

**SUMMARY REPORT OF THE  
MEETING OF LEGAL EXPERTS HELD IN  
FRANKFURT ON 27TH JUNE 1995**

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**Attachments:**

- 1 List of participants**
  - 2 Agenda of meeting**
  - 3 Final report on "The scope of EMI's mandate to prepare for Stage Three."**
  - 4 Action points**
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██████████ opened the meeting and welcomed all participants (Schedule 1). He briefly outlined the agenda for the day (Schedule 2). It was agreed that the meeting be recorded.

**A SCOPE OF THE EMI'S MANDATE TO PREPARE FOR STAGE THREE**

A paper prepared by the EMI's Legal Division following contributions from several NCBs and the legal expert's meeting of 28th March had been distributed. ██████████ and ██████████ had submitted dissenting opinions, the latter on one specific item of the paper. It was agreed to record these dissenting opinions in the paper.

██████████ added to his dissenting opinion a twofold statement: (i) that the search for consensus had been used satisfactorily in the past and present, and that the use of majority voting could create political problems in Germany, and (ii) that binding decisions from the EMI would not be acceptable to the Bundesbank.

██████████ clarified that although the paper had not fully recorded his interventions in the March meeting, he approved the version which had been distributed. Some language amendments were suggested by ██████████ and ██████████ and agreed by all.

The paper attached as Schedule 1 of these minutes was approved.

██████████ said that the report would be sent to the EMI President. He mentioned that the paper had not been prepared by the EMI on its own initiative; the issue had been raised by one member of the EMI Council.

## **B CATALOGUE OF LEGAL WORK**

A paper prepared by the General Secretariat had been distributed. ██████████ requested comments on the introductory part, and on omissions and substantial issues which required being addressed..

The conclusion of the debate could be summarised as follows:

- (a) Some inconsistencies were found between the classification of projects and their deadlines and dependence on outside inputs. It was suggested that work that is purely legal and does not depend on policy decisions be distinguished from legal work dependent on inputs from existing Working Groups and Sub-Committees. Projects classified as number 3 would be either deleted or included in an Annex to the paper.
- (b) Although it might be desirable to unify in one single act the basic regulatory institutional framework of the ESCB/ECB, it was noted that this might prove difficult. It was found to be premature to agree on such an approach before knowing the content of that framework. A “modular” approach was deemed to be more feasible.
- (c) Given the inevitable long lead times, it was agreed that the recent political agreements on the start of Stage Three did not attenuate time constraints on preparatory work.
- (d) The EMI should take a pro-active role in establishing a common platform for the exchange of information concerning the adaptation of NCB statutes, whilst it was recognised that neither the EMI nor the NCBs had rights of legislative initiative. It was acknowledged that the EMI had the task of assessing the adaptation of NCB statutes, and that it also had a consultative role in adapting legislation.
- (e) It was felt that NCBs cannot determine which areas of national legislation, other than their own statute, would require adaptation. That was a responsibility for governments and parliaments, and not for NCBs. Nevertheless, since the Treaty was unclear about the content of such adaptation and in view of the reporting task vested in the EMI by Article 109j (1), the legal experts of NCBs were prepared to help the Legal Division of the EMI in defining, on a technical level, the areas of national legislation requiring adaptation to Treaty EMU provisions.

- (f) The Catalogue submitted was found to be too lengthy and perhaps incomplete as it is probable that further legal work will arise. It was suggested to slim down the Catalogue to the minimum necessary, and be ready to add further items as the need arises. The reduction of its content might facilitate a clearer classification of projects and priorities.
- (g) It was decided that it was not for the legal experts to decide on the organisation or method of work, nor on the priorities to be adopted for the fulfilment of the legal tasks of the Catalogue.
- (h) Legal experts were asked to submit further comments on the Catalogue, in writing, not later than 14th July.
- (k) The final version will be submitted to the EMI President for presentation to the EMI Council.

### C CRITERIA FOR ASSESSING CENTRAL BANK INDEPENDENCE

██████████ made a presentation of the paper which had been distributed. He stressed the idea that it was a paper which had taken a maximalistic approach for discussion purposes, had been written with respect to previous debates in the Committee of Governors and academic doctrine on this issue, and that the EMI's position concerning central bank independence had not yet been institutionally discussed and agreed.

The following points were the subject of debate:

- (a) The transition to Stage Three
  - The time schedule foreseen by the Treaty on NCBs adaptations was not clear: some experts felt that Articles 108 and 109e(5) would require independence to be achieved at the date of establishment of the ESCB at the latest, whilst other experts considered the possibility of having the adaptations made beforehand but effective only upon the start of Stage Three.
  - Article 107 applied only as from the start of Stage Three.
  - ██████████ felt that Denmark is subject to the same adaptation obligations as any other Member State, including the independence of its NCB. Decisions adopted at the Edinburgh summit did not change the Treaty. With respect to the United Kingdom, he said that exemption from Articles 107 and 108 would only take place when that Member State notified that it did not intend to move to Stage Three.
- (b) The implications of Article 107 prohibitions
  - The need to repeat the content of Article 107 in national legislation was the object of debate. Some legal experts thought that Article 107 applied in Member States without the need to reproduce its content in national law.

- Legal experts agreed that central bank independence meant specific institutional, functional and financial features. The prohibition of instructions in Article 107 necessarily entailed having provisions in statutes that would make it impossible for such instructions to have effect, when and if made.
  - NCBs are not legislators: granting independence to NCBs was a matter for governments and parliaments, and not for NCBs. In view of the reporting and consultative roles vested in the EMI by the Treaty, it was accepted that the EMI should elaborate its views on central bank independence and, to that end, NCB legal experts might give their assistance.
  - If it was agreed that independence was the combined result of several individual legal features and it was also felt that a blind checklist approach or piecemeal analysis would not be the correct way to assess the degree of independence: the assessment ought to be effected taking a global or comprehensive view of the legal and real situation of each individual NCB.
  - Some legal experts expressed the view that the independent status of NCBs should not be modelled on the ECB, given that national peculiarities and traditions ought to be preserved, although some ECB features might of interest for adapting the status of NCBs.
  - The question was raised whether independence should apply only to ESCB matters, or whether, because NCBs cannot divide themselves, should also apply to other activities of NCBs. How can independence be combined with dependence in one single entity? Do NCBs need to have two different, but co-existing, structures and types of legal status? No comprehensive solution to this problem was reached.
- (c) Institutional independence
- NCBs of Sweden and Finland depended not on Government but on their national parliament. It was felt that the independence foreseen in the Treaty for the ESCB could not allow NCB dependence on national parliaments.
  - The existence of private shareholders in the Belgian NCB was commonly felt in Belgium to be a higher guarantee against governmental intervention than when NCBs belong 100 % to the State.
  - Mismanagement needs to be admitted as a cause for dismissal of NCB's Governors.
  - Some legal experts considered the attendance of government officials in the governing bodies of NCBs in Stage Three to be unacceptable, whatever the status of such attendance; this opinion was based on the idea that, in Stage Three, monetary policy does not fall under the competence of Member States, but under that of the ESCB, and national government officials have no role in ESCB organs. The ECB model allowing European Community representatives to attend ECB Governing Council meetings would thus be not transferable to NCBs.

- Other legal experts said they saw no harm in admitting governmental representatives to NCB boardrooms, provided that they could not influence decisions; having the right to vote was felt to give power and influence in decisions, and should not be admitted even if government officials were a minority in NCB boardrooms.
- The appointment of Governors by constitutional organs other than, and in addition to, Government was felt to be unnecessary to guarantee independence, and might moreover give ground for political bargain and compromise.

(d) Continuation of analysis

The debate had taken more time than initially allocated for this item, and important features still needed to be discussed. It was decided to stop the debate and agreed that legal experts would make further comments on the paper in writing by not later than 15th July. The Legal Division would re-draft the paper trying to reach common-ground criteria.

**D OTHER ITEMS**

In view of the time consumed in discussing other items, it was agreed to follow a written procedure to complete the paper on "secrecy and transparency in EMI activities". Legal experts were requested to contribute in writing, in order to finalise the summary on the system of secrecy and transparency applying to each NCB.

The items "Methodology for exchanging legal information" and "Consultation on draft legislation from Member States" were also postponed.

██████████ requested legal experts to express their first reactions to the letter sent by the Legal Division the previous day on the "Legal status of the single currency in Stage Three A". ██████████

██████████ explained the reasons for the short notice and announced that they would promptly be addressed again in writing on this issue in a new Legal Division note.

