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Discussion of Some Legal Issues Raised  
by the Introduction of the Euro

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## Abstract

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France, Luxembourg and Belgium have experienced the transition between their national currency system and the Euro. This historical change has generated many interesting comments. However, the legal issues involved in the delegation of monetary policy to the European Central Bank have not been adequately treated in these three French-speaking member States. This paper proposes a survey of some important questions relating to the implementation of legal rules on the Euro not yet solved. Among others, this paper discusses the duty of member States to protect their currency against the negative effects of inflation. It shows that the reduced field of member States' competences in economic policy can still lead to the adoption of different sets of rules in participating States, that is not desirable for a proper functioning of the European Monetary Union.

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## 1 Introduction<sup>1</sup>

As of 1<sup>st</sup> January 1999, the euro has become the common currency of 11 of the 15 Member States of the European Union. The adoption of the common currency was decided upon in different phases, starting with the Maastricht Treaty of 2<sup>nd</sup> February 1992, which provided for four stages (preliminary stage until 31 December 1993, first stage until 31 December 1998, second stage starting 1<sup>st</sup> January 1999 and third stage starting on 1<sup>st</sup> January 2002). The most visible effect of this development is the introduction of the new banknotes and coins as from 1<sup>st</sup> January 2002, with a transition period ending on June 30, 2002 for all participating States.

Much information is available on this historical development. Since this topic has been adequately treated elsewhere,<sup>2</sup> no deep analysis of the introduction of the euro will be carried out here. However, the advantages of introducing this common currency can briefly be summarized. The primary objective of the reform is naturally to maintain price stability (Art. 105 EC), which is expected to benefit exporters, through the elimination of exchange rate risks. Price transparency for consumers and producers, as well as efficiency in methods of payments can also be highlighted as the main effects sought.

Another aim in introducing the common currency is the elimination of transaction costs in cross-border operations. In practice,<sup>3</sup> one can estimate that for large companies the overall exchange costs would amount to 1 % of any payment, or about 0,4 % of the EU's GDP.

Of course, a certain amount of inconvenience can also be expected, such as the large costs of adapting to the new currency and issues related to rounding-up in conversion operations. These difficulties have been identified and have led to specific rules being applied during the transition period, which again will not be developed here, since they have been extensively dealt with elsewhere.

The purpose of the present article is rather to establish the legal problems faced and solved by the three French-speaking Member States that have implemented the euro (France, Luxembourg and Belgium), and find out which issues still remain unsolved. This exercise should be of direct benefit to Sweden assuming it joins the European Monetary Union (EMU).

Sweden's situation can also briefly be reviewed at this point. Sweden,

together with the UK, Denmark and Greece belonged to a group of States that did not take part into the negotiations on the EMU. As a consequence, these States were not bound to apply rights and obligations arising from the European System of Central Bank (ESCB). Among these States, both Denmark and the UK have obtained special status as a result of the negotiations leading to the Treaty of Amsterdam, signed on the 2<sup>nd</sup> October 1997.<sup>4</sup> They gained a temporary 'opt out' from the EMU entry at this stage. By contrast, neither Sweden nor Greece have the right to defer entry but simply failed to meet the convergence criteria<sup>5</sup> necessary to qualify for EMU membership. However, due to the possibility of re-examining the applicants' situation every second year, Greece has since joined the EMU as of 1<sup>st</sup> January 2001,<sup>6</sup> after meeting all the criteria. In other words, Sweden could still join the EMU providing that all conditions relating to the convergence criteria are met.

The conditions and the legal framework of the EMU lie within articles 105 EC and following, together with two regulations that are the basis for the forthcoming discussion, namely regulation n:o3320/94/EC of 17 June 1997, and regulation n:o 974/98 of 3 May 1998.<sup>7</sup> It is no coincidence that application rules are drafted in the form of directly applicable regulations rather than in the form of directives. Their legal enforcement should then not be problematic within Member States.

From a legal point of view, the substitution of currency for another one generates particular problems that are not new as such, because this phenomenon has happened before (in Germany, and France for example). Nevertheless, the introduction of the euro represents more than the mere substitution of one currency for another, as it will be issued by a political system other than a State, something that has never happened before.

