De Nederlandsche Bank NV
Legal Department

21 September 1990

COMMENTS ON DRAFT STATUTE OF THE EUROPEAN CENTRAL BANK (ECB) AND OF THE EUROPEAN SYSTEM OF CENTRAL BANKS (ESCB)

Following are the comments on the Draft Statute in its version of 14 September 1990.

1 It might be a good idea to state, by way of explanatory memorandum, that the present Draft Statute is presented as a text for introduction into a Protocol to the EEC Treaty. This means that it will have the status of primary EC law, i.e. that of a Treaty itself.

In this explanatory memorandum, a simplified amendment procedure should also be included. I propose the following text:

"Articles (here the numbers of the articles are given which deal with staff regulations, the raising of the amount of capital for the ECB, technical provisions concerning the annual accounts and monthly/weekly returns) may be amended on a proposal from the Commission or of any Member State, with the assent of the Council of the ECB, followed by an affirmative decision of the Council and the European Parlement."

In addition, there should be an enabling clause providing for supplementary tasks, for instance in respect of prudential supervision (see under 3 below).

2 I think that it would also be a good idea to include in the explanatory memorandum or comments a reference to the possible outcome of the second Intergovernmental Conference (IGC II) concerning political union. The Committee of Governors, which is to present this Draft Statute to the European Council, should indicate that the appropriate Community organs (Ecofin, Committee of Governors, Monetary Committee) should be involved in the assessment of any consequences of IGC II's outcome for the results of IGC I on EMU. This is especially important for the provisions concerning economic union (budgetary policy and the like) and for the provisions on interinstitutional cooperation and on the method of appointment of members of the ECB's governing bodies.

3 In respect of Article 3 (Tasks) I wonder whether the enabling clause, called for in the comments sub (b) should not be given in the text itself. This might be done by adding the following:

"Article 3 (2) On a proposal from the Council of the ECB, adopted by the Commission, the Council and the European Parlement may decide to confer other tasks to the ECB, provided that the objectives mentioned in Article 2 are respected. The Council shall decide by qualitative majority/unanimity. The European Parlement shall decide by a majority of its members/a two-third majority of its members/a two-third majority of members voting and a majority of its members."

(Of course, the actual decision-making process will be decided at the political level, or in IGC II.)

4 An amendment as proposed sub 3 above may be particularly useful in respect of prudential supervision. Here, an adequate clause should provide for further tasks which the ECB may undertake in the area of supervision with a view to the solvency and liquidity of the credit institutions of the common banking market. Personally, I think that the formulation of the sixth indent of Article 3 is unnecessarily vague. I would propose, as a minimum, to delete the words "as necessary", but would prefer the following phrasing:

- 'to formulate, harmonise and coordinate, in close collaboration with the supervisory authorities of the Member States, policies in respect of the interpretation and implementation of prudential supervision of credit institutions and other financial institutions which are the subject of Community legislation.'

This task, and the other tasks enumerated in Article 3, should be conferred upon the ECB.

5 Generally, it should be noted that the 'System', not being a legal person, cannot perform tasks (Article 3), conduct operations (Articles 15 ff), own reserves, etc. It is necessary to make a clear distinction between the ECB and the System and to insert 'ECB' whenever the tasks, operations, properties or decision-making bodies of the 'System' are dealt with in the present text. The actual draft does not provide the ECB with its own organs or permitted operations. I will come back to this deficiency in many comments below.

In a similar vein, in a legal text a distinction should be made between the 'Community' (used throughout the text) and the 'Union' (used in the commentary). Probably, it would be wisest, at this stage, only to introduce the concept of the Community and to specify in the comments thereto that this may need amendment or further elaboration in case the Community and the EMU would (temporarily) not coincide.

6 In Article 4 concerning the ESCB's advisory functions a problem emerges which should also be considered in respect to other provisions (see 4 and 5 above). It is the question whether the ECB or the System should be the entity entrusted with a specific task. The present wording seems to confuse the advisory functions which may already be excercised by the central banks of the Member States and the additional advisory function of the central institution. Stating that 'the System' shall be consulted may provide for confusion in the actual implementation of the advisory function. It would seem more efficient to entrust the task of giving opinions to the ECB as the System's central institution (in which the central banks of the Members States are represented through their men and women in the Central Bank Council). Thus, an opinion may emanate from the ECB on, for instance, budgetary policy or proposed EC legislation

in the area of banking or finance whereupon later (in the process of implementing common decisions in the area of economic policy or directives adopted by the Community legislator), the national central banks will also have to give their opinion to the authorities of the Member States.

