

EUROPEAN MONETARY INSTITUTE

OPINION OF THE EUROPEAN MONETARY INSTITUTE

(97/C 205/07)

Consultation by the Council of the European Union under Articles 109f (6) and 109f (8) of the Treaty establishing the European Community, respectively, on draft legislation for the introduction of the euro and some provisions relating to the introduction of the euro.

CON/96/13

1. On 11 November 1996 the EMI received from the Council of the European Union a request for consultation on two proposals from the Commission of the European Communities for Council Regulations addressing the introduction of the euro, based respectively on Article 235 and on Article 109l (4) of the Treaty establishing the European Community (Ref.: COM(96) 499 dated 16. 10. 1996; for ease of reference, the two drafts will be referred to as the '235 Draft' and the '109l (4) Draft'). The drafts are accompanied by an explanatory memorandum. Consulting the EMI is compulsory in both drafts, notwithstanding the legal base for one of them being Article 235 of the Treaty, since the subject matter of both is within its field of competence. However, the 109l (4) Draft could be adopted once the ECB has been established, and therefore the present opinion does not preclude the opinion by the ECB on that Draft, under Article 109l (4) of the Treaty, before its adoption.
2. The Commission of the European Communities' proposals deserve in general a positive appraisal. The Commission has built upon earlier work undertaken by the EMI and upon suggestions received in response to a wide consultation process undertaken with financial organisations and with the Monetary Committee, in both of which the EMI has been involved. The EMI has been an observer at the meetings of a working group of the Council constituted after the adoption of the drafts by the Commission, and has noted the several amendments proposed by national delegations. The present opinion takes into account the revised drafts as envisaged by the above-mentioned working group. The opinion is issued on the basis of the English version of the drafts; in order to ensure a uniform interpretation and application within Member States of these essential legal acts, the EMI would

emphasise the particular need for the Council to ensure the equivalence of the legal terms employed in the authentic versions of the drafts in all the official languages of the Community.

The comments outlined in this opinion will be limited to those aspects where the EMI feels there is still room for clarification.

3. The EMI takes note of the division into two draft regulations decided by the Commission, but underlines the importance of both texts being, as requested by the Commission, simultaneously politically endorsed by the European Council, presumably at its meeting in Dublin in December.

235 Draft

4. The EMI has followed the debate within the Council working group on the appropriate drafting of Article 3 of the 235 Draft addressing the continuity of legal instruments, and is aware of the arguments raised by national delegations. This is a topic of concern to financial markets. The EMI has received important and convincing representations from market organisations focusing on this specific issue. The EMI supports the conclusions of the European Council in Madrid regarding the convenience of a legal provision ensuring continuity, but is of the opinion that the language should be as ample as necessary to duly satisfy these concerns. Ensuring continuity will contribute to the stability of financial markets and facilitate the changeover to the single currency.

In this connection, the EMI welcomes the improved wording of paragraph 7 of the Preamble. In addition, several EMI Council members would favour the insertion of explicit language confirming that the concept 'introduction of the euro' used in Article 3 is widely encompassing and comprises notably the fixing of irrevocable conversion rates,

the withdrawal of national currency units and the disappearance or replacement of reference interest rates. That might be achieved either in the definitional part (Article 1), or in Article 3 itself, or at least in the Preamble of the 235 Draft.

Likewise, several EMI Council members would favour the addition of the sentence 'with reference to the introduction of the euro' at the end of Article 3, in order to avoid the risk of litigation originating in '*force majeure*' or 'changes in circumstances' clauses, or other clauses with similar effect, and in order to protect the consumers of financial services. Inclusion of the adverb 'expressly' would not be completely satisfactory, since those clauses would have been expressly agreed and nevertheless would not contemplate EMU.

Most EMI Council members would welcome, to enhance its legal value, the transfer of the definition of contracts from paragraph 9 of the Preamble to Article 1.

5. The EMI acknowledges that provisions on rounding, although not identical, are consistent with its own earlier suggestions.

1091 (4) Draft

6. The first matter to consider is the provisions regarding the end of the transitional period. From a legal perspective, the end of the transitional period entails the disappearance of the national currency units, the compulsory and automatic redenomination of all existing legal instruments, in particular in national laws and in contracts. Customers' bank accounts will be changed into euro; invoicing will have to be denominated in euro; official reporting will have to be in euro; pricing will have to be in euro; etc.