██████████ said that Article 109l (4) made a distinction between the ECU becoming a "currency in its own right" and the ECU becoming the "single currency". These two concepts should not be confused. Whilst the ECU would be a fully-fledged currency from the start of Stage Three, he thought that the "single" quality would occur only when national currencies disappeared at the end of Stage Three A. Until national currencies disappear, they would continue to be fully-fledged currencies.

Several other interventions were made addressing textual interpretations of Article 109l (4).

Both [REDACTED] and [REDACTED] explained that the problem was not in the textual interpretation of Article 1091 (4). This Article would clearly permit the two options of either legally construing a temporary dual-currency system, with the substitution of national currencies at the end of Stage Three A, or legally construing a single-currency system with national currencies being non-decimal denominations of that currency. In the latter case, the substitution would take place at the start of Stage Three, and not at the end of Stage Three A. The exercise to be done was exclusively professional, focused on the following items which pertain basically to the domain of national law:

- analysing the legal means available for adopting one or the other option, and
- analysing the legal consequences of having either a dual-currency-system or a single-currency cum national denominations-system.

Such exercise may facilitate analysis in other groups concerning the impact of either option on several other criteria: irreversibility and credibility, fixed nature of conversion rates, effect on costs and competitive distortions, public acceptability. Initially it had been indicated that such analysis should also contemplate the effect of such options in the unlikely event of a participating country opting out of monetary union or of a realignment of national currencies prior to their disappearance; several legal experts rejected the idea of even considering these unlikely events.

[REDACTED] said that although the case had already been mentioned, the Belgo-Luxembourg Monetary Union had peculiarities that did not favour it being used as an example to solve issues like the ones raised in the Legal Division letter.

[REDACTED] said that the domain of the Law was limited, and it could not solve the big questions evoked here of irreversibility, credibility, fixed nature of conversion rates, etc.

[REDACTED] thanked everyone for attending this meeting, and declared it adjourned.

**SCHEDULE 1**

**LIST OF PARTICIPANTS**

**Banque Nationale de Belgique**

**Danmarks Nationalbank**

**Deutsche Bundesbank**

**Bank of Greece**

**Banco de España**

**Banque de France**

**Central Bank of Ireland**

**Banca d'Italia**

**Institut Monétaire Luxembourgeois**

**De Nederlandsche Bank**

**Oesterreichische Nationalbank**

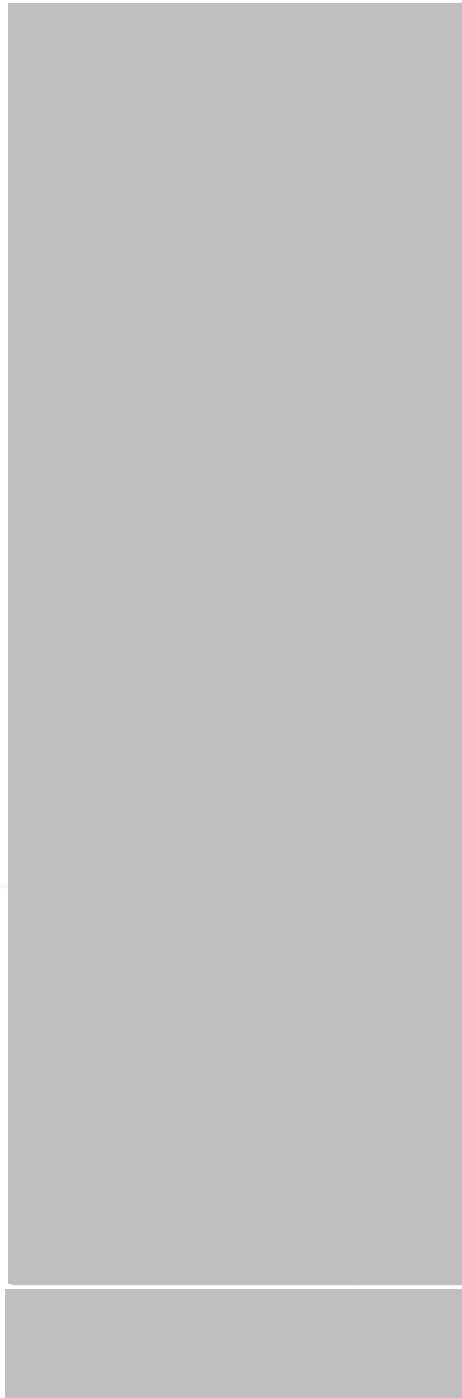
**Banco de Portugal**

**Suomen Pankki**

**Sveriges Riksbank**

**Bank of England**

**EMI**



**SCHEDULE 2**

**AGENDA**

**MEETING OF LEGAL EXPERTS**

**27TH JUNE 1995 9.30 AM - 6.30 PM**

- A 9.30 - 10.00 PREPARATION OF STAGE THREE OF EMU AND DECISION-MAKING POWERS OF THE EMI  
Final comments to the Legal Division Report to the EMI Council
- B 10.00 - 11.30 CATALOGUE OF LEGAL WORK  
Review of content
- 12.00 - 13.00 CATALOGUE OF LEGAL WORK  
Procedural aspects and organisation of work
- C 14.30 - 16.15 CRITERIA FOR ASSESSING CENTRAL BANK INDEPENDENCE
- D 16.30 - 17.30 DELIMITATION OF SECRECY AND TRANSPARENCY PRINCIPLES IN EMI ACTIVITIES
- E 17.30 - 18.00 METHODOLOGY FOR EXCHANGING LEGAL INFORMATION
- F 18.00 - 18.30 OTHER QUESTIONS  
Legal status of the ECU during Stage Three A  
Consultation procedures: analysis



## SCHEDULE 4

### ACTION POINTS

1. Catalogue of legal work

Legal experts are invited to submit any additional remarks they may have on the Catalogue of legal work of 7th June 1995 at the latest by close of business on 14th July 1995 to [REDACTED]

[REDACTED] A final version will be distributed some time after that date and will also be presented to the President of the EMI for submission to the Council of the EMI.

2. Criteria for assessing Central Bank independence

Legal experts are invited to submit any additional remarks they may have on the memorandum of 6th June 1995 at the latest by close of business on 14th July 1995 to [REDACTED]

An adjusted version will be distributed some time after that date and may be submitted to the EMI Council for its meeting on 5th September 1995. The memorandum will also be taken into account when drafting the "Article 7 Report" (the report which the EMI is required to submit to the ECOFIN Council under Article 7 of its Statute which will feature on the agenda of the EMI Council meeting of 7th November 1995).

3. Secrecy and transparency with regard to EMI-related information

Legal experts are invited to submit any remarks they may have on the memorandum of 20th June 1995 at the latest by close of business on 21st July 1995 to [REDACTED] whilst receipt of contributions to the table on page 4 of the report at the latest by the same date would also be appreciated. A final version of the memorandum will be distributed during the beginning of August and will also be presented to the President of the EMI for submission to the Committee of Alternates and/or the Council of the EMI.

4. Legal status of the single currency and national banknotes in the various phases of Stage Three

A note with questions was distributed on 26th June 1995 and any comments would be welcome, preferably by close of business on 14th July 1995, to [REDACTED] This issue needs further consideration by Legal Experts and therefore a further note and a schedule of developments will follow.

## SCOPE OF THE EMI'S MANDATE TO PREPARE FOR STAGE THREE OF EMU

### INTRODUCTORY NOTE

The present paper has been prepared following a meeting of expert lawyers of national central banks which was convened under the chairmanship of the Secretary General of the EMI (in Annex 1 appears the list of participants) in the city of Frankfurt on 28th March 1995 to review and discuss a draft paper prepared by the Legal Division of the EMI under the title "Preparation of Stage Three of EMU and Decision-making powers of the EMI". Contributions for that paper had been received in writing from legal experts of the Deutsche Bundesbank, Banque de France, De Nederlandsche Bank, the Bank of England, and the Banque Nationale de Belgique.

This paper follows the items of the agenda and reflects the main basic ideas that arose out of the meeting, but does not pretend to reproduce exactly the terms in which all individual legal experts expressed themselves.<sup>1</sup>

### I THE MANDATE OF THE EMI

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.<sup>2</sup> 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

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<sup>1</sup> [redacted] dissenting opinion, on behalf of the Deutsche Bundesbank is attached as an annex to this paper.

<sup>2</sup> 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 for making such a reference.

attention to the single monetary policy, statistics, operations to be undertaken by the national central banks (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.

