NATIONAL EXPERIENCES IN PREPARING FOR THE INTEGRATION OF NATIONAL CENTRAL BANKS INTO THE EUROSYSTEM: THE ORGANIC LAW OF BANCO DE PORTUGAL

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ABSTRACT

La legge organica (Organic Law – OL) del Banco de Portugal (BP) è stata adeguata al Trattato CE in due fasi: la prima nel 1995, la seconda nel 1998.
Gli emendamenti del 1995 miravano, sostanzialmente, a proibire il finanziamento monetario dello Stato e l'accesso privilegiato alle istituzioni finanziarie. Successivamente furono approvati altri emendamenti per avvicinare maggiormente l'obiettivo prioritario della BP al mantenimento della stabilità dei prezzi, per attribuire alla BP la responsabilità della conduzione della politica monetaria e rafforzarne l'indipendenza finanziaria.
Gli emendamenti del 1998 si basavano sul fatto che, mentre gli adeguamenti giuridici da introdurre in materia di indipendenza delle banche centrali nazionali (BCN) dovevano essere pienamente efficaci al più tardi entro la data di istituzione del SEBC, gli adeguamenti finalizzati a integrare le Banche Centrali Nazionali nel SEBC, benché preferibilmente adottati prima di tale data, dovevano divenire efficaci soltanto o all'inizio della Terza fase (per gli Stati membri senza deroga) o all'inizio della loro piena partecipazione alla UEM (per gli Stati membri con deroga). Senza conoscere, al momento di legiferare, l'inserimento o meno del Portogallo tra gli Stati membri rispondenti alle condizioni necessarie per adottare l'euro il 1° gennaio 1999, il legislatore portoghese ha considerato due ipotesi: la prima, che il Portogallo non avrebbe adottato la moneta unica il 1° gennaio 1999, e l'altra che l'avrebbe fatto. Nella prima ipotesi, gli emendamenti all'OL sarebbero stati quelli, a completamento dell'indipendenza della BP, introdotti con l'articolo 1 della Legge 5/98 (in vigore dal 1° febbraio 1998) oltre a quelli relativi all'integrazione (mitigata), introdotta dall'articolo 3 della stessa legge (in vigore dal 1° gennaio 1999). Nella seconda ipotesi, gli emendamenti alla OL sarebbero stati quelli relativi all'indipendenza, introdotti con l'articolo 1 e in vigore dal 1° febbraio 1998, e quelli che rafforzavano tale indipendenza e che riguardavano anche l'integrazione (piena), introdotta dall'articolo 2 della stessa legge e in vigore dal giorno in cui il Portogallo avesse adottato l'euro come propria valuta.

PREFACE

This paper has been written bearing particularly in mind the Member States that have not yet adopted the euro as their currency but that, should this be envisaged in the future, will face similar problems with regard to achieving legal convergence as Portugal did. In this context, its main purpose is to describe the "two in one" approach followed by the Portuguese legislative bodies when deciding to foresee, in one single legal act, the two possibilities of Portugal either adopting or not adopting the euro on 1 January 1999. This article is not intended to establish a model that should be followed by other Member States: obviously, each national legislator is free to choose its own approach. However, the European Monetary Institute (EMI) singled out the Portuguese approach for particular praise in its Opinion of 15 August 1997, noting "with particular satisfaction the comprehensive fashion in which the adaptation of the Bank's statute is foreseen in the draft law, whilst at the same time the different situations are accommodated which may occur dependent on the moment at which Portugal adopts the single currency".

INTRODUCTION

When the Treaty of Maastricht entered into force on 1 November 1993, rewording the provisions dedicated to Economic and Monetary Policy[1] of the Treaty establishing the European Community (Treaty), the statutes of the Banco de Portugal (henceforth "the Bank") were contained in an Organic Law (OL) which had been approved by Decree-Law 337/90 of 30 October 1990 (OL-90).

The new requirements of the Treaty conflicted with several provisions of OL-90, and the Portuguese authorities therefore decided to adapt the OL in two steps, the first in 1995 and the second in 1998.

