

6th March 1991

To the members of the Committee of Alternates

The attached note has been prepared by the Secretariat with a view to facilitating the Alternates' discussion on Chapter IX of the Statute. As mentioned in the Secretariat's report on the IGC meetings on 25th and 26th February 1991, the personal representatives invited the Committee of Governors to express its views on an appropriate procedure for simplified amendment of the Statute and to suggest a list of Articles subject to that procedure.

With kind regards,

A handwritten signature in cursive script, appearing to read "Gunter Baer".

Gunter D. Baer

Secretariat

SIMPLIFIED PROCEDURE FOR AMENDING
THE STATUTE OF THE ESCB AND COMPLEMENTARY COMMUNITY LEGISLATION

The Intergovernmental Conference (IGC) has invited the Committee of Governors to express its views on an appropriate procedure for amending the Statute of the ESCB and to set out a positive list of Articles in the Statute which should be subject to a simplified amendment procedure.¹ This note has been prepared in preparation for the examination of this topic by the Committee of Governors. It also reviews the issue of complementary Community legislation referred to in several Articles of the draft Statute.

I. SIMPLIFIED AMENDMENT OF THE STATUTE

As was pointed out in the Committee of Governors' Introductory Report to the draft Statute, if the Statute were to be annexed to the new Treaty in the form of a protocol, it would have the same status as the Treaty itself, i.e. it would constitute primary Community law. Accordingly, any amendment of the Statute would be subjected to the procedure applied to Treaty changes (Article 236 of the Treaty) unless there were a simplified amendment procedure. The Committee of Governors recognised the need for such a procedure since the Statute includes not only fundamental "constitutional" provisions but also provisions of a more technical nature whose amendment might prove to be warranted in changing conditions. However, the Committee refrained from making concrete proposals for the procedure to be adopted for simplified amendment because it considered that such a procedure should be in accordance with the legislative process of

1 See the Secretariat's report, dated 28th February 1991, on the IGC meeting held on 25th and 26th February 1991.

the Community. As the legislative process is expected to be revised in the context of the IGC on Political Union, the Committee felt that it was premature to propose a procedure. The Committee also refrained from specifying a list of Articles which might be subject to simplified amendment, confining itself to the general statement that all fundamental features of the System should be excluded.

If the Committee of Governors wishes to respond to the invitation of the IGC, two issues have to be addressed:

- the procedure for simplified amendment;
- the provisions of the Statute which might be subject to simplified amendment.

1. Simplified amendment procedure

In this context, four questions need to be considered:

- the right of initiative;
- consultation;
- the conditions for decision-taking;
- the place of the amendment procedure (Treaty or Statute).

(a) Right of initiative

The normal legislative procedure confers upon the EC Commission the right of initiative. When the Council acts on a proposal from the Commission unanimity is required for an act constituting an amendment to that proposal (see Article 149 of the Treaty). An exception to the Commission's right of initiative is in particular Article 188 of the Treaty which empowers the Council of the European Communities to amend certain provisions of the Statute of the Court of Justice at the request of the latter.

If the normal procedure is not considered to be appropriate, should the right of initiative be given to the ECB? If so, should the ECB have the exclusive or only a competing (i.e. other Community bodies or a Member State can make proposals) right of initiative?

(b) Consultation

If the ECB were not given the exclusive right of initiative, or no right of initiative at all, it should presumably at least be consulted. Should the ECB's opinion be given a special status, for instance, that it

cannot be overruled by the Council of the European Communities at all or that a decision to the contrary would require higher majorities?

(c) Conditions for decision-taking

Who should decide about amendments to the Statute? There are different possibilities:

- the Council alone (Article 149, paragraph 1 of the Treaty);
- the Council in co-operation with the European Parliament (Article 149, paragraph 2 of the Treaty);
- the Council and European Parliament according to a new procedure.

Which majority requirements should prevail in the Council and should such requirements vary according to circumstances: for instance, qualified or simple majority if the Council decided in conformity with a request (proposal, recommendation) or opinion of the ECB and unanimity if the Council amends the request (proposal, recommendation) or opinion of the ECB?

(d) Place of the simplified amendment procedure

Should the procedure be laid down in the Treaty (compare Article 188 of the Treaty) and/or in the Statute?

2. List of provisions subject to the simplified amendment procedure

As mentioned above, in the opinion of the Committee of Governors, fundamental features of the Statute should not be subject to the simplified amendment procedure; the procedure should rather apply to provisions which are of a more technical nature. In this respect, the following general observations can be made.

Chapter IV of the Statute dealing with the monetary functions and operation of the System contains most of the more technical provisions. Although they are formulated in very general terms, it might be prudent to include them in the list of more easily amendable provisions. In contrast, the list should not include the fundamental provisions guaranteeing the functional independence of the System's policy (Article 16 and Article 21 paragraphs 1 and 6).

In the financial provisions (Chapter V), Article 28.2 already provides for regular reviews of the key and possibly modification in accordance with the simplified amendment procedure. With the exception of Article 26.1 and - probably - Article 32 there seems to be little need to

subject any other provisions to the simplified amendment procedure since they are formulated in very broad terms and confer upon the Council of the ECB extensive powers in accordance with the principle of financial autonomy of the System.

The other parts of the Statute do not necessarily appear to be candidates for the simplified amendment procedure. This applies in particular to Chapter I and Chapter II except that the Committee of Governors recognised that other tasks than those specified in Article 3 might be conferred upon the System on the basis of the simplified amendment procedure provided that new tasks are not at variance with the System's objectives stated in Article 2.

While Chapter III contains a number of procedural provisions, most of them are of a fundamental nature which would rule out the application of the simplified amendment procedure.

An amendment of certain provisions in Chapters III and VII might become necessary if the institutional structure of the Community were to be changed (this would make the references to Community institutions in Article 15 and in Chapter VII obsolete) or new countries joined the Community (which might, for instance, have implications for Articles 10 and 11). However, in these cases the necessary adaptation of the Statute would not have to be made on the basis of a simplified amendment procedure, but would instead occur in the context of Treaty changes in accordance with Articles 236 and 237, respectively.

In conclusion, the following Articles could form the list of provisions which would be subject to the simplified amendment procedure:

- Article 3 subject to the provisions that the catalogue of tasks may be enlarged (but not reduced or altered) and that new tasks have to be consistent with Article 2;
- Article 10.4;
- Article 15.4 (last three words of the second sentence);
- Article 15.5 (frequency of consolidated statements);
- Articles 17, 18, 19, (20?), 22, 23 and 24 (or, alternatively, Chapter IV excluding Articles 16 and 21, paragraphs 1 and 6);
- Article 21 except paragraphs 1 and 6;
- Article 26.1;
- modification of the key in accordance with Article 28.

Finally, there is the question of whether it is necessary to specify explicitly that no amendment should affect the scope of the non-amendable provisions or whether this would go without saying.

II. COMPLEMENTARY COMMUNITY LEGISLATION

Complementary Community legislation is designed to give effect to provisions of the Statute referred to in Articles 4.1, 5.2, 16.2 and 30.4. Unlike the simplified amendment procedure such legislation does not change the Statute itself but could be relevant for the interpretation and application of the provisions concerned.

Consideration should be given to the question of whether the procedure for enacting complementary Community legislation should be the same as that for simplified amendment of the Statute or whether it should be different.

III. HOW TO CONVEY THE COMMITTEE OF GOVERNORS' OPINION TO THE IGC?

Should the Committee of Governors state the general lines or try to elaborate draft Articles (or elements of a draft Article)?