Many studies have been carried out in the French-speaking Member States<sup>8</sup> in order to avoid any problems as a result of the change-over. Three main types of problem have been identified in the preparatory stage of introducing the new currency. First of all, the new regulations provide for a general principle of continuity in contracts where the euro is substituted to a national currency. At this point, some international law issues have been identified and discussed which are mentioned below.

Secondly, most national and European legislation referring to 'disappearing' national currencies (or the ECU) would naturally have to be up-

dated. The methods followed by each of these States have been quite different, and some interesting divergences will be discussed.

Finally, lots of practical difficulties still remain as a hindrance to the complete implementation of the euro. Beside the difficulties still incurred in the field of cross-border payments, the substitution of the euro for national currencies generates exchange losses or gains that are nothing really new in tax law, and participating Member States have already taken care of this issue. Nevertheless, a common position is also lacking in the tax treatment of costs and charges arising, for companies and undertakings, from the change of currency. The last section of this paper will briefly report on these remaining practical difficulties.

However, the most important legal issue raised by the change of currency relates to its legal status in national law, in international private law and in European law. This issue is the object of the next part of this report.



## 2 The Legal Status of the Euro

The legal status of the euro is mainly provided for by regulations n:o 1103/97 and n:o 974/98 where the substitution of the euro for national currencies is expressly stated. It results from the Treaty of Rome that the European Monetary Union has acquired exclusive competence in some aspects of Member States' monetary laws. The difficulty to be dealt with is which specific aspects have been transferred to the European legislator.

The introduction of a common currency in different Member States of the European Union is one step in achieving capital market integration and liberalization of payments. Full monetary policy integration is thus the result of a long evolution of the European Union, where Member States have chosen whether or not to participate in its monetary union.

However, if the common monetary policy now belongs to the European System of Central Banks (ESCB) and to the European Central Bank (ECB), the Member States retain sovereignty over public finances. This principle is expressed in the regulation n:o 1103/97 of 17 June 1997, in the preamble stating that

*“8. Whereas the introduction of the euro constitutes a change in the monetary law of each Member State; whereas the recognition of the monetary law of a State is a universally accepted principle...”*

The recognition of monetary law in this context deals with international private law concepts, in order to avoid contract dissolution in the case of currency-change (principle of continuity, see under ch. 3). This recognition finds its grounds in the States' sovereignty over their internal public finances, in so far as they determine the value of their money.

With the introduction of the euro, as a supranational currency, one can wonder how much sovereignty participating States still enjoy over their public finances.

### ***Monetary Law or Civil Law?***

Traditionally, States are sovereign in ruling over a currency through their monetary law (*lex monetae*), often classified by lawyers within public law. However, the expression of this sovereignty also has consequences for the civil law of contracts, where the value of an obligation<sup>9</sup> is determined by reference to national monetary law.<sup>10</sup> The obligation of a contract to pay money is to pay that which the law shall recognize as money when the payment is to be made. Every contract for the payment of money is necessarily subject to the constitutional power of the Government over the currency, whatever power it may be, and the obligations of the parties are therefore assumed with reference to that power.

From a civil law viewpoint, in a *domestic perspective*, the currency has three main functions: 1) it is a means of payment of obligations, 2) it is an instrument measure of wealth and finally, 3) it is also a store of value.

These functions actually allow a distinction to be made between those rules that belong to civil jurisdiction (civil law, contract law) and those that belong to the public sector (public finances, economic and monetary policy and “public order<sup>11</sup>” regulations). In its turn, this distinction could help to answer the difficult question of the scope of competence of the EU in the field of currency. One could for instance suggest that the pure monetary policy rules would have to be fully delegated to the European Union, whereas the civil law rules would remain within the exclusive competence of Member States.

However, an analysis of the ground principles upon which the “*lex monetae*” is built must first be made before determining the competence of Member States in the field of monetary policy. Indeed, if Member States are sovereign in the field of national currency, they should be allowed to adopt principles applicable in their own territory, and nowhere else, such as the nominalistic or valoristic principles.

