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## EUROPE: A SINGLE CURRENCY AND A SINGLE CENTRAL BANK?

*Hugo J. Hahn \**

Permit me first to add some biographical data to my sincere thanks for the invitation to speak to you about the important questions of a single and unified European currency and a European central bank within the framework of the Communities. Indeed, I feel all the more honored by this invitation because I was Legal Adviser of the German delegation which, more than thirty years ago, negotiated the treaties on the Common Market.

In 1958, as Legal Adviser of the Organization for European Economic Cooperation, I was witness to the trial by fire of the solidifying process of the young European Economic Community, at the Château de la Muette in Paris. At that time, the continental members of the young supranational institution rejected the demand to enter into a free-trade zone covering all of Europe. This demand had been supported over the previous months by Great Britain in particular. On December 18, 1958, at twelve minutes before midnight, the members informed the head of the British delegation, Anthony Crosland, of their definitive "no." This event led to the membership of the United Kingdom in the EEC as well as the reconstitution of the Organization for European Economic Cooperation ("OEEC") and its continuation in the Organization for Economic Cooperation and Development, the current OECD. Finally, over long years, as attorney ad litem of the Federal Government in the Young Loan Arbitration, which ended on May 16, 1980, I often referred to the legal structure and to the functioning of the European Monetary System ("EMS"), as well as to the "Snake" which preceded it, in order to demonstrate, by reference to the law in force, the procedure for and the consequences of modifying exchange rates in a system with fixed rates at a time when the Bretton Woods scheme was already history. In short, though the subject proposed to me points toward the future, it no less constitutes — and not

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just for the speaker — the reflection of professional experiences and their legal solutions.

Despite the different orientations of the national judicial systems among the Member States, the European Communities are anchored in a common legal tradition. This common tradition includes, among other concepts, the constitutional law principle of the separation of powers. Born in England and formulated mainly in France, this tradition today influences the constitutional life of all the democratic European countries. Against this background of common tradition, it is not surprising that the law of the Community also recognizes a sort of separation of powers, particularly because the fundamental rights flowing from the constitutional traditions common to the member States are part of the general principles which the organs of the community have to safeguard. In this context, it seems judicious to refer not to the separation of powers, but to the separation of functions, since the intergovernmental unions, in general, do not have as many obligations or as much power as the governments of the Member States. Instead, the unions work toward the execution of a specific task that the national administrations seem, for one reason or another, less able to accomplish.

The independence of central banks from the government as to their arsenal of instruments for monetary regulation constitutes a model for the separation of functions in executive power, a model until now realized only at the national level, mainly in Western Europe and in the United States. One cannot stress too strongly that the true reason the government, and in large measure the parliament, were excluded from the legal possibility of intervening in the domain reserved statutorily to the bank of issue was that the power of the executive and legislative branches to intervene at the level of these regulatory mechanisms risks a perpetual temptation to occasionally fail to maintain or re-establish monetary stability. At a notably delicate electoral period for the political parties, it further risks privileging groups which may influence the outcome of elections. In this context, influential voices currently call for the autonomy of the European central bank whose creation, even though not foreseen forthwith, nonetheless already inflames the political imagination.

In such a situation, it cannot be the proper role of a jurist to speculate on political decisions which alone are apt to engender that creation. However, the jurist can propose models which illustrate the legal regulation to which the cooperation between the different organs of a State or a union of States in the monetary domain may be subject, and which serve as examples for the establishment of a European central

bank. Any presentation of instances of monetary cooperation in Europe must begin with a description of the European Monetary System.

First of all, the treaty which established the EEC initially did not include any stipulation envisaging the creation of a European monetary zone. The absence of specific monetary targets ensued essentially from the successful operation of the Bretton Woods accords and their practically world-wide system of fixed exchanges, a system which included the Member States of the Community. These governments were not inclined to consent to any other restriction or to any additional transfer of their sovereignty in favor of an organ of the Community.

The institution of the EMS took place only after the collapse of the monetary order conceived in 1944, a collapse definitively sealed by the new version of article IV of the International Monetary Fund ("IMF") Articles of Agreement after the interlude of the European monetary cooperation known as the "Snake." The objective of the EMS that came into effect on March 13, 1979, was to establish a closer monetary cooperation resulting in a zone of stability in Europe. A system of fixed rates, established in conformity with article IV, paragraph 2b(ii), of the IMF Articles of Agreement and destined to rely on the European Currency Unit ("ECU") in addition to national currencies as a pillar, was supposed to serve this objective. The ECU is defined as a "basket," comprising determined amounts of each currency in the Community. Within the system, it serves the following functions:

- (1) denominator for the exchange rate mechanism;
- (2) basis for a divergence indicator;
- (3) unit of account for measuring operations in both the intervention and the credit mechanisms;
- (4) means of settlement between monetary authorities in the EEC.

