THE EUROPEAN CENTRAL BANK IN THE EUROPEAN CONSTITUTIONAL ORDER

RENÉ SMITS

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Prior to the inaugural address,
Aartje Duyvené de Wit, mezzo soprano, and
Gert Wantenaar, playing the organ, performed:

Già il sole dal Gange

by **Alessandro Scarlatti** (1659-1725)

Già il sole dal Gange	*Over the Ganges now launches*
più chiaro sfavilla	*the sun god his splendor*
e terge ogni stilla	*With touch warm and tender*
del l'alba che piange.	*morn's teardrops he staunches.*
Col raggio dorato	*His rays golden beaming*
ingemma ogni stelo	*dethrone nightly shadows*
e gli astri del cielo	*While gemming the meadows*
dipinge nel prato.	*with stars brightly gleaming*

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BY

RENÉ SMITS

This text provided the basis for a lecture given by the author on accepting the Jean Monnet Chair of the Law of the Economic and Monetary Union at the Faculty of Law of the *Universiteit van Amsterdam* on 4 June 2003

Published by Eleven International Publishing
P.O. Box 358, 3500 AJ Utrecht, The Netherlands

Sold and distributed by Eleven International Publishing
P.O. Box 358, AJ Utrecht, The Netherlands

This text provided the basis for a lecture given by the author on accepting the Jean Monnet Chair of the Law of the Economic and Monetary Union at the Faculty of Law of the *Universiteit van Amsterdam* on 4 June 2003. The original title of the inaugural address was "The Position of the European Central Bank in the European Constitutional Order".

The inaugural address is available at the following websites:
http://europa.eu.int/futurum/documents/speech/sp040603_2_en.pdf
and
http://www.uva.nl/actueel/object.cfm?objectid=0FF515E0-A67E-4009-BDABB551BA7921BE

ISBN 90-77596-01-1

Cover photo Sunrise on the Ganges, March 2002

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Dear *rector magnificus*, dear colleagues, students, friends, family and others present, dear Anneke and daughters,

1. INTRODUCTION

The answer to the question "is Europe a federation?" can be found in your pockets. Why is that? Your pockets, or at least your purses, (may) contain cash: euro coins. These are pieces of metal, denominated in the single currency. The euro is the European Union's money. It represents value, is used as the standard of accounting and as a means of payment. Coins, together with bank notes, are 'legal tender'. The concept of 'legal tender' means that the notes and coins so designated can be used to extinguish a monetary debt. In plain terms: you can pay with cash. Of course, there are other, more prominent, methods of payment, notably debit and credit card payments and credit transfers. Both involve the debiting of one account held at a credit institution, and the crediting of an account held with the same or another credit institution, as a means of, again, extinguishing an obligation to pay a sum of money. Such payments through the banks involve 'book money', the invisible counterpart to the visible (and audible) cash. In twelve out of the fifteen EU Member States, payments, whether through the books of banks or in cash, are principally made in the currency these States share. The transition to monetary union entailed, for these States, relinquishing their monetary sovereignty. Sovereignty in the area of money is now vested in the European Community, notably in the body established to conduct monetary policy: the European System of Central Banks (ESCB).[1] The European Central Bank (ECB), together with the National Central Banks (NCBs) of the Member States that have adopted the euro, has been entrusted with ensuring price stability.[2]

Back to my initial statement: the coins that jingle in your pocket are an expression of the transfer of sovereignty from State to Union level and, thereby, of the federal character of the European Union. After all, a federation is characterized by the assignment[3] of certain public competences to the

[1] Art. 8 of the Treaty establishing the European Community, as amended (hereafter: EC Treaty) and Art. 1 of the Statute of the European System of Central Banks and of the European Central Bank (hereafter: ESCB Statute).

[2] Art. 105 (1) EC Treaty and Art. 2 ESCB Statute.

[3] Whether by way of specific attribution of competences, as under Community law, or by way of distribution of 'original' powers of the entity so entrusted with public governance. In the former case, no power can be exercised unless specifically granted in the founding treaty. This method of assigning competences may lead some to conclude that these originate with the States and can be taken back. This would not be my reading of the strict limitation of Community powers under Art. 5, first sentence, and Art. 7 (1) second sentence EC Treaty. For the attribution-of-powers principle in the context of the ESCB, *see* Art. 8 EC Treaty and Art. 1.1 ESCB Statute.

highest level of government, whereas other competences lie with the States which form the federation[4], or with lower[5] levels of government or, as the US Constitution states, with the people.[6] Among the Union competences,[7] some are exclusively for the Community to perform,[8] whereas others are 'shared competences': areas of public governance in which both the Community and Member States can act. However, the statement that the European Union is a federation which is entrusted with the performance of several governmental functions does not answer the question of the proper qualification, in law, of the European competences in monetary affairs. Nor is the exact place of the ECB in Europe's constitutional order determined with a broad statement such as this. Thus, the precise subject that I propose to discuss today, is: what is the place of the European Central Bank in the European constitutional order?

Closely related to this question, I will discuss how the ECB's position may be changed in the on-going European constitutional debate. Doing so, I will restrict myself to one element of the law of the Economic and Monetary Union (EMU), namely the monetary side. Economic policy co-ordination will not feature prominently in this address.

Notions such as 'shared sovereignty', 'pooled sovereignty' and 'entry into the euro' are often used in the context of EMU. These terms beg the question of the proper legal qualification of what happened, on 1 January 1999, when the former national currencies of eleven of the fifteen Member States were abolished and replaced[9] by the Euro,[10] and what will happen when new Member States adopt the euro.

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[4] I follow a legal definition of the term 'federation' whereas a political-science definition may put more emphasis on the monopoly of legitimate coercion within the States' territories to conclude that the EU, without ultimate coercive control of its citizens, is not (yet) a federation. *See* G. Marks, L. Hooghe & K. Blank, *European Integration from the 1980s: State-Centric v. Multi-level Governance*, 34 Journal of Common Market Studies 1996, 341-378, at 352.

[5] The terms 'lower' and 'higher' are used in a non-normative manner and denote the usual vertical depiction of strata of government.

[6] Article Ten in Addition to the Constitution of the United States of America (hereafter: US Constitution) reads as follows: "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people".

[7] I use the term 'Union competences' to link the EU with the central pillar of supranational legislation and policy, acknowledging that there are also EU competences in the other pillars. The pillar structure is explained in the text accompanying note 20 below.

[8] Lenaerts and Desomer mention three areas of exclusive Community competence: the common commercial policy, at least in relation to goods, the protection of fishing grounds and conservation of biological resources of the sea, and monetary policy. *See* K. Lenaerts & M. Desomer, *Bricks for a Constitutional Treaty of the European Union: values, objectives and means*, 27 E.L.Rev. 2002, 377-407, at 389.

[9] Art. 123 (4) EC Treaty unequivocally makes clear that the fixing of the conversion rates of the currencies of the Member States leads to the substitution of these currencies for the ECU (as the Treaty calls the single currency). *See also* Arts. 2 and 3 of Council Regulation (EC) No. 974/98 of 3 May 1998 on the introduction of the euro, OJ 1998 L 139/1, as amended by Council Regulation (EC) No. 2596/2000 of 27 November 2000, OJ 2000 L 300/2.

The debate on the proper constitutional framework for the European Union is very much alive today. The preparations undertaken in the so-called European Convention for a constitutional text upon which the Union is to be based did not focus on the place of the ECB. They did address the economic-union competences under the provisions on EMU and even then, the focus lied elsewhere. The recent proposal to declare the ECB an 'institution' of the Union is the first time that the ECB's position is directly at issue.[11] Also, proposals for the external competences, as well as the proposed exit clause, will influence the functioning of the ECB directly. I submit that, also in respect of the monetary side of EMU, precision and vision are needed to shape the European constitution. After all, the euro is the most recent major achievement of European integration and one closely implicating the daily lives of over 300 million Europeans.

Today, I will focus on where to position the euro's primary guardian, the ECB, entrusted as it is with the stability of the single currency. Doing so, I will, first, briefly outline the history of the debate on the future of European governance. Then, I will seek to establish what the current constitutional position of the ECB is. After that, I will look at the application of general Community law to the ECB and the present proposals for constitutional change, both in the application of the Treaty of Nice and in the context of the current constitutional European Convention. Finally, I will take this opportunity to make a contribution to the wider constitutional debate myself.[12]

2. A BRIEF HISTORY OF THE EUROPEAN CONSTITUTIONAL DEBATE

A good English custom requires that one starts legal texts with definitions. Therefore, a definition may also be the starting point for this discussion of the ECB's place in the constitutional order. One definition of a 'constitution' that I find particularly useful is:

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[10] The Greek drachma was abolished two years later and replaced by the euro when Greece joined the monetary union on 1 January 2001. *See* Regulation 2596/2000 (note 9 above) and the Council Decision 2000/427/EC of 19 June 2000 in accordance with Art. 122 (2) of the Treaty on the adoption by Greece of the single currency on 1 January 2001, OJ 2000 L 167/19. For the determination of the Member States which would adopt the euro as from its inception, *see* Council Decision 1998/317/EC of 3 May 1998 in accordance with Art. 121 (4) of the Treaty, OJ 1998 L 139/30.

[11] In draft Art. 14 in Part I of the Constitution on the Union's institutions which mentions the ECB together with the European Parliament, the European Council, the Council of Ministers, the European Commission, the Court of Justice and the Court of Auditors. *See* Document CONV 691/03, 23 April 2003. At present, the ECB and the National Central Banks are mentioned separately in Art. 8 EC Treaty, whereas the institutions are listed in Art. 7. The European Council is not even an EC institution, but an EU body acting pursuant to Art. 4 Treaty on European Union (hereafter: EU Treaty).

[12] For a previous contribution, *see* R. Smits, D. Sáinz de Vicuña, & M. Andenas, *Simplification and Subsidiarity in the Regulation of European Financial Markets*, 12 November 2002, at http://www.europa.eu.int/futurum/documents/other/oth121102_en.pdf.

> [t]he legal instrument by which the people of a certain territory agree to create institutions vested with public authority (i.e. powers to achieve certain objectives in their common and general interest) and define their respective rights with regard to such institutions and their status as citizens of the organisation, "community" or polity so created.[13]

The only problem I have with this definition is that it defines the *rights* but only implicitly defines the *obligations* of the citizens of the territory so governed. As the European Court of Justice (ECJ) already pointed out in the *Van Gend en Loos* case, the E(E)[14]C Treaty also imposes obligations on individuals – independently of the legislation of Member States. A major example is the obligation to refrain from anti-competitive behavior, as set out in Articles 81 and 82 EC Treaty.[15]

It is widely held in legal and political circles that the European Union already has a constitution. In the terms of the ECJ, the Treaties upon which the Communities[16] are based "constitute the constitutional charter of a Community based on the rule of law" and

> they established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals (…).[17]

In spite of this legal qualification, a constitution which citizens can understand is being drafted. After all, the Treaties with their consecutive amendments and their ancillary texts do not give a clear and concise picture of what the Union stands for. Neither is there clarity, in the public eye, about the means with which the Union is to obtain its objectives. Even these objectives are so vaguely worded that citizens may not feel connected with them, whereas the concrete application of Community law emerges in their daily lives. The duty free availability of goods and services from across the Union, produced and – to a certain extent – marketed in conformity with home State rules, the ability to stay and work, study or live anywhere from Tampere to Córdoba, and from Athens to Limerick, the common rules for agriculture and for the banking and finance, energy and telecommunications markets, as

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[13] I. Pernice, *Multilevel constitutionalism in the European Union*, 27 E.L.Rev. 2002, 511-529, at 515.
[14] As it then was (1963).
[15] *See*, for a similar criticism of constitutional drafting, this time in respect of European citizenship, the proposals submitted by the European Citizens Action Service (ECAS) on this subject, reported in Europe, No. 8410, 28 February 2003, at 6: "ECAS considers citizenship should not only compromise rights and that the Convention should also take account of obligations entailed by citizenship."
[16] The European Coal and Steel Community, or ECSC, which commenced in 1951 and lapsed in 2002, the European Atomic Energy Community (EAEC), begun in 1958, and the European Economic Community (EEC), likewise incepted in 1958 and renamed European Community (EC) by the Maastricht Treaty on European Union (1992). The acronym EC sometimes is also used for the three (now two) Communities taken together.
[17] Opinion 1/91 (EEA Agreement), (1991) ECR I-6079, para. 21.

well as the application of competition law are cases in point. And do I have to recall the coins jingling in your pockets?

All these rules derive from the Treaties and the secondary law adopted on the basis of these legal instruments. Unknown to many, even to informed opinion and some high quality newspapers,[18] the European Union encompasses, apart from intergovernmental cooperation in the area of a Common Foreign and Security Policy (CFSP)[19] and the area of police and judicial cooperation in criminal matters,[20] the two (remaining) Communities, Euratom and the European Community. Thus, the achievements just mentioned do not derive from the Treaty on European Union, as conventional wisdom has it, but from the 1957 EC Treaty, as amended in 1992 in Maastricht. It is this legal document and the unique methods of governance it introduced that have shaped the economic, legal and political environment in which the market operates for 380 million Europeans. The 'Community method' entails decision making by several institutions which cooperate to give "the supreme law of the land"[21], the body of principles and rules that has precedence over conflicting rules of national (i.e. State) origin.[22] The Commission (the EC executive) takes legislative initiatives, the Council (of Ministers from Member States) and the European Parliament adopt legislation. The Court of Justice ensures the observance of the law. The Court of Auditors checks that those responsible for the Community's budget use these means in a financially sound and efficient manner. Other bodies established by the EC Treaty are entrusted with further tasks or perform auxiliary functions. Notably, of course, the ESCB has been entrusted with the primary objective of achieving

[18] In this respect, it is noted and deplored that newspapers such as *Het Financieele Dagblad* and *NRC Handelsblad* in the Netherlands, and even the Financial Times often refer to rights and obligations arising under the EC Treaty as originating in the EU Treaty. Also, the competences in respect of economic union are more often than not wrongly stated. A case in point is that references to the Excessive Deficit Procedure (Art. 104 EC Treaty, which relates to the one-off convergence criterion and permanent requirement of avoidance of deficits which are considered excessive on the basis of reference values of 3% of GDP for current deficits and 60% of GDP for accumulated public debt) are often made as if these rules were only in consequence of the Stability and Growth Pact. This Pact contains the rules in addition to Art. 99 (on the EC's Broad Economic Policy Guidelines) and Art. 104. It seeks to achieve balanced budgets over time and circumscribes the discretion of the Council and the Commission when applying Arts. 99 and 104.

[19] Title V (Art.s 11-28) EU Treaty.

[20] Title V (Art.s 11-28) EU Treaty.

[21] Quote from Art. VI, the supremacy clause, of the US Constitution.

[22] The supremacy of Community law over national law was established by the ECJ in its judgments *Van Gend en Loos* (Case 26/62, (1963) ECR 10) and *Costa-ENEL* (Case 6/64, (1964) ECR 592. In the latter judgment, the ECJ stated: "[…] the law stemming from the Treaty, an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question."

price stability.[23] To that end, the ESCB has been given certain tasks which it is to carry out,[24] to a large extent, independently from political influence.[25]

Now, this state of affairs resulted in a panoply of measures of different character being adopted on the basis of various methods of decision-making, that each have their own peculiarities. For a layman, and even for the Community-law specialist, the myriad ways of adopting Community law are difficult to follow. This, coupled with the perceived distance separating the daily lives of citizens from Brussels, Strasbourg, Luxembourg and Frankfurt, has led to estrangement between the European citizens and their Union. As an aside, I remark that the 'remoteness' of the Union can be partially explained by the lack of information on EU affairs in daily newspapers and national (public and commercial) TV and radio. Also, the aloofness of 'Europe' may derive from the tendency to take a primarily national view[26] and to see the Union as a place to pursue the national interest instead of as another layer of government where issues need to be discussed on their merits rather than national viewpoints championed. Furthermore, the tendency of State politicians to blame European decision-making for unpopular outcomes, to restrict their horizon to their own State,[27] and to take a short-term

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[23] Its secondary objective, to be pursued without prejudice to its primary objective, is "to support the general economic policies in the Community with a view to the achievement of the objectives of the Community as laid down in Art. 2 [EC Treaty]" (Art. 105 (1) EC Treaty, Art. 2 ESCB Statute).

[24] Notably,

- to define and implement the monetary policy of the Community
- to conduct foreign-exchange operations consistent with Art. 111 EC Treaty (the provision on the exchange-rate relations between the euro and third currencies)
- to hold and manage the official foreign reserves of the Member States, and
- to promote the smooth operation of payment systems (Art. 105 (2) EC Treaty, Art. 3.1 ESCB Statute).

Apart from these 'basic tasks', other tasks include the issue of bank notes (Art. 106 EC Treaty, Art. 16 ESCB Statute), a contribution to the prudential supervision of credit institutions and the stability of the financial system (Art. 105 (5) EC Treaty, Art. 3.3 ESCB Statute), a consultative function (Art. 105 (4) EC Treaty, Art. 4 ESCB Statute) and a statistical function (Art. 5 ESCB Statute).

[25] Art. 108 EC Treaty, Art. 7 ESCB Statute.

[26] *See*, in the context of the parliamentary elections in the Netherlands in January 2003, the criticized lack of EU-mindedness of Dutch politicians by Advocate General Ad Geelhoed (reported under *Geelhoed verwijt politiek 'Europese blindheid'*, Het Financieele Dagblad, 16 December 2002, at 3) and the neglect of Brussels in the election campaign (M. van den Berg & J.M. Wiersma, *Politici negeren EU* (Politicians disregard EU), NRC Handelsblad, 8 January 2003).

[27] *See* the criticism levelled by the *Raad van State* (Council of State) in its Annual Report 2002 (*Jaarverslag* 2002). The *Raad van State* is the Netherlands Government's highest advisory body in respect of draft legislation. Its judicial chamber is the highest general administrative-law court in the Netherlands. In his preliminary considerations to this body's Annual Report (at 19-24), its Vice President, Mr. H.D. Tjeenk Willink, remarking that citizenship implies co-responsibility for the public cause, regrets the absence of the European dimension in the political debate and the mental withdrawal from European problems which overlap with domestic ones. He laments that the Netherlands seems more and more turned in on itself and focussed exclusively on its own problems ("*Nederland lijkt steeds meer in zichzelf gekeerd, louter gericht op de eigen problemen*"). He insists on the importance of a European civil society, a European public space in which a Europe of the citizens can flourish.

view instead of taking the lead in galvanizing support for the policies they perceive as in the best interest of the public cause, may contribute to the gap between the Union and its citizens.

