

9th October 1990

TO THE MEMBERS OF THE COMMITTEE OF ALTERNATES

Further to my transmission of 8th October relating to the draft Statute, owing to a technical oversight, some of the pages did not fully reflect the comments arising from the discussions of the Legal Experts. I should be grateful if you would substitute the attached pages for those contained in yesterday's transmission.

Would you please pass on a copy of the attached to your Legal Expert.

Best regards



Gunter D. Baer

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suggestion implies the inclusion in the Statute of specific provisions governing all aspects of the System, to ensure that there is no legal uncertainty arising from the possible application to the System of general provisions relating to Community institutions contained in the EEC Treaty. Such specific provisions might include, for example, aspects governing staff (see Article 13), budgetary issues, auditing, judicial control, professional secrecy, non-contractual liability, seat, official languages and privileges and immunities.

Alternatively (see Chairman's report on the meeting of Legal Experts on 1st and 2nd October 1990), comment b) could read as follows:

In accordance with the recommendations of the Legal Experts it has been decided to adopt the following legal structure:

- the ECB is given legal personality while the national central banks retain their separate legal personality;
 - the System as such has no legal personality and should be regarded only as a term describing the co-existence of the ECB and the national central banks, which are governed by a common set of rules and which jointly pursue the objectives of the System and perform the tasks entrusted to it;
 - the decision-making bodies are placed inside the ECB, thereby giving them the benefit of this institution's legal personality, i.e. that the ECB would be liable for acts and decisions taken by the decision-making bodies;
 - the ECB is not to be classified as a Community institution under Article 4, §1 of the EEC Treaty, instead a reference to the ECB should be inserted in a new §2 of that Article.
- c) Articles 1.2 and 1.3 have been shifted to a new Article 9. Article 1.4 has been transferred to Article 14.6.

Article 4 - Advisory functions

4.1. The ~~System~~ ECB shall be consulted regarding any draft Community legislation and any envisaged international agreements in the monetary, banking or financial field. In accordance with Community legislation, the ECB shall be consulted by national authorities regarding any draft legislation within its field of competence.

4.2. The ~~System~~ ECB may give opinions to any Community or national authority on matters within its field of competence.

4.3. The ~~System~~ ECB shall be consulted with a view to reaching consensus prior to any decision relating to the exchange rate regime of the Community, including, in particular, the adoption, abandonment or change in central rates or exchange rate policies vis-à-vis third currencies.

4.4. The ~~System~~ ECB may publish its opinions.

* * *

Comments

- a) Articles 4/1/ and 4/3/! These provisions should also be inserted in the Treaty because they impose obligations on other Community institutions rather than on the System itself!
Wherever reference is made in the draft Statute to Community legislation, it means that the procedure for complementary legislation to be specified in Chapter IX should be applied.
- b) Article 4.1.: The Legal Experts considered that provision should be made to specify at which stage the ECB should be consulted regarding draft legislation and by whom.

Article 8 - General Principle(s)

The System shall be governed by the decision-making bodies of the ECB.

* * *

Comments

One Legal Expert suggested (in his comments made after the meeting) deleting this Article. The reason is that, as stated in the comments under b), page 3, the System is only a label describing the co-existence of the ECB and the national central banks. Some Legal Experts suggested including under this Article the provision contained in Article 2.3 which relates to the [System] acting consistently with free and competitive markets.

Article 9 - Decision-making bodies of the System The European Central Bank

7/11 The decision-making bodies of the System shall be the Council and the Executive Board.

[9.1. The ECB is hereby established and shall have legal personality.]

[9.2. In each of the Member States the ECB shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings.]

9.3. The property of the ECB shall be exempt from all forms of requisition or expropriation.

Disputes between the ECB, on the one hand, and its creditors, debtors or any other person, on the other, shall be decided by the competent national courts, save where jurisdiction has been conferred on the Court of Justice.

9.4. The function of the ECB shall be to ensure that the tasks conferred upon the System under Article 3 shall be implemented either by its own activities pursuant to this Statute or through the national central banks pursuant to Article 13.

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

9.6. The organisation of the ECB and the methods for carrying out its functions are laid down in the Statute, which may be complemented in accordance with Community legislation.

* * *

Comments

- a) Article 9.3.: This text finds its origins in Articles 28 and 29 of the Protocol of the EIB. Some Legal Experts, however, suggested that such provisions should more appropriately be located in Chapter VII, General Provisions.
- b) Under article 9.6., the legal status of the members of the decision-making bodies of the ECB can be regulated. One Legal Expert suggested deleting this provision (in comments after the meeting) because it is considered to be unclear. In particular, the monetary policy instruments of the ECB should not be subject to Community legislation.

