

LEGAL ASPECTS OF THE ESTABLISHMENT OF THE ESCB

Draft articles of the Statute

Art. 1 1.2 and 1.3 could be incorporated into a broader provision regarding the ECB, possibly Article 12, to which reference is made for some specific observations.

In general, the provisions should be more detailed and better clarify the ECB's functions and its relationship with the System. Several relevant suggestions are made in Annex 1 of the Report of legal experts.

It is necessary to establish whether the directive and regulatory powers of the system are to be placed inside or outside the ECB. The latter solution appears to be reflected in the present text of the Statute. In this case the new Community authority (or institution, even if not expressly defined as such) would be the System, which would be vested with the directive and regulatory powers associated with monetary policy.

The ECB would be the thirteenth executive body endowed with operative functions (market intervention, etc.). It owns the assets and liabilities not belonging to the national central banks.

If there is agreement on the foregoing approach, the subsequent articles should refer to the System when referring to directive and regulatory powers and to the ECB when referring to operations and, in general, to ownership and matters concerning assets and liabilities. With reference to the articles drafted in Annex 1 of the Report, it would appear preferable to assign the tasks foreseen under Chapter IV -- operations -- article (new) to the System rather than to the ECB.

Some of the proposals for the subsequent articles reflect this approach. An alternative approach would be to assign the directive and regulatory functions of the System to the ECB, thereby setting it above the national central banks (in which case the System would only be an expression representing the entities involved as a whole). If this approach were adopted, these amendments would obviously become inapplicable.

Art. 3 Comments b.

Is a specific procedure contemplated for amending the Statute in this particular matter? Would it not be possible to use the ordinary "simplified procedure"?

Art. 5 5.2 ... The System shall promote . . .

Art. 6 6.1 ... The System may be represented . . . (The System is normally represented in accordance with the provisions of Article 7.3.)

Art. 7 The President or his nominee shall represent the System externally . . .

It might be advisable for the articles not to treat the Council and the Board as distinct authorities. Jurisprudence could interpret the legislation as setting up not one new Community institution (or quasi-institution), but two (the Council and the Board) as well as a public entity (the ECB).

Art. 9 9.2. It could be stated explicitly that participants are considered "present in person" in the event of a teleconference.

9.5. Second proposition - The ECB, having its own legal personality, is a Community public entity. We have misgivings about the provision making the rules of procedure the sole mechanism governing the entity's operations and organization. A solution could be a separate, albeit concise, statute for the ECB (see Art. 12).

Art. 12 Articles 1.2 and 1.3 as well as some of the provisions of Article 26 could be incorporated in this article.

The ECB should have its own statute, in the same way as the national central banks. The functions of the ECB to be governed by the statute need to be determined, together with the procedure for adopting the statute (by resolution of the Council on the advice of the Board, or by a procedure similar to the "simplified procedure for amending the Statute").

Several of the suggestions in Annex 1 of the Report of legal experts could apply to the functions of the ECB, which would only be operative (if the approach outlined with reference to Article 1 is agreed).

Art. 16 . . . The ECB may open accounts . . .

Art. 17 17.1 . . . The ECB shall be entitled . . .

Art. 18 18.2. Sanctions and the related procedure have to be specified in greater detail. We agree with the proposal in Annex 1 of the Report (Chapter IV - Operations - Article (new), final proposition) to deal with the matter in a separate legislative act.

Art. 20 20.1.2.4. Reference should be made to the ECB instead of to the System.

20.1 The final sentence can be eliminated.

20.3 Should not the reference be to 17.1?

20.4 This is not completely clear.

Art. 23 Operations should be the task of the ECB.

Simplified procedure for amending some provisions of the Statute

A possible solution would be a procedure of the kind laid down in the second paragraph of Article 188 of the EEC Treaty for amending certain provisions of the Statute of the Court of Justice. The proposal could be made by the Council of the System and the resolution adopted by the Council of the Communities, acting by qualified majority.

General provisions relating to Community institutions

Judicial control

The matter of jurisdictional control can be resolved within the framework of the article proposed in Annex 1 of the Report. However, it should be stated that the acts subject to control are those of the System's Council and Board, not those of the national central banks.

Provision should also be made for the System to be able to refer acts by other Community institutions to the Court of Justice.

Liability

The proposal in Annex 1 of the Report -- that the question of

ECB liability be referred to Article 215 of the EEC Treaty -- is acceptable provided it is made clear that the party liable for damages is not the Community but the ECB.

In addition, it should be specified that, without prejudice to the competence of the Court of Justice, other disputes to which the System is a party remain within the purview of national jurisdictions.

Staff

It could be stated that the ECB is independent in recruiting its staff, as a consequence of its financial independence.

Disputes between the ECB and its employees could be made to fall within the jurisdiction of the Court of Justice, in line with Article 179 of the EEC Treaty.

Budgetary issues

Specific provisions are required excluding those governing the other institutions, particularly as regards approval of the budget and its inclusion in a single consolidated Community budget. Article 20 of the Statute drafted by the CEPREM is a useful model. The budgetary rules to be adopted are likely to be influenced by the financial provisions now being drafted.

Seat

The seat of the ECB can be decided by the governments of the Community Governments, as laid down for all the Community institutions by Article 216 of the EEC Treaty.

It seems advisable to foresee the possibility of establishing branches or representative offices.

Auditing

The Delors Report appears to suggest excluding control by the Audit Board. This would necessitate a specific provision, by virtue of Article 206(b) of the EEC Treaty.

Professional secrecy

The provision of Article 214 of the Treaty should be extended to the members of the Council, Board and staff of the ECB as well as to its auditors. It needs to be decided whether this provision should also apply to the managers and staff of the national central banks in relation to tasks discharged by the

national central banks within the System, or whether their obligation of professional secrecy is ensured by the national laws in force.

The possibility of providing for cases in which an individual is subject to different sets of obligations of professional secrecy could also be examined. The obligation arising from the exercise of supervisory activity is significant in this regard.