The EMI supports the concept that the legal transition takes place simultaneously in all participating Member States. The date of that legal transition should coincide approximately with the date at which euro banknotes and coins will be put into circulation. The logistics of the cash changeover may need a certain flexibility in that respect. At this stage it is not yet appropriate to specify the date at which euro banknotes will be put into circulation. The EMI therefore would favour that the date for the end of the transitional period in Article 1, and the corresponding language in Articles 10 and 11, be specified

when the Draft is adopted as a Regulation by the Council, and until then brackets should be used.

7. The European Council agreed in Madrid that the regulation providing the legal framework for the use of the euro 'will have the effect that the national currencies and the euro will become different expressions of what is economically the same currency', and to that end 'will establish a legally enforceable equivalence between the euro and the national currency units'. It also agreed that the regulation should 'ensure that private economic agents will be free to use the euro; at the same time they should not be obliged to do so'. The EMI considers appropriate the manner in which these objectives are achieved in the 1091 (4) Draft.

In particular, the EMI shares the view of the Commission that the substitution of the euro for the currencies of the participating Member States as provided for in article 2 is an appropriate way to ensure those conclusions, and welcomes the provisions of the Draft enhancing the legally enforceable equivalence between euro and national currencies required by the European Council in Madrid and 'ensures the smooth functioning of the payment systems' by avoiding the need to establish dual circuits. The EMI welcomes paragraphs (3) and (6) of Article 8 of the Draft, the substance of which it regards as satisfactory. However, the wording of paragraph (3) of Article 8 could be further re-examined in order to provide more clarity.

The first sentence of paragraph (3) grants the originator of a payment the right to choose between the euro and the national unit, which is the quintessence of fungibility in scriptural payments; that sentence is clear and needs no review (although it might be advisable to substitute 'may' for 'can' to underscore that it addresses an option and not a possibility). The second sentence entitles the financial intermediary 'to make the necessary conversion for crediting an account without asking for the consent of the beneficiary', when that account has a denomination which differs from the denomination chosen by the originator of the payment. That second sentence could require more clarity with respect to the respective rights and obligations of both the intermediary and the beneficiary. In that respect, it could address multilateral payment systems or the intervention of several payment intermediaries.

For the avoidance of doubt, the wording of paragraph (3) of Article 8 should clearly ensure that

the use of the potestative tense ('may') does not permit rates other than the conversion rates.

It might be also clarified whether the sentence refers only to transfer orders, or applies also to other instruments for scriptural payments (namely cheques) which eventually lead to crediting an account, as opposed to cash payments.

The words 'and payable within that Member State' have the purpose, according to the explanatory notes, of limiting the scope of the provision to domestic payments. The EMI sees no reason to have regard to the place where a payment is originated, and would favour the extension of the provision to cross-border payments for payments in the euro unit or in the currency unit of the account of the payment beneficiary.

8. The principle of no compulsion is adequately reflected in article 8 (1), with well-balanced exceptions in the subsequent paragraphs. However, the EMI considers that the legal clarity of Article 8 (4) first indent, which allows for unilateral redenomination of tradable debt, needs to be enhanced by specifying the '*critère de rattachement*' that identifies the competent Member State: viz. the place where the issuer is located, the Member State whose currency unit is concerned, or the Member state whose laws apply to the issue, taking into account the legal basis of that regulation and the competences of Member States for private law and for the capital markets.

9. The phenomenon of commercial reproduction of banknotes is addressed in different manners by Member States, and it is a matter of concern for banknotes denominated in euro because it may widely increase in size around the time these new banknotes will be launched. The EMI considers that the different national regimes applying to commercial reproduction of banknotes might cause inconveniences in the manner in which the ECB is to act with respect to reproduction of euro banknotes. The Statute of the ESCB does not provide the ECB with instruments to deal with that particular issue. The monetary law governing the new monetary signs seems to be an appropriate vehicle to deal with this topic. The EMI therefore suggests that in Article 12 of the Draft a new paragraph is inserted along the following lines: 'The ECB shall specify the regime applying to the reproduction of banknotes denominated in euro'.

The EMI is currently analysing the several aspects related to electronic money, to the issuance of coupons and tokens denominated in euro, and to euro banknotes (namely copyright, counterfeiting, anti-copying devices or rules for modem reproduction machinery, and the regime for redemption of damaged notes). As a result of that analysis, specific provisions to be included in the 109l (4) Regulation might be advisable. The ECB may decide to provide an opinion on this subject.

10. The EMI has no objection to its opinion being made public by the consulting authority at its discretion.