

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

DRAFT STATUTE OF THE EUROPEAN SYSTEM OF CENTRAL BANKS

AND OF

THE EUROPEAN CENTRAL BANK

(COMMENTARY)

12th APRIL 1991

CHAPTER I - CONSTITUTION OF THE SYSTEM

Article 1 - The System

This Article states that the European System of Central Banks (to be known as the "System") is composed of the European Central Bank - the ECB - and the participating central banks of the Member States of the Community. In accordance with Article 14.6, the Institut Monétaire Luxembourgeois shall be regarded as a national central bank.

The System does not enjoy legal personality but its constituent parts have separate legal personality. This implies that only the ECB and the national central banks, but not the System as such, can own, buy and sell assets, contract and sue or be sued. The term "System" should thus be understood to describe the existence of the ECB and the national central banks as integral parts of the System, governed by a common set of rules and committed to the objectives and tasks assigned to it.

For the ECB, the capacity to perform legal acts is established explicitly in Article 9 of the Statute. The national central banks will retain their legal personality in accordance with national law. However, national legislation including the statutes of the national central banks will have to be made compatible with the Statute and the EEC Treaty (see Article 14.1).

Neither the System nor the ECB are to be classified as a Community institution under Article 4, paragraph 1 of the EEC Treaty. Instead, it is suggested to refer to the establishment of the System in a new paragraph of this Article. In order to avoid any legal uncertainty arising from the possible application to the System of general provisions relating to Community institutions, Chapter VII includes the necessary provisions governing the general aspects of the System.

Article 1 refers specifically to "participating" central banks. However, there is no agreement on the definition of participation. Most of the Community central banks consider that a participating central bank would be one whose Member State has become a member of the Economic and Monetary Union or has fully accepted the objectives of economic and monetary union and has pledged to become a member as soon as possible. For a Member State which will join the Economic and Monetary Union after the start of Stage Three, Chapter VIII will contain transitional provisions describing the restricted rights and obligations of its central bank pending its full participation in

the System. The Bank of England, while accepting this definition for Stage Three, i.e. after Economic and Monetary Union has been achieved, considers that a participating central bank should also be one which has accepted the obligations of membership of the System as it may have evolved before entry into Stage Three.

CHAPTER II - OBJECTIVES AND TASKS OF THE SYSTEM

Article 2 - Objectives

Article 2.1 expresses the unequivocal commitment to maintain price stability as the primary objective of the System. However, since monetary policy is not considered to be conducted in isolation of other economic policy objectives, Article 2.2 explicitly states that without prejudice to the objective of price stability, the System shall support the general economic policy of the Community. Article 2.3 confirms the adherence of the System to the fundamental principle of a market-based economy.

Article 3 - Tasks

Article 3 lists the basic tasks which are normally associated with the activities of a central bank. In order to attain the objectives stated in Article 2, the System will have the exclusive responsibility for the formulation and implementation of the monetary policy of the Community. In addition, foreign exchange market operations will be conducted in accordance with the Community's exchange rate regime as referred to in Article 4.3 and the System will hold and manage [the] official foreign reserves of the participating countries. All except one of the Community central banks agreed on the need to bring all official foreign reserve assets (including gold) of the participating countries into the System (i.e. into the national central banks) not later than at the beginning of Stage Three. This would require a Treaty provision according to which all foreign reserve assets held by official non-central bank bodies should be transferred to the national central banks of the countries concerned before the start of Stage Three (see also comments on Article 31). The reason for bringing all such assets into the System is to ensure that exchange rate and monetary policy operations are not affected by transactions in official foreign reserve assets undertaken by official bodies outside the System. The Bank of England,

which does not hold the official foreign reserves of the United Kingdom, sees no need for bringing such reserves into the System.

Other tasks listed in Article 3 entrust the System to perform functions in the context of clearing and payment systems (see Article 22) and to participate as necessary in the formulation, co-ordination and execution of policies relating to prudential supervision and the stability of the financial system (see Chapter V).

Albeit not specifically referred to in Article 3, other tasks may be conferred upon the System by the simplified amendment procedure referred to in Article 41 in Chapter VIII. However, the establishment of new tasks should not be at variance with the System's objectives stated in Article 2.

Article 4 - Advisory functions

Article 4, which confers upon the ECB advisory functions, ensures that the System is involved in all matters relating - directly or indirectly - to its field of activity. As stated in Article 12.4, the advisory functions will be exercised by the Council of the ECB.

Article 4.1 establishes the obligation for the Community and national authorities to consult the ECB regarding all draft legislation, which falls within its field of competence. The obligation for the Member States to consult the ECB before adopting national legislation calls for Community legislation. Whenever reference is made in the Statute to Community legislation the procedure for complementary legislation referred to in Chapter VIII (Article 42) is to be applied.

