

COMMITTEE OF GOVERNORS OF THE CENTRAL BANKS
OF THE MEMBER STATES
OF THE EUROPEAN ECONOMIC COMMUNITY

TELECOPIER TRANSMITTAL COVER SHEET

Number of pages including cover sheet:

Date: 4th November 1991

To:


Banque Nationale de Belgique (00322/2213150)

A l'attention de M. Rey

U R G E N T

En vue de votre entretien avec M. Baer.

Meilleurs Sentiments



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From: The Secretariat

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1st November 1991

I. DIFFERENCES BETWEEN THE PRESIDENCY'S AND THE COMMITTEE OF GOVERNOR'S VERSIONS OF THE STATUTE OF THE ESCB AND OF THE ECB¹

Leaving aside minor editorial changes as well as amendments to text passages which had been put between brackets in the Governors' version of the Statute,² the following main differences can be noted between the two texts.

1. Prudential supervision

In Article 3.1 (fifth indent) and Article 25, the Presidency's text provides for new wording which appears to be more restrictive with respect to the ESCB's involvement in prudential supervision than proposed by the Governors. Firstly, the role of the ESCB is now closely linked to policies relating to prudential supervision. In Article 3.1 the task is described as "to contribute to a smooth conduct" of such policies and according to Article 25.2 subject to a decision by the Council of Ministers "the ECB may fulfil specific tasks concerning" such policies. Secondly, the Presidency's text limits itself to "supervision of credit institutions", whereas the Governors' text also refers to supervision of "other financial institutions" which are no longer mentioned in Article 25.1.

2. The role of the ESCB in exchange rate matters

In Article 3.1 (second indent) and in Article 4.2 the Presidency's text makes a reference to draft Treaty Article 109 which

1 The texts of the Statute of the ESCB and of the ECB as included in the "Proposal by the President to the Intergovernmental Conference" (document UEM/82/91, dated 28th October 1991) and as presented by the Committee of Governors on 26th April 1991 (including Chapter IX, finalised on 28th October 1991).

2 The editorial changes and the wording chosen by the Presidency for the text between brackets in the Governors' Statute are listed in Annex I.

defines the procedure for decision-making on exchange rate agreements, guidelines for exchange rate policy as well as the Community's position and its representation on the international stage. While this Article leaves the ultimate responsibility for exchange rate policy with the Council of Ministers, it provides for two safeguards aimed at defusing a potential conflict between monetary policy and exchange rate policy objectives. Firstly, the ECB is closely involved in all procedures relating to exchange rate matters: the ECB (in addition to the Commission) has the right of initiative, or - where this right is exercised by the Commission - needs to be consulted in the field of exchange rate agreements for the ecu vis-à-vis other currencies (Article 109.1a); the ECB is to be consulted on the content and procedure for negotiating exchange rate agreements (Article 109.1b, first para.); the ECB may ask the Court of Justice whether an envisaged exchange rate agreement is compatible with the provisions of the Treaty (Article 109.1b, second para.); the ECB is to be consulted or may make recommendations on its own with respect to the formulation of broad guidelines for exchange rate policy (Article 109.2); and the ECB needs to be consulted prior to decisions on the Community's position and representation on the international stage (Article 109.3). Secondly, the guidelines shall be only "broad" and, more importantly, "be without prejudice to the primary objective of price stability". However, it should be noted that in the Presidency's text (Article 4) the ECB no longer has the possibility of publishing its opinion with regard to exchange rate matters, since such opinions are not included in the list of advisory functions in Article 4.1

3. Transfer of foreign reserve assets to the ECB and the System's control over operations in foreign reserve assets remaining with the national central banks

The Presidency's text attempts to reconcile different views on two issues. The first one relates to the question of whether all foreign reserve assets need to be held by the System. The second issue concerns the ownership of foreign reserve assets handed over to the System and held and managed by it.

As regards the first issue, the Presidency's text introduces the notion of official working balances (in foreign currency) for non-monetary

transactions, which may be excluded from the official foreign reserves to be held and managed by the ESCB (Article 3.2) but which, beyond a certain limit, could be used only with the approval of the ECB (Article 31.2). The wording of Articles 3.2 and 31.2 leaves open where such working balances would be held (with the national central banks as part of their remaining official reserve assets or with an official "fund" or a commercial bank). In addition, without any specific provision on the definition and maximum size of working balances, the necessary decisions would presumably be made by the ECB Council (with simple majority on the basis of one person - one vote) in accordance with Article 31.3.

As regards the second issue, the Presidency's text includes a new sentence in Article 30.1 which reaffirms that "the ECB shall have the full right to hold and manage the foreign reserves that are transferred to it". The emphasis on "full right" makes clear that there are no restrictions regarding the holding and management of reserves but it does not imply that the ECB has full ownership of such reserves (if ownership is denied, this raises the question of whether the ECB can make unrestricted use of the reserves in exchange market operations or whether this will be possible only in the context of guidelines established under Article 109).

