

**Committee of Governors of the
Central Banks of the Member States
of the European Economic Community**

8th April 1991

Committee of Alternates

**DRAFT STATUTE OF THE EUROPEAN SYSTEM OF CENTRAL BANKS
AND OF THE EUROPEAN CENTRAL BANK**

(Chapters VI, VII and IX)

CHAPTER VI - FINANCIAL PROVISIONS OF THE SYSTEM

Articles 26-27: unchanged.

Article 28 - Capital of the ECB

28.1. The capital of the ECB shall, upon its establishment, be ecu [x] million. The capital may be increased from time to time by such amounts as may be decided by the Council acting by qualified majority.

28.2. The national central banks shall be the sole subscribers to and holders of the capital of the ECB. The subscription of capital shall be according to the key established pursuant to Article 29.

28.3. The Council, acting by qualified majority, shall determine the extent to which and the form in which capital shall be paid up.

28.4. The shares of the national central banks in the subscribed capital of the ECB may not be transferred, pledged or attached other than in accordance with a decision taken by the Council.

28.5. If the key referred to in Article 29 is revised, the national central banks shall transfer among themselves capital shares to the extent necessary to ensure that the distribution of capital shares corresponds to the revised key. The Council shall determine the terms and conditions of such transfers.

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Comments

The text of this Article is identical with Article 29 of the draft Statute dated 27th November 1990 except in paragraphs 2 and 5, where it makes reference to the (new) Article 29 defining the key for capital subscriptions.

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Article 29 - Key for capital subscription

29.1. At the entry into force of this Statute, the key for subscription of the ECB's capital shall be established. Each national central bank shall be assigned a weight in this key which shall be equal to the sum of:

- ...% of the share of its respective country in the population of the Community in the penultimate year preceding the entry into force of the Statute;
- ...% of the share of its respective country in the gross domestic product at market prices of the Community as recorded in the last five years preceding the penultimate year before the entry into force of the Statute.

29.2. The statistical data to be used for the application of this Article shall be calculated by the Statistical Office of the European Communities in accordance with Community legislation.

29.3. The weights assigned to the national central banks shall be adjusted every five years after the entry into force of this Statute in analogy to the provisions laid down in Article 29.1. The revised key shall apply with effect from the first day of the following year.

29.4. The Council shall take all other measures necessary for the application of this Article.

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Comments

(a) The key to be established pursuant to Article 29 would be used for the subscriptions of the ECB's capital. Because the allocation of the ECB's capital would constitute the key for the application of Articles 29a, 30 and 32, the key established pursuant to Article 29 would also be relevant for all these other financial provisions.

Since the date of the entry into force of the Statute is not known and in any case will be some years after the adoption and ratification of the Treaty changes, it does not appear to be very practical to attempt the establishment of a key in terms of precise percentage figures (as was initially provided for by Article 28 of the draft Statute dated 27th November 1990). Indeed, there would be the risk that in the meantime the aggregates used as underlying criteria changed and that thus the percentages would be already out of line at the entry into force of the Statute. For this reason Article 29 lays down a method for the initial establishment and periodic adjustment of the key. The adjustments would be

virtually automatic and without recourse to the simplified amendment procedure.

(b) According to Article 29.1 the weights assigned to each national central bank would be determined on the basis of a combination of population and GDP. The weight of each criterion in the composite indicator would need to be determined. The Alternates were of the opinion that these weights should be decided by the political authorities. Some Alternates would be in favour of assigning also some weight to financial indicators. One view was that special consideration was to be given to the "residents' contributions to the monetary base". This indicator would imply that income of monetary origin be distributed to the country whose residents enabled the System to generate this income. Most Alternates considered that this would raise difficult measurement problems and introduce a rather variable element into the key.

(c) Article 29.2 stipulates that the Statistical Office of the European Communities (EUROSTAT) shall calculate the statistical data on population and GDP. EUROSTAT is the competent institution at Community level in the field of these statistics. The Community legislation referred to in Article 29.2 would be complementary legislation to be enacted in accordance with Article 42. For GDP, the Council Directive of 13th February 1989 on the harmonisation of the compilation of gross national product at market prices could be made applicable. If financial indicators were included as supplementary criteria for the key the necessary statistical data would have to be provided by the ECB.