I THE 1995 AMENDMENTS

1.1

Some of the provisions of OL-90 were clearly inconsistent with Articles 101 and 102.1 of the Treaty (the prohibition of monetary financing and of privileged access to financial institutions, respectively), and attention had to be paid to the fact that these Articles would be applicable as from the beginning of the second stage of Economic and Monetary Union (EMU), i.e. from 1 January 1994.[2]

More specifically, the Bank was allowed to "grant to the State, through the appropriate credit operations, the funds required by the latter to subscribe capital stock of international organisations operating chiefly in the monetary, financial

1 Currently Articles 98 to 124, after the renumbering made by the Treaty of Amsterdam. This paper uses the numeration introduced by this Treaty.
2 Article 116.3, in conjunction with Article 116.1 of the Treaty.

and foreign exchange fields" (Article 25); the Autonomous Regions of Azores and Madeira were permitted to resort to an "account, free of charge" opened with the Bank (Article 26)[3]; and the Bank was allowed "to buy and sell securities issued by the Portuguese State" (Article 35.1.b).

It seems obvious that Articles 25 and 35.1.b were contrary to Article 101.1 of the Treaty[4], while Article 26 contradicted Article 102.1 of the same Treaty.[5] Therefore, OL-90 was amended by Decree-Law 231/95 of 12 September 1995 with the main purpose of adapting it (although almost two years later…) to the said Articles of the Treaty.

1.2

Article 25 was reworded as follows: "(1) Overdraft facilities or any other type of credit facility with the Bank in favour of the State or other State-dependent services or bodies, other public-law legal persons and public undertakings, or any other bodies on which the State, the Autonomous Regions or local authorities may, directly or indirectly, have a dominant influence, shall be prohibited. (2) The Bank shall not guarantee any commitments of the State or any other body mentioned in the foregoing number, and shall not directly purchase debt instruments issued by the State or by the same bodies."[6]

The mechanism foreseen in Article 26 of OL-90 on the resort to a free-of-charge account by the Autonomous Regions was replaced in Decree-Law 231/95 by a transitional provision stating that "the Autonomous Regions may temporarily benefit from an interest-free credit facility with the Banco de Portugal". This exception was in accordance with the Protocol on Portugal annexed to the Treaty.[7] Later on, Article 48 of Law 13/98 of 24 February 1998 laid down that the Autonomous Regions' interest-free accounts would be definitively closed no later than 31 December 2000 and that the respective debit balances would be paid on that date.

Finally, Article 35.1.b has been reworded to allow the Bank to buy and sell securities issued by the Portuguese State "on the secondary market" only.

3 Under the original wording of Article 26 of OL-90, the State itself was also entitled to resort to a free-of-charge account opened with the Bank. However, such an account had already been closed in accordance with Article 58 of Law 2/92 of 9 March 1992 (the State budget for 1992). Therefore, at the entering into force of the Treaty of Maastricht, the part of Article 26 referring to the State's account had been implicitly repealed.

4 "Overdraft facilities or any other type of credit facility with the ECB or with the central banks of the Member States (hereinafter referred to as 'national central banks') in favour of Community institutions or bodies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the ECB or national central banks of debt instruments."

5 "Any measure, not based on prudential considerations, establishing privileged access by Community institutions or bodies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States to financial institutions, shall be prohibited."

6 The prohibition of guaranteeing commitments of the State or other public bodies was linked to Article 103 of the Treaty.

7 "(1) Portugal is hereby authorised to maintain the facility afforded to the autonomous regions of Azores and Madeira to benefit from an interest-free credit facility with the Banco de Portugal under the terms established by existing Portuguese law. (2) Portugal commits itself to pursue its best endeavours in order to put an end to the above-mentioned facility as soon as possible."

At the same time, the opportunity was taken to introduce, on a voluntary basis, other amendments with the aim of facilitating the path to EMU. In this context, the amendments to Articles 3, 18.1 and 63.2 deserve special mention.

According to Article 3 of OL-90, the objective of the Bank was, in its capacity as the central bank of Portugal, to "ensure the internal monetary equilibrium and the external solvency of the currency"; this provision came closer to the first and second sentences of Article 105.1, of the Treaty[8], insofar as it was rephrased as follows: "The primary objective of the Banco de Portugal, as the central bank of the Portuguese Republic, shall be to maintain price stability, taking into account the overall economic policy of the Government."

Article 18.1 of OL-90 stated that only "taking into account the Government's guidelines" was it incumbent on the Bank "to cooperate in the formulation of the monetary and foreign exchange policies and to execute such policies"; Decree-Law 231/95 eliminated the reference to the government's guidelines and entrusted the Bank with the responsibility for conducting monetary policy, and no longer just cooperating in the formulation of this policy: "As [the] central bank, besides the conduct of monetary policy, under the terms of Article 3, it shall be particularly incumbent on the Bank [...] to cooperate in the formulation and to implement the foreign exchange policy".

