

EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 19 September 2003

at the request of the Council of the European Union on the draft Treaty establishing a Constitution for Europe

(CON/2003/20)

(2003/C 229/04)

A. Introduction

1. On 21 July 2003 the European Central Bank (ECB) received a request from the Council of the European Union for an opinion on the draft Treaty establishing a Constitution for Europe (hereinafter the 'draft Constitution'). The European Convention on the Future of Europe (hereinafter the 'European Convention') adopted the draft Constitution in two steps on 13 June and 10 July 2003 and submitted it to the European Council meeting in Thessaloniki on 20 June and to the Italian Presidency on 18 July 2003. The European Council welcomed the draft Constitution as a good basis for starting the conference of representatives of the governments of the Member States (Intergovernmental Conference or IGC) that the Italian Presidency has convened for 4 October 2003.

2. The ECB's competence to deliver an opinion is based on Article 48 of the Treaty on European Union, which requires the consultation of the ECB in the event of institutional changes in the monetary area. The draft Constitution amends and integrates into a single Treaty the existing Treaties on which the European Union is founded and will, upon its ratification and entry into force, be the Union's basic primary law. Thus, the draft Constitution, by incorporating Title VII ('Economic and monetary policy') of the EC Treaty, addresses the legal basis of the ECB and of the European System of Central Banks (ESCB), and therefore comes within the scope of Article 48 of the Treaty on European Union. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the ECB, the Governing Council of the ECB has adopted this opinion ⁽¹⁾.

3. The ECB was neither a formal member nor an official observer of the European Convention. Nevertheless, the President of the ECB was invited to an expert hearing of the Working Group on Economic Governance on 13 September 2002, during which he conveyed the ECB's preliminary views on monetary and financial matters.

Furthermore, on 8 May and 5 June 2003, the President of the ECB communicated comments and drafting suggestions to the Chairman of the European Convention on issues that concern the ECB and the ESCB.

B. General considerations

4. The ECB welcomes the draft Constitution, which simplifies, streamlines and clarifies the legal and institutional framework of the European Union. It enhances the Union's ability to act at both the European and the international level and, therefore, is an important step in preparing the Union for the future, as requested by the Laeken Declaration.

5. The ECB understands that the transfer of the provisions on the ECB and the ESCB from the EC Treaty to the Constitution will not entail any changes to the substance, and that the tasks, mandate, status and legal regime of the ECB and of the ESCB remain substantially unchanged. Whilst the ECB attaches great value to institutional and operational stability in the monetary domain, it is also aware of the fact that a new constitution has necessary implications to the institutional framework. The ECB considers that the adjustments and updates that the current constitutional process envisages do not affect that stability.

6. The ECB has been consulted on a text that refers to, but does not have annexed to it, the Statute of the European System of Central Banks and of the European Central Bank ('the Statute') and the other protocols which are relevant for economic and monetary union (EMU). This opinion is based on two crucial and related premises. The first is that the substance of the Statute and the other protocols relevant to EMU will not be subject to changes and that these documents will be annexed to the Constitution of which they will form an integral part, as foreseen in Article IV-6 thereof. The second premise is that all parts of the draft Constitution, including the Statute and the other protocols relevant to EMU, will maintain their value as primary law, i.e. the same hierarchical level as other parts of the Treaty.

⁽¹⁾ The text of the draft Constitution on which this opinion is based is document CONV 850/03 of 18 July 2003 as released by the Secretariat of the European Convention.

This opinion is based on the premise that the substance of the Statute will not be changed. Nevertheless, the ECB understands that non-substantive amendments will need to be made to the Statute, in particular to introduce terminological adaptations and cross-references to the new numbering of the Constitution provisions, and to update provisions that have become obsolete. The ECB would wish to be associated with the preparatory activity for any such revision of the Statute.

7. In this opinion, the ECB identifies some Articles in the draft Constitution that are of relevance for the exercise of its functions and tasks, which would benefit from further clarifications, technical adjustments, and editorial changes. For ease of reference, drafting suggestions are compiled in the annex to this opinion.

