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DATE : 21 March 1991

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MESSAGE : Dear Gunter,
Please find attached, on behalf of Mr. Rey, our reactions to the
Secretariat's notes on the simplified amendment procedure and the
general provisions of the draft statute.

Kind regards,


Signature(s) :

If the message is garbled, please call :

National Bank of Belgium

March 21, 1991.

Comments on the note of the Secretariat of 6th March on
"Simplified procedure for amending the Statute of the ESCB
and Complementary Community Legislation"

1. The procedure

Preliminary remark : the simplified amendment procedure and the list of provisions subject to this procedure are of course interrelated questions; our views on the latter depend to some extent on decisions about the former.

(a) Right of initiative

The choice is between

- an exclusive right of initiative of the Commission;
- a competing right of initiative (of the Commission, a Member State or the ECB, for ex.).

The granting of an exclusive right of initiative to the Commission is in conformity with the legislative procedure.

A competing right of initiative as it is proposed before the IGC by the Belgian government is more in line with the revision procedure of article 236 (which also provides for competing initiatives).

It is perhaps important to observe that article 149 (necessity of unanimity in order to amend a proposal) is not applicable in the case of a competing initiative. The sole effect of the initiative is to start the process of amendment.

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(b) Consultation

If the initiative does not come from the ECB, it has to be consulted. The appropriate majority requirements for ECB decisions in this respect should be specified.

A solution could be to provide, as in the French and Belgian government proposals before the IGC, that unanimity would be required in the Council of the Community if the ECB has given an opinion contrary to the proposed reform.

(c) Conditions for decision-taking

- The Council alone : would not be an appropriate procedure.
- The Council in co-operation with the Parliament or in co-decision with the Parliament (with stringent majority requirements) : this option would have our preference, but it is a question which has to receive an answer at the political level, depending on the powers the IGC on Political Union is prepared to recognize to the Parliament.

Majority : it can either be qualified majority - with possibly a favorable vote cast by 8 of the 12 Member States - or unanimity (see above). Simple majority would not apply.

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2. List of provisions subject to the procedure

In our view, the list has to include :

- articles 3, 4, 5 and 6;
- among the institutional provisions : 15.4 and 15.5;
- most of chapter IV as proposed, except article 21.1;
- article 25 on prudential supervision;
- articles 26, 28.2, 29 and 30 in the chapter on financial provisions;
- articles 33 and following articles except articles 37 and 39 in the chapter on general provisions.

It goes without saying that the simplified procedure has to respect the scope of the provisions which are not open for such procedure.

3. Complementary Community legislation

The complementary legislation referred to in the articles of the Statute has to be adopted through normal legislative procedure. The consultation of the ECB should however be requested. It should be noted that when complementary Community legislation is referred to in the Statute, the legislative bodies of the Community are under obligation to act. Failure to act could give way to an appeal to the Court of justice for inaction.

The treaty should insert a provision giving the necessary legislative powers to the Community in the field covered by the Statute.

National Bank of Belgium

March 21, 1991.

AMENDMENTS TO GENERAL PROVISIONS

Article 33 - Regulatory power.

33.1. In line with our previous comments and suggestions, we propose to come back to the original drafting of the provision, i.e. :

"The Council and the Executive Board shall, in accordance with their respective responsibilities, make regulations and take decisions, necessary for the performance of tasks entrusted to the System under the present Statute."

33.2. We would add the following considerations in order to support our suggestion to delete the words "participating in the ESCB" : a regulation directly applicable in all Member States (in French : "dans tout Etat membre") means that, although it may include rules which are only materially applicable in one or some Member States, it will nevertheless be a legal act applicable on the whole territory of the Community. Any judge should eventually take it into account as directly enforceable law (and not as foreign law or as a mere fact) and any individual could avail himself of it if he has an interest to do so.

Article 34 - Enforcement.

A system of sanctions, be they "only" administrative ones, cannot be made enforceable by an independent body on the basis of a mere mention in its Statute without the backing of an appropriate legislative framework.

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A Community legislation on sanctions is thus needed, comparable, for example, to the "Ordnungswidrigkeitengesetz" in Germany.

The reference to Community legislation should therefore be left in the text of this article.

Article 36 - Staff.

The provision as it stood before amendment by the Secretariat seemed appropriate to us, as it allowed the ECB to lay down staff regulations for its officials (which would in no way assimilate these officials to civil servants of the Community, who have their own regulations) while making it still possible to hire other servants on a contractual basis (temporary, local staff, etc.).

The new drafting suggested by the Secretariat excludes the possibility of having officials under a regulatory regime.

This new draft would be acceptable to us if it is agreed that :

- contracts would not only apply to temporary detachment of national central bank servants to the ECB;
- the ECB would be able to employ staff with contracts of indeterminate duration.

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Article 39 - Signatories.

Articles 13.2 and 39 mix up two different problems : the organic representation of the ECB and the contractual representation (proxies) and there is a contradiction between these two articles.

Organic representation means that the power for bodies or persons to represent an entity externally derives directly from the statute of this entity; the bodies or persons endowed with the authority to represent are under no obligation to demonstrate to third parties the existence or the scope of this authority.

Contractual representation implies that the mandatory has to prove to third parties the authority and the scope of the powers which have been conferred upon him (by a proxy) by the organ having the power of external representation.

There is an inconsistency in the proposals made in the Secretariat's note between the fact that the president who has no power to sign alone non administrative acts would have the right to "delegate" to two staff members a power he has not for himself.

The distinction between administrative and non administrative acts is not very fortunate and goes contrary to the tendency of Community company law not to introduce distinctions in the scope of any delegation of the authority to represent.

We therefore propose to delete article 13.2 and to draft a separate article concerning the representation of the Bank, as follows :

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Article ... - Representation.

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

The last part of the article relating to the proxy that the President can give to two staff members brings about the following remarks :

1. The Bank's organic representation with regard to third parties implies the power to give proxy. Thus it is not strictly necessary to confirm it in the Statute, unless it has to be ruled out that two members of the Board can give general proxy.
2. The power given to the President by this provision to authorize two staff members to sign on behalf of the ECB does not prejudice the way this decision is taken.
3. The attention is drawn to the different legal regime of the proxy in the various Member States. In Germany, the limitations of the agent's power are not opposable to third parties while, in France and in Belgium, on the contrary, they are opposable to them. The drafting proposed suggests however that the Bank is validly committed in any case, even though the signatory exceeds his powers.
4. The proposed article on representation provides for the possibility of a general proxy only for two staff members of the Bank. It is understood that it does not rule out the possibility of specific and limited mandates for only one official of the Bank or even for a third party.