THE EUROPEAN CENTRAL BANK: INSTITUTIONAL ASPECTS

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I. INTRODUCTORY REMARKS

IN this article the legal and institutional issues surrounding the transition to a European Central Bank (ECB) will be discussed. The transition to a single currency entails many legal and institutional issues, both at the European level and at member State level. I will focus on a few main themes.

Briefly, the relevant economic and monetary union (EMU) provisions of the EC Treaty will be discussed (Part II). Even more succinctly, some aspects of the current functioning of the national central banks (NCBs) and especially the Nederlandsche Bank, will be touched upon (Part III). Then, a picture of the structure and competences of the European System of Central Banks (ESCB) will be sketched and an indication will be given of the efforts under way to amend the charters of the NCBs to adapt their legal provisions to the EC Treaty and to the future functioning of the NCBs within a Community system (Part IV). Finally, I will venture briefly into the more politically charged area of a single currency and its guardian, the ECB, functioning in a Community with member States which have opted out, have not yet opted in or are lagging in economic convergence and are, therefore, still left out of full currency union (Part V). These issues concern the future development of the Community and the Union, and are the subject of debate in the run-up to the 1996 Intergovernmental Conference (IGC) to amend the Maastricht Treaty on European Union. This article concludes with a few final remarks.

II. OVERVIEW OF THE PROVISIONS ON EMU IN THE EC TREATY

THE ECB finds its place in the Treaty establishing the European Community, as amended by the Treaty on European Union concluded in

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Maastricht. It is regulated by Articles 105 *et seq.* of the EC Treaty, which form part of the chapter on monetary policy. This chapter is only one of the elements in the EC Treaty devoted to EMU since Maastricht.[1] EMU, after all, is about the introduction of a single currency and the conduct of a single monetary policy, but it is based on the completion of the internal market in the financial area and on the co-ordination of economic policies.

A. Basic Provision on EMU

The basic provision on EMU is Article 3A, which sets out economic union (paragraph 1) and monetary union (paragraph 2). It also contains guiding principles which should be observed by the member States and the Community in their furtherance of economic and monetary union (paragraph 3).

B. Internal Market: Freedom to Effect Financial Transactions

Another major element of the EC Treaty devoted to EMU is the set of new provisions on capital and payments (Articles 73B to 73G), which introduce directly effective rights to effect financial transfers both within the Community and with third countries. (Capital movements with third countries can, in some member States, still be subject to certain national restrictions which predate the second stage of EMU, in which we are now.)

C. Economic Union

A second block of Treaty provisions concerns economic policy. These provide for the co-ordination of economic policies of the member States through a system of continuous peer-group pressure in the Council where member State policies are assessed. They are evaluated on the basis of common broad guidelines of the economic policies of the member States and of the Community. These broad guidelines are adopted by the Council (Article 103 of the EC Treaty). Co-ordination is further achieved by means of what is called in Euro-jargon the "excessive deficits procedure". This is the mechanism by which the Council, on the basis of Commission reports on the budgetary situation in the member States, takes the measure of the budget deficits and takes stock of government debt in the member States and decides whether these are excessive. In the final stage of

1. See for two interesting comments on the Maastricht Treaty and its implications Deirdre Curtin and Herman Meyers, "The Principle of Open Government in Schengen and the European Union; Democratic Retrogression" (1995) 32 C.M.L.Rev. 391–445 and Jean-Claude Prisi, "After Maastricht, Are the Community Institutions more Efficacious, more Democratic and more Transparent?" (1994) 19 E.L.Rev. 449–485.

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economic and monetary union such a finding can be followed by punitive measures against a member State which fails to correct the budgetary situation (Article 104C of the EC Treaty).

In addition to these procedures, the chapter on economic policy also contains certain prohibitions which seek to underpin fiscal prudence and the treatment of governments at any level at par with other market participants (Articles 104 to 104B of the EC Treaty). These provisions concern the prohibition of monetary financing of governments (Article 104), the prohibition of privileged access to the financial sector for governments (Article 104A) and the no bail-out clause (Article 104B), which excludes liability for the public sector's commitments on the part of other States or the Community. Finally, the possibility of Community economic policy measures, contained in the former EEC Treaty, has been retained (Article 103A).

D. Monetary Union

On the basis of these provisions concerning the financial markets on the one hand, and the framework within which economic policies are to be conducted on the other, the provisions on monetary policy find their place. Articles 105 to 109 will be discussed *infra*.

E. Institutional and Transitional Provisions

Other provisions on EMU incorporated into the Treaty in Maastricht concern the transition to the second stage (Articles 109E to 109G) and to the third stage (Articles 109J to 109L). Institutional provisions, mainly concerning the nomination by the political organs of the decision-making bodies of the ESCB, the reporting requirements in respect of the system's activities and the functioning of the Monetary Committee (to be renamed Economic and Financial Committee as from Stage 3 of EMU), are to be found in Articles 109A to 109D.

F. Protocols and Declarations

Protocols are where further, more detailed provisions on EMU can be found. First and foremost, there are the Statute of the European System of Central Banks, on which I will focus later, and the Statute of the European Monetary Institute, which is the precursor of the ECB.

Protocols are further devoted to the criteria for establishing excessive government deficits (Protocol on the Excessive Deficits Procedure), to the conditions for admission to the third stage (the so-called convergence criteria) and on certain other matters, notably the irreversible character of the movement to the third stage (Protocol on the transition to the third

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stage of economic and monetary union) and the relations with certain territories within or outside Europe (Protocol on Denmark concerning the Faroes, Protocol on Portugal concerning the Azores and Madeira, Protocol on France concerning overseas territories). A protocol on the acquisition of property in Denmark provides an unlimited exemption from the free movement of capital in respect of the acquisition of second homes in Denmark. To be mentioned also are the Opt-out Protocol of Denmark and the Opt-in Protocol of the United Kingdom.

Apart from protocols, declarations have also been adopted in Maastricht which are devoted to EMU.