The members of the EMS are the States which belong to the Community. However, Greece and Portugal do not yet participate in the exchange rate mechanism. The decisions to be made within the system are essentially the responsibility of the central banks. This is particularly the case with interventions in the currency markets and the borrowing and lending which is indispensable for carrying out these operations in the monetary circuit of the EMS. Their settlement is obtained through the European Monetary Cooperation Fund ("EMCF") which so far has not been able to achieve monetary importance outside of this technical function. The most important decisions, those that concern changes in the central rates, fall within the competence of the governments and the Commission, which always

have allowed the central banks to participate in such decisions. Outside of the EMS, the ECU is used as a unit of account in private business operations. The Commission conceives the ECU to be the basis for the creation of a European currency and thus has tried to encourage such private use of the ECU.

The governors of the EEC central banks, however, have required that this neither entail an increase of liquidity in the Community nor undermine the efficiency of their money market instruments. While acknowledging that the Bank for International Settlement ("BIS") may act as agent of the ECU Banking Association ("EBA") in the operation of the private ECU compensatory clearing system in addition to its function as agent for the EMCF, the governors very clearly enunciated their refusal, for that very reason, to endorse any unification of official ECU and private ECU circuits or any other mixture of the two.

In article 105 Sec. 2, the EEC treaty provides for the creation of an advisory monetary committee to coordinate monetary policy among EEC members and to ensure proper functioning of the Common Market. The body watches the monetary and financial situation of these states and of the Community, as well as their financial transactions generally, and informs the EEC Council and EEC Commission regularly about them. Furthermore, at the request of these two EEC organs, it renders them its assessment, as it is subject to their authority, but also proceeds likewise on its own initiative.

Article 5 of the committee's Rules requires its members to "possess outstanding knowledge in the monetary field. As a general rule, each member state shall select one member from among senior officials of the administration and the other member on the proposal of the Central Bank." Once "appointed . . . in their personal capacity," the members of the committee do not sit as representatives of their respective governments, "but shall, in the general interest. . . of the Community, be completely independent in the performance of their duties." They can be relieved of their functions only if they cease to meet the required criteria, though these criteria are indeed defined rather sweepingly in the "Rules." The short duration of their mandate — only two years — attenuates the independence of the committee's members. The term of duty, however, can be renewed.

Like the monetary committee, the "Committee of Governors of the Central Banks of the Member States of the European Economic Community" ("Governors' Committee"), owes its existence to article 105 of the EEC treaty which requires EEC members to coordinate their economic policy and to establish cooperation between their cen-

tral banks. To this end, a Council Decision of May 8, 1964, set up the Governors' Committee. The Governors' Committee is comprised of the governors of the national institutes of issue and, as a rule, a member of the commission as the latter's representative. The decision does not contain any other clauses which set forth or imply a link between the committee and other organs of the Community, except that the commission may require its convocation. One could thus deduce, by interpreting the express clauses concerning the EMCF Board of Governors that, *e contrario*, the Governors' Committee is not subject to the instructions of any Community organ.

To a considerable extent, the increase in the density of cooperation between the member States of the Community has been due to EEC institutions. This is not surprising as regards the EMCF and EMS since the Fund has been the most recent implementation of the objective enunciated by the Werner Plan. The Werner Plan calls for the establishment, within 10 years, of a monetary and economic union with a unique central bank, while EMS initially was to function in its present form for a transitional period of two years only. In the meantime, the evolution of monetary policy in the Community indeed tends to favor the setting up of a European central bank, the basic traits of which have remained in the forefront of any pertinent discussion since mid-1988. The attempt to enact EEC-wide fixed exchange rates as well as the attempt to maintain national sovereignty over the currency and national monetary jurisdiction (though with the restrictions imposed on EEC members by "central rates" ensuing from the law of the Community), are no longer felt to be compatible with the target of the European Monetary Union. Rather the transfer of the power to enact monetary policy to the Community, more precisely to an establishment that remains to be created within the Community, seems to be needed in the future.

Even before the committee was formed, U.S. central banking in the guise of the Federal Reserve System had often been referred to as a model for the unique European institute of issue. Since that time, this opinion has also been put forth by a member of the group chaired by Monsieur Delors. The advantages of this system entice on two levels. First, it suggests a federal central banking structure similar to the American system which, at the outset, provided the individual Reserve Banks in the United States with significant means of money market intervention and encouraged the generous use of regional autonomy in actual practice. Since then, the Federal Reserve system has moved rather toward centralization, evidenced by the current inclination of the various Reserve Banks to pursue a unitary rather than autono-

mous monetary policy without excluding the formative and controlling influence of their respective presiding officers on the elaboration of monetary targets and their implementation within the United States as a whole. The Federal Reserve System, moreover, gives pride of place to its other decisive trait, its unfettered functional independence from the federal executive, an independence amply rounded off by the long tenures of the Federal Reserve Board's members and of their colleagues which head the constituent local units.