(d) Article 29.3 provides for adjustments of the key every five years. The method would be the same as for the initial establishment of the key.

(e) Although the establishment and revision of the key is largely automatic there may be some - mainly procedural - issues which will have to be dealt with. Article 29.4 empowers the Council to take all necessary measures in this field.

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Article 29a - Voting on financial matters

Text of Article 28.1 of the draft Statute dated 27th November 1990 except that the expression "key attached to the Statute" should be changed into "according to their subscribed shares in the capital of the ECB".

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Article 30: unchanged except for the same drafting amendment as in Article 29a.

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Article 31: unchanged.

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INCOME OF NCBS AND ALLOCATION OF NET PROFITS OF THE ECB

General comment

While there was agreement about the principle that the monetary income should be allocated among the NCBS, different views were expressed about the desirability of laying down precise rules at the present stage. Alternative 1 which was supported by a large majority of the Alternates attempts to spell out, to the extent possible, rules governing the determination and allocation of monetary income. Alternative 2 which was presented by the Dutch Alternates is based on the assumption that it would be premature to embody specific rules in the Statute and therefore confines itself to defining a procedure which would involve the political authorities.

Alternative 1

Article 32 - Allocation of monetary income

32.1. The income accruing to the national central banks in the performance of the System's monetary policy function (called hereafter

"monetary income") shall be allocated at the end of each financial year in accordance with the provisions hereafter.

32.2. Subject to Article 32.3 the amount of each national central bank's monetary income shall be equal to its annual income derived from its assets held against notes in circulation and deposit liabilities vis-à-vis credit institutions. These assets shall be earmarked by each national central bank in accordance with guidelines to be established by the Council.

32.3. If at the entry into force of this Statute, in the judgement of the Council, the balance sheet structures of the national central banks do not permit the application of Article 32.2, the Council, acting by qualified majority, may decide that, by way of derogation to Article 32.2, the monetary income shall be measured according to an alternative method for a period of not more than five years.

32.4. The amount of each national central bank's monetary income shall be reduced by an amount equivalent to any interest paid by that central bank on its deposit liabilities vis-à-vis credit institutions in accordance with Article 19.

The Council may decide that national central banks shall be indemnified for cost incurred in connection with the issuance of bank notes or in exceptional circumstances for specific losses arising from monetary policy operations undertaken for the System. The indemnification shall be in the form deemed appropriate in the judgment of the Council; these amounts may be offset against the national central banks' monetary income.

32.5. The sum of the national central banks' monetary income shall be allocated to the national central banks in proportion to their subscribed shares in the capital of the ECB, subject to any decision taken by the Council pursuant to Article 32a.2.

32.6. The clearing and settlement of the balances arising from the allocation of monetary income shall be carried out by the ECB in accordance with the guidelines established by the Council.

32.7. The Council shall determine all other conditions required for the application of this Article.

Comments

(a) Article 32 has been drafted on the basis of the assumption that the key used for the subscription of capital of the ECB would also be applicable to income distribution. For this reason, Article 32 makes no reference to the ECB since any monetary income (as defined in Article 32) which might accrue to the ECB would be allocated (with other net earnings of the ECB) according to the same key pursuant to Article 32a hereafter. If the common income were to be shared out in accordance with a different key special provisions relating to the ECB would have to be introduced in order to allow for the possibility that monetary income would accrue to the ECB itself.

(b) Article 32.1 sets out the general principle that the income accruing to the national central banks in the performance of the System's monetary policy function shall be allocated among the national central banks at the end of each financial year.

(c) Article 32.2 sets out the method according to which monetary income shall be calculated. For the application of this method, it would be necessary that the Council establishes guidelines which would specify the assets to be earmarked, in the balance sheets of the NCBs, as the counterpart to bank notes in circulation and deposit liabilities vis-à-vis credit institutions. Besides the harmonisation of accounting rules, the application of this method could be hampered if there is not a broadly similar balance sheet structure of the NCBs.

