

DECENTRALISATION AND SPECIALISATION IN THE EUROSYSTEM (*)

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1. INTRODUCTION

«There is no doubt that the principle of decentralisation is one of the essential defining features of the ESCB's legal framework» (1).

Both independence and decentralisation are common features of modern central banking in large areas (2). If the Eurosystem and the US Federal System are organized in a decentralised manner, clear differences exist between, on the one side, the US district banks and, on the other side, the EU national central banks (3).

The role of the NCBs

The Eurosystem composed of the European Central Bank (ECB) and of the national central banks (NCBs) of the euro area is a complex and very innovative public institution. Acting through its members, the system is by nature decentralised.

Before the creation of the Eurosystem, all NCBs were qualified as decentralized services («*services publics décentralisés*») in their national context; they were subject to national legislation and governmental control. In the course of their long histories, all NCBs have been nationalised, notwithstanding the fact that some of them remain, at least partially, governed by company law (as in Belgium, Greece and Italy).

(1) F.J. PRIBO & F. CONLEDO, «The role of the decentralisation principle in the legal construction of the European System of Central Banks», in: *Legal Aspects of the European System of Central Banks*, Liber Amicorum Paolo Zamboni Garavelli, ECB, 2005, p. 190; already in the first stages of the discussion on the EMU, it became clear for the leading actors that they were thinking of a federal system, including the existing national central banks, and so corresponding to the institutional diversity in Europe and strengthening the central bank independence, see C.C.A. VAN DEN BERG, «The Making of the Statute of the European System of Central Banks», *An application of checks and balances*, Amsterdam 2004, in particular Cluster II, «Checks and balances between the ECB and the NCBs (the relations within the System)», pp. 306 and following.

For the description of the functioning of the Eurosystem, we may refer to the numerous publications available on the websites of the respective Central Banks, see, in particular, P. MOUTROT, A. JUNG and F.P. MONGELLI, «The Workings of the Eurosystem», *ECB Occasional Paper*, n° 79, January 2008, 67 p.; available on the ECB website: <http://www.ecb.int>.

(2) «Even if the institutional models feature different degrees of decentralisation, decentralisation as such entails two major assets. First, by the proximity it induces, it facilitates surveillance by intense information gathering as well as close information dissemination to the public. In other words, proximity helps the public's confidence along. Second, decentralisation arouses innovative thinking through competition in fields like operational matters, research as well as policy matters», according to Governor Yves Mersch, in a speech at Würzburg on 11 May 2001 «The Eurosystem and the Federal Reserve System: some reflections» (text available at the Banque centrale du Luxembourg).

(3) Numerous presentations and comments are available; see a.o. *Le Federal Reserve System*, by Jean-Victor Louis, Annexe II «Vers un système européen de banques centrales, Projet de dispositions organiques», Ed de l'Université de Bruxelles, pp. 267-308.

As public establishments, they were regulated by specific legislation, under the control of the Government. From the moment they became independent central banks, free from national governmental control, they became an integral part of the Eurosystem, subject to its specific governance regime.

The Treaty provides explicitly that the Eurosystem is governed by the ECB decision making bodies (4).

The Eurosystem «composed of the ECB and the NCBs» (5) incorporates but maintains the NCBs in their previous national legal format, together with the newly created European Central Bank.

The doctrine underlines the dual character of the NCBs as national institutions that are also an integral part of the Eurosystem according to Article 14.3 of the ESCB Statute.

Each Eurosystem central bank has its own legal personality. Only in specific cases (6) are NCBs acting on behalf of the ECB. They are not subsidiaries of the ECB, quite the opposite, they are the sole shareholders of the ECB (7).

Contrary to the US, for instance, the centre has no institutional budgetary power *vis-à-vis* the periphery. NCBs remain national public bodies with their own capacity and their own institutional, personal, organisational, financial and budgetary autonomy; they could not be transformed into mere agents or branches of the ECB (8).

(4) Article 107, §3 repeated in Article 8 of the ESCB Statute: «The ESCB shall be governed by the decision-making bodies of the ECB which shall be the Governing Council and the Executive Board».

(5) See reference under 2).

(6) For instance for the management of foreign reserve assets of the ECB, for the collection of statistics in accordance with EC Regulation n° 2533/98, or for the enforcement of sanctions according to Council Regulation (EC) n° 2532/98 of 23 November 1998.

(7) Article 28.2 of the Statute: «The national central banks shall be the sole subscribers to and holders of the capital of the ECB».

(8) The NCBs are the sole shareholders of the ECB while in the US the district banks can be considered as subsidiaries of the FED Federal reserve; contrary to the FED the ECB does not approve the appointments of presidents and some Reserve Bank's directors, the majority in the Governing Council comes from the periphery, while the FOMC is composed of seven members of the Federal Reserve Board and five out of twelve presidents of Regional Banks on a rotating basis. In the ECB Governing Council, there are since 1 January 2009 16 NCBs' Governors and 6 Executive Board members, each with one voting right (the rotation system for the voting rights of the NCBs governors in the Governing Council, as provided for in the new Article 10.2 of the ESCB Statute shall start only from the date the number of those governors exceeds 18, in accordance with a recent Decision of the ECB Governing Council, adopted at the majority of two-thirds of all its members, on 18 December 2008 (ECB/2008/29).

The progressive development of the Eurosystem

The Eurosystem has a single decision-making process. The ECB Governing Council has the supreme responsibility for the whole system but the operations are mainly conducted by the NCBs. Operationally, the periphery is more significant than the centre.

The legal analysis can hardly be limited to the provisions of the ESCB Statute, in view of their general and evolutionary character.

We need to proceed by an incremental approach considering how concretely the various tasks have been carried out by the Eurosystem central banks since the start of its operations on 1 January 1999. After ten years, the Eurosystem is still very young, subject to progressive development.

The Treaty and the Statute define the basic features of the organisation of the Eurosystem but entrust it with a wide autonomy for the performance of its tasks, through the intervention of all its members, at the discretion of the Governing Council.

Decentralisation versus specialisation

The title of this contribution combines decentralization and specialisation. This is quite appropriate.

Specialisation can be considered as part of the decentralisation mechanism, just as decentralisation can be seen as a kind of specialisation. Central banks, as public services, are all subject to the strict respect of the specialisation principle according which they shall carry out their tasks imposed by their organic law using the instruments made available to them by the law.

The Statute does not foresee a specialisation regime for NCBs inside the Eurosystem.

It can even be argued that a mandatory specialisation of NCBs is not in line with the Treaty (9). All NCBs have to be treated equally inside the system; it means that the ECB decision-making bodies could not impose different tasks on specific national central banks. Each NCB is territorially specialised; it acts in its country. Contrary to the US,

the Eurosystem has as many jurisdictions as euro area Member States.