Article 4.3 is closely related to the task of conducting foreign exchange market operations mentioned in Article 3. Such operations will be carried out in the framework of the prevailing exchange rate regime of the Community. While the political authorities have ultimate responsibility for decisions relating to the exchange rate regime, it is recognised that there is a close interconnection between exchange market operations and monetary policy and, thus, the System's ability to attain its primary objective of price stability. For this reason, Article 4.3 establishes the obligation to consult the ECB with a view to reaching consensus consistent with the objective of price stability prior to any decision on the exchange rate regime of the Community. However, views differ with regard to the ECB's role in the formulation of exchange rate policy. Most of the members of the Committee of Governors are of the view that decisions on the Community's

exchange rate policy should be dealt with in the same way as decisions on the adoption, abandonment or change in central rates vis-à-vis third currencies. Some Committee members are of the view that decisions on the Community's exchange rate policy should be subject to the consent of the ECB.

Article 5 - Collection of statistical information

Appropriate statistical information is an indispensable prerequisite for the conduct of monetary policy and the performance of the other tasks of the System. This implies the harmonisation, where necessary, of the conditions governing the collection, compilation and distribution of statistics in the areas of the ECB's field of competence. Accordingly, Article 5 establishes the authority for the ECB to assume functions in this field and lays down some basic conditions for the execution of this task.

In accordance with the principle of subsidiarity, Article 5.2 requires that national central banks carry out, to the extent possible, the collection of statistical information. Since statistical reporting requirements will impose obligations on third parties, the application of Article 5 will necessitate Community legislation defining the natural and legal persons subject to reporting requirements, the confidentiality regime and the provisions for enforcement (Article 5.3).

Article 6 - International co-operation

Article 6 recognises the need for the System to play an active role in international monetary co-operation and to participate in international organisations. This Article provides a considerable degree of flexibility: it enables the ECB and/or national central banks to conclude agreements with central banks of third countries and to participate in international monetary institutions, thus allowing, for instance, national central banks to remain members of the Bank for International Settlements.

Decisions relating to the System's international representation are to be taken by the Council of the ECB (Article 12.5). This ensures that the System "speaks with one voice".

If the ECB is to represent the Community in international monetary institutions and if it is to be enabled to conclude agreements on behalf of the Community, a provision to this effect would need to be introduced into the Treaty.

CHAPTER III - ORGANISATION OF THE SYSTEM

Article 7 - Independence

In order to enable the System to achieve the primary objective of price stability, it is important that the decision-making bodies should not be influenced by considerations which would be in conflict with the pursuit of price stability. Article 7 states that the ECB, the national central banks, and the members of their decision-making bodies shall be independent of instructions from political authorities or any other bodies. The principle of independence is extended further in a number of other provisions which are designed to give practical effect to this principle: these are Articles 11 and 14, which provide security of tenure to the members of the decision-making bodies; Article 21.1, which ensures functional independence; Articles 16, 19 and 20, which ensure the operational independence of the System; and those provisions in Chapter VI, which establish the System's financial autonomy.

Although independent, the System must be democratically legitimate and accountable. Democratic legitimacy is, to a significant extent, ensured by the fact that the Treaty (and the Statute annexed to it) will have to be approved by Member States and be ratified by their parliaments, and that the powers and responsibilities of the decision-making bodies as well as the scope of the System's functions are clearly circumscribed by the Statute. In addition, the Statute contains several provisions which represent elements of democratic accountability: Articles 11 and 14, which lay down the procedure for appointing the members of the decision-making bodies, assign an important role to the political authorities; Article 15 calls for co-operation with Community institutions and establishes procedures which ensure the transparency of the System's activities; and Article 27 makes the appointment of external auditors subject to the approval of the Council of the European Communities.

Article 8 - General principle

Article 8 underlines that the authority of the Council of the ECB and the Executive Board, which are the decision-making bodies of the ECB, extends to the whole System.

Article 9 - The European Central Bank

The purpose of this Article is to set out in broad terms the basic provisions governing the ECB.

In addition, by giving legal personality to the ECB, Articles 9.1 and 9.2 establish the capacity of the ECB to carry out operations. Article 9.4 confers upon the ECB the function to ensure the implementation of the System's tasks, either through its own activities or through the national central banks in accordance with Article 14.

Article 10 - The Council of the ECB

The composition and voting procedures of the Council of the ECB laid down in this Article reflect the federative structure of the System: all national central bank Governors are ex-officio members of the Council of the ECB which, in addition, will include the President, the Vice President and the other members of the Executive Board. Each member of the Council of the ECB has the right to vote. The principle of "one person, one vote" will apply to all decisions except those of a patrimonial nature (see below). This principle strengthens the decision-making process which must be oriented exclusively towards the requirements for the Community as a whole.