Concluding this overview of the Treaty provisions on EMU, the difference between economic policy, which will remain a competence of the member States subject to a more or less strict Community framework, and monetary policy, which will become completely *communautaire*, should be stressed. Legally speaking, there will be shared competences on economic union and exclusive Community competences in the area of monetary union.

III. CURRENT SITUATION: A BRIEF VIEW OF A NATIONAL CENTRAL BANK

THE preparatory work for the establishment of the ESCB is co-ordinated by the European Monetary Institute (EMI), whose first task it is to prepare for the third stage by delivering the ESCB turnkey (to quote Jacques Delors's well-known phrase).

A. National Monetary Sovereignty and Variations in Central Bank Autonomy

In the stage of EMU in which we currently find ourselves, the national central banks operate in the context of their own State's national legislation. In spite of the co-ordination of monetary policies required by the Treaty, and effected in the context of the EMI, the national monetary authorities remain responsible for the conduct of monetary policy (Article 3.1 of the EMI Statute).

In certain States, notably Germany, the Netherlands, France and Spain, they have a large measure of autonomy and are far removed from day-to-day politics. In other States their degree of independence from political authorities is less pronounced or even absent. An example of the latter is the position of the Bank of England, which basically functions as the institution entrusted with the execution of decisions taken at Treasury level.

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B. Variation in Responsibilities of NCBs

Another element of difference between the NCBs is that central banks have varied responsibilities. All of them have the task of implementing monetary policy and, as just discussed, to varying degrees they also *decide* on monetary policy. Apart from the activities geared to price stability and influencing money and foreign exchange markets, central banks may also have been entrusted with prudential supervision, that is, the supervision of credit institutions with a view to their solvency and liquidity. Here, not price stability but the protection of creditors and the stability of the financial system is at issue.

Oversight of payment systems, which are still organised on a national scale, is also a task which all EC central banks have been given, although the intensity of this task varies.

Other functions which central banks may have include supervision of other economic agents, the compilation of financial data and other statistical tasks, the function of cashier to the central government. Each central bank, of course, issues banknotes which have legal tender status.

C. Netherlands Central Bank: Functions and Relation with Government

In the Netherlands the organisation of the central bank, De Nederlandsche Bank NV, is set out in the Bank Act 1948.[2]

The Nederlandsche Bank's central task as set out in the 1948 Act is to regulate the value of the currency and to stabilise it. Furthermore, the Bank exercises prudential supervision over credit and investment institutions and exchange offices. Other tasks of the Bank include facilitating the payment system and issuing banknotes.

Section 9(1) of the Bank Act 1948 imposes on the central bank the duty to "regulate the value of the Netherlands' monetary unit in such a manner as will be most conducive to the nation's prosperity and welfare, and in so doing seek to keep the value as stable as possible". Thus the Nederlandsche Bank's central task is to regulate the value of the currency and to stabilise it. Other tasks, described in section 9, concern the circulation of banknotes, functions in respect of money transfers and the supervision of credit institutions. For the latter task reference is made to a special Act, the Act on the Supervision of the Credit System 1992.[3] This is the Netherlands' Banking Act. Furthermore, the Nederlandsche Bank also exercises the supervision of investment institutions and exchange offices.

2. [Central] Bank Act 1948 (*Bankwet*), *Staatsblad* (Official Journal of the Netherlands), No.I 166, most recently amended by Act of 9 Dec. 1993, *Staatsblad* 676.

3. Act on the Supervision of the Credit System 1992 (*Wet toezicht kredietwezen 1992*), *Staatsblad* 1992, No.722, as amended.

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The Bank's relationship with the government is set out in section 26 of the Bank Act 1948. It provides that the Minister of Finance can give such directions to the Bank's Governing Board as the Minister considers necessary for the proper co-ordination of the Bank's policy with the monetary and financial policies of the government. This mechanism was intended as an ultimate resort, but the procedure has never been tested. In fact, it provides for the Governing Board's objections to ministerial directives to be communicated to the full cabinet and discussed there. Any decision overriding the central bank's objections should be published in the Netherlands' Government Gazette (*Staatscourant*).

Section 26 has led in practice to regular consultations between a strong and autonomous central bank and the Minister of Finance, who is accountable to Parliament. Notwithstanding this practical independence it is clear that the ability to influence the central bank's Governing Board is incompatible with the independence envisaged for Stage 3. Article 107 of the EC Treaty requires full autonomy of the European System of Central Banks and its constituent parts so that section 26 will have to be scrapped.

In this context an oft-forgotten entry condition for the third stage of EMU merits attention. Article 108 (to which Article 109J on the entry procedure refers) requires each member State to have concluded the necessary amendments of its national legislation—including the statutes of its central bank—at the latest by the date of establishment of the ESCB. The amendments should make national law compatible with the Treaty and the ESCB Statute. This requirement constitutes what I would call the legal convergence criterion for admission to full currency union.

In the confines of this article, the instruments which the Nederlandsche Bank has at its disposal for the execution of its tasks cannot be elaborated upon.[4] These instruments, in so far as they relate to monetary policy, are based on the Bank Act 1948, the Act on the Supervision of the Credit System 1992 and private law. In the area of prudential supervision, the Nederlandsche Bank has been given regulatory powers with which the relevant EC directives (e.g. on solvency and consolidated supervision of credit institutions[5]) are implemented in the Netherlands.

4. For an extensive discussion of the Nederlandsche Bank's monetary policy methods in a historical context, see A. H. E. M. Wellink, "Experience Gained with Monetary Policy Instruments in the Netherlands", in *National Experiences and European Perspectives* (Bankhistorisches Archiv, Zeitschrift zur Bankengeschichte, Vol.27, 1994, pp.22–41, repr. in De Nederlandsche Bank Reprint Series, No.405). An even more elaborate discussion of the then-current instruments can be found in Emile den Dunnen and Sierd de Wilde *Instruments of Money and Foreign Exchange Market Policy in the Netherlands* (3rd rev. edn, NIBE, Amsterdam, 1992).