Comments

- a) Start-up procedures should be dealt with in Articles concerning questions of transitional arrangement, see Chapter VIII.
- b) *Some Legal Experts felt that the draft Statute was presently unclear as to which body or person shall represent the ECB. There were differing views amongst the Legal Experts as to whether it should be the Executive Board or the President, see also Article 13.2.*
- c) *Articles 11.2. and 11.3.: Some Legal Experts felt that the proposed procedure for nominating members of the Executive Board may conflict with the principle of democratic legitimacy and it was suggested that the Commission be included in the nomination process.*
- d) *Article 11.5.: This Article is analogous with Article 160 of the EC Treaty concerning the members of the Commission.*
- e) *Article 11.7.: Previous Article 12.1., draft Statute dated 14th September 1990.*

Article 12 - Responsibilities of the governing bodies

12.1. The Council shall take the decisions necessary ~~for~~ *to ensure* the performance of tasks entrusted to the System under the present Statute. The Council shall formulate the monetary policy of the Community including decisions on basic rates of interest and overall liquidity supply in the System, and shall establish the necessary guidelines for their implementation.

The Council shall delegate to the Executive Board the necessary operational powers for implementing the monetary policy decisions and guidelines. *The operational powers that have been delegated to the Executive Board by the Council shall be made public.* The Council may delegate other powers as it may specify to the Executive Board.

12.2. When implementing monetary policy in accordance with the decisions and guidelines established by the Council, the Executive Board shall give the necessary instructions to national central banks.

The Executive Board shall have responsibility for the preparation of the meetings of the Council.

12.3. *The Council shall adopt Rules of Procedure on the proposal of the Executive Board. The Rules of Procedure shall determine the internal organisation of the ECB and its decision-making bodies.*

* * *

Comments

- a) Article 12.1. reserves to the Council the strategic monetary policy decisions, whereas the implementation of these decisions would fall under the responsibility of the Executive Board. The role of the Board in the implementation of monetary policy is reflected by the provision that the Council shall delegate to the Executive Board the necessary operational powers to carry out its task. However, since the Council may revoke such powers and re-delegate them on different terms, there could still be an active role for the Council in the implementation of monetary policy.

Some Legal Experts consider that the Council's ability to revoke powers previously delegated to the Executive Board should be explicitly stated in this Article. The second sentence of the second paragraph of this Article has been included on suggestion of some Legal Experts who consider it necessary for the purpose of legal certainty in situations where the Executive Board acts on behalf of the Council and deals directly with third parties.

In order to improve clarity and define more explicitly the competences of the governing bodies, some Legal experts suggested describing separately the powers of the Council and the Executive Board. Reference was made to Article 145 of the EC Treaty. Another alternative would be to lay down clearly the procedure for delegation as well as the content of powers delegated.

A preference was stated by one Expert to separate clearly the competences of the Council and the Executive Board. In this respect, an alternative wording for the second paragraph, first sentence was suggested:

The Executive Board shall implement monetary policy on behalf of the Council in accordance with the decision and guidelines laid down by the Council.

Some experts favoured the word "confer" to "delegate".

Other Legal Experts could accept the text as drafted.

- b) Article 12.3.: The Legal Experts recommended that the Rules of Procedure should govern only the internal management of the System. However, where the rules govern important aspects of internal management, it was suggested that they should be included in the Statute. Provisions aimed at binding a person or an institution outside the internal system would fall under the exercise of regulatory powers and should be included in the Statute.

14.6. For the purpose of this Statute, the Institut Monétaire Luxembourgeois shall be regarded as a national central bank.

* * *

Comments

- a) Article 14.1.: This text has been amended following suggestions by the Legal Experts who considered that it was necessary to specify the procedure to be adopted to ensure the compatibility of the statutes of the national central banks with that of the present Statute.
- b) Article 14.2.: One Alternate suggested that the Governor of a national central bank shall be appointed by the European Council upon proposal of the respective Member State and following consultation with the Council of the System.
- || The question arose amongst the Legal Experts as to whether the Supreme Court of the respective Member State should dispense the appropriate justice following the dismissal of a Governor for misconduct. Furthermore, the issue of dismissing a national central bank governor should he assume competences beyond those specifically conferred on him by the System should also be considered.
- c) Article 14.3.: A Legal Expert proposes replacing the first sentence of this Article as follows:
Subject to Article 14.5., the national central banks are an integral part of the System and shall act only in accordance with policy guidelines of the Council and the instructions of the Executive Board.
- d) Article 14.4.: A Legal Expert proposes replacing the first sentence of this Article as follows:
Acting in accordance with the proposals of the Executive Board, the Council, taking account of the subsidiarity principle, shall lay down which monetary functions are to be carried out by the Executive Board and which functions by the national central banks, and in which areas the Executive Board and the national

Article 15 - Inter-institutional co-operation and reporting commitments

15.1. The President of the Council of the European Communities (ECOFIN) and a Member of the Commission may attend meetings of the Council. They may take part in the Council's deliberations but not in the voting.