Finally, while Article 63.2 of OL-90 on the distribution of profit for the fiscal year laid down that, after a deduction of 20% for legal and other reserves, 80% of such profit should be distributed to the State[9], the 1995 version reinforced the financial autonomy of the Bank since, after deducting 20% for reserves, the remainder would be distributed to the State as dividends, "or to other reserves proposed by the Board of Directors and approved by the Minister of Finance".

2 REQUIREMENTS OF INDEPENDENCE OF NATIONAL CENTRAL BANKS (NCBs) AND OF THEIR INTEGRATION INTO THE EUROPEAN SYSTEM OF CENTRAL BANKS (ESCB)

2.1

According to Article 108 of the Treaty, applicable as from the beginning of the third stage of EMU[10], "when exercising the powers and carrying out the tasks and duties conferred upon them by this Treaty and the Statute of the ESCB, neither the ECB, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Community institutions or bodies, from any government of a Member State or from any other body. The Community institutions and bodies and the governments of the Member States undertake to respect this

8 "The primary objective of the ESCB shall be to maintain price stability. Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Community with a view to contributing to the achievement of the objectives of the Community as laid down in Article 2."

9 The Banco de Portugal has been totally owned by the State since 15 September 1974 (Decree-Law 452/74 of 13 September 1974).

10 Article 116.3 of the Treaty.

principle and not to seek to influence the members of the decision-making bodies of the ECB or of the national central banks in the performance of their tasks."

By virtue of Article 109 of the Treaty, "each 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."

It was known that the Commission and the EMI would report to the ECOFIN Council on the progress made by the Member States in the fulfilment of their obligations regarding the achievement of EMU, and moreover that such reports would not only analyse the degree of sustainable economic convergence among Member States, but would also "include an examination of the compatibility between each Member State's national legislation, *including the statutes of its national central bank*, and Articles 108 and 109 of this Treaty and the Statute of the ESCB".[11] Moreover, the Council of Heads of State or Government, taking into account the above-mentioned reports, would confirm before 1 July 1998 which Member States fulfilled the necessary conditions for the adoption of the single currency.[12]

It derives from the above that, to be included in the group of those fulfilling the conditions for adopting the single currency, Member States should previously respect not only the economic convergence criteria, but also the *legal convergence* criteria.

In its essence, legal convergence means that (i) NCBs must be *independent*, either from the political authorities or from any other entities outside the ESCB[13]; and (ii) not only the statutes of NCBs but all national legislation that has an impact on the NCBs' performance of their ESCB-related tasks has to be compatible with the Treaty and with the Statute of the ESCB/ECB (the Statute), keeping namely in mind the *integration* of NCBs into the ESCB.[14]

2.2

The *independence* of NCBs, to which Article 108 of the Treaty and Articles 7 and 14.2 of the Statute refer, is necessary for the performance of ESCB-related tasks and may be conceived as institutional, personal, functional and financial independence.

Institutional independence means that neither the NCBs nor any member of the respective decision-making bodies may seek or take instructions from any entity outside the ESCB.

11 Article 121.1 of the Treaty.
12 Article 121.4 of the Treaty. In fact, this would take place during the first quarter of 1998 because, according to Council Decision 96/736/EC of 13 December 1996, on entry into the third stage of Economic and Monetary Union (OJ L 335, 24.12.96, p. 48), the procedure foreseen in Article 121.4 of the Treaty would be applied "as soon as possible in 1998."
13 With the natural exception of the judicial authorities.
14 Due to the limited scope of the present paper, reference shall only be made to aspects related to the statutes of NCBs.

Personal independence means that the term of office of a governor of an NCB shall be no less than five years, and that a governor may not be relieved from office unless he or she no longer fulfils the conditions required for the performance of his or her duties, or if he or she has been guilty of serious misconduct. Taking into account the spirit of the Treaty, the same rules for the security of tenure of office should also apply to the other members of decision-making bodies of NCBs involved in the performance of ESCB-related tasks.

Functional independence means that NCBs' statutes must clearly reflect that in the third stage of EMU, they will perform their duties in an operational framework whose objectives are laid down in Article 105 of the Treaty, and no longer at national level.

Financial independence implies that NCBs must be in a position that allows them to avail themselves of the financial resources that are necessary to perform their functions.

