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

31st August 1990

Confidential

REPORT OF THE LEGAL EXPERTS

I. INTRODUCTION

This report deals with the four issues contained in the mandate of the Committee of Alternates dated 20th July 1990:

- the legal personality of the System as a whole and its individual components;
- the nature of the System in the framework of Community institutions (i.e. whether the System would be an institution sui generis or a genuine Community institution, and what would be the implications of these alternatives for the operational autonomy of the System);
- aspects to be covered in the Rules of Procedure;
- the legal tender status of national currencies after exchange rates have been irrevocably locked, i.e. at the beginning of Stage Three of Economic and Monetary Union.

The meeting of the Legal Experts took place on Monday, 27th August 1990 (see Annex II: list of participants).

The objectives of the meeting were to analyse the legal implications of the provisions of the draft Statute (dated 24th July 1990) with regard to the above-mentioned mandate and to make some suggestions to amend or complement the relevant provisions (Annex I shows proposed amendments to these Articles).

Since it was outside the scope of the mandate, there was no general review of the provisions of the draft Statute. It was the view of the Experts that such a review would be useful, together with an analysis of the provisions to be inserted into the Treaty, especially those relating

to Monetary Union. It might possibly also be useful to review other provisions introduced as a result of the Intergovernmental conferences.

In discussing the four issues mentioned above, the Legal Experts took into account that the draft Statute addresses only the final stage of Economic and Monetary Union, but that some provisions would have to allow for a shift from a situation of irrevocably locked exchange rates between national currencies to one in which there would be only a single Community currency. It was recognised that the draft Statute would have to be sufficiently flexible to accommodate this evolutionary process, which, inter alia, might also imply a gradual move from a more decentralised to a more centralised system. At the same time the provisions would also have to meet the requirements of legal certainty in such a sensitive area as monetary policy.

II. ANALYSIS OF THE MANDATE

1. Legal personality

The experts have focused their discussions on three more specific issues:

(i) What does the concept of legal personality mean?
(ii) Does the System, as a whole or its component elements, require legal personality?
(iii) What consequences would the plurality of legal entities within the System have with respect to drafting the Statute?

(i) Concept of legal personality

Legal personality confers on the entity enjoying it, the capacity to become a holder of rights and obligations, to be a "sujet de droit", so that it may enter into agreements on its own, acquire and sell assets, be liable, sue or be sued in court.

The attribution of legal personality does not have any automatic consequences for specific powers.

The attribution of legal personality should be considered as a fundamental requirement for a central bank to be able to conduct operations

on its own account, especially when operating in the market; it also appears as a requisite of independence, entitling the central bank to act separately from its shareholders or the State(s) which established it.

All existing national central banks have their own legal personality, founded, for some of them, in their corporate status, and for the others, on being an autonomous body established by law.

A statutory provision has to define the field and the extent to which an entity may use its personality.

In general, the Statute shall impose limits to the capacity and fix specific conditions for its use (for instance, requiring the approval of certain acts by government authorities).

A public body has, of course, no capacity to act outside the scope of its competences as defined by or in virtue of the law.

Notwithstanding the necessary attribution of legal personality, the draft Statute has also to define clearly which powers may be used, which operations may be conducted, under which conditions and by which means.

It remains, therefore, to be determined to what extent the component elements of the System may use their legal personality in the national context, in the Community context and in the international context.

This is particularly important to avoid difficulties which could result from a lack of certainty about the personality and capacity of the System, especially when it acts in the international arena, dealing with States or international organisations. In this context, the Experts pointed out that, for instance, difficulties have arisen in the past with regard to the recognition of the legal personality of the Arab Monetary Fund and the ownership of assets of the EMCF.

(ii) Legal personality of the central institution

The Experts consider that to give legal personality to the System as a whole is only compatible with a model where all the national central banks are merged into one legal entity. Such a solution does not seem to be in line with the current thinking of the Governors.

Although Article 13.3 provides that the national central banks are an integral part of the system, they will, for an undetermined period, keep their own legal personality according to their national provisions.

Important amendments to their respective statutes shall be required to comply with the obligation to make them compatible with the Statute (Article 13.1). This obligation should lead to a broad harmonisation of national central bank powers and organisation.

Their capacity to dispose of assets will be greatly reduced, a fact which is legally recognised and acceptable. (There are many examples of legal entities which belong to a group of companies which have very restricted autonomy.) There is therefore no need to restrict this capacity to the residual sphere of activities, which is not part of the System (see Article 13.5).

The System itself can operate without enjoying legal personality; in this sense the term "System" describes simply a global structure embracing a number of intervening bodies.