The mandate given to the EMI requires the following items to be addressed:

- 1 Extent of the mandate to the EMI
- 2 The EMI and the NCBs: their respective role in the preparation of Stage Three
- 3 The EMI and the ECB
- 4 Legal accountability of the EMI

#### **1 Extent of the mandate of the EMI**

The use of the word "specify"<sup>3</sup> in the EMI's mandate (see above) raises the question as to whether the EMI is only empowered to prepare a blueprint for Stage Three, leaving all decisions to the ECB, or whether its mandate also extends to preparing Stage Three by adopting options and initiating, together with NCBs, some implementation measures before the establishment of the ECB.

The Treaty provides for an interim period between the decisions to be taken pursuant to Articles 109j (3) and (4), and the start of Stage Three when the parities are irrevocable fixed. In this period the ECB/ESCB will be established and the EMI will enter into liquidation. There seems to be a broad consensus that this interim period would be around twelve months. Nevertheless, even an interim period of twelve months should not be taken for granted, nor deemed to be sufficiently long as to postpone all decisions until the establishment of the ECB. Indeed, the implementation of a single monetary policy from the beginning of Stage Three requires considerable preparatory work, including concrete action in several fields, both in Member States and at the Community level: legal reforms, institutional changes, appropriate information systems, public information and, in some cases, a period of testing. An interim period of twelve months will not be sufficient in a number of areas. The EMI has been researching which areas of preparatory work would need early decisions to permit the

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<sup>3</sup> "Festlegen" in the German text of the Statute and "préciser" in the French version.

system being prepared at the beginning of Stage Three, and the following fields are deemed to require a lead time that exceeds the estimated 12-months interim period:<sup>4</sup>

- (a) A fully operative system of minimum reserves implies changes in the regulatory framework, the establishment of reporting systems, preparation with banks and, finally, a period of testing. Some Member States could make all final preparations within twelve months, whilst some other Member States would require a longer period.
- (b) The field of statistics, an essential tool for monetary policy decisions, also needs the adoption of regulations, both at European and national level, early implementation in Member States, and a period of testing.
- (c) The organisation of a decentralised procedure of forex and open market interventions of the ESCB, and of standing facilities, which implies not only definitions and institutional decisions but also the adaptation of local rules, the use of compatible payment-against-delivery systems for the collateralisation of the repurchase agreements (for instance), and possibly related changes in national legislations.
- (d) The organisation of a European-wide payments systems has only started with the approval of the TARGET report. To have the system fully in operation as from the start date of Stage Three requires further specifications, implementation by NCBs, and a period of testing. Some legal issues will have to be probably resolved by legislative measures (collateral, securities settlement, netting, bankruptcy questions, ... ).
- (e) The establishment of the ECB and the organisation of the ESCB require a set of decisions of institutional nature, interlinked with policy matters, which will need being adopted by the EMI during Stage Two A and subsequent adaptations in NCBs: information systems, accounting issues, etc.

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<sup>4</sup> This list is given for illustration purposes and as a basis for the need to address the abstract questions to which this paper refers. It does not preclude conclusions of ongoing debates on specific items of the list concerning transition scenarios and changeover methods to the single currency.

- (f) The field of technical preparation of banknotes requires long lead-times; depending on final decisions concerning the scenarios for changeover to the single currency, it might be the case that some decisions will have to be taken in Stage Two A.

All these areas require decisions and early, though perhaps partial, implementation to be fully operative at the start date of Stage Three.

From a legal point of view, there are good grounds to maintain that the EMI's mandate is not limited to the preparation of a blueprint but requires real action during the preparation of Stage Three. Firstly, Article 2, when defining the EMI's mandate, employs an expression which differs from the mere "specification" of a framework in a blueprint that is subsequently employed in Article 4.2: "Making the preparations required for ...". Secondly, Article 15.3 explicitly provides for a legal instrument which may, in the appropriate cases, underpin implementation initiatives, namely guidelines. Thirdly, the word "specify" in Article 4.2 should be read in conjunction with the areas to which particular attention should be paid, laid down in the five indents of 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; the fact that Article 109f (2) contains the same description (although the activities are listed before mention is made of the "specification" of the framework) gives the idea that preparation activities are prior - and different - to the specification in a final blueprint.

In addition to the above, there are two further legal considerations on which the EMI may base its competence to initiate, together with NCBs, implementation measures. A reasonable interpretation of the Treaty and the EMI Statute requires Member States to admit the possibility of early implementation measures when these are absolutely necessary, taking into account the length of the interim period, to enable the ESCB/ECB to operate from the start of Stage Three. On the basis of the "principle of effectiveness" ("effet utile") of international treaties, once competence exists the necessary capacities to perform a task are deemed to be implicitly attributed. This 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*". This theory of implied powers applies, mutatis

mutandis, to European Community Law. The European Court of Justice, in a judgement dated 9th July 1987 in joint cases 281, 283 - 285 and 287/85, 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*".

The second legal point would be Article 7 of EMI Statute, which entrusts the EMI with the task of assessing in yearly reports "*the adaptation of monetary policy instruments and the preparations of the procedures necessary for carrying out a single monetary policy in the third stage*". It appears from this text that such adaptation and preparation in Member States have to be effected during Stage Two under the aegis of the EMI, which assesses such early implementation measures in yearly reports. And the corollary is that decisions need to be made before adaptation and preparation takes place.

As a conclusion, the extent of the mandate given to the EMI includes the preparation of a blueprint of the regulatory, logistical and organisational framework necessary for Stage Three, and, in those areas where the estimated length of the interim period would not allow the ECB to finalise all preparations needed to permit a single monetary policy from the beginning of Stage Three, the decision, together with NCBs, to initiate implementation measures during Stage Two. The mandate should thus be seen as an "obligation de résultat", whereby the EMI would have to be able to present to the ECB, upon its establishment, not only a blueprint of the framework, but also all necessary prior implementation measures without which the ECB would not be able to carry out the single monetary policy as from the start date of Stage Three.

## **2 The EMI and NCBs**

The institutional design for Stage Two of EMU is a product of political compromise. The Treaty conceives the EMI as something more than the Committee of Governors and the European Monetary Cooperation Fund, both of which were dissolved and absorbed by the EMI, but as something less than the future ECB. The EMI has no authority over the NCBs, has no regulatory power and its decisions are not enforceable (Article 192 of the Treaty does not apply to decisions of the EMI, whereas it does to those of the ECB).

Article 3.1 of EMI Statute stipulates that *“The EMI shall carry out the tasks and functions conferred upon it by this Treaty and this Statute without prejudice to the responsibility of the competent authorities for the conduct of the monetary policy within the respective Member States.”*

By referring to Article 3.1, Article 15.4 makes clear that the EMI may not take any binding decision in the field of monetary policy in Stage Two. Its role in this field is confined to the coordination of national policies. This, however, does not prevent the EMI from taking preparatory measures for Stage Three to the extent that these do not interfere with monetary policy during Stage Two.

The wording of Article 2 (“the EMI shall contribute”) should be construed in the sense that the EMI is not the only and unique institution responsible for the preparation of Stage Three. Member States, the European Council and the European Commission all have their own responsibilities in the preparation of Stage Three. NCBs, as public institutions of the Member States are (see Article 5 of the Treaty) subject to the obligation to contribute to the preparation of Stage Three even under their status of independence from Government. The role of the EMI to “strengthen cooperation between national central banks” (Article 4.1) should also be read in the context of preparation for Stage Three, where NCBs have obligations for such preparatory activities.

The wording of Article 2 should thus be read in conjunction with Article 4.1: progress towards Stage Three, inclusive of the initiation of implementation measures in the areas where prompt action is needed, should be made together with NCBs within the usual framework of the activities of Working Groups and Sub-Committees organised by the EMI in accordance with the long-established tradition of the Committee of Governors.

### **3 The EMI and the ECB**

It follows from the words “for decision to the ECB” in Article 4.2 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 difference in the composition of its decision-making bodies. Whilst the EMI Council is integrated by the President of the EMI and the Governors of all NCBs, the ECB Governing Council consists only of those Governors whose NCBs participate in Stage Three plus the members of the Executive Board; also, in Stage Two Governors act in the EMI Council as

representatives of their institutions (some of which are not yet presently independent), whereas in the ECB national Governors will act in their personal capacity.

