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Legal memorandum on the proposal for a new Sveriges Riksbank Act and its compatibility with the Swedish constitution and EU law

Summary

The Riksbank Committee's final report, A new Sveriges Riksbank Act (SOU 2019:46), proposes a comprehensive reform of the regulatory framework that currently governs the Riksbank and involves a completely new approach to the Riksbank's status and independence. The Committee proposes comprehensive amendments to, inter alia, the Swedish Instrument of Government and the Riksdag Act, and puts forward a proposal for a new Sveriges Riksbank Act.

Concerning the Riksbank's independence, the question has been raised during the consultation procedure as to whether the proposal is compatible with the Swedish constitution and EU law, primarily with regard to the following points:

1. *The proposal implies a new and, compared with both the current Sveriges Riksbank Act and EU law, narrower definition of monetary policy.*
2. *The Riksbank's constitutional independence shall apply only to this narrower definition of monetary policy instead of to the broader definition in current Swedish law and in the EU Treaty.*
3. *The question of whether decisions by the Riksbank's Executive Board on the definition of the concrete price stability objective shall be approved by the Swedish Parliament, the Riksdag and, if so, what form this approval would take.*

Inconsistencies with EU law have been highlighted by:

- *the Riksbank in its consultation response.*[1]
- *the European Central Bank (ECB) in its opinion on the proposal.*[2]

[1] The Riksbank's consultation response to report A new Sveriges Riksbank Act, SOU 2019:46 https://www.regeringen.se/4979b5/contentassets/318e490e0ff94ca3b717241418d27933/sveriges-riksbank-direktionen.pdf

[2] Opinion of the European Central Bank on reform of Sveriges Riksbank, 20 April 2020 (CON/2020/13).

- *the European Commission in both convergence reports and in specific correspondence with the Swedish Government (in the form of a so-called EU Pilot).*[3]

In addition, the IMF has also directed criticism at the proposal.[4]

This legal memorandum analyses whether the proposal is compatible with the Swedish constitution and EU law based on the issues raised in the Riksbank's consultation response and the ECB's opinion. To put the issue into context, the legal memorandum also addresses comments made by the European Commission regarding existing Swedish law.

EU law requires the central bank of a Member State to be independent when it defines and implements monetary policy and when it conducts associated tasks that a central bank in the European System of Central Banks (ESCB) must be able to perform, so-called ESCB-related tasks. Current Swedish legislation largely meets this requirement. However, the assessment in this legal memorandum is that the Committee's proposal will lead to a narrower definition of monetary policy and ESCB-related tasks. This entails a limitation of the Riksbank's current independence under Swedish law that is in conflict with the requirements of EU law.

According to this legal memorandum, introducing this narrower definition of the Riksbank's ESCB-related tasks and the scope of the Riksbank's independence in the Instrument of Government risks leading to a conflict between EU law and the constitutional proposals put forward by the Committee.

The Committee's proposal that the Riksdag shall approve the establishment of the inflation target is deemed to be in need of a more extensive analysis before it can be implemented.

There are different ways of dealing with the inconsistencies with EU law identified in this legal memorandum. The memorandum presents four possible options that range from more comprehensive changes to Sweden's relation to the EMU, which are difficult to achieve, to more limited adjustments of the proposal for a new Sveriges Riksbank Act that tackle the most serious flaws in relation to EU law without further inquiry. There is no evaluation of the various options here, neither in terms of content nor regarding political feasibility, the list merely indicates alternative courses of action from a legal perspective:

1. *If it is deemed necessary to implement the legislative proposal in its current form, the Government and the Riksdag should request that Sweden be given a special status within the EU similar to that given to the United Kingdom and Denmark prior to the start of the third stage of the EMU. This is needed to minimise the risk of legal proceedings in the Court of Justice of the European Union (CJEU) and of criticism from other Member States.*

[3] See, inter alia, the European Commission's Convergence Report, June 2020, on the assessment of the compatibility of Swedish law with EU law and the Commission's questions on legislation affecting Sveriges Riksbank (case 4964/13/ECFI), where the Commission, in a written communication of 16 April 2013, pointed out that Swedish legislation must be amended so that central bank independence and the prohibition on instructions cover all ECBS-related tasks, and the Swedish Ministry of Finance's response in a letter of 25 June 2013 (Fi2013/1600).
[4] IMF, Sweden, Technical Assistance Report – Proposed Amendments to the Riksbank Act, 5 August 2020.

2. *If the advantages claimed by the Committee are assessed to be less relevant than the risks linked to the legislative proposal, the Government and the Riksdag should put the proposal to one side, naturally on condition that the current legislation is assessed as satisfactory.*
3. *If the current legislation is not assessed as satisfactory, the Government and the Riksdag should appoint a new inquiry with the task of adjusting the Committee's proposal.*
4. *If the current legislation is not considered satisfactory, but the intention is to keep the framework of the Committee's proposal without conducting a new inquiry, the legislator can instead try to adjust the proposal in the way suggested in Section 5 of this legal memorandum before the matter is referred to the Swedish Council on Legislation.*

One of the reasons for appointing the Riksbank Committee was to try to rectify a number of inconsistencies between Swedish law and EU law highlighted by the European Commission in 2013. It can therefore be assumed that the inconsistencies identified by the Commission and in this legal memorandum will be resolved in the continued processing of the legislative proposal. If the proposal is implemented without these inconsistencies being resolved, ambiguities with regard to the status and independence of the Riksbank will arise, making it difficult to apply the monetary policy framework. There is also a risk of legal measures from the Commission.

This memorandum discusses the Riksbank Committee's proposal from a purely legal perspective. As regards the need for new legislation, it is worth noting that the current monetary policy framework has enabled the Riksbank to perform its tasks in both good and bad times over the past twenty years or so. The current legislation works well regarding, for example, monetary policy, market transactions and payment systems, but it needs to be adapted to fulfil the requirements imposed by EU law and developments in society. In light of this, a revision of the Committee's proposal seems reasonable, while it seems unwarranted to rush through the legislative proposal.

1. The requirements of EU law imposed on Swedish legislation

The amendments to the Sveriges Riksbank Act (1988:1385) implemented in 1999[5] gave the Riksbank a statutory objective of price stability in accordance with the EU Treaties, reinforced independence and a new executive structure. These amendments to the Sveriges Riksbank Act with regard to the Riksbank's status fulfilled many of the requirements imposed on EU central banks in conjunction with the establishment of the ECB and the ESCB. However, there are legal requirements for further amendments to Swedish legislation in order to achieve full compatibility with EU law. The legal amendments that Sweden is obliged to implement under EU law are clarified in the sections that discuss Sweden and legal convergence in the convergence reports published by the European Commission and the ECB every second year.[6]

[5] Swedish Government Bill on the status of the Riksbank, 13 November 1997, Government Bill 1,997/98:40.
[6] European Commission and ECB convergence reports, see in particular the latest editions from June 2020.