5. Council Directive 89/647/EEC on a solvency ratio for credit institutions of 18 Dec. 1989 (1989) O.J. L386/14, as amended; the Solvency Ratio Directive can be found in the *Amsterdam Financial Series* (Martijn van Empel (Ed.)), *Materials & Cases*, III.A.12 (Kluwer 1991, loose-leaf). Council Directive 92/30/EEC on the supervision of credit institutions on a

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The monetary policy of the Netherlands central bank is, in effect, an exchange rate policy. The Netherlands' guilder's peg to the Deutschmark means that policy instruments are used with a view to ensuring the continuity of this link. Thus, not only can exchange rate stability in respect of the Netherlands' main trading partner be assured but the internal stability achieved by the Bundesbank in Germany is imported through strict adherence to very narrow exchange rate fluctuation bands. (It should be recalled that the Netherlands and Germany concluded an agreement to maintain the 2.25 per cent fluctuation bands on either side of the central rates in the Exchange Rate Mechanism (ERM) of the EMS when, on 2 August 1993, it was decided to widen the fluctuation bands in respect of other participating currencies to 15 per cent.)

IV. EUROPEAN SYSTEM OF CENTRAL BANKS AND EUROPEAN CENTRAL BANK

THIS part discusses the central banking system of the Community once Stage 3 of EMU has started.

A. Establishment of the ESCB

The ECB and the ESCB are established as soon as the Executive Board of the ECB has been appointed (Article 109L(1), first paragraph, second indent, of the EC Treaty). The ECB's Executive Board will be appointed as soon as the decision to enter the final stage of EMU has been taken or, if there will be an automatic transition to Stage 3 (as is likely to happen), immediately after 1 July 1998 (Article 109L(1)).

The system of the Treaty implies that the Council in its highest composition, that of heads of State or government, will have to decide at the end of 1996, and again at the end of 1997, whether it is appropriate for the Community to enter Stage 3, with a majority of member States (Article 109J(3) of the EC Treaty). If no such decision is made, an automatic change-over is foreseen, no matter how many States will be allowed into the final stage (Article 109J(4)). For this latter case the Treaty provides that the necessary decisions, like the appointment of the Executive Board of the ECB, are to be made around 1 July 1998.

Thus, the ESCB will prepare for its full operations as soon as the ECB's Executive Board has been appointed (Article 109L(1), final paragraph). If the transition to the third stage is made automatically, and the only decision to be made concerns which States meet the entry conditions, the ESCB is to be established immediately after 1 July 1998. As indicated, this

consolidated basis of 6 Apr. 1992 (1992) O.J. L110/52, as amended; the Consolidated Supervision Directive can be found in *idem*, III.A.11.

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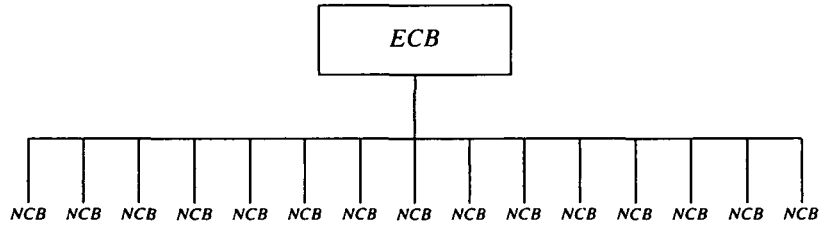
follows from Article 109L(1) of the EC Treaty. As Stage 3 would then start on 1 January 1999, this allows a half year for phasing-in.

Since it was decided at the Versailles informal meeting of the Ecofin Council and the Council of the EMI that an initial period of *one year* would be required for the ESCB to start its operations, the appointment of members of the Executive Board could well be brought forward. After all, the European Central Bank will, until 1 January 1999, operate in a preparatory capacity only and not exercise its powers in full. This is clearly stated in Article 109L. The EMI, the precursor of the ECB, will be liquidated as soon as the ESCB is established.

B. Structure of the System

The ESCB is structured as follows. The 15 existing central banks will continue to exist in their current legal forms, which differ from one member State to the next. (For instance, the National Bank of Belgium and the Nederlandsche Bank are both public limited companies, albeit in a rather unusual form, whilst the Bundesbank is a federal body corporate under public law.) Together, they will be the shareholders of the ECB (Article 28.2 of the ESCB Statute). Graphically, the system could be as shown in Figure 1.

Figure 1 *Structure of the European System of Central Banks*



Notes
NCBs are shareholders in but subject to the instructions of the ECB.
The ESCB is governed by the decision-making bodies of the ECB.

The NCBs will come under the tutelage of the ECB, whose governing bodies will govern the system (Article 8 of the ESCB Statute). The system as such does not have legal personality. It is the ECB and the NCBs and not the system which can own, buy and sell, contract and sue or be sued. The term "system" is used to denote the 16 legal entities of which it is

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made up, legal entities which are governed by a common set of rules. These rules are to be found in Articles 105 *et seq.* of the EC Treaty, as well as in the Protocol containing its Statute.

The European Central Bank will have two governing bodies: the Governing Council and the Executive Board.

The Executive Board will be the management of the ECB. It consists of a president, a vice-president and four other members (Article 109A of the EC Treaty). They will be appointed at the European level by the heads of State or government. This is a very weighty procedure which is not even in place for the appointment of the Commission (Article 158(2) of the EC Treaty provides only that the governments of the member States nominate, by common accord, the members of the Commission, while Article 109A(2)(b) specifies that Executive Board members will have to be appointed at head of State or government level).

The members of the Executive Board form part of the Governing Council, to which the governors of national central banks also belong. Thus, the NCBs which are subject to the instructions of the ECB (Article 14.3 of the ESCB Statute) are directly represented in the governing body, which is to ensure the NCBs' compliance with European Central Bank policies.

The Governing Council is to adopt guidelines and take decisions for the performance of the system's tasks and is to formulate monetary policy. The Executive Board is to implement monetary policy, to give instructions within the framework of monetary policy to the NCBs, to prepare for the Governing Council's meetings and to manage the current business of the ECB (Articles 12.1, 12.2 and 11.6 of the ESCB Statute).