Structural improvements in the way EU decision-making is being reported and educational changes which impart in our youngest citizens a sense of being European, on top of being British, Dutch, Italian, or Portuguese, may be necessary for European rule-making and rule-makers to reconnect with the people. In education, it will be necessary to inform young citizens about the governance of the European Union and, in doing so, to imbue them with respect for its principles: the republican and secular form of government, democracy and the rule of law. These principles, properly applied and upheld by independent courts, should ensure that those who govern are themselves governed by the law. These principles should also ensure that, even when majorities are in favour of intolerant measures or medieval punishments, these will not be introduced. Furthermore, attention should be given in education to the importance of the European outlook on governance, which includes respect for other cultures, languages, and methods of organization as well as emphasis on respect for the law in the international community. Speaking as a lawyer today, let me go back to the issue of the constitutional debate.

For that is precisely what the European Convention is all about: reconnecting the people with the institutions of the European Union through devising a unified structure of decision making based on a relatively simple and transparent text, i.e. a Constitution for Europe.

The Convention was established on the basis of the so-called Laeken Declaration.[28] This text was adopted in December 2001 by the European Council, that is the meeting of the Heads of State or Government, and the President of the European Commission.[29] The Laeken Declaration seeks to analyze the problems of legitimacy and to point the way towards their resolution. Simplification of the EU's legal instruments and more democracy, transparency and efficiency in the EU are what the European Convention should seek to establish. The process of constitutional change is itself a transparent one: 65 representatives of national governments and parliaments, of the European Parliament and the Commission, together with representatives of the thirteen countries which are candidates for accession, making a total of 105 persons, are to prepare for the next Intergovernmental Conference (IGC). After all, it is up to the Member States to amend the present Treaties in a conference called for that purpose. This is what Article 48 EU

[28] The Future of the European Union, Laeken, 15 December 2001 (SN 273/01), annex to the Conclusions of the presidency of the European Council meeting in Laeken on 14 and 15 December 2001, to be found at http://ue.eu.int/pressData/en/ec/68827.pdf.
[29] *See* Art. 4 EU Treaty.

Treaty provides. Thus, the Convention prepares, under the public eye and with input from political authorities as well as from the public at large, a text which is to lay the groundwork for the IGC. As long as the States are *Herren der Verträge* (masters of the founding treaties), there is no other way of changing Europe's constitution. Yet, the present method of open and transparent preparations[30] cannot be discarded in any future amendment process. I am glad that the proposition which I defended at this very spot six years ago, namely that constitutional changes should be prepared in the open, has become a reality.

The European Convention, whose progress can be monitored via the Internet,[31] was not the first attempt at constitutional drafting. Of course, the judicial qualification of the Treaties as documents of a constitutional nature implies that drafting in itself was about the creation of a constitution. Looking beyond the current treaties, mention should be made of a failed attempt at establishing a European Defence Community, a full-scale treaty signed 51 years ago.[32] It led to another treaty being drafted, on a European Political Community (1953).[33] The final defeat of the European Defence Community Treaty before the French National Assembly in 1954 made it necessary to follow the humble sector integration approach (after coal and steel, nuclear energy and the common market) which we have seen the fruits of.

Efforts to put together a different treaty text were undertaken in 1984 by the European Parliament. After its first direct election by the European citizens in 1979, it commissioned a draft treaty on European Union,[34] inspired by its member Altiero Spinelli. The 1980s saw the first major amendment to the EEC Treaty with the adoption of the Single European Act,[35] which provided, in its Article 30, the first steps towards a common foreign policy but largely concerned amendments necessary to achieve the internal market by the end of 1992. As early as 1993, Samuel Brittan wrote in the Financial Times about "[t]he case for an EC constitution".[36] The call for constitutional

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[30] Supported by press initiatives such as the series *Maak uw eigen Europese Grondwet* (Design your own European Constitution), NRC Handelsblad 4, 18 and 25 November, 2 and 7 December 2000.

[31] http://www.europa.eu.int/futurum/index_en.htm.

[32] Recently called back to memory by the open letter which former European Parliament President José María Gil-Robles submitted to the European Convention on 23 April 2003. *See* http://www.europa.eu.int/futurum/documents/offtext/sp230403_fr.htm.

[33] *See* R.T. Griffiths, *Europe's First Constitution – The European Political Community*, 1952-1954 Federal Trust for Education and Research 2000.

[34] Adopted on 14 February 1984. For the text of the draft Treaty, *see* OJ 1983, C 277/95. For a commentary of this draft, *see* F. Caportoti, *et. al., Le Traité d'Union Européenne - Commentaire du projet adopté par le Parlement européen*, le 14 février 1984, Études européennes, Éditions de l'Université de Bruxelles, 1985.

[35] Bulletin of the European Communities, Supplement 2/86.

[36] Referring to the 1996 follow-up IGC which was to finish the work remaining from Maastricht (Financial Times, 21 June 1993). As we now know, the resulting Treaties of Amsterdam (1997) and Nice (2000)

redrafting of the fundamental provisions governing Europe has been repeated time and again.

When concluding the Maastricht Treaty in 1992, the Governments of the Twelve (as they then were) decided to convene another Inter-Governmental Conference to assume the business left unfinished in Maastricht. This lead to the Amsterdam Treaty in 1997 which witnessed another round of alterations in the conduct of EU business but which fell short of the necessary amendments for accession of over 10 new Member States. Therefore, yet another IGC was convened which was to make the Union ready for enlargement and would ultimately result in the Treaty of Nice which entered into force on 1 February 2003. This restricted agenda, again, left the question of legitimacy largely unresolved. In the meantime, a debate about the 'finality' of the EU ("Where does European integration lead us?") had begun with German,[37] French,[38] and British[39] politicians publicly mapping out their views. A Declaration attached to the Treaty of Nice called for a "deeper and wider debate about the future of the European Union".[40] The legitimacy problems encountered by the Santer Commission, which was forced to resign after the European Parliament failed to discharge it for the 1998 budget because of irregularities, played a major role in the lack of faith that European citizens expressed in the governance at EU level.[41] With the combined problems of legitimacy and efficiency of EU decision-making in mind, the Heads of State and Governments convened the European Convention and entrusted it with the task of preparing another IGC.

The results of the European Convention will need to be negotiated at this IGC and, then, ratified by the national parliaments of all Member States. The idea of a Europe-wide referendum on these results has been floated, notably by the Spanish Government.[42] This referendum may coincide with next year's elections for the European Parliament. Methods are being considered to achieve further integration a European Constitution would entail, and the

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did not achieve the fundamental overhaul of decision-making thought necessary for enlargement of the EU with more than ten Member States. Thus, the Convention was installed to do just that.

[37] J. Fischer, *Vom Staatenverbund zur Föderation - Gedanken über die Finalität dereuropäischen Integration* (From Confederacy to Federation - Thoughts on the Finality of European Integration), speech at the Humboldt University in Berlin, 12 May 2000, to be found at http://www.auswaertigesamt.de/www/de/infoservice/presse/index_html?bereich_id=4&type_id=5&archiv_id=713&detail=1.

[38] *Discours prononcé par Monsieur Jacques Chirac Président de la République française devant le Bundestag*, Berlin, 27 June 2000.

[39] Prime Minister Tony Blair's Speech to the Polish Stock Exchange, Warsaw, 6 October 2000.

[40] Declaration on the Future of the European Union, attached to the Treaty of Nice, 7 December 2000.

[41] For an insightful presentation of these legitimacy issues, *see* J. Wouters, *Institutional and constitutional challenges for the European Union – some reflections in the light of the Treaty of Nice*, in A.E. Kellermann *et al*. (eds.), EU Enlargement: The Constitutional Impact at EU and National Level, 2001, at 37-54.

[42] The debate about a referendum is gathering momentum. *See, e.g.*, Q. Peel, *For once, a referendum might be useful*, Financial Times, 20 May 2003 and *Plan referendum over EU krijgt steun* (Support for EU referendum plan), NRC Handelsblad, 22 May 2003, at 1.

necessary legitimacy, democracy and efficiency in European governance, without a single State obstructing the whole process. In view of the current amendment rules, this may only be achieved after the results have been ratified (these would then provide that any further treaty amendment does not require unanimous approval), or by establishing a smaller federal circle drawn from the current EU Member States.[43] Whatever there is to these wider constitutional issues, the outcome of the European Convention will be of great importance for the political background of the euro and, thereby, for the position of the ECB. Let us now address the issue of the ECB's current position.

3. THE POSITION OF THE ECB IN THE CURRENT CONTEXT

a) General remarks

What, then is the place of the European monetary authority, the ESCB and its component parts, in the present-day constitutional set-up of the European Union? Let me confine myself to the ECB, whose decision-making bodies govern the ESCB.[44] The dual status of NCBs,[45] which are an integral part of the ESCB whilst existing at the same time as national bodies,[46] and the diversity of the national legal systems for central banks,[47] necessitate this restriction.

Let it be said from the outset, that the focus of my presentation will be on the role of the ECB in the context of full monetary union. Therefore, I will not dwell on its status in respect of Member States which have not yet adopted the euro. In the wording used by central bankers, I will look at the

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[43] *See* W.T. Eijbouts, *Presidenten, parlementen, fundamenten – Europa's komende constitutie en het Hollands ongemak*, (Presidents, parliaments, foundations – Europe's future constitution and the Netherlands' unease), Nederlands Juristenblad 2003, at 662-673.

[44] Art. 107 (3) EC Treaty, Art.s 8 and 9.3 ESCB Statute. On the relationship between the ECB and the NCBs, *see* Dr. R.M. Lastra, *The Division of Responsibilities between the European Central Bank and the National Central Banks within the European System of Central Banks*, 6 Columbia Journal of European Law 2 (2002), at 167-180.

[45] On the dual status of the NCBs *see also*, J.-V. Louis, *A Legal and Institutional Approach for Building a Monetary Union*, 35 CMLRev. (1998), 33-76, at 73. Louis does not seem to concur fully with my view as the NCBs as Community organs when acting in their ESCB capacity. He emphasises that the ESCB has two components, a national (NCBs) and a Community (ECB) one. In his view, this makes for its federal character.

[46] Art. 14.3 ESCB Statute in combination with Art. 14.5 ESCB Statute, pursuant to which NCBs "may perform other functions 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."

[47] Some NCBs are public bodies while others are companies established under private law. The requirement of prior compatibility with the EMU provisions in the EC Treaty and the ESCB Statute, laid down in Art. 121 (1) in conjunction with Art. 109 EC Treaty, did not lead to a full harmonization of national legislation with respect to the NCBs.

ECB in its 'Eurosystem' role; the 'Eurosystem' being the term coined by the central bankers to describe the ECB plus the NCBs of the participating Member States.[48] Today, I will make use of both the Treaty-given name, 'ESCB', and the central bankers' preferred name, 'Eurosystem', to describe the ECB and the NCBs of the eurozone States.

For a proper qualification of the present-day constitutional arrangements for the ECB, we have to look in two directions:

a) the interpretation of the law by the courts
b) what legal writing has to say, and, then,
c) draw our own conclusions.

Since there is hardly any case law on the ECB thus far, I propose to start with a look at learned opinion.

b) Legal writing

Learned authors have proposed different views of the ECB. For the moment excluding my own views, two main strands of thought can be discerned. There are those who lay much emphasis on the independent exercise of the functions entrusted to the monetary authority. So much so that they see the ECB as a separate international organization, closely linked to the European Community but yet distinct from its 'source'. Chiara Zilioli[49] and Martin Selmayr[50] take this view. They do acknowledge the establishment of the ECB by the EC Treaty and, therefore, a close link to the Community. Yet, their predominantly international law view makes them see a body set up by treaty serving the States which have relinquished monetary sovereignty.[51] Following their view of the EU as a "layered international organisation",[52] these authors emphasise that the transfer of monetary sovereignty from the Member States to the ESCB took place immediately without even passing through the Community institutions.

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[48] Thus distinguishing between the ESCB in its functions for the monetary union and the EU-wide functions of the ESCB. The Treaty and the Statute use the term 'ESCB' both for the ECB and the NCBs of the participating Member States and for the ECB and all NCBs, including those of the 'out' Member States. The role of the General Council (Art. 45 ESCB Statute) will thus not be discussed, nor will the transitional provisions of the ESCB Statute (Arts. 43-48 and 53 ESCB Statute; *see also* Arts. 8 and 9 of the Protocol No. 25 attached to the EC Treaty on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland (hereafter: the UK Opt-out Protocol)).

[49] Deputy General Counsel of the European Central Bank.

[50] Director of the Centre for European Law at the University of Pessau and formerly employed by the ECB as well.

[51] Or, "pooled their sovereignty as regards economic policy in a wide sense", as Zilioli and Selmayr put it (*see* C. Zilioli & M. Selmayr, The Law of the European Central Bank, 2001, at 3). I disagree with their reading of sovereignty being 'pooled' as this view denies the transfer (or partial transfer) of competences from the national to the supranational level which characterizes the European Community in so far as exclusive (or shared) competences are concerned.

[52] Zilioli & Selmayr, *op. cit.* note 51, at 7.

In my perception, these authors thus fail to acknowledge that, although ESCB competences clearly are central in EMU, there are other agents that have acquired powers in the field of monetary union. The Council's competences to act under Article 123 (4) EC Treaty,[53] the provision on the introduction of the single currency, or under Article 111, on the exchange-rate regime in respect of non-EU currencies,[54] are cases in point. Similarly, monetary-policy related powers lie with the Council, which is competent to adopt 'secondary legislation' circumscribing the ECB's use of powers in such areas as the imposition of minimum reserves and of sanctions against credit institutions failing to abide by this requirement.[55]

Zilioli and Selmayr view the ECB as "an independent specialized organization of Community law".[56] It is "a supranational organization within the Union's first and central pillar, and independent from, albeit associated with, the existing three Communities".[57] They see the relationship between the EC and the ECB as one of 'association' and not of 'subordination' or 'possession'. They even compare the link between the two to the one between the United Nations Oranisation and 'specialised agencies' such as the International Monetary Fund (IMF) and the World Bank.[58] Their avoidance of the analogy between intra-State government/central bank relationships comes from their view of the organizational framework of the European Community as *sui generis*.[59] In plain terms: the EC differs so much from both a 'normal' State and a 'normal' international organization that it can be likened to neither. Later on, I will elaborate my own vision so let me confine myself to stating that the specialized-organization view does not, to my mind, adequately reflect the extent of transfer of powers to the Community level of government nor its taking over of traditional State functions.

The view which Selmayr individually has proposed, takes him even further away from mainstream legal opinion. Whilst correctly emphasizing the de-nationalization and depoliticisation of monetary law with the establishment of monetary union, he qualifies the ECB as an independent special agency of Community law and goes as far as calling it a "new community".[60] He does see the link with the Community legal order, notably since the ECB has been created by the EC Treaty. Yet, he gives weight to its autonomous

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[53] Since the entry into force of the Treaty of Nice, that is since 1 February 2003, the Council can act by qualified majority voting (QMV).
[54] Here, as well, QMV has been introduced, at least in paragraph 4 on the representation of the Community in external matters concerning EMU.
[55] *See* Art. 107 (6) EC Treaty and Art. 42 ESCB Statute.
[56] Zilioli & Selmayr, *op. cit*. note 51, at 29.
[57] As they then were; Zilioli & Selmayr's book appeared before the ECSC Treaty lapsed.
[58] Zilioli & Selmayr, *op. cit.* note 51, at 30-31.
[59] *Id.*,at 32.
[60] M. Selmayr, *Die EZB als Neue Gemeinschaft – ein Fall für den EuGH?*, Europa Blätter 1999, 170-181, at 177-178.

position, stating that there is a unity in the area of ideas ("*ideelle(r) Einheit*")[61] and own rules in areas such as employment conditions, language and numbering of legal acts[62] as indications for the autonomous position of the ECB.[63] I concur that its autonomous constitutional position permits the ECB to adopt these separate arrangements. But I do not agree that in so doing it becomes a separate community. Before elaborating on my own view, let us see what other writers say and look at the case law.

The strand opposing the 'separateness view' is forcefully expressed by Ramon Torrent. In his rebuttal[64] of the Zilioli and Selmayr joint view,[65] he relies on common sense and on various legal provisions. He points at the mentioning of monetary union, in Article 2 EC Treaty, as one of the means to achieve the Community's objectives. Torrent also finds the Community decision-making concerning the adoption of the single currency by the Member States, which have fulfilled the convergence criteria,[66] an important element of consideration. Furthermore, the attribution in Article 4 to the Community and the Member States of responsibility for activities which are to lead to "the definition and conduct of a single monetary policy and exchange-rate policy the primary objective of both of which shall be to maintain price stability […]"[67] makes clear that, first, the Member States had and, as from 1 January 1999,[68] the Community has this responsibility. Citing, also, the numerous cases in which the Community has created bodies en-

[61] *Id.*

[62] The ECB numbers its own legal acts separately from the legal acts of the Community (although upon publication in the Official Journal an additional EC number is attributed to them). The separate numbering follows from Art. 17.7 of the ECB's Rules of Procedure (OJ 1999 L 125/34).

[63] *See* Decision of the European Central Bank of 9 June 1998 on the adoption of the Conditions of Employment for Staff of the European Central Bank as amended on 31 March 1999 (ECB/1998/4), OJ 1999 L 125/32, amended by Decision of the European Central Bank of 5 July 2001 (ECB/2001/6), OJ 2001 L 201/25, and Art. 17.8 of the ECB's Rules of Procedure (as amended on 22 April 1999, OJ 999 L 125/34), which restricts the language regime of E(E)C Regulation No. 1 to ECB legal acts adopted pursuant to Art. 34 ESCB Statute. For these legal acts, see the ECB's Compendium 2002 – Collection of legal instruments, June 1998-December 2001, available on the ECB's website (http://www.ecb.int) and upon request at the ECB (Postfach 16 03 19, D-60066 Frankfurt am Main).

[64] R.Torrent, *Whom is the European Central Bank the central bank of?: reaction to Zilioli and Selmayr*, 36 CML Rev. 1229-1241 (1999).

[65] First expressed in C. Zilioli & M. Selmayer, *The external relations of the euro area: legal aspects*, 36 CML Rev. 273-349 (1999).

[66] *See* Art. 121 (1) EC Treaty. For these decisions, *see* note 10 above.

[67] With "support (of) the economic policies in the Community, in accordance with the principle of an open market economy with free competition" as a secondary objective. *See also*, Art. 105 (1) EC Treaty and Art. 2 ESCB Statute which add that such support is "with a view to the achievement of the objectives of the Community as laid down in Art. 2 [EC Treaty]".