According to the Commission's and the ECB's most recent reports from 2020, there are inconsistencies and flaws in the Swedish legislation governing the Riksbank's independence, the monetary financing prohibition and the Riksbank's integration into the ESCB at the time of the introduction of the euro. The Commission and the ECB have described these inconsistencies in more detail in all their convergence reports since the Riksbank's status was reviewed in Swedish law in 1999 up to the most recent reports in June 2020.

As is clarified in the convergence reports, all EU Member States have an obligation to ensure that national legislation safeguards central bank independence in accordance with EU law. Central bank independence in the EU is expressed, inter alia, in terms of the prohibition on instructions in the Treaty, which states that central banks must not seek or take instructions and governments and other external bodies must not seek to influence the central bank by giving instructions.[7]

Member States that have not yet adopted the euro as their currency, and that do not have a special status in accordance with specially negotiated protocols attached to EU Treaties, are also obliged to adapt national legislation so that domestic law gradually achieves fulfilment of the requirements imposed for possible future adoption of the euro.[8]

Both these requirements, i.e. the requirement regarding the Riksbank's independence and the requirement for adaptation of Swedish law, are applicable to Sweden and Swedish legislation with regard to the Riksbank since the establishment of the ECB and the ESCB in June 1998.[9]

Although the legislative amendments enabling the Riksbank to participate fully in the Eurosystem need not enter into force until any participation in the EMU comes into question, the obligation to gradually fulfil EU law requirements regarding Swedish law already applies today and must be considered prior to any amendments to the Sveriges Riksbank Act. The ECB has expressed the obligation as follows:

> National legislation […] has to be adapted to ensure compatibility with the Treaty and the Statute in respect of Eurosystem-related tasks. To comply with Article 131 of the Treaty, national legislation had to be adjusted to ensure its compatibility by the date of establishment of the ESCB (as regards Sweden) [...] Nevertheless, statutory requirements relating to the full legal integration of a national central bank (NCB) into the Eurosystem need only enter into force at the moment that

[7] Article 130 in the Treaty on the Functioning of the European Union.

[8] Article 140.1 of the Treaty on the Functioning of the European Union mentions "obligations regarding the achievement of economic and monetary union". See also Council Decision 98/317/EC of 3 May 1998, EGT L 139, 11.5.1998, p.30

[9] The EU rules on central bank independence and the requirements imposed on national legislation therefore apply to all EU Member States, regardless of whether the Member State has adopted the euro as its currency or not; only Denmark and the United Kingdom have been awarded special status in relation to the Treaty provisions in accordance with the protocols included in and added to the Treaty regarding these two countries prior to the Stage III of EMU. Regarding central bank independence, national legislation should have been adapted to fulfil the relevant provisions in the Treaty and the Statute of the ESCB no later than the establishment of the ESCB on 1 June 1998. In addition, all Member States with a derogation according to Article 131 in the Treaty must ensure that their national legislation, including the statutes of their central bank, is compatible with the Treaties and the Statute of the ECBS, prior to any removal of the derogation and introduction of the euro.

> full integration becomes effective, i.e. the date on which the Member State with a derogation adopts the euro.[10]

The obligation to gradually achieve legal convergence with ESCB rules applies specifically to Member States that have not yet adopted the euro as their currency and not fulfilled the convergence criteria, such as Sweden. In the English version of the Treaty, Member States that have not yet fulfilled the convergence criteria and therefore have not adopted the euro are termed "*Member States with a derogation*", which suggests they deviate from Member States that have fulfilled the convergence criteria and therefore have been able to adopt the euro. In the Swedish version of the Treaty, this expression has been translated as "*medlemsstater med undantag*" ("Member States with an *exemption*"), which can be misleading as it concerns Member States that are not yet adapted to the euro, neither economically nor legally. The concept of Member States with a derogation is therefore often misunderstood as a general exemption from the obligation to adapt national legislation. However, the derogation only implies that certain obligations and rights under the EU Treaty and ESCB Statute do not apply to Member States that have not adopted the euro. However, "Member States with a derogation" are <u>not</u> exempt from the requirement for central bank independence nor from the requirement for adaptation of domestic legislation to gradually achieve consistency with the EU Treaty and the Statute of the ESCB.[11]

The ECB has stressed the importance of adaptation of Swedish law in its opinion on the proposal for a new Sveriges Riksbank Act:

> The ECB would like to emphasise that, although Member States with a derogation, including Sweden, do not yet participate in the third stage of economic and monetary union, they have a legal duty to adapt the statutes of their national central banks (NCBs) to ensure compatibility with the Treaty and the Statute of the European System of Central Banks [...]. Any legislative reform in any such Member State should aim to gradually achieve consistency with ESCB standards. The ECB has repeatedly pointed out in its convergence reports that Sweden needs to adapt its legislation governing Sveriges Riksbank to comply with Treaty requirements. The ECB and its precursor, the European Monetary Institute (EMI), have issued several opinions in response to consultation requests from the Swedish authorities which have considered matters relating to the independence of Sveriges Riksbank. [12]

In its Convergence Report on Sweden from June 2020, the Commission has also explained that Swedish legislation does not fulfil the requirements imposed by EU law:

> Swedish legislation – in particular the Sveriges Riksbank Act, the Instrument of Government and the Law on Exchange Rate Policy – is not fully compatible with the requirement for consistency in Article 131 in the Treaty. There are

[10] ECB Convergence Report, June 2020, Chapter 2.2.7 on legal integration of NCBs into the Eurosystem. Article 131 states that every Member State shall ensure that its national legislation, including the statutes of its national central bank, is compatible with the Treaties and the Statute of the ESCB and the ECB.

[11] This also means that Sweden has no legally valid exemption from the premise in the Treaty that all EU Member States are expected to participate fully in the EMU and adopt the euro as their currency once they fulfil the convergence criteria (apart from countries that have negotiated legally binding protocols that can be attached to the EU Treaties, like the United Kingdom and Denmark did prior to the start of the third stage of the EMU).

[12] Opinion of the European Central Bank on reform of Sveriges Riksbank, Section 2.1-2.2, 20 April 2020 (CON/2020/13).