The above consideration does not preclude the EMI, together with the NCBs, 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 (namely, its interest in being able to carry out the single monetary policy as from the start date of Stage Three), explicitly requires such a course of action, provided that the EMI ensures that the ECB will avail itself of a high degree of discretion in its ultimate policy decisions, endorsing, amending or abrogating, measures adopted by the EMI (and by NCBs). The ECB will not be legally bound by decisions adopted by the EMI, and thus will always retain its right to correct the course of events.

A majority of legal experts considered it difficult to identify a priori the measures to be adopted by the EMI and those to be left for the ECB. In general, decisions which would have material consequences for the actual conduct of monetary policy in Stage Three would have to be left for the ECB, or several open options may have to be prepared. On the contrary, measures of a technical nature concerning in particular the infrastructure necessary to conduct monetary policy in Stage Three, may be adopted by the EMI. It should need an ad hoc examination whether specific measures fall in one or the other category, taking into account the interests of the future ECB to avail itself of duly prepared and tested instruments and procedures necessary to permit being fully operational in a very short time span.

#### **4 Legal accountability of the EMI**

It has been concluded above by a majority of legal experts that the EMI received a mandate which qualifies as an "obligation de résultat". There is no legal obligation without legal sanction. Article 19.1 submits "acts or omissions" of the EMI to review by the ECJ. In principle, the EMI is thus legally accountable before the Court of Justice should it fail to perform its mandate, and an action based on Article 175 of the Treaty cannot be, in principle, ruled out. It is nevertheless perceived that there are technical constraints for pursuing an action based on Article 175 of the Treaty, namely the nature of preparatory acts that the EMI's mandate entails, the difficulties in demonstrating that a wrongful omission existed, and the ex-lege liquidation of the EMI before Stage Three starts.



Failure to act by the EMI will entail political, rather than legal, accountability<sup>5</sup>. Perhaps more significant is the consideration that failure to act by the EMI will undoubtedly lead to a situation in which other Community institutions will act, the EMI losing the initiative<sup>6</sup>.

## II ADVANCING THE CONSTRUCTION OF STAGE THREE.

It has been the general view of most of the legal experts that the EMI Statute offers the NCBs a legal instrument should they wish to start preparation of Stage Three in advance with legally-solid measures, and co-ordinate early implementation measures between themselves. That legal instrument is a binding decision of the EMI Council based on Article 15.4.

Article 15 permits the EMI to take decisions "in the performance of its tasks". Preparatory work is listed by the Statute (Article 4.2) as one of the EMI's tasks, and it might therefore, legally speaking, be the subject of formal decisions. The EMI, when adopting formal decisions (by unanimity of all NCBs) laying down the features of the system for Stage Three, would thus not exceed the powers given to it by the Treaty as Article 4.2 provides grounds for the EMI to adopt formal decisions. The expression "under the conditions laid down in this Statute" mentioned in Article 15.1 precisely refers, for formal decisions in the area of preparatory work, to the requirement of unanimity (Article 10.4).

Some legal experts<sup>7</sup>, however expressed the view that formal decisions (in the sense of Article 15) by the EMI are restricted to internal organizational matters and, as a principle, may not be taken in the context of preparatory activities. According to that approach, if NCBs wished to bind themselves in a legal manner in preparatory matters, the possibility would always exist to execute written agreements as has been the case for the EMS.

Other legal experts noted that NCBs, in the free use of their liberty during Stage Two, might agree to bind themselves under the form of a decision of the EMI Council, which would ensure lasting compliance by everyone in a specific layer of preparatory measures for Stage Three. It was pointed

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<sup>5</sup> See the European Parliament Resolution of 19th May 1995, where paragraph 15 states that "the EMI has seriously failed" by not defining and adopting a changeover scenario at this stage.

<sup>6</sup> See the Commission's "Green Paper" of 31st May 1995.

<sup>7</sup> 

out that in the case of EMI Decisions the addressees (NCBs) are identical with the decision-makers (the Governors representing NCBs in the EMI Council). In this respect, and subject to the condition that the decisions would be taken by unanimity in accordance with Article 10.4, a binding EMI Decision would not be in conflict with the principle laid down in Article 3.1 of the EMI Statute.

### **III VOTING PROCEDURES WITHIN THE EMI**

#### **1 Unanimity vs. majority**

Decisions for the preparation of Stage Three have been taken by the EMI Council, so far without exception, by consensus. Preparation of Council decisions by Working Groups and Sub-Committees in which all NCBs are represented pave the way for consensus-building at Council level.

The general rule for voting, as laid down in Article 10.3 of EMI Statute, is a simple majority. For example, simple majority resolutions are taken adopting the yearly reports foreseen in Articles 7 and 11 of the EMI Statute.

Article 10.4 requires unanimity for decisions concerning preparatory work.

To interpret this Article it is necessary to explore the sense of the word "decision". If the word "decision" is understood as referring to those legal instruments defined in Article 15, then unanimity would only be required in the cases where the decision would impose a binding obligation on NCBs, with remaining cases subject to the general majority rule. This interpretation might be challenged on the grounds that, for instance, the German version of Article 10.4 employs the term "Beschlüsse" as distinct from the word "Entscheidungen" employed in Article 15. This could lead to the conclusion that any action decided upon by the EMI Council in the field of preparatory work, independent from its legal nature, would require unanimity.

If, on the contrary, the word "decision" is understood as being synonymous with "resolution", and the first paragraph of Article 10.4 thus only addresses the question of voting requirements without referring to any special kind of legal acts, the consequences are also unsatisfactory. This interpretation would mean that any kind of resolution on preparatory work would require unanimity: opinions, recommendations, interim measures, data collecting, creation of working groups, contracting external advice, etc. Requiring unanimity for any kind of EMI Council resolution

concerning preparatory work would impose a rigidity and an inflexibility on the activities of the EMI in a manner inconsistent with the mandate to prepare Stage Three, and could even perhaps lead to dead-lock situations incompatible with the discharge of that duty and with the content of Protocol n. 10 "On the transition to the third stage of EMU". Not only would the specific deadline of 31st December 1996 perhaps not be met, but interim deadlines may also not be achieved (e.g. the time limit of one month to deliver an opinion on draft legislation).

A reasonable interpretation is thus needed of Article 10.4. Teleological interpretation is relevant: the requirement of unanimity is not a capricious device but has a sound reason for it which needs to be analysed. Being an exception to the general rule of majority vote, it has to be interpreted restrictively, and assumed in a balanced manner, proportional to the objective sought by the drafters of the Statute. Unanimity is required by Article 10.4 for the publication of EMI's opinions and recommendations: here the reason is to protect all Member States (and its NCBs) from the impact of such a publication. Unanimity is also required for the decisions under Articles 6.2 and 6.3: the interest hereon protected is the respect of EMS agreements, which should not be amended by decisions of the EMI. The question arises as to which are the interests to be protected in preparatory work, listed also in Article 10.4 as a field within unanimity. The following conclusion was substantially accepted by legal experts, namely that unanimity was justified, and thus required, only when the specific decision would materially affect major interests of NCBs. A majority of legal experts agreed that the final definition of the several pieces of the regulatory, organizational and logistical framework necessary for Stage Three would enter within that category of preparatory decisions of major importance for NCBs. *A contrario*, the legal experts agreed that there are a series of preparatory decisions not requiring unanimity, but perfectly able to be adopted by majority voting, such as the following:

- (i) the adoption of opinions and recommendations under Article 5.1 and 5.2, which would require a qualified majority of two-thirds of the EMI Council (Article 10.4);
- (ii) the adoption of guidelines under Article 15.3, which would require a qualified majority of two-thirds of the EMI Council (Article 10.4);
- (iii) the adoption by simple majority of intermediate or interim reports (i.e. not final) in the various fields of preparatory work, whether or not listed in the Master Plan;
- (iv) the adoption by simple majority of Article 7 and Article 11 EMI reports;
- (v) the adoption by simple majority of self-organisation measures: work-programmes, creation of working groups and sub-committees, budget allocation, etc;
- (vi) the adoption by simple majority of instrumental measures: data collection, questionnaires, contracting external help, etc.

