

COMPARISON BETWEEN THE GOVERNORS' DRAFT STATUTE  
AND THE PROTOCOL ANNEXED TO THE PRESIDENCY'S NON-PAPER  
ON TREATY PROVISIONS ESTABLISHING EMU

Deletions are indicated by overstrikes, additions by italics.  
Articles or provisions which have not been changed are not  
included.

## CHAPTER I - CONSTITUTION OF THE SYSTEM

### Article 1 - The System

Pursuant to Article III of the EEC Treaty, a system consisting of a central institution to be known as 'The European Central Bank' (hereinafter 'the ECB') and of the participating central banks of the Member States of the Community (hereinafter 'national central banks') is hereby established and shall be known as the 'European System of Central Banks' (hereinafter the 'System'). The "European System of Central Banks" (hereinafter the "System"), set up pursuant to Article 4A of the Treaty, consists of a central institution to be known as "The European Central Bank" (hereinafter "the ECB") and of the central banks of the Member States of the Community (hereinafter "national central banks").

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### Comments

Since the ESCB will be created by virtue of Article 4A of the EEC Treaty, a "technical" adjustment of Article 1 was required.

## CHAPTER II - OBJECTIVES AND TASKS OF THE SYSTEM

### Article 2 - Objectives

2.1 The ~~primary~~ overriding objective of the System shall be to maintain price stability.

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### Comments

The replacement of "primary" by "overriding" aligns the wording of Article 2 with that of Article 3A(2) of the draft Treaty.

Article 3 - Tasks

- The basic tasks to be carried out through the System shall be:
- to formulate and implement the monetary policy of the Community;
  - to conduct foreign exchange operations in accordance with the prevailing exchange rate regime of the Community as referred to *in Article 109 of the Treaty* and Article 4.3;
  - to hold and manage [the] official foreign reserves of the participating countries;
  - to ensure the smooth operation of payment systems;
  - [- to participate as necessary in the formulation, co-ordination and execution of policies relating to prudential supervision and the stability of the financial system.]

\* \* \*

Comments

Second indent: the reference to Article 109 of the Treaty does not change the substance since Article 109 essentially mirrors Article 4.3 of the Statute.

Last indent: the brackets reflect divergent views about the possibility of entrusting an independent non-elected body with tasks relating to prudential supervision.

Article 4 - Advisory functions

4.1 ~~The~~ *In accordance with Article 109E(4) of the Treaty, the ECB shall be consulted regarding any draft Community legislation and any envisaged international agreements proposed Community act in the monetary, [prudential, banking or financial] field. In accordance with Community legislation/ Within the limits and under the conditions set by the Council under the procedure laid down in Article 42, the ECB shall be consulted by national authorities regarding any draft legislation legislative provision within its field of competence.*

4.2 The ECB may ~~give~~ *frame* opinions for submission to ~~any~~ Community institutions or bodies or national authorities on matters within its field of competence.

4.3 ~~The~~ In accordance with Article 109(1) of the Treaty, the ECB shall be consulted ~~with a view to reaching~~ by the Council, which shall strive to reach a consensus, which is consistent with the objective of price stability, prior to any decision relating to the exchange rate regime of the Community, including, in particular, the adoption, abandonment or change in central rates [or ~~exchange rate policies~~ *guidelines for the Community exchange rate policy*] vis-à-vis third currencies.

4.4 The ECB may publish its opinions.

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#### Comments

Article 4.1: (a) Article 109E(4) refers to the Council which should consult the ECB on proposals for a Community act dealing with monetary matters and to Member States with respect to their draft legislative provisions in this field. (b) In the legal experts' opinion, international agreements are concluded by the Council and are therefore part of Community acts referred to in Article 109E(4). The deletion of the term "any envisaged international agreements" thus does not reflect a change in substance but only eliminates a redundancy. (c) The brackets between the term "prudential, banking and financial" reflect the divergences in opinion about the ECB's role in these fields. (d) Throughout the non-paper the reference to complementary Community legislation has been replaced by the above formulation in order to make it clear that the Statute refers to legislation which still needs to be enacted in accordance with Article 42.

