

8th October 1990

TO THE MEMBERS OF THE COMMITTEE OF ALTERNATES

Please find attached a report on the meeting of Legal Experts and, annexed to the report, a revised draft Statute.

The purpose of the meeting of Legal Experts was to review the draft Statute, introduce the necessary general provisions, consider a simplified amendment procedure and outline fundamental provisions to be inserted into the new Treaty. Many of the proposed changes in the draft Statute result from the discussion of these four items or simply reflect attempts to make the text clearly and legally concise.

There is, however, one point the Legal Experts wish to bring to the attention of the Committee of Alternates. The draft Statute (version of 14th September 1990) contained ambiguities about the legal structure of the System. As is explained in greater detail in the attached report, these ambiguities arose because the consequences of giving legal personality to the ECB and not to the System as such had not been taken fully into consideration in the draft Statute.

In the version of 14th September, the draft Statute associated the decision-making bodies with the System, i.e. it placed them outside the ECB. This approach, however, has two consequences: it would require a separate decision-making body for the ECB and it would leave the legal status of the Council and Executive Board uncertain. In fact, without the benefit of being attached to an institution with legal personality, the Council and the Executive Board would have to be considered an authority of the Community (similar to the existing Community institutions).

While this approach would be legally possible, all the Legal Experts strongly advocated a solution under which the decision-making bodies would be placed inside the ECB. The Legal Experts wish to stress two reasons in favour of this approach. Firstly, it is much less complicated, more efficient and provides for the necessary legal clarity. Secondly, if the Council (and the Executive

Board) are not firmly linked to the ECB as an institution with legal personality there could be a serious risk that in the process of negotiations in the Intergovernmental Conference the decision-making bodies would be regarded as "Community bodies" and that this would be seen as a justification for including non-central bank members in the Council.

The Legal Experts also wish to emphasise that this proposed solution is fully in accordance with the intentions of the Governors. The indivisibility of monetary policy is fully assured as all decisions on monetary policy remain firmly in the hands of the central decision-making bodies; by contrast, monetary policy operations can be carried out through the ECB and the national central banks.

With respect to the draft Statute, the proposed solution has the following implications. Firstly, the use of the term System must be restricted to those passages of the Statute where it describes (like a "label") the co-existence of the ECB and the national central banks, which are governed by common rules and which jointly pursue the objectives of the System and the tasks entrusted to it. However, whenever reference is made to decisions, advisory functions and operations, these must be clearly attributed to the ECB (or the Council and the Executive Board) and the national central banks. Secondly, the organisation of the System must be made clearer, especially with regard to the ECB.

The attached draft Statute has been revised in this sense, i.e. the term "System" has been replaced in many instances by "ECB" and/or "ECB and national central banks" and Chapter III outlines the organisational structure.

With kind regards



Gunter D. Baer

Meeting of Legal Experts on the draft Statute
of the European System of Central Banks and of the European Central Bank

Chairman's Summary

At their meeting on 1st and 2nd October 1990 the Legal Experts addressed four issues:

- review of the draft Statute (version of 14th September 1990) with a view to clarifying legal aspects and requirements;
- introduction of a Chapter containing the necessary general provisions;
- consideration of a simplified amendment procedure and a complementary legislative procedure;
- outline of fundamental provisions to be inscribed into the Treaty Chapter on Monetary Union.

This report summarises the main aspects of the discussions on these four topics.

1. Review of the Draft Statute

Under this heading the Legal Experts reviewed each Article of the draft Statute dated 14th September 1990, except those dealing with financial provisions. The Legal Experts have agreed to comment in writing on the financial provisions as soon as a draft has been finalised.

Apart from recommending a number of drafting suggestions relating to individual Articles, the Legal Experts' discussions centred on the legal structure of the System, the assignment of responsibilities to the Council

and the Executive Board and the need for references to Community legislation in certain Articles.¹

(a) The legal structure of the System

All Legal Experts expressed concern that the draft Statute contained ambiguities about the legal structure of the System (as well as the division of responsibilities among the decision-making bodies - see (b) below) which gave rise to legal uncertainty.

In this context, it is important to recall that at their meeting on 27th August 1990, the Legal Experts had recommended giving legal personality to the central institution (i.e., the ECB) while the national central banks should retain their legal personality. This approach was suggested because it facilitated conducting operations either at the centre or at the level of national central banks, thus leaving the degree of centralisation of the operations open to future decision by the System's decision-making bodies. An alternative solution - giving legal personality solely to the System - was rejected because it would have implied the merger of all national central banks and the central institution into one legal entity.