Nevertheless, the possibility exists to organise, in respect of the principle of nondiscrimination and on a voluntary basis, different levels of execution for different tasks by different central banks. NCBs may agree among themselves to cooperate or to mandate one of them for providing services. The Eurosystem may also entrust certain tasks to specific central banks but only if there is a general agreement. The discussion on decentralisation necessarily includes the problematic of the possible ways for further centralisation or specialisation.

It would be wrong to focus simply on the inevitable tensions between the centre and the periphery; a total centralisation of tasks by the ECB is legally impossible for the obvious reason that the system shall, according to the Treaty, always include the NCBs.

Centralisation should not be seen as benefiting only the ECB and decentralization should not to be assimilated, in all cases, to «Hub and spokes» model. Various discussions are now taking place concerning the attribution of specific tasks either to the ECB or to some NCBs. Some interesting legal techniques have already been experienced; they will be briefly discussed after having presented the two aspects of the decentralisation principle.

2. DECENTRALISATION IN PRINCIPLE

The decentralisation principle is derived from various provisions of the ESCB Statute, in particular Articles 9.2 and 12.1. In our view, beyond these provisions concerning the operational framework, the decentralisation principle has to be seen in the context of the federal character of the Eurosystem.

2.1. *Decentralisation as operational principle*

Decentralisation aims at efficiency. The ESCB Statute recognises the internal autonomy of the Eurosystem and the responsibilities of the Governing Council in this regard.

«The ECB shall ensure that the tasks conferred upon the ESCB under Article 105(2), (3) and (5) of this Treaty are implemented either by its own activities pursuant to this Statute or through the national cen-

(9) See PRIEGO & COMILLO, *op. cit.*, footnote 1.

tral banks pursuant to Articles 12.1 and 14». (Article 9.2 of the ESCB Statute).

Concerning the NCBs, the key provision is the third paragraph of Article 12.1 of the Statute:

«To the extent deemed possible and appropriate and without prejudice to the provisions of this Article, the ECB shall have recourse to the national central banks to carry out operations which form part of the tasks of the ESCB».

This provision establishes the basic scenario according to which the ECB decision making bodies adopt the rules while the NCBs carry out the operations. This general rule does not, nevertheless, correspond to a strict distribution of exclusive competence. The ESCB Statute remains rather vague on the concrete division of labour in the system.

The operations are decentralised «to the extent deemed possible and appropriate»; any derogation to this rule, has to be motivated accordingly by the Governing Council.

For the performance of Eurosystem tasks the ECB is not alone to decide; the NCBs also have to adopt rules (regulatory or contractual) in order to carry out the Eurosystem tasks; their legal acts have to comply with the ECB rules including the instructions of the Executive Board in view of implementing monetary policy (10).

For its part, the ECB has also the capacity to act as a bank for the execution of some Eurosystem tasks, but under the conditions laid down on a case by case basis by the Governing Council (11).

Decentralisation corresponds to an efficiency principle. The monetary policy operational framework is conceived so as to enable a wide range of counterparties to take part. In accordance with the rules of

(10) Article 12.1, second alinea of the ESCB Statute «The Executive Board shall implement monetary policy in accordance with the guidelines and decisions laid down by the Governing Council. In doing so the Executive Board shall give the necessary instructions to national central banks. In addition the Executive Board may have certain powers delegated to it where the Governing Council so decides».

(11) This is a substantial difference *vis-à-vis* the US Federal Reserve System, also federal in character, with a national coordinating and supervisory body in Washington and twelve regional Federal Reserve banks, operating arms of the System in their respective districts: if the Board has no direct operational competence, its supervision exercised on the Reserve Banks appears stronger than the control exercised by the ECB on the NCBs.

prudence and of «know your customer», a direct and exclusive relationship with the local central bank seems preferable.

If monetary policy may contribute to financial integration and the establishment of large European cross-border banking groups, the Eurosystem acts «in accordance with the principle of open market economy with free competition» (12). Special regimes for counterparties or concentration of activities in specific areas have to be avoided. Monetary policy is conducted through direct contacts with all the banks of the euro area, having all basically the same rights and obligations. Each counterparty, even subsidiary or branch of a banking group has to maintain an account with its NCB. Contrary to the field of banking supervision, there is no application by central banks for monetary policy of a principle of home country control; each counterparty has to ensure its own liquidity management under the supervision of the central bank of the host country.

The Eurosystem is thinking globally while acting locally.

The Governing Council has a wide margin of discretion when deciding on the organisational framework of the Eurosystem tasks.

Having to «adopt the guidelines and take the decisions to ensure the performance of the tasks entrusted to the ESCB under this Treaty and this Statute», the competence under Article 12.1 of the Statute includes the power to decide on the organisational set-up for the performance of Eurosystem tasks and of auxiliary activities.

2.2. Decentralisation as federal principle

From the outset, we have considered decentralisation as a basic feature of the Eurosystem together with its independence.

The authors of the Maastricht Treaty have conceived the Eurosystem as a federal system (13).

(12) Article 105(1) of the Treaty repeated in Article 2 of the ESCB Statute.

(13) The Delors Report benefited from influential contributions among which the proposals of Professor Jean-Victor Louis participant to this Conference and former member of the ESCB Legal Committee – who advocated a strong central monetary authority following the American experience: «on ne peut transposer le 'modèle' du FOMC purement et simplement dans la structure de la future banque centrale européenne. Il faut s'assurer que l'introduction d'un élément fédéral dans le processus de décision soit faite dans des conditions qui ne portent pas atteinte à la fonctionnalité de la banque centrale», Rapport sur le Federal Reserve System published as Annex II of the Rapport du groupe présidé par Jean-Victor Louis, *Vers un système européen de banques centrales. Projet de dispositions organiques*, Editions de l'Université de Bruxelles, 1989, p. 301.

For them, the need for completely centralized monetary decision-making had to be balanced by the participation of members of the centre and of the periphery in the central decision body as well as by a division of labour between the ECB and the NCBs for the conduct of the operations. This is why the federal character of the system was so to say undisputed.

The complexity of the system reflects the institutional diversity of the euro-area itself; in a certain sense, decentralisation is a preventive therapy against European bureaucratisation; the ECB officials are only a minority compared with the NCBs officials.

More fundamentally, decentralisation should be seen as part of the subtle checks and balances which characterises the Eurosystem, checks and balances at European level, with the ECB becoming one of the seven EU institutions (14), checks and balances between European and national governance.

The imbalance at the EU level between the monetary governance and the economic governance is partially compensated by the checks and balances at national level with independent central banks vis-à-vis national (and regional) governments.

The complexity of the Eurosystem, reflects the complexity of the European Union.

The tasks and the organisation of the Eurosystem might be influenced by the evolution of the European Union itself.

If decentralisation is justified by efficiency, how more European integration in the future, how more centralisation and specialisation might be expected inside the Eurosystem.