2.3

As stated above, legal convergence also has the meaning of *integration* of NCBs into the ESCB. Articles 12.1 and 14.3 of the Statute are particularly devoted to this integration, which means that it has to be taken into account that NCBs are an integral part of the ESCB and must act in accordance with the guidelines and instructions of the European Central Bank (ECB). The ESCB is an independent and self-regulated system whose components are the NCBs and the ECB[15], and where the NCBs must be able to comply with decisions taken by the ECB. Hence, national legislative provisions, including the statutes of NCBs, that create obstacles to compliance with such decisions or that do not respect the prerogatives of the ECB are incompatible with the full operation of the system.

To sum up, the full integration of NCBs into the ESCB implies the adoption of other measures beyond those aiming to ensure independence, particularly taking into account the need to allow NCBs to perform their functions in their capacity as members of the ESCB and in accordance with the decisions of the ECB.

3 THE 1998 AMENDMENTS

3.1

As mentioned before, each Member State had to ensure the compatibility of its national legislation, including the statutes of its NCB, with the Treaty and the Statute of the ESCB *"at the latest at the date of the establishment of the ESCB"*.[16] Since the ESCB would be established "as soon as the Executive Board (of the ECB) is appointed", this appointment being made *"immediately after 1 July*

15 Article 107.1 of the Treaty.
16 Article 109 of the Treaty.

1998"[17], the date of establishment of the ESCB would *precede the beginning of the third stage* of EMU. It should be noted that, regarding the application of Articles 108 and 109, the Treaty does not distinguish between Member States with a derogation and Member States without a derogation. Therefore, these Articles were binding for all Member States (with the sole exceptions of the United Kingdom and, to a lesser extent, Denmark)[18], since a derogation, in the sense of Article 122 of the Treaty, only means that the respective NCB participates in the ESCB with reduced rights and obligations. Consequently, the time limit for all the necessary legislative adaptations would be the date of establishment of the ESCB, i.e. 1 July 1998.

Besides this, the Report on Progress towards Convergence, published by the EMI in November 1996, had highlighted[19] that the adaptations to be introduced in the field of *independence* of the NCBs needed to be fully *effective*, at the latest, by the date of the establishment of the ESCB, while adaptations aiming to *integrate* NCBs into the ESCB, although possibly *adopted* before that date, only needed to become *effective* either at the start of the third stage (for Member States without a derogation) or at the start of their full participation in EMU (for Member States with a derogation).

This timing created a problem of legislative technique for the Portuguese legislative bodies. Considering that the compatibility of the statutes of the NCBs with the Treaty was one of the eligibility requirements for a Member State to adopt the single currency at the start of the third stage of EMU[20], the amendments to the OL of the Banco de Portugal would need to be adopted before knowing whether or not Portugal would participate in that group of countries. Therefore, the problem was, in addition to the provisions on independence, *how to determine which norms relative to integration into the ESCB needed to be adopted, before knowing what kind of integration (full or mitigated) would be required of the Bank*.

It appeared that the easiest way to proceed would be to divide the law amending the OL into two main parts. The first was chiefly aimed at amending some Articles of the OL then in force, so as to guarantee the independence of the Bank, and should become effective immediately; the second would fully replace the OL with a new text containing both independence and full integration requirements, and would become effective at the start of the third stage or, should Portugal not be confirmed as fulfilling the necessary conditions for the adoption of the single currency on 1 January 1999, at a later date on which Portugal would adopt the single currency.

17 Article 123.1 of the Treaty.
18 The United Kingdom, having notified the Council that it did not intend to move to the third stage, was exempted from the application of Articles 108 and 109 of the Treaty by virtue of paragraphs 2 and 5 of the Protocol on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland, annexed to the Treaty. Denmark, which had also notified that it would not participate in the third stage, was considered to be a Member State with a derogation and, as such, Danmarks Nationalbank had to fulfil the requirements of central bank independence, in accordance with Article 108 of the Treaty and with Articles 7 and 14.2 of the Statute.
19 See p. 99.
20 Articles 121.1 and 121.4.

It was however taken into account that even if Portugal were not to be in the first group of countries participating in the single currency, some mitigated integration requirements would nevertheless apply to all NCBs as from the start of the third stage[21], regardless of the full participation of the respective country at that stage. Consequently, it was also considered advisable to lay down forthwith the provisions amending the OL which – should Portugal fail to participate in the single currency from the start – were designed to reconcile the OL with these mitigated integration requirements and would become effective at the start of the third stage.