From a systematic interpretation perspective, a majority of legal experts coincided that this approach is consistent with a general criterion foreseen in the Treaty in the field of the Common Foreign and Security Policy - where political sensitivities and national interests are perhaps even more relevant than in EMU- following which unanimity requirements should no lead to inaction. Declaration n. 27 "On voting in the field of the Common Foreign and Security Policy " attached to the Treaty reads as follows:

*"The Conference agrees that, with regard to Council decisions requiring unanimity, Member States will, to the extent possible, avoid preventing an unanimous decision where a qualified majority exists in favour of that decision."*

Also, the above interpretation of the unanimity requirement would be systematically consistent with Protocol n. 10 "On the transition to the third stage of economic and monetary union", where the intention of the High Contracting Parties to avoid vetoing situations is explicitly shown:

*"All Member States shall, whether they fulfil the necessary conditions for the adoption of the 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".*

## **2 Recording decisions**

Until now the normal procedure of moving forward in the preparation of Stage Three has been through the approval of reports prepared by Working Groups and Sub-Committees. Such reports analyse alternatives and options, and propose conclusions. When the report is approved by the Council, it is understood that the NCBs accept the obligations, if any, that arise from the proposals of the report, namely, to initiate early preparatory implementation measures of some kind. This is the case, for instance, of the Payment Systems TARGET Report, approved by the EMI Council.

It is felt that the system should be made more clear and transparent from a legal point of view, and to that end, resolutions that define features for Stage Three or that entail some kind of preparatory activities by the NCBs or by the EMI should be recorded in a manner that clearly specifies the defined object of the resolution or the content of the preparatory activities to be entertained by NCBs or the EMI.

Reports which are purported to contain one final feature of the framework to which Article 4.2 refers should clearly specify this feature.

#### IV CONCLUSIONS

In the view of a majority of legal experts, the above leads to the following tentative conclusions.

##### 1 The mandate of the EMI

- The EMI's mandate requires that preparatory work for Stage Three be advanced in such a manner so as to permit that Stage Three may start with the full framework in place and fully operative in due time. In this sense, the mandate for the EMI creates an "obligation de résultat". Decisions which might be adopted and implemented during the interim period by the ECB in fields that do not require lead times beyond the twelve months initially foreseen for that period, might be delayed until the establishment of the ECB. The EMI should, nevertheless, bear in mind that the interim period might be shorter than initially foreseen.
- The EMI shares its mandate with the NCBs, which are obliged to prepare for Stage Three and facilitate the achievements of the EMI.
- Anticipation of preparatory measures is possible provided that (i) such anticipation is deemed necessary in view of the lead-time of the project, and (ii) the ECB's right to endorse or to amend, modify or abrogate the EMI's decisions is preserved.
- The EMI is in principle legally accountable before the ECJ, although the likelihood of a successful action for failure to act is impaired by the fact that the EMI will be liquidated before Stage Three, by the difficulty in proving omissions, and by the provisional preparatory nature of the works it is deemed to entertain.

##### 2 Advancing the construction of Stage Three.

- The Treaty provides the possibility for NCBs to advance preparatory measures for Stage Three by way of legally binding acts that would permit the solid adoption of some layers of the framework for Stage Three, without impinging on the ECB's right to amend, modify, abrogate or endorse such decisions. The requirement of unanimity would entail that NCBs retain their full sovereignty, which includes the right to bind themselves or, on the contrary, adopt the policy of not accepting binding obligations. Such legally binding acts might take

the form of a EMI Decision as referred to in Article 15.4 or in written agreements between NCBs or between NCBs and the EMI.

3 Voting procedures within EMI

- Article 10.4 needs a pragmatic interpretation by the EMI Council which would be consistent with other provisions of the Statute or of the Treaty. Such an interpretation should follow a line that would distinguish between (i) resolutions that would affect major interests of NCBs either during Stage Two or as prospective members of the ESCB, and (ii) other decisions on preparatory work; decisions under (i) should be taken by unanimity, whilst decisions under (ii) could be adopted by majority.
- The explicit interpretation by the EMI Council could be adopted by endorsing this report.
- Minutes of the EMI Council should clearly record resolutions that imply preparatory activities by the NCBs, and those resolutions that contain a final feature of the framework to be submitted to the ECB for decision.

**ANNEX 1**

**LIST OF LEGAL EXPERTS**

Banque Nationale de Belgique

Danmarks Nationalbank

Deutsche Bundesbank

Bank of Greece

Banco de España

Banque de France

Central Bank of Ireland

Banca d'Italia

Institut Monétaire Luxembourgeois

De Nederlandsche Bank

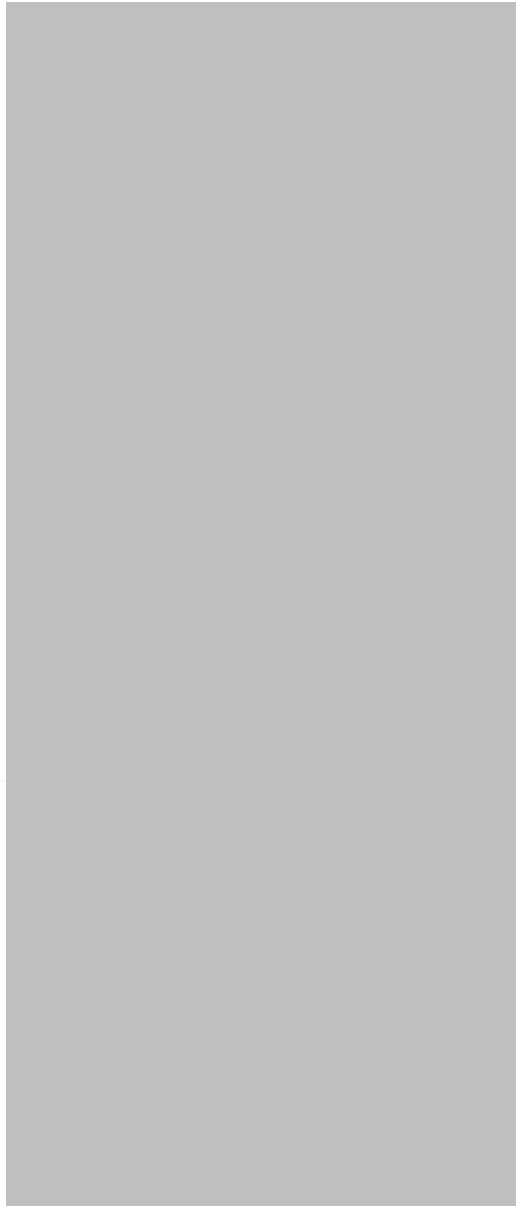
Österreichische Nationalbank

Banco de Portugal

Suomen Pankki

Sveriges Riksbank

EMI



ANNEX 2

DISSENTING OPINION OF  ON

BEHALF OF THE DEUTSCHE BUNDESBANK



### **Preparation of stage III of EMU and decision-making powers of the EMI**

In accordance with a proposal of the Secretariat General of the EMI, we are summarising the legal opinion of the Legal Department of the Deutsche Bundesbank for presentation to the Council of the European Monetary Institute, following the failure to reach agreement on the legal assessment of the decision-making powers of the EMI in preparation of stage III of EMU under Community law at the meeting of representatives of the Legal Division of the EMI with legal experts from the national central banks. A detailed substantiation is contained in our comments of March 8, 1995 (see enclosure) on the paper of the EMI's Legal Division of February 7, 1995.

#### **1. The EMI's mandate**

At no time has the EMI any monetary policy responsibility of its own. Its functions and regulatory powers must be interpreted in the light of this principle. Until the first day of stage III, monetary policy responsibility remains vested in the individual member states and the competent authorities in those states. On the first day of stage III monetary policy responsibility in respect of the participating member states will be transferred directly to the ECB.

The EMI has taken over the functions of the Committee of EC Central Bank Governors. The Committee of Central Bank Governors had the task, in particular, of coordinating the monetary policies of the member states and of holding consultations on the general principles and basic features of monetary policy.

The EMI has the additional task of specifying the regulatory, organisational and logistical framework necessary for the ESCB to perform its tasks in stage III.

The framework specified by the EMI is to be submitted for decision to the ECB on the date of its establishment. This makes clear that

- the ECB must decide on its sole and exclusive responsibility what framework it needs to perform its tasks in stage III;
- the ECB is bound by the findings of the EMI neither in law nor in terms of their content; it is free to decide to what extent it adopts these findings;
- to the extent that there are differing ideas within the EMI Council, it is part of the contractual performance of duties by the EMI for it to submit alternatives to the ECB in order to ensure the latter's freedom of decision;
- the EMI is not entitled to take formal legal decisions that are binding on national central banks as early as in stage II.

Even if the EMI Council members act on their own responsibility in performing their functions, they, as representatives of their institutions, are integrated in their respective institution's structure, in contrast to the legal status of the members of the ECB Governing Council. If binding decisions for the preparation of stage III were taken at EMI Council level, conflicts at national level would be the inevitable corollary.

