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EUROPEAN CENTRAL BANK

EUROSISTEM

## LEGAL WORKING PAPER SERIES

NO 4 / JUNE 2007

# PRIVILEGES AND IMMUNITIES OF THE EUROPEAN CENTRAL BANK

by Georg Gruber  
and Martin Benisch



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# PRIVILEGES AND IMMUNITIES OF THE EUROPEAN CENTRAL BANK

by Georg Gruber<sup>1</sup>  
and Martin Benisch<sup>1</sup>



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## Abstract

*The European Central Bank (ECB) is one of the few international/supranational institutions based on German territory. As with other international organisations, the ECB enjoys privileges and immunities in order to ensure its independence and proper functioning. This status is sometimes compared to the extraterritorial status of embassies and consulates. However, a closer analysis shows that this conclusion requires some correction and qualification. A supranational institution is confronted with the issue of its status in the host country in a multitude of circumstances, from the legal basis for its exemption from national law, to the extent of its immunity as regards jurisdiction and enforcement, to how all this is applied in practice, in particular as regards labour law and taxation.*

*The purpose of this paper is to explain the scope and content of the privileges and immunities granted to the ECB and to illustrate some of the practical legal problems on the basis of examples. In Part I we examine the extent to which the ECB is exempt from national law, in particular German law. In Part II, we discuss the ECB's immunity from jurisdiction and enforcement. Part III deals with the privileges and immunities granted to the members of the ECB's Executive Board and its staff. Part IV contains an examination of some of the problems that arise in practice when implementing the rules on privileges and immunities.*

## Introduction

The European Central Bank (ECB) as a supranational organisation created on the basis of the Treaty establishing the European Community (EC Treaty) enjoys privileges and immunities vis-à-vis the EU Member States. In this context the term ‘privileges’ means that national legislation is either not applicable to the ECB or is differently applicable<sup>1</sup>. Thus the ECB is partially exempt from national laws. In contrast to this, ‘immunities’ (immunity from jurisdiction and enforcement) do not affect the applicability of national law but its enforcement. National authorities and national courts are prevented from enforcing it by means of constraint<sup>2</sup>.

Such privileges and immunities are not unusual in public international and Community law. All international and supranational organisations enjoy privileges and immunities vis-à-vis their member states in order to enable them to perform their tasks independently and impartially<sup>3</sup>. If an international organisation were subject to national law, a member state (in particular the host state) could exert undue influence on the organisation’s activities.

Privileges and immunities are granted on the basis of public international or Community law. They are usually laid down in the organisation’s statute and/or in the headquarters agreement between the international organisation and its host state.

The legal basis of the privileges and immunities granted to the ECB is Article 291 EC. The provision reads as follows:

‘The Community shall enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of its tasks, under the conditions laid down in the Protocol of 8 April 1965 on the privileges and immunities of the European Communities. The same shall apply to the European Central Bank, the European Monetary Institute, and the European Investment Bank.’

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<sup>1</sup> Cf. Schermers and Blokker, p. 251.

<sup>2</sup> Cf. Schermers and Blokker, pp. 251-252.

<sup>3</sup> Dupuy and Scobbie, pp. 833 et seq.; Weisberg, pp. 142-146; Seidl-Hohenveldern and Loibl, p. 273.

That provision is reiterated by Article 40 of the Statute of the European System of Central Banks and of the European Central Bank ('ESCB Statute') which provides that

'The ECB shall enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of its tasks ...'

These general provisions are implemented by the Protocol on the privileges and immunities of the European Communities of 8 April 1965 ('Protocol')<sup>4</sup>. The Protocol is an integral part of the EC Treaty and is binding on all Member States of the European Union; it takes precedence over national law<sup>5</sup>. Since privileges and immunities primarily concern the relationships with the host state of the territory where the organisation is established, on 18 September 1998 the ECB located in Frankfurt and Germany as the host state concluded a headquarters agreement implementing the Protocol ('Headquarters Agreement')<sup>6</sup>. The Headquarters Agreement is an agreement under public international law and is binding on the German legislator and the German authorities. It is not binding on other Member States.

The status of international organisations under international law is similar to that of sovereign states. Both enjoy privileges and immunities vis-à-vis other states. However, the scope and nature of their respective privileges and immunities differ. Whereas states enjoy worldwide unlimited immunity for *acta iure imperii* (activities undertaken in the exercise of their sovereign powers), they are not immune with regard to *acta iure gestionis* (activities which are not part of the State's sovereign power, such as the procurement of shoes for soldiers)<sup>7</sup>. In contrast to this, in principle international organisations enjoy full immunity for all their actions regardless of their nature<sup>8</sup>. However, their privileges and immunities

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<sup>4</sup> Protocol No 36 on the privileges and immunities of the European Communities (OJ L 152, 13.7.1967, p. 13), as amended by the Treaty of Nice (OJ C 80, 10.3.2001, p. 1).

<sup>5</sup> Schmidt, in von der Groeben/Schwarze, Art. 291 EG und Protokoll Nr. 36, No 3.

<sup>6</sup> 'Abkommen zwischen der Europäischen Zentralbank und der Regierung der Bundesrepublik Deutschland über den Sitz der Europäischen Zentralbank vom 18. September 1998', *BGBl.* 1998 II, p. 2745.

<sup>7</sup> Seidl-Hohenveldern and Stein, pp. 270 et seq.

<sup>8</sup> Austrian Supreme Court (OGH), judgment of 11 June 1992, 7 Ob 627/91, *RIW* 1993, 237, 238 with the assenting note of Seidl-Hohenveldern; Cour de Cassation, Chambre sociale, judgment of 30 September 2003, *Bulletin* 2003 V, No 245 and Cour de Cassation, 1ere Chambre civile, judgment of 28 October 2003, *Bulletin* 2003 I, No 212 annulling the judgments of lower courts which had refused immunity to an international organisation (Union latine) in employment law disputes. The lower courts had wrongly applied the distinction between *acta iure imperii* and *acta iure gestionis*. See also Arbitration Award of 29 June 1990 concerning a dispute between Germany and the European Molecular Biology Laboratory (EMBL) based in Heidelberg (reported by Kunz-Hallstein, *NJW* 1992, p. 3069, 3072); Kunz-Hallstein, *GRUR Int.* 1987, p. 819, 822; Rensmann, p. 314; for a different opinion see Ehlers, in Schoch/Aßmann/Pietzner, Vorbemerkung § 40, No 47.

are limited in two ways. First, the geographical scope is in principle limited to the states which are members of the international organisation in question<sup>9</sup>. Third countries are not bound by the rules laid down in an organisation's statute unless they have explicitly or implicitly recognised the international organisation. In this context the recognition of the ECB by the US Government is of particular importance<sup>10</sup>.

Second, the privileges and immunities granted to an international organisation are conditioned by the organisation's functions (*principle of functional immunity*)<sup>11</sup>. The reason underlying this principle is that international organisations are not sovereign entities like states. They are created by their member states for carrying out specific functions. Therefore, they enjoy privileges and immunities only to the extent necessary for the exercise of those functions<sup>12</sup>. Activities outside the functions entrusted to an international organisation (*ultra vires* activities) are not covered by its special status.

The purpose of this paper is to explain the scope and content of the privileges and immunities granted to the ECB and to illustrate, on the basis of examples, some of the practical legal problems. In Part I we will examine the extent to which the ECB is exempt from national law, in particular German law. In Part II, we will discuss the ECB's immunity from jurisdiction and enforcement. Part III deals with the privileges and immunities granted to the members of the ECB's Executive Board and its staff. Part IV contains an examination of some problems that arise in practice when implementing the rules on privileges and immunities.

## **I. Partial exemption from national law**

As a rule, international organisations are only exempt from national law to the extent that privileges have been granted to them. For other activities, they are subject to national law. The reason for this limitation is that international organisations are not sovereign entities with their own territory. Their premises do not have the status of an international enclave

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<sup>9</sup> Seidl-Hohenveldern and Loibl, p. 275.

<sup>10</sup> The US International Organizations Immunities Act has been amended in order to extend that Act to the ECB (Executive Order of President Bush of 29 May 2003).

<sup>11</sup> Irrespective of the wording, the principle of functional immunity covers both privileges and immunities.

<sup>12</sup> Case C-2/88 *J. J. Zwartveld and Others v Commission* [1990] ECR-I 3367, para. 19; Seidl-Hohenveldern and Loibl, p. 275; Dupuy and Scobbie, p. 838; Rensmann, p. 314.

or international territory outside the territory of the host state<sup>13</sup>. International organisations are therefore subject to the sovereign power of the state on the territory of which they carry out their activities (*principle of territoriality*). A state's sovereignty includes the power to regulate and control all activities within its territory, including the activities of international organisations. International organisations are therefore subject to national law unless a clear and unequivocal exemption has been granted<sup>14</sup>. Some headquarters agreements contain express provisions to this effect<sup>15</sup>.

The rule that international organisations are only partially exempt from national law is fully in line with the principle of functional immunity. As outlined above, privileges and immunities are not ends in themselves; they are only granted to ensure that the international organisation in question can carry out its functions independently. Where an organisation's functions are not affected, there is no need to grant privileges and immunities.

These general principles also apply to the ECB. The ECB is only exempt from national law to the extent that privileges have been granted to it. In Section 1 below we will summarise the provisions of the Protocol and the Headquarters Agreement which exempt the ECB from national law. In Section 2 we will outline the privileges derived from the general principles of international and Community law. Section 3 deals with the limitations to the

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<sup>13</sup> Duffar, pp. 51-58; Weisberg, p. 155; Schlüter, p. 148; Kunz-Hallstein, *GRUR Int.* 1987, p. 819, 823. Exceptionally, international organisations have obtained the status of extra-territorial areas. For instance, Switzerland granted such status to the International Labour Organisation and to other international organisations during the Second World War. At the time, the Swiss Government was concerned that the German Government would use the activities of these organisations as a cover for justifying an invasion of Switzerland. By granting extra-territorial status to these organisations, the Swiss Government wanted to avoid being held responsible for their activities (cf. Duffar, p. 55). Apart from these exceptional cases, most states have not been willing to waive sovereign rights and to allow international organisations the status of international territory. Proposals made by the UNO and the European Communities were not accepted by the Member States (Duffar, p. 57).

<sup>14</sup> Weissberg, p. 155; Schermers and Blokker, pp. 1016 et seq.; Bowett, p. 312; Seidl-Hohenveldern and Loibl, p. 285; Schlüter, pp. 147-149. Cf. Tribunal Arbitral, Arbitral Award of 14 January 2003, *UNESCO v France* (unpublished) stressing that, in the absence of an explicit exemption, pensions paid to former UNESCO officials were fully subject to taxation in accordance with French law. Cf. also Case C-364/92 *SAT Fluggesellschaft mbH v European Organisation for the Safety of Air Navigation* (Eurocontrol) [1994] ECR I-43, 61 and the opinion of the Advocate General Tesauro (p. 47). The inapplicability of EC competition law to Eurocontrol was not based on its status as an international organisation (as argued by Eurocontrol) but because Eurocontrol could not be characterised as an 'undertaking' within the meaning of Article 82 EC.