The Experts recommend that the central institution should have legal personality. Even if this "institution" is not classified presently as a central bank, it has to be able to perform directly the principal activities of a central bank. Such a requirement is implied by the various provisions of the existing draft Statute. This solution seems also to be appropriate since it leaves open the future distribution of power and operations between the central institution and the national central banks.

(iii) Consequences for the Statute

If legal personality is given to the central institution, it will be necessary to replace the reference to the "System" by "central institution" in many of the articles of the present draft Statute, e.g. when dealing with operations at the centre (see Chapter IV). The concept of "System", which describes the co-existence of and interaction between the central institution and the national central banks may, however, be retained in some provisions, although a careful review of the Statute is required. At the same time, the attribution of legal personality to the central institution should go hand in hand with giving powers to the central institution, regarding domestic and international banking transactions, regulations affecting banks' behaviour and activities in the

field of external relations (with third countries, central banks or international organisations).

The Experts recommend inserting in the draft Statute articles on the lines of Articles 210 (dealing implicitly with the international legal personality of the EEC) and 211 (internal legal personality) of the EEC Treaty (see Annex I).

The Experts also pointed out that a specific provision of the EEC Treaty (Article 129) established the legal personality of the European Investment Bank and that a similar provision relating to the System should be introduced in the new Treaty.

The Experts also recommend specifying the regulatory powers of the central institution, as well as the regime of judicial control (see Annex I).

The Experts suggest completing the provision dealing with the external relations of the System (see Article proposed in Annex I and also Article 16 of the Protocol on the Statute of the European Investment Bank).

The Experts recommend that, among the financial provisions, an article should deal with conditions relating to the transfer of assets and liabilities from the national central banks to the central institution.

As far as the liability of the different entities are concerned, they propose to make a difference between the internal relations between the central institution and the national central banks on the one hand, and the relations with third parties, on the other hand.

A special provision should deal with external liability. A system inspired by the rules applied for the "indirect administration" of Community policies (e.g. CAP decisions, implementation through agricultural organisations of the Member States) could be applied. The national central banks may directly sue or be sued in national courts.

If a national central bank has to pay damages without personally being at fault but when acting on instructions from the central institution, it should be indemnified by the central institution or other national central banks.

2. The nature of the System in the framework of Community institutions

The experts recalled that a so-called "institutional quadripartism" characterises the institutional structure of the European Communities (ECSC Treaty, art. 7, EEC Treaty, art. § 1, EAEC Treaty, art. 3 § 1).

Four institutions are common to the three Communities:

- the European Parliament, which represents the peoples of the Member States;
- the Council, which represents (the Governments of) the Member States;
- the Commission, which represents the general interest of the Communities;
- the Court of Justice.

In the system of allocation of powers among the institutions there is some parallelism with the public law doctrine of separation of powers, although functions are not distributed in the Community structure in the same way as they are in Member States. Nevertheless, the analogy is striking and contributes to the differentiation of the structure of the Community in comparison with an international organisation.

The concept of an institution ("Organ" in German) underlines the feature of the Community as the bearer of sovereign rights.

The institutions are to be regarded as "Constitutional organs", "Verfassungsorgane", of the Communities.

As a general rule,[1] the Member States - not the other institutions - have the final say in the appointment of their respective member(s) of each institution.

The institutions are autonomous. Each institution has to respect the powers of the others. Only in specific cases, have assent or appeal procedures been provided (for example, in the management of escape clauses, the Council may repeal an act of the Commission).

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1 Participation of the Parliament in the appointment of the members of the Commission cannot be ruled out.

They have no other competences than those conferred upon them either explicitly or implicitly by each Treaty.

It is generally admitted that institutions have the competence - or, at least, the vocation - to adopt decisions directly applicable to the citizens of the Community.

The institutions are entities endowed with powers for the whole spectrum of Community activities.

Other bodies which are either purely consultative (Economic and Social Committee, for example) or specialised (Court of Auditors, European Investment Bank) are not "institutions" pursuant to the Treaties. With respect to the Court of Auditors, the absence of decision-making powers, vis-à-vis citizens and the position of Courts of Auditors in Member States, has also been a reason for qualifying the EC Court of Auditors created in 1975, not as an "institution" but as an "organ".

The Experts have also examined the implications of qualifying an entity as an institution under the EEC Treaty. Many provisions of this Treaty mention the institutions (Articles 5 and 6, the 5th part of the Treaty concerning the institutions of the Community, financial provisions: Art. 203; general and final provisions: Art. 214 - professional secrecy; Art. 215 al-2: non-contractual liability; Art. 216: seat; Art. 217: languages; Art. 228 paragraph 2: binding character of international agreements; last articles on "setting up of institutions"). Without entering into an in-depth discussion of the precise meaning of all the provisions referred to, the Experts observe that in some cases the reference to institutions clearly concerns only the four main organs but other provisions are applicable to every Community organ and the term "institution" has not been given in these cases a specific meaning.