There is no continuity between the decision-making bodies EMI Council and ECB Governing Council. Whereas the EMI Council is composed of the governors of the national central banks plus the EMI Council President, the ECB Governing Council will consist of the governors of the national central banks participating in stage III plus the four to six members of the Executive Board.

According to Community law, the EMI has from the outset been established for a limited period only. Its functions will expire by lapse of time. It will go into liquidation directly upon the establishment of the ECB. Any tasks which have to be continued will be taken over by the ECB.

## **2. Regulatory powers of the EMI**

The authority of the EMI to issue legal acts is limited to the submission of non-binding opinions, non-binding recommendations and non-binding guidelines. Only certain decisions exercise a binding effect. To the extent that the EMI Council is entitled to issue binding decisions, this refers to quite specific, narrowly defined special fields (holding and managing foreign exchange reserves, determination of the size of the EMI resources, liquidation of the EMI). They are characterised by the fact that the regulatory effect of the decision ceases upon the liquidation of the EMI.

## **3. Preparatory measures on a voluntary basis**

To the extent that it is considered appropriate to conduct preparatory harmonisation measures as early as stage II, individual central banks can mutually agree on a voluntary basis and within the scope of their national responsibility that the measures in question should be taken in coordinated form among the various central banks. The EMI may coordinate these efforts as part of its function of strengthening the cooperation between the national central banks. The EMI Council has no authority to adopt, by virtue of its own powers, on behalf of the individual national central banks binding Community law provisions which the central banks cannot evade. Its function is confined to coordinating measures by national central banks, which continue to act in a sovereign capacity in stage II.

## **4. Unanimity in the EMI Council**

Owing to their significance for national monetary policy sovereignty, which continues to exist during stage II, Community law provides that decisions in connection with the specification of the regulatory, organisational and logistical framework shall always require unanimity, irrespective of their formal legal design. This provision of Community law must be honoured. The consequence of this is that the framework can only be specified unanimously by the EMI Council, irrespective of whether it is a single overall concept or whether, in the absence of unanimity, alternatives are involved.

Comments on the paper by the Legal Division of the EMI dated February 7, 1995

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

**1. Basic statements of the legal opinion**

In the opinion of the Legal Division, the EMI is entitled to initiate implementation measures as early as 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. When assessing, on a case-by-case basis, the need for such implementation measures, the EMI is said to have a wide margin of discretion. It is not specified in detail what the content of these implementation measures is to be. To this extent, reference is made only to the master plan and, by way of example, to the commitment to introduce the RTGS system. Instruments of implementation are, in the opinion of the EMI staff, binding decisions to be taken unanimously, quasi-binding guidelines to be adopted by a two-thirds majority and decisions by the EMI Council to be taken by a simple majority. The EMI assumes a comprehensive authority of the EMI Council to take decisions. On the basis of the English text, "decisions" (in German: *Beschlüsse*) within the meaning of Article 10.4 sentence 1 of the EMI Statute are only such decisions as are addressed to national central banks and hence are binding in their entirety pursuant to Article 15.4 of the EMI Statute. Unanimity in the EMI Council is said to be required for such decisions only. For all other decisions a simple majority in the EMI Council is said to suffice.

If the EMI fails to perform its functions and exercise its powers, it is not impossible that action for failure to act pursuant to Article 175 of the EC Treaty is filed against the EMI.

The starting point of this consideration is the assessment that the **interim period**, i.e. the period between the decision on the starting date of stage three and the first day of stage three, should last **no more than six months** if substantial disadvantages are to be avoided. Since the ECB will not be able during this period to carry out all the preparatory work for stage three which is needed to implement a common monetary policy as from the beginning of stage three, these functions would have to be discharged by the EMI in the sense of a broader **interpretation of Community law in the light of its object and purpose**. Thus, during the interim period only **"finishing touches"** would remain to be put in place by the **ECB**.

## 2. Comments

The opinion of the EMI staff results in an **extension of the responsibilities of the EMI** (to the disadvantage of the ECB and of national central banks) which, in our estimation, can **no longer be reconciled** with the definition of the functions of the EMI as being a **pacesetter of the ECB**, as laid down in **Community law**.

### Substantiation

#### (a) The role of the EMI

According to the objectives laid down in Article 2 of the EMI Statute, the EMI will contribute to the realisation of the conditions necessary for the transition to stage three of EMU, in particular, by making the **preparations** required for the establishment of the ESCB and for the conduct of a single monetary policy and the creation of a single currency in stage three. These objectives are subject to the **basic proviso** that the EMI performs the **functions** assigned to it by the Treaty and the Statute **without prejudice to the responsibilities of the authorities competent for monetary policy in the individual member states**. **Until the first day of stage three, monetary policy responsibility remains vested in the individual member states and the competent authorities there**. On the first day of stage three the monetary policy responsibility of the member

states without a derogation is transferred directly, i.e. without the intermediation of the EMI, to the ECB. At no time has the EMI any monetary policy responsibility of its own, so that its functions and regulatory powers must likewise be interpreted in the light of this principle.

The activities of the EMI in the context of these objectives are specified in detail in Article 109f paragraphs 2 to 4 of the EC Treaty. In this connection it is of significance that, besides the functions of the European Monetary Cooperation Fund, the EMI has taken over, in particular, the functions of the Committee of EC Central Bank Governors, as last amended by the decision of the Council of March 12, 1990. But for a few supplements, Article 109f paragraphs 1 and 4 of the EC Treaty tally with the substantiation of the decision taken at the time and the definitions of functions. The Committee of Central Bank Governors, too, had the function, in particular, of coordinating the monetary policies of the member states, holding consultations on the general principles and basic features of monetary policy and issuing comments on the general orientation of monetary and exchange rate policy and on the relevant measures in the individual member states. In their operations on that Committee, the members of the Committee, who represented their institutions, acted on their own responsibility, taking due account of the Community's objectives. This is in line with the legal status of the members of the EMI Council in accordance with Article 8 of the EMI Statute. To this extent, there are substantial conceptual correspondences between the EMI and the Committee of Central Bank Governors.

The difference between the EMI and the Committee of Central Bank Governors consists in the fact that, pursuant to Article 109f paragraph 3 of the EC Treaty or Article 4.2 of the EMI Statute, the EMI has the additional task of specifying by December 31, 1996 the regulatory, organisational and logistical framework necessary for the ESCB to perform its tasks in stage three. The individual tasks are spelled out in Article 109f paragraph 3 of the EC Treaty. According to Article 4.2 of the EMI Statute, it is obvious that this is not an exhaustive enumeration ("in

particular"). The provision of Article 109f paragraph 3 last sentence of the EC Treaty, according to which the framework specified by the EMI is to be submitted for decision to the ECB on the date of its establishment, i.e. at the start of the interim period, makes it clear, however, that

- the ECB must decide on its sole and exclusive responsibility what framework it needs to perform its tasks in stage three. Hence the decision-making process on the part of the ECB is not confined to a purely formal confirmation of the findings of the EMI;
- the ECB is bound by the findings of the EMI neither in law nor in terms of their content, and is therefore free to decide to what extent it adopts these findings;
- to the extent that there are differing ideas within the EMI Council, it is part of the contractual performance of duties by the EMI for it to submit alternatives to the ECB in order to ensure the latter's unreserved freedom of decision;
- the EMI is not entitled in this context to take formal decisions that are binding on national central banks as early as in stage two.

This assessment is buttressed by the following further considerations:

- As members of the EMI Council, governors of national central banks do not have the same measure of independence as they will later enjoy as members of the ECB Governing Council. Even if the EMI Council members act on their own responsibility in performing their functions, they, as representatives of their institutions (see Article 8 of the EMI Statute), are integrated in their respective institution's structure, in contrast to the legal status of the members of the ECB Governing Council. If binding decisions for the preparation of stage three were taken at EMI Council level, conflicts at national level would be the inevitable corollary. This is prevented by ensuring that Community law assigns responsibility for taking formal decisions that are binding on

national central banks only to the ECB or to members of the ECB Governing Council acting free from instructions in every respect.

- Nor is there **any continuity** between the decision-making bodies **EMI Council** and **ECB Governing Council**. Whereas the EMI Council is composed of the governors of the national central banks and the EMI Council President, the ECB Governing Council consists of the governors of the national central banks and the four to six members of the Executive Board. Since only the governors of the national central banks whose respective member states are participating in stage three are represented on the ECB Governing Council, presumably not all governors of the 15 national central banks will be members of the ECB Governing Council.
  