While the draft Statute (of 14th September) attributes legal personality to the ECB, it does not fully take into account the consequences of this approach. The text makes the "System" the bearer of rights and obligations, the instrument of operations and the context within which the decision-making bodies perform their functions. However, since it is not the System as such which enjoys legal personality, but its constituent parts, it is only the ECB and the national central banks, and not the System, which may own, buy and sell assets, contract and sue or be sued.

1 Many of the proposed drafting suggestions have been introduced into the attached, revised draft Statute, with proposed additions being indicated by italic typeface and deletions being shown by crossing out the previous text. However, where there were differing views amongst the Legal Experts, or where changes would not simply relate to legal considerations, the relevant remarks are indicated (again in italic typeface) in the comments to individual Articles.

In following this legal construction an important decision has to be made as to the positions of the decision-making bodies of the System. Two approaches are conceivable.

A first one would be to place the Council and the Executive Board outside the ECB and thus to position them "above" the thirteen entities with legal personality. This approach would make the organs of the System "visibly" the decision-making bodies of the System and may be considered to be in conformity with the notion of a decentralised and federalist "System" in which a new institution - the ECB - would co-exist and interact with the national central banks. However, this solution would have two distinct disadvantages.

Firstly, it would make it necessary to establish a decision-making body for the ECB. If the Council and the Executive Board were to serve in two capacities (as decision-making bodies of the System on the one hand, and of the ECB on the other) it would result in an unnecessarily complicated structure. It would mean in practice that the Council (or, under delegated powers, the Executive Board) would give instructions to itself, thus operating under two different "hats". Indeed, this construction would be legally clear and justified only if the composition of the outside decision-making body and the internal (instruction-receiving) body were different, i.e. if a new decision-making body (as it exists in the national central banks) were given to the ECB. A second drawback of placing the decision-making bodies outside the ECB would be that their legal status would have to be defined. Since the System had no legal personality from which the Council and Executive Board could benefit, the two bodies could be considered as an "authority" of the Community (similar to the existing Community institutions) which itself is an institutional legal person. Thus, in a law case coming out of a decision taken by the Council and/or the Executive Board, they may be involved as "representatives" of the Community, just as the Commission and the Council of the Community may be sued if EC decisions are challenged. If no clear separation is made between the System's decision-making bodies and the Community as a legal person, there might be an undesirable blurring of (legal) dividing lines and the decision-making bodies might be viewed a kind of "European Monetary Council" or be ultimately subjected to general provisions of Community law. For example, it could imply that the Community were held liable for an act of the decision-making bodies of the System,

leading to charges on the Community budget and, thereby possibly, to interference from the political authorities.

The alternative approach would be to place the Council and the Executive Board inside the ECB, which would ascribe the acts of the decision-making bodies clearly to the ECB as a legal person. Under this approach it would not be necessary to establish a separate decision-making body for the ECB and it could be clearly identified which institution was liable for the decisions of the Council and the Executive Board. If this option were followed, the System would describe a set of rules governing the monetary powers within the Community. The ECB would be made the central institution but its organs would be responsible for the System as a whole. The concept of a System would mean that different "institutions" have the same goals to attain and the same tasks to perform. Although this approach may appear to be more centralistic, in effect it is not. The co-existence of the ECB and the national central banks underlines the federative approach to central banking arrangements and offers a wide scope for decentralisation. The position of the Council and the Executive Board would not prejudge the measure of centralisation or decentralisation which would depend entirely on the statutory provision concerning powers and the use which is made of them.

Both approaches are possible from a legal point of view and the choice of the approach is a matter for political decision. If the first approach were accepted, extreme care would have to be taken to underpin it with clear provisions which would seek to avoid the possible negative consequences at law described above. Nonetheless, it would make the Statute and the legal structure of the System excessively complicated. For this reason all Legal Experts strongly favoured the second approach (the resultant changes are incorporated in the attached, revised draft Statute) which in their view would be simpler, more efficient and provide for the necessary legal clarity. Moreover, it would lead to the same command structure, with decisions being made by the Council and the Executive Board and would therefore not differ in theory (but certainly in practical terms) from the first alternative. In addition, the Legal Experts pointed out that a proposed draft Statute with a clear legal structure submitted by the Governors to the Intergovernmental Conference would reduce the risk that in the process of political negotiations changes would be introduced which

could have the result of central banks having to share members' competences or other central bank responsibilities with political authorities.

(b) The distribution of responsibilities between the Council and the Executive Board

The Legal Experts took note that the two most important Articles dealing with the responsibilities of the Council and the Executive Board (Articles 12 and 14) have been the result of careful drafting and reflect compromises reached in the Committee of Governors. For this reason the Legal Experts refrained from amending the Articles (except for some minor changes which do not affect the content of the provisions).