«Le groupe a opté pour un système fédéral de banques centrales. L'approche unitaire impliquerait la fusion des banques centrales nationales, ce qui paraît difficile à réaliser. Le schéma fédéral implique la coexistence d'entités juridiques distinctes, une centrale et d'autres périphériques (les banques centrales nationales). Il appelle des mécanismes efficaces de coordination, ainsi qu'en témoigne l'expérience de la République fédérale d'Allemagne», *id.*, p. 30.

(14) In accordance of the new Article 9 of the Treaty to be included in virtue of the Lisbon Treaty; The duty to cooperate with the other institutions, as well as the general application of the Treaty provisions to the ECB is now undisputed, without prejudice to the respect of its independence. See B. FRANKEL, I.A. OLEAGA and W. COUSSENS, «How will the Treaty of Lisbon affect EMU», in *Eurelia*, 2207-2008-2, pp. 121-159. This is also in line with the Judgment of the Court of Justice of the European Communities of 10 July 2003 (OLAF case C-11/00) confirming that EU legislative measures are applicable to the ECB; the Court decided that «the fact that the ESCB operates in various respects in a decentralized way does not render ineffective investigations conducted by OLAF within the ECB or the communication by the ECB of information to OLAF in accordance with the provisions of Regulation N° 1073/1999» (art. n° 161).

2.2.1. *From cooperation to integration*

Previous to their integration into the Eurosystem, the NCBs had a long tradition of cooperating among themselves. The intention was to move from this voluntarily cooperation between central banks, to a mandatory coordination inside a newly created system.

The ambiguous terminology «the ECB and the national central banks» used in the provisions of the ESCB Statute relating to operational matters had been suggested by some legal experts considering the legal personality of those entities, but it simply means «Eurosystem» (15).

While in the ESCB Statute, the general term «ESCB» means the Eurosystem and the particular ESCB, Eurosystem governance is very different from ESCB governance. Succeeding to the cooperation mechanism progressively developed during the first and second stages of EMU (1992-1998), the Eurosystem established an integrated system composed of the newly created ECB and the NCBs becoming an integral part of the system (16).

This cooperation model is still in force at the level of the ESCB, where the General Council is the successor of the former EMI Council (1994-1998) (17) having itself succeeded the Committee of Governors of the central banks of the Member States of the European Community (1964-1994) (18).

The ESCB is the prolongation of the former cooperation mechanisms between NCBs, reinforced by the cooperation between the Eurosystem and the out-NCBs. The General Council, composed of the President and the Vice-President of the ECB and of the 27 NCBs Governors (19), contributes to some Euro system activities, in accordance with Article 47.2 of the Statute.

(15) To know when «ESCB» is to be read as «Eurosystem», one should refer to article 43.1 mentioning the Statute provisions not applicable to the out-NCBs.

(16) The organic provisions of the NCBs were adapted to the Treaty requirement during the second stage of the EMU; the Treaty imposes on all Member States the obligation to create a fully fledged central bank, this is why Article 1.2 of the ESCB Statute mentions explicitly the central bank of Luxembourg which was established by virtue of a national law at the same moment as the ECB, on 1 June 1998.

(17) Established by the Maastricht Treaty.

(18) Created originally by a Council Decision 64/300/EEC of 8 May 1964, as amended afterwards. (19) Article 45.2 of the ESCB Statute, the other Members of the Executive Board are attending, Article 3.1 of the Rules of Procedure adopted by the General Council on 17 June 2004, ECB/2004/12.

This is generally by the way of discussion or personal comments of Members of the General Council. This body has no power to issue mandatory guidelines to the NCBs.

This is why agreements have to be concluded in order to define the rights and duties of the 11 out-NCBs; this allows for specific provisions agreed by specific central banks, but the contents of these agreements have to respect the ECB legal acts applicable to the Eurosystem central banks, contracting parties. Agreements may be concluded either bilaterally between the ECB and each out/NCB or multilaterally for some operational activities like payment systems between all the Eurosystem central banks and the out-NCBs.

The General Council benefits from the assistance of the Committees established by the Governing Council in accordance with Article 9 and 9a of the Rules of Procedure of the ECB; which meet in extended composition for matters to be discussed in the General Council (20).

2.2.2. *Decentralisation as protection for central banks*

In accordance with the decentralisation principle each NCB shall be able to carry out the Eurosystem tasks. This is a final responsibility for the Member States which have to endow their central banks with the appropriate resources. For all intents and purposes, each NCB has to be seen as the Eurosystem in its jurisdiction. For third parties there should be no difference in being counterparty of one of the other Eurosystem central bank.

This is why it was decided to mention the «Eurosystem» in all the public documentation of its members, together with the denomination and the logo of each NCB.

This is also why, when a NCB is acting as part of the Eurosystem, it is entitled to be compensated for possible losses on behalf of all the others in accordance with their share in the capital and the income of the Eurosystem operations. In that sense, decentralisation is part of solidarity, of the «team spirit» of entities involved in common actions.

(20) Meeting as a rule four times a year.

As a rule, the NCB decides itself in accordance with its specificities on the conditions of performing its functions. It adopts its own legal documentation using tools of public or private law, in accordance with its organic law.

According to various ESCB Statute provisions, Eurosystem activities are carried out by «the ECB and national central banks» (21). The Treaty does not allow discrimination among them. All the NCBs within the Eurosystem are to be treated equally; none can be excluded from common tasks, except on voluntary basis.

For instance, it does not appear compatible with this principle to fix minimum quotas restricting a priori the number of participating NCBs for certain activities. Similarly, it may be argued that a distribution of work inside the Eurosystem making use of fixed formula, like the capital key formula, is not in line with the rule of equal treatment.

This is also why remote (cross-border) access to central bank services by counterparties in another jurisdiction remains exceptional, subject to specific authorisation by the Governing Council, but central banks may agree to cooperate with each other in order to provide common cross-border services inside the euro area.

2.2.3. *Decentralisation as an obligation*

The Treaty imposes on the NCBs themselves as members of the Eurosystem the effective implementation of the Eurosystem tasks. Each central bank has to perform its duties inside the system; there is no possibility for one of them to be replaced by another central bank; they need to have at their disposal adequate resources; this is an obligation imposed on the Member States following their participation in the euro area; they have to equip adequately their own central bank.

Each NCB has to operate in its own jurisdiction; each Eurosystem counterparty is in relation with its domestic central bank. For its part, the ECB has no specific «territory» but it may be entrusted with operational tasks by the Governing Council.

(21) See Articles 16, 17, 21, 22, 23 and 24.

Vis-à-vis the rest of the world, common Eurosystem action should be carried out by the ECB and the NCBs. Nevertheless, in the field of external relations, progress so far are limited, due largely to the role of governments and the absence of direct participation of the EU or the Eurosystem in international monetary and financial organisations.

