

Dear Mr. Chairman,

In reply to your telefax of 13th December 1990, and having regard to the present state of discussions on these points, I am sending you herewith my comments and proposals concerning Articles 32 to 39 of the draft Statute of the ESCB.

A. Article 32

I refer, as you suggest, to the text of this article contained in the version of the draft Statute dated 25th October 1990.

1. The Banque de France can accept Articles 32.1 and 32.3 to 32.6 as they stand (page 44).

I would, however, add that the definition of income contained in Article 32.1 and in comment a) (on pages 44 and 45) warrants closer consideration.

2. Article 32.2 in square brackets. The Banque de France cannot agree to the incorporation of Article 32.2, and in particular the second indent, in the draft Statute. This latter provision could have the effect of introducing into the conduct of the ESCB's external monetary policy considerations of profitability (in connection with the profits which the national central banks would earn on the reserves that they held), which should not in principle be a motivating factor.

I therefore propose that Article 32.2 be reworded:

"Article 32.2. The pooled income normally includes all income deriving from monetary policy operations and from the holding of foreign exchange reserves, whether these foreign exchange reserves are transferred to the ECB or not.

The Council may define other specific sources of income to be excluded from the consolidated income account."

3. More generally, I would emphasise that the Banque de France is in favour of drawing up rules which, during the transition period, at the beginning of Stage Three, would ensure that the mechanisms governing the System's income do not lead to excessively sharp changes in the distribution of this income (on this subject, see comment c) in the version dated 25th October). As suggested in the comments in Chapter VIII of the final version of the Statute, it might be useful to include a provision to this effect in that chapter.

B. Articles 33 to 39 (Chapter VII)

1. In the present version of Chapter VII only Article 33 poses a problem from a legal point of view, primarily because it must define the scope of the European Central Bank's regulatory power.
2. In my view the provisions concerning the regulatory power to be invested in the ECB should be laid down both in the Treaty and in the Statute of the ESCB; when decisions taken by the ECB are enforceable vis-à-vis third parties, it is the Treaty itself which must define the scope and applicability of the regulatory power thus invested in the ECB.

Moreover, Article 33.1 of the Statute assigns regulatory power both to the Council and to the Executive Board, in accordance with their respective responsibilities.

I do not consider it possible to grant the Executive Board the same powers in this area as the Council. Indeed, under Article 12.1 decision-making power rests with the Council, and rightly so since it is the deliberative body. I therefore propose that a text on the following lines be adopted for Article 33.1:

"The Council shall make the regulations and take the decisions necessary for the performance of the tasks entrusted to the System under the present Statute. The Executive Board shall ensure that they are executed as required."

3. Given this new text of Article 33.1, two possibilities can be considered for the wording of Article 33.2:

- either the nature of the regulatory acts that may be adopted by the Council and the conditions of motivation, publication and notification of these acts are described in detail;
- or the Statute makes reference in this connection to the common provisions on regulatory acts adopted by Community institutions.

I propose taking a middle course, defining the nature of the regulatory acts adopted within the framework of the System and making reference to the articles of the Treaty for the conditions of implementation.

Article 33.2 might be worded as follows:

Article 33.2: "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States participating in the ESCB.

A decision shall be binding in its entirety upon those to whom it is addressed.

Articles 190 to 192 of the Treaty establishing the European Economic Community are applicable in all respects to the regulations made and decisions taken by the Council."

4. For the moment I have no comments to make on the remaining articles of Chapter VII, relating to "General provisions". I may, however, wish to inform you of the outcome of discussions which we are currently holding on Article 36 concerning the conditions of employment of ECB staff.

These are my preliminary comments on the document as it stands. I do, however, consider that the whole set of questions relating to Articles 33 to 39 should be studied more closely.

Yours, etc.

P. Lagayette
Deputy Governor