> inconsistencies and shortcomings regarding the Riksbank's independence, the monetary financing prohibition and the Riksbank's integration into the ESCB at the time of the introduction of the euro.[13]

The criticism shall be seen as a *requirement* for adaptation and not merely as a statement that inconsistencies exist. The Commission has directed similar criticism in convergence reports submitted since 2000. In addition to its convergence reports, the Commission has also conveyed requirements for amendments to Swedish law in a special written communication to the Swedish Ministry of Finance in 2013, a so-called EU Pilot. One of the demands of the Commission is that Sweden must clarify in law that the Riksbank's independence and the associated prohibition on instructions covers all the Riksbank's ESCB-related tasks and not just monetary policy. According to the Treaty, ESCB-related tasks include to define and implement the monetary policy of the Union; conduct foreign exchange operations; hold and manage the official foreign currency reserves of the Member States; and promote the smooth operation of payment systems.[14] When carrying out these tasks, central banks in the ESCB have an independence covered by the prohibition on instructions in the Treaty.[15]

In its response to the Commission, the Swedish Ministry of Finance conveyed that "it is clearly stated in the preparatory works of the Sveriges Riksbank Act that tasks *outside* the monetary policy remit, that are ESCB-related according to the Treaty, are also covered by the prohibition". Responding to the Ministry of Finance's reference to the Riksbank Act's preparatory works, the Commission clarified that statements in preparatory works are insufficient and reiterated the requirement for a legislative amendment. At the same time, the Commission stated that it will delay initiating a legal process as it expects contacts with the Swedish authorities to lead to legislation that fully safeguards the Riksbank's independence.[16] It is made clear in the terms of reference to the Riksbank Committee that the EU Pilot is the background to the task of reviewing the Riksbank's institutional independence.[17]

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[13] European Commission Convergence Report, June 2020, Chapter 7 on the examination of compatibility of Swedish legislation with EU law.

[14] Article 127 in the Treaty on the Functioning of the European Union.

[15] Article 130 in the Treaty on the Functioning of the European Union.

[16] The Commission's questions about legislation affecting Sveriges Riksbank (case 4964/13/ECFI), where, in a written communication of 16 April 2013, the Commission pointed out that Swedish legislation must be amended so that central bank independence and the prohibition on instructions cover all ESCB-related tasks. Responding in a letter of 25 June 2013 (Fi2013/1600), the Ministry of Finance conveyed that "it is clearly and unambiguously stated in the preparatory works of the Sveriges Riksbank Act that tasks outside the monetary policy remit, that are ESCB-related according to the Treaty, are also covered by the prohibition (Government Bill 1997/98:40 p.76)." The Commission noted the Ministry of Finance's reference to the preparatory works in a letter of 20 September 2013 and clarified that statements in preparatory works are insufficient and that an amendment to Swedish law is required: "With regard to the role of the preparatory works for interpreting Swedish legislation, the Commission refers to its position [that preparatory works are neither legislation, nor legally binding rules]. For reasons of legal certainty [Sweden] shall reformulate the provisions in question in order to ensure that the prohibition on seeking or taking instructions covers all ESCB-related tasks, and not only monetary policy issues. At this stage, a letter of formal notice is not necessary yet given that further direct contacts have been established with the Swedish authorities to try to sort out the issues at stake."

[17] Terms of reference 2016:114 p. 5.

2. New, narrower definition of monetary policy and independence

The new, narrower definition of the Riksbank's ESCB-related tasks in the Committee's proposal for amendment to Chapter 9, Article 13 of the Instrument of Government is not compatible with EU law. How the Riksbank's ESCB-related tasks are linked to monetary policy can also be seen in the proposal's new provisions on monetary policy and the financial system respectively in Chapter 2 and Chapter 3 of the proposal for a new Sveriges Riksbank Act. One aspect that makes this new, narrower definition of the Riksbank's tasks in monetary policy important to analyse from an EU law perspective is the link to the Riksbank's independence.

When the Riksbank's statutory independence was introduced via amendments to the Sveriges Riksbank Act in 1999, one of the reasons was to satisfy the requirement in EU law for central banks in EU Member States not to be subject to political pressure.

Central bank independence within the EU is expressed, inter alia, in terms of the prohibition on instructions in the Treaty. Via the Committee's proposal for Chapter 9, Article 13 of the Swedish Instrument of Government and Chapters 2 and 3 in the new Sveriges Riksbank Act, the prohibition on instructions is now proposed to be limited to a narrower set of tasks and measures that the Riksbank has at its disposal. The majority of the tasks and measures not covered in this new definition of monetary policy are instead classified as belonging to financial stability and, according to the proposal, are not included in the prohibition on instructions.

The advantages claimed for the proposal are linked to the need for cooperation with other authorities in the field of financial stability, primarily Finansinspektionen and the Swedish National Debt Office, as responsibility for this area is divided between several authorities, including the Government. The Committee's starting-point is that the independence allocated to the Riksbank in monetary policy in accordance with EU law makes collaboration with other authorities more difficult and that there is thus reason to have a narrower definition of monetary policy in Sweden than the one stipulated in EU law and in current Swedish law.[18]

At the same time, the Committee considers that EU law provides scope for Member States to instruct their authorities, including their central banks, to collaborate closely with one another within the area of financial stability.[19]

2.1 How is monetary policy proposed to be narrowed?

The Riksbank Committee's proposal entails differentiating and drawing a boundary between the two main tasks of the Riksbank: monetary policy and financial stability. The proposal contains both a division of the Riksbank's toolbox into different parts and detailed regulation of when, where and how certain tools are to be used. The division is done in the legislative text by designating certain possible tools, that could previously be used for monetary policy purposes, as tools to be used to achieve financial stability.

[18] See SOU 2019:46, Chapter 20.8.1 on shared responsibility and the need for collaboration on financial stability and Chapter 24.4 on collaboration, consultation and information in the area of financial stability.
[19] Ibid p. 545.

Monetary policy is thereby given a narrower definition than is the case today, and the tools will be generally more difficult to apply due to detailed legal provisions.

Under Chapter 9, Article 13 of the Instrument of Government, the Riksbank currently has the responsibility for monetary policy, whereby Chapter 1, Article 2 of the Sveriges Riksbank Act states that the objective of the Riksbank's operations is to maintain price stability. Chapter 6 of the Sveriges Riksbank Act contains provisions on the Riksbank's monetary policy operations and Chapter 6, Articles 5 and 6 of the Sveriges Riksbank Act specify tools that the Riksbank has at its disposal for monetary policy purposes. Under Chapter 1, Article 2 of the Sveriges Riksbank Act, the Riksbank may communicate regulations within the framework of its monetary policy remit. In accordance with the applicable legislation, the Riksbank therefore has a clear overall operational objective, the price stability objective, and a main task to implement Swedish monetary policy to achieve the price stability objective with the tools specified in the Sveriges Riksbank Act.