In view of the exclusive character of its competences, the Eurosystem is not subject to the subsidiarity principle. Each NCB has to perform its duty not by delegation but in its capacity of member of the system.

A Member State is not allowed to entrust to any other national entity the task of the central bank except if especially foreseen by the Treaty, as in the field of statistics (Article 5 of the ESCB Statute) or prudential supervision and financial stability (Article 105.4 of the Treaty) where an active cooperation with the central banks is foreseen.

Further, a privatisation of a Eurosystem central bank would not be in line with the Treaty (22). For its part, a central bank is not allowed to delegate to any other body the performance of its own tasks.

The outsourcing of services by central banks is only acceptable under strict limits and conditions.

It is generally agreed that tasks that have been assigned to the Eurosystem central banks as such cannot be outsourced. Central banks must remain responsible for discharging their obligations and shall not delegate significant management responsibility. In particular, outsourced activities should:

- not imply the exercise of public authority;
- not affect the legal responsibility of the central bank itself;
- be limited to implementation activities, ancillary or preparatory in nature;
- not jeopardise the application of Eurosystem legal acts;
- be authorised by the organic law of the central bank;

(22) NCBs are performing public tasks regulated by law: the shareholders of central banks, public of private, should not be able to influence the performance of central bank tasks in view of their independence.

– be exercised under the supervision and effective control of the central bank.

The Eurosystem intervenes in the market through banking operations. The Eurosystem has recourse to instruments of commercial law under the conditions laid down by the Treaty and Article 2 of the ESCB Statute: the Eurosystem «has to act in accordance with the principle of an open market economy with free competition».

The Eurosystem has to rely on the market for its resources; it shall acquire goods and services in accordance with the European directive in the field of procurement. No procedure of procurement is applied among central banks; but a rule of preference justifies the use of available resources inside the Eurosystem system, prior to recourse to the market.

The performance of central bank tasks is not subject to procurement procedure nor competition law. If central banks as public authorities are subject to EU and national procurement laws, central bank services are excluded from procurement requirement (23).

It is also generally agreed that EU competition law as such (notably Articles 81 to 89 of the Treaty) does not apply to the Eurosystem's exercise of its tasks. These tasks are public by nature and governed on the basis of public – European and national – law.

As public body, the Eurosystem is not to be treated as an undertaking; neither should it be considered as part of a Member State for the control by the European Commission of State aids in accordance with Articles 87 to 89 of the Treaty (24).

The Eurosystem, being a unique institutional setting established by the Treaty, should not be compared with other structures and organisations akin to company law. In particular, the concept of «single entity», as used in EU competition law, is not, in our view, to be applied to Eurosystem tasks.

(23) Central bank services are explicitly excluded, according to Article 16 of EU Directive 2004/18/EC.

(24) Contributing to financial stability, central banks acting as lender of last resort, may provide exceptional liquidity assistance, but the role is limited to the liquidity management; a central bank shall not grant any credit to an insolvent undertaking.

3. DECENTRALISATION IN PRACTICE

As an efficiency principle, the decentralisation regime has to be considered distinctly for the various central banks tasks.

The first function of the NCBs shall be to participate in the execution of the Eurosystem tasks with a view to achieving its objectives.

The Treaty (25) determines four basic Eurosystem tasks; the first is «to define and implement the monetary policy of the Community»; the others being to conduct foreign-exchange operations, to hold and manage foreign reserves, to promote the smooth operation of payment systems.

The other (non basic) Eurosystem tasks are not as precisely defined, either in number or in regime. The Eurosystem itself has to make clear what it understands as Eurosystem tasks, on the basis of statutory provisions with general character.

Each task has its own governance, *modus operandi*.

As a matter of fact, the discussions about the decentralisation focus mainly on the core Eurosystem tasks.

3.1. Basic Eurosystem tasks

It is not the purpose of this contribution to present the whole operational and legal Eurosystem framework. For the performance of Eurosystem tasks, the ECB shall adopt legal acts (Article 34 of the ESCB Statute), and the Eurosystem central banks shall conduct operations (Articles 17 to 24 of the ESCB Statute).

On this basis, the Eurosystem has implemented its monetary policy, through a sophisticated legal framework.

Three aspects of this framework seem of particular relevance with regard to the decentralisation principle.

First, the rules: The Eurosystem framework, is essentially a rule-based system. It is composed of a considerable number of legal acts adopted by the Governing Council over the years.

Second, the governance: What is the concrete interaction between the ECB decision-making bodies and the NCBs implementing the

(25) Treaty Article 105, ESCB Statute Article 3.1.

ECB legal acts? The basic two level schema of governance (rules/operations) has been developed recently into a three level system of governance (rules/management/services).

Third, the responsibility: Acting as a whole through (for the moment) 17 distinct legal personalities, the Eurosystem needs a clear regime for the legal and the financial responsibility for itself and each of its members.

3.1.1. Rules versus discretion

The operational framework reflects the trade off between rules, on the one hand, and discretion, on the other hand, which is characteristic of the conduct of any effective monetary policy. While the operational framework is based on general rules, it also allows Eurosystem central banks to take collective and individual decisions.

The decentralisation principle has favored an extensive use of «ECB guidelines» as a legal format, notwithstanding the fact that guidelines are not listed among the ECB legal acts mentioned under Article 34 of the ESCB Statute (26).

The guidelines are mentioned in Articles 12.1 and 14.3 of the ESCB Statute. They are adopted by the Governing Council in accordance with Article 17.2 of the Rules of Procedure of the ECB (27). They are subordinated to EU legal acts including of course the ECB legal acts taken under Article 34 of the ESCB Statute. They are applicable to the Eurosystem central banks (ECB and NCBs).

The NCBs have to comply with the Guidelines by ensuring the adaptation in their jurisdiction of laws, regulations, administrative provisions or contractual provisions. The ECB verifies how the guidelines are implemented by the NCBs.

They are compulsory for the NCBs as long as the NCBs have the capacity to implement them. The Governing Council may grant

(26) The ECB has been so far very prudent when making use of its regulatory power for the implementation of its basic tasks, reflecting the general tendency of many central banks and supervisory authorities preferring to have recourse to soft law rather than to hard law.

(27) Article 17.2 of the Rules of Procedure of the ECB: «ECB Guidelines shall be adopted by the Governing Council, and thereafter notified, in one of the official languages of the European Communities, and signed on the Governing Council's behalf by the President. They shall state the reasons on which they are based. Notification of the national central banks may take place by means of telex, electronic mail or telex or in paper form. Any ECB Guideline that is to be officially published shall be translated into the official languages of the European Communities».

exemptions or derogations to specific NCBs. It «shall take the necessary steps to ensure compliance with the guidelines and instructions of the ECB and shall require that any necessary information be given to it» (Article 14.3 of the ESCB Statute).

No sanctions are foreseen, except peer pressure, publicity sanctions or formal recommendations. An NCB may only be condemned by the European Court of Justice if it fails to fulfil its Eurosystem obligations (28).