<sup>15</sup> Cf. Article 6(b) of the Headquarters Agreement between the FAO and Italy and Article 7(b) of the Headquarters Agreement between the International Atomic Energy Agency (IAEA) and Austria, both stating that 'except as otherwise provided in this agreement the laws of the Italian [Austrian] Republic shall apply within the headquarters seat.'

ECB's privileges. Since the ECB is located in Germany the exemption from national law mainly concerns German law.

## **1. Partial exemption from national law under the Protocol and the Headquarters Agreement**

The Protocol and the Headquarters Agreement list several fields of national law which do not apply to the ECB.

### **(a) Exemption from national tax law**

The exemption from national tax law is of major importance. According to Article 3 of the Protocol, the ECB is exempt from all direct taxes. Indirect taxes which are included in the price of goods and services must be refunded by Member States<sup>16</sup>. This provision is supplemented by Article 23, second paragraph, of the Protocol which specifies that the ECB is 'exempt from any form of taxation or imposition of a like nature on the occasion of any increase in its capital' and that 'the activities of the Bank and of its organs carried on in accordance with the Statute ... shall not be subject to any turnover tax'. These provisions are implemented by Article 7 of the Headquarters Agreement, which confirms and specifies the exemption from direct taxes, and Article 8 of the Headquarters Agreement, which regulates the procedure for the refund of turnover tax and other indirect taxes.

The reason underlying the exemption from national tax law is that the ECB's financial means should be used for the performance of its tasks and not for paying taxes to the host state<sup>17</sup>.

### **(b) Exemption from import and export restrictions**

Furthermore, the ECB is exempt from any customs duties and from prohibitions and restrictions on the import and export of articles intended for its official use and its official publications (Article 4 of the Protocol). With the creation of the single market this exemp-

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<sup>16</sup> Article 3 reads as follows: 'The Communities, their assets, revenues and other property shall be exempt from all direct taxes. The governments of the Member States shall, wherever possible, take the appropriate measures to remit or refund the amount of indirect taxes or sales taxes included in the price of movable or immovable property, where the Communities make, for their official use, substantial purchases the price of which includes taxes of this kind. These provisions shall not be applied, however, so as to have the effect of distorting competition within the Communities. No exemption shall be granted in respect of taxes and dues which amount merely to charges for public utility services.'

<sup>17</sup> Cf. Schmidt, in von der Groeben/Schwarze, Art. 291 EG, No 15; Schlüter, p. 151.

tion has lost its importance, but it remains relevant for goods imported from outside the EU.

To avoid any abuse of this privilege, Article 4 further provides that articles that have been imported free of customs duties may only be disposed of in accordance with the conditions approved by the government of the country into which the articles have been imported. To implement this provision, the German Government and the ECB have agreed that, if the ECB disposes of goods which have benefited from an exemption, turnover tax or importation turnover tax must be paid (Article 9 of the Headquarters Agreement).

(c) Exemption from national employment and social welfare law

In addition, the ECB is not subject to German employment and social welfare law (Article 15 of the Headquarters Agreement). This exemption confirms the general principle that international organisations like the ECB are empowered to determine their internal organisation (see below under Section 2)<sup>18</sup>. In the light of this general principle, the Member States have conferred autonomous power upon the ECB to create its own employment and social and welfare provisions (Article 36 of the ESCB Statute)<sup>19</sup>. The application of national employment and social welfare law would be incompatible with this autonomous power and the supranational character of the ECB's employment relationships.

(d) Exemption from data protection law

According to Article 11 of the Headquarters Agreement, the 'Federal Data Protection Act shall not apply to the ECB'. The reason underlying this exemption is the same as that justifying the exemption from employment law: the national legislator must not interfere with the ECB's internal organisation. This exemption from national data protection law does not mean that the ECB is not subject to data protection rules; Regulation (EC) No 45/2001<sup>20</sup> applies to the ECB and provides for the same level of data protection.

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<sup>18</sup> Cf. Federal Administrative Court (BVerwG), judgment of 29 October 1992, 2 C 2.90, *BVerwGE* 91, 126, 127-129 in an employment law dispute between the European School and one of its teachers; Kunz-Hallstein, *GRUR Int.* 1987, p. 819, 824.

<sup>19</sup> Zilioli, in von der Groeben/Schwarze, Art. 36 ESZB-Satzung, No 4, 11.

<sup>20</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

## 2. Partial exemption on the basis of general principles of international and Community law

In addition to the explicit exemptions laid down in the Protocol and the Headquarters Agreement, the ECB enjoys further privileges in accordance with the general principles of international and Community law. One of these general principles is the rule that international organisations have the autonomous power to lay down rules for their internal organisation and administration<sup>21</sup>. The reason underlying this rule is that national legislators should not interfere with the internal sphere of an international organisation. As regards the ECB, this general principle is reflected in Article 12.3 of the ESCB Statute empowering the Governing Council to adopt ‘Rules of Procedure which determine the internal organization of the ECB’. The ECB’s power to lay down rules for its internal organisation and administration includes the power to determine the organisational structure of the Bank, the competencies of its bodies and the administrative procedures to be followed, for instance with regard to the use of the Bank’s financial means (budgetary and accounting rules) and the procurement of goods and services.

By virtue of this general principle of international law, the ECB is exempt from national laws on the internal organisation and administration of public authorities, and in particular from national budgetary or procurement laws. This general privilege is reflected in provisions of national laws which provide for the exemption of international organisations from a particular field of law. For instance, according to Section 100(2)(c) of the German Law against restraints on competition (*Gesetz gegen Wettbewerbsbeschränkungen*), international organisations are not subject to German procurement rules.

The ECB’s autonomous power to determine its internal organisation also comprises the power to adopt ‘house rules’ and to take security measures to ensure internal order, not only vis-à-vis its own staff but also vis-à-vis visitors and, *a fortiori*, aggressors<sup>22</sup>. The German Government has recognised this power by granting the ECB the right to deploy armed personnel within its premises and, under certain conditions, outside its premises (Article 5 of the Headquarters Agreement).

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<sup>21</sup> Duffar, pp. 47-51; Kunz-Hallstein, *GRUR Int.* 1987, p. 819, 823 et seq.

<sup>22</sup> Bowett, p. 312; Duffar, pp. 47-51.



### 3. Limitations on the privileges granted to the ECB

#### (a) Applicability of national law

As explained above, the ECB is only exempt from national (German) law to the extent that privileges have been granted to it. Otherwise, national law, in particular German law, is applicable<sup>23</sup>. The ECB is therefore subject to German public law (e.g. construction law and environmental law).

There are, however, some grey areas where it is difficult to determine whether or not German law is applicable. For example, this is the case with regulations on health and safety in the workplace. On the one hand one could argue that the ECB is exempt from these rules because they are part of employment law (part of the employer's duty to protect its employees) and because they affect the ECB's internal organisation. On the other hand many of these regulations are part of building regulations which are applicable to the ECB, or they implement Community directives on health and safety. Taking these uncertainties into account, the ECB has chosen a pragmatic approach: it complies with health and safety regulations on a voluntary basis.

#### (b) Principle of functional immunity

The privileges granted to the ECB are also limited by the principle of functional immunity. As explained above, privileges are only granted to the ECB to the extent necessary for it to fulfil its functions. In general, activities outside the scope of its tasks are subject to national law<sup>24</sup>. Because of this principle, the exemptions provided for in the Protocol and the Headquarters Agreement are limited to the ECB's 'official activities' or to goods for its 'official use'. The term 'official' is defined as 'all activities undertaken pursuant to the provisions of the EC Treaty and the ESCB Statute and all activities required to fulfil the ECB's objectives and tasks under the EC Treaty and the Statute' (Article 1.10 of the Headquarters Agreement).

There is a debate in public international law about whether the privileges and immunities granted to an international organisation only cover activities which are strictly necessary for the performance of its functions or whether auxiliary activities, such as the leasing of premises or the purchase of office supplies, are also covered<sup>25</sup>. As regards the ECB, it is

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<sup>23</sup> Bowett, p. 312; Schlüter, pp. 147 et seq.; Kunz-Hallstein, *GRUR Int.* 1987, p. 819, 823.

<sup>24</sup> Wenckstern, pp. 89-90.

<sup>25</sup> In this sense see Arbitration Award of 29 June 1990 concerning a dispute between Germany and the European Molecular Biology Laboratory (EMBL) based in Heidelberg (reported by Kunz-Hallstein, *NJW* 1992, p. 3069, 3072); Austrian Supreme Court (OGH), judgment of 11 June 1992, 7 Ob 627/91,

clear from the wording of Article 1.10 of the Headquarters Agreement that the privileges granted to the ECB cover *all activities* carried out in the fulfilment of its tasks laid down in the EC Treaty and the ESCB Statute, including auxiliary activities which support the fulfilment of official tasks. Auxiliary activities required to support the fulfilment of the ECB's tasks include public relations activities (e.g. the publication of information brochures), the leasing as well as the construction of premises for the ECB<sup>26</sup>, the operation of a canteen or a boarding house<sup>27</sup> as well as the purchase of furniture, IT equipment and office supplies. Activities which would not be considered part of the fulfilment of official tasks would include, for instance, carrying on commercial activities or participation in commercial activities for profit<sup>28</sup>.

(c) Principle of loyal cooperation

Thirdly, the ECB's privileged status is qualified by the principle of loyal cooperation. According to Article 19 of the Protocol '[t]he institutions of the Communities shall for the purpose of applying this Protocol, cooperate with the responsible authorities of the Member States concerned.' This provision implements the more general rule of Article 10 EC which imposes mutual duties of sincere cooperation on the Member States and the Community institutions<sup>29</sup>.

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*RIW* 1993, 237, 238 with the assenting note of Seidl-Hohenveldern; Schmidt, in von der Groeben/Schwarze, Art. 291 EG, No 17; Rensmann, p. 317; Wenckstern, pp. 89-90; Kunz-Hallstein, *GRUR Int.* 1987, p. 819, 822 stressing that the official character is presumed and that the international organisation has some discretion in determining the official character of a task.

A more restrictive approach was adopted by: Administrative Court of Bavaria (BayVG), judgment of 15 March 1995, 7 B 92.2689, *Juris* (immunity only for core areas); Court of Appeal of Paris (CA Paris), judgment of 7 May 2003 (non-published): according to the court a contract for the planning and installation of a display case containing information about the activities of EUTELSAT was not part of EUTELSAT's official activities.

<sup>26</sup> Cf. the judgment of the Austrian Supreme Court (OGH) of 11 June 1992, 7 Ob 627/91, *RIW* 1993, 237, 238 (with assenting note of Seidl-Hohenveldern) concerning the rented premises of the EPO in Vienna.

<sup>27</sup> In the case *Germany v EMBL* (reported by Kunz-Hallstein, *NJW* 1992, p. 3069, 3072) the Arbitration Tribunal considered that the operation of a boarding house was part of the EMBL's official activities because the organisation of congresses and seminars (including accommodation for the guests) was part of the EMBL's official tasks. However, the Tribunal denied the official character of the canteen because the EMBL's Headquarters Agreement (unlike the ECB's Headquarters Agreement) limits the privileges to activities which are indispensable to the fulfilment of its tasks.

<sup>28</sup> Cf. Arbitration Award of 29 June 1990 concerning a dispute between Germany and the EMBL (reported by Kunz-Hallstein, *NJW* 1992, p. 3069, 3072); Rensmann, p. 316.