Article 10.2 requires "presence in person" for voting; this would be met by a teleconference. A delegation of voting powers will only be possible if a member of the Council of the ECB is prevented from voting for a prolonged period in which case he or she may appoint an alternate as a member of the Council of the ECB. The emphasis on personal presence underlines that the responsibility for all policy-related decisions rests with the members of the Council of the ECB.

Weighted voting would apply to all decisions of a patrimonial nature which justify the derogation from the principle of "one person, one vote". The Executive Board members in the Council of the ECB will have no weighted votes and will therefore not take part in decisions made under Articles 28, 29, 30 and 32.

In order to ensure an equitable system of balanced rights and obligations, the key for weighting votes will be the same as that for the subscription by the national central banks to the capital of the ECB (Article 29), the allocation of monetary income of the national central banks (Article 32) and of profits and losses of the ECB (Article 33), as well as the transfer of foreign reserve assets to the ECB (Article 30). In the case

of weighted voting a Governor, who is unable to be present, may nominate an alternate to cast the vote.

Both the possibility of a teleconference and the appointment of an alternate member of the Council of the ECB will have to be specified in the Rules of Procedure which the Council of the ECB shall adopt in accordance with Article 12.3.

Article 11 - The Executive Board

This Article defines the composition of the Executive Board and appointment and voting procedures. In particular, the provisions assure the members of the Executive Board of the necessary security of tenure, both by specifying the term of office and the conditions under which the members can be relieved from office. The Article also recognises the need for democratic accountability by involving Community institutions in the procedures for the appointment of the members of the Executive Board and the establishment of their terms and conditions of employment.

Article 12 - Responsibilities of the decision-making bodies

Monetary policy is indivisible and the decision-making process needs to be centralised. The Council of the ECB, pursuant to Article 12, will be the supreme decision-making body on all matters relating to the tasks of the System. Article 12.1 reserves to the Council of the ECB in particular all strategic monetary policy decisions including those relating to intermediate monetary objectives, key interest rates and the supply of reserves in the System and the establishment of guidelines for their implementation. At the same time, as the daily execution of monetary policies takes place in response to market developments, there is a continuous need for operational decisions. The responsibility for such decision-making falls to the Executive Board. However, views differ about the procedure for giving the necessary authority to the Executive Board. All but one of the Community central banks are of the opinion that the necessary operational powers for implementing the monetary policy decisions and guidelines should be delegated by the Council of the ECB to the Executive Board. This legal construction would mean that the Council of the ECB has the right to revoke such powers but would also be obliged to re-delegate them immediately on different terms. The Deutsche Bundesbank is of the view that the Executive Board should be given its own competences and that the Statute should clearly and irrevocably assign to the

Executive Board the task of implementing monetary policy in accordance with the Council of the ECB's decisions and guidelines.

The Rules of Procedure referred to in this Article should govern only the internal management of the ECB and its decision-making bodies. However, where the rules govern important aspects of internal management, they should be included in the Statute. Provisions aimed at binding a person or an institution outside the System would fall under the exercise of regulatory powers and should be included in the Statute.

Article 13 - The President

Article 13 defines the position of the President. It gives him the responsibility for chairing the Council of the ECB and the Executive Board and for presenting *personally, or through a nominee, the policy views and the opinions of the ECB. Provisions concerning the legal representation of the ECB are laid down in Article 39.*

Article 14 - National central banks

Article 14 defines the role of the national central banks in the framework of the System and stipulates that national legislation including the statutes of the national central banks are made compatible with this Statute and the EEC Treaty. The necessary changes in national laws would be undertaken in accordance with normal national legislative procedures.

The national central banks will maintain their legal personality, but subject to Article 14.5 they will form an integral part of the System and will have to act in accordance with the instructions and guidelines of the ECB. Furthermore, the national central bank Governors are members of the Council of the ECB and in this function share the responsibility for the System as a whole. The appointment procedures for national central bank Governors and the minimum term of office laid down in Article 14.2 have been designed with this consideration in mind.

All Community central banks endorse the adherence to the principle of subsidiarity in the implementation of operations undertaken on behalf of the System, i.e. to make use of the national central banks to the extent possible. However, views differ as to how this principle should be embodied in the Statute. Most Community central banks agree on the formulation that to the full extent possible in the judgment of the Council of the ECB the national central banks shall execute operations arising out of

the System's tasks. Some Community central banks prefer the formulation that the Executive Board shall make use of the national central banks, to the extent possible and appropriate, in the execution of such operations.

Article 14.5 enables the national central banks to assume functions other than those to be performed by the System, provided the Council of the ECB finds that such functions do not interfere with the objectives and tasks of the System.

