THE EUROSYSTEM

Etienne de Lhoneux

ABSTRACT

L'Eurosistema è composto dalla Banca Centrale Europea (BCE) e dalle Banche Centrali Nazionali (BCN) degli Stati membri la cui valuta è l'euro. Dall'introduzione dell'euro nel 1999, il termine "Eurosistema" è stato diffusamente utilizzato, soprattutto nelle pubblicazioni delle banche centrali.
Il Trattato di Maastricht ha introdotto il concetto del tutto innovativo del Sistema Europeo di Banche Centrali (SEBC), concetto che però rimane ambiguo perché non fa distinzione tra il SEBC nella sua composizione più ampia, che comprende le BCN di tutti gli Stati membri, e il SEBC nella sua composizione di Eurosistema, che agisce come vera e propria banca centrale per l'euro. La Costituzione firmata nell'ottobre 2004, pur mantenendo il SEBC, introduce e definisce il concetto di Eurosistema. Nel contributo, l'Eurosistema viene presentato come un organismo pubblico europeo unico, organizzato conformemente a due principi generali: il suo carattere federale e la sua indipendenza. Nella seconda parte dello studio, sono riportati alcuni sviluppi giuridici relativamente alle attività dell'Eurosistema negli ultimi sei anni.
Il contributo si concentra sulla descrizione della realtà giuridica dell'Eurosistema nei suoi aspetti sia istituzionali sia operativi.

INTRODUCTION

The creation of the European System of Central Banks (ESCB) represents a remarkable institutional innovation of the Maastricht Treaty. However, in contrast to the ESCB, the concept of the Eurosystem is not defined by either the Treaty establishing the European Community ("the Treaty") or the Statute of the European System of Central Banks and of the European Central Bank ("the Statute").

The Eurosystem has only existed since January 1999, when the euro was introduced in the new euro area (composed at that time of 11 Member States). The ESCB was created in the previous year (on 1 June 1998), and comprised the European Central Bank (ECB) and one new national central bank[1] created on that same day, together with the 14 existing national central banks (NCBs) of the European Union (EU) Member States.

The underlying raison d'être of these two new concepts is derived from the coexistence within the EU of Member States whose currency is the euro, and Member States with a derogation or an exemption, in which the new currency of the Union was not introduced. This imbalance is corrected by the fact that for most purposes in the Statute, the term "national central banks" means the central banks of the euro area Member States; the NCBs of the Member States with a derogation are in principle excluded from Eurosystem operations.

The term "Eurosystem" has been used from the beginning of the third stage of Economic and Monetary Union (EMU) not only in communication documents, but also in many legal acts of the ECB, including its Opinions concerning European and national legal acts.[2] The paradox is that the Eurosystem is systematically referred to in official European, especially central banking, publications without a precise legal basis.

The new Constitution for Europe[3] formally defines the term Eurosystem as follows:

"The Eurosystem, which comprises the European Central Bank and the national central banks of the Member States whose currency is the euro, is the monetary authority of the euro area."[4]

This contribution aims to provide some answers to a number of simple questions. The first general question is to establish whether a system may have a life of

1 According to Article 1.2 of the Protocol on the Statute, "the Institut monétaire Luxembourgeois will be the central bank of Luxembourg"; in consequence the Banque centrale du Luxembourg (BCL) was created on 1 June 1998 by the Law of 22 April 1998, replaced by the law of 23 December 1998; see: E. de Lhoneux, O. Partsch, I. Schmit and E. Simoes Lopes: "La Banque centrale du Luxembourg", in *Droit bancaire et financier au Luxembourg* (Brussels: Larcier, 2004), Vol. I, pp. 73-114; and M. Palmer, "The Banque centrale du Luxembourg in the European System of Central Banks" (Luxembourg: Banque centrale du Luxembourg Publications, 2001).

2 The term was first introduced in the January 1999 ECB Monthly Bulletin.

3 Treaty establishing a Constitution for Europe, signed in Rome on 29 October 2004, OJ C 310, 16.12.2004, Article I-30 (1).

4 Also defined in the "Eurosystem Mission Statement" of 5 January 2005 adopted by the Governing Council, see the websites of the ECB and the NCBs of the Eurosystem.

its own: is such a system a legal reality, or does it purely exist through its components? If the former is true, what are the specific differences between the Eurosystem and the ESCB in the European monetary legal order, and if the latter is the case, is this new formula merely of a symbolic or cosmetic nature, rather than representing an addition of substance? The goal of this contribution is to present the Eurosystem as an institutional and operational reality.

1 THE EUROSYSTEM AS AN INSTITUTIONAL CONCEPT

1.1 THE EUROSYSTEM AS AN EU BODY

The Treaty[5] defines the ESCB by its tasks, objectives and components, but not by its nature. The ESCB is not formally recognised as an EU institution.[6] As it was established on the basis of Article 108, it is an EU constitutional body.[7] The ESCB has no legal personality[8]; as a public body, a quasi-institution, it has to perform the tasks imposed on it by the Treaty.

An equivalent status should apply to the Eurosystem, which comprises a substantial part of the ESCB.

1.1.1 THE ESCB AND THE EUROSYSTEM

The ESCB concept was agreed during the Intergovernmental Conference (IGC) negotiating the Treaty, but without a clear definition. The desire to introduce some kind of federal dimension to the new monetary power seems to have been the driving force behind this spectacular but mysterious institutional innovation. The ESCB was conceived to avoid the abrupt setting up of a new centralised European bureaucracy, to prevent the devastating social effects of an imposed merger of central banks, and to ensure the decentralisation principle.[9] The ESCB is designed to achieve the "checks and balances"[10] which characterise the institutional framework of the EU.