Article 4.2: The amendment aims at harmonising the Statute with the Treaty which does not provide for a "Community authority".

Article 4.3: By analogy with Article 4.1 the reference to Article 109 of the Treaty makes it clear that Article 4.3 is only a repetition of Article 109. Furthermore, the wording has been aligned with that of Article 109 of the Treaty.

Article 5 - Collection of statistical information

5.1 In order to undertake the tasks of the System, the ECB, assisted by the national central banks, shall collect the necessary statistical information either from the competent national authorities or directly from economic agents. For these purposes, it shall co-operate *with the Community institutions or bodies and* with the competent authorities of ~~the Community~~ the Member States or third countries and with international organisations.

5.3 The ECB shall promote the harmonisation, where necessary, of the conditions governing the collection, compilation and distribution of statistics in the areas within its field of competence. ~~Community legislation~~ *The Council in accordance with the procedure laid down in Article 42* shall define the natural and legal persons subject to reporting requirements, the confidentiality regime and the appropriate provisions for enforcement.

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Comments

Article 5.1: Drafting change (see comments on Article 4.2).

CHAPTER III - ORGANISATION OF THE SYSTEM

Article 7 - Independence

In exercising the powers and performing the tasks and duties conferred upon them by the Treaty and this Statute, neither the ECB nor a national central bank nor any member of their decision-making bodies may seek or take any instructions from *Community institutions or bodies*, governments of Member States or any other body. The *Community institutions and bodies as well as the governments of and each* the Member States undertake to respect this principle and not to seek to influence ~~the ECB, the national central banks and~~ the members of ~~their~~ the decision-making bodies of the ECB and the national central banks in the performance of their tasks.

\* \* \*

Comments

The addition in the first sentence is designed to ensure that the System also enjoys independence vis-à-vis the European Council, should it be given a role in the setting of broad policy guidelines. The amendment to the second sentence reflects the concern expressed at the IGC meeting not to impede the necessary inter-institutional dialogue.

Article 9 - The European Central Bank

9.1 ~~THE ECB IS HEREBY ESTABLISHED AND SHALL HAVE LEGAL PERSONALITY/~~

~~9/2~~ *In The ECB which, pursuant to Article 106(2) of the Treaty, is endowed with legal personality, shall enjoy in each of the Member States the ECB shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings.*

9.2 ~~THE PROPERTY OF THE ECB SHALL BE EXEMPT FROM ALL FORMS OF REQUISITION OR EXPROPRIATION/~~

Disputes between the ECB, on the one hand, and its creditors, debtors or any other person, on the other, shall ~~be decided by~~ *fall within the jurisdiction of the competent national courts, save where jurisdiction has been conferred on the Court of Justice.*

\* \* \*

Comments

The merger of Articles 9.1 and 9.2 and the different wording reflects that the ECB will be created by virtue of Article 4A of the draft Treaty and that it will be endowed with legal personality by virtue of Article 106(2) of the Treaty.

The first sentence of Article 9.2 (new) has been deleted since this is covered by Article 40. The amendment to the remaining sentence is a pure drafting change.

Article 10 - The Council of the ECB

10.2 Subject to Article 10.3, only members of the Council of the ECB present in person shall have the right to vote. The Rules of Procedure referred to in Article 12.3 shall provide that a member of the Council of the ECB who is prevented from voting for a prolonged period may appoint an alternate as a member of the Council of the ECB.

*Subject to Articles 10.3 and 11.3 each member shall have one vote.* Save as otherwise provided for in the Statute, the Council of the ECB shall act by a simple majority. In the event of a tie, the President shall have the casting vote.

In order for the Council of the ECB to vote, there shall be a quorum of two-thirds of the members. If the quorum is not met, the President may convoke an extraordinary meeting at which decisions may be taken without regard to the quorum referred to above.

10.3 For any decisions to be taken under Articles 28, 29, 30, 32 and 33, the votes in the Council of the ECB shall be weighted according to the national central banks' shares in the subscribed capital of the ECB. A decision by a qualified majority shall be approved if the votes cast in favour represent at least [70]% of the subscribed capital of the ECB. If a Governor is unable to be present, he may nominate an alternate to cast his weighted vote.