[68] Or later for States adopting the single currency after that date. The only one to do so until now was Greece, on 1 January 2001.

dowed with separate legal personality to pursue specific Community tasks,[69] he concludes that the ECB "is simply the Central Bank of the European Community".[70]

Other views on the ECB's constitutional position are less pronounced. Let me examine a few. Jean-Victor Louis qualified the ESCB as "*ni un organe, ni une institution*", without expressly elaborating on the status of the ECB.[71] He sees the Eurosystem as a federal and decentralised entity without its own legal personality.[72] When discussing the provisions on its relations with the institutions, Louis emphasises that the ECB cannot act in a void.[73] Louis lays more emphasis on the national character of the NCBs. He sees two elements (national and Community) combined in the set-up of the ESCB, with centralised decision-making and decentralised implementation.[74]

In an early commentary on the Maastricht Treaty, that is the 1992 Treaty on European Union which amended the then EEC Treaty, *inter alia* to include the provisions on EMU, the four authors regard the ECB as "*pas une institution communautaire, mais une quasi institution ou une institution communautaire sui generis"*.[75] Some have called the ECB a Community institution,[76] whereas different authors have seen the separate mentioning of the ECB as a sign that it is not an institution of the EC.[77] Another definition calls the ECB "an independent and legally distinct Community body entrusted with decision-making powers within the ESCB".[78]

Yet another one: "the first independent regulatory agency of the Community, with the constitutional legitimacy of the Treaty".[79] Hugo Hahn calls the ECB a *"eigenständiger Handlungsträger in der Europäischen Union"*.[80] Fi-

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[69] Such as the European Centre for Vocational Training, the European Agency for the evaluation of medicinal products, and the European Centre for the development of vocational training. *See*, for full particulars, Torrent, *op. cit*. note 64, at 1233.

[70] Torrent, *op. cit*. note 64, at 1231.

[71] J.-V. Louis, *Monnaie (Union économique et monétaire)*, Répertoire communautaire Dalloz, 2000, at para. 160.

[72] *Id.*, at paras. 161 and 163.

[73] *Id.*, at para. 204.

[74] *See* Louis, *op. cit.* note 45, at 73.

[75] J. Cloos, G. Reinesch, D. Vignes & J. Weyland, *Le Traité de Maastricht – genèse, analyse, commentaires*, 1994, at 236.

[76] See J. Pipkorn, *Legal arrangements in the Treaty of Maastricht for the effectiveness of the Economic and Monetary Union*, CML Rev. 1994, 263-291.

[77] J.-V. Louis, *L'Union économique et monétaire*, Cahiers de Droit Européen 251-305 (1992), at 280, H.J. Hahn, *The European Central Bank: Key to European Monteary Union or Target?*, 28 CML Rev. 783-820 (1991), at 796, and R. Stadler, Der rechtliche Handlungsspielraum des Europäischen Systems der Zentralbanken, 1996, at 93.

[78] J.M. Fernández Martin, *The Competition Rules of the E.C. Treaty and the European System of Central Banks*, ECLR 51-58 (2001), at 53; *see also*, at 57 ("a Community body").

[79] J.M. Fernández Martín & P.G.Texeira, *The imposition of regulatory sanctions by the European Central Bank*, ELRev 391-407 (2000).

[80] H.J. Hahn, Der Vertrag von Maastricht als völkerrechtlicher Übereinkunft und Verfassung, 1993, at 42.

nally, the ECB has been compared to other executive agencies and, in that context, called "a fully-fledged regulatory agency".[81]

This brief *tour d'horizon* shows that the peculiar position of the ESCB and its central entity, the European Central Bank, makes it difficult to determine its exact legal nature. Nevertheless, in a democratic constitutional order the monetary authority's place should be clear and unequivocal. Before turning to my own view and the possible future changes in the ECB's constitutional position, let us first examine case law.

c) Case law

(i) Limited number of cases involving the ECB

As the ECB is a new body, established on 1 July 1998[82] and fully exercising its powers only as of 1 January 1999,[83] there have only been a few cases before the ECJ and the Court of First Instance (CFI) thus far. Most of these are staff cases and only one, the *OLAF case* which is pending, directly concerns the constitutional position of the ECB. Nevertheless, the cases decided up to now may help to determine the ECB's constitutional status.

Let me give one example. It concerns a recent judgment of the CFI in three joint staff members' cases against the ECB.[84] The staff members contested the ECB's refusal to grant an education allowance in respect of children of ECB personnel that were not expatriates. Only staff members who had not "established a durable link" with Germany before taking up employment with the ECB could invoke the right to an expatriate allowance, and a further education allowance. Personnel with such a German link contested the validity of the rule restricting education allowances to expatriates. The CFI found in favour of the applicants. It recognised the ECB's "independent rule-making powers".[85] But it also saw an infringement of the principle of equal treatment between staff members. This principle of non-discrimination prohibits the ECB from derogating from the general scheme of the education allowance system which the case law applicable to staff of the Community institutions has established. The relevant provision of the ECB's Conditions of Employment[86] was thus considered illegal. The ECB

[81] *Executive Agencies within the EC: The European Central Bank – a model?*, editorial comment, 33 CMLRev 623-631 (1996), at 626.
[82] Art. 123 (1) in fine EC Treaty.
[83] Art. 123 (1) in fine EC Treaty in combination with Art. 121 (4), first sentence, EC Treaty.
[84] Joint Cases T-94/01 (Astrid Hirsch *v.* ECB), T-152/01 (Emanuele Nicastro *v.* ECB) and T-286/01 (Johannes Priesemann *v.* ECB), judgment of 8 January 2003, nyr. *See* OJ 2003 C 55/24.
[85] Paragraph 53 of the judgment.
[86] For the decisions of the ECB on the conditions of employment of ECB staff, *see* note 63 above.

was to give effect to the judgment by modifying the education allowance scheme.[87] What we see the CFI do here is accepting the ECB's special position, also in respect of conditions of employment, as guaranteed by Article 36.1 of the ESCB Statute,[88] yet holding it accountable for breaching general principles. The CFI was undoubtedly helped by the fact that the ECB itself, in its Conditions of Employment, had stated that general principles of Community law and "authoritative principles of the regulations, rules and case-law which apply to the staff of the EC institutions" will be given due consideration.[89]

In this case, we see a blending of respect for the special status and the application of general principles. This may be a happy combination when ECB acts and omissions come up for judicial review.[90]

(ii) The OLAF case – an overview of the issues

The extent to which the ECB is integrated into the Community legal order will become clear, I hope, when the ECJ will give judgment in the *OLAF case*.[91] This case between the European Commission and the ECB revolves around the issue of independence and applicability of general provisions of Community law on the EC's monetary authority. The case is still pending. Therefore, it is not appropriate to anticipate its outcome. Let me confine myself to describing the main issues and the view of Advocate General Jacobs.[92]

For a proper understanding of the issues to be resolved in the *OLAF case*[93] we have to go back to the cases of fraud concerning the Community budget, made public in several reports by the European Court of Auditors and covered widely by leakages to the press by civil servants who raised red flags over the issue. The downfall of the Santer Commission in 1999 was the most visible political result of the concern over irregularities. Article 280 of the EC Treaty, inserted two years earlier in Amsterdam,[94] already requires the Community and the Member States "to counter fraud and any other illegal activities affecting the financial interests of the Community". To that

[87] Paras. 65 and 71-73 of the judgment.
[88] This provides that the Governing Council lays down the ECB staff's conditions of employment.
[89] Para. 9 (c) of the Conditions of Employment, quoted in paragraph 1 of the judgment.
[90] These can be brought before the ECJ pursuant to Arts. 230 and 232. *See also* Art. 35.1 ESCB Statute.
[91] Case C/11-00, Commission *v.* ECB, pending.
[92] Opinion of 3 October 2002.
[93] *See also*, M. Selmayr, *Die EZB als Neue Gemeinschaft – ein Fall für den EuGH?*, Europa Blätter 1999, 170-181, and B. Dutzler, OLAF *or the Question of Applicability of Secondary Community Law to the ECB*, European Integration online Papers (EioP) Vol. 5 (2001), No. 1, http://eiop.or.at/eiop/texte/2001-001ahtm.
[94] Namely by the 1997 Treaty of Amsterdam.

end, the Council and the European Parliament adopted Regulation 1073/99.[95] It empowers the Commission's anti-fraud office (named OLAF after its French name: *Office de Lutte Anti-Fraude*)[96] to conduct administrative investigations "[w]ithin the institutions, bodies, offices and agencies established by, or on the basis of, the Treaties".[97] The investigations are to be carried out "under the conditions and in accordance with the procedures provided for in […] Regulation 1073/99 and in decisions adopted by each institution, body, office or agency".[98] Under the rules thus provided for, OLAF has "immediate and unannounced access to the information held by the institutions, bodies, offices and agencies and to their premises".[99] Further investigative powers include the inspection of accounts, the searching of any document or data medium, the prevention of their disappearance and requests for oral information from staff members. A duty to cooperate with OLAF is to be included in the implementing decision each institution, body, office or agency had to adopt[100] and also follows from Regulation 1073/99 itself.[101] Moreover, these entities are to report to OLAF on any case of fraud, corruption or other illegal activity.

This wide-ranging system of fraud-busting would give an arm of the executive, namely the Commission's OLAF bureau, far-reaching powers to investigate inside other EU bodies for the purposes of protecting the Community's financial interests. This was one of the motives for two independent legal entities set up under the EC Treaty to establish similar but separate structures within their own organizations in order to protect them against fraud. Both the European Investment Bank[102] and the ECB acted alone. They were faced with Commission action against their unilateral approach to financial irregularities. Here, I will concern myself only with the ECB's case. The notion of central bank independence differentiates it from the case of the EIB.[103] Although the EIB has a legal identity separate from that of the Community, it acts on the financial markets in a lending and borrowing capacity

[95] Regulation No. 1073/99 of the European Parliament and the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), OJ 19999 L 136/1 (hereafter also: Anti-Fraud Regulation).
[96] Already set up by Commission Decision 1999/352/EC/ECSC/Euratom, OJ 1999 L 136/20.
[97] Art. 1 (3) Regulation 1073/99.
[98] Art. 4 (1) Regulation 1073/99.
[99] Art. 4 (2) Regulation 1073/99.
[100] An Inter-institutional Agreement was concluded on 25 May 1999 between the European Parliament, the Council and the Commission concerning the investigations by OLAF (OJ 1999, L136/15). The model rules for internal decisions contained therein were recommended for adoption by other institutions, bodies, offices and agencies.
[101] Art. 6.
[102] Art. 9 and Art. 266-267 EC Treaty and the Protocol on the Statute of the European Investment Bank (hereafter: EIB Statute).
[103] Zilioli & Selmayr, *op. cit.* note 51, at 25-29 also reject an analogy between the EIB and the ECB relying, partially, on the absence of regulatory power for the former.

more like a commercial financial institution[104] than an independent authority within the government, such as the ECB.[105]

The ECB had several reasons for arguing that the anti-fraud provisions should not relate to it. First, because of the separation between the ESCB's own finances and the Community budget, the financial interests of the Community itself would not be affected by any irregularities which might occur within the independent monetary authority. After all, the ECB has its own resources.[106] The ECB and the NCBs hold and manage the Member States' official foreign reserves.[107] They do so under the independence provisions of Treaty and Statute.[108] Thus, measures intended to fight fraud concerning the Union's budget would seem not to apply to the ESCB's separate, own finances. Nevertheless, the ECB admitted that when it withholds income tax from its staff for the benefit of the Community budget, and in other specific cases where the EC budget is directly concerned, the financial interests of the Community could be at stake. The ECB pleaded that these interests could then best be protected by action by the ECB on its own. The second motive behind the ECB's unwillingness to submit to OLAF inspections lies in the separation between the political institutions and the monetary authority which the EC Treaty introduced. This separation would sit uncomfortably with investigative powers being exercised by the executive's anti-fraud arm[109] within the independent monetary authority. After all, the auditing of the ESCB's finances is specifically regulated[110] and intervention by the European Court of Auditors restricted to "an examination of the operational efficiency of the management of the ECB".[111]

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[104] In his Opinion of 3 October 2002 in Case C-15/00 (Commission *v.* EIB), Advocate General Jacobs analyses the special arguments raised in the context of the EIB's insistence to adopt a separate antifraud decision and rejects all of its arguments. They related, *inter alia*, to the adoption of the decision by the Management Committee of the EIB, rather than by its Board of Governors or Board of Directors, whose acts can be challenged under Art. 230 EC Treaty and to the EIB's independence on financial markets. The ECJ has previously had occasion to pronounce itself on the EIB's special position. It has held that the EIB "constitutes a Community body established by the Treaty" (Case 110/75 (Mills *v.* EIB), (1976) ECR 955) and that its "degree of operational and institutional autonomy does not mean that it is totally separated from the Communities and exempt from every rule of Community law" (Case 85/86 (Commission *v.* EIB), (1988) ECR 1281).

[105] *See* the distinction between 'independence within the Government' and 'independence from the Government' elaborated in the texts quoted in my thesis R. Smits, *The European Central Bank – Institutional Aspects*, 1996 (2000 reprint), at 154.

[106] Art. 28 ESCB Statute provides the ECB with own capital subscribed by the NCBs (but not paid up by 'out' NCBs: *see* Art. 48 ESCB Statute and Art. 9 sub (c) of the UK Opt-out Protocol.

[107] *See* Arts. 3.1, fourth indent, 30 and 31 ESCB Statute.

[108] Art. 108 EC Treaty, Art. 7 ESCB Statute.

[109] Established on the basis of the provision in the EC Treaty which governs the Commission's internal operations (Art. 162, now 218, on the Commission's Rules of Procedure).

[110] Art. 27.1 ESCB Statute.

[111] Art. 27.2 ESCB Statute restricting the scope of Art. 248 EC Treaty.

This reflects a clear intention of the authors of the Treaty that the Community's institutions were to stay away from anything which might even look like interference with the ESCB's independent pursuit of its price stability objective. For these reasons, the ECB decided to set up its own Anti-Fraud Committee, composed of three outside persons.[112] They are to oversee the anti-fraud activities of the ECB's own Directorate for Internal Audit and to maintain relations with the Commission's OLAF.[113] The Commission did not agree with this approach and challenged the ECB's own anti-fraud decision before the ECJ. It considered its adoption as an act of defiance and, in the words of the Advocate General in his Opinion in Case C-11/00, "a negative decision not to adopt the implementing decision envisaged in […] Regulation […] 1073/99".[114]

(iii) The Opinion of the Advocate General

This brings us to the Opinion of the Advocate General. The ECJ is advised about the proper outcome of a case pending before it by an opinion of the Advocate General. His advice is not binding but may help the Court to find the law. Mr. Jacobs takes 50 pages to refute the arguments of the ECB and almost completely sides with the Commission, the Council and the Government of the Netherlands who came together to oppose the young monetary authority's plea for an independent approach against financial irregularities. His Opinion sets out the arguments against the autonomous position which the ECB considers itself in.

The Advocate General finds that the ECB is a 'body' within the meaning of the Anti-Fraud Regulation and cannot subtract itself from its operation. The wide wording chosen by the Council and the European Parliament in adopting Regulation 1073/99 is sufficient grounds for his conclusion. Furthermore, the ECB's contentions in support of its autonomous position are rejected. The ECB argued that, while it accepts that it does not "exist in a legal world totally distinct from that of the Community, and that the Community legislature may adopt general measures applicable to the ECB", it was not to be put in the same category as other 'bodies'.[115] The ECB cited six reasons for this:

- it is not an 'institution' within the meaning of Article 7 EC Treaty,

[112] Decision of the European Central Bank of 7 October 1999 on fraud prevention (ECB/1999/5), OJ 1999 L 291/36.
[113] *See* the Annual report on the activities of the Anti-Fraud Committee of the European Central Bank covering the period from March 2002 to January 2003, at http://www.ecb.int/about/pdf/afc2002en.pdf.
[114] Para. 79 of Advocate General Jacobs' Opinion of 3 October 2002 in Case 11/00.
[115] This description of the ECB's reasoning is taken from para. 55 of the Opinion of 3 October 2002 in Case 11/00.

- the ECB has legal personality distinct from that of the Community,
- the ECB has its own internal decision-making bodies,
- these bodies have been granted original powers to adopt legally binding measures,
- the accounts of the ECB are not to be examined by the Court of Auditors, and
- the ECB is to act independently from the institutions in executing its tasks.

The Advocate General bases his findings that the ECB is a 'body' established under the EC Treaty on three considerations:[116]

- the fact that the authors of the provisions on EMU chose to integrate these provisions in the EC Treaty and did not conclude a separate Treaty on EMU,
- the fact that the secondary objective for the ECB is "to support the general economic policies in the Community", and
- the fact that the ECB "is bound by Community law and subject to the jurisdiction of the European Court of Justice", which the Advocate General seems to derive from Article 6 of the EU Treaty.

Therefore, "[…] the ECB forms an integral part of the Community framework". Its particular position *within* that framework does not lead him to conclude that it would not be a body forming *part of* the Community. Taking sides in the above-mentioned debate in legal writing, the Advocate General concludes that the ECB may "be described as the Central Bank *of the European Community*".[117] The subsidiary argument that Regulation 1073/99 only applies to the ECB where it actually manages Community budget funds is not accepted by the Advocate General either. No legal reasoning leads Mr. Jacobs to this conclusion, but a factual one: it would mean that OLAF's control powers would extend only to around 3-4% of the ECB's annual budget. He calls this "unrealistic and difficult to realize in practice" and thinks it would undermine the effectiveness of the Community's Anti-Fraud Regulation.[118]

In the rest of his Opinion, the Advocate General deals with the further arguments raised in the case. In spite of his finding that Regulation 1073/99 does not exclude further separate antifraud measures taken by the ECB,[119] he considers that the adoption of the ECB's own decision undermines the Regulation's effectiveness. In substance, it is a decision not to comply with Regulation 1073/99 and a decision not to adopt the internal legal act on combating financial irregularities required by the Anti-Fraud Regulation.[120] Thus, what we have at hand, here, is a full-blown battle between Community organs on

[116] Paras 56-59 of the Opinion of 3 October 2002 in Case C-11/00.
[117] Para. 60 of the Opinion of 3 October 2002 in Case C-11/00 (his italics).
[118] Para. 61 of the Opinion of 3 October 2002 in Case C-11/00.
[119] Paras 71-73 of the Opinion of 3 October 2002 in Case C-11/00.
[120] Paras 75-96 of the Opinion of 3 October 2002 in Case C-11/00.

the extent of their individual powers. It is the constitutional aspect of the case which concerns us here, therefore other legal issues[121] will not be further discussed.