15.2. The President of the ~~System~~ ECB shall be invited to participate in meetings of the European Council and Council of the European Communities when matters relating to the System's objectives and tasks are discussed.

15.3. The ~~System~~ ECB shall draw up an annual report on ~~it~~ the activities of the System and on the monetary policy of both the previous and current year. This annual report shall be transmitted to the European Council, the Council of the European Communities and the European Parliament. The President of the ~~System~~ ECB may present the annual report before these institutions. The President and members of the Executive Board may attend meetings of the European Parliament's specialised committees, if circumstances justify.

[15.4. The ECB shall draw up reports on the activities of the System at regular intervals. These reports and statements are to be published and to be made available to interested parties free of charge.]

[15.5. A consolidated financial statement of the System shall be published each [month] [week].]

* * *

Comments

a) Article 14/2/1 This provision should be repeated in the Treaty!

A number of Legal Experts suggested that democratic accountability could be enhanced by amending this Article in the following ways:

- in Article 15.2. the President shall also be invited to meetings of the Commission when matters relating to the System's objectives and tasks are discussed;
- in Article 15.3. the Commission should be added as one of the institutions to which the annual report shall be transmitted;
- in Article 15.3., third sentence, the President shall be required to participate in (instead of "shall be invited to attend") meetings of the European Parliament.

16.3. The volume and denomination of coins issued within the Community shall be subject to approval of the Council ~~of the System~~. The coins [shall] [may] be put into circulation by the System.

* * *

Comments

- a) ~~The provisions of Articles 16/1/1/ 16/2/ and 16/3/ should also be stated in the Treaty/~~

Article 16.1. is understood to cover the issuance of bank notes by the national central banks as long as there is no single currency.

The United Kingdom Alternate wished to retain the right of some commercial banks in the United Kingdom to continue to issue bank notes. These notes have no legal tender status and are largely backed by holdings of legal tender.

- b) Article 16.2.: Most Alternates considered that it would be sufficient that national central banks stand ready to exchange notes denominated in Community currencies at par value (i.e. without any costs). Commercial banks would be free to charge the costs of the transactions but competition would reduce these to a level which would not be significantly higher than for transactions in a single currency.
- | c) *In the view of the Legal Experts, this provision should not prejudice bank transfers undertaken to discharge a monetary debt.*
- d) Article 16.3.: The brackets around "shall" and "may" refer to the fact that in ~~all some countries, except the United Kingdom and the Netherlands,~~ coins are *currently* put into circulation by the *ECB Treasury and not by the central bank*. It is also understood that coin-holdings by central banks should be kept to a minimum in order to avoid any significant funding by the System of the issuers of such coins.

Article 20 - Other instruments

The Council may decide [unanimously] [by qualified majority] upon such other *operational* methods of monetary control as it sees fit.

* * *

Comments

- a) This provision has been suggested to enable the System to adopt ~~other~~ methods of monetary control *other* than those currently in use. However, given the restrictions imposed by Article 2.3, this Article would not seem to allow the System to resort to methods of direct control, even if this might be warranted in certain extreme circumstances. *One Legal Expert suggested adding "subject to Article 2.3" at the end of the provision.*
- b) *The Legal Experts felt that this Article could not be used as an enabling clause to enhance the powers of the Council. The Article relates to operational techniques. The relevance of the provision was questioned by some Legal Experts given the [broad] scope of Article 18.*
- c) *Some Legal Experts suggested deleting this Article. One Expert proposed replacing the text, together with that of Article 24 by the following: "The ECB and national central banks may conduct operations in performing its monetary functions in respect of the principles of liquidity and security of their assets."*

CHAPTER IX - AMENDMENT AND COMPLEMENTARY PROVISIONS FOR THE SYSTEMGeneral Comments

The Legal Experts were of the opinion that the procedure for amending and complementing the provisions of the draft Statute could not be drafted before possible changes in the legislative process of the Community have been adopted following the Intergovernmental Conference on Political Union.

Article 38 - Simplified amendment procedure

To be drafted.

* * *

Comments

- a) The Legal Experts felt that this procedure should fulfil two fundamental requirements; democratic legitimacy and efficiency.

With respect to legitimacy, there was agreement that the System should not be afforded the exclusive right of initiative, but there should be an obligation for the ECB to be consulted, see Article 4. On the other hand, there should be some flexibility regarding majority requirements; for example, a qualified majority in the Council of the European Community and one of the majorities provided for deliberations of the European Parliament.

- b) There is a question as to whether the Statute should contain an exhaustive list of Articles which could be amended according to the simplified procedure (i.e. positive list) or whether it should limit itself to indicating those fundamental Articles which cannot be changed through such a procedure (i.e. negative list). For administrative reasons, most Experts favoured the second option.