Law 5/98 of 31 January thus contained simultaneously and successively the following: some changes to be introduced immediately in the OL with regard to the Bank's independence (Article 1)[22]; a new integral version of the OL, which envisaged not only the independence of the Bank but also its full integration into the ESCB, whose version would entirely replace the OL then in force as of the date of Portugal's full participation in the third stage of EMU (Article 2)[23]; and other amendments to the OL in the field of integration, which would only become effective at the start of the third stage if Portugal's full participation were to occur only subsequently, and whose validity would be confined to the interim period between the start of the third stage and the day on which Portugal adopts the euro (Article 3).[24]

In other words, without knowing, at the moment of legislating, whether or not Portugal would be confirmed as fulfilling the necessary conditions to be included in the group of Member States that would adopt the single currency on 1 January 1999, the Portuguese legislator considered two hypotheses, one being that Portugal would not adopt the single currency on 1 January 1999, and the other that it would. In the first hypothesis, the amendments to the OL would be those completing such independence, introduced by Article 1 of Law 5/98 (in force since 1 February 1998) plus those regarding (mitigated) integration, introduced by Article 3 of the same Law (in force as from 1 January 1999). In the second hypothesis, the amendments to the OL would be those regarding independence, introduced by Article 1 and in force since 1 February 1998, plus those reinforcing such independence and regarding also (full) integration, introduced by Article 2 of the same Law and in force as of the day of Portugal's adoption of the euro as its currency.

21 With the possible exception of the Bank of England, pursuant to the Protocol on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland.

22 Article 1: "(1) As of the date of publication of this Law, Articles 1, 3, 16, 43, 44, 47, 51, 57, 58, 64, 66, 67, 69, 71 and 72 of the Organic Law of the Banco de Portugal, approved by Decree-Law No 337/90 of 30 October, as amended by Decree-Law No 231/95 of 12 September and by Law No 3/96 of 5 February, shall be reworded as follows: [...] (2) As of the date mentioned in the foregoing paragraph, Articles 71-A and 71-B shall be added to the Organic Law of the Banco de Portugal in question, worded as follows: […]"

23 Article 2: "As of the day on which Portugal adopts the euro as its currency, the Organic Law of the Banco de Portugal shall have the wording contained in the annex to the present Law, of which it forms an integral part. Simultaneously, the Organic Law approved by Decree-Law No 337/90 of 30 October, as amended by Decree-Law No 231/95, of 12 September, by Law No 3/96 of 5 February, and by Articles 1.1 and 1.2 and, should it come into force, by Article 3 as well of the present Law, shall be revoked".

24 Article 3: "Should Portugal fail to adopt the euro as its currency on the day on which the third stage of Economic and Monetary Union will start, as of that date Articles 3, 19, 39 and 65 of the Organic Law of the Banco de Portugal, approved by Decree-Law No 337/90, of 30 October, as amended by Decree-Law No 231/95, of 12 September, by Law No 3/96, of 5 February and by Article 1.1 and 1.2 of the present Law, shall be reworded as follows: […]"

Among other advantages, this legislative technique provided a full picture of Portugal's intentions in this field, which was all the more important as both the EMI and the European Commission would have to produce reports containing studies on the compatibility of the national legislation of each Member State with the Treaty provisions, which would in turn be taken into account by the European Council when confirming which Member States had fulfilled the necessary conditions for the adoption of the single currency.[25] Besides this, such a legislative technique would avoid a second consultation with the ECB on a future draft OL.

As Portugal was confirmed as one of the Member States that would adopt the euro as a single currency on 1 January 1999, the amendments on independence introduced in the OL by Article 1 of Law 5/98 were in force between 1 February and 31 December 1998; the amendments on independence and full integration introduced by Article 2 of Law 5/98 entered into force on 1 January 1999[26]; whereas the amendments on independence and mitigated integration foreseen in Article 3 of the same Law never entered into force.

3.2 IT IS ILLUSTRATIVE TO COMPARE THE LEGAL REGIMES ON INDEPENDENCE AND ON INTEGRATION ENVISAGED FOR THE TWO IDENTIFIED HYPOTHESES[27]

3.2.1 PROVISIONS FOR THE HYPOTHESIS THAT PORTUGAL WOULD NOT ADOPT THE SINGLE CURRENCY ON 1 JANUARY 1999: ARTICLES 1 AND 3

We will start with the amendments laid down by Article 1 of Law 5/98 aiming to ensure the *independence* of the Bank.

3.2.1.1

Article 43 of OL-90 stated that the Governor could "suspend the effectiveness of the decisions taken by the Board of Directors" on the grounds that, in his judgement, they were "contrary to the law, to the interests of the country or of the Bank"; the suspension should be reported to the Minister of Finance and would be considered waived if the government did not confirm it within 15 days.