4. The role of the ESCB in the field of statistics

The Governors' proposal which under Article 5.3 invites the ECB "to promote the harmonisation ... of Statistics ..." is toned down "to contribute to the harmonisation".

5. Disputes between the ECB and its creditors, debtors or any other person

The Governors' proposal defines explicitly in Article 9.3 (Governors' Statute) the jurisdiction applicable in disputes between the ECB and its creditors, debtors and other persons. The Presidents' text omits this provision (presumably because this matter is considered to fall under Treaty Article 183 which according to Article 35.1 applies). The inclusion of the provision in Article 9.3 is in line with the general view of the Governors to lay down in the Statute all the necessary general provisions in order to underline the fact that the ECB is not a Community

institution in accordance with Article 4 of the Treaty and thereby to eliminate possible legal uncertainties.

6. Term of office of members of the Executive Board

The Presidency's text limits - in Article 11.2 - the term of office to a one-term period of eight years. The Governors' proposal allows for more than one term.

7. Appointment of Governors of national central banks

The Presidency's text omits - in Article 14.2 - the Governors' proposal to consult the Council of the ECB on the appointment of a Governor of a national central bank.

8. Intra-institutional co-operation

The Presidency has moved all provisions governing intra-institutional co-operation (Article 15.1-15.3 in the Governors' proposal) from the Statute to draft Article 109A of the Treaty, which, inter alia, implies that the Annual Report to be drawn up by the ECB is no longer mentioned in the Statute. In substance, the Presidency's text introduces two changes: firstly, according to Article 109A.1 the President of the Council of Ministers may submit a motion for deliberation to the ECB Council and, secondly, it is no longer foreseen that the President of the ECB shall be invited to participate in meetings of the European Council when matters relating to the objectives and tasks of the ESCB are discussed.

9. The ECB's role in the issuance of coins

The Presidency's text has deleted the Governors' proposal - in Article 16.3 - to make the volume and denomination of coins issued within the Community subject to approval of the ECB Council. The role of the ECB is now limited to being consulted - in accordance with draft Article 108.4 of the Treaty - on "the regulations concerning the issue of coins within the Member States and the volume thereof".

10. The ESCB's role in payment system

The Presidency's text on clearing and payment systems - Article 22 - is in substance the same as that proposed by the Governors. However, the Governors' wording "inside the Community" has been replaced by "inside the Member States"; in order to rule out misunderstandings the text should be adjusted to read "inside and between Member States".

11. Other operations of the ECB

The Presidency's text in Article 24, dealing with ECB operations for internal administrative purposes, is more specific than the Governors' proposal. Since this Article also applies to the national central banks, it has to be examined whether the wording chosen by the Presidency would not rule out some of the services for their staff currently rendered by national central banks (for example, the provision of housing).

12. Auditing

The Presidency has deleted in Article 27.2 the reference to Article 203 of the Treaty as not being applicable to the ECB and the national central banks. Although Article 203 refers specifically to "Community institutions" and may therefore not need to be mentioned, it nevertheless seems advisable to rule out explicitly in Article 27 the applicability of the provisions contained in Article 203.

13. Key for capital subscription

The Presidency's text on the definition of the key for capital subscriptions - Article 29.1 - modifies the Governors' proposal in two respects: firstly, it adds a third criterion ("extra-EC export" shares) to the criteria proposed by the Governors. Secondly, it leaves open whether the key would be automatic, both by saying that the key "shall be based on" (instead of "shall be equal to the sum of") and by - possibly - allowing the Council of Ministers to decide upon a Commission proposal on the weights attached to the criteria.

14. Increase in the capital of the ECB and compensation of losses incurred by the ECB

The Presidency's text confirms, as in its earlier draft proposals, that the increase in the ECB's capital shall be subject to limits and conditions established by Community legislation (Article 28.1). This procedure shall, as stated in Article 33.2, also be applied if further contributions are required to cover a loss incurred by the ECB.

15. Privileges and immunities

The Presidency's text in Article 40, governing privileges and immunities does not make reference to the "Protocol on the privileges and immunities of the European Community", as proposed by the Governors. The wording of the Presidency's Article 40 thus lacks a definition of which privileges and immunities are necessary for the performance of the ECB's tasks and who would decide on the need for such privileges and immunities.

16. Simplified amendment procedure

The Presidency's text on the simplified amendment procedure in Article 41 introduces, firstly, the requirement of unanimity in the Council of Ministers and, secondly, a competing right of initiative for the Commission, which, if exercised, would reduce the involvement of the ECB to consultation. In addition, the possibility of strengthening the role of the European Parliament is considered in the Presidency's text.

