

PREPARATION OF STAGE THREE OF EMU AND DECISION-MAKING POWERS OF THE EMI

1 INTRODUCTION

The irrevocable determination of parities will necessitate the formulation and implementation of a single monetary policy from the beginning of Stage Three in the countries which meet the criteria for participation in Stage Three. Such a move requires considerable preparatory work, including not only the presentation of a global framework in a blue-print, but also concrete action in several fields, both in Member Countries and at Community level: legal reforms, institutional changes and appropriate information systems. A good example is reserve requirements. Their introduction or harmonisation implies changes in the regulatory framework, the establishment of reporting systems, preparation with banks and, finally, a period of testing. Another example is the organisation of a decentralised procedure of intervention of the ESCB. This implies the adaptation of local rules of the game, the use of compatible payment-against-delivery systems for the collateralisation of the repurchase agreements (for instance), and possibly related changes in legislation.

The Treaty defines the transition from Stage Two into Stage Three in Articles 109j(3) and (4) and 109l(4) through an interim period starting when the Council meeting in the composition of the Heads of State or Government adopts the decisions on the starting date of Stage Three and/or the decision on which Member States fulfil the necessary conditions for the adoption of the single currency, and ending on the date of start of Stage Three, when the irrevocable fixing of the parities is adopted. In that period the ECB/ESCB is established and the EMI ceases to exist and enters into liquidation. The length of this interim period is not clearly defined in the Treaty. In different papers ("Timing issues related to the decision-making process for the transition to Stage Three" and "The changeover to the single currency and the ESCB")¹, the issue of the length of this interim period is discussed and it appears that a lengthy interim period (i.e. more than six months) would have substantial disadvantages. It may therefore be expected that this interim period, by necessity short in time, will not allow the ECB to carry out all the substantial preparatory work for Stage Three which is needed to implement the single monetary policy as from the beginning of Stage Three in Member States without

¹ These papers are currently under consideration in the competent Sub-Committees and Working Groups and are expected to be submitted to the EMI Council at its next meeting.

a derogation. Therefore, the EMI should carry out such preparatory work whilst only the finishing touch could take place in the above interim period.

This memorandum deals with potential tensions between, on the one hand, the need to prepare the appropriate arrangements for Stage Three well in advance of the date where the ECB is established and, on the other hand, the scope of the decision-making powers granted by the Treaty to the EMI with regard to the preparation of Stage Three. Special attention is paid to the prerogative of the future ECB and of the national central banks (NCBs) in Stage Three.

2 THE EMI'S MANDATE WITH REGARD TO THE PREPARATION OF STAGE THREE

The EMI's mandate with regard to the preparation of Stage Three is particularly laid down in Article 109f (3) of the Treaty establishing the European Community (the "Treaty") and Articles 2 and 4.2 of the Statute of the EMI.² Article 2 states that the EMI shall contribute to the realisation of the conditions necessary for the transition to the third stage, in particular by making the preparations required for the establishment of the ESCB, the conduct of a single monetary policy and the creation of a single currency. Article 109f (3) of the Treaty and Article 4.2 elaborate this objective by stating that the EMI shall, at the latest by 31st December 1996, specify the regulatory, organisational and logistical framework necessary for the ESCB to perform its tasks in the third stage with particular attention to the single monetary policy, statistics, operations to be undertaken by the NCBs in the framework of the ESCB, cross-border payment systems and the preparation of ECU banknotes. This framework shall be submitted by the Council of the EMI for decision to the ECB at the date of its establishment.

² References to Articles in this memorandum are references to Articles of the Statute of the EMI unless indicated otherwise. Equivalent Articles in the Treaty are generally not referred to for reasons of brevity, unless there is a particular reason to make such a reference.