Under Chapter 1, Article 2 of the current Sveriges Riksbank Act, the Riksbank shall furthermore promote a safe and efficient payment system, which, according to the preparatory works, is a fundamental task for the Riksbank and not an actual operational objective.[20] In conjunction with this, the Riksbank may, according to the preparatory works,[21] provide systems for the settlement of electronic payments, which the Riksbank does via the RIX system. In that respect, the Riksbank may, under Chapter 6, Article 7 of the Sveriges Riksbank Act, grant intraday credit to RIX participants against adequate collateral. Under Chapter 6, Article 8 of the Sveriges Riksbank Act, the Riksbank may also provide company-specific liquidity support in the form of emergency liquidity assistance. The capacity to provide liquidity support and emergency liquidity assistance gives the Riksbank the scope, under current legislation, to provide market support in crisis situations, which is another important task for the Riksbank. Under Chapter 5, Article 3 of the Sveriges Riksbank Act, the Riksbank also has the explicit task of supplying Sweden with banknotes and coins.

It is evident from the preparatory works that the Riksbank's independence under Chapter 9, Article 13 of the Instrument of Government incorporates EU law and covers all monetary policy decisions as well as tasks outside the monetary policy remit that, according to the Treaty, fall within the European System of Central Banks (ESCB),[22] comprising the ECB and the national central banks of all EU Member States, regardless of whether they have adopted the euro or not.[23] It can be mentioned here that the Commission has pointed out that this statement in the preparatory works is not clear enough and that the text of the Act itself needs to stipulate what independence actually covers.[24]

The Committee's proposal for the future is to divide the Riksbank's operations into two separate mandates, with partly overlapping powers, which are to be incorporated into two different chapters in the new Sveriges Riksbank Act, one for monetary policy

[20] Government Bill 1997/98:40 p. 54.
[21] Government Bill 1997/98:164 p. 26.
[22] As noted earlier, the ESCB-related tasks include to define and implement the monetary policy of the Union; conduct foreign exchange operations; hold and manage the official foreign currency reserves of the Member States; and promote the smooth operation of payment systems. Carrying out these tasks falls under the independence enshrined in the Treaty's prohibition on instructions, see Article 127 and 130 of the Treaty on the Functioning of the European Union.
[23] Government Bill 1997/98:40 p. 76.
[24] Terms of reference 2016:114 p. 5.

(Chapter 2) and one for financial stability (Chapter 3). This will reduce the scope of the prohibition on instructions, which will be achieved via, for example, a narrower interpretation of ESCB-related tasks than the currently applicable interpretation.[25] The result will be reduced independence for the Riksbank.

According to the Committee, the first of these two proposed mandates shall cover the Riksbank's powers within monetary policy. The prohibition on instructions shall apply to the following monetary policy measures:

- receiving deposits, offering loans in Swedish kronor (SEK) and foreign currency against adequate collateral and determining the interest rate on these.
- issuing promissory notes in SEK.
- purchasing government securities on the secondary market.
- purchasing private securities in exceptional circumstances.
- implementing foreign exchange interventions taking into account which exchange rate system is applicable.

According to the other mandate, the Riksbank shall have the objective of contributing to a stable and efficient financial system. The prohibition on instructions shall not apply to the following measures that can be exercised within the mandate for financial stability:

- supplying a payment settlement system and where necessary participate in payment settlement in relation to financial companies and authorities.
- identifying vulnerabilities and risks in the financial system that can lead to severe shocks.
- monitoring the financial infrastructure, and preparing to manage crises.
- providing liquidity support to the financial system in the form of general liquidity support and emergency liquidity assistance. [26]

The Committee proposes that it shall be possible to use the powers to issue loans and purchase and sell securities both to achieve price stability and to contribute to a stable and efficient financial system, but that the Riksbank's independence according to EU law shall vary depending on for which of these purposes loans are to be issued and securities trading is to be conducted.

Under the proposal, the Riksbank's tasks with regard to the payment system, including the RIX system, shall generally fall outside the constitutional independence enshrined in EU law.[27] These tasks are currently regulated in the monetary policy chapter of the Sveriges Riksbank Act (Chapter 6, Article 7). The reason for this proposal for change appears to be that, according to the Committee, there is reason for the Riksbank to cooperate with other authorities, primarily Finansinspektionen, in terms of excluding participants and the group of participants in the RIX system, because those issues are closely linked to stability in the financial system.[28]

However, the Committee proposes that the Riksbank shall retain its independence for operations in the ESCB when it comes to payment systems, especially as regards the application of EU regulations concerning settlement and operations within the ECB

[25] SOU 2019:46, see, inter alia, p 860 and 1716 f.
[26] SOU 2019:46, p. 48 f.
[27] Ibid p. 1763.
[28] Ibid p. 924.

General Council. In such operations, the prohibition on instructions enshrined in EU law shall apply. The Committee therefore proposes that the Riksbank shall have a kind of partial and dynamic independence for the task of promoting the smooth operation of payment systems governed by whether the power is being exercised within the framework of the ESCB or not and by the scope of applicable EU regulations. The proposal in this part must rest on a misunderstanding as the Riksbank is part of the ESCB[29] and cannot therefore, for obvious reasons, perform any ESCB-related tasks outside the ESCB. Notwithstanding these circumstances, there are purely practical reasons for why it is not possible to delimit the independence in this way, as it is difficult to determine whether the Riksbank's work on payment systems takes place on a domestic basis or whether the work is being conducted together with other members of the ESCB. The Riksbank's own system is already so integrated with the ECB's system that it is virtually impossible to consider the two systems as entirely separate.

Another consequence of the proposal is that anything designated as a financial stability measure could in future be transferred to another authority. This will be the consequence of this kind of task no longer being an ESCB-related task, according to the proposal.[30]

2.2 Boundary between monetary policy and financial stability

According to the proposal, the Riksbank shall, pursuant to detailed criteria, determine the main purpose of a measure in order to work out which mandate to use. That the Committee sees a need for a clear boundary largely stems from the argument that the Riksbank has a stronger independent status in the area of monetary policy. However, the clear boundary between the Riksbank's tasks, as proposed by the Committee, is problematic. Central banks require substantial flexibility in how various instruments may be used and what assets and liabilities they may have on their balance sheet.

In its written communication on the Committee's proposal[31], the IMF has clarified that the international standard regarding central bank tasks and instruments is not to link these to various specific objectives. According to the applicable international standard, central banks are generally free to decide on the use of the instruments in their toolbox when they carry out transactions with counterparties to maintain price stability and financial stability, without the distinction proposed by the Committee. Making a distinction of that kind can have a negative impact on the capacity to choose the most effective measures within the limited time that may be available on a specific occasion, which poses a significant risk to the Swedish economy and financial stability. Furthermore, limiting the central bank's independence to apply only to measures taken to safeguard price stability, but not to measures that, according to the Committee, can be attributed to financial stability, entails a limitation of the Riksbank's independence that is not compatible to the requirements imposed on Swedish legislation by EU law.

[29] Government Bill 1997/98:40 p. 43.
[30] For example, the Committee states that so-called general liquidity support takes place outside the monetary policy framework (SOU 2019:46 p. 941), which means that the Commission shall approve the support in advance in accordance with Article 108 of the FEU treaty (i.e. the state aid rules). By virtue of them being central bank tasks, however, monetary policy measures are exempted from the state aid regulatory framework. The Committee highlights this problem but leaves it to the Riksbank to solve it to the best of its ability (Ibid p. 944).
[31] IMF, Sweden, Technical Assistance Report – Proposed Amendments to the Riksbank Act, 5 August 2020.

In addition, the criteria for drawing a boundary between the Riksbank's remits will be very difficult to apply in practice. As the powers to issue loans and purchase and sell securities are worded differently and have different application requirements in the two chapters, respectively, and since such measures are not instantaneous events but are often implemented as programmes that stretch over time, the proposed demarcation creates a number of application problems.

Practical application issues include the choice of power for a certain measure that is both motivated from a monetary policy standpoint and appropriate in order to support financial stability, and how to designate over time a certain measure that is initially motivated from a monetary policy standpoint but later becomes a measure to promote financial stability. According to the Committee's proposal, a measure implemented because of "limited turmoil" on the market where banks obtain their funding will be classified as monetary policy, whereas if there is "significant turmoil" on the financial markets, it will be classified as a financial stability measure. Classification will therefore be governed by the actual conditions on the market, not by the measure's purpose or primary effects. This is not deemed to be a legally appropriate arrangement, as the measure can then scarcely be evaluated based on objective criteria, such as the objectives given the reason for the measure. Instead, the evaluation will be dependent on how the market was perceived at the time of the measure.

It should also be highlighted that there are limitations ensuing from the practice of the Court of Justice of the European Union (CJEU) when it comes to the scope for interpretation of what is monetary policy and what is not. Financial stability and monetary policy are not the same thing. As the Committee notes, however, the objectives of price stability and financial stability are interconnected. Financial stability can affect both the transmission of and the prerequisites for monetary policy. Furthermore, price stability is important for financial stability as high and volatile inflation increases the risks and unpredictability in the financial system. It follows from CJEU practice that importance shall primarily be attached to the objectives of the measures when assessing whether a measure is included in monetary policy. According to the CJEU, a monetary policy measure cannot be equated with an economic policy measure purely because it may have indirect effects that are also the aim of economic policy.

In the Committee's view, however, the reasoning of the CJEU is not relevant for Sweden as a Member State with a derogation. The Committee instead takes the view that what is monetary policy and what is financial stability shall be determined based on the *main* purpose of a measure. According to the Committee, the main purpose shall be determined by the market situation, if there is "limited" or "substantial turmoil".

By ignoring the aim of the measure and instead focusing on the degree of "turmoil" in financial markets, the Committee is moving the boundary for what is monetary policy and what is financial stability policy in contravention of CJEU jurisprudence.

2.3 The ECB's proposal for action to address the boundary delimitation problem

The narrow definition of monetary policy, together with the limited scope of the prohibition on instructions, which according to the proposal only applies within the

narrowly defined monetary policy remit, constitutes clear divergence from the requirement that new legislation shall converge with EU law, and directly contravenes the EU Treaties and the Statute of the ESCB, as highlighted by the ECB in its opinion of the proposal:

> Sveriges Riksbank needs to independently exercise all the basic monetary policy and payment system tasks that are necessary for a central bank to be able to achieve its primary objective of price stability established under the Treaties and the Statute of the ESCB. Under Article 127.2 in the Treaty, the basic central bank tasks to be carried out through the ESCB to achieve the primary objective of price stability include defining and implementing the monetary policy of the Union and promoting the smooth operation of payment systems. Under Chapter IV of the Statute of the ESCB, the monetary functions and operations of the ESCB include a variety of open market and credit operations, as well as providing facilities and making regulations to ensure efficient and sound clearing and payment systems within the Union and with third countries. The provision of liquidity is a monetary policy tasks at any central bank, including Sveriges Riksbank. Within the framework of the Eurosystem, the provision of liquidity support is, with the exception of emergency liquidity assistance, considered to be part of the basic task of implementing monetary policy, and is subject to the prohibition on NCBs seeking or taking instructions. […]
>
> The ability of an NCB of a Member State with a derogation to independently achieve its primary stability objective, as required under Articles 127 and 130 of the Treaty and Articles 2 and 7 of the Statute of the ESCB, would be jeopardised if that NCB's basic monetary policy and payment system tasks are not subject to the prohibition on seeking or taking instructions.
>
> It is therefore suggested that the provisions relating to Sveriges Riksbank's operation and oversight of payment settlement systems, financial infrastructures and the payment market and the provision of liquidity support (with the exception of emergency liquidity assistance) should be removed from Chapter 3 of the draft law on Sveriges Riksbank Act regarding the financial system and placed in a single chapter addressing monetary policy and payment systems. Furthermore, Sveriges Riksbank's responsibilities under the proposed amendments to the Instrument of Government, in respect of which Sveriges Riksbank may not seek or take instructions should be aligned with the conception of basic central banking tasks under the Treaty.[32]

The ECB's proposal to avoid the Swedish legal amendments contravening EU law states a possible solution to the flaws in the definition of monetary policy and the scope of the prohibition on instructions. At the same time, there are also other parts of the Committee's legislative proposal that contravene EU law.

[32] Opinion of the European Central Bank on reform of Sveriges Riksbank, Section 2.7-2.9, 20 April 2020 (CON/2020/13).

3. Establishment of the inflation target for approval by the Riksdag

Another part of the proposal where compatibility with EU law has previously been highlighted is the proposed supplementary provision 9.17.4 in Chapter 9 of the Riksdag Act, which states that, in cases where the Riksbank has taken a decision on the definition of the price stability objective, the Executive Board of the Riksbank shall make a submission to the Riksdag for approval of the objective. "If the Parliament does not approve the request, Sveriges Riksbank's immediately preceding decision on the formulation of the price stability objective will continue to apply. According to the Committee, the price stability objective would, for this purpose, cover the target variable (inflation target, price level target or mean inflation), the target level (growth rate) and the price index. Currently, Sveriges Riksbank can amend the specification of the price stability target without any requirement for approval from the Parliament."[33] The proposal also raises certain questions about the constitution that are not answered by the Committee's inquiry.