The system of the *Bank deutscher Lander* ("BdL"), instituted in West Germany after the Second World War to exercise the functions of an institute of issue before being transformed into the *Deutsche Bundesbank* in 1957, is certainly less well-known abroad than the Federal Reserve System, with which it nevertheless has a number of points in common. This similarity explains why mainly German authors take this model as a blueprint for a European central bank.

The occupation of Germany by the Allied Forces and its division into four zones of occupation entailed the complete cessation of the activities exercised by the *Reichsbank* as the institute of issue. Initiated in 1946 by the military government within the U.S. zone of occupation, the *Landeszentralbanken* became the central banks of the newly constituted *Länder*, the territorial and political subdivisions of the nascent Federal Republic. The *Landeszentralbanken* assumed, due to the *fiat* of the occupation authorities, all the powers traditionally given to institutes of issue or, in comparison to the U.S. Federal Reserve System, the individual Reserve Banks, but were denied the power to issue banknotes and coins. The banking operations were managed by a Directorate whose chairman was appointed by the Prime Minister of the Land concerned, while the other members were named by the council of administration. That council was comprised of representatives of business organizations and trade unions as well as spokesmen from the major political parties and was charged, in particular, with determining the bank rate and the various interest rates and the percentage of minimum reserves to be held by commercial banks under instructions from the *BdL*.

It was only in 1948 that the *BdL* was set up as a common undertaking by the *Länder* central banks under the unanimous authorization of the three western occupying powers. The Central Bank council, principal organ of the *BdL*, declared that the *BdL* would carry out the overall monetary policy, in particular, the bank rate and the interest rates derived from the bank rate. Executive power was generally reserved to the *Länder* central banks, which alone could operate business transactions with the commercial banks. The *BdL*,

however, only had capacity to act as bank of last resort vis-à-vis *Länder* central banks, foreign central banks, and governmental authorities. The *BdL* thus combined traits of a federal structure with the power to make nationwide regulatory enactments, a combination susceptible, indeed, of serving as a suitable model for a European central bank. Unlike the Federal Reserve Board which only defines the policy of the system and leaves the execution of it to the Federal Reserve banks (its regional components), the bank could freely pursue its own policy. That freedom strengthened its position with regard to the *Länder* central banks, which had to secure from it, through banking channels, the coins and banknotes put out exclusively by the *BdL*. The *Länder* central banks had to maintain the obligatory minimum reserves at the *BdL*.

The European Investment Bank ("EIB"), the only banking entity provided for in the law of the Community, seems to have attracted less attention than the *BdL* in the present context. This is all the more striking because the EIB ensues from a persuasive effort not only to keep the interests of the Member States compatible with those of the Community, but also to honor the needs of a bank which operates in the financial markets with a certain autonomy. The unique position conferred by these traits was recently summarized by the Court of Justice of the European Communities which found that the bank is endowed, by virtue of article 129 of the EEC treaty, with legal capacity distinct from that of the Community and is administered and managed by its own organs according to the provisions of its statute. To perform the tasks entrusted to it by article 130 of the EEC treaty, the bank must be in a position to act in total independence within the financial markets. Acknowledging such a functional and institutional autonomy of the bank does not detach it entirely from the Communities. The basic traits of the bank's ambivalent position is, on the one hand, its functional independence in the management of its business and, on the other, a close link to the Community with regard to its objective.

Functional autonomy within the domain of its competence is in essence the assessment by the Court of the legal situation experienced by the EIB in the structure of the Community. This formula was previously enunciated to describe the independence of the *Bundesbank* vis-à-vis the Federal executive. One must wonder how such freedom of action will be obtained in the case of the EIB. The answer lies in the structure itself of the EIB organs.

The board of governors, the supreme body of the bank, is composed of ministers named by the Member States. As such, the Member



States have recourse to the same persons that are on the council of the Communities, although no express provision to that effect exists. The texts do not anticipate the presence of the EEC Commission on the Board, although the Board, as a rule, invites members of the Commission to its meetings. The directives of the board of governors insist upon "the interest of the Community," which the bank must respect under article 130 of the EEC treaty, a duty which does not arise only from that provision. This calls for comparison with the clause in the *Bundesbank* statute which on the one hand makes the bank independent from instructions of the Federal executive in monetary matters, but on the other hand commits it to support the national government's general economic policy.