Both the ESCB and the Eurosystem are systems which, until now, did not correspond to a formal definition in public law. The concept of a "system" may

5 Article 107 of the Treaty and Article 1.2 of the Statute.

6 Under the new Constitution Article I-30, the ECB will be ranked among the "other institutions"; the same quality may apply to the Eurosystem itself as far as the ECB together with the NCBs are an integral part of it; the Eurosystem, as the encompassing entity, is considered to be "over" its components.

7 See in particular R. Smits, "The European Central Bank: Institutional aspects" (The Hague: Kluwer Law International, 1998).

8 This in itself is not unusual; none of the EU institutions has its own legal personality. It can be assumed that the Eurosystem may engage the EU when acting in its own field of competence. As it has a similar statute to that of the EU institutions, it may engage the legal personality of the Community when acting in the international field; for its operational tasks, the Eurosystem will rely on the legal personality of its components, namely the ECB and the NCBs.

9 The larger NCBs are currently engaged in restructuring plans affecting thousands of jobs. So far the social conditions of the staff of the Eurosystem's central banks have not been harmonised.

10 See C. C. A. van den Berg's recently published thesis, *The Making of the Statute of the European Central Banks – An Application of Checks and Balances* (Amsterdam: Vrije Universiteit Amsterdam, 2004). The concept of a system had previously been proposed by influential authors, see in particular J. V. Louis et al., *Vers un système européen de Banques centrales* (Brussels: Université de Bruxelles, 1989), but their proposals were more focused on the ECB as the core element of the proposed system; the Committee of Governors and subsequently the IGC preferred to replace the ECB by the ESCB in various provisions. Interestingly, Smits presents the ESCB extensively but under the title *The European Central Bank: Institutional Aspects*, op. cit.

have been commonplace for a long time in academic discussions on cybernetics or political science, but it has only recently made its appearance in legal texts.[11] In central banking terminology, this concept is mainly used by economists, as in for instance the notion of a "financial system" as mentioned in various central bank publications; this phrase is used as a broad concept, which includes markets, institutions and infrastructure.

In Community financial law, a system has in the field of payment and securities settlement been defined as "a formal arrangement [...] governed by the law [...]"[12]. Such arrangements not only cover technical operating systems, but also include regulatory provisions.

The political intention to set up a system was clear, but the legal clarification remained ambiguous.[13] Legal experts of the former Committee of Governors noted in 1991 that: "the term 'system' should thus be understood to describe the existence of the ECB and the national central banks as integral parts of the system, governed by a common set of rules and committed to the objectives of and tasks assigned to it."

The system cannot be limited to the sum of its components. It has its own existence and its own functioning which have enabled it to assume its role and set up its organisation. The system not only ensures the coexistence and coordination of the different entities which are part of it; it is also a system of action with common rules, rights and duties for its members, which have legal personality.

1.1.2 THE EUROSYSTEM IN THE CONSTITUTION

Article I-30 of the Treaty establishing a Constitution for Europe[14] defines the Eurosystem in the following terms:

"The European Central Bank, together with the national central banks of the Member States whose currency is the euro, which constitute the Eurosystem, shall conduct the monetary policy".

This is one of the few drafting changes in the monetary provisions of the Treaty. It was introduced by the IGC at the initiative of the ECB in its formal Opinion.[15] The Opinion states that:

11 The success of the European Monetary System (EMS) since 1979 may have contributed to the positive acceptance of the concept. It would be misleading to consider that the US Federal Reserve System was the envisaged model; the drafters of the Statute focused their attention on a basic uniform model provided in Europe by what appeared at the time to be the most successful central banks. Paradoxically, the central bank is a centralised institution in all the EU Member States.

12 See Article 2 of Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems, OJ L 166, 11.06.1998, p. 45.

13 The Delors Report states that "Considering the political structure of the Community and the advantages of making existing central banks part of a new system, the [...] monetary policy-making of the Community should be organised in a federal form in (the) ESCB. This new System would have to be given the full status of an autonomous Community institution" ("Report on Economic and Monetary Union in the European Community", presented by the Committee for the study of economic and monetary union, under the direction of Jacques Delors, President of the European Commission, approved by the European Council in June 1989).

14 Signed in Rome on 29 October 2004; OJ C 310, 16.12.2004.

15 Opinion of the ECB of 19 September 2003 at the request of the Council of the European Union on the Draft Treaty establishing a Constitution for Europe, OJ C 229, 25.9.2003, p. 7.

"Under the acronym 'ESCB' two realities coexist. On the one hand, ESCB refers to the ECB and the NCBs of all the EU Member States. On the other hand, and by the effect of other provisions, 'ESCB' also refers to the ECB and the central banks of only those EU Member States which have adopted the euro. This second concept is different from the first, since it embodies the exclusive competence for defining and conducting monetary policy, including the issue and the overall management of the euro, the management of the official foreign reserves of the Member States that have adopted the euro, and promoting the smooth operation of payment systems. The actions required to implement this competence require a high degree of harmonisation of procedures, instruments and infrastructure, and a single decision-making body with regulatory capacity.

The EU Treaty has created these two realities by introducing in the EC Treaty and in the Statute a single concept without distinguishing which provisions apply to one composition or to the other. This legislative technique does not serve the aim of clarity and comprehension of the EC Treaty. In order to distinguish the second concept of "ESCB", the Governing Council adopted and has been using since 1998 the term "Eurosystem" in its communications with the public. With a view to simplifying and making the Constitution more accessible for European citizens and, in so doing, to bringing the Union's institutional framework closer to the general public, the ECB suggested that the historic reform that the draft Constitution represents would represent a suitable opportunity to introduce the term "Eurosystem" into the Constitution".[16]

The Constitution will also formally introduce the euro into primary law, definitively replacing the former denomination of the European Currency Unit, or ECU. It qualifies the euro as the "currency of the Union" (Article I-8), and provides that "European laws or framework laws shall lay down the measures necessary for the use of the euro as the single currency" (Article III-191).

