

18th April 1991

TO THE MEMBERS OF THE COMMITTEE OF ALTERNATES

Thank you very much for your observations and remarks on the revised draft Statute, the Commentary and the letter of transmittal. The proposed changes have been incorporated in the relevant pages (which are attached), with suggestions for additions shown in italics and proposals for deletions marked by overstriking.

Since a few observations and proposed changes referred to the same passages of the Commentary, especially with regard to Article 32.2, it would be desirable to hold a short teleconference on **Monday, 22nd April 1991, at 11.45 a.m.** in order to reach a final agreement on the texts.

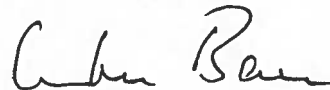
As regards the letter of transmittal, views differed as to whether versions in French and German (which, together with English are the working languages of the IGC) or in all official Community languages should be sent in due course to the IGC. The relevant sentence in the letter will therefore read as follows. "The amended Statute has so far been prepared only in English; versions in the other official Community languages will be sent to the Secretariat of the Intergovernmental Conference as soon as they become available." This wording is understood to imply that the full set of the Statute in all Community languages will be prepared at a later stage (possibly only after the transitional provisions have been drafted), but that there is a commitment on the part of the Committee of Governors to provide the text in all Community languages. Please also note that the letter of transmittal will recall the UK reservation with regard to Stage Three of EMU.

As far as the transmission of the document is concerned, the same procedure as in November 1990 will be followed: the letter of transmittal (after having been signed by President Pöhl), together with the draft Statute and the Commentary will be sent by special courier to the President of the Council of the European Communities and, for information to the

Ministers of Finance and the President of the Commission. Of course, copies will also be sent by special courier directly to the Governors.

Finally, there is the question of public availability of the Statute and the Commentary. You may recall that the first version of the Statute and the Commentary was given to the press after the informal ECOFIN meeting in Milan on 2nd December 1990 and was thereafter available to interested parties. Should the same procedure be followed, i.e. that the text would be available to the public after the informal ECOFIN meeting in Luxembourg on 11th and 12th May 1991?

With kind regards,

A handwritten signature in dark ink, appearing to read 'Gunter Baer', written in a cursive style.

Gunter D. Baer

the ECB's activities pursuant to this Statute or through the national central banks pursuant to Article 14.

9.5 The decision-making bodies of the ECB shall be the Council of the ECB and the Executive Board.

Article 10 - The Council of the ECB

10.1 The Council of the ECB shall comprise the President, the Vice President, the other members of the Executive Board and the Governors of the national central banks.

10.2 Subject to Article 10.3, only members of the Council of the ECB present in person shall have the right to vote. Each member shall have one vote. The Rules of Procedure referred to in Article 12.3 shall provide that a member of the Council of the ECB who is prevented from voting for a prolonged period may appoint an alternate as a member of the Council of the ECB.

Save as otherwise provided for in the Statute, the Council of the ECB shall act by a simple majority. In the event of a tie, the President shall have the casting vote.

In order for the Council of the ECB to vote, there shall be a quorum of two-thirds of the members. If the quorum is not met, the President may convoke an extraordinary meeting at which decisions may be taken without regard to the quorum referred to above.

10.3 For any decisions to be taken under Articles 28, 29, 30 ~~and~~ 32 and 33, the votes in the Council of the ECB shall be weighted according to the national central banks' shares in the subscribed capital of the ECB. A decision by a qualified majority shall be approved if the votes cast in favour represent at least [...] % of the subscribed capital of the ECB. If a Governor is unable to be present, he may nominate an alternate to cast his weighted vote.

10.4 The proceedings of the meetings shall be confidential. The Council of the ECB may decide to make the outcome of its deliberations public.

10.5 The Council of the ECB shall meet at least ten times a year.

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

Article 31 - Foreign reserve assets held by national central banks

31.1 The national central banks shall be allowed to perform transactions in fulfilment of the obligations towards international organisations in accordance with Article 23.

31.2 All other operations in foreign reserve assets remaining with the national central banks after the transfers referred to in Article 30 shall be subject to approval by the ECB in order to ensure consistency with the exchange rate and monetary policies of the Community.