The EIB board of directors holds exclusive power of decision over the granting of loans and guarantees and the issuing of loans. The board is also responsible for determining interest rates and securing proper management consistent with the directives of the board of governors. The board of directors is composed of a large number of members, since the arrival of Spain and Portugal, 22 ordinary members and 12 deputies. It serves as a group of experts with minimum political influence and reflects the quasi-federal structure of the Community.

Finally, it is fitting to refer to the EIB Management Committee named by the board of governors at the suggestion of the board of directors. During their six years of tenure, its members may be dismissed. Such a decision requires a majority vote by the board of governors and presupposes a recommendation from the board of directors, also by majority vote. However, there has never been a recourse to the pertinent provision. It is the responsibility of the Management Committee to prepare the decisions of the board of directors. The chairman of the board of directors is not only the "*primus inter pares*" (i.e., first among equals in that body) but also presides over the Management Committee. The president thus serves as a link between the two organs of the bank. A comparative study of the EIB has to extend to the Court of Justice its assessment of the bank's place in the law of the Community — again, functional autonomy on the one hand, submission to the objectives of the Community on the other. Indeed, the jurisdiction of the European Court of Justice over the acts of the bank and its organs is set forth in article 180 of the EEC treaty which confers on the board of directors the faculty to invoke judicial action in order to compel Member States to respect their obligations. Article 180(c) subjects decisions by the board of directors to the control of the court at the request of a member State or the EEC commission on the ground that the granting of credit has involved vices of

form. The latter jurisdictional clause serves as a reminder that even as an instance of control, the supra-national judiciary has to honor the limitations inherent in its calling.

It is too soon to predict if, and when, a European central bank may start to operate and what influence the institutions presented here as models could have on its structure. Yet as a matter of community law, the trail leading to such an institution has already been blazed. Article 102a, inserted into the EEC treaty as a result of the Single European Act, endorses the result of the debate on reform by encouraging Member States to make an effort toward greater convergence of their economic and monetary policies. The experiences acquired in the operation of the EMS and the development of the ECU must be taken into account, but do not offer the only possible models of monetary integration in Europe. If the development of the ECU goes ahead, a formal procedure of amending the EEC treaty may be indispensable because its article 236 would seem to require application in the case of institutional modifications as spelled out by article 102a of the EEC treaty, though one may regret the ponderous procedure thus to be initiated. But as the setting up of a European central bank would entail substantial cuts in the sovereignty of Member States, simple governmental decisions would be a dubious vehicle for bringing about these relinquishments, for example, under article 235 of the treaty without the participation of the parliaments.

If I would terminate here with no explanation, one could reproach me for not having dealt with half of the question — the legal aspects of a single and unitary European central bank and the legal conditions of a single and unitary European currency. I have left the second part of the title without comment until now. The reasons, however, that I did so are the same as those that cause me to refrain from formulating political advice or legal policy on the normative status of a common central bank. In the latter case, my reservation was motivated by the double task of the jurist, which is, on the one hand, to apply existing law, and, on the other hand, to translate political decisions into rules of conduct and assessment, rather than to contradict norms of higher rank and therefore fail to respect their goal. The two conditions are entirely lacking in the discussion among the political authorities in the Community regarding the legal status of a European central bank. There are no rules of law that can be applied in this domain, nor political decisions capable of being translated into legal rules. This is the reason why I mentioned, in the autobiographical prologue, projects which I have lived through personally. Then and there, it was a matter of applying positive law on the one hand, while on the other, clear

political decisions permitted the jurist to practice his profession. The references to historical and political instances borrowed from the contemporary law of intergovernmental financial institutions make it apparent that structurally the assignment of pertinent domains from Member States to the Community might be envisaged. Yet, as the examples prove, political decisions to that effect are not the business of the jurist.

A first part of the answer to the question of the creation of a single, unique European currency repeats the position set forth already with regard to the European central bank due to the silence of political leaders. At the same time this part of the answer would not be complete unless rounded off by a reference to the history of monetary law and to the practice of emerging unions of States. Indeed, there has never been a federal State (that is, a union of States functioning under a national constitution), nor a confederation of States (that is, an association of States subject to public international law) that equipped itself with a new common currency forthwith when it had just become a single monetary area. This historical fact is proven by the monetary history of the United States as well as the union of the German states and cities after the Napoleonic wars and the regrouping of the German territories by Bismarck. In all the cases whose history it is possible to trace, the currency of each Member State was maintained first, even after the setting up of a single institute of issue. It was only later that there appeared, more or less rapidly, a common currency having the same value throughout the territory of the association.

The first lesson to draw from this historical overview is that it is appropriate to moderate impatient appeals which call for juridical formulae for a single currency because these appeals put the cart before the horse. Certainly there are supplementary reasons ensuing from the present situation that plead in favor of a moderate pace, reasons that are found in each of the cases mentioned here. The creation of a new monetary unit and agreement about its name and value inside the Community and abroad should be placed in the hands of the authority that would have to put the new unit into circulation and manage its introduction and use. The more experience this authority has been able to gain in surveying cooperation among Member States and their civil servants, the better it will accomplish its task. The same holds true in approximately equal measure for the parliaments concerned in the Community and its Member States, as well as for the politically important member governments' administrative institutions. The judiciary in the Communities and the Member States may not need such advance experience. Obviously, however, the courts can benefit from a

sort of trial period during which they have an opportunity to assess the conduct of the new common monetary authority.

In short, if a monetary union is to evolve within a common monetary area, a unique currency for the Communities remains indispensable. Such a currency, however, should not follow immediately upon, nor precede, the setting up of the single European authority, but ought to be the outcome of a probationary test in the practice of the new institutions.

The dialogue over monetary union received a new impetus in 1989 due to statements made by members of the French government, especially the minister of finance who repeatedly asserted that the time had come to investigate the possibility of creating a European central bank that would administer a common currency, the ECU. The German Vice-Chancellor took up these proposals in a Memorandum on the creation of a European currency zone and a European central bank. The statement not only declared that a European currency zone with a European central bank was an economically necessary complement to the European domestic market, but also proposed that the European Council should appoint a "Council of Wise Men." For this purpose, the heads of state set up a committee to study the concrete stages in the realization of an economic and monetary union and to submit useful proposals to the Council. The committee was chaired by the president of the EEC Commission, Delors. Its members included the heads of the members' central banks, along with one member appointed by the Commission and three by the European Council. The Committee, soon known as the "Delors Committee," produced a Report on Economic and Monetary Union in the European Community. The report envisages the realization of this goal in three stages, within the framework of a unified process so that the decision initiating the first phase also represents a decision for the project in its entirety. The first phase began on July 1, 1990, the date on which the total liberalization of capital movements was accomplished. No firm deadlines were given for the remaining stages. In the view of the Delors group, the purpose of the first phase is to work out pertinent changes in the EEC treaty. This would then set the stage for the next two stages in which responsibility for monetary policy will be transferred from the Member States to a European System of Central Banks ("ESCB").

The important contribution of the first phase to the overall plan should lead to stronger rapprochement in economic development through improved cooperation in economic and monetary policy. In principle, the existing institutional framework offers the possibility of attaining the result. Indeed, changes in the EEC Convergence Deci-

sion of 1974 could introduce multilateral supervision of economic development and monetary policy based on agreed criteria, as well as a new procedure for coordination of monetary market policy. In both cases, the recommendations of the European Central Bank Governors Committee are to be taken into consideration. The responsibilities of this body must be reevaluated with a view to the possibility of assessing national decisions on monetary policy, such as the specification of annual money-supply goals. This could be done, in particular, by means of a majority decision, although it would not be binding in law yet. In this first phase, it would be important to include the currencies of any and all EEC members in the EMS exchange-rate mechanism. National legislation in each stage should grant an equal degree of autonomy to its central bank on the lines of the independence enjoyed by the Federal Reserve Board vis-à-vis the U.S. Federal Government. The effectuation of the amendments to the EEC treaty entails the opening of the second phase which includes the setting up of the ESCB. It would evolve from the coordination of national monetary policy by the Committee of European Central Bank Governors to the development and implementation of a common monetary policy envisaged for the final phase, for which the ESCB itself would be responsible. The second stage may thus be regarded as a learning process leading to collective decisions, while the ultimate responsibility for policy tenets remains with the national authorities.

The third stage would begin with the operation of the economic and monetary union and bring about the irrevocable locking of the exchange rates among the currencies of EEC members; exhaustive, complete and unmodifiable convertibility of the currencies; unrestrained freedom of capital movements; and full integration of financial markets. At the same time, the institutions of the Community would be endowed with the necessary decision-making powers. For example, these institutions then could enact binding guidelines for the national budgets. Such guidelines have two important functions. First, they prevent the endangering of monetary stability caused by budget deficits. Second, they bring about a unique financial and fiscal policy which allows the Community to attain its domestic and foreign economic goals. The ESCB would assume full responsibility for monetary policy. A common currency evolving from the ECU would replace national currencies.

In accordance with the principle of subsidiarity, the Delors Report generally does not regard the creation of new institutions in the realm of economic policy as urgent at the present time. A common monetary policy, however, would require a new institution, since concerted

action is unlikely to result from independent decisions and market interventions by individual central banks.

The Delors Report views the ESCB as compatible with the federal model, consisting of a central institution and the national central banks. As instrumentalities of the system, the report introduces (1) the ESCB Council comprising the Governors of the EEC national central banks and the members of the ESCB Directorate, and (2) the Directorate itself, the members of which are appointed by the European Council. According to the Delors Report, the ESCB Council has the power to determine the Community's monetary policy, including the exchange-rate policy toward third currencies. The Directorate keeps track of monetary developments and supervises the implementation of common monetary policies. The national institutes of issue must carry out these policies in accordance with regulations enacted by the ESCB Council and its instructions thereunder. The ESCB first and foremost would be committed to price, *i.e.* monetary stability. Only insofar as reconcilable with this primary objective, the ESCB might support the economic policies decided by the political agencies of the Community. The Delors Report enumerates the following responsibilities of the ESCB:

- (1) Concept and implementation of monetary policy;
- (2) Surveillance of exchange rates;
- (3) Administration of currency reserves;
- (4) An efficient system of payments;
- (5) ESCB's shared role in the supervision of banks and other purveyors of credit.

The Delors Report refrains from spelling out the instruments of monetary policy available to the ESCB. Nevertheless, it does set forth that, with the means at its disposal, the ESCB should be able to carry out central banking functions on the securities and money markets, as well as exercise regulatory powers. Open-market transactions with national instruments of indebtedness would still be authorized, unless they entailed extension of credit to corporations under the control of national governments or their internal subdivisions. The Delors Report conceives the ESCB as an entirely independent body under the law of the Community. Its council would not be subject to directives from the national governments or EEC agencies. An appropriately long term of office would guarantee the members of the ESCB personal autonomy. The ESCB should have to report annually to the European Parliament as well as to the European Council. Administratively, the Delors Report places the ESCB under the surveillance of a college of independent auditors which could control the accounts of the entity.

The Delors Report does not give any concrete date for the beginning of the second and third stages of an economic and monetary union. The resolution of the European Parliament of April 14, 1989, on the development of the European currency integration, however, aims at the realization of European monetary union by January 1, 1995. This parliamentary text also merits attention because it includes a comprehensive draft project proposing a charter for the European central bank. The transitional phase, however, remains as unspecified here as in the Delors Report. The European Parliament suggests that this phase should begin on January 1, 1993, a time frame considerably later than the first phase as envisaged by the Delors Committee.

It is true that by now all Member States have joined the EMS. Their participation in the exchange-rate mechanism of this system varies, however. The resolution of the Parliament deals with the issue in two ways. First, in agreement with the Delors Report, it calls for participation of all Member States in the exchange-rate mechanism under the same conditions, as well as the step-by-step elimination of the margins of fluctuation by January 1, 1995. Second, the Parliament recognizes that such advances will require a sufficient degree of economic and social convergence. It therefore refers to the concept of graduated integration, though emphasizing at the same time the joint responsibility of all Member States for the advent of economic and monetary union. In the view of the Parliament, participants in the exchange-rate mechanism should institutionalize their cooperation in economic and monetary policy by January 1, 1993, by means of a European Central Bank Governors Council and a European Economic and Financial Council. Together with the Commission and Parliament, these institutions will blaze the trail for monetary union. The Governors Council would concentrate primarily on the coordination of money-supply and interest policies, while the Economic and Financial Council would determine the key dates for money markets and financial policies. The European monetary union will be in existence by January 1, 1995, although perhaps only for those Member States that are willing and capable — essentially, the participants in the EMS exchange rate mechanism. The European central bank represents the heart of the monetary union — the Community-wide institution of a European central banking system — in which the institutes of issue of all members of the monetary union participate. The responsibilities, organization and power of the bank can be found in the European Parliament's draft status of the statute of the European central bank. It so closely follows sections of the German Federal statute establishing the *Bundesbank* (*Bundesbankgesetz* — *BBankG*) that it will suffice to

trace the rather minor differences here. The federal structure of the projected reserve system is expressly emphasized in article 2 of the draft statute. The concept of a federal structure is borne out by the retention of the power to enforce monetary policy on the basis of resolutions of the European central bank council comprising representatives of the existing national institutes of issue. The European Parliament at the outset specifies the responsibilities of the European central bank in language practically identical with Section 3 of the *BBankG*. Under the same provision, it receives jurisdiction over banking surveillance. The central bank has to secure cooperation with the appropriate international organizations in the monetary field with a view to the maintenance of border-crossing currency stability. While the parliamentary project defines the relationship between the bank and the institutions of the Community in language identical with the pertinent provisions of the *BBankG* and therefore safeguards the independence of the European institute of issue, it also calls for mandatory reporting to the European Parliament. The organs of the bank are the European central bank council and the Directorate. Participation by members of the European Parliament in the appointment of the Directorate differs from the statutory German model, the *BBankG*. The draft text assigns to the European central bank the powers to determine pertinent interest rates and to enact minimum reserve percentages. Notes issued by the bank and denominated in European Currency Units ("ECU") are to be the only unrestricted legal tender in the Community. Yet, along the lines of existing German law, the authority to mint coins remains with national governments, subject of course to Community regulations securing common standards of weight and composition.

In comparison with the two proposals described here, another pertinent project has attracted less attention. It was drafted and released to the media on May 16, 1989, by a team from the Centre de Promotion et de Recherche pour la Monnaie Europeene ("CEPREM") in Lyons, under the direction of the Principal Legal Adviser to the National Bank of Belgium, Professor Jean-Victor Louis. The European Council assigned the task of exploring the stages leading to economic and monetary union to the Delors Committee. The membership of the CEPREM group, however, comprises primarily central-bank lawyers and teachers of law. CEPREM desired to develop a text setting forth elementary treaty provisions required for the establishment of a European Central Bank in the final phase of the evolution towards monetary union. The CEPREM proposal differs from the resolution of the



parliament in that it is merely a basis for future negotiations rather than an anticipation of political decisions.

The CEPREM team presented a draft which amends the EEC treaty and inserts the principal features of the European reserve system into the constitution of the Community as well as a proposal for a bank statute. The European Parliament, on the initiative of the EEC Commission, would have to approve this statute by an absolute majority and the EEC Council by a qualified majority. The proposed amendment to the EEC Treaty commits the Community to the enactment, step by step and within a specified time limit, of the texts required for the completion of monetary union. The monetary union will have a unique monetary unit denominated the "ECU", pursue a common domestic and foreign monetary policy and comprise a single European central bank system including a European central bank. That central bank would have legal capacity as a corporate entity under the law of the Community. Its main responsibility would be the enactment and implementation of a common monetary policy guaranteeing stability of the ECU. Under the CEPREM project, the bank would enjoy independence from the European executive branch and operate autonomously, similar to the U.S. Federal Reserve System. In particular, the plan prevents the bank from seeking or accepting directives from the institutions of the community or from the governments of the Member States. National institutes of issue would continue to exist. To guarantee the uniformity of monetary policy, these national central banks are, in principle, subordinate to the central institution. Enactments of the national banks would be subject to prior approval by the European central bank. Moreover, the European central bank would have the power to delegate specific tasks to one or more national central banks.

CEPREM, in accordance with the practice in other federal central bank systems, envisages a bank council comprising the governors of the national central banks and the Directorate of the European central bank which determines the general guidelines of and decisions regarding monetary policy. The council also includes a representative of the EEC Commission who may issue a veto entailing, on the lines of the Federal German *Bundesbank* statute, the temporary suspension of the decision concerned. The Directorate has responsibility for the administration of the bank, while the governor is in charge of its current operation. The significant feature of the appointment procedure for members of the Directorate resides in the involvement of the European Parliament. The latter's identical proposal thus receives endorsement by CEPREM.

Equally, the proposal defines the powers of the bank in the field of monetary policy through the terms used by the European Parliament. CEPREM grants the European central bank the faculty to carry out any and all transactions required for accomplishing its tasks, unless expressly prohibited. Likewise, this language appears not only in the CEPREM amendments to the EEC treaty, but also in the statute of the bank proposed by the same authors. The functions of the European central bank comprise the traditional money market instruments of national monetary authorities, including the disposal of reserve positions in the IMF. The only operation expressly prohibited is the financing of public budget deficits. The European central bank may enact general decisions in order to carry out its responsibilities in the field of monetary policy, require credit institutions to maintain certain minimum reserves, and influence the credit transactions of credit institutions by determining interest rates for deposits and loans from the national institutes of issue.

A synopsis of the three texts reveals their broad agreement on the salient features of a European central bank. The differences ensue from the purpose of each text. There is agreement on the duty of the institution to maintain the value of money and on the independence of the European central bank from directives and instructions of the EEC Council and EEC Commission when implementing monetary policy. Regarding the organization of a European central bank, all three texts favor federal models in which the national institutes of issue participate in the execution of the uniform monetary policy and in law-making and rule-making through the community-wide system since their governors represent them on the central bank council. Differences relate primarily to the specifics of the plans. They probably ensue occasionally from the absence of a more thorough analysis so far. As to independence, for example, the Delors Report proposes for the European central bank the status of an autonomous agency of the Community not subject to directives from the national governments or the organs of the Community. Under the influence of the *BBankG*, the draft by the European Parliament acknowledges the same principle, yet does not mention the freedom of representatives of national central banks serving on organs of the European central bank from the directives and instructions of their proper national governments. At the same time, however, CEPREM refers to the future central bank as an "*établissement public*," whereas the parliamentary plan speaks of a corporate entity with legal capacity under EEC law and thus may be aiming at an institution substantially separate from the EEC. On the other hand, to perceive the power of the European central bank as

“*établissement public*” could point to a power of surveillance over the bank. Under French law, such an establishment of a public law nature assumes certain functions at its inception *ex officio* for largely independent execution. Yet an establishment of that nature remains subject to state supervision. The legal capacity of a corporation easily permits interference by potential supervisory authorities. Similar difficulties arise under Community law in the definition of the European Investment Bank and its relationship to the organs of the Community culminating in the grant to that bank of legal personality, *i.e.*, capacity.