\* \* \*

Comments

Article 10.2: the amendments are of a mere technical nature; the references to Articles 10.3 and 11.3 specify the derogations to the principle of "one person, one vote".

Article 10.3: the 70% threshold has been proposed by the Presidency of the IGC; some countries would favour a lower threshold in order to exclude the possibility of a single country being able to veto a decision to be taken at weighted qualified majority.

Article 11 - The Executive Board

11.1 The Executive Board shall comprise the President, the Vice President and [four] other members.

The members of the Executive Board shall be selected among persons of recognised standing and professional experience in monetary or banking matters.

The members shall perform their duties on a full-time basis. No member shall, without approval of the Council of the ECB, receive a salary or other form of compensation from any source other than the ECB or occupy any other office or employment, whether remunerated or not, except as a nominee of the ECB.

11.2 The President and the Vice President *and the other members of the Executive Board* shall be appointed for a period of [eight] years by *the governments of the Member States meeting in the European Council on a proposal by the Council*, ~~after the Council of the ECB has given its opinion~~ and after consultation with the European Parliament *and the Council of the ECB*. This mandate shall not be renewable.

~~11.3 The other members of the Executive Board shall be appointed for a period of eight years by the European Council after the Council of the ECB has given its opinion~~

11.3 The terms and conditions of employment of the members of the Executive Board, in particular their salaries, pensions and other social security benefits shall be ~~laid down in the subject of~~ contracts with the ECB and shall be fixed by the Council of the ECB on the proposal of a Committee comprising three members appointed by the Council of the ECB and three members appointed by the Council ~~of the European Communities~~. The members of the Executive Board shall not have the right to vote on matters referred to in this paragraph.

11.4 If a member of the Executive Board no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct, the Court of Justice may, on application by the Council of the ECB or the Executive Board, compulsorily retire him.



Comments

Article 11.1: The brackets reflect disagreement about the number of members of the Executive Board. Some countries are in favour of an unequal (and, in most cases, higher) number of members.

Article 11.2: (a) This article merges the former Articles 11.2 and 11.3 since the IGC has introduced a uniform procedure for the appointment of all members of the Executive Board. (b) The brackets have been introduced since some countries are in favour of a shorter term than eight years. (c) The provision that the mandate of the members of the Executive Board shall not be renewable reflects the desire of some countries for greater rotation.

Article 11.3: Change in wording due to retranslation into English of an amendment made to the French version.

Article 12 - Responsibilities of the decision-making bodies

12.1 The Council of the ECB shall *adopt the guidelines and* take the decisions necessary to ensure the performance of tasks entrusted to the System under *the Treaty and* the present Statute. The Council of the ECB shall formulate the monetary policy of the Community including, as appropriate, decisions relating to intermediate monetary objectives, key interest rates and the supply of reserves in the System, and shall establish the necessary guidelines for their implementation.

~~[The Council of the ECB shall delegate to the Executive Board such necessary operational powers as it thinks fit for implementing the monetary policy decisions and guidelines. The Council of the ECB may delegate other powers as it may specify to the Executive Board.]~~ [The Executive Board shall implement monetary policy in accordance with the *guidelines and decisions and guidelines* laid down by the Council of the ECB *including by giving the necessary instructions to national central banks.*] In addition the Executive Board may have certain powers delegated to it where the Council of the ECB so decides.

To the extent deemed possible and appropriate and without prejudice to the provision of the previous paragraph, the ECB shall have recourse to the national central banks to carry out operations which form part of the system's tasks.

12.2 When implementing monetary policy in accordance with the decisions and guidelines established by the Council of the ECB, the Executive Board shall give the necessary instructions to national central banks/

The Executive Board shall have responsibility for the preparation of Council of the ECB meetings.

\* \* \*

#### Comments

Article 12.1: The wording reflects the compromise agreed by the IGC on the options in Articles 12.1 and 14.4 of the Governors' draft Statute.