31.3 The Council of the ECB shall issue guidelines with a view to facilitating such operations.

Article 32 - Allocation of monetary income of national central banks

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 banks in accordance with guidelines to be established by the Council of the ECB.

32.3 If at the entry into force of this Statute, in the judgement of the Council of the ECB, the balance sheet structures of the national central banks do not permit the application of Article 32.2, the Council of the ECB, acting by a 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.

Article 9 - The European Central Bank

The purpose of this Article is to set out in broad terms the basic provisions governing the ECB.

In addition, by giving legal personality to the ECB, Articles 9.1 and 9.2 establish the capacity of the ECB to carry out operations. Article 9.4 confers upon the ECB the function to ensure the implementation of the System's tasks, either through its own activities or through the national central banks in accordance with Article 14.

Article 9.5 mentions the decision-making bodies of the ECB whose authority - as stated in Article 8 - extends to the whole System. The name "Council of the ECB" has been chosen in order to avoid confusion with the Council of the European Communities to which the Treaty refers as the "the Council".

Article 10 - The Council of the ECB

The composition and voting procedures of the Council of the ECB laid down in this Article reflect the federative structure of the System: all national central bank Governors are ex-officio members of the Council of the ECB which, in addition, will include the President, the Vice President and the other members of the Executive Board. Each member of the Council of the ECB has the right to vote. The principle of "one person, one vote" will apply to all decisions except those of a patrimonial nature (see below). This principle strengthens the decision-making process which must be oriented exclusively towards the requirements for the Community as a whole.

Article 10.2 requires "presence in person" for voting; this would be met by a teleconference. A delegation of voting powers will only be possible if a member of the Council of the ECB is prevented from voting for a prolonged period in which case he or she may appoint an alternate as a member of the Council of the ECB. The emphasis on personal presence underlines that the responsibility for all policy-related decisions rests with the members of the Council of the ECB.

Weighted voting would apply to all decisions of a patrimonial nature which justify the derogation from the principle of "one person, one vote". The Executive Board members in the Council of the ECB will have no weighted votes and will therefore not take part in decisions made under Articles 28, 29, 30, ~~and~~ 32 and 33.

authorities to exercise supervisory functions or to adopt measures for which they are responsible, having due regard to the objectives of the System. Article 25.2 offers the possibility of designating the ECB as a competent supervisory authority in which case it might formulate, interpret and implement supervisory policies. Any future transferal of competence to the ECB should be specified by Community legislation for which the Treaty would have to provide an enabling clause.

CHAPTER VI - FINANCIAL PROVISIONS OF THE SYSTEM

These provisions establish the financial foundations of the System and ensure its financial autonomy, which is an important element of the principle of independence (see comments on Article 7). The distribution of rights and obligations in financial matters is based, to the extent possible, on objective indicators and formulae. ~~This implies that there is no discretion regarding~~ *They will be applied for* the determination of the amount of income subject to allocation (Article 32.2) and, ~~in particular,~~ the determination of the national central banks' shares in the subscription of the ECB's capital (Article 28.2), the transfer of foreign reserve assets to the ECB (Article 30.2), the allocation of monetary income (Article 32.5) and the allocation of net profits and losses of the ECB (Article 33). The same key defined by the criteria laid down in Article 29 thus applies to all commonly shared claims and liabilities. ~~Apart from certain technical and procedural matters the decision-making power of the ECB Council is confined to the increase in the ECB's capital and reserves and, within fixed limits, the transfer of foreign reserve assets to the ECB.~~

Article 26 - Financial accounts

As the System has no legal personality, all assets and liabilities relating to the System's operations will be recorded in the balance sheets of the ECB and the national central banks. However, the conduct of a single monetary policy and the need for proper information on sources of money creation throughout the Community will require the consolidation of such assets and liabilities within a single balance sheet structure (Article 26.3). The financial year will be the same for the ECB and the national central banks and in order to ensure the comparability of financial data, the Council of the ECB will establish rules with a view to

specifies that all external transactions undertaken by national central banks (except those in fulfilment of their obligations towards international organisations) will be subject to approval by the ECB.