Guidelines are, so far, deemed to be not directly binding vis-à-vis third parties; they belong to the sphere of soft law.

The main Guideline on monetary policy instruments and procedures of the Eurosystem is referred to as the «General Documentation» (GD) which is regularly updated by the Governing Council (29).

The General Documentation ensures harmonisation and coordination among the Eurosystem central banks.

The rule-based framework allows for some discretion at the ECB or the NCB level.

First, the NCBs have to implement the Guidelines adopted by the Governing Council. To this end, they have to adapt their own legal documentation, statutory or contractual.

Second, the ECB and the NCBs may exercise certain discretion in view of the concrete application of measures decided by the Governing Council. At any moment, the Governing Council may adopt a regulation or a decision which supersedes with direct effect the guideline and its implementing measures (30).

The General Documentation was recently amended to clarify the possibility of discretion in the management of the collateral to be offered

(28) «If the ECB considers that a NCB has failed to fulfill an obligation under this Statute, it shall deliver a reasoned opinion on the matter after giving the national central bank concerned the opportunity to submit its observations. If the NCB concerned does not comply with the opinion within the period laid down by the ECB, the latter may bring the matter before the Court of Justice». Article 35.6 of the ESCB Statute.

(29) The original Guideline of 11 September 1998 and its Annexes are periodically amended; the latest amendment shall enter into force on 1 February 2009; the consolidated version is published by the ECB, «The implementation of monetary policy in the Euro area», 12 November 2008.

(30) Recently, the Governing Council has adopted a Regulation to introduce temporary changes to the General Documentation Guideline relating to the eligibility of collateral: Regulation ECB/2008/11 of 23 October 2008.

by the counterparties for the liquidity obtained from the Eurosystem (31).

The Eurosystem needs to be able to react in a timely and effective manner if confronted with any incident or a specific situation. Such discretionary measures are necessary for the implementation of a «policy» but they are subject to the respect of fundamental principles, in particular those of non-discrimination, legal certainty, proportionality and transparency.

3.1.2. Governance

In the field of payment and securities settlement systems, as in the field of collateral management, new Eurosystem services are under development.

The technically decentralised TARGET system was replaced in 2008 by a new Eurosystem Payment system TARGET2.

In view of the existing fragmentation of the European settlement market and infrastructure, the Eurosystem shall set up a multi-currency platform to be used by European central securities depositories (CSDs) for the settlement of securities transactions in central bank money (T2S, TARGET2-Securities scheduled for 2013).

For transferring cross-border collateral in the Eurosystem, a contractual arrangement was put in place by the Eurosystem (CCBM – Correspondent Central Banking Model). This model shall be replaced by a new single platform collateral management system called Collateral Central Bank Management or CCBM2 (scheduled for 2011).

Such Eurosystem facilities, of serious dimension and complexity, calls for specific managerial organisation. From the traditional scheme of governance of 2 Levels (ECB-NCBs), the Eurosystem is experiencing a 2nd generation scheme of 3 Levels for its new owned and operated systems (Target2 Payment system, Target 2 securities system, CCBM2 collateral management system).

(31) See the amendments of Chapter 6.3.1, with sixth and seventh new paragraphs, as well as the new paragraph added after the second paragraph: «The Eurosystem reserves the right to apply additional risk control measures if required to ensure adequate risk protection of the Eurosystem in line with Article 18.1 of the Statute of the ESCB...». In 2006, the two-tier system was replaced by a «single list» of eligible collateral published by the ECB; the NCBs have to assess the eligibility of the numerous new types of collateral admitted in principle in accordance with the general criteria laid down in the General Documentation.

Level 1 (basic regulatory framework) is undisputed as an exclusive competence of the ECB decision-making bodies; Level 3 consists on services provided by some Eurosystem central banks on contractual basis. Level 2 is more debated, operationally and legally.

3.1.2.1. *Regulatory framework*

The Governing Council has the supreme responsibility to regulate the Eurosystem.

Its smooth functioning is the key element for Eurosystem good governance (32). The decentralised set-up of the Eurosystem needs a strong centre, taking decisions in the interest of the whole euro area, without any subordination to regional or national interest groups.

This is a very demanding function for a body meeting, normally, twice a month. The ESCB Statute provides that the Executive Board shall prepare the meetings (33).

It provides also that «the Executive Board may have certain powers delegated to it where the Governing Council so decide» (Article 12.1). This is foreseen for the monetary policy but might be extended to other areas under the conditions laid down by the Governing Council.

The delegation of power can be seen as part of «deconcentration» aiming at reducing bureaucracy. Nevertheless, it can be argued that the Governing Council is not empowered to delegate such powers to any other body than the Executive Board.

The ECB decision-making bodies should not be overloaded by technical issues. We assume that they are not entitled to delegate certain powers to specific NCBs, such mandatory specialisation being not in line with the Treaty but various alternatives are being explored.

The decision-making bodies are assisted in their work by consultative committees composed of up to two members from each of the Eurosystem NCBs and the ECB, appointed by each Governor and the Executive Board respectively (34). The committee structure is a

valuable contribution to the federal principle ensuring the involvement of all entities of the Eurosystem in the preparation of the ECB decision; the composition of the committees reflects that of the Governing Council.

3.1.2.2. *Management*

For the organisation of the Level 2, between the basic decision and the concrete services, new legal instruments are needed. A choice has to be made by the Governing Council; discussions focus mainly on four alternatives.

- a) Contractual or statutory arrangements?
- b) From consultative committees to management committees?
- c) Separate legal entity?
- d) Eurosystem Offices (EPCO)

a) *Contractual or statutory arrangements?*

While not being a legal act for the performance of Eurosystem tasks, various agreements were concluded between NCBs and the ECB for operational matters (payments, foreign reserves, collateral management...).

A central bank may of course, through contractual arrangement, give a mandate to another central bank for specific Eurosystem operations. Acting then voluntarily, inside the ESCB, such agreement is not affected by any constraint derived from competition or procurement legislation.

Formally, the agreements are only to be modified with the accord of all the signatories. The borderline between agreements and public legal acts may be narrow in practice. Agreements concluded between Eurosystem central banks are subject to the respect of ECB legal acts including the Guidelines adopted by the Governing Council. A change of a Guideline may impose a change of the Agreements.

Some NCBs provide services to other on the basis of contractual arrangements. They may agree on specific remuneration or fees. From the moment such arrangements are accepted by all Eurosystem central banks, they may be taken over by the Eurosystem itself allowing its decision-making bodies to adopt the appropriate measures.

(32) See E. DE LHONEUX, «Du conseil des gouverneurs de la Banque centrale européenne» in: *Mélanges en hommage à Jean-Victor Louis*, Bruxelles, Institut d'Etudes Européennes, Editions de l'Université de Bruxelles, 2003, pp. 239-257.