17. Complementary legislation

In analogy to the change in the simplified amendment procedure, the Presidency's text introduces a competing right of initiative for the ECB (and the EMI). In addition, secondary legislation with respect to the framework for minimum reserve requirements (Article 19) and the imposition of sanctions (Article 34.3) is made subject to co-operation with the European Parliament.

18. Transitional provisions

(a) The Chamber of Governors and capital subscriptions

The Presidency's proposal is to establish a Chamber of Governors for the transitional period. This approach contains elements of both the Alternatives presented in the proposal of the Governors and a direct comparison between the two texts is therefore not possible. However, the following inconsistency in the Presidency's text should be noted: firstly, according to Article 45.2 the Chamber of Governors is composed of the President and Vice-President of the ECB and all Governors of the national central banks. The other members of the Executive Board have only an observer status, without votes, in the Chamber of Governors. At the same time, the responsibilities of the Chamber of Governors include - under Article 47.2 - decision-making with respect to advisory functions in Articles 4.1, 22 and 25.1, the standardisation of accounting and operations under Article 26.4, the employment conditions under Article 36 and simplified amendments under Article 41.1. However, according to the Statute, all members of the Executive Board are, in their capacity as full members of the Council of the ECB, involved in such decisions with each member having one vote (Article 10.2).

Secondly, Article 48 and 49 are not consistent. If central banks of Member States with derogations or an exemption status are subscribers to the capital of the ECB but do not pay in any capital (as Article 48 seems to suggest), Article 49 should not refer to "the subscription of capital" but the "paying-up of capital". If central banks of Member States with derogations or an exemption status are permitted to pay in a minimum percentage in accordance with Article 48, allowance would have to be made for this in Article 49. In addition, the Presidency's proposal for Article 49 does not yet address the question of deferred transfer of foreign reserve assets; a suggestion has been made by the Governors in Article 48a.

(b) Derogations from the application of the provisions governing the allocation of monetary income

The Presidency's text in Article 51 does not yet take into account the agreement in the Committee of Governors to confine the transitional period (in which Article 32 would not be fully applied) to five years and to adjust accordingly the percentages for the annual decrease of monetary income not subject to the allocation scheme.

Some other changes in the Presidency's Statute

- Article 1: - replaces "the System" by "the ESCB";
- Article 2: - links the System's support of the general economic policies in the Community to the objectives and principles laid down in Articles 2 and 3A of the Treaty;
- Article 3: - replaces "to formulate" by "to define" in the first indent;
- replaces "participating countries" by "Member States" in the third indent;
- replaces "to ensure" by "to promote" in the fourth indent;
- Article 4: - omits in 4.1 the word "banking";
- specifies that the Council of Ministers shall define the scope of the consultation to which both the Council itself and the competent authorities of Member States shall be subjected;
- Article 6: - makes a reference to Article 109.3 of the Treaty;
- Article 7: - speaks of Community institutions "or bodies";
- Article 10: - replaces "Council of the ECB" by "Governing Council";
- Article 11: - "European Council" replaced by "common accord by the governments of Member States"; recommendation by the Council (ECOFIN);
- exemption from the prohibition to engage in any other occupation can only be granted "exceptionally" by Governing Council;
- responsibility of the Executive Board for "the current business of the ECB" (instead of administration);

- Article 12: - presents a text without brackets drawn partly from Article 14.4 (on the extent to which national central banks are to be used in the execution of operations) and from Article 12.1 (on the responsibilities of the Executive Board);
- Article 13: - in 13.2 replaces "views" by "positions";
- Article 14: - inserts in 14.1 "before the beginning of stage three";
- Article 15: - replaces "at regular intervals" (in 15.4 of the Governor's text) by "at least quarterly" (in 15.1 of the Presidency's text);
- Article 16: - deletes 16.2 of the Governor's text which partly appears in Article 52;
- Article 18: - the brackets around "with lending being based on adequate collateral" in 18.1, first indent, have been deleted;
- Article 19: - introduces in 19.1 a reference to Article 2;
- replaces "to take steps to pursue the matter in the supervisory sphere" by "to take other sanctions with comparable impact";
- Article 20: - adds "respecting Article 2 and 34";
- replaces "Community Member States and other public entities in the Member States" by "Community institutions or bodies, central governments, regional or local authorities, public authorities, other bodies governed by public law or public undertakings of Member States" (see Article 104 of the Treaty);
- Article 21: - removes Articles 21.3 and 21.4 from the Governor's text;
- Article 30: - replaces "authorised" by "entitled" in 30.5;

Article 31: - introduces in 31.2 "a certain limit to be established through Article 31.3";

Article 34: - introduces the notion of ECB recommendations, ECB opinions, ECB decisions and ECB regulations;
- limits ECB regulations to definition and implementation of monetary policy and functions in the context of payment systems and future tasks in prudential supervision;
- adds a reference to Article 190 of the Treaty, which shall apply;

Article 35: - deletes 35.5 (in the Governor's text) which makes explicit that national central banks shall be liable according to their national law;