

Legal instruments of the European Central Bank

The Treaty establishing the European Community (the “Treaty”) and the Statute of the European System of Central Banks and of the European Central Bank (the “Statute”) not only attribute to the European Central Bank (ECB) the authority to conclude agreements with third parties, but also confer upon it regulatory powers. Within the legislative field these relate, on the one hand, to the ECB’s involvement as the proposer or adviser in amending certain provisions of the Statute and in drafting Community and national legal acts and, on the other hand, to the ECB’s own competence to adopt legal acts and other legal instruments which may either be addressed to third parties or are intended to establish rules for the European System of Central Banks/Eurosystem. This article focuses on those regulatory powers of the ECB which are needed in order to make the system operational and effective and which reinforce the independence of the European System of Central Banks/Eurosystem. The ECB is aware that the assignment to it of regulatory powers implies not only increased influence, but also increased responsibility and accountability. As repeatedly indicated, the aim of the ECB is not only to be open, transparent and clear about the reasons for its actions, but also to be accountable for its performance.

I ECB involvement in the legislative process

The Treaty establishing the European Community (the “Treaty”) and the Statute of the European System of Central Banks and of the European Central Bank (the “Statute”) confer upon the European Central Bank (ECB) the competence to participate in the legislative process. The latter can be divided into three specific areas of authority: first, the ECB’s right to initiate amendments to the

Statute and the adoption of complementary Community legislation; second, the ECB’s advisory role in drafting Community and national legal acts; and third, the ECB’s competence to adopt ECB legal acts and other ECB legal instruments (see the box below). This third area of authority will be the focus of this article.

Box

The competence of the European Central Bank to participate in the legislative process

The regulatory powers of the European Central Bank (ECB) are laid down in the Treaty establishing the European Community (the “Treaty”) and in the Statute of the European System of Central Banks and of the European Central Bank (the “Statute”). They can be divided into three areas of authority:

1. Right of initiative

- amending the Statute (ECB Recommendations, ECB Opinions)
- adopting complementary Community legislation (ECB Recommendations, ECB Opinions)

The ECB has the right to initiate – or to be consulted on – the amendment of specific Articles of the Statute and the adoption of legislation complementary to the Treaty and required by the Treaty in specific areas related to the tasks of the European System of Central Banks/Eurosystem. (For further information on the European System of Central Banks/Eurosystem, see the article entitled “The institutional framework of the European System of Central Banks” in the July 1999 issue of the ECB Monthly Bulletin.) These areas encompass, for instance, statistics, accounting, open market and credit operations, minimum reserves, clearing and payment systems, and external operations. The right of initiative is shared with the Commission of the European Communities.

2. Advisory role

- drafting Community legal acts and national legal acts (ECB Opinions)

The legislative bodies of the European Community (the Council of the European Union, the European Parliament, the Commission of the European Communities) and the Member States of the European Union (EU) are required to consult the ECB in respect of any proposed Community act and any draft legislative provision drawn up by national authorities which fall within the ECB's field of competence. This includes draft legislative provisions relating to the prudential supervision of credit institutions and to the stability of the financial system. Furthermore, the ECB may, on its own initiative, submit Opinions to the appropriate Community institutions and bodies or to national authorities on matters falling within its field of competence. Finally, Article 48 of the Treaty on European Union states that the ECB is also to be consulted should institutional changes be made in the monetary area.

The ECB's advisory role ensures that no Community legal act within its field of competence is adopted without its being involved; it underlines the special status of the ECB as an independent body within the Community framework vested with its own, exclusive competences.

3. Competence to adopt ECB legal acts and other ECB legal instruments

- ECB legal acts
 - Regulations
 - Decisions
 - Recommendations
 - Opinions
- Other ECB legal instruments
 - Guidelines
 - Instructions
 - Internal Decisions

The ECB has the competence to adopt Community legal acts and other ECB legal instruments. In line with the principle of limited powers – by application of which the European System of Central Banks (ESCB) and the ECB act within the limits of the powers conferred upon them by the Treaty and the Statute – the regulatory power of the ECB is restricted to the objective of fulfilling the tasks assigned to the ESCB/Eurosystem.