(33) Article 12.2.

(34) Article 9 of the Rules of Procedure of the European Central Bank, ECB/2004/2.

b) *From consultative committees to management committees?*

The ESCB/Eurosystem committees have a consultative role assisting the ECB decision-making bodies in accordance with Article 9 of the ECB Rules of Procedure. They contribute to the preparation of the decisions. Committees have no responsibility or accountability on their own.

They are making reports but they are not deemed to decide. Their acts are not subject to judicial review.

Can their role be expanded beyond this consultative function? Can they be involved in the implementation of decision or in the coordination of their execution? If yes, is it on behalf of the ECB or of the NCBs or on behalf of the whole Eurosystem?

These are debated issues. It was decided for Target 2 that a committee would be entrusted with some managerial tasks qualified as Level 2 tasks. For Target 2 the role of Committee as Level 2 is determined in a guideline.

A committee may be mandated on the basis of a contract between central banks; such a contractual mandate could hardly contain a delegation of normative power.

Any delegation of power to such committees either by the ECB or the NCBs is problematic in the absence of a legal basis in the Statute but Eurosystem Steering or coordination Committees, under the responsibility of the ECB decision-making bodies, might be established following a revision of the ECB Rules of Procedure.

On the basis of the general principle of good administration, a delegation of technical normative activity can be envisaged; as a decentralisation measure a decision-making body may allow a technical body to act on its behalf; for purely technical aspects.

Members of Eurosystem committees being staff members appointed by the respective Governor, they are deemed to act under the instructions or with the backing of the Governor. Nevertheless, such delegation should remain revocable and subject to effective control by the delegant which should keep the right to decide itself at any moment, the right to evocate or review the options agreed by a committee that the delegant itself has created.

c) *Separate legal entity?*

In view of the general principle of specialisation of public services, a public body has to carry out its tasks of general interest, using the means put at its disposal in accordance with the legislative provision having established it.

As a rule, it cannot transfer to another body its own tasks except if duly authorised by its organic law. Public authority has to be exercised by a public body. Some NCBs have been especially authorised to take and dispose of participation in public or even private institutions, commercial undertakings or nonprofit associations (35).

For the ECB itself, in the absence of such enabling provision and in view of Article 9.2 of the ESCB Statute it is very problematic to envisage the possibility of carrying out some of its activities through special legal entities (36).

Public services are established by legislators. The ECB being only regulator, it may be argued that an Amendment, adopted according to the simplified procedure foreseen under Article 41 of the Statute, should enable the Eurosystem to establish new EU public bodies.

A separate legal entity even created by the Eurosystem or fully owned by it, should be subject to similar limits and conditions as for the «outsourcing» of activities by individual central banks (see *supra*). The Eurosystem should remain fully responsible and able at any time to retake over directly the outsourced activity.

It could be envisaged to create Agencies, similar to the EU Agencies established by the EU Council on the basis of Article 308 of the Treaty, but it would normally require an Amendment of the ESCB Statute, possibly on the basis of the simplified procedure foreseen in Article 41 of the ESCB Statute.

If the setting up by the Eurosystem of new legal entities, without amendment of the Statute, is very disputable, there is no impediment

(35) Recently such a provision inserted in the organic law of the Banque centrale du Luxembourg, was welcomed by the ECB, «The ECB notes with interest the above-mentioned provision as an element which could further facilitate the evolution of the financial market infrastructure in Luxembourg, its integration within the European environment and further market harmonisation». ECB opinion of 10 September 2008, CON/2008/42.

(36) «The ECB shall ensure that the tasks conferred upon the the ESCB under Article 105(2), (3) and (5) of this Treaty are implemented either by its own activities pursuant to this Statute or through the national central banks pursuant to Articles 12.1 and 14». Article 9.2 of the ESCB Statute.

for the Governing Council to establish offices, hosted by a Eurosystem central bank, benefiting from its legal personality.

d) *Eurosystem office*

An interesting precedent has to be mentioned of creation of a Eurosystem office not located with the ECB.

In December 2007, the Governing Council created a Eurosystem Procurement Coordination Office (EPCO) and invited the Eurosystem central banks to express an interest to host it. Following an objective selection procedure among the candidates, the Banque centrale du Luxembourg was appointed by the Governing Council to host it for five years (37).

The ECB Decision of 17 November 2008 provides:

- the framework for all ESCB NCBs to participate voluntarily in joint tendering;
- a definition of the roles of leading Central banks and participating Central banks in joint tender procedures;
- a definition of the tasks of EPCO:
 - a) facilitating the adoption of best practices within the Eurosystem,
 - b) enabling the pooling of purchasing power,
 - c) coordinating the Eurosystem procurement agenda;
- a governance structure for EPCO (Steering Committee, code of conduct, financing, audit); hosted and organised by the BCL, EPCO reports to the Governing Council which approves yearly its budget and its procurement plan.

3.1.2.3. *Service providers*

The central banks providing services to the other Eurosystem central banks conclude with them contractual agreements. Such agreements are duly approved by the Governing Council and are subordinated to its future decisions. The Governing Council has also to provide specific coordination and control measures to ensure that these tasks

(37) On 17 November 2008, the Governing Council adopted the Decision laying down the framework for joint Eurosystem procurement (ECB/2008/17) aimed at fostering the participation of the ECB and the NCBs in joint procurement actions.

of specific central banks are carried out in the best conditions for the whole Eurosystem.

3.1.3. *Share of responsibility*

The Treaty and the ESCB Statute contains general rules concerning the regime of legal responsibility as well as the delicate matter of the financial responsibility inside the Eurosystem.

3.1.3.1. *Legal responsibility*

The Statute provides for a basic dichotomy.

The ECB shall be subject to the liability regime provided for in the Treaty (Article 35.3 of the ESCB Statute); its acts and omissions shall be open to review or interpretation by the Court of Justice (Article 35.1 of the ESCB Statute).

For their part, the NCBs are responsible *vis-à-vis* third parties according to national law (Article 35.3 of the ESCB Statute). At ESCB level, it was agreed that disputes between two or more NCBs or between the ECB and NCBs should be settled, wherever possible, by agreement; either bilateral, or following a recommendation of an independent panel (38).

If a NCB does not comply with its Eurosystem obligations, the ECB shall intervene according to the procedure of Article 35.6 of the ESCB Statute (39). As a rule there should be no NCB liability as long as the NCB acts in compliance with the Eurosystem framework. Specific liability regime can be applied to central banks for specific functions. For their tasks under national law, as in the field of financial stability, there is still a need for further harmonisation.

Usually national legislation provides that the responsibility of financial supervisors is limited to the case of gross or willful negligence.

The Court of Justice has decided that European law did not contain a general rule in this matter; this is why a harmonisation of the

(38) The Memorandum of Understanding on an intra-ESCB dispute settlement procedure of 1 May 2007, signed by the ECB and the NCBs which compose the ESCB, replaces a previous version; the procedure has never been activated so far.