3 THE SCOPE OF THE EMI'S COMPETENCE WITH REGARD TO PREPARATORY WORK FOR STAGE THREE

3.1 EMI and ECB

The use of the word “specify”³ in the EMI's mandate (see above, paragraph 2) raises the question as to whether the EMI is only empowered to prepare a blueprint for Stage Three or whether its mandate also extends to the initiation of implementation measures during Stage Two.

It follows from the words “for decision to the ECB” in Article 4.2 (see above, paragraph 2) that the ultimate decision-making power with regard to the implementation of the appropriate arrangements for Stage Three lies within the sole, exclusive, competence of the ECB. The rationale of this situation is to be found in the different nature of the institutions, the EMI without and the ECB with decision-making powers in the monetary field, and the (likely, initial) difference in the composition of its decision-making bodies, the EMI Council consisting of all Governors of the NCBs and the members of the Executive Board of the ECB and the ECB Governing Council consisting of those Governors whose NCBs participate in Stage Three.

The above does not preclude the EMI from initiating implementation measures for Stage Three during Stage Two to the extent that such action is necessary to ensure that all technical preparations have been made in time for the start of Stage Three. The effective fulfilment of the EMI's mandate and the safeguarding of the interests of the “unborn child”, the ECB/ESCB, requires such a course of action explicitly, provided that the EMI ensures that the ECB will avail itself of a high degree of discretion in its ultimate decisions. It also seems that the EMI itself has a wide margin of discretion when assessing, on a case-by-case basis, the need for implementation measures during Stage Two without prejudicing the ECB's prerogative.

3.2 Legal considerations

From a legal point of view, any action initiating implementation measures in the above context will find a sound basis in the EMI's Statute (and the Treaty). Firstly, Article 15 explicitly provides for legal instruments which may, in the appropriate cases, underpin implementation initiatives (particularly guidelines and decisions; see below, paragraph 4). Secondly, the word “specify” in Article 4.2 should be read in conjunction with the areas to which particular attention should be paid,

³ “Festlegen” in the German text of the Statute and “préciser” in the French version.

as mentioned in the five indents in Article 4.2. The wording of the activities required (“prepare”, “promote”, “supervise”) indicates that the EMI’s efforts should go further than merely designing a blueprint for Stage Three. Finally, the EMI’s Statute does not prevent the EMI from making progress towards Stage Three, inclusive of the initiation of implementation measures, within the usual framework of the activities of Working Groups and Sub-Committees in accordance with the long-established tradition of the Committee of Governors. This finds support in Article 4.1 regarding co-operation between the NCBs within the framework of the EMI.

In addition to the above, there are two further legal considerations on which the EMI may base its competence to initiate implementation measures. Article 31.1 of the Vienna Convention on the Law of Treaties states that a treaty should be interpreted in good faith in the light of its object and purpose. A reasonable interpretation of the EMI’s Statute requires that the EMI is in the position to initiate implementation measures in order to effectively fulfil its mandate and to enable the ECB/ESCB to fulfil its mandate. Any other interpretation would make the EMI a lame duck whose defeat would already be incorporated in the Treaty, which could never have been the intention of the drafters thereof. In addition, in the event that the Treaty on European Union and particularly the Statute of the EMI did not give an explicit basis for the application of instruments necessary to fulfil the EMI’s mandate (which is not the case, as explained in the previous part of this paragraph), the “theory of implied powers”, generally accepted in international law, would become relevant. This theory entails that, on the basis of the “principle of effectiveness” (“effet utile”), once competence exists, the necessary powers to perform a task are deemed to be implicitly attributed. The theory has been endorsed by the International Court of Justice which stated in Reparations Case, ICJ Reports (1949) 174 et seq.: *“The rights and duties of an entity such as the Organisation [in this case the United Nations] must depend upon its purpose and functions as specified or implied in its constituent documents. Under international law, the Organisation must be deemed to have those powers which, although not expressly provided for in the Charter, are conferred upon it by necessary implication as being essential for the performance of its duties”*. The European Court of Justice also endorsed the doctrine, inter alia, in a judgement dated 9th July 1987 in joint cases 281, 283 - 285 and 287/85, where it was stated *“it must be emphasised that where an article of the EEC Treaty confers a specific task on the Commission, it must be accepted, if that provision is not to be rendered wholly ineffective, that it confers on the Commission necessarily and per se the powers which are indispensable in order to carry out that task”*. This applies, mutatis mutandis, to the EMI as well.