Article 12.2: The first sentence was transferred to Article 12.1.

#### Article 13 - The President

13.2 Without prejudice to Article 39, the President or his nominee shall present the ~~views~~ positions of the ECB externally.

\* \* \*

#### Comments

The amendment of Article 13.2 stems from the re-translation into English of a change in the French text.

#### Article 14 - National central banks

14.1 The Member States shall ensure that their national legislation including the statutes of the national central banks is compatible with this Statute and the ~~EEC~~ Treaty.

14.3 Subject to Article 14.5, the national central banks are an integral part of the System and shall act in accordance with the guidelines and instructions of the ECB.

The Council of the ECB shall take the necessary steps to ensure compliance with the guidelines and instructions of the ECB, and shall require that any necessary information be given to it.

*14/4 [To the full extent possible in the judgement of the Council of the ECB, the national central banks shall execute the operations arising out of the System's tasks.] [The Executive Board shall, to the extent possible and appropriate, make use of the national central banks in the execution of the operations arising out of the System's tasks.]*

\* \* \*

#### Comments

The IGC compromise on Article 14.4 has been transferred to Article 12.1 (see comments thereupon).

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

15.1 The President of the Council of the European Communities and a Member of the Commission may ~~attend~~ participate in meetings of the Council of the ECB. They may take part in the Council of the ECB's deliberations but not in the voting. *The President of the Council may in this context submit a motion for deliberation by the Council of the ECB.*

15.2 The President of the ECB shall be invited to participate in meetings of the ~~European Council and Council of the European Communities~~ when matters relating to the System's objectives and tasks are discussed.

15.3 The ECB shall draw up an annual report on the activities of the System and on the monetary policy of both the previous and current year at a date to be established in the Rules of Procedure. *The annual report shall be addressed to the European Council, the Council, the European Parliament and the Commission.* The President shall present ~~the annual~~ *this* report to ~~the European Council, the Council of the European Communities and the European Parliament.~~ The President and *the other* members of the Executive Board may attend meetings of the European Parliament's specialised committees, *if circumstances justify, at the request of the European Parliament or on their own initiative.*

\* \* \*

Comments

Article 15.1: The third sentence has been added by the IGC. The notion "motion" may need to be specified.

Article 15.2: The deletion mirrors Article 109A of the Treaty.

Article 15.3: Mirroring in essence Article 109A of the draft Treaty, the Commission has been included in the list of addressees of the annual report whereas the European Council has been excluded from the group of Community institutions to which the President of the ECB would present the annual report. The amendment to the last sentence of Article 15.3 implies that the members of the Executive Board might be requested to appear before the specialised committees of the European Parliament.

CHAPTER IV - MONETARY FUNCTIONS AND OPERATIONS OF THE SYSTEM

Article 16 - Notes and coins

*16/2 Provisions concerning the legal tender status of Community currencies shall be established according to the Community legislation. The Council of the ECB shall make the necessary arrangements for the exchange of notes denominated in Community currencies by the national central banks at par value.*

\* \* \*

Comments

Article 16.2 has been deleted by the IGC since it is considered to cover transitional arrangements which are to be included into Chapter IX.

Article 18 - Open market and credit operations

18.1 In order to achieve the objectives of the System and to carry out its tasks, the ECB and the national central banks ~~shall be entitled~~ may:

- ~~to~~ operate in the financial markets by buying and selling outright (spot and forward) or under repurchase agreement, by *lending or borrowing* claims and marketable instruments, whether in Community or in foreign currencies, as well as precious metals;
- ~~to~~ conduct credit operations with credit institutions and other market participants [*with lending being based on adequate collateral*].

\* \* \*

#### Comments

The amendment to the first indent in Article 18.1 has been made by the IGC because in one Member State a distinction is drawn between lending operations in securities and transactions under repurchase agreements.

In the second indent of Article 18.1 the brackets have been removed.