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

Article 15 recognises that, with due regard to democratic accountability, appropriate procedures for co-operation and consultation with Community institutions, including reporting commitments, should be set up in order to ensure transparency and to promote a better understanding of the considerations underlying monetary policy. In Article 15.1, it is understood that the right of participation in Council of the ECB meetings will normally be exercised by the President of the ECOFIN Council.

CHAPTER IV - MONETARY FUNCTIONS AND OPERATIONS OF THE SYSTEM

This Chapter describes the monetary functions and operations that may be undertaken by the ECB and national central banks. The relevant Articles recognise that both are the operational arms of the System and do not prejudice as to how the execution of monetary operations will be distributed among them in line with the principle of subsidiarity (see comment on Article 14). Although national central banks are already authorised under their present statutes to perform many of the operational functions mentioned in this Chapter, reference is made to them in this Chapter in order to reaffirm that they have the necessary operational powers for executing the System's tasks, and to indicate the areas in which operational procedures may need to be harmonised.

Article 16 - Notes and coins

Article 16.1 establishes the exclusive right of the Council of the ECB to authorise the issue of notes, both in a situation when national currencies continue to circulate alongside each other and when there is a single currency. This provision also ensures that notes issued by the ECB and

the national central banks are the sole notes which have legal tender status; it does not exclude the possibility of giving legal tender status to (a limited amount of) coins. The Bank of England wishes 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.

Article 16.2 refers to the situation when national currencies continue to exist. The arrangements for the exchange of notes by national central banks at par value and without any cost are designed to ensure full substitutability between the national currencies. Commercial banks would be free to charge commissions to cover transaction costs but it is expected that competition would reduce these to a level not significantly higher than that for transactions in a single currency.

Article 16.3 is a corollary to Article 16.1. It is understood that coin-holdings by the ECB and the national central banks should be kept to a minimum in order to avoid any significant lending to the issuers of such coins.

Article 17 - Accounts with the ECB and the national central banks

Article 17 establishes the technical prerequisites for the operation of monetary policy.

Article 18 - Open market and credit operations

In accordance with adherence to the principle of free and competitive markets (Article 2.3), this Article enables the ECB and the national central banks to regulate indirectly - and without recourse to administrative controls or restrictions - money and credit market conditions. This form of monetary management relies on financial incentives, leaving it to private market participants to respond voluntarily, and is widely used in countries with deregulated markets.

The nature of a credit institution with which operations will be conducted will need to be circumscribed with reference to agreed Community definitions. A suitable definition for a credit institution might be found in Article 1 of the First Council Directive on the co-ordination of laws and regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions (77/780/EEC, OJ L322/30).

Some Community central banks consider that lending by the ECB and national central banks should be backed by adequate collateral.

Article 19 - Minimum reserves

Article 19 entitles the ECB to require credit institutions to hold minimum reserves on accounts with the ECB and national central banks and defines the means which are at the disposal of the ECB in order to enforce this obligation. This instrument does not rely on the voluntary response of willing counterparties, but imposes an obligation on market participants. The conditions and terms under which minimum reserves can be applied will have to be established by the Council of the ECB.

Article 20 - Other instruments

This Article enables the Council of the ECB to decide on the use of operational methods of monetary control other than those currently in use and specified in Articles 18 and 19.

Article 21 - Operations with public entities

Article 21.1 rules out the possibility of any kind of direct monetary financing of the public sector by the ECB and the national central banks, since recourse to central bank credit could undermine the ability of the System to achieve its primary objective. The provision implies that existing credit facilities to smooth seasonal payment flows will have to be abolished and that operations by national central banks on the primary market of government securities will no longer be possible. However, the ECB and national central banks will not be prevented from purchasing government securities in the secondary market, but only in the context of monetary policy operations.

The function of fiscal agent referred to in Articles 21.2 to 21.4 describes a service traditionally provided by central banks to governments and other public entities. Article 21.4 does not imply lending by the ECB or the national central banks to public entities.

Article 21.5 states that Articles 21.1 to 21.4 do not apply to publicly-owned credit institutions. Without this provision, such credit institutions could not be given credit by the ECB or the national central banks in the same way as private credit institutions.

Article 22 - Clearing and payment systems

Article 22 extends the role currently performed by national central banks in the field of clearing and payment systems to the System as a whole. This may imply that the ECB provides facilities with a view to promoting an expansion of the existing systems within the Community and with third countries and issues regulations in the field of clearing and payment systems.

Article 23 - External operations

The scope of external operations described in Article 23 will enable the ECB and national central banks to perform all operations necessary for the conduct of the exchange rate policy of the Community and the management of foreign exchange reserves.