As ECB legal acts and other ECB legal instruments do not confer any rights or impose any obligations on the national central banks of the Member States which have not yet adopted the euro, the ECB has entered, where this has been considered appropriate and necessary, into agreements with the central banks of those Member States, as in the case of the Trans-European Automated Real-time Gross settlement Express Transfer system (TARGET).

2 ECB legal acts

In order to carry out the tasks entrusted to the European System of Central Banks (ESCB)/Eurosystem, the ECB, in accordance with the provisions of the Treaty and under the conditions laid down in the Statute,

- makes Regulations to the extent that this is necessary to implement its designated tasks and, in specific cases, as determined by the Council of the European Union (EU Council);
- takes Decisions necessary to enable the tasks of the ESCB/Eurosystem to be carried out;

- makes Recommendations; and
- delivers Opinions.

According to the Treaty and the Statute, all measures taken by the ECB and intended to have legal effect are open to review or interpretation by the Court of Justice of the European Communities, whatever their nature or form.

It goes without saying that the Eurosystem – as a system which is governed by the rule of law – is also bound by all legal instruments which it has itself adopted.

ECB Regulations

ECB Regulations are general in the scope of their application, binding in their entirety and directly applicable in all euro area Member States without the need for implementation in national law. For instance, in the field of statistics, the ECB Regulation concerning the consolidated balance sheet of the Monetary Financial Institutions sector imposes direct reporting obligations on specified reporting agents.

As with the Regulations adopted by the legislative bodies of the European Community, ECB Regulations must state the reasons on which they are based. In order to be binding on third parties, they must be published in the Official Journal of the European Communities (referred to in this article as the "Official Journal") in all official Community languages. Unless otherwise specified, ECB Regulations enter into force on the twentieth day following the date on which they are published.

ECB Regulations are adopted by the Governing Council of the ECB and are signed on its behalf by the President. The Governing Council may decide to delegate its authority to adopt ECB Regulations to the Executive Board of the ECB, but in so doing it must specify the limits and scope of the powers thus delegated. In matters having legal effect on third parties, notification of such delegation must be given to the parties concerned, or details of the delegation published if it is appropriate to do so.

The Governing Council has hitherto adopted the following three ECB Regulations:

- Regulation (EC) No. 2818/98 of the European Central Bank of 1 December 1998 on the application of minimum reserves (ECB/1998/15);
- Regulation (EC) No. 2819/98 of the European Central Bank of 1 December 1998 concerning the consolidated balance sheet of the Monetary Financial Institutions sector (ECB/1998/16);

- European Central Bank Regulation (EC) No. 2157/1999 of 23 September 1999 on the powers of the European Central Bank to impose sanctions (ECB/1999/4).

ECB Decisions

ECB Decisions are binding in their entirety upon those to whom they are addressed and take effect upon notification. The ECB may decide to publish its Decisions in the Official Journal, in which case they are published in all official Community languages. ECB Decisions may be addressed to any legal or natural person, including the euro area Member States.

ECB Decisions must state the reasons on which they are based. They may be adopted by the Governing Council or by the Executive Board in their respective spheres of competence.

The ECB has to date adopted one Decision addressed to the euro area Member States:

- Decision of the European Central Bank of 22 April 1999 on the approval of the volume of coin issuance in 1999 (ECB/1999/NP10).

ECB Recommendations and ECB Opinions

ECB Recommendations and ECB Opinions are non-binding legal acts. They may be adopted by the Governing Council or by the Executive Board in their respective spheres of competence. ECB Recommendations and ECB Opinions may be published in the Official Journal, in which case they are published in all official Community languages.

There are two types of ECB Recommendation. As mentioned above, ECB Recommendations can be the instrument by which the ECB initiates legislative procedures at the Community level, leading to the enactment of complementary

legislation. Three Recommendations of the European Central Bank for a Council Regulation may be cited by way of example:

- Recommendation of the European Central Bank for a Council Regulation (EC) concerning the application of minimum reserves by the European Central Bank (ECB/1998/8);
- Recommendation of the European Central Bank for a Council Regulation (EC) concerning the powers of the European Central Bank to impose sanctions (ECB/1998/9);
- Recommendation of the European Central Bank for a Council Regulation (EC) concerning the collection of statistical information by the European Central Bank (ECB/1998/10).

