

Secretariat

SUGGESTIONS FOR AMENDMENTS TO THE GENERAL PROVISIONS
OF THE DRAFT STATUTE (CHAPTER VII)

The draft Articles hereafter reflect all remarks and observations which have been made during the two rounds of written procedure, as well as some comments and proposals from the Secretariat.

CHAPTER VII - GENERAL PROVISIONS

Article 33 - Regulatory power

33.1. The Council ~~and the Executive Board shall~~ in accordance with their respective responsibilities shall make the regulations and take decisions, necessary for the performance of tasks entrusted to the System under the present Statute. ~~The Executive Board shall ensure the execution of measures adopted by the Council; it shall take the decisions necessary for the administration of the ECB and for the exercise of powers which have been delegated to the Executive Board by the Council.~~

33.2. ~~To be drafted~~ A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States participating in the ESCB. A decision shall be binding in its entirety upon those to whom it is addressed. Articles [190,] 191 and 192 of the Treaty establishing the EEC are applicable in all respects to the regulations made and decisions taken by the Council.

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Comments

- (a) Article 33.1: The deletion in the first sentence and the additional sentence have been proposed by the French Alternate who considers that, because of Article 12.1 of the Statute, the regulatory powers should in principle be reserved to the Council; however, the French Alternate agrees that the Executive Board be given regulatory powers in respect of the internal administration of the ECB and within the competences delegated to it by the Council. This view is shared by the Danish Alternate. The Belgian, German and Dutch Alternates prefer the initial text of Article 33.1 which would not prejudice the open issue of the distribution of competences in Article 12.1. The Italian Alternate wondered whether it would not be possible to grant the Executive Board the right to take decisions whilst giving the Council the power to issue regulations.
- (b) Article 33.2: The text has been proposed by the French Alternate and has been generally agreed by the other Alternates subject to two reservations. Firstly, the Belgian and Danish Alternates consider that the reference to the Member States "participating in the ESCB" is unnecessary. Although each regulation will be a legal act applicable to the whole territory of the Community it will specify its scope of application and may include rules which are materially applicable only in some Member States. Each decision will be binding upon those to whom it is addressed. Thus, the possibility of deferred participation in EMU, which the reference is intended to take into account, would by no means be ruled out, even if it were not explicitly mentioned in this Article.
- Secondly, the German Alternate stressed that the reference to Article 190 of the Treaty would imply an obligation for the ECB to state the reasons on which regulations and decisions are based. Such a constraint is deemed to be impractical and unusual in cases where regulations and decisions would refer to monetary policy matters.

Article 34 - Enforcement

~~According to the Community legislation~~ the ECB and national central banks shall be entitled to impose sanctions on market participants and other economic agents which fail to comply with their obligations vis-à-vis (guidelines, instructions) regulations and decisions.

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Comments

The deletion has been asked for by the German Alternate who considers that sanctions to be imposed by the ECB should be stipulated in the Statute; Article 19 would already provide a sufficient basis. The Belgian, Danish, French and Italian Alternates and the representative of the Commission do not share this view. These Alternates stressed that sanctions cannot be imposed by an independent institution by virtue of a mere mention of this possibility in the Statute without any further specification ("Nulla poena sine lege"). A specification of the sanctions in the Statute would raise several problems. Firstly, this approach would create the necessity to proceed immediately to the drafting of the corresponding provisions. Secondly, there would be the risk of a considerable lengthening of the text of the Statute. Thirdly, the corresponding provisions could only be amended by way of the simplified amendment procedure which, depending on the outcome of the IGC, could be rather heavy. For these reasons, most of these Alternates prefer complementary Community legislation which would, for instance, be comparable to the "Ordnungswidrigkeitengesetz" in Germany.

Article 35 - Judicial control and related matters

35.1. The acts of the ECB shall be open to review and interpretation by the Court of Justice under the conditions laid down for the legal control of the acts of Community institutions. The ECB may institute proceedings ~~in~~ under the same conditions as Community institutions. Articles 173 to 176, 178, 183 and 184 of the EEC Treaty shall be applicable accordingly.

35.2. The ECB shall be subject to the liability regime as provided for in Article 215 of the EEC Treaty.

35.3. The Court of Justice shall have jurisdiction to give judgement pursuant to any arbitration clause contained in a contract concluded by or on behalf of the ECB, whether that contract be governed by public or private law.

35.4. The decision of the ECB to bring an action before the Court of Justice shall be taken by the Council.

35.5. The national central banks shall be liable according to their respective national laws.

35.6. If the ECB considers that a central bank of a Member State has failed to fulfil an obligation under this Statute, it may bring the matter before the Court of Justice.

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Comments

- (a) Articles 35.1 and 35.4: Drafting changes proposed by the Secretariat in line with Articles 173 and 175 of the Treaty, respectively.
- (b) Article 35.6 which has been proposed by the Belgian Alternate, enables the ECB to institute proceedings before the Court of Justice against the national central banks in order to establish failure to fulfil an obligation. Its purpose is to close a possible legal loophole which could result from the fact that a Member State against which the Commission has instituted proceedings (Article 169 of the Treaty) for failure by its central bank to fulfil an obligation will attempt to invoke the latter's independence in its defence. The Belgian Alternate's proposal has met with broad agreement but the representative of the Commission has pointed out that the Commission's Legal Service is examining whether such a provision might conflict with the Commission's responsibilities.