Beyond its symbolic value (Article I-8), the euro is the key element of the EU monetary policy, and is listed as an exclusive Union competence for those Member States whose currency is the euro (Article I-13); it is established as the anchor of EMU (Article III-194). The concept of the "euro area" is only informally introduced in the Constitution via the expressions "the Member States whose currency is the euro" and the "participating Member States" (Articles I-13 and III-194).[17] In so doing, the Constitution consecrates the already widely used concept of the Eurosystem.

However, the ambiguity of the Maastricht Treaty will not disappear with the entry into force of the Constitution, which does not clarify the status of the ESCB. If it recognises the Eurosystem as a distinct body, it does not make clear its concrete content vis-à-vis the ESCB, the ECB or the NCBs. No clarification is to be found in the ESCB/ECB Statute. The IGC has considered it inappropriate

16 The drafting suggestion of the ECB has been changed by the IGC to avoid introducing the dubious expression "Member States which have adopted the Union currency, the euro" into the Constitution.

17 There is no legal need for such a definition because the institutions of the Union automatically serve the euro area; the Eurogroup is the only specific case.

to adapt systematically the provisions of the Statute to indicate where the ESCB has to be read as the Eurosystem. In so doing, it follows the Opinion of the ECB.[18]

In Protocol No 4, annexed to the Constitution, Article 1 (1) has been redrafted in order to define the ESCB in the first sentence and the Eurosystem in the second, in accordance with Article I-30 of the Constitution.[19] The Constitution will also confer a constitutional value on the Eurogroup. The Eurosystem shall be associated with the Eurogroup[20], but the relationship between the Eurogroup and the EU Council of Ministers of Economic Affairs and Finance (ECOFIN) is different from that between the Eurosystem and the ESCB. The Eurogroup remains basically an informal meeting that does not interfere in the competence of the formal Council, ECOFIN, while the Eurosystem is the core of the ESCB. The General Council only contributes to the tasks of the Governing Council, which is the supreme decision-making body of the whole ESCB.

1.2 THE CHARACTERISTICS OF THE EUROSYSTEM

The Eurosystem combines the two basic characteristics of the monetary authority of the European Union; by its nature, its composition and its functions, it is federal and independent in a specific way, as this paper will later demonstrate.

1.2.1 THE FEDERAL PRINCIPLE

Monetary policy is an exclusive competence of the Union. It is not however administered according to the classical model for most European policies, the well-known principle of indirect administration. Instead, it is operated directly throughout the entire euro area, with the participation of the NCBs forming an integral part of the Eurosystem.

The relationship within the ESCB/Eurosystem between the ECB and the NCBs should in no way be compared to the situation of the other EU institutions vis-à-vis corresponding national bodies. The relationship between the European Parliament and the national parliaments, the Council of the EU and the national governments or the European Court of Auditors and the national courts of auditors are very different from the relations between Eurosystem members.

Furthermore, it would be wrong to consider that on the one hand EU institutions are only subject to EU law, whereas on the other hand NCBs are only be subject to national law. The legal order of the EU is unique. It combines European rules, which are directly applicable and enjoy primacy, with national regulations. Both

18 Paragraph 14 of the ECB Opinion of 19 September 2003, last sentence, reads: "This terminological change will require a general provision indicating that 'ESCB' is to be read as 'Eurosystem' in those provisions of the Constitution that refer to tasks or functions related to the euro or to the Member States that have adopted the euro."

19 Article 1 "The European System of Central Banks" (title unchanged) states: "1. In accordance with Article I-30 (1) of the Constitution, the European Central Bank and the national central banks of those Member States whose currency is the euro shall constitute the Eurosystem."

20 In anticipation of the Constitution, a chairman for the Eurogroup has already been appointed for two years from 1 January 2005; the President of the ECB is invited to Eurogroup meetings, where it may be assumed that he then acts on behalf of the whole Eurosystem.

the ECB and the NCBs have to comply with a mixed set of rules, at both European and national level.[21]

The coexistence of 13 legal personalities inside the system is an element of heterogeneity together with the autonomy of management and action that is left to the discretion of each central bank, either at the centre or on the periphery. Basically the Eurosystem, governed by centralised decision-making bodies and acting as a single entity, assumes public tasks of general interest. The Eurosystem was not conceived as a group of commercial undertakings subject to competition law.[22] The rules of company law find no specific application. The ECB's shareholders' rights are not to be compared with those of shareholders in limited companies: there is no right of appointment to the Executive Board, no right to withdraw or to change the Statute. The Eurosystem is basically a concept of public law, but it can be adapted to private obligations through legal mechanisms such as co-ownership or solidarity.

The Eurosystem is unique, a sui generis institution created by the Treaty, but leaving a considerable degree of latitude for internal organisation and regulation to its decision-making bodies. In accordance with Article 107 (3), it "shall be governed by the decision-making bodies of the ECB which shall be the Governing Council and the Executive Board." In consequence, these decision-making bodies have a dual role, acting for the ECB as a legal entity but also competent vis-à-vis the whole Eurosystem (and the ESCB).

