

To the Group of Legal Experts  
of the European Community  
Central Banks

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SUGGESTIONS on the DRAFT STATUTE of the EUROPEAN CENTRAL  
BANK and of the EUROPEAN SYSTEM OF CENTRAL BANKS

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I. EXAMINATION OF THE DRAFT ARTICLES

A. GENERAL COMMENTS:

The report of the Legal Experts stated that "if legal personality is given to the central institution, it will be necessary to replace the reference to the 'System' by 'Central Institution' in many of the articles." This is also true for the revised Draft Statute incorporating the amendments agreed upon by the Governors at their meeting on 11 September 1990. But, furthermore, it seems that the System's lack of legal personality imposes the necessity to assign the different tasks to the governing bodies (Council, Board, President) and System institutions (ECB, NCBs) in a much more precise pattern than does the present Draft Statute.

Also, such lack of legal personality demands that the drafters form very definite ideas about two extremely relevant legal points which so far, in my opinion, remain unclear to some extent:

First, the legal nature of the System; (an association without legal personality, created by Member States, formed by central banks--the ECB and the NCBs--and ruled by the Statute?) Regardless of

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whether this aspect will eventually be clarified in the Statutes, a common opinion should be reached concerning the System's legal nature.

Secondly, the position of the governing bodies should be further clarified as well. If the System is not an institution in the sense of Article 4.1 of the Treaty of Rome, and its governing bodies are not the governing bodies of the ECB--which "shall be administered by the Executive Board," according to Article 12, Draft Statutes--neither the Council nor the Board will enjoy the benefits of legal personality and capacity. Therefore, they will not be subject to sue or be sued, will not be able to contract, and might be dubious whether they could issue rules or orders directly binding on third persons. On the other hand, if the Council and the Board were to become the governing bodies of the ECB, (the ECB would then be the administrative staff and executive service of the Council, directed by the Board), this should be made completely clear in the Draft Statutes of the System.

Clearly, these are to a large extent political options, and the final decision has therefore to be made at a political level. However, the number of available political options may be limited by their technical feasibility from a legal standpoint.

Taking into account all these previous considerations, the following suggestions are focused on the pursuit of two basic objectives:

1. To establish a clear distribution of the powers and roles among the System's governing bodies (Council, Executive Board, President) and the System's institutions (the ECB and the NCBs). For this purpose, I will keep in mind the present internal structure of the System according to the Draft Statute (i.e. A Council and a Board without individual legal personality governing the System from the exterior of the ECB, which will, however, be administered by the Board).

2. To improve the text's wording in terms of legal accuracy and precision. It is understood that the Draft will most probably undergo profound changes and several revisions during its preparation, but in

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my opinion, some issues could be solved at this stage and the use of more precise language could be of help in spotting those aspects in which a modification might be necessary.

## B. SPECIFIC COMMENTS:

### Title

The title seems inadequate if compared to the contents of the document. At the national level, "Statute" may generally mean a law which has been made by the Government and which has been formally written. But, as this meaning is inapplicable on the international level, in such a context the term can only refer to the second meaning given to the word. That is, a set of rules arising either from law or contract governing a body considered to be a legal person. However, this document in its present form does not govern or regulate the way in which a legal person or entity must operate, because the the System as conceived in the Draft would not constitute a legal entity, and the ECB, which will be a legal person, is not really regulated in this text.

Therefore, I would suggest that this text should be called "Treaty on the European System of Central Banks and the European Central Bank," to be signed along with the Treaty on European Monetary Union (this last one, modifying the Treaty of Rome).

### Article 1

It cannot be said that the System "consists" of certain institutions, because a system is something more: a way of organising something according to a set of fixed rules. Consequently, it would perhaps be more correct to say that the System is "formed" by these institutions or the System "links" these institutions together. Even the use of the word "system" may be unclear, as it suggests the existence of a person or entity and perhaps should be substituted by another term which would underline the structural aspect (perhaps "network" of central banks).

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Depending on what is decided at the political level, the term "system" could be almost entirely suppressed in the text.

If it is desirable to make a reference to the nature of the System, it should be done in this article.

#### Article 2

When referring to "objectives," direct references to "the System" should be substituted with "members of the System."