The Experts observed that under the case law of the European Court some general provisions of Community law have been applied to autonomous organs such as the European Investment Bank (EIB) and the Centre for Vocational Training. Although these entities have a functional and institutional autonomy, they are nevertheless Community organs and they are not exempt from the application of general rules of Community law; in this context the Experts recalled the controversy in the legal literature regarding the EMCF. In order to avoid any legal uncertainty arising from the possible implicit application to the System of the general rules relating to Community institutions (a consequence of Art. 102A § 2 of the

EEC Treaty), the Experts agreed that the System should not be classified as a Community institution under Article 4, § 1 of the EEC Treaty (but, rather, a reference to the System should be added as a new § 2 in this Article) and that the draft Statute should include specific provisions on each topic for which they are needed.

3. Rules of procedure

The Experts took note that the rules of procedure are already mentioned in Articles 9 and 10 of the draft Statute. Each institution of the Community adopts freely its rules of procedure, with the exception of the Court of Justice. The rules of procedure of the Court of Justice are approved by the Council; this is due to the specific content of these rules which determine the rights and obligations (time limits, for example) of parties to sue before the Court.

The Court of Justice has recognised the legal value of the rules of procedure (in casu of the Council).[2]

Rules of procedure are subordinate to the Statutes and to the Treaty itself.

As a general principle, the Experts recommend limiting the rules to matters concerning internal management. When a provision is intended to bind a person or an institution outside the internal sphere, it has to be considered as pertaining to the exercise of a (external) regulatory power and not to the competence of self-management of an organ. The question of how to determine in casu what belongs to the internal sphere of the System has to be answered cautiously.

Provisions which are in fact rules of procedure can be included in the Statute if their importance (on political grounds, for example), justify their insertion in a text of a higher status. With these considerations in mind, the rules of procedure of the E.I.B. could, for example, be a useful reference for those of the System.

Taking into account these limits to the scope of the Rules of Procedure, the Experts draw attention to the need for a reasonably smooth and rapid mechanism for amending some provisions of the draft Statute.

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2 See Judgement of 23rd February 1988, case 68-86, U.K. v. Council, EC Reports, 1988, p. 900-902.

4. The legal tender status of national currencies at the beginning of Stage Three of EMU

The Experts observed that rules on legal tender have not been harmonised in the Community. Differences remain vis-à-vis the rights and duties of the bearer of notes ("cours légal" "cours forcé"). They also noted that national currencies include a mixture of legal and practical considerations. The limitation of the "pouvoir libératoire" of coins was mentioned in this context. Notes and coins are used by private citizens; they have to be readily available and easy to use. Their face value can neither be subject to confusion nor hesitation. The use of money is governed by reasons of comfort and tradition.

The Experts recognise that it would be logical for all currencies of the Member States to be legal tender when the parities become permanently locked since the currencies are perfectly substitutable. They observed, however, that by taking into account the practical considerations mentioned above and the importance of payment practices, which can evolve rapidly, it would be prudent to give secondary Community legislation the task of regulating such transitional issues when and if such a need is recognised.

Most Experts consider that a provision on the exclusive right of the central institution to issue notes, which shall be the only legal tender, would be necessary. The Experts have proposed to adapt Article 15 § 1 in the way indicated in Annex I.

III. RECOMMENDATIONS

The Legal Experts observed that the draft Statute leaves open the specific procedure to be applied with respect to Community legislation.

Legislative procedure under the Treaties will be reviewed in the context of the so-called second Intergovernmental Conference on political union. The respective role of the three political institutions involved in the legislative process (Council, Commission and Parliament) will be reconsidered. This could imply the necessity to harmonise the procedures provided for with respect to the progressive realisation of EMU and it is possible that a new procedure is adopted for Community legislation in general.

With regard to this, the Experts believe that an analysis of the hierarchy of legal acts is appropriate. They recalled that the Protocol has the same constitutional status as the Treaty and that a distribution of proposed provisions between these two instruments will have to be done at some stage before the start of the Intergovernmental Conference in December 1990. In general, they have taken the view that provisions related to the powers of the Community institutions or endowing the System with legally binding powers towards third parties have to be included in the Treaty.

The Experts consider that the role of secondary legislation of Community institutions should be given careful consideration. Legislative acts of the Community are clearly needed in order to provide a simplified procedure for amending some provisions of the Statute. Legislative acts will have a role to play in defining the legal framework with respect to the operation of the System (for example, in the field of prudential control). The question could also be asked whether, due to the political relevance of some decisions to be taken in the course of Stage Three (for example, pooling reserves, provisions related to the legal tender of national currencies before the single currency stage, decision to adopt a single currency, and so on) and the need for democratic legitimacy, it would not be necessary to provide for the inclusion of legislative acts for such important decisions. The adoption procedure of these acts would necessitate qualified intervention by the System (initiative, assent, consultation).