The Eurosystem has one supreme authority, the ECB Governing Council[23]; the latter has the remarkable power[24] to make regulations of general application similar to the regulations issued by the Parliament, Council or Commission, which are directly applicable in the euro area. The Eurosystem contains elements of heterogeneity but also, in many ways, of unity. It conducts and applies a single policy; it has a single decision-making process; it has a single voice[25]; and it has a single working language.[26]

The NCBs are subject to the guidelines and the decisions adopted by the Governing Council as well as to the instructions of the Executive Board with a view to implementing them. It is generally agreed on the basis of Articles 12.1 and 14.3 of the Statute that the guidelines adopted by the Governing Council

21 Indeed, even the ECB must, in some respects, comply with national regulations.

22 As a public service it does not appear as a commercial undertaking subject to competition law; the author considers that it would be inappropriate to compare the Eurosystem to a group of undertakings, and that the exclusion of its public tasks from competition law is not derived from the "single group doctrine".

23 See E. de Lhoneux, "Du Conseil des gouverneurs de la Banque centrale européenne", in *Mélanges en hommage à Jean-Victor Louis* (Brussels: Institut d'Etudes Européennes/Editions de l'Université Libre de Bruxelles, 2003),Vol. 2, pp. 239-57.

24 This power is used less in practice; only a few ECB Regulations have been formulated in the field of minimum reserves statistics and the balance sheet of monetary financial institutions and sanctions.

25 See the various presentations of the Eurosystem communication policy in the ECB Monthly Bulletin, on the ECB website and in other ECB publications.

26 Which is English; certain facilities are provided for French, German and Italian; according to Article 17.8 of the Rules of Procedure of 19.2.2004 (referring to the principles of a Council Regulation determining the language to be used by the EEC of 15 April 1958, the ECB legal acts generally published in the Official Journal of the European Union, as well as the ECB official publications, are to be made available in the various national languages of the EU; the NCBs provide translation services to this end.

are binding only on Eurosystem members: usually the NCBs in the framework of the decentralisation principle, but also the ECB.[27]

According to Article 34.2 of the Statute, the opinions and recommendations of the Governing Council shall have no binding force. Nevertheless, they are legal acts to be respected by all Eurosystem central banks. It can even be argued that to the extent that the Governing Council, with the contribution of the General Council, adopts Opinions, these may not be circumvented, even by the central banks of non-participating Member States.[28]

The Governing Council shall remain the supreme ECB decision-making body of the enlarged European Union. The modification of its voting rules in accordance with the new Article 10.2 of the Statute[29] will ensure its proper functioning in respect of the fundamental voting principle of "one member, one vote".[30]

The Statutes of the NCBs have been only partly harmonised[31], and the Statute purely contains basic common rules ensuring the smooth functioning of the decision-making process in the system.

Article 38 imposes a single regime of professional secrecy for "members of the governing bodies and the staff of the ECB and the national central banks". This regime allows for the exchange of confidential information inside the Eurosystem. It may impose "Chinese walls" between the ESCB and the Eurosystem, so that, for example, the documents of Eurosystem/ESCB Committees meeting in standard composition may not be circulated to the other members of these committees meeting in extended composition. On the basis of this Article, common rules for confidentiality, classification and management of documents are adopted.[32] The committees "shall assist in the work of the decision-making

27 A good example is provided in the area of payment systems, one of the basic tasks of the Eurosystem. The TARGET 1 payment system , and the future TARGET 2, which should become operational in 2007, are both organised by a Guideline containing obligations for the ECB, which has a certain operational capacity in this area, as well as for the NCBs. An Agreement is concluded between all the ESCB central banks for the participation of the central banks of the Member States with a derogation or exemption. Nevertheless, this Agreement imposes on these central banks the responsibility to respect the same provisions as those of the Guideline; it is a mere *"contrat d'adhésion"* that is not individually negotiable.

28 The Governing Council is the supreme decision-making body not only of the Eurosystem but also, by virtue of Article 107.3 of the Treaty, of the ESCB as a whole. The General Council is only a decision-making body to a very limited extent.

29 As amended by the Decision of the Council meeting in the composition of the Heads of State or Government of 21 March 2003 on an amendment to Article 10.2 of the Statute, OJ L 83, 1.4.2003, p. 66, after a Recommendation of the ECB on the basis of Article 5 of the Treaty of Nice.

30 The new Article 10.2 can be seen as a remarkable success for the Eurosystem, taking into account the particularly rigid framework given by Article 10.6; ECB President Duisenberg said during the Press Conference of 6 February 2003, presenting the Recommendation agreed unanimously by the Governing Council: "And I challenge anyone to come up with a model that is as transparent, as equitable and as simple as the one we have come up with." According to a well-informed commentator: "Mêlant raison et audace, le nouveau mode de fonctionnement du conseil des gouverneurs concilie la nature fédérale de la BCE avec la préservation des équilibres existant entre les gouverneurs des BCN", in F. Allemand, "L'audace raisonnée de la réforme de la Banque centrale européenne", *Revue du Marché commun et de l'Union européenne*, No 469 (2003), pp. 391-98.

31 See the Convergence Reports adopted originally by the European Monetary Institute (EMI) in 1998, then by the ECB in 2000, 2002 and 2004; these Reports imposed by Article 222 of the Treaty contain an assessment of the requirements and progress of legal convergence on the part of the Member States adopting the euro.