3.1 Constitutional problems

The proposed system is that the Riksdag shall decide on the formulation of the price stability objective pursuant to Chapter 9, Article 6 of the Instrument of Government, which gives the Riksdag the right to determine guidelines for the budget, a so-called guideline decision.[34] However, this provision refers to the Riksdag's right to decide within financial power, that is, the right to determine over income to the state and to dispose of the state's assets, primarily through decisions on expenditure as regulated in Chapter 9, Articles 1-11 of the Instrument of Government. The provision does not, however, give the Riksdag any decision-making powers within the area of monetary policy; it is the Riksbank that, according to the Committee's proposal for Chapter 9, Article 13 of the Instrument of Government, has the responsibility for formulating and implementing monetary policy.[35] The Instrument of Government and its preparatory works are clear that fiscal power and monetary policy are two separate areas within economic policy and, as the proposal must be interpreted, the Committee does not intend to change this relationship.[36]

Decisions on formulating the price stability objective are thus without doubt within the scope defining and implementing monetary policy. It is therefore unclear whether the Riksdag, with the support of a budget regulation, can *decide* to approve or reject a monetary policy decision. Neither are guideline decisions legally binding.[37] The Committee's proposal must however be understood as a decision on approving or not

[33] Opinion of the European Central Bank of 20 April 2020 on reform of Sveriges Riksbank section 1.4, CON/2020/13.
[34] SOU 2019:46 p. 629.
[35] Chapter 9, Article 5, fourth paragraph of the Riksdag Act is also clear that Chapter 9, Article 6 of the Instrument of Government is intended for decisions regarding government bills concerning the state budget. The Riksbank's submissions are consequently made with the support of another provision in the Riksdag Act, namely Chapter 9, Article 17.
[36] Government Bill 1973:90 p. 353-354, SOU 2008:125 565-567 and Government Bill 2009/10:80 p. 232-233.
[37] Government Bill 2009/10:80 p. 232.

approving the Riksbank's decision being *binding* as the Committee seems to be saying that it affects the legal status of the Riksbank's decision.[38]

For the reasons mentioned, there is thus cause to compare the proposed system with a requirement for subordination[39] for the Riksbank's decisions to apply (cf. Chapter 8, Article 6 of the Instrument of Government). The provision the Committee proposes shall regulate the Riksbank's right to decide on the price stability objective must thus be regarded as an authorisation. However, the question is whether it is possible to subordinate *decisions* made by administrative authorities and not merely regulations communicated by the Government or administrative authorities. There is no explicit support in the Instrument of Government for the proposed subordination system.

There is much to indicate that the Riksbank's decisions on establishing the price stability objective are to be regarded as application of the law. Chapter 12, Article 2 of the Instrument of Government states, however, that the Riksdag may not determine how an administrative authority, such as the Riksbank, may decide in a particular case that concerns application of the law. Further, Chapter 12, Article 3 of the Instrument of Government prescribes that tasks within public administration may not be carried out by the Riksdag to an extent other than stipulated in the Constitution or the Riksdag Act. This provision does not only clarify that the Riksdag is prevented from deciding on administrative matters that according to the statutes are the responsibility of the Government or other public authorities. It also says that the Riksdag on the whole cannot by law or other manner append itself to any administrative task.[40]

However, the Committee does not mention how the proposed system relates to the relevant provisions in the Instrument of Government, regardless of whether they are guideline decisions or a subordination or some other type of administrative task. The proposed system for defining the price stability objective seems therefore to have been insufficiently examined.

3.2 The ECB's opinion is that the proposal is incompatible with EU law

The requirement for independent central banks and the prohibition on instructions applies to all of EU Member States. The European Commission and ECB have defined clearly and in detail in their convergence reports the scope of central bank independence, divided into functional, institutional, personal and financial independence. The ECB clarifies its view on independence in its opinion on the Committee's legislative proposal:

> The rights of third parties to approve, suspend, annul and defer an NCB's decisions are contrary to NCBs' institutional independence and incompatible with the Treaty and the Statute of the ESCB as far as ESCB-related tasks are concerned. The Parliament's right to approve or reject Sveriges Riksbank's decisions on the design of the price stability objective would therefore be inconsistent with Article

[38] SOU 2019:46 p. 1777.
[39] Subordination often arises within public administration, but then it is a case of certain types of interventional administrative authority decision that concerns individuals being submitted for judicial review for reasons of legal security.
[40] Norstedt's legislative commentary on the provision.

> 130 of the Treaty. This decision should rather be taken by Sveriges Riksbank's Executive Board, as the decision-making body responsible for the formulation of Sveriges Riksbank's monetary policy.[41]

The constitutional issues presented and the ECB's opinion suggest that further analysis of the forms of any approval by the Riksdag in determining the inflation target is necessary.

4. ESCB-related tasks and independence

The legal solution for narrowing monetary policy is thus to state the Riksbank's ESCB-related tasks in the Constitution in a way that deviates both from applicable Swedish law and EU law via an amendment to Chapter 9, Article 12 of the Instrument of Government. The assessment is that this proposal contravenes EU law and is also dubious from the point of view of Swedish law. The Committee states that it has chosen "to reproduce the most central European Union regulations for the Riksbank's operations" as it finds that "the regulatory framework applicable in Sweden ought to be inferred from Swedish legislation".[42] Such a choice is possible, but then EU law must be correctly incorporated, without amendments or national interpretations. To state, as the Committee proposes, the multi-faceted EU concept of ESCB-related tasks in the Swedish constitution on the basis of a Swedish interpretation of what ESCB-related tasks entail is not compatible with the principle of the primacy of EU law over Swedish law.

When the Riksbank's status was adapted to EU law, the legislator rejected the idea of incorporating EU provisions into Swedish law. The Government stated the following reasons for this stance:

> The basis for the Government's deliberation has been that the Instrument of Government shall reproduce the main elements for how Sweden is governed. From the point of view of EC law, there is no requirement for the provisions to be incorporated into the Instrument of Government for Swedish law to be compatible with the treaty. EC law already contains regulations regarding the conditions for removing the governor of the central bank and a prohibition on giving and taking instructions aimed at the Riksbank. As these questions are already regulated in EU law, which comprises an integral part of the Swedish legal system, it can be argued that there is no need for, or that it might even be inappropriate, to repeat the provisions of the EC legislation in the Swedish legal system.[43]

The primary underlying reason for this impression was however that "the direct effects of EC legislation and its priority over Swedish law mean it is unnecessary" to reproduce the requirements of EC legislation in Swedish laws.[44]

The content of the current concept, the ESCB-related tasks, is dependent on the exact wording of the provisions in the EU Treaty and the Statute of the ESCB, and how these should be interpreted is ultimately determined by the CJEU and not by the Swedish

[41] Opinion of the European Central Bank of 20 April 2020 on reform of Sveriges Riksbank section 2.5, CON/2020/13.
[42] A new Sveriges Riksbank Act, final report the Committee, p. 45, SOU 2019:46.
[43] Government Bill 1997/98:40 p. 50.
[44] Ibid p. 49.

legislator. That which is covered by the tasks applies to all Member States and therefore cannot be established unilaterally by one Member State, as this opens up for different interpretations and application of the law among Member States, which then undermines the actual basic concept behind EU law. However, this is exactly what the Committee is doing by interpreting the ESCB-related tasks, thereby giving the concept a unique Swedish content. This question is particularly prominent with regard to the Committee's interpretation of the task of promoting the smooth operation of payment systems. The Committee chooses to interpret this task as referring to such tasks and powers for the Riksbank as follow on from directly applicable legal acts from the EU and from other collaboration within the ESCB.[45]

As this task has no clear definition in EU law, there is a risk of the Committee's interpretation deviating from how, for example, another Member State or the CJEU would interpret it. Partly for this reason, the CJEU has outlined in various judgments the principles according to which provisions of Community law shall be interpreted.[46]

The interpretation by the Committee of the task of promoting a smoothly functioning payment system does not follow the principles established by the CJEU.[47] As CLEU practice is binding, the Committee's assessment of the content of the task appears both inadequate in substance and legally doubtful.