- According to Community law, the EMI has from the outset been established for a limited period only. Its functions will expire by lapse of time. It started operation on the commencement of stage two (Article 109f paragraph 1 of the EC Treaty) and will go into liquidation directly upon the establishment of the ECB, i.e. immediately after the decision on the starting date of stage three has been taken (Article 109l paragraph 2 of the EC Treaty). According to the time-table provided for in Community law, the EMI will be liquidated, at the latest, immediately after July 1, 1998. Liquidation will occur irrespective of whether or not the EMI has completed its preparatory work within the meaning of Article 109f paragraph 3 of the EC Treaty. Any tasks which have to be continued will be taken over by the ECB, see Article 109l paragraph 2 of the EC Treaty.
  
- According to Article 15 of the EMI Statute, the **authority of the EMI to issue legal acts** is limited to the submission of **non-binding opinions, non-binding recommendations and non-binding guidelines**.

**Only decisions exercise a binding effect.** Decisions in the legal sense are characterised by the fact that they are the typical means of regulating particular cases, and that they are directed only to specific



addressees. In the case of decisions by the EMI Council, these are only **the respective national central banks**, pursuant to Article 15 third indent of the EMI Statute.

Precisely in this respect they differ from **regulations** which are generally valid, to **issue** which the **EMI is not empowered**. The regulatory content of regulations is applicable to specific objective sets of facts, and has a legal effect on general and on abstractly outlined groups of addressees in member states. The EMI Council does not have any such regulatory powers.

To the extent that the EMI Council is entitled to issue **decisions** within the meaning of Article 15 of the EMI Statute, this refers to quite **specific, narrowly defined special fields** (holding and managing foreign exchange reserves, **Article 6.4**; determination of the size of the EMI resources, **Article 16**; liquidation of the EMI, **Article 23.6**), for which a **qualified majority of two-thirds** is required according to Article 10.4 sentence 2 of the EMI Statute. Decisions going beyond this within the meaning of Article 15 of the EMI Statute, which the EMI Council could adopt by a simple majority pursuant to Article 10.3 of the EMI Statute, are not envisaged in our opinion.

- Moreover, **these specific fields** are characterised by the fact that the **regulatory effect of the decision ceases upon the liquidation of the EMI**. New regulations must therefore be adopted by the ECB at the start of stage three. It is therefore **impossible for the EMI to create a precedent for the ECB**. A continuation of the legal effect of **EMI Council acts** is not envisaged either in accordance with Community law, since no **legal succession by the ECB** is associated with the **liquidation of the EMI**. Thus the **ECB does not enter as legal successor into acts adopted by the EMI**. On the basis of the explicit provision in Article 23.1 of the EMI Statute, only liabilities and assets are transferred to the ECB. If, during the preparation of stage three within the meaning of Article 109f paragraph 3 of the EC Treaty, the EMI Council were to adopt binding legal acts in the form of unanimous

decisions, their legal effect would cease upon the liquidation of the EMI because the legal succession of the ECB is limited to liabilities and assets. In other words, the ECB Governing Council would have to decide on its own responsibility again anyway.

- Since, at the time of **deciding on the framework** within the meaning of Article 109f paragraph 3 of the EC Treaty or Article 4.2 of the EMI Statute, the **EMI Council cannot judge with certainty which member states will participate in stage three of EMU**, there is no sense in its being able to **force individual national central banks, by means of a binding decision, to take preparatory measures.**

These principles, applying to the relationship between the EMI and the ECB, should not be impaired by the EMI being granted, in the estimation of the EMI staff, powers to take implementation measures to the detriment of the ECB by way of a more broadly defined and supplementary interpretation of Community law, with reference to the very brief interim period.

**(b) Preparatory measures on a voluntary basis**

To the extent that it is considered appropriate to conduct preparatory harmonisation measures as early as stage two, individual central banks can mutually agree on a **voluntary basis** that the measures in question should be taken in coordinated form among the various central banks. The **EMI may coordinate these efforts** as part of its function of strengthening the cooperation between the national central banks (Article 109f paragraph 2 first indent). The essential difference between this approach and the strategy of the EMI staff is that the **EMI Council has, in fact, no authority to adopt, by virtue of its own powers, on behalf of the individual national central banks binding Community law provisions** which the central banks cannot evade. Its function is confined to coordinating measures by national central banks that continue to act in a sovereign capacity, in stage two.

**(c) Duration of the interim period**

The duration of the interim period is clearly defined in Community law for the beginning of stage three of EMU on January 1, 1999 (Article 109j paragraph 4 of the EC Treaty). According to that provision, the interim period **starts on July 1, 1998 and ends on December 31, 1998**, see Article 109l paragraph 1 sentence 1 of the EC Treaty.

No provision has been made for the eventuality that the starting date of stage three is set by decision by the Heads of State or Government in accordance with Article 109j paragraph 3 of the EC Treaty. In view of the fact that the preparations specified in Article 109l paragraph 1 of the EC Treaty must be carried out irrespective of the starting date of stage three, and that less time is available, in the aggregate, if **stage three starts before July 1, 1998**, it is obvious from the legal point of view that in this case, too, the **interim period lasts at least six months**. In such a case, **Community law does not contain any explicit provisions on the maximum duration of the interim period**.

**(d) The interpretive criteria of the Legal Division of the EMI**

In the opinion of the Legal Division, **Article 15 of the EMI Statute** provides for the appropriate legal instruments for any implementation initiative taken by the EMI. These statements may give rise to the assumption that the powers of the EMI to carry out the preparations pursuant to Article 109f paragraph 3 of the EC Treaty should be extended with reference to an existing set of legal instruments.

According to the general principles of Community law, however, it is not **permissible to grant a European legal entity powers not substantiated in the Treaty solely with reference to generally available legal instruments**. This **contradicts the principle of limited individual powers**, according to which **authority to grant authority** does not exist at Community level (Federal Constitutional Court, ruling of October 12, 1993, page 55 ff. and page 79 ff.). Since, as noted above, in the field of preparing the

regulatory, logistical and organisational framework pursuant to Article 109f paragraph 3 of the EC Treaty, the EMI has no power to take formal decisions that are binding on national central banks, such powers cannot be substantiated by reference to Article 15 of the EMI Statute.

According to Article 248 of the EC Treaty, the Treaty is drawn up in a single original in the German, French, Italian and Dutch languages, the texts in each of these languages being equally authentic (for the member states that have acceded in the interim and their languages, Article 248 applies in accordance with the relevant acts of accession). Hence it is not permissible to take the word "specify" solely with reference to the English wording as a reason for substantiating powers without taking account of the wording in other languages. The neutral German wording "*stellt fest*" provides no reason for such an interpretation substantiating such powers.

In the opinion of the Legal Division, Community law, read in conjunction with **Article 31.1 of the Vienna Convention on the Law of Treaties** (Vienna Convention), can be interpreted in the light of its object and purpose to the effect that the **EMI must initiate implementation measures as early as stage two** in order, on the one hand, to enable it to effectively fulfil its own mandate as defined in Article 109f paragraph 3 of the EC Treaty, and, on the other hand, to enable the ECB to discharge its mandate in accordance with Article 105 paragraph 1 of the EC Treaty. However, the direct applicability of Article 31.1 of the Vienna Convention **presupposes**, for one thing, that **all member states** of the European Community have acceded to this Treaty and, for another, that Article 31.1 of the Vienna Convention as a general clause is not superseded by more specific, **Community-law interpretive provisions**. This is a serious possibility, because, compared with general international agreements, Community law is characterised by a large number of special features (e.g. the far-reaching transfer of competence to the European Community and the direct authority to enact legislation). These considerations would apply even if it is assumed that Article 31.1 only involves codified conventional international law and therefore requires general application in all member states, irrespective of the accession agreement. In addition, it is

questionable whether the interpretation principle of Article 31.1 of the Vienna Convention, which by nature is geared to the clarification of interpretation problems in connection with **competence definitions** between **national law** and **international agreement**, can be used to define competences between two Community institutions. Additional problems of application result from the fact that the relationship between the **EMI** and the **ECB** is a relationship between **predecessor** and **successor institutions**, the successor institution being established in accordance with a basically differing conception.

