

5th February 1991

To the members of the Committee of Alternates

As mentioned in my telefax of 1st February 1991 please find attached two notes which have been prepared by the Secretariat with a view to facilitating the Alternates' discussions on the open technical questions relating to Articles 32 to 39 of the draft Statute.

With kind regards,



Gunter D. Baer

Secretariat

Main points made in central banks' comments on Article 32:

Distribution of income of the System and allocation
of net profits and losses of the ECB

The Secretariat has received contributions from six central banks expressing their views on Article 32 of the draft Statute (version of 25th October 1990). These contributions have been circulated to the Committee of Alternates. Given the diversity of responses received, the Secretariat did not feel in a position to propose (alternative) draft texts and has limited itself to the summing-up of the following main points contained in the responses.

1. Consolidation versus non-consolidation of income

Germany, France and Italy endorse the general principle of income consolidation but differ in their views on the income items to be included in the pooling. Italy and France support the consolidation of all income deriving from monetary policy operations and the holding of (pooled and unpooled) foreign exchange reserves. France proposes to confer the right upon the Council to define other specific sources of income to be excluded from the consolidated income account. Italy proposes to exclude income of National Central Bank (NCB) activities that have no direct bearing on monetary policy, such as acting as the government's fiscal agent or managing their real estate. Germany favours the exclusion of income on those foreign reserve assets which have not yet been pooled, but would be prepared to accept the pooling of such income if it were decided unanimously by the Council of the ECB. Germany would also be prepared to extend the list of types of income excluded from pooling (an average return

on each central banks' holdings of private ecus and other national EC currencies as of the date of entry into the final Stage).

The Netherlands express reservations about the principle of income pooling, at least at the start of Stage Three, but are prepared to introduce a provision that the Council of the ECB, subject to approval by governments, may at the start of the ECB decide that further elements of NCB income, in addition to the income on pooled reserves, will have to be centralised.

The United Kingdom and Ireland do not yet take a clear position but suggest the prior need to undertake a thorough analysis of all issues involved.

2. General principles to be taken into consideration in the decision on income allocation

The following principles are mentioned in the contributions:

(a) Consistency

- the mechanism for income distribution must not hinder the achievement of the primary objective of the System or create situations in which other objectives might influence the performance of the System's operations and functions (Italy);
- to avoid the effect of introducing into the conduct of the ESCB's external monetary policy considerations of profitability (France);
- income distribution should leave individual NCBs indifferent as to where in the System transactions are conducted when these are clearly intended to further the policy purposes of the System (United Kingdom).

(b) Equity

- the performance of tasks of the System should not create distortions in the allocation of income among its members (Italy);
- most desirably, the NCB's income should not be altered by virtue of its participation in the System, but at the very least, in

carrying out its tasks the ECB should seek to avoid redistributive effects (Ireland);

- income distribution should reflect fairly the contributions made, and burdens carried, by individual NCBs and the ECB (United Kingdom).

(c) Efficiency

- financial provisions must enable the System to perform its functions and conduct its operations efficiently (Italy);
- give the ECB and each NCB every reasonable incentive to restrain its costs and to manage its assets effectively (United Kingdom).

(d) Subsidiarity

- income distribution should fully respect the principle of subsidiarity (United Kingdom).

3. Specific issues for further study

Apart from the UK and Irish proposal to undertake a fundamental appraisal of all questions involved, the following specific issues have been mentioned:

- the definition of income contained in Article 32.1 warrants closer consideration (France);
- the impact of market forces and operations on profit distribution (Netherlands);
- the key for distributing pooled income (Italy); extent of consolidation and key for distribution should be considered jointly (Netherlands);
- the capital structure of the ECB (United Kingdom);
- transitional arrangements to avoid sharp redistributive effects at the start of Stage Three (France);
- definition and measurement of seignorage (United Kingdom, Italy);
- remuneration of gold deposits in the context of foreign reserve asset pooling (Ireland).

4. Points for discussion

The contributions indicate that before addressing the issue of the appropriate mechanism for income allocation (a decentralised, partially or fully centralised system), the following three points may be worth discussing:

- (a) Which should be the guiding principles for a system of income allocation? As the Bank of England notes "criteria may conflict in certain respects and judgement may be needed to reconcile them". For example, if operational freedom (i.e. leaving to the decision-making bodies how and where operations are conducted) is to be ensured, would this not mean that either "the avoidance of redistributive effects in carrying-out tasks" or "the fair reflection of contributions made and burdens carried by individual NCBs" would not be fulfilled?
- (b) How should a key for income distribution be determined? Would the key be helpful in giving practical effect to certain guiding principles, such as "equity"? Should the key for income distribution be different from that for capital subscriptions? Could a redistribution mechanism involving the Community budget facilitate the establishment of a distribution key?
- (c) What procedure should be followed in order to complete the draft Statute? Would the proposal of the Bank of England be acceptable to find Statute language that leaves the freedom to take decisions later while working towards general principles? Is it conceivable to find a solution under which the Council of the ECB would be entrusted with the decision on the politically sensitive issue of income allocation without having to seek the approval of the political authorities?