C. The objectives and competences of the Union

8. Article I-3(3) of the draft Constitution states that 'The Union shall work for the sustainable development of Europe based on balanced economic growth ...'. Article 2 of the EC Treaty confers on the Community the task of promoting 'non-inflationary growth', and Article 4(3) mentions 'stable prices' as a 'guiding principle' for the activities of both the Community and the Member States. The ECB regrets that such an explicit reference to price stability is not contained in Article I-3 on the Union's objectives. Price stability yields confidence in the long-term value of the euro and translates into low and stable long-term interest rates, which in turn foster a high level of investment and, ultimately, growth and employment. Price stability also avoids an ad hoc redistribution of wealth as a result of price increases. Therefore, the ECB would welcome that the draft Constitution retained the current prominent positioning at the forefront of the EC Treaty of the guiding principle of stable prices, and would like to suggest that a reference to 'non-inflationary growth' be introduced in Article I-3(3) of the draft Constitution: 'The Union shall work for the sustainable development of Europe based on balanced and non-inflationary economic growth ...'. Alternatively, a reference to price stability could be considered.
9. Article I-12 of the draft Constitution lists as an exclusive competence of the Union 'monetary policy, for the Member States which have adopted the euro'. In the context of Article I-12 the term 'monetary policy' is not to be read in a narrow and technical sense as referring only to the basic task of the ESCB to which Article III-77(2)(a) of the draft Constitution refers. Such a narrow view is neither warranted nor intended. Contrary to this restrictive interpretation, the ECB understands the term 'monetary policy' as reflecting the title of Section 2 of Chapter II of Title III of Part III of the draft Constitution,

and therefore considers that it encompasses all exclusive competences related to the euro as described in the relevant provisions of the draft Constitution, in particular Articles III-77 and III-78.

D. The institutional status of the ECB and of the ESCB

The Union's institutional framework

10. The status of the ECB within the Union's institutional framework is governed by Article I-29 of the draft Constitution under which the ECB would be one of the 'Other institutions' of the Union. Article I-29 preserves the ECB's substantive features, in particular its independence, including financial independence, legal personality and regulatory capacity, specifically the power to issue legally binding acts. The ECB therefore understands that the framework created by the draft Constitution does not imply, and is not meant to imply, any change to the substance of the current institutional status of either the ECB or the ESCB.
11. The ECB notes that Article I-29 is placed under Title IV of the draft Constitution, entitled 'The Union's Institutions'. This same heading appears in Article I-18, where the ECB is not included. Thus, the draft Constitution on the one hand places the ECB under the Title of 'Union's Institutions' but on the other hand the provision that lists the Union's institutions does not include the ECB. Because of its specific institutional features, the ECB needs to be differentiated from the 'Union's institutions' and this justifies the fact that Article I-18 does not list the ECB. To increase the clarity, consistency and soundness of its institutional status, if not for purely editorial reasons, the ECB would like to recommend that the heading of Title IV be changed to 'The Institutional Framework of the Union'; this expression (derived from the current heading of Chapter I of Title IV), would therefore encompass the constellation of institutional bodies, namely: (i) the Union's institutions (Chapter I), and (ii) the ECB, Court of Auditors and the advisory bodies (Chapter II). As a result of this the heading of Chapter I should be changed to 'The Union's Institutions', consistently with the heading of Article I-18 in this Chapter. By swapping the headings in this way, the ECB would be part of the 'institutional framework of the Union', without being within the list of the 'Union's institutions'. The Union's institutions would of course also be part of the 'institutional framework of the Union'. In addition, Article I-29 on the ECB also deals extensively with the ESCB and may also refer to the Eurosystem if the suggestion in paragraph 14 below were to be followed. The Article defines the concept of the ESCB/Eurosystem, mentions their decision-making bodies, and refers to their objectives and tasks. Therefore, the ECB suggests that the ESCB and the Eurosystem should be included in the heading of Article I-29, together with the ECB.

The independence of the ESCB

12. Paragraph 3 of Article I-29 addresses the independence of the ECB, including its financial independence. However, the national central banks (NCBs) of all the Member States, i.e. all the ESCB members, shall also be independent according to Article III-80 of the draft Constitution. Thus, the ECB would welcome the introduction of a reference to the independence of the NCBs in paragraph 3 of Article I-29. This may be achieved by replacing the third sentence by the following sentence: 'When exercising their powers and carrying out their tasks and duties, the ECB, the national central banks, and any member of their decision-making bodies shall be completely independent'. As a consequence, the first sentence of paragraph 3 of Article I-29 would need to be replaced by the following wording: 'The European Central Bank is an Institution which has legal personality and which shall be independent for its finances'.
13. The ECB notes that the ECB is defined by Article I-29(3) as 'independent' while the expression 'completely independent' is applied in relation to both the Commission (Article I-25(4)) and the Court of Auditors (Article I-30(3)). The ECB understands this difference in terminology as being merely linguistic and reflecting no qualitative difference between the independence of these institutions and that granted to the ECB, but would suggest for reasons of consistency that the terms be aligned.

