

## **OPINION OF THE EUROPEAN MONETARY INSTITUTE**

on a consultation by the Ministry of Finance of Finland under Article 109f (6) of the Treaty establishing the European Community (“the Treaty”) and Article 5.3 of the Statute of the EMI;

on a draft government bill (the “Draft”) extending the validity of the Foreign Exchange Act (954/85) (the “Act”).

### **CON/95/15**

- 1 The present consultation was initiated on 9th November 1995 by the Ministry of Finance of Finland in a letter addressed by Ms. Arja Alho to the President of the EMI. Pursuant to Article 4 of the Council Decision of 22nd November 1993 (93/717/EC) on consultation of the European Monetary Institute by authorities of the Member States on draft legislative provisions, the EMI has been asked to deliver its opinion by the end of November 1995.
- 2 The aim of the draft is to extend the validity of the Foreign Exchange Act until the end of 1998. The contents of the Act will remain unchanged with one exception, namely, the decisions issued under the Act authorising the Bank of Finland to monitor foreign exchange risks of the credit institutions would be repealed and the monitoring would be transferred to the Financial Supervision Authority by an amendment of the Act on Credit institutions contained in the Draft.
- 3 The EMI’s competence to give an opinion in this consultation procedure is based on Article 1, paragraph 1, second indent, of Council Decision 93/717/EC, as the draft concerns the powers of a national central bank.
- 4 The Act is an economic emergency powers legislation, designed to form the legal basis for decisions by the Council of State in serious emergency cases, such as the threat of war or other serious crisis. The Act does not allow the Government to directly undertake regulatory

measures, even under emergency conditions. However, it forms the legal basis for decisions by the Council of State, which, after being approved by the Parliament, entitle the Bank of Finland to take measures necessary to secure the country's external payments and stable domestic monetary conditions. Possible measures include requirement of authorisation for various foreign exchange transactions specified in the Act. Given the importance of the legality principle in the Finnish legal system, namely the principle that the scope for action by the executive has to be based explicitly on law, it is understandable that necessary legislative preparations are taken.

- 5 To evaluate properly the question of the compatibility of the Draft with EC law, it is necessary to recall the contents of the relevant Articles of the Treaty.
- 6 Article 73b of the Treaty stipulates that “*within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and third countries shall be prohibited*”. This Article is directly applicable and grants a fully fledged right to the European citizens.
- 7 Articles 109h and 109i list situations in which derogations from the basic principle of free capital movements might be envisaged. As a rule, any restriction to capital movements needs a prior approval by the Commission, which determines the conditions and details of protective measures (Article 109h (1)). In case of a sudden balance of payments crisis, if a decision under Article 109h (2) is not immediately taken, it is possible for the Member State concerned to take protective measures without a prior approval of the Commission; however, “*such measures must cause the least possible disturbance in the functioning of the common market and must not be wider in scope than is strictly necessary to remedy the sudden difficulty which have arisen*” (Article 109i (1)). The Commission and the other Member States must be informed of such protective measures not later than when they enter into force. Acting by a qualified majority, the Council may decide that the Member State concerned shall amend, suspend or abolish the protective measures.
- 8 Considering the above-described background and since, according to the principle of supremacy of Community law, the provisions of the Treaty prevail even on national subsequent legislation, it emerges clearly that the Act may only be applied in the limited situations described in

Articles 109h and 109i of the Treaty, subject to the rules and procedures laid down in these Articles and only until the beginning of Stage Three (Article 109i(4)). Therefore, since the protective measures which will be taken on the basis of the Act in the event of a balance of payments crisis need also to be in compliance with the Treaty, the Draft appears to be compatible with EC law.

- 9 In order to guarantee transparency and certainty of law, the EMI welcomes the extensive reference, in the preamble to the Draft, to the Treaty provisions limiting the possibility of adopting national protective measures to very exceptional cases.
- 10 The above reasoning leads to the conclusion that the Foreign Exchange Act is not in conflict with the Treaty, at least until the beginning of Stage Three. It is understood that, according to the principle of supremacy of the Community law, the scope of application of the Foreign Exchange Act is clearly limited to situations in which the Treaty allows derogations from the basic principle of freedom of capital movements. Furthermore, protective measures based on the Foreign Exchange Act may be amended, suspended or abolished by a decision of the Council taken by a qualified majority.
- 11 The EMI's agrees that this opinion may be made public by the competent Finnish authorities at their discretion.