All Community central banks, except the Bank of England, consider it necessary for the application of Article 31 (as well as Article 30) that in those participating countries in which foreign reserve assets are held by official bodies other than the national central bank, steps are taken to transfer these assets to the central bank before the start of Stage Three. This would allow each national central bank to participate in the transfer scheme and would ensure that all foreign reserve assets in the Community would be subject to the guidelines of the Council of the ECB. If that approach is followed a Treaty provision should stipulate the transfer of all foreign reserve assets to national central banks.

Article 32 - Allocation of monetary income of national central banks

This Article specifies the rules for determining the amount of income subject to allocation and its distribution among the national central banks. One Community central bank, pointing to the difficulties in defining rules for income determination and allocation many years prior to these rules taking effect, would have preferred not to lay down specific rules at this time but to embody in the Statute a procedure according to which these rules should be determined at a later stage by the Council of the European Communities, acting by qualified majority upon a proposal of the Council of the ECB.

The monetary income referred to in Article 32.1 represents the return on interest-bearing assets which form the counterpart to bank notes in circulation and deposit liabilities vis-à-vis credit institutions, i.e. the aggregate monetary base held by the national central banks (and, possibly, the ECB). As such income is derived from the performance of the System's monetary policy function, it should be considered common income to be shared out among the national central banks. Any other income earned by the national central banks would not be subject to allocation but be retained by them.

Article 32.2 sets out the method for calculating monetary income [*Alternative 1: which assumes that there would be some convergence in the balance-sheet structures of national central banks.*] [*Alternative 2: which assumes that there would be some convergence in the balance-sheet structures of national central banks.*] Under this "direct method" specific certain

assets with similar characteristics would be earmarked as counterparts to the monetary base and the actual income thereon would be allocated. Apart from the harmonisation of accounting rules as foreseen under Article 26.4, the application of this method requires guidelines by the Council of the ECB which would determine how assets should be allocated to the monetary base in each national central banks' balance sheets.

Since it is possible that *the preconditions for applying the direct method may not be completely fulfilled differences in the balance-sheet structures of the national central banks do not yet permit the application of the direct method* at the time this Statute enters into force, Article 32.3 entitles the Council of the ECB to adopt for a period of not more than five years an alternative method for calculating monetary income. This method would determine monetary income indirectly by multiplying the annual average monetary base by a representative interest rate (the "implicit method"). When taking the decision in accordance with Article 32.3, the Council of the ECB would also have to establish a formula for the setting of the representative interest rate.

Notwithstanding the method for calculating monetary income, Article 32.4 keeps open the possibility of deducting certain specific costs from monetary income before allocation. Firstly, if compulsory reserves were remunerated at a uniform interest rate decided by the Council of the ECB, each national central bank's monetary income would be reduced by the interest paid on these liabilities. Secondly, in the event that a national central bank's share in the cost of generating 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 national central bank suffers specific losses arising from monetary policy operations undertaken for the System, the Council of the ECB would be entitled to decide on some form of compensation in order to indemnify the national central banks concerned. However, no other costs would be deductible from the monetary income, i.e. that in accordance with the principle of subsidiarity each national central bank would remain responsible for controlling the level and the structure of operating costs and other expenses.

The total monetary income subject to allocation would be shared out among the national central banks in accordance with the key used for the subscription of the ECB's capital. Since the key for allocating monetary income is the same as that used for distributing the ECB's net profits and

losses, no special mention needs to be made in Article 32 of the possibility of monetary income accruing to the ECB. Under the provisions of Article 33 any such income earned by the ECB *other than that transferred to reserves* would be rechannelled automatically to the national central banks and in the same proportion as monetary income is allocated in accordance with Article 32. The reference in Article 32.5 to Article 33.2 reaffirms that a loss incurred by the ECB may, following a decision by the ECB Council, be covered by current monetary income.