The decision-making structure of the ESCB is depicted in Figure 2.

C. Autonomy of the ECB and the NCBs

The ESCB is to operate autonomously, independent of the political organs of the Community and the member States or any other body. This is a basic principle, enshrined in Article 107 of the EC Treaty and Article 7 of the ESCB Statute, under the heading "independence". It is inserted into the Treaty on the basis of experience in countries with long-standing traditions of autonomy for the central bank, and notably on Germany's experience with the independent Bundesbank. The autonomy for implementation of the system's tasks requires restraint on the part of the political organs at Union and national level and an independent mind on the part of the central banks of the Union and the members of their decision-making bodies. It is believed that only with such autonomous institutions can the strict monetary policy necessary to ensure price stability be properly implemented.

The autonomy of the system is guaranteed by several features of the rules relating to it.

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Figure 2 *Decision-making bodies of the ECB*

Governing Council	Executive Board + Governors of 15 NCBs.
Executive Board	President, Vice-President + four members.
Division of responsibilities	Governing Council: • broad orientations; • monetary policy decisions; • financial matters ECB/NCBs. Executive Board: • day-to-day monetary decisions; • instructions to NCBs; • current business of ECB.
Voting	Simple majority in Governing Council and Executive Board (Articles 10.2 and 11.5) *but* in respect of financial affairs ESCB (Articles 28–30, 32, 33, 51) weighted voting among NCB Governors only (Board members have no vote) (Article 10.3) *and* certain decisions are subject to special majority (Articles 14.4 and 20: two-thirds; Article 41.2: unanimity).
General Council	President + Vice-President + Governors of 15 NCBs.
Responsibilities	EMI tasks still to be performed in Stage 3; contribution to other tasks (Articles 44 and 47).

The direction not to accept instructions from any government body, at whatever level (Community/State/other), and the prohibition of the latter seeking to influence the decision-making bodies of both the ECB and the NCBs, are the centrepiece of the autonomy-related provisions.

The long term of office of Executive Board members, which does not coincide with that of the Commission, the European Parliament, or of any president or government of the member States, is another feature. They are appointed for a single, non-renewable term of eight years (Article 109A(2)(b), second sentence, of the EC Treaty). Likewise, the governors of NCBs should have a term of office of at least five years (Article 14.2 of the ESCB Statute). As no provision limits the duration of their term of office, it may be that the NCB governors on the Governing Council serve longer than their Board counterparts.

Neither the members of the Executive Board nor the governors of the NCBs may be relieved from office for policy reasons; only if they no longer fulfil the conditions required to perform their duties or have been guilty of serious misconduct can they be dismissed. The European Court of Justice can "compulsorily retire" an ECB Board member at the instance of the ECB itself (Article 11.4 of the ESCB Statute). It can also directly review a

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national decision to dismiss an NCB governor (Article 14.2 of the ESCB Statute).

Financial autonomy of the system has also been provided for: its resources are the assets of the NCBs, which do not form part of the Community budget. The European Court of Auditors can examine the ECB only for its operational efficacy (Article 27.2 of the ESCB Statute).

I have already alluded to the legal autonomy of the system: although it is a body of the Community (Article 4A of the EC Treaty), its constituent parts are separate legal persons, unlike the institutions of the Community (Commission, Council, European Parliament, Court of Justice and Court of Auditors).

The ESCB will be subject to reporting requirements, both to the public at large (through annual accounts, quarterly reports and weekly statements: Article 15 of the ESCB Statute) and to the political bodies of the Community (Article 109B of the EC Treaty). Under the latter provision, the President of the Ecofin Council and a member of the Commission may attend Governing Council meetings. They do not have a right to vote, however. The Ecofin Council President may submit a motion for deliberation.

The European Parliament may hold a general debate about the yearly report which the ECB President is to present to it. He and other Executive Board members may be heard by the European Parliament's committee on monetary affairs (Article 109B(3) of the EC Treaty). Should Parliament not agree with the ECB's policies, it cannot impose its will. Contrary to the present situation in the member States, or in the United States, where Parliament can amend the central bank law to force the monetary authority to take its views into account, the ESCB Statute cannot be amended by the European Parliament. The provisions on the ESCB have the force of Treaty law and can be amended only through a full Treaty revision, requiring an Inter-Governmental Conference and the ratification of its results by each State. (An exception has been made for certain technical amendments of the ESCB Statute for which the concurrence of the Council and the Parliament will suffice: Article 106(5) of the EC Treaty and Article 41 of the ESCB Statute). Thus, the autonomy of the system is strongly anchored in rock solid legal provisions.

As a counterpoint to this far-reaching autonomy it should be remembered that the system will be subject to full judicial scrutiny: the provisions on legal review include references to the ECB and to the NCBs (see, for instance, Articles 173, 175, 176, 177 and 180(c) of the EC Treaty). It is interesting to note that the NCBs, in so far as they perform functions in the ESCB, will be taken "out of the realm" of State responsibility and be subjected to review by the ECB instead of the Commission. I refer to the provision under which the ECB assumes the powers which the Commission has by virtue of Article 169 of the EC Treaty. Article 180(d) of the

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Treaty and Article 35.6 of the ESCB Statute provide for this. No longer will a State be legally responsible for the conduct of "its" central bank in terms of compliance with the EMU provisions in Community law. This clearly indicates the extent to which the system is autonomous, but at the same time subject to full judicial scrutiny, in the Community legal order.

D. Objectives of the System

The primary objective of the system is to maintain price stability. This overriding goal shines through all the provisions adopted with a view to the establishment of the ESCB. Only as a secondary objective will the ESCB have to support the general economic policies in the Community (Article 105(1) of the EC Treaty and Article 2 of the ESCB Statute).

1. Four basic tasks for the system

Four basic tasks are "to be carried out through the ESCB", which means that they are to be implemented by the ECB and NCBs collectively. They are (Article 105(2) of the EC Treaty and Article 3.1 of the ESCB Statute):

(1) the definition and implementation of the monetary policy of the Community;
(2) to conduct foreign exchange operations;
(3) to hold and manage the official reserves of the member States; and
(4) to promote the smooth operation of payment systems.

