sup>92</sup>. In support of that argument, Würtz suggests as an example the Resolution of the Council on the establishment of an exchange-rate mechanism in the third stage of the economic and monetary union at Amsterdam on 16 June 1997<sup>93</sup> and qualifies it as a ‘quasi-legal act’ clearly falling within the ECB’s fields of competence<sup>94</sup>.

### 4.3 Amendments to proposed Community acts and draft national legislative provisions<sup>95</sup>

In the case of amendments to draft legislative provisions two scenarios may be distinguished:

- (a) the ECB opinion has not already been adopted at the time when the amendments are proposed. In this case, the ECB will consider these amendments in its assessment of the most recent text, provided that the latter is submitted to the ECB without delay.
- (b) the ECB opinion has already been adopted at the time when new substantive provisions are proposed. In this case, the ECB should be consulted on those amendments within a period that allows for effective compliance with Decision 98/415/EC.

A consultation is required whenever amendments to proposed acts are substantive. In practice, this has resulted in situations where the ECB has been consulted three times<sup>96</sup> on different versions of the same draft legislation.

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<sup>91</sup> With regard to the importance of consultations on implementing measures, see also paragraph 1.3 of Opinion CON/2007/4 of 15 February 2007 at the request of the Council of the European Union on eight proposals amending Directives 2006/49/EC, 2006/48/EC, 2005/60/EC, 2004/109/EC, 2004/39/EC, 2003/71/EC, 2003/6/EC and 2002/87/EC, as regards the implementing powers conferred on the Commission, (OJ C 39, 23.2.2007, p. 1).

<sup>92</sup> See Smits, p. 211.

<sup>93</sup> OJ C 236, 2.8.1997, p. 5.

<sup>94</sup> See Würtz, pp. 297-298 who also makes reference to Smits p. 467 et seq.; Zilioli and Selmayr (2001), p. 207 et seq., and Usher, p. 189 et seq.

<sup>95</sup> See also Section 2.3.

<sup>96</sup> The Polish Minister for Finance consulted the ECB on three versions of a draft law proposing certain amendments to the regulation of the national deposit insurance scheme, managed by the Bank Guarantee Fund: Opinion CON/2008/32 of 23 July 2008 at the request of the Polish Minister for Finance on a draft law amending the Law on the Bank Guarantee Fund, Opinion CON/2008/5 of 17 January 2008 at the request of the Polish Minister for Finance on a draft law amending the Law on the Bank Guarantee Fund and Opinion CON/2007/26 of 27 August 2007 at the request of the Polish Minister for Finance on a draft law amending the Law on the Bank Guarantee Fund. The Cypriot Ministry of Finance consulted the ECB three times on provisions amending the Central Bank of Cyprus Laws of 2002 and 2003: Opinion CON/2006/50 of 26 October 2006 at the request of the Cypriot Ministry of Finance on a draft provision amending the draft law amending the Central Bank of Cyprus Laws of 2002 and 2003, Opinion CON/2006/33 of 28 June 2006 at the request of the Cypriot Ministry of Finance on a draft provision amending the

## 5 FIELDS OF COMPETENCE<sup>97</sup>

Having regard to the schematic position of Article 105(4) of the EC Treaty, in Title VII Part III (economic and monetary policy) in Chapter 2 on monetary policy, following the provision on the primary objective of the ESCB (Article 105(1) of the EC Treaty) and the basic tasks to be carried out through the ESCB (Article 105(2) of the EC Treaty), it follows that the ECB's advisory role is linked to the tasks of the ESCB<sup>98</sup>. Although Article 105(4) of the EC Treaty refers to the ECB's advisory function exercised in the ECB's fields of competence, the term 'fields of competence' is generally interpreted as referring to ESCB/ECB tasks. In particular, that interpretation is supported by Article 9.2<sup>99</sup> of the Statute of the ESCB, which makes the ECB responsible for all tasks conferred on the ESCB<sup>100</sup>.

The absence of a definition of the concept of 'fields of competence' suggests that uncertainties may sometimes arise. Although this ambiguity is probably intentional, given that treaties generally result from compromises between different views, to assist Member States and Community authorities in their assessment of whether to consult the ECB, greater clarity on the notion of the ECB's 'fields of competence' would be beneficial. In the absence of other rules and in addition to the provisions of Decision 98/415/EC, the above interpretation linking the fields of competence to ESCB/ECB tasks may serve to guide Community and national authorities.

Having regard to the interrelation between tasks and fields of competence of the ECB, Community acts and draft legislative provisions concerning 'basic tasks' of the ECB are clearly within ECB's fields of competence for the purposes of Article 105(4) of the EC Treaty. According to Article 105(2) of the EC Treaty, which is mirrored in Article 3.1 of the Statute of the ESCB, '[t]he basic tasks to be carried out through the ESCB shall be:

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draft law amending the Central Bank of Cyprus Laws of 2002 and 2003 and Opinion CON/2006/4 of 27 January 2006 at the request of the Central Bank of Cyprus on a draft law amending the Central Bank of Cyprus Laws of 2002 and 2003.

<sup>97</sup> For a list of ECB opinions classified according to matters falling within ECB's fields of competence see the ECB's legal booklet: 'The ECB's advisory role. Overview of opinions (1994-2008)'.

<sup>98</sup> Opinion of Advocate General Jacobs in *OLAF*, above footnote 3, points 137-141.

<sup>99</sup> Article 9.2 of the Statute of the ESCB reads: 'The ECB shall ensure that the tasks conferred upon the ESCB under Article 105(2), (3) and (5) of this Treaty are implemented either by its own activities pursuant to this Statute or through the national central banks pursuant to Articles 12.1 and 14.'

<sup>100</sup> In his Opinion in *OLAF*, above footnote 3, Advocate General Jacobs argues in point 137 that '[t]he notion of measures in its fields of competence in the fourth paragraph must be understood in the light of the enumeration of tasks in Article 105(2) EC, and of the fact that Article 105 EC is placed in Chapter 2 under the heading Monetary policy rather than in Chapter 3 which lays down institutional provisions for the ECB. It follows, in my view, that Article 105(4) EC must be interpreted as applying to proposed measures which are concerned with the issues covered by Article 105(2) EC (monetary policy, foreign exchange operations, management of foreign reserves and payment systems) and, perhaps, by Article 105(5) and (6) EC (prudential supervision) and Article 106 EC (issue of bank notes and coins)'.