(39) If this procedure has not been applied so far, cases of non-compliance of Eurosystem central banks are regularly treated in the Eurosystem, under the auspices of the Governing Council.

national rules limiting the responsibility of the central banks acting as supervisors, would be particularly welcome (40).

3.1.3.2. *Financial responsibility*

The financial responsibility regime of the Eurosystem central banks combines two principles: financial independence of each central bank, on the one hand, sharing of profit and losses for Eurosystem basic tasks, on the other.

3.1.3.3. *Financial independence*

Each Eurosystem central bank is financially independent; it has its own budget and financial accounts as well as its own rules for distribution of profit.

The ESCB Statute provides that «for analytical and operational purposes» the Executive Board shall draw up a consolidated balance sheet of the Eurosystem, but it maintains the financial and budgetary autonomy of each central bank. There is so far no Eurosystem budget.

The central banks need to be able to perform their tasks. With regard to the principle of financial independence it is important to ensure that each central bank covers its own expenses.

At the beginning, the Treaty for the ECB and national law for the NCBs had to equip the central banks with the appropriate financial, legal and human resources.

The Governing Council when imposing new tasks on Eurosystem central banks has to consider their costs. It is easy for the ECB, because the Governing Council is its budgetary authority; it is more complicated for tasks to be performed by the NCBs.

It should not be presumed that public functions are always performed free of charge.

On the contrary, it may be assumed that the principle of cost recovery is part of the general principle of good administration also applicable to the central banks. Services provided by central banks to the

(40) The judgement of the Court of Justice of 12 October 2004, *Peter Pilaffi*, C-222/02, *Rec.*, 2004, p. I-9425, commentators of this judgment are generally favouring an harmonisation of national legislations. See in particular R. Rini, «Quelle responsabilité pour les autorités de surveillance bancaire dans l'Union européenne?», in *Euradia*, 2007, p. 191, 2008/2.

market are usually remunerated according to the cost recovery principle. For Eurosystem services, the Governing Council shall fix the fees to be paid by Ball the counterparties all across the euro area, like for instance the payment system Target.

In certain circumstances, the Governing Council has accepted to limit the application of the full cost recovery to the extent that a «public good factor» was demonstrated. It is the case for Target2 as a payment system, following the tradition of central banks in this area which is part of the «core business» of the Eurosystem.

The costs of the NCBs, not compensated by fees, are deemed to be covered by their share in the Eurosystem profits. Nevertheless many Eurosystem tasks are not compensated by direct revenues. The distribution of the monetary income should ensure that the NCBs have adequate financial resources for their Eurosystem tasks. The problem is that the key adopted for the distribution of revenues is not necessarily in line with the share of work to be accomplished by each central bank in its jurisdiction.

In case the NCB provides a service to another, it shall be compensated, either by bilateral agreement or by decision of the Governing Council on a specific basis (41).

In case NCBs provide services to the whole Eurosystem, it shall be compensated on the basis of specific rules adopted by the Governing Council. For instance, the basic costs of «hosting» a Eurosystem office are directly supported by the ECB budget while specific costs are distributed among participants (42).

Profit and loss sharing mechanisms

The ESCB Statute foresees that the profit of the ECB shall finally be distributed to its shareholders, the NCBs, while the monetary income of the NCBs shall be distributed among themselves in accordance with the same capital key (43).

(41) For instance when a central bank acts on behalf of another for the management of the ECB foreign reserves, the Governing Council has confirmed that the NCB acting with another may be compensated.

(42) Cf. EPCO *supra*.

(43) See Articles 29, 32 and 33 of the ESCB Statute.

The Eurosystem generates its own resources. Most of the Eurosystem tasks are profitable and losses are deemed to be exceptional (44).

This is obvious for the issue of banknotes or the allocation of credit; it is also true for other actions as the requirement of monetary reserves even if, for the moment, the minimum reserves held by the credit institutions with the Eurosystem, are remunerated.

The credit risks in particular were originally deemed to be very limited in view of the rule that any Eurosystem lending has to be based «on adequate collateral» (45).

In case of losses, the ECB may have recourse to the NCBs through offset against monetary income (46) or even in increase of capital.

In case of losses of NCBs, the ESCB Statute (47) foresees that «*The Governing Council may decide that national central banks shall be indemnified against costs incurred in connection with the issue of banknotes or in exceptional circumstances for specific losses arising from monetary policy operations undertaken for the ESCB (Eurosystem). Indemnification shall be in a form deemed appropriate in the judgment of the Governing Council; these amounts may be offset against the national central bank's monetary income.*»

It may be assumed that loss-sharing among Eurosystem central banks is a general principle: the profits are distributed among central banks; the losses shall be shared among them.

The Governing Council has only to decide on the concrete implementation of this general principle.

What are the costs? What are the losses: do they include unrealised losses, or internal NCBs costs? What is the «appropriate form» of indemnification?

The Governing Council shall decide on the conditions and the procedure. It may also decide to make provisions in the accounts of the ECB and the NCBs, in case of expected but unrealised losses. The

(44) The most significant income is the seigniorage income resulting from the issue of banknotes (for which a specific regime was decided by the Governing Council, allocating 8% to the ECB and the remainder to the NCBs in accordance with the capital key); the monetary policy is also profit making, this is why the ESCB Statute foresees the distribution of the Eurosystem «monetary income» (Article 32 of the ESCB Statute).

(45) In accordance with Article 18.1 of the ESCB Statute.

(46) In accordance with Article 33.2 of the ESCB Statute concerning the Allocation of net profits and losses of the ECB and Article 28.1 of the ESCB Statute concerning the capital of the ECB.

(47) Article 32.4 of the Statute.

Governing Council may also decide to create provisions in the ECB to cover losses (48).

An indemnification may be disputed if the NCB was not acting according to the Eurosystem legal framework, or, in the specific case of a willful or negligent actor omission of a particular NCB. In that case, in order to decide on the failure of a NCB to fulfill an obligation under the ESCB Statute, the ECB has to deliver previously a reasoned opinion and may afterwards bring the matter before the European Court of Justice in Luxembourg (49). There is no precedent.

3.2. Other Central Bank tasks

The first function of any NCB is to carry out the basic Eurosystem tasks. They have also other functions. Some are resulting of as mix of European and national law, other are purely national.

3.2.1. Mixed tasks

The Treaty provides for tasks which, at least so far, are only partially regulated for or by the Eurosystem.

We have to limit ourselves to some general considerations concerning four areas of activities, to be qualified as partial Eurosystem activities by virtue of the Treaty.

Notwithstanding their importance and the 10 years of the Eurosystem, these tasks have not yet been harmonised and continue to be regulated partly by EU law, partly by national law:

- Statistics (Article 5 of the ESCB Statute);
- External operations (Article 23);
- Banknotes (Article 16);
- Prudential supervision and financial stability (Article 25).