7 The comment to Article 4, which states that the advisory functions should be inserted into the Treaty itself, puzzles me. If the Statute has the status of Treaty law, is it really necessary to repeat certain texts, simply because they impose obligations on others than the ECB or the national central banks? Also, the reference to 'other' Community institutions should be deleted in view of the fact that the legal experts proposed (and the Alternates accepted) that the System nor its central institution should be a Community institution in the sense of Article 4 of the present EEC Treaty.

8 Also in respect of Article 5 concerning the collection of statistical information, it seems necessary to distinguish between the ECB and the System as a whole. Now already the central banks of the Member States together collect the necessary information as Article 5 (1) requires the System to do. It would seem to be provide much more clarity if the ECB would be entrusted with the task of information collecting which task it may delegate as much as possible to the central banks of the Member States as Article 5 (2) rightly provides.

9 Is the correct technical term for a non-member State not: third country? If that is so, the relevant text in Article 5 (1), second sentence, should read: 'or third countries'. See also Article 22.

10 The present text does not make clear whether it provides sufficient basis for the requirement of economic agents or others to report to the ECB or to the Member States' central banks. Probably this should be further specified in secondary legislation. I propose the following text for Article 5 (3):

'Article 5 (3) On a proposal from the Commission, with the assent of the Council of the ECB, the Council and the European Parlement may adopt regulations specifying the natural and legal persons which are subject to reporting requirements for statistical purposes or for other tasks entrusted to the ESCB. Such regulations shall specify which data are to be provided and at what intervals. They shall further specify the confidentiality which is to be respected with a view to the data gathered.'

In a comment to this new Article 5 (3) reference should be made to the confidentiality regime of, for instance, the Second Banking Directive. The wording in the present draft Statute is not adequate, since it requires the ECB to follow a (unspecified) confidentiality regime which is only applicable through implementing legislation at the Member State level and hence cannot be applied directly to the ECB. Even if all the data collection is actually done by the national central banks, the possiblity

of reporting to the central institution requires this institution itself to be subject to a confidentiality regime. This can only be specified either by the Treaty (or the Statute) itself or by an EC regulation.

11 Although I fully recognise the necessity to allow, certainly at this stage, the national central banks to participate on their own in international monetary institutions, I wonder whether it would not be correct to provide that the ECB shall represent the EMU in questions concerning its single monetary policy. A representation by various central banks may either mean inefficiency or representation by only certain central banks.

Further, I suggest to qualify Article 6 (2) in view of the fact that certain international monetary institutions only recognise States and not central banks as members although central banks may represent these member countries (I refer specifically to the IMF). It might be necessary for the international recognition of the ECB as an international legal person, to provide in its Statute that it may represent the Community (and not only: the System). Finally, it might be efficient to provide that the Community may be represented by the ECB when international agreements are concerned in the area of monetary, finance and banking, subject, of course, to a mandate from the political authorities.

12 We should critically assess a set of provisions under which two governing bodies are introduced for the decision-making process of the System as a whole, while a governing body of the ECB is only summarily provided for (Article 7 (1) versus Article 12 (1)). Personally, I propose that the same result can be reached by providing for the Council and the Executive Board to be the governing bodies of the ECB and for the ECB to be able to give instructions to the central banks of the Member States, as has been provided already in Article 13 (3). This would also prevent the very strange situation, from a legal point of view, that the ECB would neither have an objects clause nor a proper regulation of its governing bodies. If this proposal were to be followed, it might be a good idea to include the words: 'and the ECB' in the provisions concerning the objectives of the System (Article 2) and its tasks (Article 3).

The present text does not make clear where responsibility lies (and, indeed, liability arises) when a decision is made by the Council or the Executive Board. The System as a whole cannot be responsible and liable since it lacks legal personality. A solution under which the ECB is responsible (except when a national central bank has acted outside the confines of the instructions from the ECB) would be logical and legally sound. Third parties dealing with the ECB or with the central banks of the Member States under instructions from the ECB will be most puzzled by the inaccuracy of the present drafting of the ECB's Statute.

13 I propose that the Statute provides that the President is the Governor of the ECB. Perhaps there should also be a paragraph which delineates his responsibilities, e.g. as a spokesman for the ECB (see Article 14).

14 The autonomy of the System and its constituent parts would be enhanced if also the central banks of the Member States are mentioned in Article 8. I would propose that 'neither the ECB, nor the national central banks, or any member of a decision-making body of either (...)' are to receive instructions.