### *‘Nominalism’ and ‘Valorism’, a Comparative Overview of Different Legal Traditions*

The legal discussions surrounding the foundations of monetary obligations have their origins in the distinction between the principles of *nominalism*<sup>12</sup> and *valorism*<sup>13</sup> upon which civil law rules are based. According to the prin-

ciple of nominalism, the definition of a currency is provided by its denomination and not by its value, therefore ensuring its legal constancy.

In other words, the general question is *whether and if so how* fluctuations in the value of a monetary obligation can be taken into consideration in a legal system.

This question is closely connected to how the civil law traditions of each country deal with the valuation of monetary obligations. From a historical viewpoint, it seems that *nominalism* has universally predominated as a basic principle regulating the monetary order and economic policy, appearing in the early fifteenth century on the Continent and in the eighteenth century in the UK.<sup>14</sup> However, in England, nominalism is not derived from the law of money, nor is it a product of public law, as opposed to France and Germany, where legislation is taken in the form of “public order” rules (ordinances), because the national economic authorities have the right to regulate some aspects of pricing policies in their territories.

One of the effects of nominalism is to let the creditor bear the risks of depreciation. Allowing the creditor to shift this risk on to the debtor depends upon the nature of this principle. If it is of “public order” nature, the rule shall not be derogated by convention, but by statutory provisions (such as in France). The English system is based on the opposite view, that since nominalism is not a product of public law, parties in their contracts can disregard it in their conventions (therefore providing for escalation and index clauses).

Naturally, the nominalism principle finds its expression in civil laws of different kinds. It has generally been adhered to, even in periods of fluctuating monetary value. General actualisation, or any change of value in *simple debts in domestic agreements* has always been avoided as a principle.<sup>15</sup> Indeed, since the agreement of the parties on the value of the obligation is the core of the contract, any change in this value would entail either revision or cancellation of the contract. The lack of stability in the value of a contract undermines legal security, and must therefore be avoided.

When unforeseeable risks or events in the nature of *‘force majeure’* occur, the principle of nominalism can easily lead to an absurd situation undesired by one of the parties, where the law or the judge might compensate for the imbalance resultant. In England, the question of whether a change of monetary value can release parties from their contracted duties depends on the

theory of frustration,<sup>16</sup> and some judges have developed a theory of the ‘presumed intent’ allowing the nominalism effects<sup>17</sup> to be ignored.

This solution has no equivalent in civil law countries, where the theory of frustration has no value. There are other ways of releasing parties from their duties when for instance the agreement upon a sale and its payment are postponed in time, such as a ‘revision’ or ‘rescission’ depending upon circumstances, but in any hypothesis, there are rules to follow if this step is to be taken.<sup>18</sup>

The Swedish civil law principles seem to be close to the English liberal approach since the judge can offer a revision of the value in the contract, when the parties have not agreed upon such an occurrence, thus derogating from the ‘*Pacta sunt servanda*’ principle.<sup>19</sup> Moreover, and contrary to the French legal system, the judicial power can offer a supplement to the incomplete expression of the parties’ intention, who intended to cover the risk of money depreciation and did not express it.

Naturally, the different approaches in civil law to the question of adaptation to the change in value of monetary obligations have already been subject of long discussions, which need not to be repeated here.<sup>20</sup> However, some aspects of the questions raised in these discussions can be useful for the understanding of the current report, especially in order to assess whether Member States can amend currency legislation after joining the EMU.

### *Long-term and Successive Monetary Obligations*

The incidence of changes in monetary value is more important when contracts include *long-term successive obligations*, and where parties have not adequately protected themselves against their possible negative effects. In practice however, there are many methods of excluding the effects of nominalism that once again mainly depend upon civil law traditions. Parties usually try to foresee how their costs might increase at the time of signing contracts. Unless some exceptional circumstances occur, civil law usually provides for a large freedom of contract, and parties are bound to their first estimate of their financial duties.

Contrary to common law countries where other kinds of solution such as hardship clauses or revision clauses can be included in agreements, in “Continental” countries there is no real possibility of allowing a judicial or

arbitrary intervention in long-term successive domestic monetary obligations. Moreover, the revision of a contract by a judge does not provide for the same legal certainty as the possibility of updating values in long-term contracts. Consequently, parties often provide for escalation through indices that allows both parties to provide for a revaluation of their obligations and liabilities in advance and in regular stages.