However, there are three further questions which concern the ECB's position that came up in the proceedings. The first question concerns the distinct finances of the Community and the ECB. Here, the Advocate General reaches a clear conclusion: the financial interests of the Community mentioned in Article 280 (4) encompass more than the budget of the Community and also cover the resources of the ECB.[122] The second question concerns the requirement of prior consultation of the ECB. Here, the Advocate General finds that the prior consultation requirement of Article 105 (4) EC Treaty, which requires that proposed Community or national acts within the ECB's fields of competence be submitted to the ECB for advice,[123] is an "essential procedural requirement".[124] Thus, not consulting the ECB when this should have been done, may make the adopted legal act null and void. However, the ECB's view that it is to be consulted on any proposed acts which may concern the ECB's internal organization (such as its activities to combat fraud) is rejected. It is only in respect of the ECB's competences under Article 105 – the provision setting out its basic tasks and its role in banking supervision and the stability of the financial system[125] – that the prior consultation requirement exists, not when the ECB's power to determine its internal organization is concerned.[126] Since the Community's Anti-Fraud Regulation "is plainly not within the fields of competence of the ECB outlined in Articles

[121] Such as (i) the question as to whether the ECB should have challenged Regulation 1073/99 on the basis of Art. 230 EC Treaty rather than rely on Art. 241 to invoke its inapplicability; (ii) the ambit of Art. 280 EC Treaty.

[122] Paras 113-125 of the Opinion of 3 October 2002 in Case C-11/00, where the Advocate General prefers the "clear wording" of the Treaty provision over the "structural interpretation of the Treaty favoured by the ECB".

[123] With a distinction between Community acts, on all of which the ECB has to be consulted, and draft legislative provisions of Member States, which are to be submitted for advice when falling within secondary legislation adopted to that effect. Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (OJ 1998 L 189/42) lays down the instances in which national authorities have to consult the ECB.

[124] Para. 131 of the Opinion of 3 October 2002 in Case C-11/00.

[125] The Advocate General makes a distinction between Art. 105 (2), concerning the basic tasks of monetary policy, foreign exchange operations, holding and management of foreign reserves and payment systems oversight, and Art. 105 (5) and (6), on prudential supervision and systemic stability, as well as Art. 106, on the issuance of bank notes. The first (basic) tasks are certainly covered by the requirement for the Community legislature to consult the ECB. The latter issues may also be covered. I beg to differ and would conclude that all these issues (and auxiliary tasks such as those set out in Art. 5 ESCB Statute, on statistical reporting) fall within the scope of the consultation requirement.

[126] Such as Art. 12 ESCB Statute, which concerns the responsibilities of the ECB's decision-making bodies, and Art. 36, concerning staff.

105 and 106", Regulation 1073/99 was not adopted in violation of the consultation requirement.[127]

On the third question, the independence issue, central to the constitutional position of the ECB, the Advocate General considers that this independence is a functional one: related closely to the tasks for which the autonomous position has been granted. Only where it was considered necessary for the accomplishment of the ECB's tasks has it been given independent status.[128] A quote reveals the thinking of the Advocate General:

> […] [T]he principle of independence does not imply a total isolation from, or a complete absence of cooperation with, the institutions and bodies of the Community. The Treaty prohibits only influence which is liable to undermine the ability of the ECB to carry out its tasks effectively with a view to price stability, and which must therefore be regarded as undue.[129]

Thus, in the Advocate General's view, the ECB cannot be considered shielded from Community acts which do not concretely affect or inhibit the performance of the ECB's tasks. OLAF's internal investigations do not impinge upon this functional independence.[130] This follows from the manner in which the Treaty has embedded the ECB in the Community framework. The Advocate General points to the participation of the Council President and a member of the Commission in Governing Council meetings who, though without the right to vote, are more than mere observers. He finds[131] that "[t]hey presumably have the right to speak in order to influence, within reasonable limits, the decision-making […]".[132] Arguing further that OLAF, although "not a body entirely separate from the Commission",[133] has "a substantial degree of operational independence"[134] and that access to particularly sensitive information closely related to its price-stability objective could be excluded from OLAF's investigations,[135] the Advocate General finds that Regulation 1073/99 does not violate the principle of independence of the ECB.[136] He proposes that the ECJ declare the ECB's own anti-fraud decision void.[137]

We have to await the outcome of the *OLAF case* to know how the ECJ will judge on the independence issue. Let me say that it does seem possible

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[127] Para. 134-141 of the Opinion of 3 October 2002 in Case C-11/00.
[128] Para. 147 of the Opinion of 3 October 2002 in Case C-11/00.
[129] Taken from para. 155 of the Opinion of 3 October 2002 in Case C-11/00.
[130] Para. 147 of the Opinion of 3 October 2002 in Case C-11/00.
[131] Referring to my thesis, *op. cit.*, note 105, at 171-173.
[132] Para. 156 of the Opinion of 3 October 2002 in Case C-11/00.
[133] Para. 161 of the Opinion of 3 October 2002 in Case C-11/00.
[134] Para. 165 of the Opinion of 3 October 2002 in Case C-11/00.
[135] Para. 167 of the Opinion of 3 October 2002 in Case C-11/00.
[136] Para. 175 of the Opinion of 3 October 2002 in Case C-11/00.
[137] Para. 195 of the Opinion of 3 October 2002 in Case C-11/00.

for the Court to accept the general application of Community law, including the anti-fraud measures, to the ECB while also granting the limited applicability thereof in the context of the ECB's financial independence. After all, the ECB does seem to have a case to argue that the bulk of its financial affairs do not affect the Community's budget. Also, the financial interests of the Community, in so far as they include the ESCB's own finances, may be well-protected in a manner upholding the legislative intent to distance the monetary authority from the institutions. Without prejudging any further the outcome of this case, let me conclude by giving you my legal view of the ECB in the current constitutional set-up of the Union.

d) Own view

For me, it is quite clear that the ECB is a body of the European Community. It is one of its organs established to pursue the objectives with which the EC is entrusted.[138] Thus, apart from the five 'institutions' which are to carry out the Community's tasks,[139] and, apart from the other bodies and organs without separate legal personality,[140] several organs have been established with legal personality. The EIB, mentioned earlier, is a case in point. The ESCB is a combination. As a group of bodies it lacks separate legal personality, since the Eurosystem as such has not been given this status. But its constituent parts are separate legal entities. The Eurosystem is composed of, at present, thirteen[141] such legal entities: the NCBs of the participating Member States plus the ECB itself. Thus, any action to acquire or dispose of property or to take part in judicial proceedings is to be channelled through any of the legal entities making up the ESCB. Under the decentralization principle,[142] the ESCB makes itself felt on the markets mainly through action by the NCBs.

Thus, instead of emphasising the international legal personality of the ECB, alongside that of the EC itself, and the separate internal legal personality of the ECB, which distinguishes it from the EU's institutions, created to act for and on behalf of the Community, I take a constitutional legal view. In

[138] *See* Art. 2 EC Treaty.
[139] Art. 7 (1) EC Treaty.
[140] Such as the Economic and Social Committee and the Committee of the Regions (Art. 7 (2) and Arts. 257-262 and 263-265 EC Treaty), the Committee of Permanent Representatives (Art. 207 (1) EC Treaty) and, closer to the area of EMU, the Employment Committee (Art. 130 EC Treaty), the Economic Policy Committee (see Art. 272 (9) EC Treaty and Council Decision 74/122/EEC, OJ 1974 L 63/21; for its composition and statutes, *see* Council Decision of 29 September 2000 (2000/604/EC), OJ 2000 L 257/28) and the Economic and Financial Committee (Art. 114 (2)-(4) EC Treaty and Council Decision of 21 December 1998 on the detailed provisions concerning the composition of the Economic and Financial Committee (98/743/EC), OJ 1998 L 358/109).
[141] If the entire ESCB is counted, the number of legal entities is sixteen.
[142] Art. 12.1, third paragraph, ESCB Statute.

the context of Community law as the superior level of government in European affairs,[143] the ECB is a separate legal entity entrusted with a limited but important part of government policy: ensuring price stability,[144] that is the absence of inflation,[145] as a necessary ingredient for the efficient functioning of the market in Europe. To this end, certain tasks have been entrusted to the ECSB, of which the ECB is the central element.

I emphasise the parallel with the next highest level of government, that of the States. Here, special government functions have also been set apart as arms of the State without separate legal personality, such as cabinets, ministries or departments, parliament, the courts and bodies distinguishable but not legally separate from the State. A further line of separation from the State occurs when public functions are entrusted to separate legal entities at State level. Cases in point were, of course, central banks, but other special agencies also tend to be endowed with legal personality of their own.[146] These independent agencies of government certainly form part of the overall State structure. Reasons of effective and efficient operation in pursuit of distinct policy areas have been valid arguments for giving these public-sector bodies the status of separate entities. No-one would question their 'belonging' to the State from a constitutional viewpoint, naturally acknowledging the fact that they are liable for their own acts and omissions although their shareholders or members may be considered politically or even legally accountable for losses which these separate legal entities cannot bear but society nevertheless wishes to see covered.

Seen in this way, the ESCB is truly 'the central bank of the European Community'.[147] This is my preferred view of the ECB: as an organ of the Community. Not as an organ in the same sense as the EC's institutions but as an independent agency for the performance of monetary policy attributed to

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[143] This description of the superior level of government is not intended to diminish the value of a higher level of law, namely international public law, notably *ius cogens*. This law forms the context in which to organise the constitutional set-up of individual actors on the international scene. In the case of the EU, it would be the main such actor. The States would continue to be international actors as well, for those aspects of governance that would remain within their (shared or exclusive) competences.

[144] For clarity's sake: price stability means a stable price level, or the absence of inflation, not: stable individual prices. As ECB Executive Board member Otmar Issing made clear recently, "[…] changing relative prices play a crucial and beneficial part in economic adjustment and decision making by individual actors be it companies or households". *See* O. Issing, *Monetary and Financial Stability: Is there a Trade-off?*, presentation before the Conference on Monetary Stability, Financial Stability and the Business Cycle, 28-29 March 2003, Bank for International Settlements, Basle.

[145] On the ECB's monetary policy strategy, and on the threat of deflation – the general lowering of prices – *see* the ECB Press Conference and Press seminar on the evaluation of the ECB´s monetary policy strategy, including a slide presentation by Prof. Otmar Issing, at http://www.ecb.int/key/03/sp030508_2.htm.

[146] For an overview of specialised agencies of the EU, apart from the EIB and the ECB, *see* Wouters, *op. cit.* note 41, at 47, note 58.

[147] Note the difference with Torrent's qualification of the ECB as the central bank of the European Community: my phrasing acknowledges that the combination of the ECB and the NCBs of participating Member States performs the function of the EC's central bank.

the Community level of government and for the execution of several other tasks within the overall price-stability objective.

This view of the ECB extends to the larger ESCB. As I have said, it is not itself endowed with legal personality. Yet, because of the combination of legal entities entrusted with Community policy and Community tasks the ESCB can also be seen as a Community organ. Thus, the ECB and the NCBs – in their ESCB functions – are organs of the Community, both individually and acting as a system. Whether the composition of this Community organ could be simplified, by joining the legal personalities of its constituent parts, is a matter of preferred organization.[148] The continued functioning of the NCBs as national bodies outside their ESCB functions[149] and the desire to keep a firm distance between the ESCB, on the one hand, and Community and State political authorities, on the other, seem to argue against it. To me, the ESCB structure, although difficult to explain, does not require urgent adaptation in the context of the European Convention for reasons of transparency.[150]

4. THE APPLICATION OF COMMUNITY LAW TO THE ECB

a) General remarks

Since I consider the ECB to be an organ of the Community, it seems logical to seek to establish in how far the general rules of Community law apply to it. Three areas of the law will be examined. In doing so, I will occasionally make proposals for future arrangements which the European Convention may take on board. Areas already covered by the Convention, or by the Treaty of Nice, and a look into the Europe's constitutional future will then complete my presentation.

b) Competition law[151]

The authors of the Treaty considered "an open market with free competition, favouring an efficient allocation of resources" so important that they obliged

[148] For an overview of the possible legal qualifications of NCBs within the ESCB, *see* Fernández Martin & Texeira, *op. cit.* note 79, at 396-397.

[149] Art. 14.4 ESCB Statute permits the NCBs to perform non-System functions unless the Governing Council finds that these interfere with the ESCB's tasks and objectives. *See also* text accompanying note 46 above.

[150] Contrary, Fernández Martin, *op. cit.* note 78, who calls the ESCB "an unfinished creature" and a "legal conundrum in need of resolution" (at 52).

[151] I would like to thank Ms Janine Galjaard and Mr Kees Hellingman, both of the *NMa*, for valuable comments to an earlier draft of this part of the text.

the ESCB to follow this principle,[152] and subjected the Member States and the Community to the same, as well.[153] An important element of the free market is, of course, the observance of the competition rules of Articles 81 and 82 and the prohibition of State aid pursuant to Articles 87-89 EC Treaty.

The rules regarding competition relate to 'undertakings' or associations thereof. The question arises whether the ECB and the NCBs are such undertakings when acting in their capacity under the Treaty and the Statute. The widespread use of private-law contracts for implementing monetary policy decisions and conducting foreign-exchange operations could well lead an observer to conclude that this is the case.[154] If the market operations of the central banks were to be so qualified, the Commission would have the power of enforcement of competition law against the ECB and the NCBs.[155] Moreover, the question would arise whether, under Regulation 1/2003, the so-called modernisation rules which will apply as of 1 May 2004, the national competition authorities (NCAs) would have enforcement powers against NCBs when they should act in an anti-competitive manner in their Eurosystem capacity.[156]

In order to answer the question of applicability of competition rules, it should be noted that the ECJ follows a restrictive reading of the concept of 'undertaking' when public authority is involved. In the *Eurocontrol case*, an international public body was considered not to be an 'undertaking' since, in the ECJ's view, its activities were connected with the exercise of powers "[…] which are typically those of a public authority" and not of an economic nature.[157]

Generally, a public entity either conducts economic activities of a commercial or industrial nature by offering goods and services on the market, or exercises official authority.[158]

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[152] Arts. 4 (2), in fine, and 105 (1) EC Treaty and Art. 2 ESCB Statute.

[153] Art. 4 (1), in fine, and (2), in fine, EC Treaty.

[154] *See* the Guideline of the European Central Bank of 7 March 2002 amending Guideline ECB/2000/7 on monetary policy instruments and procedures of the Eurosystem (ECB/2002/2; 2002/553/EC), OJ L185/1 to which is annexed the Document *The Single Monetary Policy in the euro area – General Documentation on Eurosystem monetary policy instruments and procedures* (corrigendum in OJ 2002 L 191/58).

[155] Pursuant to Council Regulation No. 17 of 6 February 1962, First Regulation implementing Arts. 81 and 82 of the Treaty, OJ 13, 21 February 1962, p. 204/62, as amended lastly by Regulation (EC) No. 1216/1999, OJ 1999 L 148/5.

[156] *See* Art. 5 of Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Art.s 81 and 82 of the Treaty, OJ 2003 L1/1.

[157] Case C-364/92 (SAT Fluggesellschaft mbH *v*. Eurocontrol), (1994) ECR I-43, para 30.

[158] *See* Case C-343/95 (Diego Calì & Figli Srl *v*. Servizi ecologici porto di Genova SpA (SEPG)), 1997 ECR I-1547, para 16 citing Case 118/85 (Commission *v*. Italy, 1987 ECR 2599, para 7). A similar distinction is made in the area of social security. *See* most recently: Judgment of the CFI of 4 March 2003 in Case T-319/99 (Federácion Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN) *v*. Commission), not yet reported.

Admittedly, this case law relates to the exercise of public authority by State bodies, or by a public international organisation. I have just defended a qualification of the ECB and the NCBs as a Community organ and contradicted the view of the ECB as an international public organisation. Still, the transfer of public authority from the State to the Community level should not, in itself, entail a different treatment in the application of competition law. After all, the same line of reasoning which leads the Court to distinguish, at State and international level, between the exercise of public authority and the pursuit of economic activities can be applied to the Community level of government. This leads me to conclude that the legal entities which form the ESCB do not qualify as 'undertakings' when they perform monetary-policy or payment-oversight functions.[159] Therefore, I concur with the only view expressed on this point in legal writing, namely that

> [a]ll ECB activities which are instrumental or directly or indirectly related to the fulfilment of its public tasks should be considered to be covered by the public character of the ECB […][160]

and, hence, are not directly subject to Articles 81 and 82.

The crucial question to ask, then, is: are the ESCB activities undertaken within its public authority or ancillary to its tasks? Or, does the Eurosystem also undertake activities which are normally engaged in by private companies for gain? An interesting passage from the ECB's 2002 Annual Report gives rise to questions in this respect. When describing a common Eurosystem fee policy for cash transactions of professional clients at the counters of the National Central Banks, a distinction is made between services which all NCBs provide free-of-charge and other activities. These latter services may be provided against a fee "taking into account that they may also be offered by commercial third parties".[161] It would seem that these extra services, offered by some NCBs only, do not necessarily flow from their public tasks. Having a common fee policy in respect of these activities may cause a competition lawyer to raise his eyebrows. Should it be established that the NCBs act in a capacity outside the public sphere, they might qualify as 'undertak-

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[159] As a leading commentary of the EC Treaty already stated in 1999: "[d]ie Europäische Gerichtshof tendiert dazu, alle mit der Ausübung öffentlicher Gewalt verbundenden, traditionellerweise dem Staat zugeordneten Handlungen aus dem Geltungsbereich der Artikel 85 und 86 auszuschließen", H. Schröter, *Commentary to Art. 85, preliminary remarks, paragraph 34*, in H. von der Groeben, J. Thiesing & C.-D. Ehlermann, (eds.), Kommentar zum EU-/EG-Vertrag, 2-72. (My translation: The ECJ's case law shows a tendency to excluding from the applicability of Art.s 85 and 86 all acts of public authority which have traditionally been for the State to perform).

[160] Fernández Martin, *op. cit.* note 78, at 55.

[161] ECB Annual Report, at 134. The *Jaarverslag 2002* (Annual Report 2002) of De Nederlandsche Bank N.V., at 38, specifies that NCBs will charge the same for domestic and out-of-State services.

ings'[162] in direct competition with commercial providers of the same services, and be subject to the scrutiny of the Commission.[163]

All of this relates to the direct application of Articles 81 and 82 to the ECB and NCBs possibly acting as undertakings. The further question is whether, as Community bodies, they can freely dissociate themselves from the competition rules. Of course, they cannot. The principle of faithful observance of Community obligations[164] requires Member States to abide scrupulously by the principles of the free market when conducting public tasks through undertakings.[165] To my mind, Community bodies should likewise be bound by competition law principles. Case law on the observance of the internal market rules by the Community institutions leads me to think that, similarly, the ESCB is to exercise its tasks "from the perspective of the unity of the market".[166] This, and the emphasis in EMU provisions on an open market economy with free competition, would mean that, both in their public activities, as well as when operating as normal market participants, the ECB and the NCBs are bound to respect the competition provisions. They should not induce or encourage behaviour by their counterparties which would lead to a restriction of competition. It would seem that any infringement on competition rules by the legal entities constituting the Eurosystem would be attributable to the ECB.[167] I recommend that the Commission open a permanent dialogue with the ECB to assess both the qualification of ESCB behaviour and its compliance with competition law. The Commission could pro-

[162] They may plead application of Art. 86 EC Treaty which may allow some reduction in the strictness of application of competition law for "undertakings entrusted with the operation of services of general economic interest".