(d) Since it is not possible to assess at this stage whether the necessary preconditions for the application of the Article 32.2 would have been fulfilled at the entry into Stage Three, Article 32.3 enables the Council to adopt temporarily an alternative method for measuring monetary income. This method would determine monetary income indirectly by multiplying the annual average monetary base by a "representative" interest rate (implicit method). Two reservations were made by some, though not the same, Alternates. Firstly, any possibilities of applying an alternative method should be restricted to less than five years. Secondly, the decision by the Council to adopt a different method should be made by simple majority.

(e) Article 32.4 makes provision for two contingencies: First, in case compulsory reserves were remunerated at a uniform interest rate

decided by the Council, each NCB's monetary income would be reduced by the equivalent of interest paid on these liabilities. Second, in the event that an NCB's share in the cost related to the generation of monetary income from the issuance of bank notes were to be much higher than its share in the allocated monetary income, or in exceptional circumstances where a NCB would suffer specific losses arising from monetary policy operations undertaken for the System, the Council would be entitled to decide on some form of compensation in order to indemnify the NCBs concerned.

(f) Article 32.5 states that the monetary income is to be apportioned to the NCBs in proportion to their shares in the capital of the ECB (see comment (a)). The reference to Article 32a.2 means that a loss incurred by the ECB may, on a decision by the Council, be covered by current monetary income. While the concept of allocating monetary income to the NCBs was supported by most Alternates, the view was also expressed that such monetary income should be transferred to the Community budget.

(g) Article 32.6: the mechanism for the clearing and settlement of the balances resulting from the allocation of monetary income need not be set out in detail in the Statute; it will have to be established and administered by the ECB in accordance with the Council's guidelines.

(h) In order to smooth out possible abrupt changes in income allocation following the entry into force of the Statute and the application of Article 32 thereof, it might be necessary to make provisions for a transitional arrangement by way of derogation to Article 32. The transitional arrangement should be laid down in the transitional provisions (Chapter VIII of the Statute) and comply with the requirements of flexibility and transparency. The transitional provision would enter into force following a decision by the Council. This provision could be phrased as follows:

"If, at the entry into force of this Statute, the Council, acting by qualified majority, decides that the application of Article 32 results in significant changes in national central banks' relative income positions, the amount of income to be allocated pursuant to Article 32 shall be reduced by a uniform percentage which shall not exceed ..% in the first year after the entry into force of this Statute and which shall decrease by at least .. percentage points in each subsequent year. This transitional

provision shall be applicable for a period of not more than three years after the entry into force of this Statute."

The proposed enabling clause would permit to exempt - at the beginning of Stage Three - a part of the monetary income from being allocated according to Article 32. The activation of the transitional scheme would be subject to a decision taken by the Council, acting by qualified majority. The Council's margin for manoeuvre, however, would be limited in three respects. First, the activation would be conditioned by the Council's perception of significant changes in relative income positions of the NCBs resulting from the application of Article 32 (changes in income due to other reasons would be no justification for implementing the transitional arrangement). Second, upper limits would ensure that only part of the monetary income would be exempted from the allocation scheme. Third, the transitional arrangement would be limited to a period of three years after the entry into force of the Statute.

Three reservations, however, were made by some - although not the same - Alternates. Firstly, the application of the transitional arrangement should be made mandatory. Secondly, the transitional arrangement should be applied for more than three years. Thirdly, that part of monetary income which would not be subject to allocation in accordance with Article 32 should be distributed on the basis of NCBs' shares in aggregate monetary base prior to the start of Stage Three.

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Article 32a - Allocation of net profits and losses of the ECB

32a.1. The net profit of the ECB shall be transferred in the following order:

- (a) an amount to be determined by the Council shall be transferred to the general reserve fund;
- (b) the remaining net profit shall be distributed to the shareholders of the ECB in proportion to their subscribed shares.

32a.2. In the event of a loss incurred by the ECB, the shortfall may be offset against the own funds of the ECB or, following a decision by the Council, against contributions from national central banks, in proportion to their subscribed shares.