#### Article 19 - Minimum reserves

The ECB ~~shall be entitled to~~ *may* require credit institutions to hold minimum reserves on accounts with the ECB and national central banks. Regulations concerning the calculation and determination of the required minimum reserves ~~shall~~ *may* be established by the Council of the ECB. In cases of non-compliance the ECB shall be entitled to levy penalty interest and to take steps to pursue the matter in the supervisory sphere. [*The Council shall, in accordance with the procedure laid down in Article 42, adopt the general rules for the implementation of that Article.*]

\* \* \*

#### Comments

The last sentence has been added by the IGC but the brackets indicate different views as to whether there is a need for complementary Community legislation. The term "general rules" is to make it clear that

this legislation would specify the limits and conditions under which the ECB would be free to set reserve requirements. It might, however, be warranted to examine whether this wording is sufficient to ensure the necessary operational independence and flexibility. Alternatively, it might be considered whether the Statute itself could not specify the limits and conditions.

Article 20 - Other instruments

The Council of the ECB may decide, by a ~~qualified~~ majority of two-thirds of the votes cast, upon the use of such other operational methods of monetary control as it sees fit *respecting Articles 2 and 34.*

\* \* \*

Comments

The addition of the last few words reflects the desire of the IGC to limit the scope of Article 20.

Article 21 - Operations with public entities

21.1 The ECB and national central banks shall not grant overdrafts or any other type of credit facility to the Community *institutions or bodies*, to Member States and other public entities in the Member States [or purchase debt instruments directly from them] [*or be obliged to purchase debt instruments from them*].

21/3 The ~~function~~ of fiscal agent shall ~~comprise~~ all banking transactions except those referred to in Article/21/1 above/

21/4 The ~~entities~~ for which the ECB and national central banks act as fiscal agents in accordance with Articles/21/2 and 21/3 shall issue debt instruments either through the system or in consultation with it/

\* \* \*

Comments

Article 21.1 continues to rule out overdrafts and other direct credit to public entities; however, with regard to the possibility of acquiring directly debt instruments issued by public borrowers, the wording proposed by the Governors has become one of the two alternatives; the second alternative only precludes that the ECB and the national central banks be obliged to purchase such debt instruments. Article 104(1) of the draft Treaty is only consistent with the second alternative and does not contain brackets. Articles 21.3 and 21.4 of the Governors' draft were deleted since they were not considered necessary by the IGC.

Article 23 - External operations

The ECB and the national central banks ~~shall be entitled~~ may:

- ~~to~~ establish relations with central banks and financial institutions in third countries and, where appropriate, with international ~~and supranational~~ organisations;
- ~~to~~ acquire and sell spot and forward all types of foreign exchange assets and precious metals. The term "foreign exchange asset" shall include securities and all other assets in currency of any country or units of account and in whatever form held;
- ~~to~~ hold and manage the assets defined above;
- ~~to~~ conduct all types of banking transactions in relation to third countries and international and supranational organisations, including borrowing and lending operations.

\* \* \*

Comments

The deletion of the term "supranational" in the first indent reflects the opinion that the notion "international organisations" was sufficiently large as to cover all possible cases. It has been overlooked by the authors that the term "supranational" should also be deleted in the last indent.

Article 24 - Other operations

In addition to operations arising from their tasks, the ECB and the national central banks may enter into operations that serve their administrative purpose~~s~~ or for their staff.

[CHAPTER V - PRUDENTIAL SUPERVISION

Article 25 - Supervisory tasks

25.1 The ECB shall be entitled to offer advice and to be consulted on the ~~interpretation~~ scope and implementation of Community legislation relating to the prudential supervision of credit and other financial institutions and financial markets.

25.2 The ECB may formulate/ ~~interpret~~ and implement policies relating to the prudential supervision of credit and other financial institutions for which it is designated as competent supervisory authority.]

\* \* \*

Comments

The brackets indicate divergent views in the IGC about the possibility of conferring upon non-elected bodies tasks in the field of prudential control.

The amendments reflect the fact that only the Court of Justice is competent for interpreting Community legislation.

Article 27 - Auditing

27.1 The accounts of the ECB and the national central banks shall be audited by independent external auditors recommended by the Council of the ECB and approved by the Council ~~of the European Communities~~. The auditors shall have full power to examine all books and accounts of the ECB and national central banks, and to be fully informed about their transactions.