[163] Although NCBs may play a role here, both after 1 May 2004 in respect of Community competition law and, now or later, on the basis of national competition law, I would prefer action by the Commission as best-placed authority to assess for the entire Eurozone whether these activities relate to a public function or not and, whether they would constitute anti-competitive behaviour.

[164] The so-called principle of "*Gemeinschaftstreue*" in Art. 10 EC Treaty.

[165] *See*, *inter alia*, Case 13/77 (GB-INNO-BM *v.* ATAB), (1977) ECR 2115; Joined Cases 209-213/84 (Asjes e.a. - Nouvelles Frontières), (1986) ECR 1425; Case 267/86 (Van Eycke *v.* N.V. Aspra), (1988) ECR 4769 and Case C-245/91 (OHRA Schadeverzekeringen), (1991) ECR 1993 I-5851.

[166] *See* Joined Cases 80 and 81/77 (Société Les Commissionaires Réunis SARL *v.* Receveur des douanes; SARL Les fils de Henri Ramel *v.* Receveur des douanes), 1978 ECR 927, para 35. Here, the ECJ held that the Community institutions were bound, in exercising their powers in the area of the Common Agricultural Policy "from the perspective of the unity of the market". In a later case, the ECJ does not address the question of applicability of Treaty provisions on Community institutions: Case 46/86 (Albert Romkes *v.* Officier van Justitie for the District of Zwolle), 1987 ECR 2671, para 24: "[…] without there being any need to examine whether Art. 30 [currently 28, rs] of the Treaty is applicable to measures adopted by the Community institutions."

[167] Similarly, in respect of NCB acts sanctioning infringements against ECB regulations or decisions, Fernández-Martin and Texeira, *op. cit.* note 79, at 400, "Their [the NCBs'] acts would be fully attributable to the System or, in the absence of legal personality of the latter, to the [EuropeanCentral] Bank, the decision-making authority in the system."

ceed before the Court[168] in the unlikely event that it considered such activities to violate open-market provisions.

Moreover, turning to the area of State aid, in activities by which the ESCB seeks to foster financial stability, the ECB and the NCBs are bound to uphold market principles and to refrain from acts which may constitute state aid.[169] Here, the Commission does have the role to play which Article 88 gives it: it should assess the compatibility with the common market of any aid given by the NCBs to financial institutions. After all, the NCBs' profits and losses are borne ultimately by their shareholders, mostly the national governments. Their recently-acquired capacity as a Community body should not shield them from application of the prohibition of public financial assistance distorting market conditions, whether directly or by analogy. In the event that financial assistance were not granted by the NCBs, following the decentralisation principle, but by the ECB itself, I would likewise plea for Commission action by analogy: the ECB's profits accrue to the NCBs[170] and, thereby, indirectly to the States.

Summing up, the ECB and NCBs are to apply competition law without Commission or NCA enforcement, but have to submit any possible State aid to the Commission for approval. The specific free-market principle in the EMU provisions of the Treaty[171] underlines this requirement to uphold free competition and the need to forestall any possible misuse by the ECB, or by the NCBs, of their privileged position. Furthermore, since payment systems, in particular, are an area of activity where competition does not seem to be guaranteed, vigilance by the ECB itself when overseeing them is required to uphold free-market principles.[172]

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[168] *See* Art. 232, fourth paragraph, EC Treaty.

[169] The granting of liquidity assistance by the ECB or the NCBs should always be on the basis of collateral. This follows from Art. 18.1, in fine, ESCB Statute. This may be an argument for a reasoning that such assistance will not lead to losses and, therefore, will not have to be borne by national budgets. I would still consider that such assistance needs to be approved by the Commission pursuant to Art. 87 or the principle underlying it, namely that no market distortions may be brought about by assistance which may ultimately be funded by public sources. At least, the Commission should scrutinise whether such assistance is true liquidity assistance or a propping up of solvency. The former may be considered acceptable for central banks, the latter is not. *See* my thesis, *op. cit*. note 105, at 270-271.

[170] Art. 33 ESCB Statute.

[171] For the application of free-market principles to the ESCB, *see* Art. 105 (1), third sentence, EC Treaty and Art. 2, third sentence, ESCB Statute: "The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources […]". For the general application of free-market principles in the area of EMU, *see* Art. 4 (1) and (2), in fine, EC Treaty.

[172] It is interesting to note that a recent report by central banks from the G-10 and Australia on *Policy issues for central banks in retail payments* (Committee on Payments and Settlement Systems (CPSS), Bank for International Settlements, Basle, March 2003, available at http://www.bis.org/publ/cpss52.pdf), suggests that fostering competitive market conditions and behaviours is among the main objectives of central bank policies in regard to retail payments.

c) Other internal market rules

A few words only on other internal-market rules. As I have defended before,[173] the ESCB is to uphold the freedom to provide services[174] without a cross-border establishment as a fundamental right in the internal market. In devising its system for the supply of central bank credit, or the management of collateral for such credit,[175] the possibility of banks in one Member State going to a central bank in another should be accommodated. This is the issue of so-called 'remote access'.[176] The requirement to respect the singleness of the market follows from the case law of the ECJ according to which the institutions of the Community, although they have a wide discretion in exercising their powers, should respect the general principles of law, including the freedom of trade in the internal market.[177]

Similarly, the provision of goods and services to the ESCB needs to conform to the public tendering procedures which Community law[178] and international trade law requires public authorities to follow. Here again, Community public authorities may not themselves be subject to the relevant directives, but their respect for fundamental organisational principles of the internal market requires them to act accordingly. In the awarding of contracts for the design of the new ECB building,[179] the ECB can be seen to follow public procurement rules.

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[173] *See* my thesis (*op. cit*., note 105), at 251-260.
[174] Art. 49 EC Treaty.
[175] Art. 18.1 ESCB Statute.
[176] Whereas in my thesis (*op. cit*., note 105) I did not completely deny the notion that rule-of-reason exceptions could be acceptable when applying internal market rules to the creation of the new central banking function, I now hold the view that such exceptions are only granted to States and are not available for Community institutions and bodies. There is, after all, no State interest which legitimises a deviation from the Community principles. Hence, full 'remote access' should be possible.
[177] Case 37/83 (Rewe), (1984) ECR 1229.
[178] *See* Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, OJ 1993 L 199/1, most recently amended by Commission Directive 2001/78/EC, OJ 2001 L 285/1, consolidated version consulted at http://europa.eu.int/eurlex/en/consleg/pdf/1993/en_1993L0036_do_001.pdf. Possibly, an exemption of the public tendering requirement for "supply contracts which are declared secret or the execution of which must be accompanied by special security measures […]" could apply (Art. 2 (2) a). Even so, if the central banks rely on such an exemption they should do so in a transparent fashion. This would permit taxpaying citizens, and their representatives or mandated institutions (MEPs, European Court of Auditors) to verify the efficiency of contracts for the supply of bank notes (*cf.* Art. 27.2 ESCB Statute). The Rules of Procedure of the ECB require that the principles of publicity, transparency, equal access, non-discrimination and efficient administration are given due regard in the procurement of goods and services. Exceptions to these principles, except the last one, are allowed for reasons of security or secrecy, and in a number of other cases. *See* Art. 19 of the Rules of Procedure, note 63 above.
[179] *See* http://www.new-ecb-premises.com/.

Whether the same holds true for the awarding of contracts in respect of, for instance, the printing of bank notes cannot yet be read in publicly available material.[180]

d) Accounting and auditing

As corporate governance issues and accounting standards are focal points of public attention, it is remarkable that the ECB can adopt its own accounting principles according to which its annual accounts are to be drawn up.[181] Also, it is to adopt[182] "the necessary rules for standardizing the accounting and reporting of operations undertaken by the national central banks".[183] The Governing Council, when adopting the ECB's accounting principles, admittedly referred to International Accounting Standards and International Financial Reporting Standards.[184] Also, the auditing of ECB as well as NCB accounts is to be done by external auditors recommended by the ECB's Governing Council but approved by the Ecofin Council.[185] Thus, a fair measure of refer-

[180] The ECB's 2002 Annual Report (at 132) describes the production of bank notes following a "decentralised production scenario with pooling" according to which several NCBs share the production of specific denominations. It fails to give insight into the actual awarding of printing contracts, if any (several central banks having their own in-house printing facilities whereas others rely on outside bank note printing companies).

[181] Art. 26.2 ESCB Statute. *See* the Decision of the European Central Bank of 5 December 2002 on the annual accounts of the European Central Bank (ECB/2002/11; 2003/132/EC), OJ 2003 L 58/38. The ECB's 2002 *Annual Report* states, at 201, that the Decision "applies to the drawing-up of the annual balance sheet and profit and loss account of the ECB for the year ending 31 December 2002." It adds that "[t]he revisions to the accounting policies of previous years are not significant."

[182] Art. 26.4 ESCB Statute. *See* the Guideline of the European Central Bank of 5 December 2002 on the legal framework for accounting and financial reporting in the European System of Central Banks (ECB/2002/10; 2003/131/EC), OJ 2003 L 58/1.

[183] The NCBs of 'out' Member States are not subject to Art. 14.3 ESCB Statute. I take this to mean that the Guideline does not apply to them, even though Art. 26.4 ESCB Statute does (*see* Art. 43.1 ESCB Statute which only excludes application of Art. 26.2). Since Art. 26 ESCB Statute *in toto* does not apply to the United Kingdom (Art. 8 UK Opt-out Protocol), the Bank of England is certainly not subject to the standards of the Guideline. This view is confirmed by the Guideline itself which, pursuant to Art. 25 (3), is addressed to the NCBs. Art. 1 (1), fourth indent, defines NCBs as: "the NCBs of participating Member States".

[184] Art. 1 (1), second indent, Decision ECB/2002/11. Art. 20 (3) instructs the ECB, when the Decision, or a further decision by the Governing Council of the ECB, fails to lay down a specific accounting treatment, to follow relevant International Accounting Standards "in so far as these do not contradict in a material manner the European Community accounting legislation". Also, interpretation of the Decision is to follow "generally accepted accounting standards" in addition to the (undisclosed (!)) preparatory work and "the accounting principles harmonised by Community law"; *see* Art. 20 (2).

[185] Art. 27.1 ESCB Statute. Art. 27.2 contains the limited examination of the ECB (relating to its operational efficiency only) by the Court of Auditors, mentioned before.

ence to internationally accepted standards and of external control has been achieved.[186]

However, the rules against which the auditors are to judge the ECB[187] are self-imposed. Constitutionally, I consider this an awkward position. I submit that a better rule would be for the European Parliament and the Council to adopt a legislative act setting out the ECB's accounting rules, as well as harmonized accounting standards for the NCBs.[188] In order for these rules and standards to be practical and respectful of the secrecy requirements[189] of the monetary authority, the ECB itself should submit a draft on the basis of which[190] Parliament and Council should act. This would also foster continuity with the present rules and standards, something which is important for a young central banking institution in the process of establishing its authority, as well as for comparisons over the course of time.

e) Concluding remarks

The above look at the application of Community law to the ECB leads me to conclude that, in principle, Community law is fully applicable. Subject to the specific guarantees for its independent status and the special arrangements put in place for the monetary authority, the ECB, as a Community body, is to comply with Community law. The lack of clarity on this issue does not strengthen the ECB but weakens it. The ECB's argument that it should generally be treated as having an exempt status under Community law, as in the *OLAF case*, does not seem helpful in achieving the special treatment which its separate finances and its independent position justify. Also, the ECB's reticence in making clear whether it considers itself bound by rules on competition, state aid, the unity of the internal market, and public procurement, as well as its self-regulation in the area of accounting rules, may undermine its justified independent position as the EU's monetary authority rather than sustain it.

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[186] In line with the EC requirement for publicly traded companies. *See* Regulation (EC) 1606/2002 of the European Parliament and the Council of 19 July 2002 on the application of international accounting standards, OJ 2002 L 243/1.

[187] NCBs may be subject to further rules of accounting and auditing pursuant to national law and, indirectly, Community law (namely in as far as national law is based on harmonised EC standards). NCBs whose legal status is that of a public limited company, or whose shares are publicly quoted, will especially feel the influence of these rules. *See* Art. 2 (2) Guideline ECB/2002/10.

[188] Thus establishing precisely which standards and rules are to be applied rather than offering an oblique reference to unspecified 'Community accounting legislation' that applies if the ECB's Governing Council has not decided otherwise, as currently under Art. 20 (3) of Decision ECB/2002/11.

[189] Central bank operations may require an element of surprise and are often based on business data collected from financial institutions: both elements make a strict confidentiality regime imperative. *See* Art. 38 ESCB Statute.

[190] Meaning that deviations from their proposed rules and standards would be the subject of consultation of the ECB, as a requirement which is embodied in Art. 105 (4) EC Treaty.

Clarification of the status of the ECB and of the NCBs, as a Community body, collectively responsible under the decision-making bodies of the ECB for monetary policy and appurtenant tasks, would be welcome. The European Convention should provide this clarification.

5. POSSIBLE FUTURE CONSTITUTIONAL DEVELOPMENT

a) General remarks

Having sketched the history of the constitutional debate in Europe and the ECB's position in the present constitutional order, it is time for a look at future developments. I propose to address, first, the changes in decision-making in an enlarged Union called for by the Treaty of Nice. Then, I will briefly look at possible implications for Europe's monetary authority of matters which are now under discussion at the Convention. I will conclude with a few considerations of a wider nature than the ECB's position.

b) Decision-making with enlarged membership

One constitutional amendment is already on the table, ready for ratification. This derives from the mandate which the Treaty of Nice gave the ECB's Governing Council. In an amendment adopted in Nice, Article 10.6 of the ESCB Statute was inserted. It required the ECB to submit an amendment for the provision on decision-making, Article 10.1 of the same Statute.

Although the Treaty of Nice did nothing to simplify the Union's decision-making in an enlarged composition, it required action by the ECB to make sure interest-rate and other monetary-policy decisions could still be made in an efficient and business-like manner with up to 27 Governors around the table. In order to understand the present proposal, let me sketch the current decision-making process first.

At present, key decisions on monetary policy[191] are taken by the Governing Council of the ECB.[192] The decision-making bodies of the ECB are the Governing Council and the Executive Board. The Governing Council consists of the Executive Board plus the Governors of the NCBs of the Member

[191] Art. 12 ESCB Statute attributes the responsibilities of the main decision-making bodies. The Governing Council adopts guidelines and ensures that the ESCB's tasks are performed. It formulates the monetary policy of the Community and takes the decisions inherent therein. The Executive Board implements monetary policy set by the Governing Council, issues instructions to the NCBs and may have delegated powers.

[192] Decisions concerning the ESCB's internal finances are to be taken by the Governors alone, with their votes weighted according to their NCBs' share in the ECB's capital, and without participation of the Executive Board members, whose votes are given a weight of zero. *See* Art. 10.3 ESCB Statute.

States that have adopted the euro.[193] Each member of the Governing Council has one vote.[194] Members of the Governing Council are to take decisions with the Community interest at heart.[195] Both the Executive Board members, appointed as they are at EU level, and the nationally-appointed NCB Governors act in their Community capacity. A NCB Governor may be inclined to present the case of his or her national economy when decisions are to be taken but he or she is not mandated to act for this part of the European economy. Rather, NCB Governors should act in the interest of Community-wide price stability.[196]

When the Union expands through accession, further Member States are to adopt the euro. This is subject to them meeting the convergence criteria set out in the EC Treaty.[197] Under unchanged provisions, each acceding Member State would mean another Governor around the table in Frankfurt. This Governor could not only make her or his voice heard but, also, vote on monetary-policy decisions. With the present proposal for Treaty amendment, submitted by the ECB immediately upon the entry into force of the Treaty of Nice[198] and adopted by the Council a few weeks later,[199] this state of affairs would change. It is to be noted that the national parliaments of all Member States have to ratify this Decision before it enters into force. Non-participating Member States have to ratify it as well, since this concerns a Treaty amendment: the ESCB Statute has the status of primary Community law. If the amendment has obtained force of law before accession of the ten acceding Member States, they will not have to ratify the Decision as, to them, it would then be *acquis communautaire*. The new system of voting entails the following. As of the moment that the number of Governors exceeds fifteen (there are twelve now), they will be divided into two groups. This di-

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[193] Art. 107 (3) EC Treaty and Art. 8 ESCB Statute. As I restrict myself today to full membership of monetary union, I will not consider the third decision-making body which exists temporarily to include the NCBs of the 'out' Member States, the General Council. *See* Art. 123 (3) EC Treaty, Arts. 45-47 ESCB Statute and Paragraph 9 of the UK Opt-out Protocol.

[194] Art. 10.2 ESCB Statute.

[195] *See* the *Commentary* (explanatory memorandum) to the draft Statute of the ESCB submitted by the Committee of Governors of the Central Banks of the EEC, Europe, Documents No. 1669/1670, 8 December 1990, at 22. *See also* my thesis (*op. cit.*, note 105), at 100.

[196] Of course, where I say "Community", the eurozone is meant, since monetary policy for the Member States which have not (yet) adopted the euro is decided by their own central banks or, in the case of the United Kingdom, by its Government in cooperation with the Bank of England. *See* Art. 43.1 ESCB Statute and Paragraph 4 of the UK Opt-out Protocol.

[197] Art. 121 (1) provides these criteria and Art. 122 (2) the decision-making procedure.

[198] Recommendation, under Art. 10.6 of the Statute of the European System of Central Banks and of the European Central Bank, for a Council Decision on an amendment to Art. 10.2 of the Statute of the European System of Central Banks and of the European Central Bank (ECB/2003/1; 2003/C 29/07), OJ 2003 C 29/6.

[199] Decision of the Council, meeting in the composition of the Heads of State or Government, of 21 March 2003 on an amendment to Art. 10.2 of the Statute of the European System of Central Banks and of the European Central Bank (2003/223/EC), OJ 2003 L 83/66.

vision will be made on the basis of ranking of Member States according to Gross Domestic Product at market prices (GDP mp) and the total aggregated balance sheet of the monetary financial institutions.[200] Based on this criterion,[201] a first group of Governors will consist of the five Governors of NCBs from the highest ranking Member States. They will have four votes, implying a rotation among them of these voting rights. A second group will be formed of the other Governors. They will share eleven voting rights. Thus, a division will be created between the Governors of the biggest Member States, based on GDP and financial-sector importance, and the smaller ones. As soon as the number of Governors climbs further and reaches twenty-two, another group will be created. Still using the same criterion, the second group of Governors will be split into two, one group with eight votes and the other with the remaining Governors sharing three votes. This system implies a rotation of voting rights but not of speaking time: each Governor, voting or not, may still participate in the debate. The Council Decision makes clear that one is to do so "in a personal and independent capacity". The system is designed to make sure that the rotation periods are the same for each group. Also, members of the Executive Board will have permanent voting rights. The ratio between their voting rights and those of the NCB Governors would thus be set at 6:15 (with 6:12 being the current ratio).