Article 24 - Other operations

This provision enables the ECB to set up its operational and administrative infrastructure and to provide banking services for its employees. The Article also confirms that the national central banks may continue to perform such operations.

CHAPTER V - PRUDENTIAL SUPERVISION

Article 25 specifies the activities which might be undertaken by the ECB when carrying out the tasks mentioned in Article 3, indent 5, in respect of prudential supervision. The ECB will have an advisory and consultative role in the interpretation and implementation of Community legislation relating to supervisory policies. In accordance with the principle of subsidiarity, Article 25 - in conjunction with Article 14 - does not affect the ability of national central banks and other competent national authorities to exercise supervisory functions or to adopt measures for which they are responsible, having due regard to the objectives of the System. Article 25.2 offers the possibility of designating the ECB as a competent supervisory authority in which case it might formulate, interpret and implement supervisory policies. Any future transferal of competence to the ECB should be specified by Community legislation for which the Treaty would have to provide an enabling clause.

CHAPTER VI - FINANCIAL PROVISIONS OF THE SYSTEM

These provisions establish the financial foundations of the System and ensure its financial autonomy, which is an important element of the principle of independence (see comments on Article 7). *The distribution of rights and obligations in financial matters is based, to the extent possible, on objective indicators and formulae. This implies that there is no discretion regarding the determination of the amount of income subject to allocation (Article 32.2) and, in particular, the determination of the national central banks' shares in the subscription of the ECB's capital (Article 28.2), the transfer of foreign reserve assets to the ECB (Article 30.2), the allocation of monetary income (Article 32.5) and the allocation of net profits and losses of the ECB (Article 33). The same key defined by the criteria laid down in Article 29 thus applies to all commonly shared claims and liabilities. Apart from certain technical and procedural matters the decision-making power of the ECB Council is confined to the increase in the ECB's capital and reserves and, within fixed limits, the transfer of foreign reserve assets to the ECB.*

Article 26 - Financial accounts

As the System has no legal personality, all assets and liabilities relating to the System's operations will be recorded in the balance sheets of the ECB and the national central banks. However, the conduct of a single monetary policy and the need for proper information on sources of money creation throughout the Community will require the consolidation of such assets and liabilities within a single balance sheet structure (Article 26.3). The financial year will be the same for the ECB and the national central banks and in order to ensure the comparability of financial data, the Council of the ECB will establish rules with a view to harmonising the accounting and reporting of operations undertaken by national central banks (Article 26.4). Article 26 does not preclude national central banks from presenting their own balance sheets in a manner consistent with existing national accounting practices.

Although not specifically mentioned in Article 26.3, it is assumed that the consolidated balance sheet will be published together with the annual report referred to in Article 15.3. Furthermore, Article 15.5 provides for the regular publication of consolidated financial statements.

Article 27 - Auditing

Auditing by independent external auditors and the fact that budgetary provisions contained in the Treaty do not apply to the System are essential for the financial autonomy of the ECB and the national central banks. The procedure for appointing auditors involves the Council of the European Communities in accordance with the principle of democratic accountability.

Article 27.1 does not require that the same auditors audit the accounts of the ECB and the national central banks. However, the principles applied by all auditors should be uniform and the number, status and term of the auditors would have to be specified.

Article 28 - Capital of the ECB

The endowment of the ECB with its own capital reflects the institution's status as legal person with its own balance sheet and operations. The national central banks will be the sole subscribers to, and holders of, the ECB's capital. Capital should be paid up out of the assets of the national central banks, i.e. without entailing an increase in national central banks' liabilities. Part of the capital of the ECB might be paid up in gold.

The right of the Council of the ECB to increase the ECB's capital from time to time and to determine the extent to which and the form in which this capital is to be paid up represents an important element of financial autonomy.

The distribution of capital shares (for both the initial capital and increases in capital) according to the key established pursuant to Article 29. Following an adjustment of the key there would be a re-allocation of share capital in accordance with the adjusted key (see Article 29.5).

Article 29 - Key for capital subscription

The key for the subscription of the ECB's capital would be established on the basis of a combination of Member States' shares in the population and the GDP of the Community, with the relative importance of these two indicators being determined by the weights assigned to them. Some

Community central banks are of the view that the criteria for establishing the key should also include financial indicators.

Article 29.2 stipulates that the Statistical Office of the European Communities (EUROSTAT) shall calculate the statistical data on population and GDP since it is the competent institution at Community level in the field. The Community legislation referred to in Article 29.2 would be complementary legislation to be enacted in accordance with Article 42. For GDP, the Council Directive of 13th February 1989 on the harmonisation of the compilation of gross national product at market prices could be made applicable (89/130/EEC, Euratom, Official Journal L49/26).