- to define and implement the monetary policy of the Community,
- to conduct foreign-exchange operations consistent with the provisions of Article 111 of this Treaty,
- to hold and manage the official foreign reserves of the Member States,
- to promote the smooth operation of payment systems’.

However, the ECB’s fields of competence are not limited to its basic tasks. Article 2(1) of Decision 98/415/EC lists non-exhaustively the most relevant matters on which the ECB should be consulted by national authorities and at the same time clarifies the extent of the ECB’s fields of competence<sup>101</sup>. The matters listed are: ‘currency matters; means of payment; national central banks; the collection, compilation and distribution of monetary, financial, banking, payment systems and balance of payments statistics; payment and settlement systems; rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets’; and monetary policy instruments with respect to Member States which have not yet adopted the euro. In addition, the authorities of the Member States that have not adopted the euro must consult the ECB on any draft legislative provisions on the instruments of monetary policy<sup>102</sup>.

‘National central banks’, which is one of the categories listed in Article 2 of Decision 98/415/EC, covers a number of matters that fall within the ECB’s field of competence e.g. institutional changes, independence, accounting, reporting and auditing, board members, minimum reserves, monetary policy, participation in international monetary institutions, price stability, prohibition on monetary financing and privileged access, prudential supervision, foreign reserves, uncollateralised intra-day credit to government, professional secrecy, participation in international monetary institutions, and NCB statutes. Given the fact that the ECB is entrusted with the task of examining the compatibility of NCB statutes with Article 108 of the EC Treaty, which refers to the independence of the NCBs, and Article 109 of the EC Treaty, which refers to the requirement of legal convergence of those statutes with the EC Treaty and the Statute of the ESCB, clearly any amendment to NCB statutes is subject to consultation of the ECB<sup>103</sup>.

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<sup>101</sup> Although Decision 98/415/EC applies only to national consultations, in general terms the ECB’s fields of competence should be the same in cases of EU and national consultations with the exception of those areas closely linked to national legislation such as NCBs, as discussed further. For the conclusion that Decision 98/415/EC can be used as an aid to interpret the ECB’s fields of competence see Würtz p. 301 and the Opinion of Advocate General in *OLAF*, above footnote 3, point 143.

<sup>102</sup> Article 2(2) of Decision 98/415/EC.

<sup>103</sup> As concluded in Opinion CON/2008/9 of 21 February 2008 at the request of the German Ministry of Finance on a draft law amending 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

The category ‘national central banks’ includes both ESCB-related and non-ESCB-related tasks. Whereas NCBs have non-ESCB related tasks (such as banking operations) in addition to those related to the ESCB, at a national level, both sets of tasks are governed by their statutes, which must be consistent with Community law. This compatibility requirement is set out in Article 109 of the EC Treaty, which is reproduced in Article 14.1 of the Statute of the ESCB, and is intended to ensure the legal integration of NCBs into the ESCB. Article 109 of the EC Treaty provides that ‘[e]ach Member State shall ensure, at the latest at the date of the establishment of the ESCB, that its national legislation including the statutes of its national central bank is compatible with this Treaty and the Statute of the ESCB.’ National legislation introducing new NCB tasks must therefore be compatible with Community legislation.

Moreover, the performance of non-ESCB related tasks should be consistent with the requirement of central bank independence established by Article 108 of the EC Treaty mirrored in Article 7 of the Statute of the ESCB. Nonetheless, NCBs retain some flexibility in that regard, as according to Article 14.4 of the Statute of the ESCB, ‘[n]ational central banks may perform functions other than those specified in this Statute unless the Governing Council finds, by a majority of two thirds of the votes cast, that these interfere with the objectives and tasks of the ESCB. Such functions shall be performed on the responsibility and liability of national central banks and shall not be regarded as being part of the functions of the ESCB’.

In the area of collection, compilation and distribution of monetary, financial, banking, payment systems and balance of payments statistics, the ECB’s powers are set out in Article 5 of the Statute of the ESCB. Pursuant to Article 5.3 of the Statute of the ESCB, the ECB is mandated to contribute to the ‘harmonization, where necessary, of the rules and practices governing the collection, compilation and distribution of statistics in the areas within its fields of competence’. Therefore, ECB opinions in this field may constitute one of the tools for the accomplishment of this task.

Consultation is also required in the area of ‘rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets’. However, according to recital 3 of Decision 98/415/EC that requirement is stated to be ‘without prejudice to the present assignment of competences for policies relating to the prudential supervision of credit institutions and the stability of the financial system’. In that context, Article 105(5) of the EC Treaty confers on the ECB and the NCBs of the Eurosystem, in the area of financial stability and supervision, 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’.

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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.’

The ECB competence under the sixth indent of Article 2(1) of Decision 98/415/EC to issue opinions in relation to rules applicable to financial institutions is conditional on the draft legislative provisions having the required degree of significance in relation to financial stability. Member States are under an obligation to consult insofar as the proposed legislative provisions ‘materially influence’ financial stability. This condition does not apply to EU consultations on proposed Community acts relevant to the stability of the financial system.

The area ‘rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets’ also includes matters related to money laundering and terrorist financing, settlement finality, financial collateral arrangements, securitisation, dematerialisation of securities (from the perspective of the potential impact on the markets), reorganisation and winding-up of financial institutions. In the context of the 2008 financial markets crisis, national legislative provisions enhancing the deposit guarantee schemes or aimed at ensuring the stability of the financial market were adopted. In relation to those measures, the ECB had to ensure ‘consistency with the management of liquidity by the Eurosystem and compatibility with the operational framework of the Eurosystem’<sup>104</sup>. Matters of prudential supervision and financial stability in the context of consultations may be considered in conjunction with Article 25.1 of the Statute of the ESCB, which provides that the Council, the Commission and the competent authorities of Member States ‘may’ consult the ECB on ‘the implementation of Community legislation relating to the prudential supervision of credit institutions and to the stability of the financial system’.

As regards EU consultations, the second paragraph of Article 48 of the TEU<sup>105</sup> concerning institutional changes in the monetary area establishes a requirement for consultation. Under the EC Treaty, including the Statute of the ESCB, the following provisions require consultation of the ECB:

- Article 59 of the EC Treaty concerning safeguard measures of the Council in relation to movements of capital to or from third countries;
- the second paragraph of Article 104(14) of the EC Treaty concerning Council provisions replacing the Protocol on the excessive deficit procedure annexed to the EC Treaty;

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<sup>104</sup> See Opinion CON/2008/55 of 20 October 2008 at the request of the Austrian Ministry of Finance on draft legal measures to ensure the stability of the Austrian financial market.