32 Confidential information may only be used for the performance of a public task at the origin of its collection; this speciality principle restricts the circulation of information inside the ESCB or the Eurosystem or even inside each central bank; so for instance, individual pieces of statistical information may not be used without specific legal provision for the performance of supervisory tasks. ECB documents are subject to confidentiality rules contained in Administrative circulars.

bodies of the ECB and shall report to the Governing Council via the Executive Board." Basically, these committees belong to the Eurosystem; they are composed of up to two members from each of the Eurosystem NCBs and the ECB, appointed by each Governor and the Executive Board respectively [...]".[33] Additionally, "whenever it deals with matters falling within the field of competence of the General Council", a committee will also include up to two staff members appointed by the non-participating NCBs (i.e. non-Eurosystem NCBs). They also may be invited "whenever the chairperson of a committee and the Executive Board deems this appropriate".[34] The same rule applies for "representatives of other Community institutions and bodies and any other third party".[35]

The documents of the committees are subject to the confidentiality rules of the ECB. Normally they may only circulate within the Eurosystem, as they are preparatory documents for the ECB decision-making bodies. After these bodies have taken their decision, they can be released by the ECB, in particular to the General Council members, by the President in accordance with Article 47.4 of the Statute and Article 6 of the Rules of Procedure of the General Council.[36]

It is also the President's responsibility to organise the way in which the General Council shall contribute to the tasks of the ECB in accordance with the Statute. Basically, the draft measures for these specific tasks are submitted to the General Council for observation.[37]

1.2.2 THE INDEPENDENCE OF THE EUROSYSTEM

The ECB and the NCBs respectively are independent by virtue of the Treaty (Article 108) and in accordance with the Statute (Article 7) and the national legislation organising each NCB.

The ECB insisted on the recognition of the ESCB and Eurosystem in the institutional framework of Part I of the Constitution, and suggested a reference in the Constitution to the independence of the NCBs.[38] There are indeed good reasons to consider that the independence regime affects the system as a whole, not only its entities that have legal personality. The independence of central banks contributes to the smooth functioning of the Eurosystem; the NCBs' independence is therefore limited by their participation in the Eurosystem. The independence of the other central banks of the ESCB is also guaranteed, but has a very different meaning in the absence of their participation in the Eurosystem.[39]

The institutional, personal and functional aspects of independence have been extensively analysed and explained by the ECB.[40] The Convergence Reports

33 Article 9 of the Rules of Procedure (RoP) of the European Central Bank, ECB Decision 2004/2 of 19 February 2004, OJ L 80, 18.3.2004, p. 33.
34 Article 9 of the RoP.
35 Ibid.
36 Decision of the ECB of 17 June 2004 to adopt the Rules of Procedure of the General Council of the European Central Bank, ECB Decision 2004/12, OJ L 230, 30.6.2004, p. 61.
37 See Article 6, ibid.
38 See Paragraph 11 of the ECB Opinion of 19 September 2003.
39 The subject of the independence regime of the "out" central banks lies outside the focus of this paper.
40 The types of independence are summarised in the legal chapters of the Convergence Reports of the ECB, following the first Convergence Report drawn up in 1998 by the EMI in accordance with Article 121 of the EC Treaty.

addressed these issues before the entry of the new NCBs into the Eurosystem. However, the financial independence requirements after their entry, with the concept of the financial independence of the Eurosystem, still need to be defined concretely, although some aspects of this question have been addressed in recent ECB Opinions.

Article I-30 (3) of the Constitution provides that the ECB "shall be independent in the exercise of its powers and in the management of its finances".[41] The financial independence of the NCBs and the Eurosystem is to be clarified on the basis of the Statute[42] in conjunction with their organic national provisions.

Each NCB has its own funds, resources and expenses expressed in its annual accounts established on the basis of national provisions and the standardising accounting and reporting rules established by the Governing Council on the basis of Article 26.4 of the Statute. No national contribution is imposed; the NCBs have to finance the subscription of the capital of the ECB – the initial subscription as well as the capital increases as determined by the Governing Council[43] – as well as the coverage of any eventual losses and the transfer of foreign reserve assets to the ECB.

By setting up the Eurosystem, the Treaty nevertheless imposes on each Member State the duty of ensuring that its NCB fully performs its tasks in that system.

The Statute[44] provides for the annual distribution among NCBs of the monetary income accruing to them from their performance of the Eurosystem's monetary policy. In turn, according to national law, their own benefits may be distributed to the respective Member States. The rule according to which "the national central banks are an integral part of the ESCB" (Article 14.3 of the Statute) also covers the financial assets of each NCB. If this were not so, the Eurosystem would be one of the weakest central banks in the world; this was surely not the vision of the founders of EMU.

The following aspects may be clarified concerning, respectively, budgetary autonomy, the protection of own funds, the distribution of profits and the protection of reserve assets with central banks. The accounting and reporting rules have to be harmonised in view of the financial statements, among other reasons.[45]

A. Budgetary autonomy

Each central bank preserves its budgetary autonomy: it decides its expenditures and allocates adequate funds to its provisions and reserves in order to ensure

41 Nevertheless, the resources and expenditures of the ECB are part of the "financial interests of the Community" mentioned in Article 280 of the EC Treaty, CJEC, Case C-11/00 Commission v European Central Bank (2003) ECR I-7147, point 95.

42 The Governing Council has clarified elements of these aspects in some recent Opinions, in particular the ECB Opinion of 20 January 2004 at the request of the Economic Committee of the Finnish Parliament on the governmental proposal to amend the Suomen Pankki Act and other related acts (see the ECB's website, www.ecb.int, for more details).

43 Article 28.1 of the Statute.

44 Article 32.

45 See Articles 15 (Reporting requirements) and 26 (Financial accounts).

that its financial stability is secured and that its Eurosystem tasks are not endangered.

This is also the case with the ECB. Its yearly budget is adopted by the Governing Council, according to the normal voting procedure of one member, one vote. For obvious reasons of independence, the Statute does not include the approval of the budget among those financial provisions to be adopted by the shareholders by weighted voting.