<sup>29</sup> Case C-2/88 *J. J. Zwartveld and Others v Commission* [1990] ECR I-3367, para. 17-21; Schmidt, in von der Groeben/Schwarze, Art. 291 EG, No 60.

Accordingly, Article 17 of the Headquarters Agreement provides that:

‘The ECB shall co-operate at all times with the competent German authorities in order to prevent any abuse of the privileges, exemptions, immunities and facilities provided for in this Agreement.’

These provisions reflect a general principle of public international law according to which a host state and an international organisation are obliged to cooperate in good faith<sup>30</sup>. According to this general principle, the host state is obliged to respect the privileges and immunities granted to the international organisation and to support it, to the best of its abilities, in the fulfilment of its tasks. The host state’s duty to protect the ECB’s premises against intrusion or damage, as laid down in Article 5.1 of the Headquarters Agreement, reflects this general principle. An international organisation, for its part, is obliged to respect the host state’s legal order as far as is compatible with its statute and tasks, and must cooperate with the national authorities<sup>31</sup>. When invoking its privileges and immunities an international organisation must take into account the interests of the member state concerned.

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<sup>30</sup> Cf. ICJ, Advisory opinion on the interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, ICJ Report 1980, p. 96: ‘... the paramount consideration both for the organization and the host state in every case must be their obligation to cooperate in good faith to promote the objectives and purposes of the organisation as expressed in its constitution.’

<sup>31</sup> Case C-2/88, *J. J. Zwartveld and Others v Commission* [1990] ECR I-3367, para. 17-21; Schmidt, in von der Groeben/Schwarze, Art. 291 EG, No 60.

## II. Immunity from jurisdiction and from enforcement

Like other international organisations<sup>32</sup> the ECB enjoys immunity from jurisdiction (Section 1) and immunity from enforcement (Section 2).

### 1. Immunity from jurisdiction

#### (a) Immunity from jurisdiction as the rule

Immunity from jurisdiction means that national courts are not competent to decide on legal disputes between an international organisation and a third party. Any action initiated against an organisation is inadmissible and must be dismissed. The principle of immunity from jurisdiction is a general and well-recognised principle of public international law and it applies even in the absence of an explicit provision<sup>33</sup>. It is reflected in provisions of national law which limit the competence of national courts to organisations and persons who are subject to the jurisdiction of the respective state<sup>34</sup>.

However, in contrast to other international organisations the European Community and ECB do not enjoy unlimited immunity<sup>35</sup>. The EC Treaty and the ESCB Statute do confer a subsidiary competence upon national courts. Article 35.2 of the ESCB Statute states:

‘Disputes between the ECB, on the one hand, and its creditors, debtors or any other person, on the other, shall be decided by the competent national courts, save where jurisdiction has been conferred upon the Court of Justice.’

The same rule applies for the European Community (Article 240 EC)<sup>36</sup>.

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<sup>32</sup> Cf. Seidl-Hohenveldern and Loibl, pp. 276-277; Bowett, p. 311; Weisberg, pp. 148-154; Gaillard and Pingel-Lenuzza, *ICLQ* 2000, pp. 1-15.

<sup>33</sup> Administrative Court of Bavaria (BayVGh), judgment of 15 March 1995, 7 B 92.2689, *Juris* and judgment of 8 July 1999, M 29 K 97.8476, *GRUR Int.* 2000, p. 77; Rensmann, pp. 319-321; Kunz-Hallstein, *GRUR Int.* 1987, p. 819, 821.

<sup>34</sup> Cf. Section 20 of the German Law on judicature (*Gerichtsverfassungsgesetz*).

<sup>35</sup> Wenckstern, pp. 78-79. The opinion of Rensmann, pp. 320-321, according to whom no immunity has been granted to European Communities, does not take into account the impact of the exclusive competence of the Court of Justice.

<sup>36</sup> The provision reads: ‘Save where jurisdiction is conferred on the Court of Justice by this Treaty, disputes to which the Community is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States.’

This means that the ECB enjoys immunity from national jurisdiction only for those cases which fall under the *exclusive* jurisdiction of the Court of Justice as laid down in the EC Treaty (Articles 226 to 239) and the ESCB Statute<sup>37</sup>. In particular, the Court's exclusive competence covers actions against the ECB aimed at reviewing its acts and omissions (Articles 230 to 232 EC) as well as claims for damages (Article 235 EC). Article 36.2 of the ESCB Statute is of particular importance; it states that '[t]he Court of Justice shall have jurisdiction in any dispute between the ECB and its servants within the limits and under the conditions laid down in the conditions of employment.' This means that disputes between the ECB and its staff fall under the exclusive competence of the Court of Justice, more precisely the European Union Civil Service Tribunal, and must not be brought before a national court<sup>38</sup>.

Since the competencies of the Court of Justice are listed exhaustively, all disputes not covered by Articles 226 to 239 EC may be brought before a national court. Article 35.2 of the ESCB Statute does not regulate which national court is competent to decide on the dispute in question; this must be determined in accordance with the rules of international procedural law<sup>39</sup>. When a national court is competent in accordance with Article 35.2 and applies Community law, in particular the provisions of the ESCB Statute, it has to take into account the case law of the Court of Justice and refer any question relating to the validity and interpretation of acts of the Community (including the ECB) to the Court of Justice for a preliminary ruling (Article 234 EC). Some legal authors even consider that national courts are 'Community courts' when they act on the basis of Article 35(2) EC<sup>40</sup>.

In practice, the subsidiary competence of national courts is of limited relevance since the competencies of the Court of Justice are interpreted broadly<sup>41</sup>. Furthermore, the Court's

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<sup>37</sup> Gaiser, *EuR* 2002, p. 517, 537.

<sup>38</sup> Zilioli, in von der Groeben/Schwarze, Art. 36 der ESZB-Satzung, No 20; Gaitanides, p. 194. Cf. also the judgment of the Federal Administrative Court (BVerwG) of 29 October 1992, 2 C 2.90, *BVerwGE* 92, 126, 129-139 in an employment law dispute between the European School and one of its teachers.

<sup>39</sup> López Torres, in von der Groeben/Schwarze, Artikel 35 ESZB Satzung, No 14.

<sup>40</sup> Zilioli and Selmayr, p. 126; López Torres, in von der Groeben/Schwarze, Artikel 35 ESZB Satzung, No 15.

<sup>41</sup> Seidl-Hohenveldern and Loibl, p. 277; Gaitanides, in von der Groeben/Schwarze, Art. 240 EG No 9; Ehlers, in Schoch/Abmann/Pietzner, Vorbemerkung § 40, No 48.

competence may be extended by arbitration clauses<sup>42</sup>. Article 35.4 of the ESCB Statute states:

‘The Court of Justice shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the ECB, whether that contract be governed by public or private law.’

The ECB has made use of this possibility on several occasions, in particular in respect of contracts with Member States, public entities or other international/supranational organisations<sup>43</sup>.

According to the prevailing opinion, the principle of immunity from jurisdiction should be interpreted restrictively because of the risk of conflict with the general principle of effective legal protection<sup>44</sup>. In order to satisfy this principle, international organisations are required to establish an internal independent tribunal (in particular for employment law disputes) or to accept recourse to arbitration for disputes with third parties. According to recent case law an international organisation is not considered to be immune if its dispute resolution mechanisms do not meet generally recognised standards<sup>45</sup>.

The ECB as well as the other Community institutions fully meet these requirements. The EC Treaty provides for an effective system of legal protection<sup>46</sup>. In case of a dispute, a third party may bring the ECB before the Court of Justice and request the annulment of the ECB’s decisions under the conditions laid down in Article 230 EC, or claim damages on

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<sup>42</sup> López Torres, in von der Groeben/Schwarze, Artikel 35 ESZB Satzung, No 14; Gaiser, *EuR* 2002, p. 517, 538.

<sup>43</sup> For instance, Article 21 of Headquarters Agreement with Germany provides that: ‘Any differences of opinion between the Government and the ECB concerning the interpretation or application of this Agreement which cannot be settled directly between the parties may be submitted in accordance with Article 35.4 of the ESCB Statute by either party to the European Court of Justice.’

<sup>44</sup> Wenckstern, pp. 142 et seq.; Rensmann, pp. 322 et seq.; Gaillard/Pingel-Lenuzza, *ICLQ* 2000, pp. 11-15. See also the judgment of the European Court of Human Rights (ECHR) of 18 February 1999, *Waite and Kennedy v Germany*, 26083/94 [1999] ECHR Reports of Judgments and Decisions 13. The Court decided that immunity granted to the European Space Agency (ESA) does not infringe Article 6 of the European Convention on Human Rights (Right of access to a court) because the ESA’s internal dispute resolution mechanisms were a ‘reasonable alternative means of legal process’; see similarly the Administrative Court of Bavaria (BayVG), judgment of 8 July 1999, M 29 K 97.8476, *GRUR Int.* 2000, p. 77, 78 with regard to the European Patent Office.

<sup>45</sup> Labour Court of Brussels (CA Bruxelles), judgment of 4 March 2003, *Journal des Tribunaux* 2003, pp. 684 et seq.; Labour Court of Brussels (CA Bruxelles), judgment of 17 September 2003 (unpublished); Court of Appeal of Paris (CA Paris), judgment of 7 October 2003 (unpublished).

<sup>46</sup> Cf. López Torres, in von der Groeben/Schwarze, Artikel 35 ESZB-Satzung, No 5 et seq.

the basis of Article 288 EC. The ECB's activities are therefore fully subject to judicial control; it only enjoys immunity from *national* jurisdiction.

(b) Exceptions to the principle of immunity

The immunity from jurisdiction granted to the ECB is limited in two respects.

(i) Activities outside scope of the ECB's functions

The first limitation to the principle of immunity results from the principle of functional immunity. The ECB, like other international organisations, enjoys immunity from jurisdiction only for carrying out its official tasks as set out in the EC Treaty and the ESCB Statute and for auxiliary activities required to fulfil those tasks (see above in Part I.3(b)). Activities outside scope of the ECB's functions are fully subject to the jurisdiction of national courts<sup>47</sup>.

(ii) Waiver of immunity

Secondly, an action against the ECB may be brought before a national court if the ECB has waived its immunity. Such waiver may be declared in advance, with regard to all potential legal disputes with a third party by way of a jurisdiction clause in a contract, or only in respect of a specific legal dispute that has already arisen<sup>48</sup>. Most of the contracts concluded by the ECB for the procurement of goods and services contain such a jurisdiction clause; it usually provides for the competence of the local courts in Frankfurt am Main. By agreeing to such a jurisdiction clause the ECB implicitly waives its immunity from jurisdiction. With regard to the competence of national courts, according to Article 35.2 of the ESCB Statute (see above) in many cases the waiver in the jurisdiction clause is only of a declaratory nature. The advantage of inserting a jurisdiction clause in the contract consists in clearly determining the competent court, thereby avoiding the uncertainties of international procedural law.

## 2. Immunity from enforcement

In addition to immunity from jurisdiction, the ECB also enjoys immunity from enforcement. This means that national law, even if applicable to the ECB, cannot be enforced

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<sup>47</sup> Cf. judgment of the Administrative Court of Bavaria (BayVGH) of 15 March 1995 (7 B 92.2689, *Juris*) concerning the issuance of school fee notices by the European School of Munich, which was considered to be *ultra vires* and therefore subject to the control of German courts.