SUGGESTIONS FOR AMENDMENTS TO GENERAL PROVISIONS

Article 33 - Regulatory power

33.1. The Council ~~and the Executive Board shall~~ *in accordance with their respective responsibilities*, shall make the regulations and take decisions, necessary for the performance of tasks entrusted to the System under the present Statute. *The Executive Board shall ensure that they are executed as required.*

33.2. ~~To be drafted~~ *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 EEC are applicable in all respects to the regulations made and decisions taken by the Council.*

Comments

- a) Article 33.1: The deletion in the first sentence and the additional sentence have been proposed by the French Alternate who considers that, because of Article 12.1 of the Statute, the Executive Board cannot be granted the same regulatory powers as the Council. This view is not shared by the Belgian Alternate, who argues that it would be normal to make provision for the Executive Board to adopt implementing regulations for the purpose of exercising the powers invested in it by the Council or under a general implementing authorisation. In addition, the possibility of regulations from the Executive Board should not be ruled out in the event of a delegation of powers to that body.
- b) Article 33.2: The text has been proposed by the French Alternate. The Belgian Alternate generally agrees with the text proposed but considers that the reference to the Member States "participating in the ESCB" is unnecessary. It is argued that each regulation will specify its scope of application and each decision will be binding upon those to whom it is addressed. Thus, the possibility of deferred participation in EMU, which the reference is intended

to take into account, would by no means be ruled out, even if it were not explicitly mentioned in this Article.

Article 34 - Enforcement

~~According to the 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 (guidelines, instructions) regulations and decisions.

Comments

The deletion has been asked for by the German Alternate who considers that sanctions to be imposed by the ECB should be stipulated in the Statute.

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 in 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 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. *If the ECB considers that a central bank of a Member State has failed to fulfil an obligation under this Statute, it may bring the matter before the Court of Justice.*

Comments

Article 35.6 which has been proposed by the Belgian Alternate, 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. Its purpose is to close a possible legal loophole which could result from the fact that a Member State against which the Commission has instituted proceedings (Article 169 of the Treaty) for failure by its central bank to fulfil an obligation will attempt to invoke the latter's independence in its defence.

Article 36 - Staff

36.1. The Council of the ECB, on a proposal from the Executive Board, shall lay down the Staff Regulations of ~~officials and the Conditions of Employment of other~~ the servants of the ECB. *The Staff Regulations shall become an integral part of the contracts between the ECB and its servants.*

The Court of Justice shall have jurisdiction in any dispute between the ECB and its servants within the limits and under the conditions laid down in the Staff Regulations ~~and the Conditions of Employment~~.

36.2. The *Staff Regulations* shall include the conditions of recruitment and promotion, the salaries, pensions and other social security benefits, the limitation of external activities, the Unions' rights and their relations with the Executive Board, the exchange of staff members from the national central banks.

Comments

The present wording of Article 36 (which had been copied from Articles 179 and 212 of the Treaty) suggests that the staff of the ECB will have the same status as the staff of the Community institutions: permanent staff enjoying the status of "officials" ("fonctionnaires" in French, "Beamte" in German) and other servants employed on a temporary contractual basis. During the elaboration of mutually consistent translations of the draft Statute in the other Community languages, it has become apparent that some central banks are in favour of employing all the ECB's staff on a contractual basis. If this were generally agreed, it would be useful to clarify this principle in the Statute along the lines proposed by the Secretariat.

Article 37 - Seat

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

Article 38 - Professional secrecy

38.1. The members of the governing bodies and the ~~staff officials and other servants~~ 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.

Comments

See comments on Article 36.

Article 39 - Signatories

The ECB shall be legally committed vis-à-vis third parties in respect of administrative matters by the signature of the President or - as in all other matters - by either by the signature of the President or by the signatures of two members of the Executive Board or two members of the staff of the ECB who have been duly authorised by the President to sign on behalf of the ECB.

Comments

The UK Government has incorporated this Article into its draft Statute of the EMF and the German Alternate has proposed the re-incorporation of this Article into the draft Statute of the ESCB, subject to the specified amendments. Analogous provisions can be found in many central bank statutes.

The re-incorporation of this Article, which was initially proposed by the Secretariat, would be useful as it would afford secure legal protection to third parties when dealing with the ECB and would thus facilitate relations with them.

However, there is the question of whether Article 39, as amended by the German Alternate, is consistent with Article 13. According to the latter Article the ECB shall be represented externally by the President or his nominee. This means that the President alone is entitled to represent the

ECB and to delegate this power to other persons. The proposal made by the German Alternate would seem to create uncertainty about the scope of the President's power as the term "administrative matters" is not clearly defined. In contrast, if the President's power were to be confined, Article 13 would need to be reviewed.

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 ~~officials and other~~ servants to the extent necessary for the performance of the ECB's tasks.

Comments

The changes proposed by the Secretariat aim to ensure consistency with:

- the prevailing legal situation ("European Communities" instead of "European Community");
- Article 36 (see comments thereupon).

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