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Comment

This Article is essentially identical with Article 32.5 and Article 32.6 of the draft Statute dated 25th October 1990.

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Alternative 2

Article 32 - Income of the national central banks and allocation of net profits and losses of the ECB

32.1. Upon a proposal of the Council, the Council of the European Communities, acting by a qualified majority, shall establish uniform guidelines to determine the income of the national central banks in their performance of functions under this Statute and to allocate this income to the national central banks.

32.2. The income of national central banks received on functions which are performed under Article 14.5 shall not be regarded as income for the purpose of Article 32.1.

32.3. The net profit of the ECB shall be transferred in the following order:

- (a) an amount to be determined by the Council shall be transferred to the general reserve fund;
- (b) the remaining net profit shall be distributed to the shareholders of the ECB in proportion to their subscribed shares.

32.4. In the event of a loss incurred by the ECB, the shortfall may be offset against the own funds of the ECB or, following a decision by the Council, against contributions from national central banks, in proportion to their subscribed shares.

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Comments

It is suggested to adopt the same procedure for the establishment of uniform guidelines in Article 32.1 as the simplified amendment procedure in Article 41.

CHAPTER VII - GENERAL PROVISIONS

Article 33 - Regulatory power

33.1. The ECB shall make the regulations and take the decisions, necessary for the performance of tasks entrusted to the System under the present Statute.

33.2. A regulation shall have general application. It shall be binding in its entirety and directly applicable. A decision shall be binding in its entirety upon those to whom it is addressed. Articles 191 and 192 of the Treaty establishing the EEC are applicable in all respects to the regulations made and decisions taken by the ECB.

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Comments

The wording of Article 33.1 does not prejudice the division of responsibilities between the Council and the Executive Board.

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Article 34 - Enforcement

According to Community legislation, the ECB and national central banks shall be entitled to impose sanctions on market participants and other economic agents which fail to comply with their obligations vis-à-vis regulations and decisions.

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Comments

Article 34 gives recognition of the principle that sanctions cannot be imposed by an independent institution by mentioning this possibility in the Statute without any further specification ("Nulla poena sine lege").

Article 35 - Judicial control and related matters

35.1. The acts of the ECB shall be open to review and interpretation by the Court of Justice under the conditions laid down for the legal control of the acts of Community institutions. The ECB may institute proceedings under the same conditions as Community institutions. Articles 173 to 176, 178, 183 and 184 of the EEC Treaty shall be applicable accordingly.

35.2. The ECB shall be subject to the liability regime as provided for in Article 215 of the EEC Treaty.

35.3. The Court of Justice shall have jurisdiction to give judgement pursuant to any arbitration clause contained in a contract concluded by or on behalf of the ECB, whether that contract be governed by public or private law.

35.4. The decision of the ECB to bring an action before the Court of Justice shall be taken by the Council.

35.5. The national central banks shall be liable according to their respective national laws.

35.6. The Court of Justice shall have jurisdiction in disputes concerning the fulfilment by a national central bank of obligations under this Statute. If the ECB considers that a national central bank has failed to fulfil an obligation under this Statute, it may bring the matter before the Court of Justice.

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Comments

The first sentence of Article 35.6 states clearly that the Court of Justice has jurisdiction in disputes between the ECB and an NCB (see also the similar provision in Article 180 of the Treaty for the European Investment Bank). The second sentence of Article 35.6 enables the ECB to institute proceedings before the Court of Justice against the national central banks in order to establish failure to fulfil an obligation under the Statute. The purpose of Article 35.6 is to close a possible legal loophole which could result from the fact that, given the NCBs'

independence from their respective governments, Article 169 of the Treaty might not be applicable.

Article 36 - Staff

36.1. The Council of the ECB, on a proposal from the Executive Board, shall lay down the conditions of employment of the staff of the ECB.

36.2. Disputes between the ECB and its staff may be brought before the Court of Justice which shall have jurisdiction.

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Comments

The wording of Article 36 offers the ECB the necessary flexibility for determining the conditions of employment of its staff. It does not prejudge the legal status of the staff, i.e. whether it would be employed on a contractual basis or would enjoy the status of "officials".