<sup>48</sup> Cf. Wenckstern, p. 132 et seq.; Rensmann, pp. 321-322.

against the ECB by means of administrative or legal measures of constraint. The principle of immunity from enforcement covers the ECB's premises (paragraph (a)), the ECB's (movable) property and assets (paragraph (b)), and the ECB's communications (paragraph (c)). As with immunity from jurisdiction, the ECB may also waive its immunity from enforcement (paragraph (d)).

(a) Inviolability of the ECB's premises

The principle of inviolability is laid down in Article 1 of the Protocol (in connection with Article 23 of the Protocol). The first and second sentences of Article 1 read as follows:

'The premises and buildings of the Communities [and of the ECB] shall be inviolable. They shall be exempt from search, requisition, confiscation or expropriation.'

This provision is supplemented by Article 2.1 of the Headquarters Agreement which states

'The inviolability of premises mentioned in Article 1 of the Protocol shall be understood to mean the following:

No official of the Government or person exercising any public authority, whether administrative, judicial, military or police shall enter the premises of the ECB except with the consent and under the conditions approved by its President. In the event of an emergency such consent to take urgently required protective measures shall be deemed to have been given.'

By virtue of these provisions, the German authorities are prevented from entering the ECB's premises in order to carry out measures of constraint (e.g., searching for criminals or confiscation of assets)<sup>49</sup>. The ECB is not obliged to grant access to its premises unless there is an emergency such as a fire or hostage-taking. The ECB's President may, at his own discretion, allow the German authorities to enter the ECB's premises and he may determine the conditions under which this takes place (e.g., access limited to certain areas). However, when taking such a decision, the President has to take into account that the principles of loyal cooperation and good neighbourliness may limit the privileges and immunities granted to the ECB (see above). The President's discretion is also limited by the prohibition on the abuse of the privileges and immunities for purposes other than carrying out the ECB's tasks<sup>50</sup>. For instance, the ECB is not allowed to give shelter to criminals or grant asylum to third persons. In practice, the ECB cooperates closely with the German authorities, in particular the German police.

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<sup>49</sup> Schmidt, in von der Groeben/Schwarze, Art. 291 EG, No 7.

<sup>50</sup> Cf. Bowett, p. 313.

The concept of inviolability of the premises also includes the freedom of access<sup>51</sup>. This means that the German authorities must not hinder ECB staff or official visitors from entering the ECB's premises.

The premises of the ECB which are protected by Article 2 of the Headquarters Agreement are defined in Article 1.11 of the Agreement as 'the land, buildings and parts of building, including access facilities, used for the official activities of the ECB', regardless of whether they are owned or rented by the ECB<sup>52</sup>. The term 'premises' therefore includes the office buildings rented by the ECB, including buildings rented for specific purposes such as data centres. It also includes rooms owned/rented by the ECB and then sublet to some other company or organisation which contributes to the performance of the ECB's official tasks (e.g., the International Counterfeit Deterrence Centre located within the ECB's premises). The ECB's 'premises' also includes the site on which the new ECB offices will be built, even though it is not currently used for the official activities of the ECB. The *raison d'être* of Article 2, which is to ensure the independence and proper functioning of the ECB, calls for the inclusion of the future headquarters of the ECB as protected premises. If this were not the case, the German authorities could exert influence on the ECB's official activities by preventing it from moving to its new premises. Finally, the President's residence is also included in the term 'premises'.

However, real property owned by the ECB for investment purposes only, or premises used for other than official activities are not part of the ECB's premises enjoying the status of inviolability.

It should also be highlighted in this context, Germany as the host state has a duty to protect the ECB's premises against attacks from third parties<sup>53</sup>. Article 5.1 of the Headquarters Agreement states:

'It is the Government's duty to protect the premises of the ECB against any intrusion or damage and any other impairment of its operations by taking appropriate measures.'

For the sake of completeness it should be mentioned that the principle of inviolability does not prevent the German authorities from serving documents relating to administrative and legal proceedings at the premises of the ECB (Article 2.2 of the Headquarters Agreement).

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<sup>51</sup> Weissberg, pp. 159 et seq.

<sup>52</sup> Cf. Wenckstern, pp. 263-264 with further references.

<sup>53</sup> Schmidt, in von der Groeben/Schwarze, Art. 291 EG, No 7.

(b) Protection of the ECB's movable property and assets

In addition to the ECB's premises, the principle of immunity from enforcement also covers the ECB's movable property and assets. The third sentence of Article 1 of the Protocol states (in connection with Article 23 of the Protocol):

'The property and assets of the Communities shall not be the subject of any administrative or legal measure of constraint without the authorization of the Court of Justice.'

This provision is supplemented by Article 6 of the Headquarters Agreement which extends the immunity from enforcement to funds of third parties held by the ECB. The provision reads:

'Protection against administrative or legal measures of constraint pursuant to Article 1 of the Protocol also applies to funds or records of transactions which are held with the ECB for the purpose of settlement in the context of payment systems.'

By virtue of these provisions the ECB's movable property may only be seized (e.g. in executing a court order to pay a specific amount of money) with the prior authorisation of the Court of Justice. According to the established practice of the Court of Justice, such authorisation will not be given 'if the measures of constraint raise difficulties which might place in jeopardy the functioning or independence of the Community institution'<sup>54</sup>. If the Court of Justice were to authorise a creditor to execute a measure of constraint against the ECB's property and assets, it would amount to an authorisation to enter the ECB's premises<sup>55</sup>.

(c) Inviolability of the ECB's archives and communications

The ECB's archives and communications are also inviolable, pursuant to Article 2 of the Protocol (in connection with Article 23) which states:

'The archives of the Communities [and of the ECB] shall be inviolable.'

The term 'archives' comprises

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<sup>54</sup> Case 2/68 *Ufficio Imposte di Consumo di Ispra v Commission* [1968] ECR 435, 439; Case 1/88 *SA SA Générale de Banque v Commission* [1989] ECR 857, para. 9; Case C-2/88 *Imm. J. J. Zwartveld and others v Commission* [1990] ECR I-4405, para. 11; Case C-1/00 *SA Cotecna Inspection SA v Commission* [2001] ECR I-4219, para. 9-10; Case C-1/02 *SA Antippas v Commission* [2003] ECR I-2893, para. 12.

<sup>55</sup> Schmidt, in von der Groeben/Schwarze, Art. 291 EG und Protokoll Nr. 36, No 11.

‘...all records, correspondence, documents, manuscripts, photographs, films, sound recordings, computer programs and tapes or discs belonging to or held by the ECB, and to all information contained therein, irrespective of its location’ (Article 3 of the Headquarters Agreement).

The ECB’s official communications are also protected against measures of constraint. According to Article 6 of the Protocol:

‘For their official communications and the transmission of all their documents, the institutions of the Communities [and the ECB] shall enjoy in the territory of each Member State the treatment accorded by that State to diplomatic missions.

Official correspondence and other official communications of the institutions of the Communities shall not be subject to censorship.’

This provision is confirmed by Article 4, first sentence, of the Headquarters Agreement according to which ‘[t]he ECB’s official communication and official correspondence shall be inviolable.’

These provisions provide comprehensive protection for the ECB’s archives and its official communications, regardless of whether their content is confidential and regardless of the originator of the document<sup>56</sup>. The protection goes beyond the scope of Article 2 of the Protocol because it precludes national authorities not only from taking possession of the documentation but also from taking note of the contents or from gathering information without the consent of the ECB.

#### (d) Waiver

Exceptionally, a Member State may take measures of constraint, even without the prior authorisation of the Court of Justice, if the ECB has waived its immunity<sup>57</sup>. However, the waiver must be declared explicitly and with a view to concrete measures of constraint<sup>58</sup>. A waiver of immunity from jurisdiction (consent to a jurisdiction clause) does not include waiver of immunity from enforcement.

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<sup>56</sup> Cf. Wenckstern, p. 267.

<sup>57</sup> Case 1/71 SA *X v Commission* [1971] ECR 363, para. 7; Case 1/87 SA *Universe Tankship Company Incorporated v Commission* [1987] ECR 2807, para. 4-6; Case C-1/94 SA *Dupret SA in liquidation v Commission* [1995] ECR I-1, para. 3. In all cases the Court considered that an authorisation of the Court was superfluous because the Commission had declared that it had no objections to the measures.

<sup>58</sup> Case C-182/91 *Forafrique Burkinabe SA v Commission* [1993] ECR I-2161, para. 16-18; Schmidt, in von der Groeben/Schwarze, Art. 291 EG, No 10; Rensmann, p. 331.

### III. Personal immunity

In accordance with international practice<sup>59</sup>, privileges and immunities are also granted to the ECB's governing bodies and its staff. The purpose of extending privileges and immunities to persons acting on behalf of an international institution is to ensure that they are able to exercise their tasks fully independently<sup>60</sup>.

However, the levels of protection granted to the members of the Executive Board and members of staff, differ. Whereas the members of the Executive Board enjoy full diplomatic immunity pursuant to Article 19 of the Headquarters Agreement (Section 2), members of staff (Section 1) are only immune in respect of acts performed in their official capacity (cf. Article 12 of the Protocol). A special status is granted to members of the Governing Council/General Council and representatives of NCBs (Section 3).

It needs to be highlighted in this context that the privileges and immunities are accorded to members of staff 'solely in the interests of the ECB' (Article 18, first sentence, of the Protocol). This does not prevent a member of staff from invoking the privileges and immunities in a legal dispute with a national authority<sup>61</sup>. However, the member of staff may not waive the privileges and immunities granted to him/her. It is up to the ECB to decide on such waiver (Section 4).

#### 1. Privileges and immunities granted to ECB staff

According to Article 23, first paragraph, of the Protocol, ECB staff enjoy the same privileges and immunities as officials and servants of the Community institutions enjoy in accordance with the Articles 12 to 14 of the Protocol. Germany, as the host state, and the ECB have agreed on more specific rules for the implementation of these provisions (cf. Articles 12 to 14 of the Headquarters Agreement).

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<sup>59</sup> Weissberg, pp. 167-168; Bowett, pp. 314 et seq.; for a critical view see Hölscheidt/Schotten, *NJW* 1999, pp. 2851 et seq., arguing that the immunity of EU officials would no longer be justified.

<sup>60</sup> Wenckstern, p. 303; Gaitanides, p. 194.

<sup>61</sup> Case 6/60 *Humblot v Belgium* [1960] ECR 559, 570-571; Wenckstern, p. 168 with further references. However, in contrast to the former Protocol of the European Coal and Steel Community, neither the Protocol nor the Treaty provide for direct action against the Member State before the Court of Justice. The member of staff concerned must use the legal remedies available under national law. The competent court may or must then refer the question to the ECJ for a preliminary ruling (Article 234 of the Treaty); cf. Case 1/82 *Mr and Mrs D v Grand Duchy of Luxembourg* [1982] ECR 3709, para. 8-11; Schmidt, in von der Groeben/Schwarze, Art. 291 EG, No 38.

As privileges and immunities are only granted to ‘staff’ we will explain in paragraph (a) the categories of employees that enjoy this status. In paragraph (b) we will illustrate the concept of immunity from legal proceedings in respect of official acts. Paragraph (c) deals with the privileges granted to ECB staff.