Leaving the technicalities of the system[202] aside for interested students to read in the legal texts, I like to make the following comments. First, it may be noticed that the proposed new voting arrangement was the subject of some criticism[203] but was adopted and submitted to national parliaments for ratification in order to become law. Apparently, the level of authority of the ECB is such that the political institutions which had to take its proposal on board, or reject it, did the first with astoundingly little open debate. Second, although the system is designed to strike a balance between efficiency and legitimacy, and in spite of the emphasis on independent and non-national in-

[200] According to the ECB's 2001 Annual Report (at 213), Monetary Financial Institutions (MFIs) are the money-creating sector of the euro area. They include the central banks, credit institutions and other financial institutions whose business is to receive deposits or close substitutes thereof outside the MFI sector and to grant credit for their own account or invest in securities (*id.*).

[201] The first part of the criterion is assigned a 5/6 weight, the second part a 1/6 weight.

[202] Which include the voting pattern for implementation of the system (where all Governing Council members have the vote and a two-thirds majority is required), and the possibility for the Governing Council itself to postpone the start of the rotation system until there are more than eighteen Governors: Art. 10.2 (new), sixth indent, ESCB Statute.

[203] *See Finland opposes changes to ECB voting system*, Central Banking Publications on-line news service (http://www.centralbanknet.com), 19 February 2003; *European Parliament rejects ECB vote rotation idea*, Central Banking Publications, 11 March 2003. *See also* the Opinion of the Commission, delivered 21 February 2003 (not yet published in the OJ; *see* Document COM (2003) 81 final), and that of the European Parliament, delivered 13 March 2003 (not yet published in the OJ, but *see* the highly critical report by the Committee on Economic and Monetary Affairs, 10 March 2003, Document A5-0063/2003 final).

put in any ECB policy decision, it would seem to strengthen the idea of national representation.[204] In this respect, the fixing of the ratio between the central and the regional voices around the table at a level which is more favourable for the latter even than nowadays, does not amount to a strengthening of the federal character of the Eurosystem. Third, having all Governors around the table – even without the right to vote – does not make for an efficient organisation of meetings. Therefore, in my view, the adoption of the amendment proposal is to be deplored. It would have been better to reduce the number of Governors around the table. This would have been possible by allowing central banks to merge and cater for a wider area than a single State in the future, or by appointing into the Governing Council a small number of people qualified for their monetary-policy competence rather than their nationality.[205] The Commission, in its Opinion on the ECB's recommendation for the amendment, suggested further changes and aired the idea of creating a "monetary policy board".[206] To my mind, the Convention,[207] or the IGC which is to follow it, would need to rethink the outline of legitimate yet efficient ECB decision-making.

6. RELEVANCE OF DISCUSSIONS AT THE EUROPEAN CONVENTION

a) General remarks

Turning now to the debate which takes place within the European Convention, several issues can be seen as of direct relevance for the ECB. I restrict myself to four elements of the debate:

- the qualification of the ECB as an 'institution'
- the classification of legal instruments

[204] This is also reflected in the criticism levelled against the proposed change in voting arrangements from the House of Commons. The United Kingdom's Treasury Select Committee apparently considers that "the prospect of UK exclusion from 20 per cent of ECB interest rate votes could prove an obstacle to entry". I concur with its view that "[i]t was regrettable such an important decision on reform was taken so quickly and with limited debate". Statements reported by Central Banking on-line news service, 1 May 2003.

[205] Similar criticism came from the Financial Times in a leader of 18 February 2003 (*The ECB's game of musical chairs*).

[206] Commission Opinion on ECB recommendation ECB/2003/1 of 1 February 2003 for a Council Decision on an amendment to Art. 10.2 of the Statute of the ESCB/ECB (based on Art. 10.6 of the Statute), Document COM(2003) 81 final, Explanatory Memorandum, at 5. The Commission is right to state that the ECB's proposed model "should not be seen as a possible precedent for the future composition and decision-making process of other Community institutions" [meaning: organs].

[207] Whose Working Group on Economic Governance already called on the ECB to make use of the enabling clause of Art. 10.6 ESCB Statute without making any proposals of its own. *See* the Final report of Working Group VI on Economic Governance, Document CONV 357/02, 21 October 2002.

- the attribution of competences between the Union and the Member States

and

- the strengthening of economic-policy coordination.

The qualification of the ECB as a normal 'institution' deserves some comments from a legal viewpoint. A new classification of the EU's legal instruments may have an influence on the legal instruments which the ECB has at its disposal. The attribution of competences leads to a classification of powers as exclusive or shared. The current proposals seem to overlook several powers currently attributed to the ESCB. Thus, they may lead to a weakening of its constitutional position. Finally, the ECB now is faced with a scattered authority in the economic-policy area. Any strengthening of economic-policy making at the Community level immediately impacts on its position.

b) The qualification of the ECB as an 'institution'

In the current legal order, the ECB is not an 'institution'. At the European Convention, a proposal has been drafted to include the ECB as one of the institutions which would number seven if the proposed amendments are accepted.[208] At present, institutions are bodies without separate legal personality acting for and on behalf of the Community or the Union, as the case may be. I am in favour of expressly providing that the ECB is part and parcel of the Union's legal order. But, putting the monetary authority at par with the political and judicial authorities (the 'institutions') is not the appropriate way to do so. It may imply the application of the budgetary provisions of the EU[209] which would endanger the ECB's independence as the separation of its finances from those of the present-day institutions would cease to exist.

In my view, a preferred option would be to devote a separate provision to the ECB, and to the NCBs, calling them a separate, independently functioning EU organ. Such a provision would end the current fog surrounding the ECB's legal status and the application of Community law. It would imply that another provision of the proposed EU Constitution be amended as well.

In Article I-29, some of the current rules on the ESCB are placed together but with an emphasis on the ECB.[210] The admittedly complex, yet unique le-

[208] Including, apart from the five present institutions, the European Council as a separate institution. *See* Art. I-18 of the proposed EU Constitution (Document CONV 724/03, Annex 1, 26 May 2003, at 12). More on the European Council later.

[209] Arts. 268 ff. EC Treaty; Arts. I-52 ff. of the Draft EU Constitution (Document CONV 724/03, Annex 2, at 120).

[210] For critical remarks in respect of this draft provision, then still numbered Art. 21, *see* President Duisenbergs remarks at the ECB press conference of 8 May 2003 with a transcript of the questions and answers, at http://www.ecb.int/key/03/sp030508.htm.

gal structure of the Eurosystem is not well reflected in this proposal. Nor are its tasks well defined now that several among them are no longer mentioned in the text.[211] For now, apart from clarification of its status, I would plead to keep the ESCB's current basic provisions and to wait a few more years before fundamentally redrafting EU central banking law.

This is not to say that the ESCB's competences should always be set in stone. Currently, they are embedded in the Treaty and documents of similar value. Therefore, apart from instances of simplified amendment,[212] any changes to be brought about need to undergo the full process of Treaty change. It is remarkable that this state of affairs, unique in the world, has not come up for discussion. A more mature relationship between political institutions and the central bank would imply that the main provisions on monetary policy and related tasks and the guarantees for its independence continue to be of a constitutional nature but that other provisions have the force of normal law. As a result, the ESCB would be subject to a closer scrutiny of the legislator, which would help ensure a more effective democratic control over the pursuit of the public good of price stability. As said, at present, this is one step too far: we have only limited experience with the new monetary arrangements for Europe.

So, my advice to the European Convention would be to specifically provide that the ESCB is a Union body but, for the remainder, to leave its basic provisions unchanged. Nevertheless, some further constitutional issues need to be addressed already.

c) Classification of legal instruments

Among the objectives of the European Convention is a reduction in the number of legal instruments which the Union has at its disposal. There are so many 'means of action available to the Union for the performance of its tasks' that the public view has become obscured.

Which laws can emanate from Brussels and Strasbourg? Which from Frankfurt? In a Convention document[213] a broad consensus to reduce radically the number of legal instruments available is mentioned. Restricting myself to binding legal acts, the idea is that there would be four main categories:

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[211] Such as the three basic tasks besides monetary policy: *see* note 24 above. Yet, the issuance of the Euro is mentioned, but not in a sufficiently precise manner: the authorisation thereof should relate to the coins (Art. 106 (2) EC Treaty), the bank notes being issued by the ECB and the NCBs themselves (Art. 106 (1) EC Treaty; Art. 16 ESCB Statute).

[212] *See* Art. 107 (5) EC Treaty and Art. 41 ESCB Statute. *See also* Art. 10.6 ESCB Statute, discussed before. Finally, another method of adopting changes may be seen in the enabling clause in respect of prudential supervision (Art. 105 (6) EC Treaty and Art. 25.2 ESCB Statute).

[213] Draft of Arts. 24 to 33 of the Constitutional Treaty, Document CONV 571/03, 26 February 2003. *See also* Art. I-32 of the Draft Constitution, Document CONV 724/03, 26 May 2003, Annex 1, at 22.

1) European law – of general application;
2) European framework laws – which require the same result to be achieved Union-wide but which leave the national authorities 'entirely free' to choose the form and the means to achieve that result;
3) European regulations – generally applicable acts of a non-legislative nature;

and

4) European decisions – addressed specifically to one or more addressees.

The Convention's document grants the ECB the power to adopt regulations and decisions.[214] Yet, it fails to acknowledge the consequences of redrawing the map of legal acts for all of the current ECB competences. After all, the EC Treaty and the ESCB Statute give the ECB regulatory powers[215] and the ability to act through instruments such as guidelines and instructions.[216] A flexible solution will need to be adopted in order not to forego the present-day possibilities of the monetary authority to be organised by using an array of legal instruments. I plead for keeping the current provisions on the ECB´s legal instruments.

d) Attribution of competences

An element of the constitutional debate concerns the re-ordering of competences as either exclusive Community competences or shared competences between Community and Member States,[217] implying that other powers are reserved competences at State level. Article I-12 (1) of the Draft Constitution,[218] grants the Union exclusive competence in the area of monetary policy for Member States that have adopted the euro. This is a correct but insufficient approach. Correct because it is clear that the Community has exclusive competence in the monetary field for those States which have acceded to monetary union. But also insufficient because it is not monetary policy alone which has been made into an exclusive competence at Community level. Four additional areas should be covered by the allocation of exclusive powers.

First, exchange-rate policy, that is the policy in relation to the external value of the single currency and relations with third countries, monetary policy being the domestic policy. The latter and former both serve internal price

[214] Originally proposed Art. 26; *see* Document CONV 571/03, 26 February 2003. *See* Art. I-34 of the Draft Constitution, Document CONV 724/03, 26 May 2003, Annex 1, at 23.
[215] Art. 110 EC Treaty and Art. 34 ESCB Statute.
[216] Arts. 12.1 and 14.3 ESCB Statute.
[217] *See* Document CONV 528/03, 6 February 2003. *See also* Document CONV 724/03, 26 May 2003.
[218] *See* Document CONV 724/03, 26 May 2003, Annex 1, at 8.

stability.[219] Exchange-rate policy is also an exclusive competence. This follows from Article 4 (2), which speaks of "a single monetary and exchange-rate policy", and from Article 111, which gives the Community the competences to act externally.

Second, the tasks which the ESCB has been given in respect of the external reserves of the Member States and the conduct of foreign exchange operations are to be recognised as falling within the exclusive domain of the Community. The holding and management of the reserves is an essential element in the creation of a monetary authority. It is precisely here that the consequences of the establishment of monetary union do not seem to have sunk in completely. In some instances, NCBs and national governments have behaved as if the official foreign reserves still were at the disposal of national policy-making.[220] In the interests of a strong monetary authority and of effective operation of the single monetary and exchange-rate policies, these centrifugal forces should be checked. Thus, exchange-rate policy, including the holding and management of reserves and foreign-exchange operations, should be designated as an exclusive Community competence. This would be in line with the view of ESCB powers to be, in principle, exclusive in nature.[221]

Third, the oversight of payment systems should be mentioned. It is the fourth basic task of the ESCB[222] and an area in development. It cannot easily be subsumed under 'internal market legislation', an area indicated as a shared competence in the Draft Constitution,[223] since it is concerned with overseeing the efficient operation of payment systems and their safety.[224] This task is crucial to an effective monetary policy and supports the financial-stability task of the ESCB.[225] Although the extent of this power and, in-

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[219] *See* Art. 4 (2) EC Treaty.

[220] *See ECB takes authority over foreign currency reserves*, Central Banking Publications on-line news service, 22 October 2002. This article reveals alleged attempts by the governments involved to use the foreign exchange reserves of the Irish and Italian central banks to alleviate budgetary constraints.

[221] I concur with the view that "the tasks and powers of the ESCB are to be regarded as being exclusive in nature, save as otherwise indicated", proposed by Fernández Martin, *op. cit.* note 78, at 52. *See also* Fernández Martin & Texeira, *op. cit.* note 79, at 397, note 42: "The definition and implementation of monetary policy, the competences relating to foreign exchange policy and management of foreign reserves exclude the concurrent competence of the national level." And, at 398: "[…] NCBs are pre-empted from adopting any acts in the framework of the tasks attributed to the System unless explicitly enabled to do so", a state of affairs which excludes acts by other State bodies *a fortiori*.

[222] Art. 105 (2), fourth indent, EC Treaty and Art. 3.1, fourth indent, ESCB Statute.

[223] Art. I-13 (2), first indent, of the Draft Constitution. *See* Document CONV 724/03, 26 May 2003, Annex 1, at 9.

[224] On the interest to central bankers of efficient and reliable retail payment systems and instruments, *see* the report by the G-10 body involved with payments oversight, the CPSS, mentioned in note 172 above. Note that ECB Executive Director Tomasso Padoa-Schioppa is chairman of the CPSS.

[225] Art. 105 (5) EC Treaty and Art. 3.3 ESCB Statute.

deed, its nature, has become the subject of intense debate,[226] it seems unacceptable that the current powers of the ESCB in this area were not mentioned. The European Convention should propose that these powers belong to the sphere of monetary-policy competences, thereby declaring them to be exclusive competences[227] at the federal level and creating a clear picture serving the interest of a single payments area, a corollary of the single currency.[228]

Fourth, and finally, the issue of bank notes is an exclusive ESCB task which should be mentioned separately. Although mentioned as a task which is not labelled 'basic', it is clear that the ECB's "exclusive right to authorize the issue of bank notes" and the issuance of bank notes by the ECB and the NCBs itself – bank notes which are "the only such notes to have the status of legal tender within the Community"[229] – are exclusive Community competences.[230] Only the issue of coins is still a State matter, subject to ECB approval on the volume of issuance and Council harmonization of the denominations and technical specifications.[231] Thus, the bulk of money, namely so-called book money (the euros 'in circulation' in the form of claims on banks) and bank notes, are within the purview of the Community's exclusive competences. All that remains of the previous core State power of minting currency is small change. The European Convention should also take this fourth element of ECB powers into account when designating areas as falling within the Community's exclusive competences.

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[226] *See The role of the Eurosystem in payment and clearing systems*, ECB Monthly Bulletin of April 2002, at 48-59. *See also* Ch. Keller, *Regulation of payment systems – some reflections on Art. 22 of the Statute of the ESCB*, Euredia 2001-2002/3, at 455-472. Contrary, G. Gruber & R. Smits, *Commentary of Art. 22 ESCB Statute*, in Von der Groeben/Thiesing/Ehlermann (Eds.), Kommentar zum EU-/EG-Vertrag, 6th edition (forthcoming).

[227] This also seems to be the ECB's position. In its April 2002 Monthly Bulletin, the ECB states that the payment-systems functions of Art. 105 (2), fourth indent, EC Treaty and Art. 3.1, fourth indent, ESCB Statute "became the shared competence of the ECB and the euro area NCBs as provided for by the Treaty and the Statute", a convoluted way of saying that this is a competence of the Eurosystem, not a shared competence of the ECB and national central banks in the latter's residual, national capacities.

[228] The ECB declared "the creation of a single payment area for the euro" its objective in its 1999 report *Improving cross-border retail payment service – the Eurosystem's view*, available at http://www.ecb.int/pub/ pdf/retailps.pdf: "[…] a single currency environment requires a single payment area." *See also* the ECB's Opinion of 26 October 2001 at the request of the Council of the European union on a proposal for a regulation of the European Parliament and of the Council on cross-border payments in euro (CON/2001/34), OJ 2002 C 308/17 sub 5. This Opinion preceded the adoption of Regulation (EC) No. 2560/2001 of the European Parliament and of the Council of 19 December 2001 on cross-border payments in euro, OJ L 344/13.

[229] Both pursuant to Art. 106 (1) EC Treaty and Art. 16 ESCB Statute.

[230] Of course with the exception of the States with a derogation (*see* Art. 122 (3) EC Treaty and Art. 43.1 ESCB Statute) and the United Kingdom (*see* paragraphs 5 and 8 of the UK Opt-out Protocol).

[231] Art. 106 (2) EC Treaty.

e) Economic-policy co-ordination

First indications from the European Convention[232] showed that there was no fundamental questioning of the present-day distribution of competences between the Community and the Member States in the area of EMU. According to the findings of the Convention's Working Group on Economic Governance, the basic rules in respect of the ECB should remain unchanged. Also, Member States would retain competence for economic policy. Improvement of the co-ordination of these policies may take the form of a stronger role for the Commission as initiator[233] and supervisor of the outcome.[234] Furthermore, some have argued that the basic rules concerning the so-called open method of co-ordination, used in adjacent sectors such as employment, pensions and social policy, be included in the Constitutional Treaty. Only recently has a proposal been put forward[235] to restrict EMU economic-policy co-ordination to Eurozone members, elevating the so-called Eurogroup[236] in the Ecofin Council from a privileged club between the participating Member States to the status of a separate decision-making body.

The Open Method of Coordination (OMC) has been the focal point of much attention in academic writing.[237] It consists of comparing notes between national governments, often organised around responses to a common questionnaire. Best practices may evolve on the basis of these comparisons. The 'OMC' method may further entail benchmarking, target setting and periodic reporting, as well as so-called multilateral surveillance.[238] In plain sociological terms: peer group pressure. The method is characterised by a complete absence of any formal co-ordination or harmonisation of rules and policies. Its 'open' nature permits a wide range of policy choices. Also, it may obscure the process to outsiders such as interested citizens, companies

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[232] *See* the Final report of Working Group VI on Economic Governance, Document CONV 357/02, 21 October 2002.

[233] The Commission would make a formal proposal instead of a recommendation for the Broad Economic Policy Guidelines (BEPG). The difference is that the Council can only override a proposal by unanimity (Art. 205 (2) EC Treaty).