Since it cannot be ruled out that after the entry into force of the Statute the *immediate* application of Article 32 *would may* entail an undesirably large and sudden reallocation of income in comparison with the preceding year, provision should be made for a transitional arrangement in Chapter IX (The transitional provisions for the System). Such a transitional arrangement should be flexible and transparent and *the relevant provisions* should lay down the specific features of an approach leading in a predetermined manner to the full application of Article 32 within a *reasonable limited* period of time.

Article 33 - Allocation of net profits and losses of the ECB

This Article governs the distribution of net profits and losses of the ECB and the building-up and drawing-down of a general reserve fund. The general principle of commonly sharing financial claims and liabilities in accordance with the key used for subscription of capital also applies to Article 33.

CHAPTER VII - GENERAL PROVISIONS

As has been pointed out in the comment on Article 1, the Statute is based on the assumption that the System is not classified as a Community institution in accordance with paragraph 1 of Article 4 of the EEC Treaty. Instead, the establishment of the System would be mentioned separately in a new paragraph of this Article 4. In order to avoid any legal uncertainty arising from the possible application to the System of general provisions relating to Community institutions, Chapter VII includes the necessary provisions governing the general aspects of the System. In many instances these provisions are broadly similar to those contained in the existing EEC Treaty.

Article 34 - Regulatory powers

Article 34.1 confers upon the ECB the power to issue regulations and take decisions which will obligate third parties. However, the power can only be exercised to the extent necessary for the performance of tasks entrusted to the System under the Statute.

Mirroring in essence Article 189 of the Treaty, Article 34.2 defines the legal nature of regulations and decisions of the ECB. The *"Direct applicability"* means that a regulation is legally binding in the whole Community. It does not rule out the possibility of deferred participation of some Member States in EMU and thus limited material application of since in this case the regulations would specify that part or all rules laid down therein would not be applicable in some Member States in the regulation. Conditions of publication and entering into force of regulations, as well as notification and enforceability of decisions are made in accordance with Articles 191 and 192. No reference is made to Article 190 since an obligation to state the reasons of a regulation dealing with monetary policy related matters does not appear to be warranted.

Article 34.3 confers upon the ECB and the national central banks the power to enforce measures taken by virtue of regulations issued under Article 34.1. The application of Article 34.3 will require corresponding Community legislation. This provision gives recognition of the principle that sanctions need to be precisely specified ("Nulla poena sine lege").

Article 35 - Judicial control and related matters

The intention of this Article is to ensure the same level of judicial control as the one which is applicable to the institutions of the Community. It would require a modification of the Protocol on the Statute of the Court of Justice in order to permit the submission of observations by the ECB under Article 20 (preliminary rulings) and interventions under Article 37 of the Statute of the Court.

Article 35.6 establishes the jurisdiction of the Court of Justice in disputes between the ECB and a national central bank (see also the similar provision in Article 180 of the Treaty for the European Investment Bank) and enables the ECB to institute proceedings before the Court of Justice against a national central bank 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 national central

banks' independence from their respective governments, *action under* Article 169 of the Treaty might not be ~~applicable~~ *effective*.

Article 36 - Staff

The wording of Article 36.1 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".

Article 36.2 is in line with Article 179 of the EEC Treaty.

Article 37 - Seat

This provision enshrines the seat of the ECB in the Statute.

Article 38 - Professional Secrecy

This Article is in line with Article 214 of the EEC Treaty.

Article 39 - Signatories

The purpose of Article 39 is twofold. Firstly, it defines the persons who are the legal representatives of the ECB and stipulates the conditions for the exercise of their power. Secondly, Article 39 aims at providing legal protection to third parties when dealing with the ECB and ensures that the ECB would be committed vis-à-vis third parties, even if the contractual signatory (signatories) exceeded his (their) powers.

Although the proposed Article embodies the principle of double signature (except for the President), 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 to the extent that these persons are given specific and limited mandates by the President.

Article 39 is consistent with Article 13.2 which refers to policy statements (and note to representation in the legal sense).

Article 40 - Privileges and immunities

Article 40 is inspired by Article 28 §1 of the Statute of the EIB and Article 28 of the Merger Treaty. It would mainly imply that the ECB would be exempt from any form of national taxation. However, since Article 32