The ECB has adopted two further Recommendations which are currently under discussion at the EU Council with a view to legislative action being taken:

- ECB Recommendation for a Council Regulation (EC) concerning the limits and conditions for capital increases of the European Central Bank (ECB/1998/11);
- ECB Recommendation for a Council Regulation (EC) concerning further calls of

foreign reserve assets by the European Central Bank (ECB/1999/1).

All of the aforementioned ECB Recommendations have been published in the Official Journal.

ECB Recommendations can also, in the traditional sense of the term, be instruments by which the ECB provides the impetus for action to be taken (not only of a legal nature); they may be addressed to any legal or natural persons, to Community institutions or to Member States. An example of this is the Recommendation of the European Central Bank of 1 December 1998 on the statistical reporting requirements of the European Central Bank in the field of balance of payments and international investment position statistics (ECB/1998/NP21), which was addressed to the Belgian-Luxembourg Exchange Institute, the Central Statistics Office in Ireland and the Ufficio Italiano dei Cambi.

ECB Opinions are delivered whenever the ECB is consulted by the Community institutions or by the Member States in accordance with the Treaty or the Statute, or on the ECB's own initiative whenever deemed appropriate by the ECB with regard to matters falling within its field of competence.

3 Other legal instruments

The ECB's regulatory powers are not limited to the adoption of the aforementioned legal acts. The ECB may also adopt legal instruments which are of internal relevance to the Eurosystem and intended to govern the Eurosystem without having a direct legal effect upon third parties. Each of the Eurosystem's constituent bodies, i.e. the national central banks of the Member States participating in the euro area and the ECB, retains an individual legal personality. Taking this unique structure into account, the ECB

must have at its disposal the internal legal instruments necessary to allow the Eurosystem to operate efficiently as a single entity with a view to achieving the objectives of the Treaty. Consequently, the Statute stipulates that the national central banks of the Eurosystem are an integral part of the ESCB and must act in accordance with the Guidelines and Instructions of the ECB.

ECB Guidelines and ECB Instructions are special types of legally binding instrument,

the introduction of which has been necessary on account of the special structure of the Eurosystem outlined above. They are formal legal instruments, and have the objective of ensuring that the tasks entrusted to the Eurosystem are carried out within its internal organisation and are in line with the internal division of competences. As part of Community law, ECB Guidelines and Instructions, as well as ECB Regulations and Decisions, will, in accordance with the rule of supremacy, prevail over pre-existing and subsequent national legislation falling within the scope of their applicability. It is the task of the Governing Council to ensure compliance with ECB Guidelines and ECB Instructions. In this undertaking, the Governing Council will be supported by the Executive Board, which will make provision for the drafting of regular compliance reports.

The formal requirements for the adoption of ECB Guidelines and ECB Instructions are not specified by the Treaty or by the Statute, but rather are laid down in the Rules of Procedure of the European Central Bank and follow general principles of Community law. Given their nature as legal instruments, the legal effects of which are internal only, there are no obligations under Community law to publish ECB Guidelines and ECB Instructions. However, the ECB has published parts of the ECB Guidelines which are of interest to operators in the market and to the general public at large. This, in turn, enhances the transparency of the Eurosystem's activities.

ECB Guidelines

Following the structure established by the Statute, in accordance with which operations forming part of the tasks of the Eurosystem are to be carried out by the national central banks whenever appropriate and possible, ECB Guidelines are designed to be legal instruments by which the policy of the Eurosystem is defined and implemented. They contain the general framework and the main rules which require implementation by the national central banks. Taking into account

the differences in the financial market structures and in the legal systems of the euro area Member States, ECB Guidelines have been conceptually designed in such a manner as to allow, as far as possible, an appropriate decentralised execution of monetary policy operations, while at the same time fully respecting the requirements of a single monetary policy in the euro area. As a consequence, monetary policy is implemented either by means of contracts to be concluded between the national central banks and their counterparties or by means of regulatory acts addressed to the counterparties, depending on the legal regime of each of the national central banks.