2. Other tasks for the system

Apart from these central tasks, others will be assigned to the system.

First, the system has to contribute to the smooth conduct of prudential supervision in the Community. This is a reflection of the need for consistency among prudential supervisory policies in a common currency area. Prudential control is assigned to the competent authorities in the various member States. I refer to the principle of home State control and mutual recognition of supervisory regimes upon which the Second Banking Directive[6] is based. In spite of the fact that this division of responsibilities

6. Second Council Directive 89/646/EEC on the co-ordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of credit institutions and amending Directive 77/780/EEC, of 15 Dec. 1989 (1989) O.J. L386/1, as most recently amended by the Post-BCCI Directive (95/26/EC) (1995) O.J. L168/7; the Second Banking Directive can be found in *idem*, III.A.11.

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will remain, at least initially, a measure of co-ordination at the central bank level has been provided for through the ESCB (Article 105(5) of the EC Treaty and Article 3.3 of the ESCB Statute).[7]

The system will further have functions in the field of statistics on banking and financial matters (Article 5 of the ESCB Statute).

An important function concerns the system's consultative role. The ECB will to have to be consulted prior to the adoption of Community legislation or national legislation within its fields of competence (Article 105(4) of the EC Treaty; Article 4 of the ESCB Statute). The ECB can also give opinions on its own initiative.

Finally, the ECB will, through its Governing Council, have the exclusive right to authorise the issue of banknotes in the Community, such issue to be effected by the ECB itself, or by the national central banks (Article 105A(1) of the EC Treaty and Article 16 of the ESCB Statute). Furthermore, the ECB has to approve the issue of coins by the member States (Article 105A(2) of the EC Treaty).

E. Activities of the ECB and the NCBs

The Statute of the ESCB sets out the activities which the system can conduct in order to implement its tasks. These operations are enumerated in Articles 17 to 24, 25 and 34 of the Statute. They enable the system to function in the financial markets, to grant credit facilities, to impose minimum reserves, to offer clearing and payment systems and to maintain external relations.

Furthermore, the ECB will have a regulatory capacity (Article 108A of the EC Treaty and Article 34 of the ESCB Statute). It can make regulations for the implementation of some of its tasks, take decisions and make recommendations or deliver opinions. Furthermore, the ECB will be empowered to impose fines or "periodic penalty payments" on economic operators who fail to comply with its regulations or decisions. (This is one of the areas in which secondary legislation by the Ecofin Council will be necessary before the system can fully exercise its competences: Article 106(6) of the EC Treaty and Article 42 of the ESCB Statute). The nature of these ECB acts is similar to those mentioned in Article 189 of the Treaty in respect of legal acts emanating from the Council, the Commission or the European Parliament.

7. On the organisation of prudential supervision in a common currency area, see "Banking Supervision in the European Community—Institutional Aspects", report of a working group of the ECU Institute chaired by Jean-Victor Louis (Editions de l'Université de Bruxelles, 1995).

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F. Harmonisation of NCB Charters through the Treaty and ESCB Statute

Through this enumeration of competences, the ESCB Statute achieves a direct harmonisation of the national bank charters, which will have to be in conformity with the Treaty and the Statute. Thus, the system will be able to perform in unison, its constituent parts having at least the same powers to operate. I say "at least", because the NCBs may be given wider competences than those provided for in the Statute.

Such powers may be necessary to perform other functions which are not, or only partly, related to the activities of the system. An example is prudential supervision, for which many but not all NCBs are responsible. The Governing Council of the ECB may prohibit the performance of non-ESCB functions by a national central bank, should it find (by a two-thirds majority) that such functions would interfere with the system's own objectives and tasks (Article 14.4 of the ESCB Statute).

G. Preparations for Amending Netherlands Legislation

In this context it is appropriate to indicate the efforts undertaken to amend national law so as to be compatible with the ESCB Statute. In the Netherlands the preparations for amending the Bank Act 1948 are under way. The Nederlandsche Bank has prepared a memorandum setting out the changes which, in its view, are necessary for its charter to be consistent with the EC Treaty and the ESCB Statute. Discussions with the Ministry of Finance are currently being held with a view to laying before Parliament a Bill containing a completely revised Bank Act 1948 in time for its adoption prior to the first date at which the Community will decide whether to enter Stage 3.

Main elements of the proposed new Act would be the incorporation of the central bank into the ESCB, the specification of price stability as the primary objective of the central bank, the enumeration of the powers given to NCBs under the ESCB Statute and the abrogation of the ministerial right to give directions to the central bank. Thus, the Bank Act 1948 would be made compatible with the requirement of participation in Stage 3 of EMU. The amendment would also provide an opportunity to modernise the Act and take developments in financial markets and in central bank competence into account, notably in respect of oversight of payment systems.

The Bill would have to be submitted to the EMI for prior advice (Article 109F(6) of the EC Treaty; Article 5.3 of the EMI Statute; Council Decision 93/717/EC of 22 November 1993[8]). The mechanism of EMI

8. (1993) O.J. L332/14.

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advice on draft legislation enables the co-ordination of legal provisions in the field of central banking across Europe.

H. Exchange Rate Policy

The ESCB will be exclusively competent to devise and implement the Community's monetary policy. In the area of exchange rate policy with respect to third currencies, however, a role has been reserved for the Ecofin Council.

An exchange rate arrangement with a currency of a third country (the US$ or the Japanese yen) may be concluded by the Council. Article 109 of the EC Treaty also formulates the Council's tasks if no formal, Bretton Woods-like agreements exist. In a situation of floating currencies, as we have experienced during the past 20 years, the Ecofin Council may formulate general orientations for exchange rate policy in respect of third currencies. Such general orientations may not affect the ESCB's primary objective of maintaining price stability in the Union. Thus, the Council cannot impose behaviour which would undermine monetary policy.