A small technical point is that the (forbidden) instructions may come from Community institutions, Governments of the Member States, or other bodies.

15 The confidentiality restraint in respect of the proceedings of Council meetings (Article 9 (4)) may conflict with the requirements to give opinions, to report to the European Parlement, to the Commission or to the Council as well as with the necessity of democratic control. I think a more balanced provision could read as follows:

"Article 9 (4) The proceedings of the meetings shall be confidential. Subject to the requirements of interinstitutional cooperation or public accountability (Articles 14 and 31) and the requirement that decisions of a general nature be published (here a reference should be included to the provision enabling the ECB to adopt decisions binding banks), the outcome of Council deliberations shall only be made public pursuant a specific Council decision to that effect."

16 If the ECB is to have one set of Rules of Procedure, concerning the organization of both its Council and its Executive Board, this should be specified. Now, Articles 9 (5) and 10 (6) may be read as providing for two sets of 'internal rules'.

17 The proposed procedure for nominating members of the Executive Board (Article 10 (2) for the President and Article 10 (3) for the other members) would seem to be in conflict with the present institutional set-up of the Community since a direct democratic link is missing: only in case of appointment of the President does the European Parlement have a mere right to be consulted, while no other institution of the Community is involved in the appointment procedure. It would seem advisable to include the Commission in the nomination process. Of course, the outcome of IGC II will have a bearing on these two provisions (see remark no 2 above).

18 Furthermore, one may request why the term 'Council of the System' is used in these two provisions while in others the shorthand 'Council' is used, with the possibility of confusion with the Council of ministers.

19 Further to previous remarks concerning the lack of precision of the provisions concerning the ECB, one wonders why Article 11 (1) does not confer upon the Council the task of taking decisions necessary for the performance of everything the ECB has to do. This could be achieved by adding 'and the ECB' after 'to the System' in the first sentence of Article 11 (1), or by replacing 'the System' by 'the ECB'.

20 There is no apparent procedure for the delegation of powers by the Council to the Executive Board (to be regulated in the Rules of Procedure?). The statement in the comments on revocation and re-delegation should be included in the text. Thus, Article 11 (1) would be supplemented by the following sentence:

'The Council may revoke such powers and re-delegate them on different terms.'

Should the Statute (or the Rules of Procedure) provide for publicity to be given to the (terms of the) delegation so that third parties may rely upon them in their dealings with the ECB?

21 If the legally more efficient set-up of a central institution which is empowered to give instructions to the peripheral institions is followed, this would have consequences for Article 12 and for Article 13. For instance, the national central banks would be made subject to policy guidelines and instructions from the European Central Bank. As its administrative bodies are the Council of the Executive Board, this way of formulating leads to the same result as that provided by the current text of Article 13 (3) while being legally far more acceptable.

22 In this respect, it should be noted that a specific provision on the responsibility and liability for 'non-system operations' of the national central banks should be included, for instance in Article 13 (5).

23 I do not see a valid reason why the President of the European Central Bank is not to be invited to meetings of the Commission when matters relating to the System's objectives and tasks are discussed. I would propose an amendment to that end in Article 14 (2). Article 14 (2), or a Treaty provision, should also state what the ECB President may do in Council (and Commission) meetings. Presumably: give opinions, but not vote.

Similarly, the Commission could be included in the organs to which the ECB should submit its annual report.

Finally, the apparent lack of democratic accountability in the present draft could be remedied by a requirement (and not simply a possibility) to appear before and to report to (and not simply: to attend) meetings of specialised committees of the European Parlement. The present text, drawn as it is from the Council Decision taken with a view to Stage One of EMU (Article 3 of Decision 64/300/EEC, as amended by Decision 90/142/EEC), seems insufficient.

24 Should Article 15 (2) not specify what form of Community legislation is to be adopted in respect of the legal tender status of Community currencies? Also, should there not be a clear indication that this provision applies to the transitional period during which Community currencies of the present denominations (sterling, lira, Deutschmarks, guilders) are

still circulating? The necessity to regulate on payment of monetary debts by way of 'book money' (monnaie scripturale) may also be acknowledged in the Statute. A text which is to last well into the 21st century should not confine legal tender status to coins and notes but should allow for bank transfers in ecu to discharge a monetary debt.

The comment sub (d) is incorrect where it refers to the putting into circulation of coins 'by the ECB' in the UK and the Netherlands. This should read: 'by their central banks'.