The Committee's interpretation of the task forms the basis of the Committee's proposal in the area of financial infrastructure, which is discussed in Chapter 21 of the Committee's report. As a consequence of the Committee's interpretation, the tasks concerned in that context will not be covered by the constitutional independence according to the Committee's proposal for Chapter 8, Article 13 of the Instrument of Government. As stated above, the tasks mainly concerned are the provision of payment settlement systems (e.g. RIX) and the oversight of the financial infrastructure.

The Committee notes that the general provision in the Instrument of Government on the independent decision-making of central administrative authorities, Chapter 12, Article 2 of the Instrument of Government, might be applicable to the tasks that are proposed to no longer be covered by Chapter 9, Article 13 of the Instrument of Government. The provision in Chapter 12, Article 2 entails in brief that no authority may determine how an administrative authority shall decide in a particular case relating to the exercise of public authority vis-à-vis an individual, or relating to the application of law. The question is then whether the tasks of providing payment settlement systems

[45] SOU 2019:42. p. 520 f. and 1214.
[46] Ds 2017:41 p. 97 and judgment in CILFIT against Italian Ministry of Health, C-283/81, EU:C:1982:335 points 18–20. To begin with, it must be borne in mind that community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions. It must also be borne in mind, even where the different language versions are entirely in accord with one another, that Community law uses terminology what is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States. Finally, every provision of Community law must be placed in is context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.
[47] This applies in particular to the interpretation principle that every provision of Community law must be placed in a context and interpreted in the light of the provisions of Community law as a whole, having taken account of the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.

and the oversight of the financial infrastructure can be considered the exercise of public authority vis-à-vis an individual or whether they relate to the application of law.

The Committee notes that the Riksbank's monetary policy decisions do not comprise the exercise of public authority vis-à-vis an individual, other than in very rare exceptions such as decisions on reserve requirements against a particular institution. The Committee states that the question is rather whether monetary policy comprises the application of law, given that the objective and means for monetary policy are largely regulated by law. It goes on to say that for most authorities, the tasks and objectives are clear in various types of regulation, often expressed in relatively general terms, without this necessarily becoming a question of the application of law. On the other hand, if the question is whether the authority should take a stance on whether certain prerequisites in a provision in law are met or not, there are stronger reasons for ensuring it is a question of application of the law. But in the opinion of the Committee, it is not self-evident that the monetary policy decisions comprise such application of the law as stated in Chapter 12, Article 2 of the Instrument of Government solely on the grounds that the task of conducting monetary policy, the objective for monetary policy and the monetary policy powers of authority are largely regulated in law.[48] The same situation applies to significant parts of the tasks of providing payment settlement systems and the oversight of the financial infrastructure. Currently, the tasks are mostly performed via agreements of in the form of other actions that cannot be considered to be the exercise of public authority or application of law.

What is stated here means that the tasks the Committee proposes shall be transferred from the monetary policy field, through the above described division into two mandates, and instead are proposed to be part of the Committee's proposal for Chapter 3, together with the tasks of providing a system for the settlement of payments (e.g. RIX) and overseeing the financial infrastructure, will not be covered by the Committee's proposal for independence pursuant to Chapter 9, Article 13 of the Instrument of Government, and probably not by the independence following on from Chapter 12, Article 2 of the Instrument of Government, either.

It is precisely the situation that many of the Riksbank's measures, regardless of their purpose, are not the exercise of authority or application of law, which would require a special provision regulating the Riksbank's independence. This is largely because the Riksbank exercises its powers or takes its measures with regard to the whole of society, and that often takes place through agreements with the Riksbank's counterparties; agreements that are entered into voluntarily and entail the counterparty thus not being party to any matter at the Riksbank, even if the Riksbank may have initiated the agreement through a decision.[49] The situation mentioned was probably also one of several reason as to why independence pursuant to Chapter 9, Article 13 of the Instrument of Government was introduced.[50]

The Committee summarises the position of the Riksbank under Swedish law by noting that the fact that the current provision in the Instrument of Government pursuant to the Committee's proposal is limited to ESCB-related tasks and some gathering of statistics

[48] Ibid p. 1,208.
[49] Government Bill 2016/17:180 pp. 48 and 56.
[50] Government Bill 1997/98:40, p. 76 f.

does not exclude the possibility of the Riksbank also being able to act independently in other areas.[51] But the question is under which constitutional provision it would be possible to exercise that independence, as the Committee's own assessment is that it is not certain that Chapter 12, Article 2 of the Instrument of Government is applicable. The fact that the Committee *claims* that the Riksbank can act independently lacks significance, as it is not possible to change the area of application of a provision without changing the actual wording of the provision, that is, it is not permitted to legislate solely by means of new statements in the preparatory works.

The results of the Committee's proposal are that the Riksbank will in principle have a completely unregulated position in the constitution in the area the Committee designates as financial stability and which is regulated in the Committee's proposal for Chapter 3. As the Riksbank's constitutionally protected independence does not have this meaning today, the proposal implies a limitation of the Riksbank's independence and is thus also a deviation from EU law.