The percentage shares reflecting the key would be calculated when the Statute enters into force. The same calculation method would apply when the key is adjusted every five years (Article 29.3). The adjustment would be automatic and without recourse to the simplified amendment procedure (Article 41), but there might be some procedural measures which the Council of the ECB would be empowered to take in accordance with Article 29.4.

Article 30 - Transfer of foreign reserve assets to the ECB

In a Monetary Union the exchange rate policy vis-à-vis third currencies is indivisible and consequently the management of official foreign reserves are a matter of common concern. Article 30.1 establishes the procedure under which the ECB will be endowed by the national central banks with a certain amount of foreign reserve assets. The Bank of England does not see any necessity to transfer the ownership of foreign reserve assets to the ECB and considers it sufficient that each central bank agrees to make available a predetermined amount of reserves for the disposal of the ECB.

The amount of foreign reserve assets which needs to be transferred to the ECB is difficult to quantify at the present stage; it will, inter alia, depend on the exchange rate regime of the Community and the future international monetary and financial conditions. However, the amount of foreign reserve assets placed at the disposal of the ECB will have to be sufficiently high to ensure the credibility of the System's exchange rate policy. These considerations are reflected in Article 30.1 which entitles the Council of the ECB to decide within a fixed limit the proportion of foreign reserve assets to be transferred initially to the ECB and the amounts to be called up at later dates.

The ECB may call further contributions of foreign reserve assets beyond the limit set in Article 30.1, but since such calls are indeterminate in size, Article 30.4 stipulates that a legal basis for such transfers will have to be established by Community legislation.

It is likely that at the entry into force of the Statute the level and the composition of the national central banks' foreign reserve assets will differ. The draft text of the Statute empowers the Council of the ECB to make arrangements for enabling the national central banks to meet their obligations under Article 30.

The foreign reserve assets to be pooled through mandatory transfers under Article 30.1 will consist of foreign convertible currencies and possibly gold, but not claims on the IMF (reserve positions, SDRs). The latter assets might be pooled in accordance with Article 30.5, the main purpose of such action being to centralise the financial relations of the Community countries with the IMF. In this case, all claims would be pooled independently of the key used for the mandatory transfers. The application of this provision will require accompanying decisions by Member States appointing the ECB as their Agent at the IMF; this could be reflected in the Treaty or, if the pooling is envisaged for a later stage, be dealt with by Community legislation.

Finally, it is understood that Article 30 does not prejudice the possible role of national central banks in the management of foreign reserve assets transferred to the ECB and in the execution of foreign exchange interventions.

Article 31 - Foreign reserve assets held by national central banks

Depending on the limit set in Article 30.1 and the calls made under this provision, a part of the foreign reserve assets might remain with the national central banks. As changes in foreign reserve assets not only affect exchange rates but also domestic liquidity conditions, Article 31.2 specifies that all external transactions undertaken by national central banks (except those in fulfilment of their obligations towards international organisations) will be subject to approval by the ECB.

All Community central banks, except the Bank of England, consider it necessary for the application of Article 31 (as well as Article 30) that in those participating countries in which foreign reserve assets are held by official bodies other than the national central bank, steps are taken to

transfer these assets to the central bank before the start of Stage Three. This would allow each national central bank to participate in the transfer scheme and would ensure that all foreign reserve assets in the Community would be subject to the guidelines of the Council of the ECB. If that approach is followed a Treaty provision should stipulate the transfer of all foreign reserve assets to national central banks.

Article 32 - Allocation of monetary income of national central banks

This Article specifies the rules for determining the amount of income subject to allocation and its distribution among the national central banks. One Community central bank, pointing to the difficulties in defining rules for income determination and allocation many years prior to these rules taking effect, would have preferred not to lay down specific rules at this time but to embody in the Statute a procedure according to which these rules should be determined at a later stage by the Council of the European Communities, acting by qualified majority upon a proposal of the Council of the ECB.

The monetary income referred to in Article 32.1 represents the return on interest-bearing assets which form the counterpart to bank notes in circulation and deposit liabilities vis-à-vis credit institutions, i.e. the aggregate monetary base held by the national central banks (and, possibly, the ECB). As such income is derived from the performance of the System's monetary policy function, it should be considered common income to be shared out among the national central banks. Any other income earned by the national central banks would not be subject to allocation but be retained by them.

Article 32.2 sets out the method for calculating monetary income which assumes that there would be some convergence in the balance-sheet structures of national central banks. Under this "direct method" certain assets with similar characteristics would be earmarked as counterparts to the monetary base and the actual income thereon would be allocated. Apart from the harmonisation of accounting rules as foreseen under Article 26.4, the application of this method requires guidelines by the Council of the ECB which would determine how assets should be allocated to the monetary base in each national central banks' balance sheet.