Also, I wonder whether it can really be left to the ESCB to determine the denomination of coins. Is it not up to the (Community) legislator to determine the denomination of bank notes and coins?

Finally, it should be made clear that the ECB is also empowered to issue bank notes and coins (which, after all, constitute debts of a legal entity, which the System itself is not). Whether the ECB will make use of this power or rather the national central banks, remains for the Council to decide.

25 I consider it strange, indeed, that the ECB is empowered to conduct all types of banking transactions in relation to third countries (Article 22 (3)), while within the Community its range of permitted activities is much more narrowly circumscribed. The present structure of chapter IV empowers the System to conduct certain operations for certain ends only (buying and selling marketable instruments can only be done with a view to open market and credit operations, and not for instance with a view to underpinning the stability of the financial system). The power to buy and sell foreign exchange seems to be related to operations with third countries only and not to the purely internal objective of influencing domestic interest rates.

In order to prevent these unnecessary constraints I propose:
- to delete the words 'in order to influence money market conditions in the Community,' in Article 17 (1)
- to divide Article 22 into two, one provision dealing with relations with international organisations elsewhere (which would find its proper place in Article 6) and another provision on the ability, without reservations, of the System and the ECB to buy and sell foreign exchange and securities
- to indicate that the powers given here are given to both the ECB and to the national central banks individually. Thus, the harmonization of the statutes of the central banks of the Member States would be greatly facilitated (since under EC law they would then be directly empowered to effect the operations enumerated in the ESCB Statute). It is necessary, however, also to empower the ECB itself to make these operations. The 'System' as such is not a legal person and should not be the subject of the provisions concerning operations. Hence I would prefer to delete 'the System' and to write: 'the ECB and the national central banks'.

26 I wonder whether the minimum reserves and other instruments mentioned in Articles 18 and 19 should not be further specified in secondary Community legislation. Unclear is whether this is meant by the reference in Article 18 (1) to 'the Council'. The ability to 'penalise' credit institutions requires further clarification (what sanctions, what appeal procedure), since this is far too open-ended a provision to be acceptable in a democratic society under the rule of law.

27 Article 20 seems to have been drafted in successive stages: Article 20 (3) should refer to Article 20 (1) and not to Article 19 (1) and Article 20 (5) is sufficient and does not need to be supplemented by the last sentence of Article 20 (1) on publicly-owned credit institutions.

28 Finally, I would propose that Article 23 would not be limited to operations of an administrative nature, but would specifically provide that the ECB and the central banks of the Member States are empowered to conduct all operations 'conducive to the tasks of the System'. Thus, Article 23 may read:

'Article 23 Subject to Article 20 (1) and in addition to the other operations enumerated, the ECB (and the national central banks) may enter into any operations conducive to (or: necessary for) the fulfilment of its (their) tasks, including operations which serve their administrative purposes or their staff.'

If this, more open-ended approach is considered too ambitious, I propose to limit the range of powers of the ESCB by including a general prohibition to engage in operations which would endanger its liquidity or solvency. Under this system, the simplified amendment procedure would only be used to confer other tasks upon the System's legal entities and not to permit a wider ambit of operations.

29 By way of concluding remarks I wonder whether a provision should be inserted requiring the ECB to publish its decisions of a general nature (for instance on minimum reserve requirements) in the Official Journal of the EC. Its consolidated financial statement could also be published there. Perhaps this can be provided for in the specific clause dealing with general provisions relating to Community institutions. In this respect I propose that the E(S)CB be also mentioned in Article 5 ('Community loyalty'), in Article 6 (principle of economic policy coordination), Article 190 (motivation of decisions) and Article 191 (publication thereof).

I would prefer that the Court of Auditors is not empowered to examine the accounts of the ECB, which would follow from Article 206a. In view of the different treatment of the central banks in this respect it would seem more appropriate to entrust such a task to a special auditing committee, to be established under the Statute.

Similarly, Article 199 and following should exclude the E(S)CB from inclusion into Community budget whilst at the same time providing for its consultation in the process of drafting the Community budget.

A specific confidentiality clause would seem to be called for (see Article 214) a well as a clear liability rule (see Article 215). Also provisions on the seat (Article 216) and the languages (Article 217), as well as on the E(S)CB's position vis-à-vis the European Court (Articles 173, 174, 175 and 177, as well as 178, 181 and 184) are necessary.

(Please note that under this heading, references are to Treaty provisions).

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