Special procedural constraints are built in to ensure that the Council's powers under Article 109 are used only after consultation with the ECB. Article 109(1) and (2) does not deal with relations between the single currency and the currencies of member States which have not yet acceded to full EMU.

Article 109(3)–(4) further lays down the decision-making procedure for the Community's external representation. This provision is completed by Article 6 of the ESCB Statute on international co-operation by the system.

V. TRANSITIONAL ARRANGEMENTS

HAVING set out the main aspects of the future European System of Central Banks, I now turn to the transitional arrangements concerning the establishment of Stage 3 of EMU.

A. Decision-Making Procedure for Transition to Stage 3

Article 109J(3) of the EC Treaty states that the Council, meeting in the composition of heads of State or government, shall, acting by a qualified majority, decide no later than 31 December 1996 whether a majority of the EC member States fulfil the criteria for transition to Stage 3. If by the end of 1997 the date for the beginning of the third stage has not yet been set, it starts on 1 January 1999, even if only a minority of member States are ready for this transition. The conditions for entry into stage 3 of the EMU are set out below:

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(1) Legal compliance criterion (Article 108; see also Article 109J (1), second sentence):
   (a) compatibility of national legislation (including NCB statutes) with Treaty and Statute of the ESCB (especially central bank autonomy: Article 107).
(2) Economic convergence criteria (Article 109J(1) and Protocol on Convergence Criteria):
   (a) price stability (inflation rate close to that of three best-performing States);
   (b) sustainable government financial position (no excessive deficit, the reference values being: government deficit less than 3 per cent of GDP and government debt less than 60 per cent of GDP);
   (c) observance of "normal" fluctuation margins in ERM of EMS for two years without severe tensions;
   (d) durability of convergence reflected in long-term interest rate levels.

B. States with a Derogation

The member States which will not qualify for the transition to the third stage will have a derogation. The provisions which will not apply to them are mentioned in Article 109K(3) of the EC Treaty. Where the Treaty refers to "Member States", only the member States without a derogation are meant (Article 109K(4)). The member States with a derogation do not have the right to vote on the decisions in respect of EMU specified in the Treaty; Article 109K(5) contains a special rule for majority voting in the Council in these cases.

Article 109K(2) of the EC Treaty adds that at least once every two years, or at the request of a derogation State, the Commission and the ECB are to report to the Council whether a member State with a derogation fulfils the necessary conditions to enter Stage 3 of EMU. Member States with a derogation will therefore be regularly assessed as to their progress in complying with the economic criteria set out in Article 109J(1) of the EC Treaty. Thus, it is clearly the intention of the Treaty that the derogation status will be of a transitional and transient nature.

1. Denmark

At present it is already clear that, regardless of the date for the start of Stage 3, there will be at least one member State with a derogation, namely Denmark. It will be recalled that the Treaty of Maastricht could not at first be ratified as the Danish population voted against the Treaty on European Union in a referendum. The EC member States reacted to this no-vote by adopting interpretative language on the position of Denmark in the Euro-

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pean Union, which proved to be acceptable to the Danes during a second referendum. A protocol already attached to the EC Treaty in Maastricht entitles Denmark to an opt-out of the EMU provisions in the EC Treaty. It makes clear that the procedure mentioned in Article 109K(2) of the EC Treaty can be initiated only at Denmark's request. A "decision" taken by the European Council, meeting in Edinburgh in December 1993, contains Denmark's notification of its opt-out of Stage 3.[9]

2. United Kingdom

A second protocol on certain provisions relating to the United Kingdom has also been attached to the EC Treaty in Maastricht. The spirit of this protocol is very different from the Danish protocol. The UK Opt-in Protocol is about three times as long as the Danish Opt-out Protocol. It emphatically states that the United Kingdom must notify the Council whether it intends to move to the third stage and that, unless it gives such a notification, it shall be under no obligation to do so (Article 1 of the UK Opt-in Protocol). Article 4 of the UK Protocol explicitly points out that as long as the United Kingdom remains in Stage 2 of EMU it shall retain its powers in the field of monetary policy.

The Danish Protocol merely refers to the provisions on derogation States. They provide that these States will retain monetary sovereignty (Article 109K(3), Article 43.2 of the ESCB Statute and Article 3.1 of the EMI Statute, which will remain relevant for the relations between full currency union members and other States, since the ECB is to take over those tasks of the EMI which will still have to be performed in Stage 3: Article 44, first sentence, of the ESCB Statute).

Another difference between the Danish and UK Protocols is that the latter not only provides for the derogation of the EMU obligations mentioned in Article 109K(3) of the EC Treaty but it also adds extra derogations especially for the United Kingdom. Examples of obligations from which the United Kingdom has additional derogations are:

(1) the obligation to avoid excessive government deficits (Article 104(1) of the EC Treaty), which will not apply to the UK; Article 109E(4) requiring an endeavour to avoid excessive government deficits will continue to apply;
(2) the obligation to consult the ECB on draft legislation falling within the latter's field of competence (Article 105(4) of the EC Treaty), which will not apply to British draft legislation (while currently UK proposals for legislation have to be submitted for advice to the EMI); and
(3) the requirement to confer autonomy on national central banks

9. (1992) O.J. C348/2.

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(Article 107 of the EC Treaty), which will likewise not apply to the United Kingdom.

Most strikingly, the United Kingdom will not be bound by the basic provision on monetary union (Article 3A(2) of the EC Treaty), which states that the activities of the Community include the irrevocable fixing of exchange rates and the introduction of a single currency, the ECU.

C. Institutional Problems of a Monetary Split-Up

It was mentioned above that, once Stage 3 starts, there will be at least one member State with a derogation—Denmark—and another which will have the right to opt in, namely the United Kingdom. It is highly likely that there will also be a number of States which, while under an obligation to move to Stage 3, will temporarily not yet be admitted, because they do not yet comply with the convergence criteria. This division between member States participating in Stage 3, those with a derogation and a third category comprising the United Kingdom alone, will create institutional difficulties for the EC institutions, as well as for the ECB. These difficulties will intensify over time. Therefore, the aforementioned division of member States into three separate categories is only workable and acceptable provided that the derogation and opt-in status are changed as soon as possible.