(e) **Provisions necessitated by the rulings of the Federal Constitutional Court on the Maastricht Treaty**

A **basic reservation** about the interpretive criteria of the EMI Statute arises from the **German point of view** from the rulings of the Federal Constitutional Court (ruling of October 12, 1993, page 79 ff.). The court found as follows:

"The Union Treaty, and especially the EC Treaty, follow the **principle of limited individual powers**. Although under that principle a specific provision conferring duties or powers can be interpreted in the light of Treaty goals, **a Treaty goal is not by itself enough to create or extend duties or powers**. Moreover, by express references to amendment (Article N of the Union Treaty) or extension (Article K.9 of the Union Treaty), the Union Treaty clearly delineates a **legal development within the terms of the Treaties and the making of legal rules** which overstep its boundaries and is **not covered by applicable Treaty law**. Article 23 paragraph 1 of the Basic Law adopts that criterion when it requires an **assenting law** for amendments to the treaty bases of the European Union and similar rules.

Inasmuch as the Treaties establishing the European Communities, on the one hand, in limited circumstances confer sovereign rights and, on the other hand, regulate Treaty amendments - through a normal and also in a simplified procedure - this distinction takes on meaning for the future treatment of the individual powers. Whereas a dynamic extension of the

existing Treaties has been supported so far on the basis of a broad treatment of Article 235 of the EEC Treaty in the sense of a "lacuna-filling competence" (*Vertragsabrundungskompetenz*) and on the basis of considerations relating to the implied powers of the Communities and of Treaty interpretation as allowing maximum exploitation of Community powers or "effet utile", in future the interpretation of enabling provisions by institutions and agencies of the Community will have to consider that the Union Treaty basically distinguishes between the exercise of a conferred limited sovereign power and the amendment of the Treaty, hence the interpretation will not result in an extension of the Treaty; such an interpretation of enabling provisions would not have a binding effect for Germany."

(f) Interpretation of Article 10.4 of the EMI Statute

German text: *"Für Beschlüsse im Zusammenhang mit den Artikeln 4.2, 5.4, 6.2 and 6.3 ist Einstimmigkeit der Mitglieder des Rates des EMI erforderlich."*

English text: "Decisions to be taken in the context of Articles 4.2, 5.4, 6.2 and 6.3 shall require unanimity of the members of the Council of the EMI."

In the opinion of the Legal Division, "decisions" within the meaning of Article 10.4 only constitute decisions which are addressed to the national central banks and hence are binding in their entirety in accordance with Article 15.4; unanimity in the EMI Council is required only for such decisions. "Decisions" that impose no binding commitments on the national central banks, such as the master plan, are not decisions within the meaning of Article 10.4, and can therefore be taken by a simple majority in the EMI Council pursuant to Article 10.3.

In the German text, the term "*Beschlüsse*" is used instead of the term "decisions". What is to be understood by the term "*Beschlüsse*" is explained by reference to Article 10.3. "*Sofern in dieser Satzung nichts*

*anderes bestimmt ist, faßt der Rat des EMI seine **Beschlüsse** mit der einfachen Mehrheit seiner Mitglieder*" (English text: ... the EMI shall act by a simple majority ...)." Article 10.3 regulates as a major premise the voting procedure in the EMI Council. The formal result of this voting procedure is always a "*Beschluß*". The term "**Beschluß**" is therefore not a legal term, but a general description of a **statement or opinion arrived at by the EMI Council under the procedure, irrespective of its formal legal design in the individual case**. If the EMI Council has the competence to issue legal acts on the basis of the corresponding authorities, these "*Beschlüsse*" can also be adopted in the forms provided for in Article 15. The term "*Beschlüsse*" deliberately leaves this question unresolved, however, since Article 10.3 deals only generally with the determination of the voting relations in voting procedures in the EMI Council and not with the legal form of taking "*Beschlüsse*". This idea is likewise taken up in Article 10.4 sentence 1. Here, too, it is not the legal form of the "*Beschlüsse*", but only the number of votes in a voting procedure, which is involved.

Owing to their significance for **national monetary policy sovereignty**, which continues to exist **during stage two**, Community law provides that decisions in connection with Article 4.2 (specifying the regulatory, organisational and logistical framework), Article 5.4 (publication of opinions and recommendations within the meaning of Article 109f paragraphs 4 and 5 of the EC Treaty), Article 6.2 (administrative measures in connection with the monetary reserves transferred to the EMI) and Article 6.3 (acquisition of ECUs from other holders) always require **unanimity, irrespective of their formal legal design**. This provision of **Community law must be honoured**.

The upshot is that the **framework** specified within the meaning of Article 109f paragraph 3 of the EC Treaty or Article 4.2 of the EMI Statute **can only be determined unanimously by the EMI Council**, irrespective of whether it is ultimately a single overall concept or whether, in the absence of unanimity, alternatives are involved. The framework must first be submitted to the ECB for decision. This alone does justice to the significance of the decisions to be taken. Depending on the special subject

involved, the individual decisions have the legal form prescribed in the Treaty.

According to Article 15.1 of the EMI Statute, for the discharge of its functions under the Statute the EMI may adopt **guidelines** which are addressed to the **national central banks**. The EMI Council may adopt **guidelines** that define the methods for the implementation of the conditions needed to enable the ESCB to perform its functions in stage three, pursuant to Article 15.3 of the EMI Statute. As **non-binding "pieces of advice"** by the EMI Council to the national central banks, they serve to create at the national central banks the conditions that are necessary to enable the framework according to Article 109f paragraph 3 of the EC Treaty or Article 4.2 of the EMI Statute (which will be defined later) to be transferred to them. According to Article 10.4 sentence 2 of the EMI Statute, a qualified majority of two-thirds is necessary for the adoption of the guidelines. **The national central banks can decide during stage two whether they will observe these guidelines.**

In the light of its all-embracing wording, Article 15.3 of the EMI Statute also covers the **preparatory work filling in the framework**, which the EMI Council specifies in organisational, logistical and regulatory respects, so that the ECB can perform its functions in **stage three**, pursuant to Article 109f paragraph 3 of the EC Treaty, read in conjunction with Article 4.2 of the EMI Statute. This work may also be **done in the legal form of guidelines**. For **taking decisions** on these guidelines, **unanimity** is required in the EMI Council, according to Article 10.4 sentence 1 of the EMI Statute.

The guidelines in connection with Article 15.3 of the EMI Statute must be **submitted to the ECB for decision** according to Article 15.3 of the EMI Statute. Once the decision has been taken (after having been amended or supplemented, if necessary), they become binding, and will apply immediately after the start of stage three of EMU.



**(g) Action for failure to act according to Article 175 of the EC Treaty**

According to Article 19.1 of the EMI Statute, the acts and omissions of the EMI are open to review and interpretation by the Court of Justice in the cases and under the conditions laid down in the Treaty. It follows from this that, in principle, an action for failure to act pursuant to Article 175 of the EC Treaty may be filed against the EMI. Hence the member states and the other institutions of the Community can file an action at the Court of Justice in order to clarify whether, in violation of the Treaty, the EMI has failed to take a **decision**. By decision within the meaning of Article 175 of the EC Treaty, the European Court of Justice (Parliament/Council 13/83 Vol. 1985, 1556, 1592 f.) understands all measures the scope of which can be determined well enough for them to be put into concrete shape and constitute the subject of execution within the meaning of Article 176 of the EC Treaty.

On the basis of the interpretation by the European Court of Justice of the term "decision", on the one hand, and of the role of the EMI as described under item 2 (a) above, on the other, it seems to be **next to impossible**, with only a few exceptions, for any action for failure to act filed against the EMI to have any prospect of success. To the extent that the EMI has the task of specifying the regulatory, organisational and logistical framework necessary for the ESCB to perform its functions in stage three, these are merely preparations, the content and scope of which cannot be determined so precisely that they can be the subject of execution. The framework specified by the EMI cannot be the subject of execution either, if only because the EMI has no authority to adopt such final regulations. When it takes its decision at a later date, the ECB will have complete and unreserved discretion. This is suggested, above all, by the following arguments outlined in item 2 (a) above:

- To the extent that the EMI does not complete its tasks within the meaning of Article 109f paragraph 3 of the EC Treaty or Article 4.2 of the EMI Statute, they will be taken over by the ECB pursuant to Article 109l paragraph 2 of the EC Treaty.

- Until the start of stage three, monetary policy responsibility remains in the hands of the appropriate authorities of the member states.
- The specification of the framework within the meaning of Article 109f paragraph 3 of the EC Treaty or Article 4.2 of the EMI Statute requires a unanimous decision in the EMI Council and is a reflection of the sovereignty of the national central banks, which continues to exist during stage two.

signed:



signed:

