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EDITORIAL COMMENTS

Executive Agencies within the EC: The European Central Bank – a model?

The issue of executive agencies as an alternative model for carrying out particular Community tasks of an executive nature, has regained interest in the run-up to the 1996 Intergovernmental Conference. The most frequently quoted example is, of course, the creation of a Competition Agency to which the powers of the European Commission under Articles 85 and 86 EC, as well as the Merger Control Regulation, would be transferred. Other commentators have advocated the transformation of the present Environmental Agency into a real regulatory agency with effective decision-making powers. Again another suggestion has been to set up a European Agency to combat fraud on the Community budget.

Of course, the issue is certainly not new. Executive agencies already form part and parcel of the institutional structures of the Communities,[1] whether directly created by the Treaties (e.g. the European Investment Bank, the Euratom Supply Agency) or set up by instruments of secondary Community law. The latter type are rather numerous, although their powers are limited so as to respect the restrictive conditions imposed by the Court's case law. The reasons behind the creation of these bodies are varied. Normally, it is the technical specificity of an activity requiring the concentration of particular expertise which

1. See Pipkorn, in Starck (Ed.), *Erledigung von Verwaltungsaufgaben durch Personalkörperschaften und Anstalten des öffentlichen Rechts* (Baden-Baden, 1992), p. 227.

prompts the creation of a separate organizational structure. At the same time, a certain detachment from the political process of decision-making by the Community institutions is seen as a safeguard for an adequate fulfilment of these executive tasks. Another reason for organizational independence could be the need to allow for the involvement of outside interests, such as the social partners in the case of the European Centre for Vocational Training in Berlin and the European Foundation for the improvement of living and working conditions in Dublin.

It is precisely this congenital characteristic of most executive agencies, the capacity to function independently and remain unfettered by the political institutions, which raises what is usually the most difficult question about their structure: how is one to arrange their accountability? In that regard, the examples of the existing Treaty agencies, the EIB and the Euratom Supply Agency, provide two basically different models, followed with the necessary nuances, by the agencies set up under secondary law. The EIB is organized to be largely independent of the Community institutions, and controlled by Member State governments. The Euratom Supply Agency, on the other hand, is brought under the control of the European Commission. A recent innovation in Community practice is to allow the European Parliament to appoint members of the governing board of an agency (with the Environmental Agency).

By far the most independent and powerful of the executive agencies in the Community system will be the European Central Bank. In view of the ongoing debate on these agencies, also in the context of the 1996 Intergovernmental Conference, the institutional structuring of the European Central Bank merits a closer look.[2] But there is, moreover, another reason to do so. The entry date of the third stage of monetary union is approaching, and the present evolution of economic indicators gives a fairly optimistic outlook for a critical mass of Member States being able to pass over the threshold to monetary Union in 1999.

2. Cf. Slot, "The Institutional Provisions of the EMU", in Curtin and Heukels (Eds.) *Institutional Dynamics of European Integration, Essays in Honour of Henry G. Schermers* Vol. II, (Dordrecht, 1994), p. 229.

The European Central Bank (ECB) is the decision-making centre of the European System of Central Banks (ESCB). This system is composed of the ECB, which will have legal personality, and the national central banks (NCB). The organization of this system is in itself an institutional nicety. The national central banks are the shareholders of the European Central Bank. From a company law perspective, the ECB would seem to be a joint venture, the jointly controlled subsidiary of the national central banks, not only because of their capital ownership, but also because of their direct involvement in the policy-making of the ECB. Indeed, the Governors of the NCBs are ex officio members of the Governing Council of the ECB, which is its supreme policy-making organ (Article 12.1 Statute). The Governing Council consists of the Governors of the NCB (without a derogation) and the six members of the ECB's Executive Board who are appointed by common accord of Member State governments at the level of Heads of State and Government. The Governing Council decides by a simple majority (with a quorum of two thirds of its members). On some major issues (for instance: capital increase, transfer of foreign reserve assets) the Governing Council decides by a qualified majority, the members of the Executive Board being excluded from voting (Article 10.3 Statute).

In view of this predominant position of the national bank governors, the ESCB might be compared with a horizontal group of companies (*Gleichordnungskonzern*, *Mehrmutterkonzern*), NCB's and their jointly controlled subsidiary forming an economic unity. This image of economic unity is further confirmed by the obligation to publish a weekly consolidated financial statement of the ESCB (Article 15 Statute) as well as a consolidated balance-sheet. Moreover the Statute imposes a common audit for the annual accounts of ECB and NCB's by centrally appointed accountants. However, the comparison with the structure of a group of companies remains of limited value when it comes to reflecting the institutional complexity of the ESCB. Indeed, the jointly controlled subsidiary has a formal power of instruction, together with possible sanctioning powers, with regard to its parents, the NCBs (Articles 12.1 and 14.3 Statute). Any reference to the phenomenon of a group of companies (*Konzern*) falls short of explaining this construc-

tion. Indeed, one might presume that under any company law system such a relationship would be considered too incestuous to be allowed.

The ECB, as the power centre of the ESCB, constitutes a fully-fledged regulatory agency. The institutional mechanism of the ESCB can be analysed as a separate legal order, while remaining, of course, firmly embedded in the Community legal order. How are the powers distributed in this legal sub-order?

1. Regulatory powers

These powers are distributed between the ECB itself and the Council of the Union, the task of technical rule-making for monetary policy being entrusted to the ECB, while the more fundamental rule-making with regard to the organization of the system itself, is a matter for the Council. One might say that the ECB is the regulator *within* the system (Article 108A EC), and the Council the regulator *of* the system (e.g. under Article 105(6), the Council may confer new tasks regarding prudential supervision of credit institutions upon the ECB; Article 105A gives the Council competence to harmonize denominations and technical specifications of coins; Article 106(5) and (6) grant the Council power to amend various articles of the ESCB Statute and to enact complementary legislation). To exercise its regulatory powers, the ECB can enact regulations and take decisions (Article 34 Statute).

Decision-making procedures for the Council with regard to the exercise of its regulatory powers in respect of the ESCB are rather different from normal EC procedures. One is struck first of all by the extreme variety of procedures. Within the framework of the Treaty Chapter on monetary policy alone the Council may decide according to not less than eleven different procedures. The differences relate to decision-making by the Council (unanimity, qualified majority), the role of the Commission (proposal, recommendation, consultation or none), of the ECB (recommendation, consultation) and of the European Parliament (assent, cooperation procedure of Article 189C, consultation, none). The diminished role of the Commission in some of these procedures has been pointed out, and rightly so. The Commission had to step back

to allow the ECB to play its role in the decision-making. That does not necessarily mean, however, that decision-making by the Council has become more intergovernmental. For the important amending powers of the Council regarding the Statute of the ESCB to be exercised, both unanimity of the Council and assent of European Parliament are required. In terms of democratic legitimacy of Community decision-making, this procedure provides for a double lock.

2. Executive powers

The main executive role within the ESCB falls to the ECB. It exercises powers delegated by the Council and has a general decision-making power to carry out the tasks entrusted to the ESCB (Article 108A EC and Article 9 Statute). The ECB is the operational arm of the ESCB. It acts either directly or through the NCBs. This reflects the classic model of decentralized execution of Community policies. Moreover, and in line with the principle of subsidiarity, the Statute of the ESCB expresses a clear preference for the ECB to have recourse to the NCBs for carrying out operations of the ESCB "to the extent deemed possible and appropriate" (Article 12.1 Statute). Apart from the ECB and the NCBs as executive arms of the ESCB, the Council, too, plays a role in executive rule-making for a number of subjects. The previously mentioned powers of the Council under Article 106(6) EC and Article 42 Statute are mainly of an executive nature. The Commission, which – according to Article 145 EC – is the normal executive for the Community, does not play such a part within the ESCB. And when the Council decides to delegate implementing powers, it may be expected to delegate to the ECB, not to the Commission (cf. Article 34.1 Statute).

The position of the ECB as the main executive within the ESCB is further reinforced in two respects. First of all, it has special powers to enforce respect of its decisions. Under the conditions laid down by the Council, the ECB can impose fines or periodic penalty payments to undertakings. These sanctioning decisions benefit from the regime of Article 192 EC and are thus enforceable within Member States. Moreover the ECB will be the guardian of the ESCB rules with regard

to the NCBs. For that purpose it has similar powers to those of the Commission under Article 169 EC, enabling it to open infringement procedures against an NCB in breach of its obligations under the ESCB and, if the conflict is not solved, to bring the case before the European Court (Article 180(d) EC and Article 35.6 Statute). Decisions in this respect will be taken by the Governing Council of the ECB. It might have been more appropriate to entrust this responsibility to the Executive Board, instead, and not involve the governors of the NCBs in such decisions.

The executive role of the ECB also has an external dimension. It may participate in international monetary institutions and "where appropriate" establish relations with international organizations (Article 23 Statute). The ECB must be able to enter into international agreements for that purpose. However, general treaty-making power with regard to issues of monetary policy, and particularly Community participation in international exchange rate systems, is granted to the Council (Article 109 EC).

3. Judicial powers

The legal order of the ESCB ensures the respect of the rule of law by providing for an adequate system of legal protection through the European Court of Justice. The classic procedures under Community law for legal redress are available against illegal (in)action by the ECB, or in order to obtain damages. Moreover the regulations and decisions enacted by the ECB will enjoy the status of Community law and may be invoked by interested parties in the national courts if the usual conditions for direct effect are met. The preliminary procedure of Article 177 EC will then be available for the national Courts to ensure uniform interpretation of these rules. A rather special illustration of the completeness of this system of legal protection is the possibility for a governor of an NCB to appeal against his dismissal by the competent national authority by means of an action brought before the European Court. This is in sharp contrast with the normal approach of Commu-

nity law, which is not to interfere with the internal organization and institutional structures of Member States.

One might conclude from this brief analysis that within the realm of its powers, the ECB constitutes an independent regulatory Agency with real supranational status. In some respects, the ESCB might even be considered as more centralized or, to use that dangerous word, more federalized than the Community system itself. One might refer to elements such as the power of instruction of the central authority (ECB) *vis-à-vis* the national institutions participating in the system (NCBs), the institutional requirements imposed on the organization of those national institutions (independence from national governments, regulation of terms of office of the governor of the NCB, grounds for his dismissal with possible appeal to the European Court, need of special authorization from the ECB for NCBs to carry out activities outside the scope of their ESCB membership). Another example of the supranational features of the ESCB are the powers of control with regard to NCBs granted to the centrally appointed auditors.

The autonomy of the ECB with regard to both Member States and Community institutions, once again when acting within its own province, is even constitutionally guaranteed (Articles 107 EC and 7 Statute). This autonomy also extends to financing. The ECB will be financed from its own resources, not through the Community budget. All these arrangements were held to be indispensable as an institutional guarantee to allow the development of sound monetary policy. For that reason, the system of monetary decision-making has deliberately been put at a distance from the normal politically organized and democratically legitimated system of decision-making. All this makes the question how the system is to be made accountable even more interesting.

Of course, as far as respect for the rule of law is concerned – it has already been said – the operation of the ECB has been made fully accountable. For the rest, accountability on the part of the ECB works mainly through *transparency*. Transparency towards the public at large, through the various reports (weekly, quarterly, annual) and annual accounts which the ECB will disclose, under the supervision of independent auditors; transparency towards the political institutions

of the Community, because of (again) the reporting requirements and because of the presence (but with no real participation, since they have no voting right) of representatives of Council and Commission in the meetings of the Governing Council of the ECB; transparency towards the European Parliament, because of the annual report, which will be used as the basis for a general debate, and the appearence of the President or a Vice-President of the ECB before the competent EP committees, if the latter so request. Moreover, the European Parliament is very modestly involved in the procedure for the appointment of members of the Executive Board of the ECB. Of course the political institutions of the Community have important powers to amend and to complete the rules of the ESCB. However, they cannot interfere with or correct the monetary policy decisions made by the ECB. Article 8 of the ESCB Statute states as a general principle: "The ESCB shall be governed by the decision-making bodies of the ECB". The message is clear: and by no one else. The only authority capable to stop the system is the collectivity of Member States as "Herren der Verträge" (Article N TEU).

With the completion of this analysis of the institutional characteristics of the ECB, one may wonder what contribution the ECB may make to the general debate on executive agencies and their place within the Community system? In particular, one might think that the ECB presents an example illustrating how far the logic of an agency mechanism can go in terms of autonomy with regard to the normal institutional system of political decision-making. In that respect, the ECB will most probably remain an atypical and unique case. One might add, as a matter of principle that what can still, "à la limite", be considered acceptable for reasons of protecting monetary policy from conjunctural and short term political considerations, will be difficult to defend for other sectors, such as competition or environmental policies. There, an unbridled technocratic form of decision-making, entirely detached from the political, democratically controlled levels of decision-making, should be firmly opposed.

For the time being, there appears to be little chance of seeing this model followed for an EC Competition Agency or an EC Environmental Agency. The Westendorp Report which prepared the 1996 Inter-

governmental Conference, addresses one (flat) sentence to the issue by referring to one member having "put forward the idea of transferring executive powers of the Commission to special agencies". But few things are so uncertain as the outcome of these intergovernmental negotiations.