27.2 The provisions of Articles 203 and 206a of the Treaty shall not apply to the ECB or to the national central banks.

Article 28 - Capital of the ECB

28.1 The capital of the ECB shall, ~~upon its establishment on becoming operational,~~ be ecu [~~€~~] 5,000 million. The capital may be increased ~~from time to time~~ by such amounts as may be decided by the Council of the ECB acting by ~~the~~ the qualified majority *provided for in Article 10.3, within the limits and under the conditions set by the Council under the procedure laid down in Article 42.*

28.2 The national central banks [*on behalf of the Member States*] shall be the sole subscribers to and holders of the capital of the ECB. The subscription of capital shall be according to the key established pursuant to Article 29.

28.3 The Council of the ECB, acting by ~~the~~ the qualified majority *provided for in Article 10.3*, shall determine the extent to which and the form in which capital shall be paid up.

\* \* \*

Comments

Article 28.1: (a) The first amendment relates to the proposal made by the Presidency of the IGC that the ECB would be created at the beginning of Stage Two but would only become operational two years later. (b) The reference to Article 10.3 is a clarification of the term "qualified majority". (c) The introduction of complementary Community legislation was suggested by the IGC for reasons of democratic accountability (IGC meeting of 21st May). It implies that the ability of Council of the ECB to increase the capital of the ECB would be confined within the limits and conditions laid down in complementary Community legislation. If such a restriction of the System's financial autonomy will have to be accepted, it might nevertheless be warranted to examine whether the Statute should not circumscribe the contents of the complementary Community legislation. Alternatively, it might be considered whether the limits and conditions could not be specified in the Statute itself.

Article 28.2: The additional words between brackets refer to the proposal made by France that the ECB's capital be subscribed by the Member States.

Article 28.3: The reference to Article 10.3 is a clarification of the term "qualified majority".

Article 29 - Key for capital subscription

29.1 ~~At the entry into force~~ On the implementation of this Statute, the key for subscription of the ECB's capital shall be established. Each national central bank shall be assigned a weight in this key which shall be equal to the sum of:

- [- 45% of the share of its respective country in the population of the Community in the penultimate year preceding the ~~entry into force~~ implementation of the Statute;
- 55% of the share of its respective country in the gross domestic product at market prices of the Community as recorded in the last five years preceding the penultimate year before the ~~entry into force~~ implementation of the Statute.]

29.2 The statistical data to be used for the application of this Article shall be calculated by the Statistical Office of the European Communities in accordance with ~~Community legislation~~ the rules adopted by the Council under the procedure provided for in Article 42.

29.3 The weights assigned to the national central banks shall be adjusted every five years after the ~~entry into force~~ implementation of this Statute in analogy to the provisions laid down in Article 29.1. The adjusted key shall apply with effect from the first day of the following year.

\* \* \*

Comments

Article 29.1: The change is motivated by the fact that the Statute is due to enter into force on 1st January 1993. However, the key should be fixed only when the Statute is implemented. The procedure for

determining the date of implementation will have to be defined in the final provisions.

Article 29.2: The brackets indicate divergent views on three issues:

- some countries wish to include other criteria than GDP and population;
- one country does not agree about the relative weighting of population and GDP;
- one country wishes to see room for political decision in the determination of the key.

Article 30 - Transfer of foreign reserve assets to the ECB

30.1 Without prejudice to the provisions of Article 28, the ECB shall be ~~endowed~~ provided by the national central banks with foreign reserve assets, other than Community currencies and ecus, up to an amount equivalent to ecu ~~{\*}~~ 50,000 million. The Council of the ECB shall decide upon the proportion to be called up by the ECB at the ~~entry into force~~ implementation of this Statute and the amounts called up at later dates.

30.4 Further calls of foreign reserve assets beyond the limit set in Article 30.1 may be effected by the ECB ~~in accordance with Community legislation~~ within the limits and under the conditions set by the Council in accordance with the procedure of Article 42.