Since it is possible that the preconditions for applying the direct method may not be completely fulfilled at the time this Statute enters into force, Article 32.3 entitles the Council of the ECB to adopt for a

period of not more than five years an alternative method for calculating monetary income. This method would determine monetary income indirectly by multiplying the annual average monetary base by a representative interest rate (the "implicit method"). When taking the decision in accordance with Article 32.3, the Council of the ECB would also have to establish a formula for the setting of the representative interest rate.

Notwithstanding the method for calculating monetary income, Article 32.4 keeps open the possibility of deducting certain specific costs from monetary income before allocation. Firstly, if compulsory reserves were remunerated at a uniform interest rate decided by the Council of the ECB, each national central bank's monetary income would be reduced by the interest paid on these liabilities. Secondly, in the event that a national central bank's share in the cost of generating monetary income from the issuance of bank notes were to be much higher than its share in the allocated monetary income, or in exceptional circumstances where a national central bank suffers specific losses arising from monetary policy operations undertaken for the System, the Council of the ECB would be entitled to decide on some form of compensation in order to indemnify the national central banks concerned. However, no other costs would be deductible from the monetary income, i.e. that in accordance with the principle of subsidiarity each national central bank would remain responsible for controlling the level and the structure of operating costs and other expenses.

The total monetary income subject to allocation would be shared out among the national central banks in accordance with the key used for the subscription of the ECB's capital. Since the key for allocating monetary income is the same as that used for distributing the ECB's net profits and losses, no special mention needs to be made in Article 32 of the possibility of monetary income accruing to the ECB. Under the provisions of Article 33 any such income earned by the ECB would be rechannelled automatically to the national central banks and in the same proportion as monetary income is allocated in accordance with Article 32. The reference in Article 32.5 to Article 33.2 reaffirms that a loss incurred by the ECB may, following a decision by the ECB Council, be covered by current monetary income.

Since it cannot be ruled out that after the entry into force of the Statute the application of Article 32 may entail an undesirably large and sudden reallocation of income in comparison with the preceding year, provision should be made for a transitional arrangement in Chapter IX (The

transitional provisions for the System). Such a transitional arrangement should be flexible and transparent and should lay down the specific features of an approach leading in a predetermined manner to the full application of Article 32 within a limited period of time.

Article 33 - Allocation of net profits and losses of the ECB

This Article governs the distribution of net profits and losses of the ECB and the building-up and drawing-down of a general reserve fund. The general principle of commonly sharing financial claims and liabilities in accordance with the key used for subscription of capital also applies to Article 33.

CHAPTER VII - GENERAL PROVISIONS

As has been pointed out in the comment on Article 1, the Statute is based on the assumption that the System is not classified as a Community institution in accordance with paragraph 1 of Article 4 of the EEC Treaty. Instead, the establishment of the System would be mentioned separately in a new paragraph of this Article 4. In order to avoid any legal uncertainty arising from the possible application to the System of general provisions relating to Community institutions, Chapter VII includes the necessary provisions governing the general aspects of the System. In many instances these provisions are broadly similar to those contained in the existing EEC Treaty.

Article 34 - Regulatory powers

Article 34.1 confers upon the ECB the power to issue regulations and take decisions which will obligate third parties. However, the power can only be exercised to the extent necessary for the performance of tasks entrusted to the System under the Statute.

Mirroring in essence Article 189 of the Treaty, Article 34.2 defines the legal nature of regulations and decisions of the ECB. The direct applicability does not rule out the possibility of deferred participation in EMU since in this case the regulations would specify that part or all rules laid down therein would not be applicable in some Member States. Conditions of publication and entering into force of regulations, as well as

notification and enforceability of decisions are made in accordance with Articles 191 and 192. No reference is made to Article 190 since an obligation to state the reasons of a regulation dealing with monetary policy related matters does not appear to be warranted.

Article 34.3 confers upon the ECB and the national central banks the power to enforce measures taken by virtue of regulations issued under Article 34.1. The application of Article 34.3 will require corresponding Community legislation. This provision gives recognition of the principle that sanctions need to be precisely specified ("Nulla poena sine lege").

Article 35 - Judicial control and related matters

The intention of this Article is to ensure the same level of judicial control as the one which is applicable to the institutions of the Community. It would require a modification of the Protocol on the Statute of the Court of Justice in order to permit the submission of observations by the ECB under Article 20 (preliminary rulings) and interventions under Article 37 of the Statute of the Court.

Article 35.6 establishes the jurisdiction of the Court of Justice in disputes between the ECB and a national central bank (see also the similar provision in Article 180 of the Treaty for the European Investment Bank) and enables the ECB to institute proceedings before the Court of Justice against a national central bank in order to establish failure to fulfil an obligation under the Statute. The purpose of Article 35.6 is to close a possible legal loophole which could result from the fact that, given the national central banks' independence from their respective governments, Article 169 of the Treaty might not be applicable.

