

Meeting of Legal Experts on certain aspects relating
to the draft Statute of the "System"
on 1st and 2nd October 1990

Chairman's summary

1. The legal nature of the System and the responsibilities of the
decision-making bodies

The main concern of the Legal Experts was that the draft Statute¹ contained ambiguities about the legal nature of the System and the assignment of responsibilities, and thereby gave rise to legal uncertainties.

(a) The legal structure of the System

In this context it is important to recall that at the meeting on 27th August 1990:²

- the idea of giving legal personality to the System as a whole had been dismissed by the Legal Experts. The principal reason was that legal personality of the System would imply the merger of all national central banks into one legal entity and not permit national central banks to keep their own legal personality in accordance with national law. This solution was not considered to be in line with the intentions of the Governors;
- the Legal Experts proposed to give legal personality to the central institution (i.e. the ECB), while retaining the legal

1 Draft Statute, version dated ?.

2 See the Report of the Legal Experts, dated 31st August 1990.

personality of the national central banks. This solution permitted carrying out operations either at the centre or at the level of national central banks, thus leaving the degree of centralisation (in operations) open to future decisions by the System's governing bodies. Under this approach the "System" would simply be the term describing the co-existence of the ECB and the national central banks, which, in accordance with decisions made "at the centre", would jointly be entrusted with the fulfilment of objectives and tasks.

When following this second approach it is important to remember that a "System" without legal personality cannot act, contract, sue or be sued and that therefore the Statute will have to set out clearly the distribution of powers and roles of the System's governing bodies (Council, Executive Board and President) and its institutions (ECB and national central banks). Indeed, some Legal Experts even questioned the correctness of using the term "Statute" for the System (for instance, in the title), as this would normally mean a set of rules arising either from law or contract governing a body considered to be a legal person. In these Experts' view the draft Statute in its version of 14th September 1990 did not govern or regulate the way in which a legal person or entity must operate (because the System had no legal personality), and the ECB (which was given legal personality) was not really regulated in that text.

The question of the System's legal nature is closely linked to the position of the decision-making bodies. If the Council and the Executive Board are defined to be the decision-making bodies of the System, they will not enjoy the benefits of legal personality and capacity, i.e. they cannot contract. When clarifying "who" shall be permitted to do "what", a (political) decision will have to be taken about the position of the decision-making bodies.

Two approaches are conceivable: a first one would be to establish the Council and the Executive Board by (ratification of) the Statute and, without creating direct institutional links with the ECB and the national central banks, by virtue of the powers entrusted to the decision-making bodies they would be able to give the necessary instructions to the ECB and the national central banks. The decisions of the Council and the Executive

Board would then be carried out in the form of operations conducted by the ECB and the national central banks with third parties.

A second approach would be to bring the decision-making bodies into the ECB, giving them the dual role of decision-making bodies for the System as a whole and governing bodies of the ECB. In other words, the ECB would be the administrative staff and the executive service of the Council and be directed by the Executive Board.

If the first approach (the Council and the Executive Board are outside the ECB) were followed all regulatory powers should be clearly attributed to the Council and the Executive Board (the question of the appropriate division of responsibilities between them is discussed under (b)), while all operations (and provisions dealing with ownership of assets and liabilities) should be assigned to the ECB and the national central banks. The ECB would be a thirteenth executive body (alongside the national central banks) and its functions (e.g. to undertake centralised operations in the foreign exchange market and the domestic money market), organisation (its organs and staff), instruments and relations with the Council and Executive Board would have to be laid down in the Statute. It would probably also be advisable to reorganise the Statute, for instance, by introducing immediately after Article 3 the relevant Articles defining the decision-making bodies' structure and responsibilities and then to add the necessary provisions relating to the ECB.

The Legal Experts were not in favour of this approach. Doubts were expressed whether it would be legally sound to create a System in which the Council and the Executive Board (without legal personality) could issue rules and orders which would be directly binding on third parties. In particular, it could give rise to legal uncertainty arising from a lack of clarity as to where the ultimate responsibility and liability for actions of the System lie.

For this reason the Legal Experts advocated adopting the second approach, i.e. making the Council and the Executive Board the governing bodies of the ECB. This would imply that the ECB (i.e. its governing bodies) could give instructions to the national central banks to carry out operations in the pursuit of the System's objectives. Of course, to the extent that it is considered necessary and appropriate, the ECB itself could perform certain centralised operations. However, even under this approach the draft Statute (version of 14th September 1990) would need to

be amended with a view to clarifying the functions and organisation of the ECB. Most of the necessary text adjustments would, however, only involve the replacement of references to the "System" by those to the "ECB" (as regards decision-making or regulatory powers) or the "ECB and the national central banks" (as regards operations). Moreover, by making the Council and the Executive Board the governing bodies of the ECB, no further provisions relating to the organs of the ECB (other than the staff) would be required. In the view of the Legal Experts this approach would be logical and legally sound, and clearly indicate to third parties that the ultimate responsibility and liability for actions of the System lie with the ECB.

It should, however, be emphasised that in spite of the distinct preferences of the Legal Experts the choice between the two approaches is a political decision to be taken by the Governors. In the attached draft Statute the revisions, which follow the second approach, should be considered only as an illustration of the second approach. The changes have been made on the basis of the draft Statute dated 14th September 1990 and while it proved necessary to reorganise some of the Articles (mainly Articles 1, 7 and 8), all proposed changes have been indicated clearly, with additions being shown by italic typeface and deletions by crossing out the old text.