30.6 The Council of the ECB shall ~~determine all other conditions~~ ~~required~~ take all other measures necessary for the application of this Article.

\* \* \*

Comments

Article 30.1: (a) The amount of ecu 50 billion has been suggested by the IGC. (b) For the change in wording, see comment on Article 29.1.

Article 30.4: See comment (a) on Article 4.1.

Article 30.6: Minor drafting amendment.

Article 32 - Allocation of monetary income of national central banks

32.3 If ~~at the entry into force~~ on the implementation of this Statute, in the judgement of the Council of the ECB, the balance sheet structures of the national central banks do not permit the application of Article 32.2, the Council of the ECB, acting by a qualified majority, may decide that, by way of derogation to Article 32.2, the monetary income shall be measured according to an alternative method for a period of not more than five years.

32.7 The Council of the ECB shall ~~determine all other conditions required~~ shall take all other measures necessary for the application of this Article.

\* \* \*

Comments

Article 32.3: See comment on Article 29.1.

Article 32.7: Minor drafting amendment.

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

33.1 The net profit of the ECB shall be transferred in the following order:

- (a) an amount to be determined by the Council of the ECB *which may not exceed 20% of the net profit* shall be transferred to the general reserve fund *within the limit of 100% of the capital*;
- (b) the remaining net profit shall be distributed to the ~~shareholders of the~~ ECB *in shares* in proportion to their subscribed shares.

33.2 In the event of a loss incurred by the ECB, the shortfall may be offset against the own funds of the ECB ~~of~~, *and if necessary*, following a decision by the Council of the ECB, against *a further* contributions ~~from~~ *from* national central banks, in proportion to their subscribed shares *decided on in accordance with the procedure laid down in Article 28.1.*

\* \* \*

Comments

Article 33.1: The amendments made by the IGC set limits to the ability of the ECB to build up reserves.

Article 33.2: The amendment introduced by the IGC implies that any contribution to be made by national central banks in order to offset losses incurred by the ECB would be subject to the provisions of the complementary Community legislation prepared in the context of Article 28.1 (see also comments (b) on Article 28.1). This implies that any contribution by the national central banks would be equivalent to the (compensatory) increase in the ECB's capital; this will possibly have consequences for the application of Article 32.5.

CHAPTER VII - GENERAL PROVISIONS

Article 34 - Regulatory power

34.1 The ECB shall make the regulations and take the decisions necessary for the performance of tasks entrusted to the system under the present Statute. The ECB shall:

- draw up recommendations and opinions;
- take, under the conditions laid down in this Statute, the decisions necessary for carrying out the tasks entrusted to the System under the Treaty and this Statute;
- adopt, under the conditions laid down in this Statute, ECB regulations to the extent necessary to implement the tasks defined in Articles 3, first indent and 22 and in cases which shall be laid down in the acts of the Council referred to in Article 42.

34.2 A regulation shall have general application. It shall be binding in its entirety and directly applicable. A decision shall be binding in its entirety upon those to whom it is addressed.

An ECB regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States, subject to derogations which may be adopted under Article 109G(2) of the Treaty. Recommendations and opinions shall have no binding force. Articles 190, 191 and to 192 of the Treaty establishing the EEC are

~~Applicable shall apply~~ in all respects to ~~the~~ ECB regulations ~~made~~ adopted and decisions taken by the ECB.

34.3 Within the limits and under the conditions adopted by the Council under the procedure laid down in Article 42 ~~According to Community legislation~~, the ECB and the national central banks shall be entitled to impose sanctions ~~on market participants and other economic agents which fail for failures~~ to comply with ~~their~~ obligations ~~vis-à-vis~~ with respect to ECB regulations adopted and decisions ~~referred to in this Article~~ taken on the basis of this Statute.

\* \* \*

#### Comments

Article 34.1: The amendments are basically a follow-up to the discussion in the IGC about the ECB's power to issue regulations. The present wording:

- confines this power to the tasks specified in Article 3, first indent and Article 22 and to those cases provided for by Community legislation to be adopted under the procedure of Article 42;
- by introducing "ECB regulations", it is made clear that such regulations are not regulations in the sense of Article 189 of the Treaty (although, as mentioned below, the difference is rather of a formal nature).