<sup>105</sup> Article 48 of the TEU reads: ‘The government of any Member State or the Commission may submit to the Council proposals for the amendment of the Treaties on which the Union is founded. If the Council, after consulting the European Parliament and, where appropriate, the Commission, delivers an opinion in favour of calling a conference of representatives of the governments of the Member States, the conference shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to those Treaties. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area. The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.’

- Article 105(6) of the EC Treaty on the Council’s authority to confer upon the ECB specific tasks concerning policies relating to prudential supervision of credit institutions and non-insurance financial institutions;
- Article 106(2) of the EC Treaty in the area of euro coin issuance concerning Council measures to harmonise the denomination and technical specifications of circulation coins;
- Article 107(5) of the EC Treaty mirrored in Article 41 of the Statute of the ESCB, which concerns Council amendments to certain provisions of the Statute of the ESCB;
- Article 107(6) of the EC Treaty mirrored in Article 42 of the Statute of the ESCB, which concerns secondary Community legislation affecting the ECB/ESCB. This provision requires the ECB to be consulted on any act adopted by the Council pursuant to Article 20 of the Statute of the ESCB;
- Article 111(1) to (4) of the EC Treaty: paragraph (1) requires consultation of the ECB before the Council concludes formal agreements on an exchange-rate system for the euro in relation to non-Community currencies, and also before adopting, adjusting or abandoning the central rates of the euro within the exchange-rate system; paragraph (2) requires consultation before the Council formulates general orientations for exchange-rate policy in relation to these currencies; paragraph (3) requires consultation before the Council decides on the arrangements for the negotiation and for the conclusion of agreements concerning monetary or foreign-exchange regime matters by the Community with one or more States or international organisations; paragraph (4) requires consultation in connection with the position to be adopted by the Community, and its representation, at international level as regards issues of particular relevance to economic and monetary union;
- Article 112(2)(b) of the EC Treaty, rearticulated in Article 11.2 of the Statute of the ESCB, concerning the appointment of ECB Executive Board members;
- Article 114(3) of the EC Treaty on the composition of the Economic and Financial Committee;
- Articles 123(4) and 123(5)<sup>106</sup> of the EC Treaty on the conversion rates between the euro and the currencies of the Member States adopting the euro and other measures necessary for the introduction of the euro in Member States with a derogation;

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<sup>106</sup> See, for example, Opinion CON/2007/19 of 5 July 2007 at the request of the Council of the European Union on a proposal for a Council regulation amending Regulation (EC) No 974/98 as regards the introduction of the euro in Cyprus, on a proposal for a Council regulation amending Regulation (EC) No 974/98 as regards the introduction of the euro in Malta, on a proposal for a Council regulation amending Regulation (EC) No 2866/98 as regards the conversion rate to the euro for Cyprus and on a proposal for a Council regulation amending Regulation (EC) No 2866/98 as regards the conversion rate to the euro for Malta.

- Article 10.6<sup>107</sup> of the Statute of the ESCB on the procedure for amendments to Article 10.2 of the Statute of the ESCB concerning the voting procedures in the ECB’s Governing Council. In addition, Article 25.1 of the Statute of the ESCB establishes a regime of optional consultation, according to which the Council, Commission and the competent authorities of the Member States have the possibility to consult the ECB ‘on the scope and implementation of Community legislation relating to the prudential supervision of credit institutions and to the stability of the financial system’.

In practice, there are cases where the particularity of the subject-matter of draft national provisions makes it unclear whether those provisions come within the scope of the duty of consultation laid down in Decision 98/45/EC. In such cases, although Member States remain responsible for the decision of whether to consult, taking account of its activities in monitoring compliance with the obligation to consult, the ECB may advise the consulting authority on whether consultation is necessary.

Similarly, in cases that are not straightforward in the context of EU consultations, there can be informal discussions with the ECB on whether consultation is required, subject to the proviso that responsibility for the final decision rests with the Community institutions and bodies, regardless of the advice given by the ECB.

## **6 TIMING AND PROCEDURAL STEPS**

### **6.1 Timing**

As regards national consultations, Decision 98/415/EC addresses the issue of when to consult the ECB (see Section 6.1.1) and provides for the possibility for the consulting authority to set a time limit within which the ECB should adopt an opinion (see Section 6.1.2), which is aimed at ensuring that consultations form a useful role in the legislative process.

#### **6.1.1 Appropriate time to consult the ECB**

Article 4 of Decision 98/415/EC defines what constitutes ‘effective compliance’ with the Decision and, in essence, with the duty to consult the ECB. According to that provision, consultation is effective if national authorities address the request for an opinion ‘at an appropriate stage’ that enables the initiating authority of the national draft legislative provisions to take the ECB’s opinion into consideration before taking its decision on the substance. As a further condition, where appropriate, consultation is effective if ‘the opinion received from the ECB is brought to the knowledge of the adopting authority if the latter is an authority other than that which has prepared the legislative provisions concerned’. That provision establishes that regardless of which national authority submits the consultation request, the authority initiating the legislation needs to have sufficient time, according

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<sup>107</sup> Inserted by Article 5 of the Treaty of Nice.

to the timing constraints of the national legislative process, to consider the ECB opinion and, where necessary, exercise its discretion to amend the draft legislative provisions in order to accommodate the ECB's opinion before submitting the draft to the concerned adopting authority.

It is the national authorities' responsibility to estimate when to consult the ECB so that the consultation is not simply a formal procedural step, but an effective one, offering a real possibility for the relevant national authorities to consider and reflect on the ECB's opinion. Such assessment needs to reflect the national legislative process, in particular, its inherent timing constraints, and, at the same time, the duration of the consultation procedure at the ECB.

Where the authority consulting the ECB both initiates and adopts the draft legislation, the decision on when to consult the ECB appears to be easier to reach and the estimation of the time limits necessary for the adoption of the legislation does not present many problems. Where the initiating and adopting authorities differ, the appropriate time to consult the ECB is the time when the draft is still with the initiating authority as it needs to have the opportunity to take the ECB's opinion into consideration before forwarding the draft provisions to the adopting authority. In practice, depending on the nature of the national legislative process, the adopting authority, for example the parliament, may still have time to consult the ECB and consider whether to amend the draft legislative provisions in order to accommodate the ECB's opinion.