On the other hand, the ECB may not impose charges in the budgets adopted by the NCBs in accordance with their national legislation and in excess of the revenues they receive from the ECB. The Statute organises the pooling of revenues and their redistribution to the NCBs. For the ECB, specific arrangements are decided by the Governing Council, acting unanimously.[46] Eurosystem operations generate profits which are then redistributed, thus enabling the NCBs to finance their own participation in the Eurosystem. Specific compensation can be granted by the ECB for any specific costs that they incur.[47] In terms of specific tasks, such as payment systems, the costs of the Eurosystem shall be recovered by the customers or, if it is considered to be a service of general interest, shall be supported directly by the ECB budget or by the Eurosystem as a whole in accordance with the capital key determining the distribution of profits and the contribution to losses or charges.

B. The protection of own funds and the distribution of profits

The Eurosystem is deemed to make profits, most notably in the case of monetary operations, with the inclusion of the seigniorage income from banknote issuance, which is fundamentally profit-making. The annual profits of the central banks may be transferred to their shareholders (for the NCBs, the respective Member States; and for the ECB, the NCBs). However, the policy of provisioning and transfers to the reserve shall not be left entirely to the discretion of the shareholders in pursuit of their own financial interests. Moreover, each NCB has to ensure adequate provisioning. An NCB "should not be deprived of the opportunity of protecting itself against the erosion of the real value of its capital in the longer term."[48] The ECB may also consider that the accounting rules to be established by the Governing Council in accordance with Article 26.4 of the Statute additionally cover provisioning measures at the NCB level.

It may be argued that the own funds of a Eurosystem central bank can be reduced through the sole intervention of national authorities.

The Treaty has established a system in which the shareholders are the final guarantors of the ECB, whose own funds are very limited. This is why the NCBs

46 See in particular the Decision of the ECB of 6 December 2001 on the issue of euro banknotes, ECB/2001/15, OJ L 337, 20.12.2001, p. 52, which contains in an annex the banknote allocation key since 1 January 2001, whereby the share of the ECB is fixed at 8% of the issued banknotes.

47 For monetary policy functions, the Statute explicitly provides 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." (Article 32.4, No 2).

48 ECB Opinion of 20.1.2004, paragraph 11.

may be called on in the future to finance any capital increases of the ECB. The principle of stable capital for the ECB, with the possibility of increase – and the prohibition of reimbursement or decrease – is logically correlated with the same dynamics at the level of the participating NCB. Any other approach might imply the renationalisation of a Community body.

The assets and liabilities of each entity are affected by the rules of the system. The financial independence of each central bank is aimed at protecting the independence of the Eurosystem as such, in view of the performance of its tasks.

Each entity of the Eurosystem must be self-supporting; there is no reverse guarantee from the ECB to the NCBs.

In creating the Eurosystem and the ECB, the Treaty did not discharge the Member States of their obligation to create and maintain their own effective, stable and independent central bank. On the contrary, Article 1.2 of the Statute clearly states this commitment, in explicitly imposing on the only Member State without a central bank the obligation to create one.[49] In this sense "NCBs should be in a position to avail themselves of the appropriate means to ensure that their ESCB-related tasks can be properly fulfilled."[50] This is why the Treaty does not authorise Member States to reduce unilaterally the financial means of their NCB; it can be argued that these means, even if they belong to the NCBs, are also part of the Eurosystem.

It should be noted that, for the national Treasuries, the right to receive NCB profits does not include the right to treat a reimbursement of capital as ordinary fiscal revenue for the year, i.e. a reimbursement of capital. The reduction of capital is not the attribution of a profit. It is equivalent to an element in the liquidation of the NCB. Such partial liquidation of an entity of the Eurosystem is contrary to the Treaty if it entails the risk that the NCB could be unable to fulfil its tasks; it is in any case subject to the opinion of the ECB, which may consider either that such a reduction requires its approval, or that it should invite the Commission to bring the case before the European Court of Justice. If the Member State in question is not allowed to receive credit from its central bank, it could be argued that *a fortiori* it may not take over its central bank's own funds.

The general line of argument whereby the risks of the NCBs have been assumed or dramatically diminished since the setting up of the Eurosystem may be contested. The Treaty does not guarantee any minimum profit for the NCBs. Situations of very low interest rates, decrease in the demand for banknotes or increased financial stability may not be considered as purely hypothetical. NCBs have to be prepared to act in the case of an emergency.

49 The Article states that "The Institut monétaire luxembourgeois will be the central bank of Luxembourg". As this provision was implemented after 1998, it will be deleted according to the new version of the Statute annexed to the Treaty on the Constitution.

50 EMI Convergence Report 1998; this may also apply to the "out" NCBs, but in a different context.

C. The protection of foreign reserve assets

The ECB considers that a law forcing an NCB to sell foreign reserve assets in order to pay its Member State shall be subject to its previous approval in accordance with Article 31.2 of the Statute.[51] Such approval has to be justified by reference to the exchange rate and monetary policies of the Community. In any event, the NCB must be able to transfer additional reserves according to Article 30 of the Statute.

It can be argued that with the introduction of the Eurosystem, several risks have diminished for the national monetary authorities. However, it would be wrong to consider that Member States are totally free to continue to determine the level of their foreign reserves. More fundamentally, the question of whether a Member State has the right to impose the sale of foreign reserve assets has to be answered in view of the basic Eurosystem task "to hold and manage the official foreign reserves of the Member States". Article 31.2 refers to the management of these reserves. The "holding", for its part, implies that these reserves should be maintained by the NCBs; it can be argued that any reimbursement to the respective Member States implies the need for authorisation by the Governing Council, which is the supreme decision-making body of the Eurosystem. One could consider that even if the Treaty mentions the "reserves of the Member States", that is simply by reference to their origin or possibly to their beneficiaries in case of liquidation. Since the creation of the Eurosystem, these national reserves are also to be considered as "Eurosystem reserves".