#### Article 3

"Tasks of the System" may be inadequate and it might be preferable to refer to tasks "to be carried out through the system." Also, the System cannot "participate," "hold," "formulate," etc. Instead, the tasks to be "performed through the System" would be "the formulation, the holding, the participation, etc."

#### Article 4

4.1 "The System" should be substituted here by "the Council of the System." Besides, a provision for such consultation should be a formal part of the Community legislative process. Therefore, the EEC Treaty should be amended in accordance therewith, and a reference thereto should be included in this subpart.

4.2 "System" should be substituted by "Council of the System" as above, or by ECB, if desired.

4.3 As in subparts 2 and 3 of this article, "System" should be changed for "Council of the System." It would also be convenient to specify who shall consult the Council.

#### Article 5

5.1 Perhaps the heading "Collection of statistical information" does not properly reflect the content of the article. Is this article meant to establish that the System may collect all "necessary information in order to perform its functions," or just statistical information?

It is unclear how the System (through the national central banks when possible) will collect the information

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directly from economic agents. Whether it may require such information or depend on voluntary cooperation should be specified here. A provision for credit institutions and other economic agents stating the terms of the information obligations, if any, should be considered.

Concerning the "competent national authorities," there is no provision for the case of conflicts with national laws on confidentiality.

5.3 Again, it is unclear whether the subpart limits its scope to statistical information. Should that be the case, it would perhaps be adequate to refer to the relevant provisions of Community Law. But if that is not the case, which provisions would be the "relevant provisions?" Article 214 of the EEC Treaty and the relevant provisions in the Banking Coordination Directives do not seem to be entirely applicable. (The Treaty provision is addressed to other categories of persons, although jurisprudence might eventually extend its scope to the "System." The provisions of the Banking Coordination Directives are mostly addressed to supervisors.)

#### Articles 7 through 14

Chapter III, containing the provisions dealing with governing bodies, could still be subject to a profound revision. However, the present text of the draft is a result of the negotiation process, and as a direct consequence thereof, the following comments are limited to technical suggestions based on the present text.

#### Title

The chapter deals with more than just governing bodies. The title "Institutional Provisions" may be more adequate.

#### Article 8

The importance of this article requires better definitions. The reference to the System should state: "neither the ECB nor the NCBs nor the System, nor governing bodies or members thereof..." Once the exact persons and groups who shall act "independently" are defined, it would be preferable to better define "seek or receive any instructions." While this provision specifically prevents the seeking of instructions, it also seems to prevent their receipt, which may be impossible, since they may originate

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from third parties, lobbies, etc. Therefore, it should refer to "follow instructions."

#### Article 9

9.2 In reference to the Council, this subpart poses transitional problems. If less than all Member States join this agreement in the beginning, it could leave an imbalance in voting rights. (For instance, if only four countries join, the Executive Board will have five votes and the Governors will have four votes.) This could be resolved by a transitional provision, but a simpler solution would be to provide 12 votes for the Governors, distributing the twelve in equal shares. (Thereby, in the previous example, each Governor would have three votes.)

9.5 The reference to the ECB being controlled by the rules of procedure leaves a hollow area in the scope of the Treaty. This would likely eliminate the possibility of using "Statute" as part of the title.

#### Article 10

Article 10.5 should provide for political immunity and independence for the Executive Board members.

#### Article 11

11.1 Under the heading "Responsibilities of the Governing Bodies," the delegation to the Executive Board, as envisioned, is prone to create an extremely instable situation. The term "shall delegate," without more, has no meaning whatsoever and could lead to a vicious cycle. If this is the result of the negotiation procedure, a better arrangement must be formulated. Furthermore, the first and second subparts are inconsistent:

"The Council shall take the decisions necessary for the performance of tasks entrusted to the System under the present statute." (Therefore, it should be able to make any decision to this end.)

"The Council shall formulate the monetary policy...and shall establish the necessary guidelines for their implementation." (So, in those areas, the powers of the Council seem to be limited to establish guidelines.)

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"The Council shall delegate to the Executive Board the necessary operational powers..." (Does this mean that the Council does have power in operational matters, but by force of the article must delegate that power to the Executive Board?)