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Article 37 - Seat

The seat of the ECB shall be established at (....).

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Article 38 - Professional secrecy

38.1. The members of the governing bodies and the staff of the ECB and the national central banks shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy.

38.2. Persons having access to data covered by specific secrecy Community legislation shall be subject to such legislation.

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Article 39 - Signatories

The ECB shall be legally committed vis-à-vis third parties by the signature of the President or by the signatures of two members of the Executive Board or by those of two members of the staff of the ECB who have been duly authorised by the President to sign on behalf of the ECB.

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Comments

Article 39 confers the power of organic representation of the ECB (i.e. the power of representation which is directly derived from the Statute) upon the President and the other members of the Executive Board but the President alone would enjoy the power to give proxy to staff members to sign on behalf of the ECB.

Article 39 also aims at providing legal protection to third parties when dealing with the ECB. It does not preclude that the scope of contractual representation could be restricted by internal regulations. However, the ECB would be validly committed vis-à-vis third parties, even if the contractual signatory (signatories) exceeded his (their) powers. It thus avoids possible complications arising from differences in national law in respect of the extent to which limitation of the agent's power can be opposed to third parties.

Although the proposed article embodies the principle of double signature, it is understood that it does not rule out the possibility of the ECB being legally committed by only one member of the Executive Board or one of its staff members or even by a third party under the conditions of specific and limited mandates given by the President.

In order to ensure that Article 13.2 is not in conflict with Article 39, it should be made clear that Article 13.2 refers to policy statements (and not to representation in the legal sense). To this end, Article 13.2 may be amended as follows:

"Without prejudice of Article 39, the President or his nominee shall represent the views of the ECB externally."

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Article 40 - Privileges and immunities

The Protocol on the privileges and immunities of the European Communities shall apply to the ECB, the members of its decision-making bodies and its staff to the extent necessary for the performance of the ECB's tasks.

CHAPTER IX - MENDMENT OF THE STATUTE AND COMPLEMENTARY LEGISLATION

Article 41 - Simplified amendment procedure

41.1. By way of derogation to Article 236 of the EEC Treaty and subject to Article 41.2, Articles 5, 17, 18, 19, 21.2, 21.3, 21.4, 21.5, 22, 23, 24, 26, [32] and 36 may be amended by the Council of the European Communities, at the request of the ECB, after consulting the European Parliament and the Commission. The approval of the ECB's request for amendment requires a decision of the Council of the European Communities acting by qualified majority.

41.2. Article 3 shall be amended by the Council of the European Communities in accordance with the procedure referred to in Article 41.1 only to the extent necessary to confer upon the System additional tasks which are not at variance with the System's objectives stated in Article 2 and do not impinge on the System's basis tasks defined in Article 3.

41.3. A request made by the ECB under Article 41.1 shall require a unanimous decision by the Council.

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Comments

(a) As the simplified amendment procedure only relates to provisions dealing with operational and technical aspects of the System, it confers the exclusive right of initiative to the ECB. This procedure is in analogy to Article 188 of the Treaty, except that the Council of the European Communities shall act by qualified majority in order to facilitate the decision-making process.

(b) Article 41.2 is a *lex specialis* to Article 41.1; it implies that the possibility of amending Article 3 in accordance with the simplified

procedure only refers to additional tasks (and not the basic tasks as currently defined in Article 3) and that these additional tasks have to be compatible with the objectives defined in Article 2 and the present basic tasks in Article 3.

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Article 42 - Complementary legislation

The Council of the European Communities, acting by a qualified majority on a proposal from the Commission and after consulting the ECB and the European Parliament, shall enact the legislation necessary for the application of Articles 4.1, 5.3, 16.2, 25.2, 29.2, 30.4 and 34.

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Comment

Article 42 reflects the idea that complementary legislation should not be enacted in the same manner as foreseen for simplified amendment, but instead in accordance with the "normal" legislative procedure (i.e. the procedure for secondary Community legislation). The ECB will be involved in the legislative procedure by its right to be consulted prior to the adoption of this legislation.