One may regret the lack of common governance, the incomplete harmonisation or the lack of efficiency for the performance of those tasks.

(48) In the past the Governing Council has decided to create a specific provision in the ECB financial accounts when losses in the value of foreign reserve assets resulted from the depreciation of the US dollar.

(49) In accordance with the procedure laid down in Article 35.6 of the ESCB Statute.

In the field of statistics, two regimes coexist. The regime of the ECB regulation and the regime of cooperation between the Eurosystem and various public authorities in accordance with Article 5.1 of the Statute (50).

In the field of external operations, some harmonisations exist as for foreign reserve management.

In the field of banknotes, the issuance regime is regulated by the ECB but diversity remains for the production.

Some central banks tender, other are producing their banknotes through their own printing works or via public printing works.

From a legal point of view, it seems that so far the concept of «issue of banknotes» does not include their production, but may include the organisation of the cash services in the Eurosystem.

In the field of prudential supervision and financial stability, the role of central banks is in full development following the present financial crisis. From a legal perspective, we are still confronted with an enormous fragmentation and variety across the euro area.

At macro-level, general task of supporting economic policies in the Community (Article 105 of the Treaty) is mainly carried out at national level: contribution to public finance analyses, to structural measures, to financial stability (remaining so far mostly a national competence), surveillance of liquidity of market and operators.

At micro-level, the Eurosystem repeatedly has advocated for an involvement of central banks in prudential supervision, but Article 105 (6) of the Treaty, so far, has not been activated.

Concerning the oversight of payment or securities settlement systems, in the absence of the ECB regulation, notwithstanding the concrete formulation of Article 22 of the ESCB Statute, the central banks do operate on the basis of national law.

The provision of emergency liquidity assistance to central bank counterparties (ELA) remain so far a task performed by an NCB under

(50) «In order to undertake the tasks of the ESCB, the ECB, assisted by the national central banks, shall collect the necessary statistical information either from the competent national authorities or directly from economic agents. For these purposes it shall cooperate with the Community institutions or bodies and with the competent authorities of the Member States or third countries and with international organizations».

its responsibility and liability but under certain control of the Eurosystem.

3.2.2. *National tasks*

If decentralisation is a basic feature for the Eurosystem basic tasks, it is of course even more evident for the other functions developed by the NCBs on the basis of their national law.

The ESCB Statute provides that: «National central banks may perform functions other than those specified in this Statute unless the Governing Council finds, by a majority of two thirds of the votes cast, that these interfere with the objectives and tasks of the ESCB. Such functions shall be performed on the responsibility and liability of national central banks and shall not be regarded as being part of the functions of the ESCB» (51).

The ECB shall be consulted on any draft legislative change of the organic laws of NCBs (52). In its numerous Opinions, the ECB has made sure that the independence of the central banks should not be affected by supplementary tasks of NCBs. The Governing Council, which adopts those opinions, ensures also that Article 101 of the Treaty, prohibiting the monetary financing by the NCBs shall be respected and that the NCBs are not taking over national tasks without adequate compensation or remuneration.

4. CONCLUSION

Decentralisation is a fundamental feature of the Eurosystem combining a central decision-making process and a decentralised operational framework; the NCBs represent by far the largest component of the Eurosystem.

The decentralisation principle is expressed in Article 12 of the ESCB Statute but is also to be seen in a wider context; it is the consequence of the federal character of the Eurosystem, involving all NCBs of the Eurosystem both in decision-making and its later implementation.

(51) Article 14.4 of the ESCB Statute.

(52) Article 105, §4 of the Treaty, Article 4 of the ESCB Statute, Council Decision of 29 June 1998 on the consultation of the European central Bank by national authorities regarding draft legislative provisions (98/415/EC), see also the ECB Guide concerning this consultation of June 2005, www.ecb.int.

The ECB is specialised at the centre while each NCB is specialised in its own district.

The Eurosystem has proved to be a flexible and efficient institution. An effective decentralisation requires an adequate regulatory framework.

The basic harmonisation achieved during the convergence process leading to participation in the Eurosystem has to be further enhanced following the development of the Eurosystem itself and of its activities.

The Eurosystem tasks are carried out on the basis of the ECB regulatory framework which is in constant evolution. We have seen consolidation and clarification processes; initial agreements were later replaced by guidelines and some guidelines were replaced by the ECB regulations; this is beneficial to legal security and effectiveness.

Neither a full centralisation of activities by the ECB, nor a mandatory specialisation of some Eurosystem central banks would be legally feasible, but the Treaty allows for the establishment of various decentralisation techniques.

While a top-down approach is applicable for the basic tasks of the Eurosystem, a bottom-up approach with enhanced cooperation between Eurosystem central banks is also in line with the ESCB Statute.

We have argued that specialisation was not really an alternative to decentralisation but merely a complement. The ESCB Statute, in their present format, does not allow for exclusive mandatory specialisation of some central banks. On a voluntary basis some central banks are specialising in specific areas; they provide services on a voluntary basis under conditions laid down in bilateral agreements or in decisions of the Governing Council.

As a rule, the Governing Council being the supreme decision-making body of the Eurosystem shall determine the *modus operandi* of new Eurosystem activities.

Some interesting formulas of governance and management have been invented. We have mentioned the 3-level governance for complex cross-border activities in the fields of payments or securities settlement systems or management of collateral; we have also presented the new Eurosystem Procurement Office, hosted by an NCB, as an

example of innovative techniques combining cooperation between central banks and their voluntary specialisation for the benefit of the Eurosystem as a whole.

The Eurosystem shall further evolve in accordance with the expected increase of its responsibilities in various areas in the coming years. For each new function to be developed by the Eurosystem, adequate corporate governance has to be devised.

The decentralisation principle will most probably continue to be applied in the case of future activities of the Eurosystem. It is hardly disputable that the Eurosystem, in the present financial turmoil, is confronted with new tasks in the field of financial stability; this is also true for international relations.

The legal framework has to be adapted consequently; further harmonisation is welcome. An amendment of the ESCB Statute could take place; new rules for possible specialisation, management issues, new activities, common actions, setting up of legal entities, loss sharing or financial independence would be welcome.

Some may consider that the integration of NCBs into the Eurosystem proceeds too slowly; notwithstanding their integration into the Eurosystem, their staff is mostly composed of nationals. Most of the jobs in central banks may no longer be restricted to nationals, according to EU law, but staff mobility among Eurosystem central banks is mainly confined to transfers from NCBs to the ECB.

After ten years, the Eurosystem is still in its infancy. Its subtle combination of checks and balances is the best guarantee for its success. Nevertheless, excessive complexity or diversity has to be avoided, in order to ensure the efficient, transparent and accountable management of the remarkable and innovative set up, which the Eurosystem is.