The Eurosystem

14. Under the acronym 'ESCB' two realities coexist. On the one hand, ESCB refers to the ECB and the NCBs of all the EU Member States. On the other hand, and by the effect of other provisions, 'ESCB' also refers to the ECB and the central banks of only those EU Member States which have adopted the euro. This second concept is different from the first one, since it embodies the exclusive competence for defining and conducting monetary policy, including the issue and the overall management of the euro, the management of the official foreign reserves of the Member States that have adopted the euro, and promoting the smooth operation of payment systems. The actions necessary to carry out this competence require a high degree of harmonisation of procedures, instruments and infrastructure, and a single decision-making body with regulatory capacity.

The EU Treaty has created these two realities by introducing in the EC Treaty and in the Statute Articles that distinguish between which provisions apply to one composition or to the other. This legislative technique does not serve the aim of clarity and comprehension of the EC Treaty. In order to distinguish the second concept of 'ESCB', the Governing Council adopted and has been using since 1998 the term 'Eurosystem' in its communications with the public. With a view to simplify and make the Constitution more accessible for European citizens and

in so doing to bring the Union's institutional framework closer to the general public, the ECB would suggest that the historic reform that the draft Constitution represents would be a suitable opportunity to introduce the term 'Eurosystem' into the Constitution. This could be done in Article I-29(1), where the second sentence could be replaced by the following: 'The European Central Bank, together with the national central banks of the Member States which have adopted the Union currency, the euro, shall constitute the Eurosystem. The Eurosystem shall conduct the monetary policy of the Union'. This terminological change will require a general provision indicating that 'ESCB' is to be read as 'Eurosystem' in those provisions of the Constitution that refer to tasks or functions related to the euro or to the Member States that have adopted the euro.

E. International representation of the euro

15. The international representation of the euro is addressed in Articles III-90 and III-228 of the draft Constitution. The ECB understands that the draft Constitution does not, even implicitly, deprive the ECB of its current competences based on the monetary tasks explicitly entrusted to the ESCB by the EC Treaty. However, as the responsibilities of the ESCB are not referred to in the body of Article III-90, it is advisable for reasons of legal clarity to add such an explicit reference. For that purpose, the ECB suggests the insertion of a fourth paragraph in Article III-90 stating that 'The measures adopted on the basis of this Article shall be in compliance with the allocation of powers laid down in Articles III-71 and III-77.' Thus mirroring the language of Article 111(4) of the EC Treaty.
16. A significant number of the issues that are of particular interest for EMU are discussed not only within international organisations but also in informal multinational groupings, many of which are standard-setters for financial markets (e.g. G-10, etc.). In order to clearly express that the scope of Article III-90 extends to those groups, the ECB would like to suggest that the word 'fora' be used in addition to the word 'conferences' in paragraphs 1 and 3 of Article III-90 of the draft Constitution.
17. In order to enhance the precision of Article III-90 of the draft Constitution, the ECB would like to recommend the addition of the word 'monetary' to 'international financial institutions', so as to clearly restrict this provision to 'international monetary and financial institutions'. Moreover, in order to address the inconsistency between paragraphs 1 and 3 of Article III-90, the ECB would like to recommend either the insertion in paragraph 3 of the expression 'after consultation of the European Central Bank' or the deletion of the expression 'on a proposal from the Commission' since the 'procedural provisions of (paragraph) 1 ... apply' and the only procedural provisions of that paragraph are a proposal from the Commission and the consultation of the ECB.

F. Other provisions that affect the institutional status of the ECB

18. Article I-59 of the draft Constitution contains a new set of rules for voluntary withdrawal from the Union, and in particular, requires an exit agreement 'setting out the arrangements for the withdrawal' and organises the Union's allocation of competences and procedures. To the extent that such arrangements enter into the fields of competence of the ECB, the ECB understands that it will be fully associated with the Council of Ministers in the procedure.
19. The ECB acknowledges the choice made by the draft Constitution to make the 'ordinary legislative procedure' (currently the 'co-decision procedure') the basic rule for the adoption of legislation, fully involving the Parliament and requiring qualified majority voting in the Council. The ECB notes that the draft Constitution moves to the legislative procedure the adoption of certain legislation that concerns the EMU institutional set-up, such as the transfer to the ECB of specific tasks concerning policies relating to prudential supervision of credit institutions (Article III-77(6)) and the simplified amendment of the Statute (Article III-79(5)), whereas in other areas such as the appointment of the members of the Executive Board it retains the 'common accord'.
20. Articles III-88 and III-89 of the draft Constitution refer to the Eurogroup, for which a new Protocol has been created and will be annexed to the Constitution. The ECB welcomes the fact that the Constitution incorporates the Eurogroup, in line with the conclusions of the Luxembourg European Council of 12-13 December 1997. In view of the draft Constitution's recognition of the Eurogroup, the ECB would like to state that it understands the wording of Article 1 of the Eurogroup Protocol as being without prejudice to the tasks and responsibilities of the ESCB, as described in the draft Constitution.