In the context of the financial markets crisis, many Member States adopted urgent legislation on which the ECB was consulted, thereby tacitly raising the issue of the appropriate time to consult. In those cases the ECB adapted its own procedures in order to provide a timely opinion reflecting that urgency (see on this point Section 6.1.2). However, effective compliance with Decision 98/415/EC could have been better achieved, if the consulting authorities had consulted the ECB earlier, for example, on an initial or earlier draft<sup>108</sup>.

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<sup>108</sup> In paragraph 2.1 of Opinion CON/2008/92 of 22 December 2008 at the request of the Slovenian Ministry of Finance on a draft decree laying down criteria and conditions for granting loans under Article 81.a of the Law on public finance, the ECB drew the attention of the Slovenian Ministry of Finance to the fact that '[t]he ECB has been flexible and able to respond within extremely short time limits to consultation requests received during this year's financial turmoil, but would have welcomed being consulted on the present Slovenian draft decree at an earlier stage in order to ensure that the adopting authority would have had sufficient time to take the ECB's considerations into account.' See also Opinion CON/2008/54 of 17 October 2008 at the request of the Danish Ministry of Economic and Business Affairs on a proposed Law on financial stability, in particular paragraph 2.1, Opinion CON/2008/76 of 25 November 2008 at the request of the Slovenian Ministry of Finance on a draft law amending the Law on public finance, paragraph 2.1, and Opinion CON/2008/88 of 19 December 2008 at the request of the Slovenian Ministry of Finance on a draft decree laying down criteria and conditions for granting guarantees under Article 86.a of the Law on public finance.



## 6.1.2 Time limit for the ECB to adopt an opinion

The second time-related aspect to the request for an opinion received from national authorities concerns the time limit in which the ECB delivers an opinion. The purpose of such limitation is to avoid ‘unduly lengthen[ing] procedures for adopting legislative provisions in the Member States’<sup>109</sup>. Where a consulting authority considers it necessary, it may indicate a time limit for the ECB. Decision 98/415/EC sets out in Article 3(1) only a minimum period for that time limit, that is, ‘one month from the date on which the President of the ECB receives notification to this effect’, which in practice has proven to be too short. Consequently, the one-month time limit should be fixed only in cases where there is a pressing need for the ECB to adopt its opinion within that period. The experience of the ECB has shown that the standard period for adopting an ECB opinion is between six and eight weeks. Naturally, in some cases the process is much shorter and in others longer. The period that is actually required for the adoption of a specific opinion should be reasonable and will vary according to the nature, complexity and sensitivity of the draft legislative provisions concerned. Under Article 3(2) of Decision 98/415/EC, in cases of extreme urgency the time limit may be reduced. However, the consulting authority must expressly state the reasons for such urgency<sup>110</sup>.

The legislative provisions concerning measures adopted in the context of the financial markets crisis aimed at preserving the stability of domestic financial markets constitute a very good example of situations in which urgency was justified<sup>111</sup>. In many cases the draft legislative provisions were adopted by the national authorities by accelerated legislative procedures in the days immediately following the consultation request (Opinions CON/2008/55, CON/2008/57 and CON/2008/92)<sup>112</sup> or less than 24 hours thereafter (Opinions CON/2008/54 and CON/2008/88)<sup>113</sup>. In the latter case, the national

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<sup>109</sup> Recital 6 of Decision 98/415/EC.

<sup>110</sup> In EMI Opinion CON/98/14 at the request of the Council of the European Union under Articles 106(6) and 109f(8) of the Treaty establishing the European Community (the Treaty) and Article 42 of the Statute of the ESCB on a proposal from the Commission for a Council Decision on the consultation of the European Central Bank by national authorities on draft legislative provisions (the proposal) (OJ C 190, 18.8.1998, p. 6), which was later adopted as Council Decision 98/415/EC, the EMI stated that ‘[w]hereas in most cases in the past the EMI has been able to meet even very short deadlines set by national authorities, experience has shown that both requiring the consulting authority to state the reasons for any urgency and allowing a request to be made for an extension to deadlines for replies might increase the efficient and orderly procedure followed when providing opinions’.

<sup>111</sup> In 2008 the ECB adopted 30 such opinions: Opinions CON/2008/44, CON/2008/46, CON/2008/48, CON/2008/50 to 52, CON/2008/54 to 62, CON/2008/65 to 69, CON/2008/74 to 76, CON/2008/79 to 81, CON/2008/88, CON/2008/89, CON/2008/91 and CON/2008/92.

<sup>112</sup> Opinion CON/2008/55 of 20 October 2008 at the request of the Austrian Ministry of Finance on draft legal measures to ensure the stability of the Austrian financial market, Opinion CON/2008/57 of 21 October 2008 at the request of the German Ministry of Finance on a Law on the implementation of a package of measures to stabilise the financial market and an order on its implementation and Opinion CON/2008/92 of 22 December 2008 at the request of the Slovenian Ministry of Finance on a draft decree laying down criteria and conditions for granting loans under Article 81.a of the Law on public finance.

<sup>113</sup> Opinion CON/2008/54 of 17 October 2008 at the request of the Danish Ministry of Economic and Business Affairs on a proposed Law on financial stability; and Opinion CON/2008/88 of 19 December 2008 at the request of the

authorities left no room for effective consultation. The ECB opinion was relevant only in relation to further legislative provisions complementing or implementing the adopted legislation. The ECB has been flexible and managed to adopt opinions in response to national consultations within extremely short time limits of only three days (Opinions CON/2008/44, CON/2008/62 and CON/2008/67)<sup>114</sup>. At the same time, it used the opportunity to remind consulting authorities that extreme urgency is not a reason to disregard the duty under Article 105(4) of the EC Treaty, a duty that is not abrogated even in cases of particular urgency. Generally, in such cases dialogue between the national authorities and the ECB is important and ‘should enable the interests of both to be taken into account’<sup>115</sup>.