This power to suspend the effectiveness of the decisions, insofar as it depended on confirmation by the Cabinet, was not compatible with the institutional independence of the Bank and, therefore, Law 5/98 changed it into the equivalent of a right of veto, although restricted to the issues concerning the participation of the Bank in the ESCB as well as the independence of the Governor as a member of the decision-making bodies of the ECB, to which he would inherently belong.[28]

25 Articles 121.1 and 121.4 of the Treaty.

26 The amendments on independence introduced by Article 1 of Law 5/98 had by then been subsumed within the more significant amendments brought about by Article 2.

27 Comparison is naturally limited to the essential features of these regimes.

28 Article 43.2, as amended by Article 1 of Law 5/98: "The vote in the affirmative of the Governor shall be required for all the decisions taken by the Board of Directors or by Executive Committees, which, in his motivated judgement, may affect either his decision-making autonomy in his position as member of the decision-making bodies of the European Central Bank, or the compliance with the obligations of the Bank as an integral part of the European System of Central Banks".

3.2.1.2

There was general consensus that the independence of NCBs could be jeopardised if the same rules for the security of tenure of office – which Article 14.2 of the Statute only expressly provides for central bank governors – were not also applied to other members of the decision-making bodies of NCBs involved in the performance of ESCB-related tasks.[29] The Portuguese legislator therefore added two new paragraphs, 4 and 5, to Article 44 of OL-90[30] to ensure the implementation of this principle. Paragraph 4 is self-explanatory, while paragraph 5 seeks to highlight the fact that, according to the Statute, only the Governor has the right to institute proceedings at the Court of Justice of the European Communities (the vice-governors and other members of the Board shall only have the right to institute proceedings at Portuguese courts, under general terms).

3.2.1.3

Three new paragraphs, 5, 6 and 7, were added by Law 5/98 to Article 64 of OL-90.[31] Paragraphs 5 and 6 were justified because, in their absence, the Bank would be subject on the one hand to the financial system governing public administration services and bodies, like any other public body, and, on the other hand, to the control of the Portuguese Court of Auditors. This would hamper its management and, consequently, the successful performance of the Bank's tasks as an integral part of the ESCB.

3.2.1.4

A new paragraph, number 2, was also added by Law 5/98 to Article 69 of the OL-90[32] with the aim of putting an end to an old practice which required the Minister of Finance to sign the Notices of the Bank, since such a practice, in terms of the ESCB-related tasks, was not consistent with the Bank's independence.[33]

3.2.1.5

Turning now to the amendments foreseen by Article 3 of Law 5/98 aiming at the *integration* of the Bank into the ESCB, the first one worth noting is the rewording of Article 3 of the OL.

In contrast to the text then in force, as amended in 1995[34], Law 5/98 redrafted Article 3 of the OL as follows: "(1) The Bank, in its capacity as central bank

29 Cf. EMI, *Report on Progress towards Convergence* (1996), p. 102.

30 Paragraphs 4 and 5 of Article 44, as amended by Law 5/98: "(4) The Governor and the other members of the Board of Directors may only be relieved from office should any of the circumstances envisaged in Article 14.2 of the Statutes of the European System of Central Banks and of the European Central Bank occur. (5) The Governor may institute proceedings against such a decision, pursuant to the provisions laid down in Article 14.2 of the Statutes of the European System of Central Banks and of the European Central Bank."

31 Paragraphs 5, 6 and 7 of Article 64, as amended by Law 5/98: "(5) The Bank shall not be subject to the financial system governing the autonomous funds and services of the public sector. (6) The Bank shall not be subject to the prior control of the Court of Auditors, nor to its successive control in the issues relating to its participation in the performance of the tasks entrusted to the European System of Central Banks. (7) The provisions of the foregoing paragraph shall be applicable to all Funds operating at the Bank or in whose management the Bank participates."

32 "(2) The Notices of the Bank shall be signed by the Governor and published in Series I, B of the Official Gazette".

33 In broad terms, the "notices" of the Bank are mainly the expression of its regulatory power (*pouvoir règlementaire*) to produce rules detailing the principles established by the law.

34 See *supra*, 1.2.

of the Portuguese Republic, shall be an integral part of the European System of Central Banks. (2) The Bank shall pursue the objectives and shall participate in the fulfilment of the tasks entrusted to the ESCB, pursuant to the provisions laid down in the Treaty establishing the European Community and in the statutes of the European System of Central Banks and of the European Central Bank."