Article 34.2: The legal nature of the ECB regulations is not very different from that of the regulations referred to in Article 189 of the Treaty except that the reference to Article 109d of the draft Treaty makes clear that ECB regulations shall not be binding in those countries which do not participate in the final stage of EMU.

Furthermore, the reference to Article 190 of the Treaty implies that the reasons on which ECB regulations and decisions are based would have to be stated.

Article 35 - Judicial control and related matters

35.2 The ECB shall be subject to the liability regime as provided for in Article 215 of the ~~EEC~~ Treaty.

35.6 *By way of derogation from Article 169 of the Treaty, the ~~The~~ Court of Justice shall have jurisdiction in disputes concerning the fulfilment by a national central bank of obligations under this Statute. If the ECB considers that a national central bank has failed to fulfil an obligation under this Statute, it may bring the matter before the Court of Justice.*

\* \* \*

Comments

The addition in Article 35.6 makes it clear that Article 169 of the Treaty would not apply to disputes between the ECB and the national central banks.

Article 36 - Staff

36.1 The Council of the ECB, on a proposal from the Executive Board, shall lay down the conditions of employment of the staff of the ECB.

36.2 Disputes between the ECB and its staff may be brought before the Court of ~~Justice~~ *First Instance provided for in Article 168A of the Treaty* which shall have jurisdiction.

\* \* \*

Comments

Following the establishment of a Court of First Instance disputes between the Community institutions and its agents fall within the competence of this Court subject to a right of appeal to the Court of Justice on points of law. The amendment to Article 36.2 thus aims at harmonising the Statute with current Community legislation.

CHAPTER VIII - AMENDMENT OF THE STATUTE AND COMPLEMENTARY LEGISLATION

Article 41 - Simplified amendment procedure

41.1 By way of derogation to Article 236 of the EEC Treaty, Articles 5, 17, 18, [19], 21.2, 21.3, 21.4, 21.5, 22, 23, 24, 26, 32, 32.2, 32.3, 32.4, 32.6 and 36 may be amended by the Council of the European Communities, at the request of the ECB and after consulting the European Parliament and the Commission. The approval of the ECB's request for amendment requires a decision of the Council of the European Communities acting by a qualified majority.

41.2 Article 3 may be amended by the Council of the European Communities in accordance with the procedure referred to in Article 41.1 to the extent necessary to confer upon the system additional tasks which are not at variance with the system's objectives stated in Article 2 and do not impinge on the system's basic tasks defined in Article 3.

41.2 A request made by the ECB under this Article shall require a unanimous decision by the Council of the ECB.

\* \* \*

Comments

Article 41.1: (a) The French version contains the clause "Without prejudice to Article 236" instead of "By way of derogation". This change makes it clear that the provisions listed in Article 41 could also be amended in accordance with the procedure laid down in Article 236.

(b) The inclusion of Articles 32.2 to 32.4 and 32.6 (instead of the entirety of Article 32) aims to ensure that only technical provisions are amendable by virtue of Article 41. There was no unanimity about the inclusion of Article 19.

Article 41.2: This provision was deleted since there was general agreement that the simplified amendment procedure should not be applied to Article 3.



Article 42 - Complementary legislation

The Council ~~of the European Communities~~ acting on a proposal from the Commission and after consulting the ECB and the European Parliament, shall enact the legislation necessary for the application of:

- Articles 4.1, 5.3, 16.2, [19], 25.2, 28.1, 29.2, ~~30.4~~ and 34.3 acting by a qualified majority;
- Article 30.4 acting unanimously.

\* \* \*

Comments

First indent: (a) the brackets around Article 19 indicate divergent views about the need for complementary Community legislation for the application of Article 19 (see comments thereon). (b) The reference to Article 16.2 has remained although it was deleted.

Second indent: the requirement of unanimity for enacting Community legislation for the application of Article 30.4 might restrict the possibility of calling in reserve assets beyond the ceiling of ecu 50 million (see comments on Article 30.1).