As ECB Guidelines are legal instruments which are internal to the system and addressed to the national central banks only, they are not intended to directly or individually affect the legal rights of counterparties. In accordance with the Rules of Procedure of the European Central Bank, ECB Guidelines are adopted by the Governing Council and thereafter notification is sent to the national central banks of the Eurosystem. If it is expressly decided to publish ECB Guidelines, publication will be in the Official Journal in all official Community languages.

The Governing Council may decide to delegate to the Executive Board its regulatory power to adopt ECB Guidelines. In so doing, the Governing Council must specify the limits and scope of the delegated competences.

The ECB has to date adopted several ECB Guidelines. Two of these have been published in the Official Journal:

- Guideline of the European Central Bank of 1 December 1998 on the statistical reporting requirements of the European Central Bank in the field of balance of payments and international investment position statistics (ECB/1998/17);
- Guideline of the European Central Bank of 7 July 1998 on certain provisions regarding euro banknotes as amended on 26 August 1999 (ECB/1999/3).

Parts of the remaining ECB Guidelines, in particular those provisions which specify the operational framework of the ESCB/Eurosystem, have been published by the ECB itself on account of the interest of issues which they address for operators in the market and for the general public.

- “The single monetary policy in Stage Three: Specification of the operational framework”
- “The single monetary policy in Stage Three: General documentation on ESCB monetary policy instruments and procedures”

4 Internal Decisions

In addition to ECB Guidelines and Instructions, the ECB has the competence to adopt internal Decisions which have a normative value within the system and which address matters of an internal organisational or administrative nature. There are no explicit addressees, but these Decisions are legally binding on the Eurosystem. Until now the ECB has adopted several such Decisions; some of them have been published in the Official Journal, for instance:

- Decision of the European Central Bank of 3 November 1998 concerning public access to documentation and the archives of the European Central Bank (ECB/1998/12);

5 Concluding remarks

The regulatory powers of the ECB reflect the particular status of the ESCB/Eurosystem within the overall Community framework. By equipping the ECB with the competence to adopt Regulations, Decisions, Opinions and Recommendations and thus making the ECB a “Community legislator”, the Treaty and the Statute emphasise that conferring tasks upon the ESCB/Eurosystem is not sufficient; in order to make the system operational and effective,

ECB Instructions

ECB Instructions are adopted by the Executive Board. They do not of themselves have a policy objective, but rather are designed to ensure implementation of monetary policy Decisions and Guidelines by giving specific and detailed instructions to the national central banks of the Eurosystem.

Even though they may be considered to have a lower hierarchical status than other Community legal acts, ECB Instructions constitute an important part of the legal framework which is legally binding on the national central banks of the Eurosystem and judicially enforceable.

- Decision of the European Central Bank of 1 December 1998 on the national central banks’ percentage shares in the key for the capital of the European Central Bank (ECB/1998/13);
- Decision of the European Central Bank of 1 December 1998 laying down the measures necessary for the paying-up of the capital of the European Central Bank by the non-participating national central banks (ECB/1998/14).

these tasks need to be complemented by the legal instruments necessary for them to be implemented both at the Community level and at the level of the Member States. At the same time, these regulatory powers reinforce the independence of the ESCB/Eurosystem.

By virtue of its competence to adopt ECB Guidelines and ECB Instructions, the ECB has the necessary legal instruments at its disposal

to make the system functional. By contrast with Community Regulations, Decisions, Opinions and Recommendations, the concepts of which have been developed over time, ECB Guidelines and ECB Instructions are new legal instruments which have been designed to cope with the special features of the Eurosystem.

The ECB is aware that the assignment of regulatory powers means not only increased influence, but also increased responsibility and accountability. As repeatedly indicated, the ECB aims not only at being open, transparent and clear about the reasons for its actions, but also at ensuring that it is accountable for its performance.