Nonetheless, the Legal Experts noted that the present text does not distinguish clearly between the responsibilities of the two bodies. As a consequence, the following points were made:

Firstly, in Article 12.1 the first sentence seems to confer upon the Council the task of taking decisions necessary for the performance of everything the System has to do. This power, however, seems to be restricted thereafter in the field of monetary policy to key decisions and the establishment of guidelines for their implementation. While accepting that there was a difference between strategic decision in the course of monetary policy and decisions relating to day-to-day management in line with the course of monetary policy, the Legal Experts felt that this distinction needed to be made clearer.

Secondly, with regard to Article 12.1, second paragraph, some of the Legal Experts pointed out that the arrangement under which "the Council shall delegate ..." was not sufficiently clear. Two possibilities for improvement were mentioned: one would be to lay down in detail the content of the powers to be delegated by the Council to the Executive Board as well as the procedure for delegation; the other possibility was to give the two bodies distinct competences, for example, by conferring upon the Council the power to take decisions (as in Article 12.1, the first two sentences) and upon the Executive Board the task of implementing monetary policy decisions in accordance with the guidelines established by the Council.

Thirdly, in Article 14.3, according to the first sentence the national central banks are obliged to act "in accordance with the policy guidelines and instructions of the Council or the Executive Board". It was suggested rephrasing this by saying either "... guidelines and instructions

of the ECB" or "... guidelines of the Council and the instructions of the Executive Board".

Fourthly, it might have to be indicated in Article 14 in which areas the ECB and the national central banks shall execute the monetary operations (assigned to them) with credit institutions.

Finally, the draft Statute was not sufficiently clear as to who should make legally binding declarations for the ECB. There was a (political) choice between the President (in which case Article 13.2 should be made clearer) or the Executive Board (in which case a provision needed to be introduced into Article 11).

(c) The need for Community legislation

The Legal Experts were of the view that in a number of draft provisions it would be necessary to acknowledge the need for Community legislation, under which the System should be enabled to take certain decisions or perform tasks with direct bearing on third parties.

In this context two issues have to be considered: the appropriate legal procedure for secondary Community legislation and the decisions and acts to be made subject to such a procedure. As far as the first issue is concerned, the Legal Experts deliberately refrained from proposing a particular procedure for an amendment and complementary legislation, since they did not want to prejudge the legal procedure (i.e. the involvement of, and interaction between, the Commission, Council of the European Communities and the European Parliament) which is expected to be revised in the context of the Intergovernmental Conference on Political Union.

As regards the second issue, the Legal Experts recommended that the following Articles be specified further in secondary Community legislation: Article 5 (collection of statistical information); Article 9 (a new Article on the ECB); Article 14 (national central banks; compatibility of their statutes); and Article 16 (legal tender status of Community currencies).

There was also agreement among the Legal Experts that the imposition of sanctions on credit institutions which fail to meet their minimum reserve requirements should be regulated by Community legislation. However, if a provision requiring such legislation whenever the ECB shall be entitled to impose sanctions is included in Chapter VII (see point 2 below), it is not necessary to make a reference to Community legislation in

Article 19.2. As regards Article 19.1 (the imposition of minimum reserves) views differed about the need for Community legislation. Most Legal Experts favoured an enabling clause by Community legislation but some argued that for the ECB and national central banks to be able to operate such a regime at the inception of the System it would be important to determine (through a Council decision) the conditions under which and the liabilities to which minimum reserves could be applied.

2. Chapter on General Provisions

It should be recalled that the Legal Experts at their meeting on 27th August 1990 had recommended not to classify the System as a Community institution, i.e. not to add the System to the list of institutions mentioned in Article 4, §1 of the EEC Treaty but to insert a reference to the System in a new §2 of that Article.

This, however, necessitates the introduction into the draft Statute of a special Chapter (VII) which should contain the necessary provisions governing all general aspects of the System. Without a comprehensive list of such provisions there would be a danger of legal uncertainty arising from the possible application to the System of general provisions relating to Community institutions.

The Legal Experts agreed on a set of provisions to be included in Chapter VII (see the attached, revised draft Statute). The Legal Experts are confident that the proposed general provisions safeguard the System from being subjected to general provisions contained in the Treaty. However, it should be remembered that specific provisions governing the budget and auditing (if the political decision is taken not to subject the ECB to the control by the Court of Auditors) will need to be introduced in the Chapter on financial provisions, in order to ensure that the corresponding Treaty provisions do not apply to the System. The Legal Experts saw no need for introducing a special provision on languages, the reason being that where official languages were to be used (e.g. in the publication of decisions, etc) they would have to be those of the Community. If the number of working languages were to be limited, this could be done in the Rules of Procedure.

3. Simplified amendment and complementary provisions

The Legal Experts endorsed the idea of introducing a simplified procedure for amending Articles of a more technical nature and consideration may also be given to introducing a provision which lays down the procedure for complementing Articles of the Statute in accordance with Community legislation.