1. Continuation of the Exchange Rate Mechanism

I should first highlight one particular consequence of the existence of member States with a derogation. Before these member States can move to Stage 3, they will be judged, *inter alia*, on their observance, over a period of at least two years, of the normal fluctuation margins provided for by the Exchange Rate Mechanism (ERM) of the European Monetary System (Article 109J(1), first paragraph, third indent, of the EC Treaty). Article 109M(2) of the EC Treaty, moreover, establishes a continuity between the experience with the European Monetary System up to the end of Stage 2 and the obligations of member States which do not accede to full currency union, regarding their exchange rate policy in Stage 3. It follows from these Articles that in Stage 3 there will need to be a revised EMS which will comprise the ECU on the one hand, and the currency or currencies of the member States with a derogation on the other hand.

It will not be possible to transpose the original EMS mechanically to Stage 3 as, to give only one reason, the ECU will no longer be a basket currency (see Article 109G, second paragraph, and Article 109L(4) of the EC Treaty) and its present-day function as a common denominator for the bilateral exchange rates cannot be maintained. Also, the decision-making procedures maintained in the context of the EMS will have to be revised as

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the national governments of the member States which have acceded to the currency union are no longer competent in monetary affairs. This competence has been fully taken over by the Community, and specifically by the ECB. Thus, the new ERM will group together, on the one hand, the national competent authorities in the member States with a derogation and, on the other, the ECB, which will have exclusive competence in this field according to Article 105 of the EC Treaty. The different status of the members of the new ERM, bringing together the single currency and at least one major currency outside (sterling) and perhaps only a few currencies which do not fulfil a major role in international financial markets, will also make it difficult to transpose without more the arrangements applied thus far.

There will be a need for sensible Treaty interpretation, abiding by its terms ("there be an ERM") yet allowing account to be taken of the new institutional and economic realities once Stage 3 has set in.

2. *Consequences for the ESCB*

As long as not all member States have acceded to the currency union, a third governing body will function within the ESCB alongside the Governing Council and the Executive Board.

It is called the General Council of the ECB and consists of all NCB governors and the President and Vice-President of the ECB (Article 45.2 of the ESCB Statute). The General Council is competent for the responsibilities which the system will take over from the EMI for those member States which are still in Stage 2 of economic and monetary union. This requires a little explanation. The United Kingdom and Denmark, as well as any States which have not been admitted to Stage 3 from the beginning, will remain subject to the provisions which are applicable in Stage 2, as we have just seen with some rather important exceptions and variations in the case of the United Kingdom. Thus, monetary policy will remain their national prerogative: this derives, *inter alia*, from Article 3.1 of the EMI Statute which, as indicated above, will continue to apply to the functions which the ESCB will take over from the EMI in respect of derogation and opt-out States. The States not fully participating in economic and monetary union will continue to treat their exchange rate policy as a matter of common interest (Article 109M). This is the basis for continued operation of an exchange rate mechanism such as that of the current EMS. This mechanism will then have to be managed by the ESCB, notably by its General Council in which all NCBs and the ESCB are represented.

The existence of the General Council, which will also have advisory and preparatory tasks in respect of the other activities of the system, implies that the Governing Council and the Executive Board will not be composed on a Community-wide basis. Only the NCBs from member States which enter monetary union from the start will be represented in the

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Governing Council; only nationals of those States are eligible for appointment as members of the Executive Board. The special rules applying to derogation States (notably Article 109K) and to the two States with an opt-out or opt-in (the Protocols on Denmark and the United Kingdom) provide for these exemptions.

3. Consequences for the Community Institutions

What sort of difficulties might arise for the EC institutions in a multi-speed EMU?

First and foremost, there will be consequences for the functioning of the Commission which, pursuant to Article 155 of the EC Treaty, is the guardian of the Treaty and of the Community as such. As in all other fields of EC policy, the Commission will have its pivotal role to play in the area of EMU. Examples of its role in respect of monetary union are the Commission's recommendation on whether a member State qualifies to move to Stage 3 (Articles 109J(1) and 109K(2) of the EC Treaty) and its proposal on the conversion rates at which currencies will be irrevocably fixed (Article 109L(4) and (5) of the EC Treaty). These examples concern recommendations which will have important bearings on the member State in question. Also, a Commission representative may participate in meetings of the ECB's Governing Council without, however, having the right to vote (Article 109B(1) of the EC Treaty).

In the area of economic union, too, the Commission is to submit proposals and recommendations. It is to formulate broad economic guidelines in draft, which the Council adopts in the so-called multilateral surveillance procedure (Article 103(2) of the EC Treaty). It is the Commission which will have to make a first assessment of the budgetary situations in the member States. Its opinion triggers the excessive deficits procedure (Article 104C(5) of the EC Treaty).

Although it is clear that, in making these recommendations, the Commission is bound to take the Community interest to heart, the interests of the currency union, on the one hand, and of the derogation and opt-in States, on the other, may diverge. This may require a tough balancing act by the Commission and even a choice between what is good for the vanguard of the union, accession to which is the aspiration of the remaining States, and the other States.

If the transitional period during which some member States do not yet participate in full currency union is relatively brief, this would not seem to bring the Commission into deep conflict. Also, the number of States which remain outside the currency union would be an important factor. Were a split between members of the full currency union and others to persist and if there are many States outside, then the continued operation of the same Commission for the currency union and for the other States might begin to pose institutional problems, not least externally. Will a British com-

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missioner for monetary and economic affairs represent the Union in G7 discussions? How will the Commission evaluate a budgetary situation which, in a single currency area, is untenable as it drives up interest rates on the ECU through excessive public demands for funding, while a similar situation in a small State which does not participate in Stage 3 would not be judged as severely?