In the light of the above considerations, proposals have been made for a number of new provisions (see Annex I), which, however, have not yet been fully discussed by the Experts. In addition, as far as the questions raised under Section II, 2 of this report are concerned, the Experts consider that:

- it would be appropriate to insert the reference to the System not in § 1 of Article 4 EEC Treaty - enumerating the institutions - but in a new § 2;
- it would be necessary to consider the appropriateness of specific provision in the Statute governing such issues as:
  . staff (an Article is foreseen in the draft Statute);
  • budget;

- auditing accounts;
- judicial control (see Article 180 relating to the EIB and Annex I);
- professional secrecy;
- non-contractual liability (see Annex I);
- seat;
- official languages;
- privileges and immunities (in this respect, an amendment of the related Protocol, on the lines of Article 22 concerning the EIB, would also be necessary).

The application of Article 5 (loyalty clause) has also to be assessed with respect to the System.

Annex I

PROPOSALS FOR AMENDING THE DRAFT STATUTE*

CHAPTER I - CONSTITUTION

Article (new)

[The central institution shall have legal personality.]

Article (new)

[In each of the Member States the central institution 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.]

Article (new)

[The governing bodies of the System shall be those of the central institution.]

Article (new): Judicial control and related matters

[The acts of the (System) (central institution) shall be reviewed and interpreted by the Court of Justice under the conditions laid down for the legal control of the acts of Community institutions and, in case of failure to act, by the Articles 173, 175 and 177 of the EEC Treaty.

The central institution shall be subject to the liability regime as provided for in Article 215 of the EEC Treaty.

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* These amendments have been suggested by the Belgian representatives on the Group. With the exception of the first three amendments to Chapter I, the proposals have not been discussed in detail.

The national central banks shall be liable according to their respective national laws.

The central institution shall indemnify the national central banks against any losses or damages owing to their participation in the System, except in cases where the national central bank is in fault or negligent in carrying out its functions.]

Note: In this context a modification of the Protocol on the Statute of the Court should also be requested in order to permit the submission of observations by the System under Article 20 (preliminary rulings) and interventions under Article 37 of the EEC Treaty.

CHAPTER II - OBJECTIVES AND TASKS

Article 6 could be completed as follows:

[The central institution has responsibility for the implementation of the monetary agreements of the Community; it may accept responsibility for the execution of other agreements in the field of its competences. In so doing, it acts on behalf of and with the resources put at its disposal by the Community or the Member States.

It may represent the Community and the Member States.

It shall co-operate with all international organisations active in fields similar to its own.]

CHAPTER III - GOVERNING BODIES

Article (new)

[The rules of procedure, adopted by the Council on the proposal of the Board, shall include provisions on the functioning of the central institution and the organisation of the relations within the System.]

CHAPTER IV - OPERATIONS

Article (new)

[In order to carry out its tasks, the central institution shall provide policy guidelines to be implemented by all the participating national central banks; the central institution shall also give individual and collective instructions which shall bind the national central banks.

Article X of these Statutes (or: the Rules of Procedure) shall determine the conditions for issuing the guidelines and instructions.

The central institution shall take decisions and make regulations which shall be directly applicable in all Member States and binding in their entirety for their addressees. The decisions and regulations shall be adopted according to the following procedure (...). Articles 190 and 191 of the EEC Treaty will be applicable accordingly.

According to the Community legislation, the central institution shall be entitled to penalise (national central banks or) credit institutions which fail to comply with their obligations vis-à-vis (guidelines, instructions) decisions or regulations.]

Article 15.1

[The (central institution) shall have the exclusive right to issue notes in the Community which shall be the only legal tender. Any transitional provisions concerning the legal tender status of national currencies shall be regulated according to the Community legislation.]

Committee of Governors of the
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Annex II

MEETING OF LEGAL EXPERTS

List of participants

Chairman	Mr. G.D. Baer
Banque Nationale de Belgique	[redacted]
Danmarks Nationalbank	[redacted]
Deutsche Bundesbank	[redacted]
Bank of Greece	[redacted]
Banco de España	[redacted]
Banque de France	[redacted]
Central Bank of Ireland	[redacted]
Banca d'Italia	[redacted]
Nederlandsche Bank	[redacted]
Banco de Portugal	[redacted]
Bank of England	[redacted]
Commission of the European Communities	[redacted]
Agent for the EMCF	[redacted]
Secretariat of the Committee of Governors	[redacted]

The group held one meeting: on 27th August 1990