After the Second World War for instance, changes in monetary value were universally avoided by the use of 'gold clauses' or currency clauses until the petrol crisis in the seventies. After that period of economic crisis, index clauses have acquired large practical importance, in order to depart from the rigidity of the '*pacta sunt servanda*' rule leading to the impossible application of the contract, or as tools of protection against *internal* changes in the purchasing value of the money.

However, in some States such as France<sup>21</sup> and Germany<sup>22</sup> (and Finland<sup>23</sup>) where huge inflation has been experienced (in 1959 in France and in 1920 in Germany), leading to a massive devaluation of the national currency, the use of escalation<sup>24</sup> clauses in domestic civil contracts has since been regulated (however, this kind of clauses has always been allowed in international contracts). Indeed, the principle of nominalism and the fear of rampant inflation have made the monetary legislator suspicious of the use of index clauses that could give rise to such a situation.

Before the creation of the European Monetary Union, there was no doubt that Member States could freely decide how to protect their national currency against inflation. As a consequence, they could naturally take the position of forbidding indexing and escalation of debts and liabilities in periods of economic crisis, as a means of avoiding the depreciation of creditors' wealth, leading to a devaluation of their currency.<sup>25</sup> But the real question is whether this is still possible for participating States in the EMU.

As a rule, France and Germany still forbid any indexing of *domestic* monetary obligations on general indices although some exceptions<sup>26</sup> are allowed. The German legislator has nevertheless amended its position in civil law in order to take into consideration the delegation of monetary policy powers to the European Council and to the European Central Bank.<sup>27</sup> However, neither primary nor secondary EU legislation forbid the regulation of escalation and index clauses in internal law, therefore participating States should be entitled to forbid them according to the German Government.<sup>28</sup>

One can wonder whether such a position is allowed when the target of

such a measure is to protect a national currency against inflation. Indeed, there are no more national currencies to protect, and the duty to provide for price stability seems to lie with the European Central Bank.

Some authors<sup>29</sup> believe that a distinction should be made at this point in the analysis of the contracts where an index is provided for. If the clause intends to protect the debtor or one of the parties in a contract, such as in a lease contract (where the rent is tied to the national index of cost of construction), or in an employment contract (where the salary is linked to minimum wage index<sup>30</sup>), it should be left to Member States to keep this policy. But if the clause uses a general index, such as a general price or inflation index, with no specific purpose other than the protection of the value of wealth, then the common monetary policy should consider the rule in question in the view of the price stability approach. In reality, it is difficult to apply this artificial kind of distinction, since the general goal of an index is to protect the erosion of wealth over time, whoever benefits from its effects, i.e. the Government or the weak party in a contract.

The key question is whether the Member States or the European authorities are competent to control inflation. Furthermore, there is no agreement within economics on the definition of “inflation” which explains the total lack of such theory behind the civil law traditions. The only pertinent analysis from a civil law viewpoint relates to the valuation of monetary obligations and the imbalances it creates between the parties to the contract.<sup>31</sup>

However, there seems to be a link between the exceptions to nominalism (such as escalation or revision) in civil law and States’ sovereignty in public finances that must prevent inflation from devastating their economies. On the other hand, the regulation of the value of monetary obligation could amount to control over prices by States, which might be considered inefficient from an economic viewpoint. If the value of the euro is fixed by reference to *national economic measures*, then the basis for assessment of this value should be equivalent in all participating States and therefore, there should be a common position on index clauses as well as price fixing rules.

The customary recognition of the *lex monetae* as the instrument of national sovereignty leads to as many national solutions as countries, and the question is whether this is desirable in the context of the European Monetary Union.

### ***Exclusive Field of European Competence?***

The next question relates to the legal basis upon which the European authorities may act in the field of domestic monetary obligations.

The Treaty of Rome in its 1999 version does not clearly provide for a total transfer of national monetary and economic policy to the European central institutions. Nevertheless, Member States have expressly delegated competences such as the definition and implementation of Community monetary policy specifically in conducting foreign exchange operations to try and maintain price stability (art. 4.2. and art. 105 EC).