2 THE EUROSYSTEM AS AN OPERATIONAL CONCEPT

The Eurosystem started with an already defined monetary policy framework before the introduction of the euro in 1999; since then, other Eurosystem operations have been developed. An exhaustive overview implies a detailed analysis that would exceed by far the scope of this paper; however, some general considerations regarding the decentralisation principle and the organisation of activities may be helpful in presenting the Eurosystem.

2.1 THE DECENTRALISATION PRINCIPLE

According to various Statute provisions, Eurosystem activities are carried out by "the ECB and national central banks."[52] As a rule, each central bank has to be able to conduct all the basic Eurosystem operations, even if it may decide not to perform certain functions or to cooperate with other Eurosystem entities in the execution of specific tasks. At the same time, the Eurosystem does not allow competition among its members for services of general interest.

The general organisational principle of the Eurosystem is a preference for the decentralisation of activities inside the system. The Treaty's preference for

51 Paragraph 11 of the ECB Opinion of January 2004 concerning Finnish legislation.
52 Articles 16, 17, 21, 22, 23 and 24.

decentralisation is expressed in various provisions, but most clearly in Article 12.1 of the Statute. It is finally for the Governing Council to determine how, in practice, the operations shall be carried out. In most cases, centrally adopted decisions are implemented through the action of the NCBs.

The Governing Council has the general competence to define the modalities of decentralisation "to the extent deemed possible and appropriate". The Treaty itself allows for a certain flexibility in the organisation of the Eurosystem and the division of labour between the ECB and the NCBs. One should of course not exaggerate the tensions present in any federal structure between the centre and the periphery. Some very pragmatic solutions exist, and the decentralisation model has proven to be flexible. The centralisation of some activities and even specialisation may be decided in respect of the general principle of equal treatment. All the NCBs within the Eurosystem are to be treated without discrimination or preference. Derogations to this principle are only possible on a voluntary basis. The application of internal rules such as guidelines and instructions taken on the basis of Articles 12.1 and 14.3 of the Statute may not be left to the discretion of the addressee. No permanent opt-out may be allowed to NCBs for basic Eurosystem tasks. An NCB may not be authorised to apply national solutions forever, in derogation from the Eurosystem's operational organisation, as this would introduce discrimination among NCBs and distort the uniform application of ECB decisions. Formal differentiation requirements need support in primary law (which appears very restrictive in that regard) or unanimous support at the level of the Governing Council.

It does not appear compatible with this rule to fix minimum quotas restricting *a priori* the number of participating NCBs. Similarly, it may be argued that a distribution of work inside the Eurosystem, for certain activities, making use of the capital key formula, is not in line with the rule of equal treatment. The capital key is confined by the Statute to the financial rights and obligations of the shareholders, and is not intended to provide a measure for the effective contribution of the NCBs to the Eurosystem. It should furthermore be remembered that other criteria are also used in the Treaty to differentiate some NCBs from the others – in particular, the three criteria for the new voting modalities in the Governing Council, as mentioned in the amended Article 10.2. Any fixed division of activities requires the unanimous agreement of the governors in so far as it implies an exceptional measure unforeseen in the Treaty, to be justified and accepted by all as specific circumstances.

The decentralisation principle should not be seen as a cost factor, but mainly as an efficient way of conducting operations with full respect for equal treatment and a level playing-field.

Flexibility is realised by the systematic use by the Governing Council of "guidelines". These are obligatory for the NCBs so long as the latter are not

53 The President of the ECB has already had to write to one national government in view of entrusting its NCB with the adequate legal and administrative resources to comply with statistical requirements.

entrusted with the adequate legal and financial means; they appear more as "obligations de moyens" than as "obligations de résultat".[53] They may not contain direct obligations for third parties; in such cases, the NCBs are only allowed to use their national instruments. The same applies in the case of sanctions imposed on operators: if these fall outside the scope of the EC Regulations for which the ECB is basically competent, the NCB in question acts purely on its own behalf.

Outside the scope of its exclusive European competence, the Eurosystem may provide a forum for the coordination of central bank activities. This is the case for the function of oversight of payment and securities settlement systems, which is currently carried out by the NCBs, mainly on the basis of national law; this is also the case for the contribution to prudential supervision and financial stability.

For the participation of the NCBs of countries with a derogation or exemption, in the absence of the possibility of relying on ECB guidelines, contractual arrangements may be concluded; however, these will be subject to possible amendments of the guidelines that are binding for the Eurosystem.

Whereas the Statute organises the redistribution of ECB profits, the financing of Eurosystem operations is not specified. Article 32.4 provides for possible indemnification of NCBs against costs in connection with the issue of banknotes or, in exceptional circumstances, for specific losses arising from monetary policy operations undertaken for the ESCB. This rule is applicable in the field of monetary operations, for which the NCBs are globally remunerated by the Eurosystem. For other Eurosystem tasks, it is for the Governing Council, in its capacity of budgetary authority, to decide by which modalities the participating central banks shall be compensated, either by the operators or by the Eurosystem itself, in respect of its financial provisions. When, as is often the case, cost recovery is made through fees imposed on the external counterparties, then a single tariff shall apply. The same prices are applied to Eurosystem services throughout the euro area.[54] Whereas services of general interest are provided by the Eurosystem as a public good, the costs shall be assumed by the Eurosystem itself in respect of the financial provisions of the Statute.

As far as the NCBs' activities remain national, their financing is exclusively subject to national regulations, in conformity with Article 14 of the Statute and in respect of competition law.

2.2 THE ORGANISATION OF EUROSYSTEM ACTIVITIES

Monetary policy operations offer the most visible application of the decentralisation principle.