The above reflects the fact that the development towards Stage Three is, by nature, an evolutionary process requiring intermediate and cumulative action during Stage Two. It should be emphasised that non-fulfilment of the EMI's mandate could be challenged under Articles 109f(9) and 175 of the Treaty before the European Court of Justice by other Community institutions and Member States on the grounds of "failure-to-act". Lack of action from the side of the EMI may also lead to a situation in which other Community institutions will try to fill in the existing gaps with the EMI thus losing the initiative.

4 VOTING PROCEDURES WITHIN THE EMI

4.1 Introduction

As explained above, the EMI has a variety of instruments at its disposal to fulfil its mandate, inclusive of the legal acts mentioned in Article 15. An annex to this note contains the voting requirements for these instruments as laid down in Articles 10.3 and 10.4. The table shows that the general rule is a simple majority, whilst a qualified majority or even unanimity is required only in exceptional cases. These cases relate to sensitive areas such as the publication of opinions and recommendations on monetary policy issues, the financial position of the EMI and contributions of the NCBs and the implementation of Stage Three. Decisions taken in the context of Article 4.2 and binding upon the NCBs, to whom they are addressed, require unanimity, whilst non-binding guidelines⁴ on the implementation of Stage Three require a qualified majority.

4.2 Decisions under Community law

In general, decisions⁵, taken under Community law by Community institutions and binding on the addressees are governed by Articles 189 to 192 of the Treaty. These Articles, inter alia, specify the nature and legal effects of decisions and also contain rules relating to the legal basis, reasoning, notification, effectiveness and enforcement. There are many types of decisions, some authorising an action, others imposing obligations. Case-law of the European Court of Justice has frequently dealt with the problem of how to distinguish a decision from non-binding communications, opinions or recommendations. In Case 54/65 (*Compagnie des Forges de Châtillon et alt. v. High Authority*) the European Court of Justice defined a decision as "*a measure emanating from the competent authority, intended to produce legal effects and constituting the culmination of a procedure within that*

⁴ "Leitlinien" in the German text of the Statute and "directives" in the French version.

⁵ "Décisions" in the French version of the Statute. The German text uses "Entscheidungen" and "Beschlüsse" synonymously, thus indicating that decisions may take various forms.

authority, whereby the latter gives its final ruling in a form from which its nature can be identified". Judgements relating to the question as to whether these conditions have been met suggest that the Court is, to a large extent, influenced by the importance which a positive or negative answer may have for the legal protection of the addressees of the decisions. In this connection, the Court has already ruled several times that the distinction between the various categories of legal acts is of a substantive rather than a formal nature. It is not the form or a name given to a measure by an institution but rather its object or content which are decisive for the determination of its legal status and effects.⁶ It follows from the above that the legal effects of an act are the decisive factor when assessing whether such an act can be classified as a decision.

4.3 Decisions of the EMI

Articles 189 to 192 of the Treaty have been elaborated for the EMI in the above Articles 15, 10.3 and 10.4 and therefore paragraph 4.2 above applies *mutatis mutandis* to decisions taken by the EMI as well. Hence, it should be assessed on a case-by-case basis whether a course of action has actual binding legal effects on NCBs as a precondition for its qualification as a decision. With regard to arrangements for Stage Three, this can only refer to implementation obligations during Stage Two imposed on NCBs. Such decisions require unanimity under Article 10.4.