In the spirit of genuine cooperation between national authorities and the ECB, national authorities should allow sufficient time to the ECB to follow all the procedural steps and take into account and reach a consensus between the views of all governors before adopting an opinion. On the other hand, the ECB should adopt its opinion in the shortest time possible having regard to the urgency and importance of the legislative procedure and not lengthen unnecessarily the procedure. Aside from the opinions produced in the context of the financial turmoil, national opinions were adopted in as little as two days in cases such as Opinion CON/2002/15<sup>116</sup>, and EU opinions in merely one day in cases such as Opinion CON/1998/61<sup>117</sup> or in two days in cases such as Opinions CON/2006/57<sup>118</sup> and CON/2007/9<sup>119</sup>. At the other extreme, few (14) national opinions required more than 100 days for adoption, with the longest consultation period of 144 days required for Opinion CON/2008/34<sup>120</sup>. For EU consultations, some 30 consultations required more than 100 days for adoption, with the longest

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Slovenian Ministry of Finance on a draft decree laying down criteria and conditions for granting guarantees under Article 86.a of the Law on public finance.

<sup>114</sup> Opinion CON/2008/44 of 3 October 2008 at the request of the Irish Minister for Finance on a draft Credit Institutions (Financial Support) Bill 2008, Opinion CON/2008/62 of 29 October 2008 at the request of the Swedish Ministry of Finance on a draft ordinance on State guarantees for banks etc., and Opinion CON/2008/67 of 13 November 2008 at the request of the Spanish Ministry for Economic Affairs and Finance on a draft order implementing Royal Decree-Law 7/2008 authorising State guarantees.

<sup>115</sup> See recital 6 in the preamble to Decision 98/415/EC.

<sup>116</sup> Opinion CON/2002/15 of 30 April 2002 at the request of the Finnish Ministry of Finance on a draft proposal concerning the rounding of payments denominated in euro.

<sup>117</sup> Opinion CON/1998/61 at the request of the Council of the European Union under Article 109l(4) of the Treaty establishing the European Community on a proposal for a Council Regulation (EC) on the conversion rates between the euro and the currencies of the Member States adopting the euro, (OJ C 412, 31.12.1998, p. 1). The opinion was adopted exceptionally by means of teleconferencing on 31 December 1998.

<sup>118</sup> Opinion CON/2006/57 of 12 December 2006 on a draft Commission directive implementing Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards the clarification of certain definitions, (OJ C 31, 13.2.2007, p. 1).

<sup>119</sup> Opinion CON/2007/9 of 13 April 2007 on a proposal for a regulation of the European Parliament and Council on quarterly statistics on Community job vacancies, (OJ C 86, 20.4.2007, p. 1).

<sup>120</sup> Opinion CON/2008/34 of 4 August 2008 at the request of the Swedish Ministry of Finance on a report concerning the financial independence of Sveriges Riksbank.

consultation period of 111 days required for Opinion CON/2006/21<sup>121</sup>. Nevertheless, the majority of the national and EU opinions were adopted by the ECB in less than 62 days.

Pursuant to Article 3(3) of Decision 98/415/EC, where a time limit has been set by the consulting authority, the ECB may request in due time an extension of this time limit of up to four additional weeks and such request may not be unreasonably declined by the consulting authority. After the time limit has expired, the national procedure for adoption of the draft legislation may continue.

Article 3(4) of Decision 98/415/EC provides for the continuance of the process for adoption of the draft legislation in the absence or delay in the receipt<sup>122</sup> (that is following expiry of the time limit determined in accordance with Article 3(1) to (3)) of the ECB's opinion, which implies in turn that the process for adoption of draft legislative provisions is suspended pending receipt of the ECB's opinion or expiry of a time limit set for the submission of the ECB's opinion. As rightly indicated in the Guide<sup>123</sup>, this does not mean that the whole national legislative process should be suspended. On the contrary, preparatory work of parliamentary standing committees, request and discussion of other opinions submitted by national authorities or other steps in the preparation of the draft can be carried out to avoid unnecessary delay, as long as the adopting authority is able to 'meaningfully' consider the ECB's opinion prior to taking its decision on the substance.

With respect to EU consultations, the consulting institution may also set a time limit for the ECB. Although there are no formal provisions in this respect, the same considerations of reasonableness and timeliness are applied as with national consultations. Usually it takes a maximum of three months to adopt an opinion on a proposed Community act.

In June 2007, a joint task force composed of representatives of the Commission, the Council's Secretariat and the ECB issued a report on the consultation of the ECB on proposed Community legal acts. The task force was established following a suggestion of the ECB's President. The objective of the report was to ensure that all parties accelerate internal procedures so that the ECB may be consulted and deliver its opinions as early as possible in the legislative process. Moreover, it recognised the obligation to consult the ECB on Lamfalussy Level 2 measures falling within the ECB's fields of competence and clarified the ECB's advisory competence in the fields of prudential supervision and financial stability. The discussions within the task force developed a shared understanding of the need for cooperation for the benefit of the legislative processes of the Community as a whole. The report

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<sup>121</sup> Opinion CON/2006/21 of 26 April 2008 on a proposal for a directive on payment services in the internal market, (OJ C 109, 9.5.2006, p. 10).

<sup>122</sup> Note that Article 3(4) of the Decision links the time limit to receipt of the ECB opinion and not its adoption, which, in principle, may differ in time.

<sup>123</sup> See page 19 of the Guide.

reflected the common understanding of the members of the task force but did not formally bind their respective institutions<sup>124</sup>.

## 6.2 Procedural steps

With respect to procedural steps, the Guide provides detailed guidance while Decision 98/415/EC is concise, but not comprehensive, addressing procedural aspects in Articles 3 and 4. Generally, the same procedure applies both to national and EU consultations, with any particularities highlighted in the following sections.

The procedural steps of the consultations are: (i) request for an opinion; (ii) establishment of a drafting panel within the ECB; (iii) acknowledgment of receipt; (iv) preparation of the opinion; (v) adoption of the opinion; (vi) transmission of the opinion and its further consideration; and (vii) publication.