The Legal Experts refrained from making concrete proposals for such provisions, mainly because it is expected that in the forthcoming Intergovernmental Conference the legislative process of the Community will be revised. As the requirement of democratic legitimacy needs to be respected in the procedures under which Articles of the Statute can be amended or complemented, it is advisable to await the outcome of the Intergovernmental Conference before drafting the two necessary provisions.

Nonetheless, the Legal Experts were in agreement that the following elements will have to be taken into account when making a definitive proposal:

- there should be only one simplified amendment procedure and not several ones applying a different degree of stringency;
- democratic legitimacy rules out the possibility of giving an exclusive right of initiative to the decision-making bodies of the System;
- there should be an obligation to consult the decision-making bodies of the System;
- there should be some flexibility in laying down majority requirements;
- consideration could be given to setting out a complementing procedure (following possibly new procedures for ordinary Community legislation) which might have less stringent requirements than the simplified amendment procedure.

Regarding the question of whether the simplified amendment provisions shall specify an exhaustive list of Articles to which it should apply, or conversely, a list of fundamental Articles to which it should not apply, the majority of Legal Experts tended to favour the latter approach.

4. Fundamental provisions to be included in the Treaty

The Legal Experts recalled that the draft Statute will be annexed to the Treaty and that it will therefore have status of primary EC law.

Nonetheless, it was considered desirable to include some basic provisions governing the System also into the Treaty's Chapter on Economic and Monetary Union. There appeared to be some agreement among the Legal experts that this should not result in an overburdening of the Treaty but it was recognised that this was not a legal issue and that the choice of Statute provisions to be incorporated in the Treaty should be made by the Committee of Governors. It should, however, be remembered that any provision contained in the Treaty can only be changed in accordance with the rigorous procedure for Treaty amendment (unanimity of Member States and ratification by national parliaments) and that there should preferably be consistency between those Articles which do not fall under the simplified amendment procedure and those included in the Treaty.

In order to facilitate the work of the Committee of Governors, the Legal Experts have set out a list of fundamental provisions, which, however, should be regarded only as an illustrative example (see Annex I).

4th October 1990

Principal provisions to be inserted into the Treaty

1. As indicated in the comments to Article 1 of the draft Statute, reference to the System should be made in a new §2 of Article 4 of the EEC Treaty. Such a provision could state that "A European System of Central Banks consisting of a central institution - the European Central Bank - and of the central banks of the Member States of the Community shall be established".

2. In addition, the following principal features of the System may be reflected in the new Treaty:

(a) Basic elements of Economic and Monetary Union

(Such an Article would introduce the basic characteristics of Economic and Monetary Union; the part on Monetary Union should refer to the single monetary policy conducted on the responsibility of a European System of Central Banks with a European Central Bank.)

(b) Currency regime

(Such an Article would define the monetary unit of the Community and establish its legal tender status.)

(c) Statute and basic principles

(This Article would state that the Statute of the European System of Central Banks and of the European Central Bank is laid down in a Protocol annexed to the Treaty; it would mention the principal objective of maintaining price stability, with detailed tasks and functions being laid down in the Statute; it would state the independence of the System and its democratic accountability.)

(d) Organisation

(This Article would state that the European Central Bank has legal personality and that the System shall be governed by the

decision-making bodies of the European Central Bank, the Council and the Executive Board.)

(e) Operations with public entities

(This Article would state that the System shall not grant credit to Community institutions, governments or other public entities; it might refer to other possible services, such as fiscal agent.)

(f) Regulatory power

(This Article would say that the European Central Bank shall be entitled to issue regulations and take decisions in accordance with the Statute.)

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

28th September 1990

Definitive List

MEETING OF LEGAL EXPERTS

BASLE, 1st AND 2nd OCTOBER 1990 AT 9.30 a.m. - ROOM E

List of participants

Chairman	Mr. G.D. Baer
Banque Nationale de Belgique	Mr. J.-V. Louis
	Mr. E. de Lhoneux*
Deutsche Bundesbank	Mr. D. Haferkamp
Bank of Greece	Mrs. M. Georgoutsakou
Banco de España	Mr. P. Bieger
Banque de France	Mr. P. de Lapasse
Central Bank of Ireland	Mr. T. Grimes
Banca d'Italia	Mr. P. Zamboni Garavelli
Nederlandsche Bank	Mr. R. Smits
Banco de Portugal	Mr. G. Galvao
Bank of England	Mr. M. Lewis
Commission of the European Communities	Mr. J. Pipkorn*
Agent for the EMCF	Mr. J.-C. Dagassan
Secretariat of the Committee of Governors	Mr. A. Giles
	Mr. P. Petit

* Mr. E. de Lhoneux and Mr. J. Pipkorn only attended on 1st October.