Article 36 - Staff

The wording of Article 36.1 offers the ECB the necessary flexibility for determining the conditions of employment of its staff. It does not prejudge the legal status of the staff, i.e. whether it would be employed on a contractual basis or would enjoy the status of "officials".

Article 36.2 is in line with Article 179 of the EEC Treaty.

Article 37 - Seat

This provision enshrines the seat of the ECB in the Statute.

Article 38 - Professional Secrecy

This Article is in line with Article 214 of the EEC Treaty.

Article 39 - Signatories

The purpose of Article 39 is twofold. Firstly, it defines the persons who are the legal representatives of the ECB and stipulates the conditions for the exercise of their power. Secondly, Article 39 aims at providing legal protection to third parties when dealing with the ECB and ensures that the ECB would be committed vis-à-vis third parties, even if the contractual signatory (signatories) exceeded his (their) powers.

Although the proposed Article embodies the principle of double signature (except for the President), it is understood that it does not rule out the possibility of the ECB being legally committed by only one member of the Executive Board or one of its staff members or even by a third party to the extent that these persons are given specific and limited mandates by the President.

Article 39 is consistent with Article 13.2 which refers to policy statements (and note to representation in the legal sense).

Article 40 - Privileges and immunities

Article 40 is inspired by Article 28 §1 of the Statute of the EIB and Article 28 of the Merger Treaty. It would mainly imply that the ECB would be exempt from any form of national taxation. However, since Article 32 assumes that the provisions governing the allocation of income apply to income before taxation, the national central banks could be subject to different national taxation laws.

CHAPTER VIII - AMENDMENT OF THE STATUTE AND COMPLEMENTARY LEGISLATION

Chapter VIII introduces a simplified procedure to amend those provisions which do not embody the fundamental principles of the System (Article 41) and also provides for a complementary procedure specifying what steps should be followed where acts of Community legislation are called for in the Statute (Article 42).

Article 41 - Simplified amendment procedure

If the Statute is annexed to the EEC Treaty in the form of a Protocol, it will have the status of Community primary law and any revision of the provisions of the Statute would normally be subjected to the Treaty revision procedure laid down in Article 236 of the EEC Treaty.

Some flexibility, however, needs to be preserved for amending provisions of a more technical nature in response to changing circumstances. For this reason, Article 41 lays down a simplified procedure for amending such provisions. As the procedure only relates to provisions dealing with operational and technical aspects of the System, Article 41 confers the exclusive right of initiative to the ECB. The proposed procedure is in analogy to Article 188 of the Treaty. However, in order to facilitate the decision-making process, the Council of the European Communities shall act by qualified majority.

Article 41.2 enables the Council of the ECB to amend also Article 3 in accordance with the simplified procedure; however, this possibility only refers to additional tasks (and not the basic tasks as currently defined in Article 3); in addition, these additional tasks have to be compatible with the objectives defined in Article 2 and the present basic tasks in Article 3. Any request by the Council of the ECB to amend the Statute by simplified procedure needs to be made on the basis of a unanimous decision (Article 41.3).

Article 42 - Complementary legislation

The application of a limited number of provisions will require complementary Community legislation (see comments on Articles 4, 5, 16, 25, 29, 30 and 34). This complementary legislation should be enacted in accordance with the "normal" legislative procedure (i.e. the procedure for secondary Community legislation). However, as this legislation relates to matters of concern to the ECB, it should be consulted prior to the adoption of this legislation.

CHAPTER IX - TRANSITIONAL PROVISIONS FOR THE SYSTEM

The decisions to be taken concerning the contents of Stage Two and the transition from Stage Two to Stage Three will determine the transitional provisions relating to the establishment of the System and its

functions. These transitional provisions may have to accommodate a number of hypotheses:

- Progressive establishment of Economic and Monetary Union

If the transfer of functions entrusted to the System is progressive, the Statute must accommodate this and stipulate that measures will be taken to ensure that the tasks are carried out.

- Participation in the Economic and Monetary Union

If Member States join the Economic and Monetary Union on different dates, the implications of these successive accessions will have to be accommodated by spelling out the restricted rights and obligations of those who join at a later date (see comments on Article 1).

- Start-up procedures

The start-up procedures will define, for example, the role of the Committee of Governors of the Member States of the Community in the appointment of the first President of the System and the first members of the Executive Board.

Furthermore, in the context of the allocation of the System's income among national central banks (see comment on Article 32), there will also be a provision which will allow for the introduction of temporary arrangements to avoid major redistributive income effects at the inception of the System.