Article 36 - Staff

36.1. The Council of the ECB, on a proposal from the Executive Board, shall lay down the ~~Staff~~ Regulations of ~~officials and the conditions~~

~~of Employment of other the servants staff~~ of the ECB. These Regulations shall become an integral part of the contracts between the ECB and its staff ~~servants~~.

36.2. The Regulations of the staff shall include the conditions of recruitment and promotion, the salaries, pensions and other social security benefits, the limitation of external activities, the Unions' rights and their relations with the Executive Board, the exchange of staff members from the national central banks.

36.3. The Court of Justice shall have jurisdiction in any dispute between the ECB and its ~~servants~~ staff within the limits and under the conditions laid down in the ~~Staff~~ Regulations of the staff and the ~~Conditions of Employment~~.

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Comments

The present wording of Article 36 (which had been copied from Articles 179 and 212 of the Treaty) suggests that the ECB would employ two categories of staff: (i) permanent staff enjoying the status of "officials" ("fonctionnaires" in French, "Beamte" in German) who would be appointed to an established post by an instrument issued by the appointing authority of the ECB (which would still have to be specified) and whose rights and duties vis-à-vis the ECB would be governed by a regulatory regime laid down in the staff regulations (which would become part of secondary Community legislation); and (ii) other servants employed on a contractual basis in accordance with the conditions of employment (private law). The present wording is preferred by the German and Spanish Alternates who consider that the ECB should be given the possibility of employing both categories of staff, both for reasons of flexibility and because of possible repercussions on the status of staff in the NCBs which employ "officials". In contrast, the French Alternate is in favour of employing all staff on a contractual basis; he would therefore prefer the amended text subject to the remark that the notion "staff regulations" might create the risk of being interpreted as forming part of public law. To avoid this risk one might replace "staff regulations" by "conditions of employment". (It should be noted, however, that the EIB's "staff regulations" form an integral part

of the contracts with its staff.) The Danish Alternate could also accept the amended version. The same would apply to the Belgian Alternate provided that there is agreement on two principles: firstly, that contractual approach should not imply that all staff be recruited by way of temporary detachment from national central banks. Secondly, the ECB should be able to conclude contracts of indeterminate duration. This latter requirement would be met without saying if contracts were the only legal instrument governing the relationships between the ECB and its staff.

In the opinion of the Secretariat, the issue of the status of the ECB's staff should also be viewed in the light of the legal nature of the ECB's functions and the manner in which the tasks are carried out. On the one hand, the primary tasks of the central banks (and thus those of the ECB), i.e. in particular the formulation and implementation of monetary policy, belong to the public sphere. The status of the members of the Executive Board correspond to this public function. They will hold public office. Their duties are laid down in the Statute (i.e. in an instrument of public law) and they are appointed by the political authorities (see Article 11). On the other hand, the ECB's functions may be executed mainly through operations which are governed by private law although the purpose of these transactions emanates from the public function of the ECB. Such operations (e.g. foreign exchange market interventions) could be carried out on behalf of the ECB by staff employed on a contractual basis. The question might be more difficult to answer if and when the ECB acts by virtue of regulatory powers. To the extent that the staff participates in the exercise of these powers (which must be necessary for practical reasons) considerations of legitimacy might require that at least this part of the staff, would be employed on the basis of a regulatory regime.

Article 37 - Seat

The seat of the ECB shall be established at (....).

Article 38 - Professional secrecy

38.1. The members of the governing bodies and the *staff officials* and *other servants* of the ECB and the national central banks shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy.

38.2. Persons having access to data covered by specific secrecy Community legislation shall be subject to such legislation.

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Comments

See comments on Article 36.

Article 39 - Representation of the ECB

39.1. *The ECB shall be legally committed vis-à-vis third parties by the signature of the President or by the signatures of two members of the Executive Board or by those of two members of the staff of the ECB who have been duly authorised by the President to sign on behalf of the ECB.*

39.2. *A declaration made to the ECB shall have full legal effect if addressed to one person authorised to represent the ECB.*

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Comments

- (a) Article 39.1: The above text has been proposed by the Belgian and German Alternates; it replaces an earlier proposal made by the German Alternate (see the Secretariat's note dated 5th February 1991) which raised objections on the part of most other Alternates. At the same time, the Belgian-German proposal would imply the deletion of Article 13.2.

The proposed text confers the power of organic representation of the ECB (i.e. the power of representation which is directly derived from the Statute) upon the President and the other members of the Executive Board but the President alone would enjoy the power to give proxy to staff members to sign on behalf of the ECB.

Article 39.1 also aims at affording legal protection to third parties when dealing with the ECB. Whereas the competences of the persons who are the organic representatives of the ECB are visibly laid down in the Statute, uncertainty may exist with

regard to the scope of contractual representation. The proposed text suggests that the ECB would be validly committed in any case, even if the contractual signatory exceeded his powers. It thus avoids possible complications arising from differences in national law in respect of the extent to which limitation of the agent's power can be opposed to third parties.

Although the proposed article embodies the principle of double signature, it is understood that it does not rule out the possibility of the ECB being legally committed by only one of its officials or even by a third party under the conditions of specific and limited mandates given by the President.

(b) Article 39.2: The text has been proposed by the German Alternate.

Article 40 - Privileges and immunities

The Protocol on the privileges and immunities of the European Communities shall apply to the ECB, the members of its decision-making bodies and its ~~officials and other servants~~ staff to the extent necessary for the performance of the ECB's tasks.

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Comments

The changes proposed by the Secretariat aim to ensure consistency with:

- the prevailing legal situation ("European Communities" instead of "European Community");
- Article 36 (see comments thereupon).