(b) The distribution of responsibilities between the Council and the Executive Board

The Legal Experts took note that the two most important Articles dealing with the responsibilities of the Council and the Executive Board (Articles 11 and 13) have been the result of careful drafting and reflect compromises reached in the Committee of Governors. For this reason the Legal Experts refrained from amending the Articles (except for some minor changes which do not affect the important provisions).

Nonetheless, the Legal Experts expressed concern that the present text does not distinguish clearly between the responsibilities of the two bodies. Incidentally, the need to clarify the respective competences exists, irrespective of which approach is followed in determining the legal nature of the System (see (a) above). The following points were made:

Firstly, in Article 11.1 the first sentence seems to confer upon the Council the task of taking decisions necessary for the performance of

everything the System has to do. This power, however, seems to be restricted thereafter in the field of monetary policy to key decisions and the establishment of guidelines for their implementation. While accepting that there was a difference between strategic decision in the course of monetary policy and decisions relating to day-to-day management in line with the course of monetary policy, the Legal Experts felt that this distinction needed to be made clearer.

Secondly, in Article 11.1, second paragraph, the Legal Experts pointed out that the first sentence stating that "the Council shall delegate ..." had little meaning and that the arrangement needed to be made clearer. Two possibilities were mentioned: one would be to lay down a procedure for the delegation of powers by the Council to the Executive Board; the other was to give the two bodies distinct competences, for example, by conferring upon the Council the power to take decisions (as in Article 11.1, the first two sentences) and upon the Executive Board the task of implementing monetary policy decisions in accordance with the guidelines established by the Council.

Thirdly, in Article 13.3, according to the first sentence the national central banks are obliged to act "in accordance with the policy guidelines and instructions of the Council or the Executive Board. The Legal Experts suggested rephrasing this by saying either "... guidelines and instructions of the ECB" or "... guidelines of the Council and the instructions of the Executive Board".

2. Introduction of references to secondary Community legislation

The Legal Experts were of the view that in a number of draft provisions it would be necessary to acknowledge the need for Community legislation, under which the System should be enabled to take certain decisions or perform tasks with direct bearing on third parties. It was not considered sufficient to give general and extensive powers to the decision-making bodies simply in the form of a Statute provisions, even if the Statute had the status of primary EC law and therefore had to be ratified by national parliaments.

In this context two issues have to be considered: the appropriate legal procedure for secondary Community legislation and the decisions and acts to be made subject to such a procedure. As far as the first issue is

concerned, the Legal Experts agreed that the procedure for secondary Community legislation should be the same as that proposed for a simplified amendment procedure (see Section 3 below).

As regards the second issue, the Legal Experts recommended that the following Articles be specified further in secondary Community legislation: Article 5 (collection of statistical information); Article 8 (a new Article on the ECB); Article 13 (national central banks; compatibility of their statutes); Article 15 (legal tender status of Community currencies); and Article 18 (minimum reserves).

3. Simplified amendment procedures

The Legal Experts fully endorsed the idea of introducing a simplified amendment procedure in order to make it possible to revise some Articles of a more technical nature or to confer new tasks upon the System without having to follow the rigorous procedure of Treaty amendment. The Legal Experts felt that it would be desirable to introduce two different types of provisions, one to be applied in normal circumstances and one to be used in exceptional emergency situations. However, the texts proposed in Chapter IX - which, in any case, would need to be reviewed thoroughly, with particular emphasis on the appropriate majority requirements - should at present be considered simply as illustrative examples. The main reason for not having made a more definitive proposal is that the Legal Experts considered it important to await the outcome of the Intergovernmental Conference on Political Union, which is likely to change the role of the Community institutions in the legislative process.

4. Democratic accountability

A number of Legal Experts felt that the present Statute showed a lack of democratic accountability and they therefore made proposals on how to reduce the "democratic deficit". These Experts recognised, however, that this was a highly political question (and, for this reason, no reference to proposed amendments is made in the attached draft Statute).

The proposals to strengthen democratic accountability related to Article 14 on inter-institutional co-operation. In particular, it was suggested that:

- in Article 14.2 the President shall also be invited to meetings of the Commission when matters relating to the System's objectives and tasks are discussed;
- in Article 14.3 the President shall be required to participate in (instead of shall be invited to attend) meetings of the specialised committees of the European Parliament.

Moreover, it was suggested to rephrase the first part of Article 14.3 by saying that "The Council shall approve an annual report on the activities of the System and the Council shall publish or transmit it to the stated organisations".

5. Questions to be dealt with in the "Transitional provisions"

The Legal Experts did not discuss explicitly the contents of Chapter VIII "Transitional provisions", since details of this chapter will only be worked out at a later stage. However, two observations with relevance for the transitional provisions were made.

Firstly, it was felt that the concept of "participating" national central banks (see Article 1) needed to be made more precise. This could possibly be done in Chapter VII by either giving a list of the participating national central banks, or the criteria to be fulfilled by participating national central bank or by laying down a procedure under which national central banks would be considered to participate.

Secondly, if not all Member States join the System at its inception, there could be an imbalance in voting rights. For example, if only four countries joined, the Executive Board would have a clear majority in the Council. It was suggested that this issue should be resolved in the transitional provisions by, for instance, distributing in equal shares the twelve votes provided for in the Statute among the Governors of the participating national central banks.