(a) Members of staff enjoying privileges and immunities

The categories of officials and servants of the Communities that enjoy privileges and immunities are defined in Regulation No 549/69<sup>62</sup> which the Council adopted on the basis of Article 16 of the Protocol. The Regulation was amended in 1998 in order to include ECB staff. Article 4c of the Regulation, inserted at that time, reads as follows:

‘Without prejudice to Article 23 of the Protocol on the privileges and immunities of the European Communities with regard to the members of the Governing Council and of the General Council of the European Central Bank, the privileges and immunities provided for in Article 12, in the second subparagraph of Article 13 and in Article 14 of the Protocol shall apply under the same conditions and within the same limits as those laid down in Articles 1, 2 and 3 of this Regulation to:

- staff of the European Central Bank,
- persons receiving disability, retirement or survivors' pensions paid by the European Central Bank.’

Unlike the Regulation, the Headquarters Agreement uses the term ‘employee of the ECB’. However, the meaning of this term is the same, as Article 1.9 of the Headquarters Agreement refers for its definition to Article 4c of the Regulation.

By virtue of Article 4c of the Regulation, former members of staff receiving a pension from the ECB also enjoy privileges and immunities, though with some limitations. Since the Regulation does not specify which of the ECB’s servants are to be considered as ‘staff’, it is up to the ECB to define this category<sup>63</sup>. According to the Conditions of Employment for staff of the European Central Bank, members of staff are only those persons who have signed a contract appointing them to a specific position within the ECB. The Conditions of Employment further distinguish between a full member of staff appointed for an indefinite

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<sup>62</sup> Regulation (Euratom, ECSC, EEC) No 549/69 of the Council of 25 March 1969 determining the categories of officials and other servants of the European Communities to whom the provisions of Article 12, the second subparagraph of Article 13 and Article 14 of the Protocol on the privileges and immunities of the Communities apply (OJ L 74, 27.3.1969, p. 1) (English special edition: Series I Chapter 1969(I) p. 119) as amended by Council Regulation (EC, ECSC, Euratom) No 1198/98 of 5 June 1998 (OJ L 166, 11.6.1998, p. 3).

<sup>63</sup> Cf. Federal Financial Court (BFH), judgment of 6 August 1998, IV R 75/97, *DSiRE* 1998, 870, 872; Wenckstern, pp. 169 et seq.

period or a definite period of more than one year, and a short-term contract employee appointed for a definite period of less than one year. However, for the purposes of the Protocol, all three categories are to be considered as staff within the meaning of Article 4c of Regulation No 549/69. Otherwise, the reference to the Protocol on Privileges and Immunities (cf. Article 3 of the Conditions of Employment for Staff and Article 2 of the Conditions of Short-Term Employment) would not make sense. The definition used in the Conditions of Employment shows that the decisive criterion for determining whether a person is a member of staff is the *appointment* of a person by a contract to a specific position. Therefore, contractors, freelancers and trainees (or interns) are not ‘members of staff’ within the meaning of the Protocol<sup>64</sup>. They do not enjoy personal immunity and are fully subject to national laws, regardless of the function they fulfil<sup>65</sup>. In contrast, NCB staff or staff from other organisations seconded to the ECB for a certain period of time are ‘ECB staff’ within the meaning of the Protocol because they obtain a short-term employment contract for the period of their secondment.

(b) Immunity from legal proceedings

According to Article 12(a) of the Protocol, ECB staff members enjoy immunity from legal proceedings. The provision reads as follows:

‘In the territory of each Member State and whatever their nationality, officials and other servants of the Communities [including ECB staff] shall:

(a) subject to the provisions of the Treaties relating, on the one hand, to the rules on the liability of officials and other servants towards the Communities and, on the other hand, to the jurisdiction of the Court in disputes between the Communities and their officials and other servants, be immune from legal proceedings in respect of acts performed by them in their official capacity, including their words spoken or written. They shall continue to enjoy this immunity after they have ceased to hold office.’

The purpose of this provision is to ensure that officials and other servants of the Communities (including ECB staff) can perform their tasks fully independently; judgements on their performance on the basis of national law would be incompatible with this purpose<sup>66</sup>. The

<sup>64</sup> Cf. Joined cases T-202/96 and T-204/96 *Andrea von Löwis and Marta Alvarez-Cotera v Commission* [1998] ECR II-2829, para. 25, 51 et seq. with regard to freelance interpreters engaged by the Commission.

<sup>65</sup> Cf. Federal Financial Court (BFH), judgment of 6 August 1998, IV R 75/97, *DStRE* 1998, 870, 871 et seq. concerning the taxation of the ‘salary’ paid by the Council of Europe to an interpreter. As the interpreter was employed on a day-to-day basis the Court classified him as a freelancer, although he had received confirmation from the Council of Europe that he was an *agent temporaire*.

<sup>66</sup> Case 5/68 *Sayag and AG Zürich v Leduc and others* [1968] ECR 589, 600.

immunity granted to ECB staff is similar to the status of diplomatic representatives, but it differs in several respects. On the one hand the scope of the immunity granted to ECB staff is limited because it only covers acts performed in their *official capacity*<sup>67</sup>. Unlike diplomats, ECB staff members do not enjoy immunity for private activities (e.g. with regard to legal disputes with landlords or traffic offences); for such activities they are subject to the applicable national jurisdiction, without restrictions. The Court of Justice has defined the term ‘acts performed by them in their official capacity’ in two judgments concerning traffic accidents<sup>68</sup>. According to the Court, the scope of the immunity is limited to acts which, by their nature, are part of the tasks to be performed by the official/servant concerned; the act in question must directly serve the performance of the task. On the basis of this narrow understanding, the Court considered that driving a car would only fall within the scope of the immunity if this activity were part of the Community’s tasks and required to be performed by the Community official.

On the other hand the scope of the immunity granted to ECB staff is broader than diplomatic status in some respects<sup>69</sup>. First, ECB staff enjoy immunity in all EU Member States including their country of origin, whereas diplomats only enjoy immunity in the country where they are accredited but not in their country of origin. Second, in contrast to diplomats, ECB staff continue to enjoy immunity even after they have ceased to hold office. This extension of immunity is required in order to prevent former ECB staff being sued for acts performed during their term of office. If ECB staff risked being sued immediately after their term of office, they would not be able to fulfil their tasks with full independence and impartiality.

It should be stressed that immunity from legal proceedings does not, as a matter of course, mean that ECB staff are not responsible for their acts and omissions<sup>70</sup>. As specified in Article 12(a) of the Protocol, staff members are immune from legal proceedings by national authorities and from actions brought by private persons before a national court. This does not prevent the ECB from taking disciplinary measures or claiming damages in accordance with the ECB Conditions of Employment. Furthermore, the Member State or the private person concerned may sue the ECB in the Court of Justice and request the annulment of disputed acts in accordance with Article 230 EC or claim damages in accordance with Article 288 EC.

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<sup>67</sup> Cf. for other international organisations, Seidl-Hohenveldern and Loibl, p. 279.

<sup>68</sup> Case 5/68 *Sayag and AG Zürich v Leduc and others* [1968] ECR 589, 600 and Case 9/69 *Sayag and AG Zürich v Leduc and others* [1969] ECR 329.

<sup>69</sup> Cf. for other international organisations Seidl-Hohenveldern and Loibl, p. 279; Bowett, p. 308.

<sup>70</sup> Schmidt, in von der Groeben/Schwarze, Art. 291 EG, No 40.

### (c) Privileges

ECB staff enjoy a number of privileges; in particular they are exempt from national tax law (sub-paragraph (i)) and from national immigration restrictions (sub-paragraph (ii)). A third privilege, exemption from national currency or exchange regulations (Article 12(c) of the Protocol), has lost its importance since the creation of the single market and the introduction of the euro.

#### (i) Exemption from national tax law

According to Article 13, second paragraph, of the Protocol, ECB staff ‘shall be exempt from national taxes on salaries, wages and emoluments’ paid by the ECB. However, income from other sources (e.g. interest income and rents) is fully subject to national tax law<sup>71</sup>. According to Article 14 of the Protocol, such income shall be taxed in the country where the member of staff had their domicile before entering the service of the ECB.

The exemption from national taxation, which is often criticised, reflects a well-established international practice<sup>72</sup>. The reason underlying this exemption is that the taxation of salaries in accordance with national law would raise a number of difficult legal questions<sup>73</sup>. If the salaries were taxed in accordance with German tax law, Germany would realise an unjustified profit from the fact that the seat of the ECB is in Germany. Alternatively, the salary received by a member of staff could be taxed in the staff member’s country of origin. Due the different tax systems this would, however, entail unequal treatment of staff members<sup>74</sup>.

In order to avoid such distortions, the EU has established its own tax system for salaries, wages and emoluments paid to its servants. According to Article 13, first paragraph, of the Protocol

‘Officials and other servants of the Communities [including ECB staff] shall be liable to a tax for the benefit of the Communities on salaries, wages and emoluments paid to them by the Communities...’.

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<sup>71</sup> Case C-263/91 *Niels Kristoffersen v Skatteministeriet* [1993] ECR I-2779, para. 13.

<sup>72</sup> Bowett, pp. 317-318; Seidl-Hohenveldern and Loibl, pp. 281-282.

<sup>73</sup> Cf. Bowett, pp. 317-318.

<sup>74</sup> Cf. Federal Financial Court (BFH), judgment of 6 August 1998, IV R 75/97, *DSiRE* 1998, 870, 872; Seidl-Hohenveldern and Loibl, p. 281; Commission de Recours de l’Organisation de Coopération et de développement économiques, Decision No 115 of 23 November 1985 (unpublished).

Such internal tax system is fully in line with the general rule that servants of international organisations are exempt from tax law; that exemption is limited to national tax law<sup>75</sup>.

On the basis of Article 13 of the Protocol, the Council adopted Regulation No 260/68<sup>76</sup> which also applies to ECB staff<sup>77</sup>. It allows the refutation, at least in part, of the criticism that EU officials and ECB staff, unlike all other European citizens, are exempt from taxation.

(ii) Exemption from immigration restrictions

According to Article 12(b) of the Protocol (in connection with Article 23), ECB staff together with their spouses and dependent family members shall ‘not [be] subject to immigration restrictions or to formalities for the registration of aliens’. This provision is implemented by Article 14 of the Headquarters Agreement according to which ECB staff, their spouses<sup>78</sup> and their dependent children require neither a work permit nor a residence permit. Other dependent family members forming part of the staff member’s household and supported by the staff member are also exempt from the requirement for a residence permit; however, they need a work permit if they take up employment in Germany. This restriction has lost its importance since, in principle, citizens of the other EU Member States and, under certain conditions, their family members enjoy freedom of movement including labour mobility in Germany<sup>79</sup>.

In addition to these privileges, the German Government has granted ECB staff and family members forming part of their household the right to obtain a personal identity card in or-

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<sup>75</sup> Commission de Recours de l’Organisation de Coopération et de développement économiques, Decision No 115 of 23 November 1985 (unpublished).