The prominent position the Delors Report gives to the European Council has no counterpart in the two other proposals. To begin, the EEC Council appoints the members of the European central bank Directorate. Second, the bank is accountable to the Council as well as to parliament. If duly summoned, the president of the ESCB has to report to the European Council. It thus takes on a new character as an organ of the Community. In addition to statements on political principles, it now equally makes legally obligatory decisions on individual items.

Unlike the organization of the European central bank, the substance of its jurisdiction over monetary policy and the means for its implementation receive only scant attention in the CEPREM draft treaty. To assert that the bank has the power to carry out all transactions not prohibited amounts to a no-load formula. The faculty to make decisions of a general or individual portent in execution of functions presupposes an enumeration of the transactions and market initiatives the bank is to survey and control. True, pertinent provisions are set forth in the CEPREM draft statute. One may wonder, however, whether the elementary prohibition of budget deficit financing, which the parliament's project does not even mention, ought not to find a place in the text of the treaty itself. Moreover, the power of the European central bank to require minimum reserves merits a more specific assignment than is present in the language of the parliamentary draft or the CEPREM statute. True, only credit institutions are meant to maintain minimum reserves. However, the European central bank's power over the shaping of banking conditions (in particular, interest rates on loans and deposits) would seem to require more incisive restraints than the mere general announcement that such power could be exercised for a limited period only. At this point, the question arises whether such broad, unspecified grants of executive authority to the European central bank can satisfy the precept that civil rights may be narrowed only by means of a normative enactment

based on conclusive reasoning, even if the European Court of Justice is sometimes less prepared to grant constitutional protection to corporations than to private persons.

The Single European Act of 1986, in force since 1987, inserted into the EEC treaty article 102a which recommends that consideration be given to the experience gathered during the operation of the EMS and in the use of the ECU. It also asks that the present legislative and executive jurisdiction be respected. It requires, furthermore, the application of article 236 of the EEC treaty, which grants each EEC Member State the faculty to prevent an amendment from being passed against its disposition through the provision that a treaty revision requires ratification by all the signatories.

The unequivocal provision of article 102a of the EEC treaty could bar the result sought by the European Parliament — the establishment of a European Central Bank Governors Council and a European Economic and Financial Council by means of a separate agreement between those Member States that participate in the EMS exchange-rate mechanism. The attraction of such a distinct scheme would be precisely the avoidance of the complicated process required by article 236. In practice, article 102a of the EEC treaty does not seem to deny the prospects of separate yet more intense monetary cooperation among some EEC members. Thus, for example, one of the functions of the Franco-German economic and financial council set up by a bilateral convention in 1988 (concluded without endorsement by the Community) consists *inter alia* in the assessment of the monetary policy pursued by either state, jointly and separately in the European realm with the goal of reaching as broad an agreement as possible. That seems to suit the purpose of article 102a of the EEC treaty. For the first phase of the process establishing European economic and monetary union, the Delors Report proposes strengthened coordination of pertinent national policies. This goal should be served by the amendment to the resolution on cooperation between EEC members' national central banks approved by the Madrid European Council session in June 1989. True, article 102a of the EEC treaty is probably not restricted to institutional changes, but also applies to the assignment of new responsibilities to existing agencies when the scope and substantive weight of those changes lead to an incisive loss of sovereignty on the part of the Member States. Otherwise, it might be possible to endow the existing organs of the Community (Council, Commission, Monetary Committee and Committee of Central Bank Governors) with the powers required for economic and monetary union. The projected evolution seems unlikely to go beyond this goal.

The conclusion of this introductory survey would therefore amount to the acknowledgement of a dual affirmation ensuing from article 102a of the EEC treaty. It remains doubtful on legal grounds whether the establishment of a unique European central banking scheme by assigning additional, yet in no way novel, powers to existing national and supranational bodies requires recourse to that provision which would make the process subject to unanimous approval by any and all EEC Members. Yet, in all likelihood, ratification of the treaty amending the basic EEC compact will be sought in order to avoid subsequent political controversy or even litigation. The prudent approach will thus again retain pride of place. In conjunction with the waiver by the majority of EEC members and their central banks of any definitive timetable for the advent of the second and third phases envisaged by the Delors Report (as expressed at their most recent Rome meeting in September 1990), the calendar of progress toward European Monetary Union excels anew by the discretionary margin which has been its significant trait before.