### 6.2.1 The request for an opinion

The national authority or EU institution consulting the ECB submits a letter signed by the representative of that authority/institution<sup>125</sup> to the ECB's President requesting an opinion on the text of the draft legislative provisions or the proposed Community act attached to the letter. The procedure is considered initiated only on the date the ECB's President receives the request, and any time limit is calculated starting only from that date. An explanatory memorandum describing the subject matter and the main objectives pursued by the draft or proposal, the stage it has reached in the national/Community legislative process and the name and details of a contact person is information, which if attached to the request, can make the procedure run more smoothly and facilitate understanding of the draft provisions in question, the context in which they were drafted and proposed, and their purpose(s). Communication with the contact person may prove very productive in terms of promoting a full understanding of the objectives and potential effects of all or part of the draft provisions. In the case of EU consultations, the relevant documents are usually transmitted in the form of a proposal for a Community act. Where the draft national legislation is extensive or contains a large number of provisions addressing a variety of matters or the consultation request concerns two related pieces of draft legislation, the ECB recommends that the consulting authority indicate the draft provisions on which the ECB's comments are particularly sought. Two draft acts may be the object of the same opinion if these are related due to their subject matter and the consultation request refers to both of them or the two consultation requests are transmitted at the same time or at a sufficiently short

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<sup>124</sup> See ECB Annual Report 2007, pp. 124-125.

<sup>125</sup> For example, in the case of NCBs, the letter is signed by the NCB governor/president. Requests from ministries are signed by the minister concerned.

interval from each other to allow the ECB to address both of them in the same opinion as was the case in the national consultation Opinion CON/2008/52<sup>126</sup> or the EU consultation Opinion CON/2008/37<sup>127</sup>.

All documents related to national consultations may be submitted to the ECB in the official language(s) of the Member State concerned. In cases where the request is made as a matter of extreme urgency, an English translation of the explanatory memorandum and the main draft provisions submitted for consultation is desirable, but the request for an opinion need not be delayed in the absence of such translation.

### **6.2.2 Establishing the drafting panel**

The request for an opinion and the relevant documents, together with an English translation of the most relevant provisions, are circulated to all ECB business areas concerned by the draft legislation. A drafting panel of ECB staff from all relevant ECB business areas, including a lawyer (the lead lawyer) (in the case of national consultations the lead lawyer is one qualified in the jurisdiction concerned (the ‘country rapporteur’)) is appointed by the ECB’s management. This panel is charged with preparing the draft opinion.

### **6.2.3 Acknowledgment of receipt**

An acknowledgment of receipt is sent to the consulting authority in the same language as the consultation request. The letter mentions the date when the request was received marking the beginning of the procedure. At the same time, the documentation received and the English translation are sent to the members of the Governing Council and the General Council of the ECB. This enables them to familiarise themselves with the consultation dossier from the start and be in a position to comment properly when the draft opinion is submitted to them for comments. In cases where a Member State consults the ECB voluntarily, beyond the scope of the duty to consult, this fact is noted in the acknowledgment of receipt together with an indication of whether the ECB has specific comments that will be communicated through an ECB opinion.

### **6.2.4 Preparing the opinion**

Following the drafting panel meeting, its members examine the consultation dossier and prepare comments and drafting suggestions for the opinion according to the expertise of the business area they represent. This approach is intended to assist the consulting institutions in reducing the risk of

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<sup>126</sup> Opinion CON/2008/52 of 17 October 2008 at the request of the Spanish State Secretary for Economic Affairs on a Royal Decree-Law creating a Fund for the acquisition of financial assets and on a Royal Decree-Law adopting urgent financial and economic measures in relation to the concerted European action plan of the euro area countries.

<sup>127</sup> Opinion CON/2008/37 of 7 August 2008 on a proposal for a directive amending Directive 98/26/EC and Directive 2002/47/EC (OJ C 216, 23.8.2008, p. 1).

misinterpretation and increasing the efficiency of drafting if adopting the ECB's views. The lead lawyer incorporates the comments and drafting suggestions into the body of the draft opinion. The panel considers whether it would be useful to liaise with the contact person indicated in the request for an opinion or with the relevant NCB to obtain clarification of certain provisions that the ECB considers important.

An ECB opinion is drafted in numbered paragraphs, usually using the following structure: introduction and legal basis (where it states the date on which the request for consultation was received, the identity of the consulting authority and the legal basis for the ECB's competence); purpose of the draft law (which summarises the relevant draft legislative provisions); and general and specific observations.

Since the end of 2005, EU opinions contain an annex with specific drafting suggestions. The purpose is to avoid misunderstandings arising on the views expressed in the opinion and to enable the consulting authority to take the comments on board immediately and in a transparent manner.

Once drafted and agreed by the members of the drafting panel, the first draft opinion is submitted to the ECB's relevant Executive Board member for endorsement and circulation to the Governing Council with the benefits of the observations of the General Council.

#### **6.2.5 Adopting the opinion as an ECB legal act**

An ECB opinion is usually adopted by the ECB's Governing Council. However, 'in exceptional circumstances and unless not less than three Governors state their wish to retain the competence of the Governing Council for the adoption of specific opinions, ECB opinions may be adopted by the Executive Board, in line with comments provided by the Governing Council and taking into account the contribution of the General Council'<sup>128</sup>.

Pursuant to Article 47.1 of the Statute of the ESCB, one of the responsibilities of the General Council is to contribute to the advisory function of the ECB referred to in Articles 4 and 25.1 of the ESCB Statute and accordingly it has the opportunity to submit observations before the Governing Council adopts an opinion<sup>129</sup>. In practice, it is not the General Council as a decision-making body, but the members of the General Council who are involved in the advisory function of the ECB, thus mirroring the way the meetings of the General Council are organised to take account of each member's views.

Opinions requested by a national authority are adopted in the official language of the respective Member State and in English. Opinions resulting from EU consultations are adopted in English and translated into all official Community languages except consultations concerning the appointment of a

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<sup>128</sup> Decision ECB/2004/2 of 19 February 2004 adopting the rules of procedure of the European Central Bank (OJ L 80, 18.3.2004, p. 33), Article 17.5.

<sup>129</sup> Ibid., Article 12.1.

member of the Executive Board where the opinion is adopted in all official Community languages. All ECB opinions are signed by the ECB's President, according to Article 17 of the Rules of Procedure of the ECB. In his absence, the ECB's Vice-President has signed opinions.

ECB opinions constitute Community legal acts adopted in response to EU or national consultations or at the ECB's own initiative and are addressed to Community institutions or bodies or to the relevant Member States. While EU consultations constitute an element of the Community legislative process, national consultations are a mandatory element of the national legislative process, such consultations constituting a compulsory procedural requirement for the adoption of national legislative provisions. To the best of the author's knowledge, in the majority of Member States, ECB opinions are submitted directly to the parliament, when this is the adopting authority, as part of the legislative package. Nonetheless, in the majority of Member States there are no express rules requiring the consulting authority to proceed in this way. In some Member States, (e.g. Italy, Portugal and Slovakia) an ECB opinion is not submitted to the parliament as part of the legislative package. Two reasons are offered in justification of that approach. First, the consulting authority's submission to the parliament of the draft legislative provisions already takes account of the ECB opinion. Second, ECB opinions are public and published on the ECB's website. Those reasons are, in the author's view, unconvincing, in particular where national rules of legislative procedure generally require the results of mandatory consultation to be submitted to the adopting authority. The mere fact of publication and consideration by the consulting authority are inadequate reasons not to submit an ECB opinion to the adopting authority in the framework of the legislative process.