In addition to a general duty to avoid excessive Government deficits, Member States must provide information to the ECB on a yearly basis detailing internal actions taken to reach “price stability” and the other convergence criteria.<sup>32</sup> The Commission and the Council are provided with adequate sanction tools against States with excessive deficit that do not follow the recommendations made for their reduction.

Consequently, if the responsibility for price stability is still held by participating Member States, it is exercised under the supervision of the European Central Bank. Logically, how Member States combat inflation and price stability should also be an area supervised by the central authorities. Therefore, the question of whether, and if so, how a participating Member State can forbid escalation clauses in order to protect price stability should also be under the supervision of the competent European Central Bank.

The key question is to determine *who* must protect the stability of the euro, and with which tools. In practice, the question relates to the possible co-existence of national budgetary powers with the exclusive competence of the European Communities in the field of monetary law, and the recognition of “*lex monetae*” in the regulations on the euro does not provide for a clear-cut answer. One can question the extent of market ‘openness’ in the light of objectives such as price stability.

Another aspect of this question lies within some other provisions of the Treaty of Rome relating to the four freedoms. The recent developments at the European Court of Justice in the field of free movement of capital<sup>33</sup> regarding tax law show how a field of Member States’ exclusive competence, such as income tax law, can be subjected to the non-discrimination principle. The application of laws such as those of Germany or the France prohibiting index clauses in internal agreements could potentially discour-

age investment in these States. If this does not amount to a clear breach of the discrimination principle, however, the capital import neutrality pleaded by the ECJ would probably not be respected in such a case.

In the field of civil law, the exclusive competence of Member States has also been defended fiercely over the years, as in the case of tax law. However, if an aspect of European law such as the non-discrimination principle can be raised within this field, there is no doubt that the ECJ could issue rulings in this field too.

Moreover, the Treaty of Rome ensures that competition in the internal market is not distorted. If French and German banks cannot compensate the risk of inflation with an automatic index clause in their loan contracts, they might cover themselves by using a higher interest rate than in other States where general index clauses are allowed. As a result, they would be at a disadvantage vis-à-vis their European competitors, and the conditions for ensuring that competition on the internal market is not distorted would no longer be met.

It should be added that the European authorities are currently conducting an in depth study of the private law systems in place across the EU. The main aim is to better understand the effects that the existence of different national contract laws may have on the functioning of the internal market.

Both the Commission, in a communication of 11 July 2001, and the European Parliament, in a working paper of June 1999, have highlighted this issue. They are now on the look-out for cases where such differences have hindered intra-community trade for manufacturers, service providers, traders or consumers. The legal differences can constitute obstacles to the free movement of goods, people, and/or services, when one of the parties in a cross-border transaction must become familiar with the foreign law, especially when disagreement and litigation occur. The EC Convention on the Law Applicable to Contractual Obligations (Rome, 1980) has standardized rules governing conflicts of law between Member States, but is barely sufficient.

The discrimination of prospective customers can also be encouraged by the procedural laws of different Member States which retain exclusive competence in this area.<sup>34</sup> For instance, according to Article 4(2) of the 1980 Rome convention, if the customer of a service is not a consumer, and if the parties have not included a 'choice of law' clause in their contract, the applicable law is that of the country where the contractor's main place of business is located.



In other words, any dispute originating in standard contracts between professionals will be solved at the service provider's tribunal. Any well-informed professional would therefore avoid entering into a standard (non-negotiated) agreement proposed by a non-national service provider, in order to avoid unfamiliar foreign laws. A solution is currently being sought for such 'passive' discrimination. Among those proposed to date are the drafting of a European Civil Code and the standardization of some civil laws, both of which are backed by international civil law doctrine.

Therefore, cases of hidden discrimination, such as forbidding the use of clauses offering protection against fluctuation in monetary value (as in France and Germany), could form the basis of a discussion about standardization at the European level.

The far-reaching consequences of the valuation of monetary obligations will probably not lead to actual cases at the ECJ in the near future. However, there are questions raised by the introduction of the euro, which have yet to be answered. The purpose of this report is both to highlight them and to promote their discussion.