On the contrary, resolutions of the EMI Council that do not impose actual obligations to NCBs, would be subject to the general rule of majority vote. This not only seems to be a sound legal but also a reasonable interpretation of the Statute of the EMI as the EMI will need to have the appropriate flexibility to fulfil its mandate without progress being blocked by unanimity requirements. This view is supported by Protocol No 10 to the Treaty on European Union on the transition to the third stage of economic and monetary union which, *inter alia*, states that "*all member states shall, whether they fulfil the necessary conditions for the adoption of a single currency or not, respect the will for the Community to enter swiftly into the third stage, and therefore no Member State shall prevent the entering into the third stage*" and Article 5 of the Treaty which states that the Member States "*shall facilitate the achievement of the Community's tasks*" and "*shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty*". The above finds its limit in the rationale of the unanimity requirement that the EMI should not have the power to create obligations for the NCBs without their prior consent. In other words, NCBs cannot be obliged to adopt in Stage Two implementation measures for Stage Three against their will. This would mean that, for instance, the adoption of the Master Plan for Stage Three, taking into account its tentative, non-binding,

⁶ See Case 20/58 Phoenix-Rheinrohr AG v High Authority (1959) ECR 75 at 82; Cases 16 and 17/62 Confédération nationale des producteurs des fruits et légumes et al v Council (1962) ECR 471 at 478; see, more generally, Cases 22 and 23/60 Elz v High Authority (1961) ECR 181 at 188.

character, would not be a decision in the sense of Article 10.4, whilst a commitment to introduce RTGS systems in preparation of Stage Three may indeed be considered as an Article 10.4 decision.

4.4 Procedure for decisions binding on NCBs

Weighing up the interests of all parties involved and with a view to the special nature of co-operation of NCBs within the framework of the EMI, the following approach with regard to decisions under Article 15 in conjunction with Article 10.4 might be sound. The NCBs and the EMI could continue with their consensus-based preparation of Stage Three and the former should be aware that this could, explicitly or implicitly, lead to a decision in the sense of Article 10.4 actually imposing binding obligations on them. If the NCBs could not accept such obligations, they should make a reservation. Such a reservation would have the effect that no binding decision could be taken, even with regard to those central banks which agree with the proposed course of action. The EMI, for its part, could try to define the subject of the reservation in such a way that the agreed parts of proposals could obtain a binding character once a decision has been taken. The onus would thus be on each individual NCB to decide whether a decision would impose an unacceptable obligation on it. This approach reflects generally accepted principles in international law on reservations towards (treaty) obligations. It is noted that such reservations would not prevent other NCBs from adopting non-binding guidelines with a qualified majority or from adhering to implementation initiatives on a voluntary basis, but it would indeed mean that such proposals could not, or at least not fully, obtain a binding character. In this connection, it is also noted that Article 5.4 of the EMI's Rules of Procedure implies that abstention does not prevent unanimity from being reached. In other words, reservations should be made explicitly.

4.5 Guidelines of the EMI

Pursuant to Article 15.3, the Council of the EMI may adopt guidelines laying down the methods for the implementation of the conditions necessary for the ESCB to perform its functions in Stage Three. The adoption of such guidelines requires a two-third majority (Article 10.4). These guidelines are an instrument without a clearly defined meaning under Community law. In fact, this instrument was especially created by the drafters of the Treaty to allow NCBs forming a qualified majority to move ahead during Stage Two with implementation measures for Stage Three in anticipation of a decision of the ECB at a later date, if unanimous decisions could not be reached. Hence, such guidelines are a legal act "sui generis" with the following characteristic features:

- They are similar to Article 10.4 “decisions” in the sense that they are addressed to NCBs and refer to implementation during Stage Two of measures necessary for Stage Three.
- They differ from Article 10.4 “decisions” in that they do not create binding obligations for national central banks, which assertion could be qualified by the fact that the general principle of “venire contra factum proprium non nocet” would mean that a guideline, although not legally enforceable, would nevertheless be at least morally binding on the NCBs having voted in favour.
- Furthermore, the requirement that guidelines need to be submitted to the ECB Governing Council for its (majority) decision, may have the meaning that the non-binding effect of a guideline is only provisional, pending the ECB’s final decision.