A systematic definition of powers that must be exercised by the Council and which powers it may delegate could lead to more efficiency and reduce future conflicts.

#### Article 13

The provision related to national central banks in 13.1 should specify that their statutes be made compatible with this Statute "prior to joining the System."

#### 13.2 and 13.3

These subparts indicate that the national central banks owe obedience to the System's governing bodies and must follow their instructions and guidelines. However, Governors may hypothetically be tempted to disobey those instructions for personal reasons or to protect national interests. In such cases, it may be wise to include a procedure for the Council of the System to apply to the European Council for the removal of disobedient Governors (for reasons other than those resting in their person). Only with such a clause could the system keep working if a serious conflict arises. (For instance, if six or seven "rebellious" governors, independent from their national governments, refuse to follow valid instructions delivered by the Council of the System.)

#### Article 14

In this article related to Inter-institutional cooperation, the point numbered 14.3 should read, "The Council of the System shall approve an annual report on the activities of the System" and the Council shall publish or transmit it to the stated organizations.

The very small degree of parliamentary accountability provided for in the last paragraph of this article taints the Draft with a heavy democratic deficit. It would appear much more in line with domestic legislation if the President "shall" (and not "may") attend the European Parliament's specialized committees, and could be required (and not "invited") to attend meetings of the European Council and

the Council of Ministers. The purpose of the Parliamentary appearances should be stated, though one may assume that said appearances are to furnish information about matters relating to the system. On the other hand, it may help clarify matters by stating whether the Governors will be required to attend similar parliamentary meetings on the level of individual member states.

#### Article 15

15.2 A mere statement that "provisions concerning the legal tender status of community currencies shall be regulated according to the Community legislation" is not specific enough. (Unless, of course, the Treaty of Rome is amended to complete this provision.) According to the Treaty of Rome, the adoption of Community legislation requires different types of procedures, provisions, and majority votes, depending on the subject matter. And, obviously, the Treaty does not indicate in its present form which legal basis should be used to regulate currency matters, and therefore what procedures should apply.

#### Articles 16, 17, 20, 21, 22, and 23

Even if one wants to leave open the questions of exactly who will carry accounts, buy and sell securities, etc., it is inadequate and misleading to say that the "System" shall perform such functions. It would therefore be more adequate to state: "The Members of the System;" or even more precise would be "the ECB and the NCBs, according to the terms set forth in the Rules of Procedure, shall..."

#### Article 18.1

More should be said about these "regulations": publication and translation in official languages should be required.

#### Article 18.2

The article should be more precise when referring to possible penalties, the nature of penalties, the procedure for imposing them, and the procedure for appeals from decisions to impose penalties. The minimum necessary would be to regulate who shall regulate and impose penalties, to



prevent violating general principles of law, such as "nulla poena sine lege."

#### Article 31

According to the wording, the consolidated financial statement will not include all operations carried out by national central banks, because article 13.5 states that they may continue to perform functions other than those described in the Statute, but "such functions shall not be regarded as being part of the System." It may be necessary, therefore, either to require the consolidated financial statement of the "System's members" or to explicitly set a rule excluding operations outside the "System" from the consolidated statement. However, the financial provisions will have to be taken into consideration in this respect.

#### 11. SUGGESTIONS FOR THE ADDITION OF GENERAL PROVISIONS

As pointed out in the first meeting of Legal Experts, an examination of the Draft shows that it does not cover some aspects which are normally contained in the law of European institutions and in Comparative law applicable to national central banks. Suggested additions are:

1. Naming the seat of the BCE, and powers to open branch and representative offices.
2. Official languages and working languages to be used by the System's governing bodies and by the BCE.
3. Immunities and privileges accorded to the BCE, its personnel, and officers. This should include a definition of exactly who shall be considered as included in the above groups, and what acts shall be protected. As a possible guide, the Protocol of Brussels of 5 April 1965 on Privileges and Immunities of the European Community may serve well.
4. "Horizontal" coordination among national central banks should be incorporated in a provision or subpart. This provision should include a delimitation of the central banks' duties to cooperate with other central banks within the System in order to comply with instructions and guidelines issued to them.