<sup>76</sup> Regulation (EEC, Euratom, ECSC) No 260/68 of the Council of 29 February 1968 laying down the conditions and procedure for applying the tax for the benefit of the European Communities (OJ L 56, 4.3.1968, p. 8) (English special edition, Series I Chapter 1968(I), p. 37).

<sup>77</sup> Some legal authors (e.g. Seidl-Hohenveldern and Loibl, p. 282) question the usefulness of the Community’s taxation system because the taxes levied from the Community officials are at the end paid from the Community’s budget. The same effect could be reached by a simple reduction of the salaries. This consideration is not valid for the ECB because the employer and the tax authority are not identical.

<sup>78</sup> The term ‘spouse’ presupposes a marriage in accordance with national law. It does not include recognised partners within the meaning of the ECB’s Conditions of Employment.

<sup>79</sup> Law on the general free movement of citizens of the Union (*Gesetz über die allgemeine Freizügigkeit von Unionsbürgern*) of 30 July 2004, *BGBl. I*, p. 1950, 1986, as last amended on 7 December 2006, *BGBl. I*, p. 2814. The Law implements Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ L 158, 30.4.2004, p. 77).

der to facilitate travel (Article 13.2 of the Headquarters Agreement). However, such identity card may only ‘be used, in conjunction with a valid passport, to cross the borders without a visa into other Schengen Member States’. Since citizens of the EU Member States enjoy full freedom of movement (if they live within the Schengen area) or, at least, do not need a visa to travel to another EU Member State, the practical benefit of such identity cards is limited. But these identity cards may be of help to staff members or family members who are not nationals of an EU Member State and therefore subject to visa restrictions.

Unlike the members of the Executive Board, other members of staff are not exempt from the general obligation to register with the local registration offices (Article 14.3 of the Headquarters Agreement). Since the obligation of register is neither an ‘immigration restriction’ within the meaning of Article 12(b) of the Protocol nor a ‘formality for the registration of aliens’, this requirement is in line with the Protocol.

## **2. Status of the members of the Executive Board**

Unlike other ECB staff, the members of the ECB’s Executive Board have full diplomatic status. According to Article 19.1 of the Headquarters Agreement

‘The members of the Executive Board shall enjoy the privileges, exemptions, immunities and facilities granted to all diplomats accredited by the Federal German Government in accordance with the Vienna Convention on Diplomatic Relations of 18 April 1961.’

This means that members of the Executive Board are immune from legal proceedings for all their acts and omissions regardless of whether they act in their official capacity or in a private capacity. They also enjoy the privileges granted to diplomats in accordance with the Vienna Convention; in particular they are exempt from German tax law (with the exceptions mentioned in Article 34 of the Vienna Convention, for instance ‘indirect taxes of a kind which are normally incorporated in the price of goods or services’) and their private residences and their correspondence are inviolable. This equivalence with diplomats also applies to the families of Executive Board members. According to Article 19.2 of the Headquarters Agreement

‘Family members forming part of the households of and supported by members of the Executive Board shall enjoy the same privileges, exemptions, immunities and facilities granted to the family members of diplomats accredited by the Federal German Government.’

It is highlighted that the scope of the status granted to the members of the Executive Board even goes beyond the status granted to diplomats. Whereas diplomats enjoy immunity only in the host state, members of the Executive Board also enjoy immunity in their country of

origin<sup>80</sup>. This extension is necessary to ensure the full independence of the members of the Executive Board, also vis-à-vis the authorities of their country of origin. However, the protection granted in the country of origin is limited. Article 19.3 of the Headquarters Agreement, which is in line with international practice, provides that

‘For German nationals or persons whose residence for tax purposes pursuant to Article 14 of the Protocol is in Germany, immunity from legal process and inviolability shall only be granted for the duties performed in the exercise of their official activities.’

The reason underlying this provision is that it would not be justifiable to grant a member of the Executive Board who is a German national or resident immunity from private law suits<sup>81</sup>.

These provisions only concern the ECB’s relationships with Germany as the host state. The status of members of the Executive Board in the other Member States is not explicitly provided for in the Protocol<sup>82</sup>. However, it follows from Article 23, first paragraph (‘This protocol shall also apply ... to the members of its organs’) that the members of the Executive Board enjoy the privileges and immunities laid down in Articles 12 to 15 of the Protocol in all Member States. These provisions are supplemented by Article 105 EC and Article 11.4 of the ESCB Statute ensuring the independence of the members of the Executive Board.

### **3. Status of members of the Governing/General Council and NCB staff participating in the exercise of the ECB’s functions**

The NCB Governors and Presidents who are members of the Governing Council and/or the General Council, as well as NCB staff who represent their NCBs in advisory committees may not invoke the privileges and immunities granted to members of the Executive Board or ECB staff. The scope of Article 19 of the Headquarters Agreement is explicitly limited to members of the Executive Board and does not apply to members of the Governing Council or General Council or NCB staff. Also, they are not ECB staff within the meaning of Articles 12 to 15 and 23 of the Protocol and Regulation No 549/69.

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<sup>80</sup> Cf. Seidl-Hohenveldern and Loibl, pp. 279-280.

<sup>81</sup> Seidl-Hohenveldern and Loibl, p. 279.

<sup>82</sup> The Protocol only refers to the Members of the Parliament (Articles 8 to 19), the Commissioners (Article 20) and the Judges of European Court of Justice (Article 21).

Nonetheless, the NCB Governors and Presidents, as well as NCB staff who participate in carrying out the ECB's functions, enjoy immunity when acting on behalf of the ECB. According to Article 11 of the Protocol

‘Representatives of Member States taking part in the work of the institutions of the Communities, their advisers and technical experts shall, in the performance of their duties and during their travel to and from the place of meeting, enjoy the customary privileges, immunities and facilities.

This Article shall also apply to members of the advisory bodies of the Communities.’

Although the members of the Governing Council and General Council are not ‘representatives of Member States’ within the meaning of this provision, it must be applied to them *mutatis mutandis*. Otherwise, the members of the Governing Council and the General Council would enjoy less protection than other NCB representatives contributing to the work of the ECB.

The meaning of the reference to the ‘customary privileges, immunities and facilities’ is not clear. Some legal authors are of the opinion that Article 11 refers to the privileges granted to members of the European Parliament in accordance with Article 8 (free movement) and Article 9 (immunity from legal proceedings in respect of acts undertaken in the performance of their duties)<sup>83</sup>. Others take the view that the ‘customary privileges, immunities and facilities’ are those provided for in the Protocol or even the privileges and immunities granted to diplomats<sup>84</sup>.

#### **4. Waiver of immunity**

In accordance with international practice<sup>85</sup> the ECB may waive the immunities granted to the members of the Executive Board and its staff. In this respect Article 18, second sentence, of the Protocol provides:

‘Each institution of the Communities shall be required to waive the immunity accorded to an official or other servant wherever that institution considers that the waiver of such immunity is not contrary to the interests of the Communities.’

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<sup>83</sup> Schmidt, in von der Groeben/Schwarze, Artikel 291 und Protokoll Nr. 36, No 36.

<sup>84</sup> For references see Schmidt, in von der Groeben/Schwarze, Art. 291 EG, No 36.

<sup>85</sup> Cf. Wenckstern, pp. 185 et seq.; Weissberg, p. 168.

The reason underlying this provision is that privileges and immunities are granted to the members of the Executive Board and ECB staff solely with the purpose of ensuring the independence and proper functioning of the ECB. Since the provisions of the Protocol and the Headquarters Agreement are aimed at the protection of the institution, and not of the persons, it is up to the ECB to decide on the waiver. The member of staff concerned has no right to appeal against this decision<sup>86</sup>.

It is clear from the wording of Article 18 of the Protocol that the ECB enjoys a certain discretion when judging whether a waiver would be in line with its interests<sup>87</sup>. Under certain circumstances, however, the ECB may be obliged to waive the immunity of a member of the Executive Board/member of staff. As a rule, international organisations are obliged to waive immunity for offences committed by members of staff outside their official work<sup>88</sup>.

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<sup>86</sup> Cf. Wenckstern, pp. 168, 185. Schmidt seems to be of different opinion in von der Groeben/Schwarze, Art. 291 EG, No 59.

<sup>87</sup> Schmidt, in von der Groeben/Schwarze, Art. 291 EG, No 60; Hölscheidt/Schotten, *NJW* 1999, pp. 2851, 2853.

<sup>88</sup> Seidl-Hohenveldern and Loibl, p. 280; Hölscheidt/Schotten, *NJW* 1999, pp. 2851, 2853.

#### **IV. Implementation of the rules on privileges and immunities – Problems arising in practice**

The implementation of the rules on privileges and immunities raises a number of practical legal questions which we will illustrate in the following. These problems relate in particular to employment and social welfare law (Section 1) and to tax law (Section 2).

##### **1. Employment and social welfare law**

###### **(a) Employment of temporary agency staff and freelancers**

Like other international organisations the ECB engages temporary agency staff or independent contractors (freelancers) to support ECB staff in the fulfilment of its tasks. The contracts with agencies or with freelancers are subject to national (usually German) law.

The engagement of temporary agency staff or freelancers by an international organisation raises the question of whether the ECB is subject to national rules aimed at the protection of temporary agency staff or freelancers. Such rules provide, in particular, that under certain conditions temporary agency staff or freelancers are to be considered as employees and may invoke the same rights and privileges as employees.

The applicability of such national rules cannot be denied by a simple reference to Article 15 of the Headquarters Agreement, because this Article only provides that employment relationships under the ECB's Conditions of Employment are exempt from German employment and social welfare law. One could argue that this provision is not opposed to the existence of employment relationships governed by national employment and social welfare law.

Such an interpretation would, however, be incompatible with the autonomous power conferred upon the ECB to adopt rules on its internal organisation and to regulate its employment relationships. According to the case law of the Court of Justice<sup>89</sup> and other

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<sup>89</sup> Case 65/74 *Porrini and others v the European Atomic Energy Community* [1975] ECR I-319, para. 11 et seq.; Case 232/84 *Commission v Jean-Louis Tordeur and Others* [1985] ECR I-3223, para. 28 denying the applicability of Belgian employment law; also Seidl-Hohenveldern, *IPRax* 1995, pp. 14, 15.

courts<sup>90</sup> this autonomous power comprises the power to define the conditions under which a person is to be considered a member of staff. The national legislator must not interfere with this principle by treating temporary agency staff and freelancers as ‘staff’. Therefore, national rules establishing a (fictive) employment relationship with an international organisation are not applicable. Procedurally, any action against the ECB before a national court would be inadmissible because of the Court of Justice’s exclusive competence to rule on employment law disputes between the ECB and its staff (cf. Article 36.2 of the ESCB Statute and Part II.1(a) above). The Court of Justice’s exclusive competence also comprises the power to decide on whether there is an employment relationship.

(b) Attachment of claims

As with other employers, the ECB may be subject to enforcement measures taken by third parties against ECB staff with regard to activities which are not related to their official tasks. Typical of such measures are court orders for the attachment of salary or the disclosure of an (earlier) assignment of a salary claim by the creditor of a member of staff.

As explained above Article 1, third sentence, of the Protocol provides that the property and assets of the ECB may not be subject to any administrative or legal measures of constraint without the authorisation of the Court of Justice.