It should be remembered that the co-ordination and the required convergence of economic policies is necessary to underpin a single market and a single currency. The leverage which the governments individually lose over economic affairs since the abandonment of frontiers can be regained through collective action. (This was the reason underlying the co-ordination of economic policies which was one of the two means to achieve the Community's objectives under the EEC Treaty (Articles 2 and 145(1)).) Also, it is unacceptable in an integrated economic area to have governments undermine the common policy through excessive borrowing, crowding out private parties from the single capital market denominated in ECU and pushing up the interest rate. This, after all, is the reason underlying the policy co-ordination mechanisms and the prohibitions on favouring government actors over private parties, enshrined in the economic union chapter of "Maastricht".

The issue further arises whether the Commission will, or may, pay special attention to the needs of member States with a derogation—and consequently interpret the criteria of Article 109J(1) of the EC Treaty in a liberal way—or, rather, whether the Commission will pay attention to the interests of the EC as a whole. There is a built-in conflict between the interests of member States even if Article 155 of the EC Treaty is clear on this point in insisting that the Commission is the guardian of the Community's interests.

The same issue of divergent political and economic interests between member States can also cause problems for the European Parliament. It is clear that the Parliament will not have a prominent role in the functioning of EMU, but it is nevertheless the case that Parliament will hold an annual debate on the activities of the ESCB (Article 109B(3) of the EC Treaty). An MEP from a member State with a derogation, or from the United Kingdom, will participate fully in parliamentary debates on the ECB's activities and the question arises whether this indirect influence by MEPs from member States not participating in Stage 3—and who are not directly concerned—will remain acceptable in the long term.

I turn now to the Council. As already mentioned, in Stage 3 the voting rights of the member States with a derogation will be suspended regarding EMU issues (Article 109K(5) of the EC Treaty). Examples of these issues are:

(1) the appointment of the ECB directors (Article 109K(5) of the EC Treaty);

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(2) decisions regarding the exchange rate policy in respect of third countries (Article 109 of the EC Treaty); and
(3) the issue of ECU coins (Article 105A(2) of the EC Treaty).

By themselves the rules on the suspension of the votes of member States with a derogation and the United Kingdom are clear. It should be recognised, however, that they are always derived from combinations of Treaty provisions and that they complicate the already Byzantine decision-making procedures of the Community.[10]

It will be difficult to explain why the United Kingdom and other States will not be able to cast a vote in certain cases, especially if the impact of the decisions taken in the currency union on the remaining States will be great. Moreover, will the public of the currency union members and its representatives continue to accept that UK and other States' ministers fully take part in the debate about, if not in the voting on, such issues? This situation is somewhat like the one in the run-up to "Maastricht", when the United Kingdom had its full part to play in the contents of the EMU provisions adopted while it was clear that Great Britain would not take part in their implementation.

Here as well, then, the conclusion must be that the interests of the Community would be best served by a brief transition of all member States to Stage 3.

VI. CONCLUDING REMARKS

THE division of member States moving into Stage 3, while others remain in Stage 2, will create institutional difficulties for the ECB, the Commission and the European Parliament. Also, this division will complicate the Council's EMU work to a considerable degree. The co-ordination of economic policies between States sharing a single currency may entail stricter guidance and more severe budgetary restraint than would be acceptable for Council members who have yet a long way to go before entering Stage 3, or whose avowed policy is never to take part at all!

The Inter-Governmental Conference reviewing the Treaty on European Union and the revised EC Treaty is due to commence in 1996. It is not likely that the aforementioned difficulties will then be used to change the EMU provisions in the EC Treaty. The EMU articles are better left alone, as EMU is a finely balanced compromise. Reopening the debate on specific procedural or political issues could unravel the present consensus on EMU and this should certainly be avoided. If stronger commitments in the area of economic policy are necessary, introducing Schengen-like

10. On the already intricate make-up of Union decision-making see Deirdre Curtin and Herman Meyers van Ooik, "The Constitutional Structure of the Union: A Europe of Bits and Pieces" (1993) 30 C.M.L.Rev. 17–69.

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decision-making procedures among the currency union members only would not seem to be the answer. As Bundesbank director Peter Schmidhuber, who recently advocated a stronger economic union, himself recognised, this would entail numerous legal difficulties.[11] Thus, a stronger union, both as regards economic policy and in respect of political integration, may ultimately be introduced into the EC Treaty but there seems to be no urgent need to reopen the discussions which led to the present-day provisions. The 1996 IGC should not interfere with the sensitive process of establishing monetary union, which by then will be fully under way.

Even so, the political and procedural problems accompanying extended transitional periods for the move to Stage 3 remain pressing, which is why I advocate a swift move to Stage 3 for all EC member States. This will require incisive economic policy changes for those States whose results on the convergence scoreboard are less than glittering. For only if the right economic conditions are met can the adventure of a single currency be safely entertained.

Should it become clear that certain member States wish to remain outside the currency union for ever, other solutions may have to be devised. If these member States are the same as those which advocate a watering down of the Union and which resist the move towards bringing the intergovernmental pillars of the Union Treaty slowly but surely into the fold of Community decision-making, then some rethinking of Europe's structure may have to be done. Here, the former British prime minister and the former European Commission President seem to find common ground: while Baroness Thatcher advocates a retreat from the Union, Jacques Delors thinks two Europes (one of free movement and one of common powers) might be possible. A restructuring of the European enterprise might be undertaken in such a way that States whose interest is in the common market only can continue to derive the benefits therefrom in some form of membership of the European Economic Area (EEA), while the others are free to have, among themselves, common institutions for the common regulation of economic activities, a common and single currency and a common defence. The time might become ripe for serious debate in this direction. This is certainly not on the agenda today, and far surpasses the realm of EMU. Yet, a clear restructuring of Europe along these lines might also help forestall the problems which can be foreseen for the operation of the single currency area in the context of a divided Community.

One may hope that such a multi-centred Europe may perhaps be

11. "Schmidhuber fordert Vertragsergänzung", *Handelsblatt*, 9 June 1995.

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possible and feasible to bring into the internal market countries as yet outside the Union, but that it will not have to be necessary to start such a debate with a British government. London is, after all, the international financial centre of Europe, and it should be both within the purview of internal market regulations and within the single currency area of Europe.

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