For other operations, specific rules shall be applied. In the field of payment systems, three NCBs will develop a common platform to be used by all the

54 This will be the case, for instance, with the new payment system TARGET 2, starting in 2007.

central banks of the ESCB for TARGET 2, which is a Eurosystem service replacing the existing interlinking mechanism between national systems.

In the field of management of foreign reserve assets, six central banks have agreed to offer standardised services decided by the Governing Council.

For banknote production, it is foreseen, in the medium term, to rely on one single Eurosystem tender procedure.

In the field of statistics, the legal framework governing Eurosystem activities, based on Article 5 of the Statute, is composed of a large number of European and national regulations. EU regulations[55] and ECB regulations allow the transfer of data from NCBs to the ECB. Considering the functional use of these data for the performance of either ESCB or Eurosystem activities, such data are exchanged between the central banks concerned under the protection provided by the common confidentiality regime on the basis of Article 38 of the Statute.

In the field of contribution to prudential supervision and financial stability, each NCB has to act on its own in a system of mutual cooperation, as long as the ECB has neither activated its competences under Article 22 of the Statute nor has been entrusted by the Council with specific tasks in accordance with Article 105 (6). Even in this area, the Eurosystem has a role to play.[56] The oversight of payment and securities settlement systems is a core competence of the Eurosystem. As long as the ECB has not adopted regulatory measures, each NCB must act on its own. For such Eurosystem activities, the NCBs' competences are not confined to the implementation of operations, but also imply the exercise of decision-making power. This is a sector in which the existence of regulatory power for NCBs remains of particular importance.

A detailed examination of the field of external relations is not the aim of this paper, although a few general comments can be made in this regard.

The role of the Eurosystem in the international field is basically founded on Articles 6 and 23 of the Statute, and is essentially of an operational nature. The Eurosystem has to contribute in its area of competence to the implementation of international agreements binding on the EU or its Member States. The problems may be exemplified by the situation with the International Monetary Fund (IMF). The NCBs are the fiscal agents of their respective Member States in their capacity as IMF members. In the IMF, there is no common position systematically expressed by the ESCB[57], the Eurosystem or the Eurogroup. The

55 See in particular Council Regulations (EC) 322/97 and (EC) 2533/98 concerning the collection of statistical information by the ECB, OJ L 318, 27.11.1998, p. 8; ECB Regulation 2423/2001 concerning the consolidated balance sheet of monetary financial institutions, OJ L 333, 17.12.2001, p. 1; and ECB Regulation 63/2002 concerning statistics on interest rates applied by monetary financial institutions to deposits and credits, OJ L 10, 12.1.2002, p. 24.

56 See K. Liebscher, "Das Eurosystem trägt eine besondere Verantwortung für die Stabilität des Finanzsystems und die Förderung der Finanzmarktintegration in Europa", in *Das Leitbild des Eurosystems*, Vienna, 13 January 2005, available at www.oenb.at.

57 It is so far mainly within the International Relations Committee (IRC) that coordination among ESCB central banks is sought, notably for issues related to the IMF.

EU does not have a single chair and does not speak with one voice: although EU Member States represent 32% of the total votes in the IMF (compared with 17% for the United States), they take part in ten constituencies, in a number of which they are in a minority position.

This is basically not in line with the transfer of exclusive competence, which would imply that both the internal and external aspects of the single currency are dealt with exclusively by the competent European bodies.

The Constitution provides that "in order to secure the euro's place in the international monetary system, the Council, on a proposal of the Commission, shall adopt a European decision establishing common positions on matters of particular interest for economic and monetary union within the competent international financial institutions and conferences" (Article III-196). This Article goes on to state that "The Council, on a proposal from the Commission, may adopt appropriate measures to ensure unified representation within the international financial institutions". In both cases, "The Council shall act after consulting the European Central Bank" and decide in its Eurogroup composition.[58] This procedure may contribute to the clarification of responsibilities and support various pragmatic solutions adopted by the EU and national authorities for their external relations.

CONCLUSION

The Maastricht Treaty was particularly innovative in establishing the ESCB together with the ECB. The definition of the ESCB was however limited to its tasks and composition.

There is no ex ante definition of the ESCB's reality as a "system". An assessment requires more of an inductive than a deductive approach. A system is an original and evolving concept; it possesses flexible rules designed to accommodate the evolution of both its organisation and its activities.

The situation created in 1999 by the decision of some Member States not to introduce the euro resulted in the transformation of most of the ESCB into a new system, the Eurosystem. Six years after the introduction of the euro, this paper examines the reality of the Eurosystem. It concludes that the Eurosystem works; indeed, its reality is assessed by its effectiveness and its successes.

Some confusion will nevertheless remain. The distinction between the ESCB and the Eurosystem is not clear-cut. The Eurosystem is not only derived from legal texts but also, to a significant extent, from practice.

From a communication point of view, replacing the acronym "ESCB" with the term "Eurosystem" was almost certainly a positive step. The Constitution, which

58 Paragraphs 1 and 2.

it is hoped will enter into force in 2006, following the completion of the cumbersome approval procedure in the Member States, will transform the Eurosystem into a permanent concept within the EU institutional framework. At the moment, the ESCB and the Eurosystem are very different; the one mainly a collection of entities with legal personalities, while the other functioning as an operational body in charge of the performance of the tasks transferred from the EU Member States to the Union with the introduction of the single currency.

When, hopefully, the euro becomes the currency in all the Member States that presently have a derogation or exemption, the ESCB will then come to an end and will simply be replaced by the Eurosystem. Such a progressive approach is not unusual in European constitutional law. Indeed, the whole history of the EU is marked by progressive evolutions whereby institutional experiments are later sanctified by law.

By recognising the Eurosystem, the Constitution provides welcome elements of cohesion and clarification. The way forward will be through the transformation of the ESCB into the Eurosystem.