Further, the position of EU law when there is a conflict of norms with national law should also be considered. Pursuant to Chapter 10, Article 6 of the Instrument of Government, the Riksdag can within the scope of the collaboration with the European Union transfer the right of decision-making that does not concern the principles for government. Through this constitutional provision, it is clear that Sweden is a member of the EU and that the provisions in the Instrument of Government do not regulate the position and impact of EU law in Sweden, but that this is done through the EU Treaties and the principles deriving from them. The inquiry that lay behind the introduction of the provision in connection with Sweden joining the then EC observed that membership would entail regulation of the Swedish social system through "two partly separate legal systems with different origins; the national legal system with decisions in the system prescribed by the Instrument of Government and the Community's legal system with decisions in the system following on from, primarily, the Treaty of Rome".[52] The inquiry established that the Community law's binding effect meant that "no provision in the Constitution or other law prevents EC law from obtaining the effect that it explicitly requires or that the EC court has stated that it has".[53]

The principle of the EU law's priority over national law was thus well known also before Sweden joined the EU. If the doubts about the compatibility of the proposal with EU law are not removed, Swedish authorities and courts may find themselves in a difficult situation as regards the application and interpretation of the provisions once they have entered into force; can these provisions be given full legal effect? The review that must take place if an incompatibility is noted between Swedish law and EU law has a solution prescribed in the preparatory works of the act; EU law takes priority over Swedish constitutional law.[54] If the constitutional law is not compatible with the relevant and applicable provisions on central bank independence and tasks in the EU treaties, a practitioner applying the law in a Swedish context thus has no choice but to give the EU law the most legal effect. One way of achieving this legal effect would be to apply the

[51] SOU 2019:40 p. 1,215.
[52] EG och våra grundlagar, Betänkande av Grundlagsutredningen inför EG (EC and our constitutional laws, Report of Constitutional law inquiry prior to EC), p. 95, SOU 1993:14.
[53] Ibid.
[54] Government Bill 2009/10:80 p. 141.

relevant Treaty provisions instead of Swedish legislation or to apply Swedish provisions in the light of EU law.

It is also noteworthy that the Committee proposes that the Executive Board's current responsibility for the Riksbank's operations is extended to also cover a responsibility for its operations being conducted in accordance with *the obligations ensuing from Sweden's membership of the European Union*.[55] The Executive Board is thus given clear directives as to how a conflict of norms with EU law should be resolved. It is highly desirable, however, not least from a democratic point of view, that the legislation is adapted to EU law from the very beginning and that the adaptation is not passed on to the practitioner applying the law.

5. Alternative courses of action

There are different ways of dealing with the inconsistencies with EU law identified by this legal memorandum. For example, there are courses of action that give Sweden scope to legislate precisely as the Committee proposes, but are dependent on how other Member States see the issue. Another course of action is based on applicable law continuing to govern the Riksbank's operations without major legislative amendments.[56] When assessing the alternatives, however, it should be borne in mind that the current legislation has been tested during both the current Covid-19 crisis and the 2008 financial crisis and has been shown to work also in times of crisis. The need to remedy any possible flaws in the current legislation does not therefore appear so urgent that there would be no time to take note of and consider alternatives to the Committee's proposal prior to the further processing of the proposed legislation.

Four possible options are presented below that range, on an imaginary scale, from more comprehensive changes to Sweden's relation to the EMU, which are difficult to achieve, to more limited adjustments of the legislative proposal that tackle the most serious flaws in relation to EU law without further inquiry. There is no evaluation of the various options here, neither in terms of content nor regarding political feasibility, the list merely indicates alternative courses of action from a legal perspective:

1. If it is deemed necessary to gain the advantages of the legislative proposal that the Committee highlights in its final report, the Government and the Riksdag should, to minimise the risk of judicial proceedings in the CJEU and criticism from other Member States, request a special status within the EU, similar to that given to the United Kingdom and Denmark prior to the start of the third stage of the EMU. This requires that Sweden negotiates a legally-binding protocol that can be appended to the EU Treaties and (possibly with reference to the referendum on the euro) allowing Sweden to depart from the requirements for central bank independence and adaptation of national legislation to gradually meet the requirements for legal convergence.

[55] See the Committee's proposal for Chapter 11, Article 19 of the Sveriges Riksbank Act.

[56] The legal memorandum considers the Riksbank Committee's legislative proposal in relation to the Swedish constitution and EU law and there is, notwithstanding the alternative course of actions stated here, a need to update the Sveriges Riksbank Act within certain specific areas. This applies to, for example, the Riksbank's arguments in its petition to the Riksdag on the state's role on the payment market and with regard to contingency planning. Any adjustments in these areas can, however, be done within the framework of the current legislation.

2. If the advantages claimed by the Committee are assessed to be less relevant than the risks linked to the legislative proposal, the Government and the Riksdag should put the proposal to one side, naturally on condition that the current legislation is assessed as satisfactory.
3. If the current legislation is not assessed as satisfactory, the Government and the Riksdag should appoint a new inquiry with the task of adjusting the Committee's proposal.
4. If the current legislation is not considered satisfactory, but the intention is to keep the framework of the Committee's proposal without conducting a new inquiry, the legislator can instead attempt an adjustment of the legislative proposal before the matter is referred to the Swedish Council on Legislation. For example, it is possible to follow the ECB's proposal and move the regulations governing the operations of the Riksbank, its oversight of payment systems, financial infrastructure and the payment market and general liquidity support (excluding emergency liquidity assistance) from Chapter 3 on financial stability in the proposal, and put these provisions in a chapter of their own on monetary policy and payment systems. In addition, the legal solution that narrows the Riksbank's ESCB-related tasks in Chapter 9, Article 13 of the Instrument of Government needs to be abandoned (by allowing the provisions only to be included in the Sveriges Riksbank Act) and/or adapted (to a list of central bank tasks that is not closed) so that the Swedish constitution does not contravene the Treaty. The proposal on an approval from the Riksdag when establishing the inflation target is perhaps not so easy to change without further investigation, but perhaps this point can be left for now and analysed separately in a supplementary government bill once more light has been shed on the issue.

6. Conclusions

EU law requires the central bank of an EU Member State to be independent when it formulates and implements monetary policy and conducts associated ESCB-related tasks. The assessment in this legal memorandum is that the Riksbank Committee's proposal implies a narrower definition of monetary policy and ESCB-related tasks and a restriction of the Riksbank's independence in contravention of the requirements of EU law. According to this legal memorandum, introducing this narrower definition of the Riksbank's ESCB-related tasks and the scope of the Riksbank's independence in the Instrument of Government risks leading to a conflict between EU law and the Swedish constitution. In addition, the forms of the proposal for an approval by the Riksdag when determining the inflation target are considered to be in need of a more extensive analysis before the legislative proposal is implemented.

In light of one of the reasons for appointing the Committee being to attend to the European Commission's previous comments on the compatibility of Swedish law and the Sveriges Riksbank Act with EU law, it must be assumed that the issues identified will be dealt with in the continued processing of the legislative proposal. If the proposal is implemented without any adjustment, ambiguities with regard to the status and independence of the Riksbank will arise, which will lead to difficulties in applying the monetary policy framework. There is also a risk of legal measures from the Commission.

This memorandum discusses the Riksbank Committee's proposal from a purely legal perspective. As regards the need for new legislation, it is worth noting that the current monetary policy framework has enabled the Riksbank to perform its tasks in both good and bad times over the past twenty years or so. The current legislation works well regarding, for example, monetary policy, market transactions and payment systems, but it needs to be adapted to fulfil the requirements imposed by EU law and developments in society. In light of this, a revision of the Committee's proposal seems reasonable, while it seems unwarranted to rush through the legislative proposal.