ECB opinions are drafted with due care to consistency in expressing views on a matter. Generally, they contain references to previous opinions covering similar cases in other Member States to ensure and prove the consistency of the views expressed. ECB opinions are objective and based on legal and technical reasons and not on political views. They are specific enough to contribute expert advice for the legislative authorities but they also establish a common approach and interpretation throughout Europe on specific matters. A particularity of the ECB opinions is that they are the result of a process of discussions and sharing of views and expertise among 27 governors. According to Article 10.2 of the Statute of the ESCB, the Governing Council acts by a simple majority of the members having a voting right, unless provided otherwise in the Statute of the ESCB. However, in practice, ECB opinions are adopted only with the consensus of all members of the Governing Council where all agree on the content of the opinion.

#### **6.2.6 Transmission of the opinion and its further consideration**

The opinion is transmitted to the consulting authority with a letter from the ECB's President in the official language of the respective Member State. If the consulting authority is not the adopting

authority and having in mind the requirement for the Member State to take the measures necessary to ensure effective compliance with Decision 98/415/EC, the consulting authority is obliged to bring the ECB opinion to the attention of the adopting authority or the authority preparing the draft, if such authorities are not the same as the consulting authority. For that purpose, academic literature has recommended that Member States introduce coordinating centres ‘at the constitutionally highest administrative level responsible for the redirecting of consultations and opinions’<sup>130</sup>. Such a practice has developed in Belgium, in as much as the Legislative Council (*Afdeling wetgeving van de Raad van State/Section de Législation du Conseil d’Etat*) requires the submission of any ECB opinion in cases where ECB consultation is mandatory before proceeding with the legislative procedure.

### 6.2.7 Publication

Since January 2005, all ECB opinions have been published on its website in the ‘legal framework’ section<sup>131</sup> immediately after their adoption and submission to the consulting authority, unless there are specific grounds to refrain from immediate publication. If there are such specific grounds, the opinion is published at the latest six months after its adoption. Opinions adopted as a result of a national consultation are adopted in English and in the official language of the respective Member State, or in the language that the Member State used when consulting the ECB, where it has more than one official language. The title of national opinions (as described in Section 1) is translated in all official EU languages. Opinions on proposed Community acts are translated into all official EU languages and published in the *Official Journal of the European Union*. For ECB legal acts, the ECB applies a language regime<sup>132</sup> that is in line with Council Regulation (EC) No 1 of 15 April 1958 determining the languages to be used by the European Economic Community<sup>133</sup>.

ECB annual reports list the ECB opinions adopted in the year concerned following consultation by Member States and by the Community institutions.

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<sup>130</sup> Arda, p. 141 et seq.

<sup>131</sup> In December 2004, the Governing Council decided that the ECB opinions issued at the request of national authorities would, as a rule, be published immediately following their adoption and subsequent transmission to the consulting authority.

<sup>132</sup> For the language regime in the EU and the importance of multilingualism, see Athanassiou.

<sup>133</sup> OJ 17, 6.10.1958, p. 385.



## 6.2.8 Impact assessment

Once the legislation that has been the subject of a consultation has been adopted, the ECB performs an impact assessment<sup>134</sup>, which is a routine review of the final version of the legislation that was the subject of an ECB opinion. In a majority of cases, ECB opinions have been followed either in whole or in part in the relevant EU or national legislation.

## 7 FAILURE TO CONSULT THE ECB

Any Community institution or body or national authority that falls within the scope of the duty to consult the ECB has both the power to consult and equally the power not to consult. However, it must accept the legal consequences of exercising such discretion. Failure to adhere to this requirement may result in infringement proceedings before the Court of Justice against a Member State under Articles 226 and 227 of the EC Treaty and could also trigger the annulment of the legal act concerned, irrespective of whether that measure is a Community act or a national legislative provision. Proceedings may be brought in national courts concerning the validity or enforceability of national legal provisions. Since a national court cannot rule on the validity or enforceability of a Community act, but only of a national act, under Article 234 of the EC Treaty it may request a preliminary ruling from the Court of Justice on that matter.

If a Member State infringes the obligation to consult the ECB under Article 105(4) of the EC Treaty in conjunction with Decision 98/415/EC, proceedings may be initiated by the Commission under Article 226 of the EC Treaty or by the ECB when the obligation to consult relates to an NCB. The ECB can bring such proceedings before the Court of Justice under Article 237(d)<sup>135</sup> of the EC Treaty and Article 35.6<sup>136</sup> of the Statute of the ESCB. No case-law has been generated in this context so far. Under Article 227 of the EC Treaty, actions can be brought by a Member State against another Member State that has breached the obligation to consult the ECB.

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<sup>134</sup> In the context of national consultations, the ECB appreciates receiving a copy of the legislative provisions as finally adopted. Such follow-up usually contains also the reasoning for not accepting the ECB's views if that should be the case.

<sup>135</sup> Article 237(d) provides that: 'The Court of Justice shall, within the limits hereinafter laid down, have jurisdiction in disputes concerning: [...] (d) the fulfilment by national central banks of obligations under this Treaty and the Statute of the ESCB. In this connection the powers of the Council of the ECB in respect of national central banks shall be the same as those conferred upon the Commission in respect of Member States by Article 226. If the Court of Justice finds that a national central bank has failed to fulfil an obligation under this Treaty, that bank shall be required to take the necessary measures to comply with the judgment of the Court of Justice.'

<sup>136</sup> Article 35.6 of the Statute of the ESCB provides that '[t]he Court of Justice shall have jurisdiction in disputes concerning the fulfilment by a national central bank of obligations under this Statute. If the ECB considers that a national central bank has failed to fulfil an obligation under this Statute, it shall deliver a reasoned opinion on the matter after giving the national central bank concerned the opportunity to submit its observations. If the national central bank concerned does not comply with the opinion within the period laid down by the ECB, the latter may bring the matter before the Court of Justice.' See also Article 35.5 of the Statute of the ESCB: 'A decision of the ECB to bring an action before the Court of Justice shall be taken by the Governing Council.'