The question has been raised as to whether the attachment of claims against the ECB is a measure of constraint within the meaning of Article 1 of the Protocol. It could be argued that the Protocol does not address this issue, as such measures do not concern the *assets of* the ECB but only *claims against* the ECB. However, for instance, legal measures taken on the basis of Section 840 *Zivilprozeßordnung* (ZPO, the German Code of Civil Procedure) impose certain obligations on a debtor, such as the obligation within two weeks of receiving an attachment of earnings order to serve notice on the new creditor recognising the debtor’s obligation not to pay the original creditor and instead to pay the new creditor. These obligations mean that the ECB is not only affected indirectly, as the third party

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<sup>90</sup> ECHR, judgment of 18 February 1999, *Waite and Kennedy v Germany* 26083/94, [1999] ECHR Reports of Judgments and Decisions 13; German Federal Labour Court (BAG), judgment of 10 November 1993, *IPRax* 1995, pp. 33-35 concerning the applicability of the German Law on the hiring out of employees (*Arbeitnehmerüberlassungsgesetz*) to the European Space Agency (ESA). Section 10 of this Law establishes a fictitious employment relationship between the borrowing company and the employee in case the lending company does not have a valid permit to hire out its employees. The Federal Labour Court considered an action based on Section 10 of the Law inadmissible because of the ESA’s immunity. The German legislator would not be empowered to establish the fiction by which an employment relationship with the international organisation is created. The decision was confirmed by the ECHR (no violation of the right of access to court) and the ESA’s internal Appeals Board.

debtor of a claim to its members of staff, but is subject to certain procedural claims by a third party. This at least touches on the immunities of the ECB<sup>91</sup>.

As explained above, the ECB may waive its immunity and under certain circumstances it is even obliged to do so. When deciding on the waiver the ECB must take into account the principle of loyal cooperation (Article 17 of the Headquarters Agreement). The ECB seems to be under an obligation to cooperate, particularly where any interference with the independence of the ECB with regard to its public tasks under Community law can be excluded (see Article 291 EC). It could therefore be argued that making the ECB subject to certain obligations under German law, on the enforcement of court orders against ECB staff, does not impinge upon the performance of its tasks.

Moreover, Article 18 of the Protocol limits the privileges, immunities and facilities accorded to officials and other servants of the Community to those which are in the interest of the Communities. This provision further obliges an institution of the Community

‘...to waive the immunity accorded to [its staff] wherever that institution considers that the waiver of such immunity is not contrary to the interests of the Communities.’

If, under certain circumstances, the ECB is obliged to waive the immunity of its staff in relation to their official functions, it is more difficult to justify why the ECB would not be under an obligation to cooperate, when a court order concerns a private matter of a member of staff, unrelated to their official duties. Therefore, it seems reasonable for the ECB to cooperate in cases of measures of constraint taken against its staff members on the basis of a court order.

The ECB has always followed a cooperative approach in such matters, which is supported by the very small number of actual cases in which this has been relevant. The ECB takes a similar approach to the rare cases of disclosure of salary attachments.

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<sup>91</sup> Cf. Case 1/71 *X v Commission* [1971] ECR 1971 363, 439; Case 1/87 *SA Universe Tankship Company Incorporated v Commission* [1987] ECR 2807, para. 3; Case 1/88 *SA SA Générale de Banque v Commission* [1989] ECR 857, para. 9; Case C-1/00 *SA Cotecna Inspection SA v Commission* [2001] ECR I-4219, para. 9-10; Case C-1/02 *SA Antipapas v Commission* [2003] ECR I-2893, para. 12.

(c) Social allowances under national law (e.g. *Eigenheimzulage*, *Kindergeld*, etc.)

Whether or not members of staff of the ECB qualify for social allowances under national (in particular German) law depends on whether they fulfil the requirements laid down in the respective regulations. We have analysed two allowances which are particularly relevant, the home owner's allowance (*Eigenheimzulage*) and child allowance (*Kindergeld*).

Both allowances have one important pre-condition under German law which ECB staff do not normally fulfil. The allowances are only paid if the applicant is subject to unlimited tax liability in Germany (*unbeschränkte Steuerpflicht*)<sup>92</sup>. However, ECB staff are only subject to unlimited tax liability if they are Germans or have lived in Germany as a foreigner for a long period so that the condition in Article 14 of the Protocol (maintenance of domicile for tax purposes in the country of origin) does not apply to them. The third possibility (i.e., income from other professional activities in Germany) can only apply in the year of taking up employment with the ECB or the year of leaving ECB employment.

It should be noted in this context that Article 13 of the Protocol does not preclude a Member State from taking the actual income of an ECB staff member into account when granting benefits<sup>93</sup>. Article 13 of the Protocol does not require Member States to grant officials and other servants of the Community the same benefits as are paid to beneficiaries in accordance with the relevant national provisions.

Under Section 1(3) of the German Income Tax Act (EstG), ECB staff may apply to become subject to unlimited tax liability in Germany. The satisfaction of the relevant criteria will depend on the individual case. Once this status is granted, ECB staff are fully entitled to the abovementioned allowances. For completeness, the spouse of a staff member, who is not an ECB staff member but is otherwise gainfully employed in Germany, is also subject to unlimited tax liability in Germany and qualifies for these allowances.

## 2. Tax law

(a) Exemption of salaries from taxation

The implementation of Article 13, second paragraph, of the Protocol exempting salaries, wages and emoluments from national taxation has raised a number of legal questions.

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<sup>92</sup> See Section 1 of the *Eigenheimzulagengesetz* (Law on home ownership allowances) and Section 62(1) *Einkommenssteuergesetz* (EStG, Law on income tax).

<sup>93</sup> Case C-333/88 *Peter John Krier Tither v Commissioners of Inland Revenue* [1990] ECR I-1133, para. 15; Case C-229/98 *vander Zwalmen und Massart v Belgian State* [1999] ECR I-7113, para. 29.

In a number of judgments the Court of Justice has stressed that the provision must be interpreted broadly. This applies initially to the terms ‘salaries, wages and emoluments’. These include all kinds of payments received from the ECB in consideration for services rendered by the member of staff. The term ‘emolument’ covers all kinds of allowances, including for instance widows’ allowances<sup>94</sup>. The term ‘taxes’ has equally to be interpreted broadly. Article 13, paragraph 2, precludes any national tax, regardless of its nature and the manner in which it is levied, which is imposed directly or indirectly on an ECB staff member by reason of the fact that they are in receipt of remuneration paid by the ECB, even if the tax in question is not calculated by reference to the amount of that remuneration<sup>95</sup>. Taking into account the staff member’s income for the calculation of the tax rate applicable to other income of that person or to the income of the spouse in the case of joint taxation is also prohibited<sup>96</sup>.

However, staff members are not exempt from charges and dues which are paid as a fee for services rendered by a public authority<sup>97</sup>. Such charges and dues are not taxes within the meaning of Article 12 of the Protocol, even if they are calculated on the basis of the staff member’s salary. The fact that the member of staff does not pay taxes to the national treasury does not, however, justify any kind of discrimination<sup>98</sup>. It also merits attention that the scope of Article 13, second paragraph, is limited to taxes that are levied periodically and does not exclude the imposition of one-off taxes such as inheritance tax<sup>99</sup>. In accordance with Article 14 of the Protocol a staff member may be subject to such taxes in the Member State where they had their domicile before entering the service of the ECB.

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<sup>94</sup> Case 7/74 *Reiniera Charlotte Brouerius van Nidek v Inspecteur der Registratie en Successie*, [1974] ECR 757.

<sup>95</sup> Case 6/60 *Humblet v Belgium* [1960] ECR 559, 579 et seq.; Case 260/86 *Commission v Belgium* [1988] ECR 955, para. 10 concerning a tax on income from immovable assets. Although the tax was levied from the owner, in practice it was borne by the tenants. The refusal of the Belgian state to grant a reduced rate of tax where the tenant or his/her spouse was an official of the European Communities was considered incompatible with Article 13, second paragraph, of the Protocol.

<sup>96</sup> Case 6/60 *Humblet v Belgium* [1960] ECR 559, 579 et seq.

<sup>97</sup> Case 32/67 *I.G.F. Van Leeuwen v City of Rotterdam* [1967] ECR 43, 48.

<sup>98</sup> Case 152/82 *Sandro Forcheri and his wife Marisa Forcheri v Belgian State* [1983] ECR 2323, para. 19.

<sup>99</sup> Case 7/74 *Reiniera Charlotte Brouerius van Nidek v Inspecteur der Registratie en Successie*, [1974] ECR 757. The Court concluded, from reading Article 13.1 (Community tax) together with Article 13.2, that ‘only covers national taxes of a similar nature to those levied by the Community on the same sources of income.’

(b) VAT on the import of cars

Recently, the question was raised whether the import of cars by ECB staff from their country of origin to Germany is subject to VAT.

Article 12(d) of the Protocol<sup>100</sup> provides that ECB staff may, under certain conditions, be entitled to import free of duty their furniture and effects at the time of first taking up their post. The Protocol was adopted before the concept of turnover tax was introduced into the Community framework, so under a wide interpretation this provision also includes the import of vehicles free of VAT. The term ‘effects’ includes, *inter alia*, a motor car personally owned by an ECB staff member<sup>101</sup>. Article 12(d) of the Protocol is implemented by Article 12 of Headquarters Agreement.<sup>102</sup>

In 2006, the German Federal Finance Court (*Bundesfinanzhof*)<sup>103</sup> decided on the case of a former EMI staff member who had purchased a new car from a car dealer in her EU home state and had brought it to Germany when taking up her position. The supply of the car by the Danish dealer was treated as an intra-Community supply and was accordingly exempt from Danish VAT. Subsequently, the German tax authorities sent the plaintiff a VAT assessment for personal vehicle taxation and determined the VAT due on the intra-Community acquisition of the car.

Unlike the court of first instance, the Federal Finance Court (*Bundesfinanzhof*) ruled in favour of an exemption from VAT. It decided that the tax exemption would not follow di-

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<sup>100</sup> Article 12(d) reads: ‘In the territory of each Member State ... officials and other servants of the Community shall ... enjoy the right to import free of duty their furniture and effects at the time of first taking up their post in the country concerned ... subject in either case to the conditions considered to be necessary by the government of the country in which this right is exercised’.

<sup>101</sup> The existence of Article 12(e) of the Protocol, which also refers to the import of a motor car free of duty, does not contradict such an interpretation, as it does not deal with the specific case of a member of staff taking up their post, but applies without a time limit. Article 12(e) reads: ‘... officials and other servants of the Community shall ... have the right to import free of duty a motor car for their person use, acquired either in the country of their last residence or in the country of which they are nationals on the terms ruling in the home market in that country ...’

<sup>102</sup> The provision reads as follows: ‘At the time of first taking up their post in the Federal Republic of Germany, employees of the EMI and family members forming part of their households shall be exempt from customs and excise duties in respect of the import of their furniture and personal effects which are in their ownership or possession. Vehicles shall likewise be exempt, though where a vehicle is imported from a third country only if it has been used there by the employee for a period of at least six months prior to being imported ...’