5. Professional secrets and confidential information: If the scope of Article 5.3 is limited to statistical information, a specific provision should be added to regulate the duties of confidentiality for the System's governing bodies, member institutions, and staff members.

6. Liability is another issue not included. The proposal at the first meeting of Legal Experts appears adequate: "The central institution shall be liable together with the national central banks for the operations of the System, according to the general rules of Community Law." However, it may be preferable to broaden this liability by incorporating the provisions of Article 215 of the EEC Treaty.

7. Judicial control of the acts of the System's governing bodies, and of acts and decisions of the ECB, should be provided for in the Draft. It is suggested that a specific submission to the jurisdiction of the European Court of Justice be added as a control on these organisations' acts (and omissions). Acts and decisions of national central banks, in matters related to this draft, should also be submitted to this control.

8. Regulatory powers should be more clearly established. According to the Draft, the Council can make "decisions," establish "guidelines," and give "instructions" within the System (art. 11) and shall "take necessary steps to insure compliance with its policy, guidelines and instructions." (art. 13) It shall also establish "regulations" concerning the calculation and determination of the minimum reserves, and is allowed to address "requirements" to credit institutions so that they maintain minimum reserves. However, a general provision granting general regulatory powers, fixing the limits thereof, and establishing procedures for adoption of regulations, is missing from the Draft. I believe the incorporation of such a provision, which could well be in line with the proposal of the Banque Nationale de Belgique at the first meeting of Legal Experts (art. 7 bis), is of utmost importance for the adequate functioning of the System.

9. Council staff is not provided for in the Draft. For obvious reasons the Council must have a staff, however small, which should be subject to a determined set of regulations and rules. As most probably this staff is to be provided by the ECB, will said staff be subject to the same rules and regulations as those of general application in the Draft's Article 12.2?

### III. PROCEDURE OF AMENDMENT THROUGH SECONDARY LEGISLATION

In providing for an amendment procedure, it is clear that a previous decision must be made as to which parts shall be subject to a rigid amendment procedure and which parts shall be more easily changed. However, I would suggest that any process for amendment should include the following characteristics:

1. Community nature-- It must require participation in decision making from the Community institutions. This is an indispensable requirement when taking into account the Community nature of the System, and would further require that results be sanctioned and published in the Official Journal of the European Communities.
2. Be specific-- Amendments of the Statute should not be made by way of any of the legal acts provided for in Article 189 of the Treaty of Rome. The Statute should have its own, and more rigid, procedure for amendment.
3. Be multipolar-- Modifications of the Statute must require input from all relevant bodies (the System, the Community, National Governments).
4. Be democratic-- To give uncontested legitimacy to the procedure, ultimate decisions should correspond to the European Parliament.

The final form of this procedure could be affected to a greater or lesser extent by the Conference on European Political Union and the decisions resulting therefrom, which could possibly change the institutional framework of the Community.

As a mere suggestion, the mechanics of amendment could be as follows:

1. Proposal upon the initiative of the Commission or the Council of the System, without distinction between to the two.
2. Submitted to the opinion of the Economic and Social Committee, the European Parliament, and to the body mentioned in 1 above which did not initiate the procedure.

3. Possibility of proposal's modification by the initiating body, whether the Commission or the Council of the System.
4. Consent and approval by the organisation mentioned in 1 above, whether the Commission or the the Council of the System, which was not responsible for the proposal of the amendment.
5. Approval by the Council of Ministers, allowing amendments if it unanimously agrees to do so.
6. Passage by the European Parliament, requiring a qualified majority.

Lastly, one must consider the speed which in some cases may be required in the amendment process. Because the nature of the Statute affects areas of monetary and economic policy, and the stability of the banking system, it would be very convenient to provide for a system of urgent reform of the Statute that would permit the System to react efficiently to crisis on a Community level. Therefore, for such contingencies, the Statute should provide for emergency powers in the form of an urgent modification procedure. Merely as an example, the Council of Ministers could be empowered to act on recommendation of either the Commission or the Council of the System, and issue modifications which would immediately enter into effect, but which would be subject to subsequent ratification by the Parliament, after receiving recommendations from the Economic and Social Committee and the non-recommending body (either the Commission or the Council of the System).