The reasons behind this amendment are certainly worth elucidating. The Portuguese legislative bodies were confronted with an apparent contradiction between the Treaty provisions and the provisions of the Statute as regards the degree of involvement in the objectives and tasks of the ESCB by the NCBs of the Member States that would not adopt the single currency from the start of the third stage (non-participating NCBs).

Resorting to a virtually identical wording, the objectives of the ESCB are defined in Article 105.1 of the Treaty and in Article 2 of the Statute, while its basic tasks are defined in Article 105.2 of the Treaty and in Article 3 of the Statute.

Article 122.3 of the Treaty states that Articles 105.1 and 105.2 would not apply to any Member States not joining the single currency from the start of the third stage, which leads to the assumption that the non-participating NCBs would neither be involved in the objectives nor in the tasks of the ESCB.

However, Article 43 of the Statute, which develops Article 122.3 of the Treaty, confirms the non-applicability of Article 3 (tasks) of this Statute, although not of Article 2 (objectives) of the same Statute. This indicates that, after all, the non-participating NCBs share the pursuance of the ESCB's objectives, although they do not take part in the fulfilment of its tasks.

This contradiction, which resulted from the literal meaning conveyed by the texts, had to be solved by resorting to established techniques for interpreting the law. Along this line, the interpreter verified that the ESCB would be composed of all the NCBs, with no exception (Articles 107.1 of the Treaty and Article 1.2 of the Statute). For this reason, non-participating NCBs assist the ECB in the collection of statistical information in order to undertake the tasks of the ESCB (Article 5 of the Statute); they may be prevented from performing functions that interfere with the objectives and tasks of the ESCB (Article 14.4 of the Statute); they are prohibited from granting credit to public sector entities (Article 101 of the Treaty and Article 21 of the Statute); their assets and liabilities that fall within the ESCB are included in the consolidated balance sheet of the ESCB (Article 26.3 of the Statute); they subscribe their part to the capital of the ECB (Articles 28 and 29 of the Statute) and may be forced to pay up a minimal percentage as a contribution to the operational costs of the ECB, even though in principle the need to pay up their subscribed capital is waived as long as their country has a derogation (Article 48 of the Statute)[35]; and the

35 This in fact happened through Decision ECB/1998/14 of 1 December 1998, which laid down the measures necessary for the paying-up of the capital of the ECB by the non-participating NCBs (OJ L 110, 28.4.99, p. 33). This Decision was replaced by Decision ECB/2003/19 of 18 December 2003 (OJ L 9, 15.1.2004, p. 31), which, in turn, has itself been repealed and replaced by Decision ECB/2004/10 of 23 April 2004 (OJ L 205, 9.6.2004, p. 19).

respective governors are members (Article 45.2 of the Statute) of the General Council of the ECB, which is one of its decision-making bodies (Article 45.1 of the same Statute).

However, the non-participating NCBs retain their powers in the field of monetary policy according to national law (Article 43.2 of the Statute) and, namely, are not subject to the guidelines and instructions of the ECB (Articles 12.1 and 14.3 of the Statute of the ESCB, which do not apply to them pursuant to Article 43.1 of the Statute).

Based on the above, and also taking into account the fact that the provisions of the Statute as laid down in a Protocol annexed to the Treaty have the same legal force as this one, the Portuguese legislator concluded that Article 122.3 of the Treaty should be interpreted in light of the provisions of Article 43 of the Statute, which means that the non-participating NCBs also pursue the objectives of the ESCB and, albeit on a more limited basis, also take part in the performance of its tasks.

It may appear somewhat surprising that the enforcement of this new wording of Article 3 of the OL was proposed to become effective on 1 January 1999, although the ESCB and the ECB were to be established earlier, in accordance with Article 123.1 of the Treaty. This was on the one hand due to the fact that a different solution would have lead to a higher degree of complexity, in terms of transitory law. On the other hand, it was also felt that during such an interim period, the direct applicability of the relevant Articles of the Treaty and of the Statute would suffice to remove any doubts not only with regard to the participation of the Bank in the composition of the ESCB, but also as to the terms and conditions under which such participation should take place.

3.2.1.6

According to Article 19.1 of the OL, the Bank should "ensure the centralisation and compilation of the monetary, financial, foreign exchange and balance-of-payments statistics". In order to reinforce the integration of the Bank into the ESCB, Article 19.1 was reworded by Law 5/98 as follows: "(1) The Bank shall ensure the collection and compilation of the monetary, financial, foreign exchange and balance of payments statistics, particularly within the scope of its cooperation with the European Central Bank".