The other interesting issue raised by the introduction of the euro relates to the principle of continuity in international contracts.

### 3 The Principle of Continuity in an International Context

As previously stated, the euro replaces national currencies with a supranational currency whose value is fixed and controlled by the ECB. The second question linked to the introduction of the euro arises from article 3 of regulation n:o 1107/93 stating:

#### Article 3

The introduction of the euro shall not have the effect of altering any term of a legal instrument or of discharging or excusing performance under any legal instrument, nor give a party the right unilaterally to alter or terminate such an instrument. This provision is subject to anything which parties may have agreed.

This rule is based on the recognition of States' monetary law as a universally accepted principle (stated in point 8 in the preamble of this regulation<sup>35</sup>). As a consequence, a State's unilateral decision to change currency is imposed on everyone (even foreigners) whatever legal system is applicable to the contracts referring to this currency.<sup>36</sup> Thus, the change of currency in a monetary obligation should not cause any problems, at least from the angle of international public law. The change of currency should not constitute a serious ground for a re-negotiation of international agreements where national currencies are used as a reference.<sup>37</sup>

However, contracts are also subject to civil law, and in this specific view, the majority of doctrine on legal aspects of the euro has noted the risk of contract discontinuity, especially if one of the parties is protected under a non-EMU State's law. Thus, in this respect, the regulation seems to protect long-term contracts from instability due to the change of currency.

Officially, the European authorities have confirmed that all kinds of contracts and legal instruments shall 'continue' after the disappearance of the national currencies. As early as 1995, the Commission issued a Green Paper where it stated that the introduction of the euro could not be a valid ground upon which the principle of frustration<sup>38</sup> could be invoked.

It should be noted that some authors consider the recognition of the *lex monetae* in the regulation as more embarrassing than useful. Indeed, as explained in the previous part (III), the *lex monetae* provides the Member

States with constitutional autonomy in determining the value of their currency, and consequently, the freedom to choose between nominalism or valorism as the basis for valuing monetary obligations. The *lex monetae* principle would have nothing to do with the continuity of contracts, which is a result of the '*lex contractus*'. This is an international private law principle that is useful in deciding which laws are enforceable in cross-border transactions.<sup>39</sup>

Indeed, the non-automatic resolution of contracts provided for by Art. 3 of the regulation does not provide for a satisfactory solution on behalf of third States' civil laws. One can wonder how such a regulation could ever apply to any other laws than those of the Member States. An illustration of this reasoning is provided for by American laws (State of Illinois and State of New York<sup>40</sup>), that lay down that the change of currency in the EU shall not entail automatic application of the theory of frustration, i.e., no party subject to the relevant law of the US may ask for the termination of an agreement where the euro was introduced instead of another currency. In other words, it can be stated that without such a specific provision, third States' parties would not be under the jurisdiction of this regulation, and could ask for a termination of the contract, should they fulfil the conditions laid down by their own civil law jurisdiction. On the other hand, Switzerland's position<sup>41</sup> not to provide for legislation that expressly recognizes the euro shows that the ground of the "continuity" principle lies in the monetary sovereignty of Member States or of the EU.

Thus, the regulation provides a rule of continuity that is technically inapplicable between parties of Member States and Third States. However, the regulation might be applicable to parties of Member States both in and out of the EMU, due to its binding force and direct applicability within the European Union. Some say that this rule is nonetheless of merely 'declarative' value, and therefore is not binding on Member States. As a result, some Member States have included the possibility of re-negotiating contracts in their national legislation, where the substitution of the euro could affect obligations.<sup>42</sup>

These discussions lead us back to the same questions as in the previous part of this report, namely, what is the real legal basis of the euro? Is it Member States' sovereignty in monetary law? If so, why does the EU need to interfere in international contract law in this "declarative" regulation? Is the rule of continuity an expression of the European Union's powers in

international private law? Can we consider that Member States have delegated their monetary law to the ECB but not their civil law? Is this position coherent?

The practical implications of these questions might seem unimportant, as all enterprises are supposed to get prepared during the transitory period. However, the following example will illustrate that some legal difficulties still remain.