Thus, in fact, a guideline is an instrument in between Article 10.4 unanimity “decisions” and simple majority Article 10.3 “resolutions” with a norm-setting sense and moral authority on NCBs superior to the ordinary resolutions. Given the above features, their adoption justified a qualified majority vote for the drafters of the Statute.

5 CONCLUSIONS

In summary, the above leads to the following tentative conclusions.

- The EMI’s mandate allows and requires that preparatory work for Stage Three entails the power for the EMI to itself initiate implementation measures during Stage Two. This power cannot prejudice the ECB’s ultimate and exclusive decision-making powers with regard to the implementation of the original monetary policy for Stage Three. This means that the ECB Council may have the final say in a menu of options, make final decisions upon the reserve requirements if any or on the ceiling and the determination of collateral, etc.
- Failure-to-act by the EMI may be challenged before the European Court of Justice by other Community institutions and Member States and could lead to the EMI losing the initiative to such institutions or national authorities.
- The EMI has a variety of instruments at its disposal to fulfil its mandate. These instruments may, in the appropriate cases, be underpinned by legal acts. The latter include non-binding opinions, recommendations and guidelines as well as binding decisions. These legal acts generally require a simple majority unless the subject of the act was felt by the drafters of the Treaty to justify unanimity or a qualified majority.
- As far as the preparation of Stage Three during Stage Two is concerned, unanimity is only required for those decisions which impose obligations on NCBs during the latter Stage. Reservations to decisions which an NCB feels require unanimity will need to be made explicitly and will have the effect that such a decision, or at least the relevant parts thereof, is

not binding, not only for the national central bank(s) which made the reservation, but for the other NCBs as well.

- If unanimity cannot be reached on a given implementation measure, the fall-back position for NCBs supporting the initiative would be to adhere to the initiatives on a voluntary basis or to support the adoption by the EMI Council of non-binding guidelines with a qualified majority. Such guidelines are an instrument with specific features placing them between Article 10.4 decisions and ordinary Article 10.3 resolutions.

VOTING REQUIREMENTS IN STAGE TWO FOR LEGAL ACTS OF THE EMI LISTED IN ARTICLE 15 OF ITS STATUTE			
Legal acts Voting requirements	Opinions at the request of third parties and recommendations at the EMI's own initiative (non-binding)	Guidelines addressed to NCBs (non-binding)	Decisions addressed to NCBs (binding)
Simple majority	All legal acts which are not mentioned below as an exception to this general rule		
Qualified majority of two thirds of the members of the Council of the EMI	<ul style="list-style-type: none"> - Opinions and recommendations on the overall orientation of monetary policy and exchange-rate policy as well as on related measures introduced in each Member State and (to governments and to the EU Council) on policies which might affect the internal or external monetary situation in the Community and, in particular, the functioning of the EMS (Article 5.1) - Recommendations to the monetary authorities of Member States concerning the conduct of their monetary policy (Article 5.2) 	Guidelines laying down the methods for the implementation of the conditions necessary for the ESCB to perform its functions in the third stage (Article 15.3)	<ul style="list-style-type: none"> - Rules for bilateral contracts on holding and managing foreign-exchange reserves as agent for the NCBs (Article 6.4) - Size of the EMI's own resources and determination of key for contributions from NCBs (Article 16) - Measures relating to the liquidation of the EMI (Article 23.6)
Unanimity	n.a.	n.a.	Decisions taken in the context of : <ul style="list-style-type: none"> - preparation and implementation of Stage Three (Article 4.2) - publication of opinions and recommendations (Article 5.4) - implementation of the EMS agreement (Article 6.2) - granting of the status of "other holders" of ECUs and fixing of the relevant terms and conditions (Article 6.3)