When adopted without having consulted the ECB, Community acts may be annulled by the Court of Justice in actions brought by Member States, the Commission, the Council, the European Parliament, the Court of Auditors, the ECB and natural and legal persons against the Commission, the Council, the European Parliament or the ECB. Articles 230 and 233 of the EC Treaty describe the circumstances in which such an action may be brought and the grounds for annulment that may be pleaded. Although in general terms, actions based on Article 230 of the EC Treaty are brought before the Court of First Instance, in the case of actions brought by the Member States, Community institutions and the ECB, jurisdiction rests with the Court of Justice<sup>137</sup>. The Court of Justice is competent to review the legality of Community acts and to declare them void if the action brought against them is well founded<sup>138</sup>, for example, where the act infringes an essential procedural requirement or provisions of the EC Treaty. Moreover, the ECB may bring actions before the Court of Justice under Article 230(3) of the EC Treaty subject to two conditions:

- (a) the purpose of the action is to protect the ECB's prerogatives. It is recognised that one of the prerogatives of the ECB is to give advice through its opinions; a matter that is not simply an advisory task, but also an advisory right. It has a right to be consulted and express its views on the matters falling within its fields of competence to both Community and national authorities<sup>139</sup>.
- (b) the contested act is alleged to be invalid on the grounds of lack of competence, infringement of an essential procedural requirement, infringement of the EC Treaty or of any rule of law relating to its application, or misuse of powers.

The question of whether consultation of the ECB is an 'essential' procedural requirement of the EC Treaty, which must be satisfied prior to the adoption of a Community act or a national legislative provision, is for the Court of Justice to determine. Not all failures to comply with procedural requirements result in annulment<sup>140</sup>. However, in certain cases concerning the obligation to consult Community institutions the Court of Justice held that non-consultation constitutes an infringement of an essential procedural requirement<sup>141</sup>.

Proceedings may be brought in national courts concerning the validity or enforceability of national provisions adopted without consultation of the ECB. In those Member States in which individuals have a right to initiate proceedings seeking to annul a national legislative provision on the grounds of a serious procedural defect, individuals should have the right also to seek the annulment of national legislative provisions adopted in breach of an essential procedural requirement of Community law,

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<sup>137</sup> See Article 225(1) of the EC Treaty in conjunction with Article 51 of the Statute of the Court.

<sup>138</sup> Article 230 of the EC Treaty in conjunction with Article 231 of the EC Treaty.

<sup>139</sup> Smits, p. 213, referred to also in Arda, p. 143.

<sup>140</sup> Craig and de Búrca, pp. 533-534.

<sup>141</sup> See Section 2.3 above.

such as prior consultation of the ECB<sup>142</sup>. In that context, in *Grad v Finanzamt Traunstein*<sup>143</sup> the Court of Justice held that ‘where, for example, the Community authorities by means of a decision have imposed an obligation on a Member State or all the Member States to act in a certain way, the effectiveness (*‘l’effet utile*) of such a measure would be weakened if the nationals of that State could not invoke it in the courts and the national courts could not take it into consideration as part of Community law. [...] Article 177 [now Article 234 of the EC Treaty], whereby the national courts are empowered to refer to the Court all questions regarding the validity and interpretation of all acts of the institutions without distinction, also implies that individuals may invoke such acts before the national courts. Therefore, in each particular case, it must be ascertained whether the nature, background and wording of the provision in question are capable of producing direct effects in the legal relationship between the addressee of the act and third parties.’ Accordingly, in order to determine whether natural and legal persons may rely on Decision 98/415/EC before national courts, regard must be had to such context including the first subparagraph, second indent, of Article 105(4) of the EC Treaty and the respective provisions of national law. In relation to direct effect, in *van Gend & Loos*<sup>144</sup> the Court of Justice established three criteria to determine whether or not a particular provision may be invoked by individuals in national courts. These criteria can be summarised as follows: for a provision to have direct effect it must be sufficiently clear, precise and unconditional and should not require Community or national authorities to adopt further rules for its implementation.

When examining the reasons for non-consultation, it appears that most often they concern matters of political expediency or result from emergency rules and deadlines at the national level, such as an imminent deadline for the implementation of a directive. Should the argument be raised that the consultation procedure is a bureaucratic procedural step with no added value and a mere delay for the consulting authority, such argument must surely apply equally to consultation of the relevant authorities within the Member States and other public and democratic procedures and principles such as that of transparency.

Within the ESCB, the Legal Committee (LEGCO), which provides legal support for the fulfilment of the ESCB’s statutory tasks is responsible for closely monitoring domestic legislative developments and NCBs and the ECB report internally on compliance with the obligation to consult the ECB on draft legislative provisions by national authorities in the ECB’s fields of competence.

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<sup>142</sup> See the Guide, p. 25.

<sup>143</sup> Case 9/70 *Grad v Finanzamt Traunstein* [1970] ECR 825, paragraphs 5 and 6.

<sup>144</sup> Case 26/62 *van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1.

As of 2008, information regarding the most significant cases of non-compliance with the duty to consult the ECB on draft national and Community legislation is also included in the ECB's annual report<sup>145</sup>.

## **Conclusion**

Consultation of the ECB is an essential procedural requirement enshrined in the EC Treaty, which requires Community institutions and bodies as well as national authorities to request the ECB's opinion before taking a final decision on draft Community or national legislation within the ECB's fields of competence. The consulting authority is required not only to formally request an opinion from the ECB, but also take the ECB's view on the matter into consideration before finalising the legislation.

As outlined earlier, there are still ambiguities and uncertainties as to the scope of proposed Community acts and scope of Community institutions and bodies subject to the obligation to consult the ECB, as well as to the scope of the ECB's 'fields of competence'.

The practical aspects discussed in this paper, in particular in Section 6, demonstrate that the ECB is sufficiently flexible to respond in a timely fashion to submitted requests in conformity with the EC Treaty and Decision 98/415/EC. Nevertheless, it is important to underline that cooperation between the ECB and the authorities, institutions and bodies under a duty to consult it plays an important role in ensuring the efficiency of the consultation procedure, at the end of which a Community legal act is adopted.

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<sup>145</sup> See ECB Annual Report 2007, p. 127.

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