3.2.1.7

A new sub-paragraph a) was added to Article 39.1 of the OL, stating that it would be incumbent upon the Governor "to carry out the tasks of member of the General Council of the European Central Bank, pursuant to the provisions laid down in the Treaty establishing the European Community and in the Statute of the European System of Central Banks and of the European Central Bank".

The reason for this amendment was that the function of member of the General Council of the ECB would not be performed on behalf of the Bank, in contradiction to what was prescribed in the subsequent two sub-paragraphs b)

and c) of the same Article.[36] In fact, while the governors that compose the Council of the EMI were considered as "representatives of their institutions", and the prohibition of instructions only covered "the Council of the EMI" (Article 8 of the EMI Statute), the situation is completely different in the third stage of EMU, as regards both the decision-making bodies of the ECB (one of which is the General Council, as laid down in Article 45.1 of the Statute) and the decision-making bodies of the NCBs: in the ECB, the aforementioned representation ceases and the prohibition of instructions include the "ECB, the NCBs or any member of their decision-making bodies" (Article 108 of the Treaty and Article 7 of the Statute).

3.2.2 PROVISIONS FOR THE HYPOTHESIS THAT PORTUGAL WOULD ADOPT THE SINGLE CURRENCY ON 1 JANUARY 1999: ARTICLE 2

For the hypothesis whereby Portugal would not adopt the single currency on 1 January 1999, Articles 1 and 3 of Law 5/98 merely introduced some adjustments in OL-90. But for the hypothesis that Portugal would adopt the single currency on 1 January 1999, the entirely reformed OL foreseen in Article 2 of Law 5/98 incorporated fundamental amendments to the same OL-90. Some examples that illustrate these amendments are provided below.

3.2.2.1

While, in the first hypothesis described above, Article 3.2 of the OL stated that "the Bank shall pursue the objectives and shall participate in the fulfilment of the tasks entrusted to the ESCB, pursuant to the provisions laid down in the Treaty establishing the European Community and in the statutes of the European System of Central Banks and of the European Central Bank", for the second hypothesis it was added that, besides the above, the Bank "shall be *subject to the provisions of the Statute* of the ESCB and of the European Central Bank, *acting in accordance with the guidelines and instructions* of the European Central Bank pursuant to the same Statute."

3.2.2.2

While, in the first hypothesis, Article 43.2 referred to the Governor as a member of "the decision-making bodies of the European Central Bank"[37], the equivalent Article 32.2 of the reformed OL mentions, more precisely, the Governor as a member of "the Governing Council and of the General Council of the ECB".

3.2.2.3

The same applies to the competence of the Governor: while in the first hypothesis the new sub-paragraph a) added to Article 39.1 mentioned the Governor as a member of "the General Council" of the ECB[38], the corresponding Article 28.1 (a) mentions him/her as a member of "the *Governing Council* and of the General Council".

36 Article 39.1 (b) of the OL: "To represent the Bank"; Article 39.1 (c) of the OL: "To act on behalf of the Bank with foreign or international institutions".
37 See *supra*, 3.2.1.1, 2nd paragraph.
38 See *supra*, 3.2.1.7.

3.2.2.4

In the same vein, only on the assumption that Portugal would adopt the single currency was it possible to introduce in the OL, via Article 2 of Law 5/98, some other fundamental changes, namely the deletion of the provisions related to banknotes denominated in escudo; the deletion of references to the "currency issue of the bank and other sight escudo liabilities"; the deletion of the reference to the powers of the Bank to conduct monetary policy (which contradicted the provisions of Article 105.2 of the Treaty and of Articles 3.1, 12.1, 14.3, 18.2, 19.1 and 20 of the Statute)[39]; the deletion of the reference to the powers of the Bank not only to "cooperate in the formulation of the foreign exchange policy" but also to "implement such policy" (since, according to Article 4.2 of the Treaty, the Community has a single exchange rate policy whose types of definition and implementation as well as the sharing of responsibilities between the ECOFIN Council and the ECB are set forth in Article 111); the deletion of the reference to the powers of the Bank to determine the composition and the requirements of minimum reserves imposed on credit institutions (which was inconsistent with Article 19 of the Statute); and, finally, the specification, in the indicative list of operations available for monetary policy and foreign exchange purposes, that such operations are carried out "in order to meet the objectives and to perform the tasks of the ESCB".

39 The participation of the Banco de Portugal in this area is at any rate subject to the general provisions of the new Article 3.2 (see *supra*, 3.2.1.1).