[234] The Commission should give first warnings to Member States deviating from the BEPG or from the provision on avoiding excessive budget deficits (Art. 104 EC Treaty), whereas nowadays the Council is to act under Arts. 99 (4) and 104 (6) and (7), respectively. *See also ECB's Papademos seeks Commission role on pact*, Central Banking Publications on-line news service, 8 May 2003.

[235] *See Eurogroup seeks more economic control – Demand for non-members of single currency zone to have sharply reduced role in decision making*, Financial Times, 21 May 2003, at 1.

[236] On the Eurogroup, *see* J.-V. Louis, *The Eurogroup and economic policy co-ordination*, Euredia, 2001-2002/1, at 19-43.

[237] *See, inter alia*, C. de la Porte, *Is the Open Method of Coordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?*, 8 European Law Journal 1, at 38-58; D. Hodson & I. Maher, *The Open Method as a new mode of governance: The case of soft economic policy-coordination*, 39 Journal of Common Market Studies 4 (2001), 719-745.

[238] *See* De la Porte, *op. cit.* note 237, at 40 quoting the Presidency Conclusions of the Lisbon European Council of 23-24 March 2000.

and special-interest groups. The method has the distinct advantage of allowing Member States to compete for the best policies and of the Union to have testing grounds for new ideas in the public domain.[239] In my view, this advantage should be kept. Nevertheless, a general outlining in the Constitution of "the basic objectives, procedures and limits of the open coordination method" would serve transparency.[240]

Beyond this method, the Community competences to act in the economic-policy area should, indeed, be strengthened along the lines proposed at the European Convention. The Commission's role should be strengthened.[241] Only then can the Community come up with an adequate response in the economic-policy area to challenges from within and from outside. To my mind, the present arrangements allow far too much scope for dithering and procrastination by individual ministers. The ECB will then see a stronger actor in the economic-policy arena and this will, in practice, circumscribe its range of action. Still, I think that better possibilities to undertake common efforts to combat Europe's economic weaknesses should appeal to the ECB, as it always calls for them to be corrected.[242] Also, within its current competences, the Council could make wider use of its power to take Community economic-policy measures pursuant to Article 100 (1) EC Treaty.[243]

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[239] In line with the famous quote of Justice Brandeis of the US Supreme Court, in his dissenting opinion in New State Ice Co. *v.* Liebmann, 285 U.S. 262 (1932), which reads as follows: "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. *It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country*." (emphasis added). *See* http://caselaw.lp.findlaw.com/cgibin/getcase.pl?court=us&vol=285&invol=262#284. On this quote and federalism, *see* M.S. Greve, *Laboratories of Democracy: Anatomy of a Metaphor*, Federalist Outlook, American Enterprise Institute for Public Policy Research, No. 6, May 2001, to be found at http://www.federalismproject .org/masterpages/publications/eurotranscript.pdf. This website contains interesting material on the European Convention from an American perspective. I gratefully acknowledge the assistance of Mr Jim Oltman of Hartsdale, N.Y., and Mr Chuck Kellner, of Barrington, R.I., in finding these references.

[240] Contrary, the European People's Party (EPP) in the European Parliament. *See* E. Brok, *EPP Essentials on Economic Governance*, contribution to the Convention, on behalf of the EPP Convention Group, Document CONV 761/03, 23 May 2003.

[241] *See* the strengthened role of the Commission in the monitoring of the BEPG pursuant to Art. 99 EC Treaty, which the Draft Constitution enhances by permitting it to issue warnings and by requiring its proposal, rather than a recommendation, for Council action. A similar strengthening of the Commission's position is foreseen for Art. 104 EC Treaty. (*See* Arts. III-68 (4) and III-73 (5) and (6) of the draft EU Constitution (Document CONV 725/03, at 49 ff.). *See also Contribution franco-néérlandaise à la Convention: renforcement du rôle de la Commission*, sub I c), at http://www.france.diplomatie.fr/actu/Art..asp?ART=33644.

[242] *See*, for instance, the transcript of questions and answers at the ECB' press conference on 6 March 2003, at http://www.ecb.int.key/03/sp030306.htm.

[243] For which QMV suffices since the entry into force of the Treaty of Nice.

7. CLOSING REMARKS

a) General remarks

I would like to end by presenting some specific proposals to the European Convention. As a general remark, the constitutional text should express the will of the peoples to be governed, for certain matters, at the Union level, over and above governance at national, regional and local levels. It should grant the EU autonomous competences, and make clear that these no longer can be said to have been 'borrowed' from the States and can be withdrawn. Thus, the continued implication that States can retract the powers granted to the Union, or even withdraw from it, are two elements of the proposed Constitution which I would strongly advise against. The principle of attribution of powers[244] can be retained without resorting, as the Convention does, to calling this "conferral" of competences on the Union, the implication being that powers can be taken back.[245] My constitutional reasoning would be that the attribution of powers is a once-and-for-all ceding of sovereignty. Of course, voluntary withdrawal from the Union may be possible but only under the rule of law. This implies that a treaty be agreed between the Union and the State which seeks to exit, setting out the terms for withdrawal. Doing otherwise would not only contravene current constitutional law[246] but also contradict the irreversible nature of the move to the single currency, now laid down in the Treaty.[247] Permitting unilateral withdrawal by a participating Member State would also be highly unpractical: re-nationalisation of monetary policy requires proper preparation, if only to protect the single currency. Any method of leaving the Union other than through an agreement with the EU and the remaining States would be secession, just as much as a unilateral declaration of independence by Brittany from France, by *Cataluña* from Spain, or by *Friesland* from the Netherlands would amount to that.

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[244] *See* Art. 7 (1), in fine, EC Treaty and, for the ESCB, Art. 8 EC Treaty and Art. 1.1 ESCB Statute.
[245] *See* Art. I-1 (1) of the Draft Constitution, Document CONV 724/03, 26 May 2003, Annex 1, at 2.
[246] The Convention's Praesidium's assumption that "many hold that the right of withdrawal exists even in the absence of an explicit provision to that effect" (*see* Document CONV 724/03, 26 May 2003, Annex 2, at 135) does not reflect mainstream legal thinking and contradicts the practice adopted thus far. Greenland left the (then) EEC precisely by way of a treaty between Denmark (acting for Greenland) and the Member States: see the Treaty, amending with regard to Greenland, the Treaties establishing the European Communities, OJ 1985 L 29/1.
[247] *See* Protocol No. 24 annexed to the EC Treaty on the transition to the third stage of economic and monetary union. *See also*, Art. 123 (4) EC Treaty on the 'irrevocable' fixing of the conversion rates of the currencies which are replaced by the euro.

After the adoption of a single currency,[248] it is time for an open acknowledgment that the European Union, although not a State, is not an international public organisation in the classical sense of the word either.[249] The States have lost one of their original core powers, the issue of money, by ceding sovereignty to the European level of government. On a blunt note: British insistence that the Union is merely a club where supreme sovereigns 'share' some of their competences should be resisted.[250] Specifically in relation to the Convention proposals, the provisions on 'conferral' and 'exit' need thorough amendment, or should be completely deleted from a document of a constitutional nature.

My more specific remarks relate to matters as diverse as the question of the EU presidency, financial-sector regulation, the Common Foreign and Security Policy and inter-religious dialogue. After all, a Constitution for Europe should regulate the exercise of public authority over the entire spectrum of common interest. A better governance for Europe,[251] to my mind, also requires the following.

b) A single presidency for Commission and Council

One of the main points of debate at the European Convention concerns the presidency of the Council (the EC institution), and of the European Council (the EU body). Nowadays, the Council is presided in turn by each Member State for a six-month period. The order of this rotating Presidency is decided by the Council itself.[252] Here, the interests of continuity and effectiveness seem to argue for stability whereas the interests of the smaller States may require that they continue to chair the meetings of these bodies even if only once every many years. Also, a longer-term presidency for the Council would make this body, representative of the individual Member States' interests, more powerful against the Commission, the guardian of the Community interest. Thus, the balance of power in the Union is at stake.

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[248] On the impact of the adoption of the single currency on the expression of the commonalities among Europeans in their common governance, *see* L.Catá Backer, *The Euro and the European Demos: A Reconstitution*, Yearbook of European Law 21 (2001-2002), 2003.

[249] The recognition that the Union has its own currency, in Art. I-29 of the Draft Constitution (Document CONV 724/03, 26 May 2003, Annex 1, at 20), is a welcome step forward from the current drafting of Regulation 974/98 (*see* note 9 above) which, in Art. 2, declares the euro to be the currency of the participating Member States.

[250] Viewed from this perspective, and from that of transparency, the report in the Financial Times of 23 May 2003 that the "UK gets the F-word off (the) EU constitutional draft" is an ominous sign. After all, a constitution should clearly reflect the attribution of competences and the EU will be no less federal in certain respects for not mentioning this quality in its constitution.

[251] The idea behind a better governance of the European Union was beautifully captured by Quentin Peel in his contribution entitled *A dream that needs democracy*, Financial Times, 24 March 2002, at 15.

[252] Art. 203 , second paragraph, EC Treaty. For the European Council, *see* Art. 4, second paragraph, third sentence, EU Treaty.

A solution for this dilemma could be found through strengthening both institutions. If the Council would benefit from a permanent president who would also chair the Commission, that would seem to combine the best of both worlds. Hence the proposal to make the Commission, present always in Council meetings in order to defend its proposals or recommendations, responsible for the chairmanship. It would greatly enhance the effectiveness of the Union if there were to be only one agenda set for both major decision-making institutions instead of two (one by the Commission and one by the Council Presidency each six months), as currently is the case. Also, it would legitimise the Council in a double manner: before the national parliaments, to whom the ministers are responsible, and before the European Parliament, to whom the Commission is responsible.[253] This idea has already been put forward before[254] and has also been floated at the Convention[255] but did not yet receive wide support.[256] The legitimacy of the Commission would be enhanced by providing for an elected Commission President. If we were to combine the strengthening of the Commission, by having its President elected, with the strengthening of the Council, by abolishing its rotating Presidency, we would enhance effectiveness and legitimacy, the Community method and the Council all at once. This combination of executive and legislative functions has a precedent in the United States where the Senate – with two representatives each of the individual States the body most resembling the EU's Council, although Senators are directly elected and European ministers are usually not – is presided over by the (elected) Vice-President without the right to vote except in case of a tie.[257]

For the ECB, adopting this proposal would mean a change in practice, as nowadays the Council President and a Member of the Commission may sit in on Governing Council meetings. The Council President may even submit a motion for deliberation in Frankfurt.[258] Joining the chair of both institutions

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[253] Art. 201 EC Treaty.

[254] *See* B. Crum & W. Coussens, *A unique opportunity to change Europe's institutional architecture*, European Voice 16-22 January 2003, at 9; G. Tabellini & Ch.Wyplosz, *Why a presidency is the best model for Europe*, Financial Times, 26 February 2003; *Duff fleshes out alternative plan for a single president*, European Voice, 30 January-5 February 2003, at 9.

[255] *See* A. Duff's amendments to Art. 16a of the proposed Constitution, namely to suppress the idea of a permanent president of the European Council, proposing instead an integrated presidency of the executive formations of the Council with that of the Commission, as reported in Agence Europe, No. 8456, 7 May 2003, at 5. Commission President Romano Prodi also supports the idea of combining the Commission and Council Presidents. *See Prodi launches counter-attack against Giscard proposals'*, European Voice, 15-21 May 2003, at 1.

[256] *See Plenary ready for battle royal over future leadership of EU*, European Voice, 15-21 May 2003, at 4. For more viewpoints on the presidency debate *see*, e.g., Ch. Patten, *A panjandrum for a president*, Financial Times, 7 May 2003, at 13, and M. Prowse, *A strongman is not the kind of leader that Europe needs*, Financial Times, 17/18 May 2003, at 7.

[257] Art. I section 3 sub (4) of the US Constitution.

[258] Art. 113 (1) EC Treaty.

in the manner proposed would mean that this right would belong to the Commission President, as Council chairperson.

In this vein, another proposal may be made. Abolish the European Council! This means: abolish the regular meeting of the Heads of State and Government plus the Commission President. Under Article 4 of the EU Treaty they are "to provide the Union with the necessary impetus for its development" and "are to define the general political guidelines" of the Union. This proposal may seem far-fetched, indeed preposterous. Let me explain why it is not so.

In the first place, the Council may already meet in the composition of the Heads of State and Government. In the field of EMU, several provisions[259] require the Heads of State or Government to act.[260] When it comes to the appointment of the members of the ECB's Executive Board, the Governments are to act at this highest level, as well.[261] In this composition, the value of the Council's announcements, although legally at par with those of any other composition of the same body, may carry extra weight. From this perspective, there is no need to have an additional body, officially set apart from the Council as originally established under the EC Treaty. There is even less need for the European Council as a separate EU body in a Draft Constitution which stipulates that this body acts by consensus with the Commission President not voting.[262]

In the second place, as the Commission is always present at Council meetings, albeit in a supportive capacity rather than as a member, the President of the Commission as Head of the EC executive may join the other Heads of Government. Under the proposal that the Commission chair Council meetings, the chairman of the meeting of Heads of State and Government would be the Commission's President.

In the third place, the European Council has always sat uncomfortably with the constitutional set-up of the European Community since it is a superimposed body without authority under Community law. The unified structure of the Union which is being contemplated – an abandonment of the pre-

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[259] *See* Art. 121 (4) on the decision which Member States could adopt the single currency as from the start of Stage 3, and Art. 122 (2) on the decision whether another Member State may join the single currency area, which is to be made by the Council but after discussion in the Council in the composition of the Heads of State and Government. *See also* Art. 10.6 of the ESCB Statute, on the adoption of an amendment to the voting arrangements laid down in Art. 10.2 thereof.

[260] The European Council is to act pursuant to Art. 99 (2) EC Treaty (discussion of the draft Broad Economic Policy Guidelines) and receives a copy of the ECB's annual report pursuant to Art. 113 (3) EC Treaty and Art. 15.3 ESCB Statute.

[261] Art. 112 (2) (b) EC Treaty.

[262] *See* Arts. I-20 (4) and I-24 (2) of the Draft Constitution (Document CONV 724/03, 26 May 2003, Annex 1, at 13 and 16).

sent 'three pillar' structure[263] – would logically require that the European Council's position be reviewed. In the area of EMU, in particular, it has intervened without any legal basis in the field of intra-Community exchange-rate relationships,[264] a situation which has been deplored in legal writing.[265] Thus, abolishing a body separate in law but unknown to be so for the public eye would greatly simplify the workings of the Union. As I have tried to indicate, this would be done without diminishing the political weight in EU affairs of the highest-ranking State officials acting together with the Commission President. Of course, such a proposal would be hard to swallow for the combined egos of the present European Council meetings, and certainly for the originator of this club, Convention President Valéry Giscard d'Estaing. To him, I would like to say: be bold, abolish your brainchild in name and in law, but not in practice!

c) Financial-sector regulation

Let me return, for a moment, to an issue closer to the ECB and the law of the EMU. Hardly any attention has been given at the Convention to the regulation of the financial sector. The European Convention seems to overlook the entire issue of professional standard-setting in Europe. Thus far, the internal market for services and establishment has been created on the basis of harmonised rules for the professions, laid down in directives. National law implements these directives. Thus, any financial-market operator needs to abide by the national rules which, although harmonised to a certain extent,[266] make up a patchwork of State-based legal systems for the organisation of the market. Two years ago, the rules for the adoption of the financial-services legislation were amended with a view to speeding up the EU response to market

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[263] Compare Art. 4 of the proposed EU Constitution (Document CONV 528/03, Annex I, 6 February 2003) with Arts. 1 and 3 EU Treaty.

[264] The so-called ERM-II, the Exchange Rate Mechanism which was established as a follow-up to the European Monetary System's ERM (1979-1998) and which is considered to replace the reference to the EMS in the convergence criteria (Art. 121 (1), fourth indent, EC Treaty). *See* the Amsterdam European Council Resolution of 16 June 1997 on the establishment of an exchange-rate mechanism in the third stage of economic and monetary union, OJ 1997 C 236/5. The ERM-II is further based on the Agreement of 1 September 1998 between the European Central Bank and the national central banks of the Member States outside the euro area laying down the operating procedures for an exchange rate mechanism in stage three of economic and monetary union, OJ 1998, C 345/6, as amended by the Agreement of 14 September 2000 between the European Central Bank and the national central banks of the Member States outside the euro area amending aforementioned agreement, OJ 2000 C 167/19.

[265] *See* Louis, *op. cit.* note 45, at 70-71 and 76. *See also* my thesis, *op. cit.*, note 105, at 465-484.

[266] For the banking industry *see*, notably, Directive 2000/12/EC of the European Parliament and the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions, OJ 2000 L 126/1, as amended.

changes.[267] These amendments only apply to the securities field[268] but they seem to have export value to adjacent sectors. These so-called Lamfalussy amendments,[269] although welcomed as a modest step in the right direction, do not address two major inefficiencies. These are the multi-layered process of rule-making and the national discrepancies ensuing from the use of EC directives as the legislative instrument. After agreement at G-10 level – financial-sector rules derive from global agreements, in the area of banking from agreement in the Basle Committee on Banking Supervision – EC legislation will have to be agreed upon. EC rules are, first, to be established for the general framework of standards and, thereafter, for the details. Both will then have to be translated into rules at the national level. There, further implementation by the national regulators, be they central banks or other supervisory bodies, may imply that ultimately five stages have to be passed before a rule will have changed market practice.[270] Furthermore, reliance on national legislation provides obstacles to an effective single market. The insistence on national implementation undermines the singleness of the market. It provides economic operators in each State, and rule-makers in that State as well, with opportunities to continue a balkanisation of the internal market which shields them from effective competition from outside these invisible legislative frontiers.

In a submission to the Convention, a specific regime for financial sector regulation has been proposed by two colleagues and myself.[271] In line with the ideas put forward earlier, let me add the following. Europe should be endowed with strong central legislative powers for the financial sector whose integration, after all, provides the internal market-substratum for EMU. Such internal-market legislation should not be made subject to a test of subsidiarity, requiring *ex post* validation of Community action. Also, Europe would

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[267] *See* the Commission Decision 2001/527/EC of 6 June 2001 establishing the Committee of European Securities Regulators (CESR) OJ 2001, L 191/43, and Commission Decision 2001/528/EC of 6 June 2001 establishing the European Securities Committee, OJ 2001, L 191/45. The CESR acts as an independent advisor to the Commission and helps to prepare 'level 2' implementing measures. Under the new approach to legislation, four levels are distinguished: level 1 consists of legislative acts adopted by the European Parliament and the Council, level 2 of implementing decisions in the form of Commission acts, level 3 of co-operative implementation efforts through the CESR network and level 4 of strengthened enforcement of Community law.