<sup>103</sup> First instance Hessisches Finanzgericht AZ 6 K 1971/02, decision of 17 September 2003, second instance, Bundesfinanzhof AZ V R 65/03, decision (Gerichtsbescheid) of 28 September 2006.

rectly from the Protocol or from the EMI Headquarters Agreement because it had consistently held that only VAT on imports constitutes a customs duty, but not VAT on intra-Community acquisitions. However, by reason of the reference in Section 4b No 3 of the German Law on turnover tax (*Umsatzsteuergesetz* 1993), the exemption from VAT on imports or customs duties results in a tax exemption for intra-Community acquisitions. As the transfer of the car to Germany would have been exempt as an import on the basis of Article 10 of the EMI Headquarters Agreement (the predecessor of Article 12 of the ECB Headquarters Agreement), the application of Section 4b No 3 *Umsatzsteuergesetz* 1993 leads to exemption from VAT also in the case of an intra-Community acquisition. Furthermore, the *Bundesfinanzhof* stated that the import of the car must ensue within 12 months of the date of first entry, without it being decisive in that regard on what date the post was taken up. The *Bundesfinanzhof* considered this interpretation of Article 10 of the EMI Headquarters Agreement to be free from doubt in Community law, so that it refrained from making a reference for a preliminary ruling under Article 234 EC. Furthermore, it did not decide on the application of Article 12 of the Protocol to this case.

(c) Reimbursement of VAT included in the rent paid by the ECB

On 8 December 2005, the Court of Justice issued its final ruling in a case between the ECB and the Federal Republic of Germany<sup>104</sup>. The case concerned the ECB's claim for reimbursement of the VAT included in the rent for its premises and in the ancillary costs and investment costs related to this rent.

The background to the case is the following: The inclusion of VAT in the rent and the ancillary costs paid by the ECB arose from the specific provisions of German tax law. Under normal circumstances, a company can offset the VAT it pays to its suppliers (input tax) against the VAT it charges to its clients (output tax), and as a result it only pays the difference between these two amounts to the tax authorities. For normal commercial undertakings, therefore, VAT should be a neutral tax. Charges for the supply of rented property (rent and ancillary services) are not in principle subject to VAT under German law. However, a landlord has the possibility of opting for the VAT regime (to 'opt to tax') and, if it does so, it can offset the VAT it receives against the VAT it has paid. The right to opt to tax is only available, however, if the tenant is carrying on commercial activities. Since the ECB is a public institution, it cannot be considered as a commercial company for tax purposes. This means that the ECB's landlords cannot opt to tax. To avoid a financial loss resulting from the inability to offset input tax against output tax, landlords therefore compensate by including the input tax in the rent. The ECB's landlords did indeed increase the

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<sup>104</sup> Case 220/03 *European Central Bank v Federal Republic of Germany* [2005] ECR I-10595.

monthly rent charged correspondingly, once they were aware that the ECB could not be considered as a commercial undertaking. The ECB considered that it suffered a *de facto* VAT charge, although *de iure* it is exempt from VAT.

The German tax authorities had rejected the ECB's claim with the argument that the invoices of the ECB's suppliers did not show the tax separately. The ECB had argued that the Headquarters Agreement, construed in the light of the Protocol, supported its claim. In particular, the ECB argued that the obligation of Member States laid down in Article 3 of the Protocol to refund, 'wherever possible', turnover tax which is 'included in the price of movable or immovable property' does not require the tax to be 'invoiced separately'. By insisting on the tax being invoiced separately, Germany obtained a fiscal advantage which is exactly what the Protocol and the Headquarters Agreement are aimed at avoiding.

The Court decided that Article 8.1 of the Headquarters Agreement expressly makes the refund of turnover tax subject to the condition that the tax is invoiced separately. It continued that, although some other interpretation of the Headquarters Agreement might be possible in the light of its legal context, in the opinion of the Court, this was not possible in this case because of the clear wording of the relevant clause. The Court ruled that this wording was not contrary to the aims of the provision of the Protocol which regulates the refund of turnover tax. The Court considered that refusing the refund of a tax which is not invoiced to the ECB, but which is paid as input tax by the other parties, does not go beyond the margin of discretion granted to the Member States and EU institutions concerning the implementation of Article 3 of the Protocol.

#### (d) Prohibition on involving the ECB in the collection of taxes

The question whether and to what extent the ECB may be involved in the collection of taxes was raised in the context of the Law on the containment of illegal employment in the building sector of 30 August 2001<sup>105</sup>. According to this Law, a principal, i.e. a party ordering construction works is obliged to deduct 15 % from a contractor's invoice and to transfer this to the German tax authorities unless the contractor provides an exemption certificate (*Freistellungsbescheinigung*). If the principal fails to deduct taxes as required, the tax authorities may call upon him for the money. The purpose of this provision is to reduce illegal employment in the building sector and to ensure the proper payment of income taxes.

The German Ministry of Foreign Affairs informed the ECB about this Law and invited it to comply with its provisions. This would not only have caused some administrative difficul-

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<sup>105</sup> *Gesetz zur Eindämmung illegaler Betätigung im Baugewerbe*, BGBl. I, p. 2267.

ties but it was also considered incompatible with the ECB's status, in particular in respect of the co-liability for the payment of taxes. Article 7.3 of the Headquarters Agreement provides that

‘The ECB, within the context of its official activities, is exempt from the obligation to pay, withhold or collect taxes from third parties and from any reporting obligations in connection with the levying of taxes.’

As outlined above, the refurbishment of the ECB's existing premises as well as the construction of the new premises are part of the ECB's official activities. Therefore the Law on the containment of illegal employment does not apply to the ECB. The Ministry of Foreign Affairs was informed accordingly and accepted this assessment.

(e) Mineral oil tax reimbursement: obstacles in practice

The remission or refund of indirect tax provided for in Article 3 of the Protocol also extends to another indirect tax, the mineral oil tax<sup>106</sup>. While mineral oil tax has been reimbursed without difficulties in the host state, the ECB has met additional procedural requirements in the Netherlands. International/supranational organisations can only purchase petrol exempt from mineral oil tax from a central depot in Rotterdam. Such a requirement constitutes a heavy practical obstacle which it is difficult for a supranational organisation that is not located in the Netherlands to overcome. Given the minor amounts of tax involved, the ECB has not invested further effort in such reimbursement procedure.

## V. Summary

As with other international organisations, the ECB enjoys privileges and immunities in order to ensure its independence and proper functioning.

Under its privileges the ECB is partially exempt from the rules of national law which are considered to be incompatible with its independence and its autonomous power to determine its internal organisation and administration. However, the ECB is not fully exempt from national law. Since the ECB's premises are part of German territory and not an extra-territorial area, German law applies unless privileges have been granted to it. Furthermore,

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<sup>106</sup> Article 8, paragraph 2, of the Headquarters Agreement confirms this explicitly:

‘Furthermore, in application of Article 3, paragraph 2, of the Protocol, the Federal Finance Office shall reimburse, at the request of the ECB, the mineral oil tax included in the price of petrol, diesel and heating oil, if the latter is intended for the official use of the ECB and the amount of tax due exceeds DEM 50 in each case.’

the privileges only cover the ECB's official activities which are aimed at the fulfilment of its functions (principle of functional immunity). This includes the ECB's core tasks as well as auxiliary activities which are necessary for the fulfilment of the core tasks, but not activities outside the scope of its functions. Finally, the privileges granted to the ECB are qualified by the principle of loyal cooperation.

The ECB also enjoys immunity from national jurisdiction. This means that in principle national courts are not empowered to decide on legal disputes involving the ECB. Actions against the ECB are inadmissible and must be dismissed. However, the ECB's immunity from jurisdiction is limited. Legal disputes which do not fall under the exclusive competence of the Court of Justice may be brought before a national court. Since the competencies of the Court are interpreted broadly and may be extended by way of arbitration clauses, the practical relevance of this subsidiary competence is limited. The ECB's immunity is also limited to activities which are aimed at the fulfilment of its functions. No immunity applies if the ECB waives it.

Furthermore, the ECB enjoys immunity from enforcement. This means that claims against the ECB may not be enforced by administrative or legal measures of constraint without the prior authorisation of the Court of Justice. Such authorisation may only be given if the measure does not jeopardise the functioning and independence of the ECB. Immunity from enforcement covers the ECB's premises, its movable assets, its archives and its communications.

The members of the Executive Board and ECB staff also enjoy privileges and immunities to ensure that they are able to fulfil their tasks fully independently and impartially. It is emphasised that the privileges and immunities are not personal benefits; they are granted solely in the interests of the ECB. The ECB may waive them and, under certain conditions, the ECB may even be obliged to do so if an action does not relate to the staff member's tasks.

The implementation of the rules on privileges and immunities has raised a number of practical legal questions. Some of these could be solved, while others have given rise to legal disputes and have been clarified by the Court of Justice or by national courts.

To conclude, it must be stressed that privileges and immunities are not favours granted to the ECB but are efficient instruments to ensure the proper functioning of the ECB and its independence vis-à-vis the Member States .

## List of abbreviations

|                  |                                                                                                                       |
|------------------|-----------------------------------------------------------------------------------------------------------------------|
| BayVGH           | Bayerischer Verwaltungsgerichtshof (Administrative Court of Bavaria)                                                  |
| BFH              | Bundesfinanzhof (Federal Financial Court of Germany)                                                                  |
| BGBI.            | Bundesgesetzblatt (German law gazette)                                                                                |
| BVerwG           | Bundesverwaltungsgericht (Federal Administrative Court of Germany)                                                    |
| BVerwGE          | Amtliche Rechtsprechungssammlung des Bundesverwaltungsgerichts (Official Reports of the Federal Administrative Court) |
| Cf.              | confer, compare with                                                                                                  |
| Court of Justice | Court of Justice of the European Communities                                                                          |
| DStRE            | Deutsches Steuerrecht – Entscheidungsdienst (German law review)                                                       |
| ECB              | European Central Bank                                                                                                 |
| ECHR             | European Court of Human Rights                                                                                        |
| ECR              | European Court Reports                                                                                                |
| EC (Treaty)      | Treaty establishing the European Community                                                                            |
| EMI              | European Monetary Institute                                                                                           |
| ESA              | European Space Agency                                                                                                 |
| ESCB Statute     | Statute of the European System of Central Banks and of the European Central Bank                                      |
| Et seq.          | and the following                                                                                                     |
| EU               | European Union                                                                                                        |
| EuR              | Europarecht (German law review)                                                                                       |
| FAO              | Food and Agriculture Organization of the United Nations                                                               |
| GRUR Int.        | Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil (German law review)                                  |
| ICJ              | International Court of Justice                                                                                        |
| ICLQ             | International and Comparative Law Quarterly                                                                           |
| IPRax            | Praxis des Internationalen Privat- und Verfahrensrechts (German law review)                                           |
| Juris            | Juristisches Informationssystem für die Bundesrepublik Deutschland (German legal database)                            |
| NCB              | National central bank                                                                                                 |
| NJW              | Neue Juristische Wochenschrift (German law review)                                                                    |
| OGH              | Oberste Gerichtshof (Supreme Court of Austria)                                                                        |
| OJ               | Official Journal of the European Union                                                                                |
| p.               | page                                                                                                                  |
| para.            | paragraph                                                                                                             |
| Protocol         | Protocol on the privileges and immunities of the European Communities of 8 April 1965                                 |
| RIW              | Recht der internationalen Wirtschaft (German law review)                                                              |
| UNESCO           | United Nations Educational, Scientific and Cultural Organization                                                      |

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