G. Exchange-rate convergence criterion

21. Article III-92(1)(c) of the draft Constitution refers to the exchange-rate criterion as follows: 'the observance of the normal fluctuation margins provided for by the exchange-rate mechanism for at least two years, without devaluing against the euro'. This text reiterates the wording of Article 121 of the EC Treaty but deletes the reference to the European Monetary System (EMS) which no longer exists. However, this deletion may imply that the expression 'observance of the normal fluctuation margins

provided for by the exchange-rate mechanism' could henceforth only reasonably be understood as referring to the standard $\pm 15\%$ fluctuation band of the new exchange-rate mechanism (ERM II). This interpretation would not be in line with the way in which the exchange-rate criterion has been applied in the past, where due account was taken of the fact that when Article 121 was drafted (originally Article 109j) the normal fluctuation margins of the exchange-rate mechanism (ERM) were $\pm 2,25\%$.

For reasons of legal clarity, and equal treatment among past, current and future members of the ERM II, the ECB would like to suggest the following amendment to Article III-92(1)(c): 'the observance of the normal fluctuation margins provided for by participation in the exchange-rate mechanism for at least two years without severe tensions, in particular without devaluing against the euro.'

A reference to the need to avoid 'severe tensions' is already included in the Protocol on the convergence criteria. It has served as a basis for applying — in the ECB convergence reports and Commission assessments — the exchange-rate criterion in accordance with its intended scope.

This opinion is drafted under the premise that the Protocol on the convergence criteria referred to in Article 121 of the EC Treaty will be annexed to the Constitution and without any changes to the substance.

H. Editorial suggestions

22. In paragraph 3 of Article III-91 the ECB would propose that the text be improved by replacing 'Under Chapter IX' with 'Under the conditions laid down in Chapter IX'.
23. In the second sentence of Article III-278(d) of the draft Constitution the word 'Council' should be replaced by 'Governing Council', in order to avoid confusion with the General Council of the ECB.

This opinion will be published in the *Official Journal of the European Union* and on the website of the ECB.

Done at Frankfurt am Main, 19 September 2003.

The President of the ECB

Willem F. DUISENBERG

ANNEX

ECB drafting suggestions

Article I-3: 'The Union shall work for the sustainable development of Europe based on balanced and non-inflationary economic growth ...'

Part I, Title IV, heading: ~~'The Union's Institutions'~~ 'The Institutional Framework of the Union'

Part I, Title IV, Chapter I, heading: ~~'The Institutional Framework'~~ 'The Union's Institutions';

Article I-29, heading: 'The European Central Bank, the European System of Central Banks and the Eurosystem'

Article I-29(1): 'The European Central Bank, together with the national central banks, shall constitute the European System of Central Banks. The European Central Bank, together with the national central banks of the Member States which have adopted the Union currency, the euro, shall constitute the Eurosystem. The Eurosystem shall conduct the monetary policy of the Union.'

Article I-29(3), first sentence: 'The European Central Bank is an Institution which has legal personality and which shall be independent for its finances'.

Article I-29(3), third sentence: ~~'In the exercise of its~~ When exercising their powers and for its finances carrying out their tasks and duties, # the European Central Bank, the national central banks, and any member of their decision-making bodies shall be completely independent'.

Article III-90(1): 'In order to secure the euro's place in the international monetary system, the Council of Ministers, on a proposal from the Commission and after consulting the European Central Bank, shall adopt a European decision establishing common positions on matters of particular interest for the economic and monetary union within the competent international monetary and financial institutions, and conferences and fora'.

Article III-90(3): 'The Council of Ministers, on a proposal from the Commission and after consultation of the European Central Bank, may adopt appropriate measures to ensure unified representation within the international monetary and financial institutions, and conferences and fora. The procedural provisions of paragraphs ~~1 and 2~~ shall apply.'

Article III-90, new (fourth) paragraph: 'The measures adopted on the basis of this Article shall be in compliance with the allocation of powers laid down in Articles III-71 and III-77.'

Article III-91(3): 'Under the conditions laid down in Chapter IX ...'

Article III-92(1)(c): ~~'the observance of the normal fluctuation margins provided for by~~ participation in the exchange-rate mechanism for at least two years without severe tensions, in particular without devaluing against the euro.

Article III-278(d): 'the fulfilment by national central banks of obligations under the Constitution and the Statute of the European System of Central Banks and the European Central Bank. In this connection, the powers of the Governing Council of the European Central Bank ...'