[268] *See* B.J. Drijber, *Europese effectenwetgeving in een institutionele voortrekkersrol*, Sociaal-Economische Wetgeving 2003, at 114-121. *See also Jaarverslag 2002* De Nederlandsche Bank N.V. (note 161 above), at 103-105.

[269] Based as they are on a European-Council commissioned Report of the Committee of Wise Men on the Regulation of Securities Markets, presided over by Alexandre Lamfalussy. *See* http://europa.eu.int/ comm/internal_market/ en/ finances/general/lamfalussyen.pdf.

[270] Please note that these five stages (worldwide norms; EU general standards; EU implementing measures; national legislative implementation; national regulatory application) only partially overlap with the four levels distinguished in the so-called Lamfalussy approach indicated in note 267 above.

[271] *See* the contribution mentioned in note 12 above.

be wise to prevent the kind of dual competences at State and federal level existing in the United States which, for instance, have recently been alleged to slow down the speedy sanctioning of conflict-of-interest issues on the American market.[272] Restricting myself for now to the financial-sector: the single market and single currency call for an unfettered Community competence to enact directly effective professional standards.

d) CSFP and further exclusive competences-in-the-making

An area which is seemingly far away from the field of EMU is that of foreign policy. In the run-up to the Iraq War of this Spring, public confidence in the ability of the Union to speak with one voice was greatly diminished. Nevertheless, the lessons to be learned here may be the most useful. Giving the Union its own foreign policy competences, beyond the intergovernmental cooperation that the EU Treaty already provides for, may not be on the agenda for today. Yet, a roadmap setting out the ultimate position to be achieved may be a useful instrument to reach this goal. After all, the customs union, the internal market and the euro have all been realised following this method. Also, the political underpinning of the single currency may require that this piece of daily-life integration be followed by a true single voice on the international scene.[273] Thus, an exclusive competence to act externally in general foreign and security policy could be set as an objective for the Union to achieve in, say, a decade. A first step might be to further 'closer co-operation', a technical term for the enhanced form of integration which the current Treaties[274] allow a majority of Member States to consider among themselves.[275] Of course, the cynic listening to this will remark (or think) that this is beyond reality. I naturally acknowledge that recent experience does not make one optimistic for the attribution of federal competences in

[272] *See* Financial Times of 14 April 2003 which reported, at 17, on State/federal competences in connection with the 'global' settlement with Wall Street banks on conflicts of interest in investment research and banking business (*SEC looks to impose curbs on watchdogs at state level*) and, on the backside of that same page (at 18) on insistence, from UK auditors, to have national exemptions from accountancy rules (*UK auditors urge Brussels to back off*). *See*, similarly, *Drive for greater SEC powers*, Financial Times, 22 May 2003, at 4.

[273] Similarly on the importance for the Europeans to organise their CFSP effectively in the wake of the introduction of the single currency, *see* A. Szász, *De euro na Saddam* (The euro after Saddam), Het Financieele Dagblad, 28 April 2003, at 9.

[274] Arts 43-45 EU Treaty and Art. 11 EC Treaty.

[275] Such closer co-operation cannot be established between Member States in areas which fall within the Community's exclusive powers (Art. 11 (1) sub a EC Treaty). This means that the monetary division in the EU cannot be seen as a form of enhanced co-operation since monetary competences are exclusive according to present-day law. It is by virtue of their opt-outs or status as a State with a derogation (Art. 122 (1) in fine EC Treaty) that the UK, Denmark and Sweden do not participate in monetary union. Since economic-policy is a mixed competence, the current provisions on closer cooperation could be used for a strengthening of economic-policy co-ordination among the Member States that have adopted the euro.

the external area. And yet, I am convinced that it is in this area that a powerful position for the Union is needed most. The external representation of the EU in monetary matters, nowadays fully possible pursuant to Article 111 EC Treaty yet underdeveloped, would also be strengthened if the competence to act in foreign affairs were accepted as an element of sovereignty to be ceded.[276]

Specifically on EMU, the European Convention originally proposed that Article 111, on external powers in relation to EMU, be largely retained.[277] The accompanying commentary, which implied that the Commission should represent the Union externally, ignored the ECB's independent competences. So do the Convention's recent proposals.[278] The new wording on the external competences[279] is a step backwards from the current legal position. The text calls for coordination among Member States and, thus, fails to recognize the exclusive European external competence in monetary and exchange-rate matters. This proposal deserves to be scrapped. Also, the proposal to appoint a Eurozone Finance Minister,[280] who may even represent the Union externally in EMU affairs,[281] is not a good idea. We do not need another function but application of the present-day competences. Moreover, dual external representation by the Commission, rather than the Council, and the ECB would seem to be more in line with the fundamentals of EMU.[282]

e) Inter-religious and inter-cultural dialogue

Let me end with the beginning. No, not the beginning of this address which really is drawing to a close, but the beginning of it all. I refer to the debate about a reference in the preamble to the EU Constitution to Europe's religious heritage. We have seen that the proposals have led to divisions and de-

[276] Of course, this should not be done in a once-and-for-all fashion but gradually, with Community bodies taking over national prerogatives over time. In a creative process such as the shaping of a Constitution, I am neither an idealist nor a realist. I belong to the school of thought that considers appealing ideas a necessary focal point that sustains the hard work in the realisation of change.
[277] In a new Art. 34. *See* Document CONV 685/03, 23 April 2003.
[278] *See* Document CONV 725/03, 27 May 2003, notably Art.s III-66 to III-91.
[279] Art. III-81, if adopted, would require that "Member States whose currency is the euro shall coordinate their action among themselves and with the Commission with a view to adopting common positions on monetary matters within the competent international financial institutions and conferences". It adds "[t]hey shall defend and promote those common positions." The ECB is to be "fully associated with" this co-ordination for "monetary policy or directly related matters".
[280] *See* the proposed Protocol on the Eurogroup, Document CONV 725/03, 27 May 2003, at 181.
[281] *See First draft of EU Constitution out today*, Financial Times, 27 May 2003, at 2.
[282] Similarly, the EPP. *See* its contribution mentioned in note 240 above, which calls for external representation in economic matters by the Commission and in monetary matters by the ECB. I would add that, in exchange-rate matters, as well, the Commission may be best suited to represent the Union, naturally under mandate from the Council.

bate.[283] Now religion and philosophy may rightly give rise to lively exchanges of views. But they should not sharpen already existing differences or lead to deadly fighting. There have been far too many occasions in Europe's history on which this has been the case. Therefore, I would propose to forgo a reference to religious inspiration in the preamble. Yet, I do propose to make the Union competent to act where its strength should lie and to counteract the forces of inter-religious and inter-communal strife. It should have, as a competence shared with that of the Member States,[284] the power to act in furtherance of inter-religious and inter-cultural dialogue.[285] This goes one step further than what is currently the case under Declaration No. 11 annexed to the Treaty of Amsterdam[286] and, also, further than the Convention proposals in this area.[287] Not only respect for, and dialogue of the Union with, religious and philosophical organisations is required but, also, a fostering by the EU of dialogue among religions and philosophies and their adherents.

To give you an idea of where I stand in this debate, let me conclude with a quote on inter-religious dialogue from the Chief Rabbi of the capital of Europe:[288]

> Sortir de chez soi, aller à la rencontre de l'autre, prendre le temps de l'écouter, de le connaître, apparaît aujourd'hui comme une démarche indispensable à ceux qui veulent construire une Europe plus unie, une Europe plus conviviale, plus pacifique, plus fraternelle, mais aussi à ceux qui veulent vivre une dimension nouvelle de l'expérience spirituelle.

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[283] *See Giscard attacked over EU "preamble"'*, Financial Times, 29 May 2003, at 1.

[284] The exercise of these competences is closely related to the freedoms of expression and of belief, enshrined in the Charter of Fundamental Rights of the European Union proclaimed by the European Parliament, the Council and the Commission in Nice on 7 December 2000 (OJ 2000, C 364/1) and in national constitutions.

[285] Thus, with a competence wider than currently under Art. 151 EC Treaty. This restricts action to the cultural field (excluding religion in a restricted reading of that term) and to the adoption of recommendations and incentive measures whereas truly legislative action may be called for. On the importance of educational and cultural competences for fostering integration, *see* L. Catá Backer, *op. cit.* note 248, at 32-34.

[286] Declaration No. 11 reads as follows: "The European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States. The European Union equally respects the status of philosophical and non-confessional organisations."

[287] Art. I-51 of the proposed EU Constitution (Document CONV 724/03, Annex I, 26 May 2003) would add the following to the text of Declaration No. 11, as a provision of the Draft Constitution: "Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations."

[288] A. Guigui, Chief Rabbi of Brussels, *Le dialogue interreligieux entre défis et réalités* in Intercultural dialogue/Dialogue interculturel, acts of a conference held in Brussels on 20 and 21 March 200, European Commission, 2002, at 104.

In English[289]:

> Today, leaving home, going out to meet others, taking time to listen to them, and to get to know them, seems an indispensable step to take for those who wish to build a more united Europe, which is also a better place to live and which is more peaceful and fraternal in nature, but it is also indispensable for those who would like to add a new dimension to their spiritual life.

Waarde Richard, jouw colleges aan de Vrije Universiteit maakten mij enthousiast voor het Europese recht, een enthousiasme dat voortduurt tot op de dag van vandaag.

Waarde Martijn, onder jouw bezielende begeleiding werkte ik aan mijn – hier ter plekke verdedigde – proefschrift over de ECB. Vandaag is daaraan een actueel hoofdstuk toegevoegd.

Esteemed Dr. Duisenberg, a climate conducive to academic activities alongside in-house legal practice at the central bank was fostered by you, your colleagues and successors. Thanks to this environment, which is also present at the competition authority, a fruitful combination of law and practice can be attained.

Dear Antonio, Chiara and other members of the ESCB's Legal Committee, I am honoured by your presence here today and remember with fondness our discussions on legal aspects of the single currency. Let's stay in touch!

Dear students, no inter-activity today! I do look forward to the lectures and to the discussions with you on EMU.

Dear Anneke, Jennifer, Daniella and unborn grandchild: as the nucleus of my extending family, you sustain me with your love and support. You form the solid home base for ventures into the legal area and into Europe and the world.

[289] Author's translation.

ACKNOWLEDGMENTS

I would like to thank Mr. Atilla Arda, paralegal (as he then was) at the Legal Department of *De Nederlandsche Bank N.V.* (DNB), the central bank of The Netherlands, of which I was general counsel, and Mr. Joris de Vries, paralegal at the Legal Department of the *Nederlandse Mededingingsautoriteit* (NMa), the Netherlands Competition Authority, where I am Director of the Legal Department, for their help in assembling documentation for this inaugural address.

Similarly, I wish to express thanks to Ms. Shirley Tarroe, my secretary at DNB, and Ms. Annemiek Annegarn, my current secretary at the NMa, for their assistance.

Finally, a word of thanks to Mr. Duncan Craig for his valuable assistance in using correct English.

All errors and omissions in this text are mine. The views given are, of course, personal and may not be attributed to the persons who assisted me, or to DNB, the ESCB or the NMa.

ANNEX : OVERVIEW OF MAIN CONCEPTS USED

The European Union (EU)

The European Union, based on the EU Treaty (of Maastricht (1992), as amended), consists of

1) the *European Community* (EC) and the European Atomic Energy Community (Euratom), based on the EC Treaty and the Euratom Treaty (both signed in Rome (1957), as amended),

and intergovernmental co-operation in two fields:

2) the Common Foreign and Security Policy (*CFSP*), and
3) Police and Judicial Co-operation in Criminal Matters.

The tasks of the EC are carried out by five institutions:

1) the European Parliament – *legislative and controlling tasks*
2) the Council (of national ministers) – *legislative and executive tasks*
3) the Commission (the EC executive) – *executive tasks; guardian of EC interest*
4) the European Court of Justice (ECJ), including the Court of First Instance (CFI) – *judicial fuction: interpretation of EU rules and ensuring respect for the law*

and

5) the Court of Auditors – *oversees EU finances*

Pursuant to the EU treaty, there is also:

- The European Council – *overall political guidelines*

which consists of the Heads of State or Government of the Member States and the President of the European Commission.

EC Members States – Belgium, Denmark*, Greece, Spain, Germany, France, Ireland, Italy, Luxembourg, The Netherlands, Austria, Portugal, Finland, Sweden*, United Kingdom*.
(*States that have not yet adopted the euro).

Accession candidate countries – accession expected for 2004: Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia; – accession expected for 2007: Bulgaria and Romania; – accession negotiations yet to be opened: Turkey.

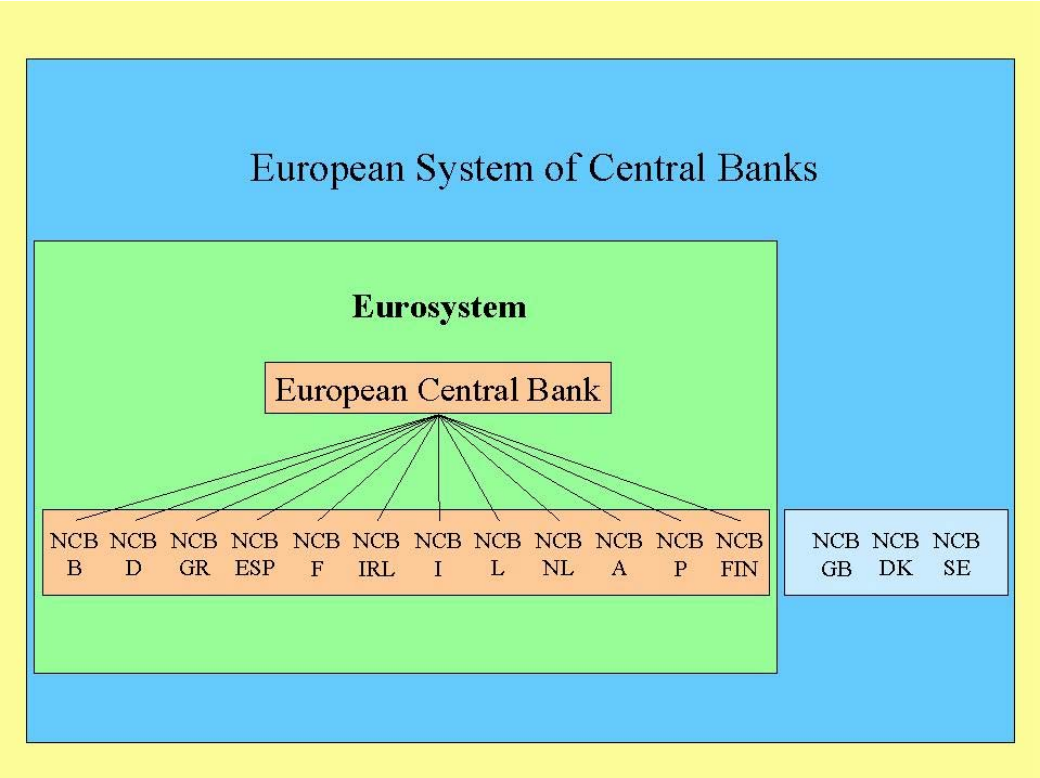
Economic and Monetary Union (EMU)

Economic union: co-ordination of national economic policies
Monetary union: single monetary and exchange-rate policy, the objective of both is price stability.

The European System of Central Banks (ESCB)

The European System of Central Banks consists of:
- the European Central Bank (*ECB*) and
- the National Central Banks (*NCBs*) of the EU Member States

Among these sixteen legal entitities, the ECB and NCBs of the twelve Member States which have adopted the euro together act as the monetary authority of the EC. To avoid confusion with the ESCB including the NCBs of the UK, Denmark and Sweden, the ECB plus NCBs of the participating States are called the 'Eurosystem'. Graphically, the ESCB can be depicted as follows:



The 'Eurosystem' is governed by the decision-making bodies of the ECB:

- the *Executive Board*:
  - President, Vice President and four other members
  - appointed at EU level
  - responsible for day-to-day management
- the *Governing Council*
  - Executive Board plus NCB Governors of Eurozone States
  - takes major monetary policy decisions
  - convenes monthly

'Eurosystem' objectives

1) maintaining price stability
2) supporting general economic policies in EU

'Eurosystem' tasks

- defining and conducting EC monetary policy
- conducting foreign-exchange operations
- holding & managing States' official foreign reserves
- promoting smooth operation of payment systems

plus:

- issuing € bank notes
- approving issue of € coins by Member States
- contributing to prudential supervision and financial stability
- consultative role in draft legislation EU and Member States
- collecting statistical information

The European Convention

The Convention is charged with considering key issues of the EU's future development and identifying possible responses, that is: drafting a European constitution.

Composition:

- Chairman (Valéry Giscard d'Estaing) and two Vice Chairmen
- 15 representatives of the 15 Member States' Governments
- 30 representatives from the 15 Member States' national parliaments
- 16 Members of the European Parliament (MEPs)
- 2 Commission representatives
- 13 representatives from the 13 accession candidate countries' Governments

- 26 representatives from the 13 accession candidate countries' national parliaments

in total: 105 members.

Amendment of the EU and EC Treaties currently requires an **I**nter**g**overnmental **C**onference (*IGC*). Here, the Governments of the Member States, assisted by the Commission, agree new texts. These then have to be ratified by the national parliaments of all Member States. In some States, a referendum is required.

PROFESSOR RENÉ SMITS

René Smits studied sociology and law at the *Vrije Universiteit* (Free University) in Amsterdam.

He has held several positions at *De Nederlandsche Bank N.V.*, the central bank of the Netherlands, including in the legal field and that of banking supervision. He has been the central bank's general counsel since 1989. In that capacity he was responsible for legal advice on in-house corporate affairs as well as special central-bank related subjects, such as the preparation of EC banking regulations (in the context of the '1992' internal market programme), legal questions concerning the IMF, legal work on EMU, et cetera. His writings include contributions on EC monetary law, notably his thesis *The European Central Bank – Institutional Aspects* (Kluwer Law International, The Hague/London/Boston, 1997, 2000 reprint).

In January 2000 he was appointed part-time Professor of the Law of Economic and Monetary Union at the *Universiteit van Amsterdam* (University of Amsterdam). On 4 June 2003 he gave his inaugural address, entitled "The position of the European Central Bank in the European constitutional order".

Since 1 November 2001 he is Director of the Legal Department of the *Nederlandse Mededingingsautoriteit* (Netherlands Competition Authority) in The Hague. This department is involved in the preparation of sanctions (fines, periodic penalty payments) for infringements of Netherlands and EC competition law, as well as in legal advice on energy regulation since the Office for Energy Regulation is a chamber of the NMa. It handles administrative reviews and appeals before the courts against decisions of the competition authority and the energy regulator.

He is visiting professorial fellow at Queen Mary, University of London.