There are no specific provisions in the regulations on the euro regarding the suppression of inter-bank reference rates such as the LIBOR, FIBOR, PIBOR etc. Neither are there any provisions on the consequences for international financial operations implied in the use of these interest rates. Although the Commission is of the opinion that no major difficulties will incur due to the lengthy transitional period, the legal doctrine is of different opinion.<sup>43</sup> Financial contracts that have national currencies as an object (currency swaps) need to be interrupted, and loans with *floating* interest rates need to be adapted to the new reference index (EURIBOR), unless they can be cancelled, because the new index changes the balance in the contract dramatically. The preamble to the regulation n:o 1103/97 (§7) states that 'in the case of fixed interest rate instruments, the introduction of the euro does not alter the nominal interest rate payable by the debtor'. However, no legal statement relates to other kinds of interest rate instruments. Hopefully, the parties have been able to amend their obligations arising from the new index before the 31 December 2001, thanks to the possible solutions of their civil law rules allowing for the re-negotiation of contracts.

It is still possible that someday the ECJ might have to rule upon the basis of the regulation providing for continuity of contracts, and that one of the parties could question its competence in the field of international private law. In other words, the silence of the European legislator creates a grey area of competences that may impact the level of legal certainty.

#### **4 A Short Overview of Difficulties Faced when Introducing the Euro**

Following the previous discussions relating to the theoretical and legal foundations of the euro, this section of the article will illustrate some practical difficulties that participating States have faced in the introduction of the euro.

The introduction of the euro as a currency of account took place on 1<sup>st</sup> January 1999, when a transition period started until the arrival of the euro “as money”, on 1 January 2002.

If individuals have not yet been directly concerned (although banks have already provided people with cheques and bank account statements in euro, alongside the national currency), undertakings in participating States have already switched their financial statements into euro. Some of the issues raised by this conversion, and how legislators have prepared themselves for this transition are presented briefly hereafter.

The participating States have chosen different methods for amending their legal instruments where the reference to the national currency would be replaced by the Euro. In order to identify the instruments to be changed, the ministry of justice of each participating Member State have listed the laws in which the national currency was referred to. No major legal problems have been discovered at that point, although some difficulties of conversion were naturally identified. For the participating States, the main difficulty consisted in updating their laws and international agreements where the national currency was used.

As stated previously, and based upon the principle of continuity, these international agreements need not be renegotiated. However, France has negotiated some complementary agreements under the authority of the European Union, in order to amend the exchange rate between the French franc and the CFA and Comoros franc. Additionally, Monaco has been allowed to adopt the euro as official legal tender currency.<sup>44</sup> The international public law consequences of the introduction of the euro have been identified on a case-by-case basis in a systematic approach.

Additionally, and from a purely internal viewpoint, the participating States have all faced the problem raised by the difficult reading of figures in legal instruments, due to the conversion rates between the euro and their

national currency. Indeed, art. 5 of regulation n:o 1103/97 provides that monetary amounts to be paid or accounted for when a rounding takes place after a conversion shall be rounded up or down to the nearest cent. In other words, rounding up or down to the nearest euro is not possible.

However, many States have amended their legal instruments in order to reach a “round” amount of euro instead of euro and cents, when possible, in order to obtain a clearer text. However, the conversion to the euro should never generate costs on behalf of individuals,<sup>45</sup> and in Luxembourg and France, for instance, the authorities have issued the rule that conversion shall never create imbalance at the detriment of individuals or companies, and the rounding-off shall always be done in favourable way for private persons.

All these difficulties do not generate any legal issues or problems of law, at least not a kind that can be identified at present. So far, participating States have taken positions in the following different fields:

### ***Company Law***

Companies must amend their capital and convert it into euro. For most participating States, a choice is offered to companies either to maintain the capital in euro with three decimals or to convert each share into a round figure, which entails adjustment. Indeed, the sum of each converted share is never equal to the amount of the converted capital. For instance, if a company with 1,500,000 FF capital corresponding to 15,000 shares worth 100 FF each converts its capital to euros, the capital will then be:

$1,500,000/6,55957=228,673.53$  euro, that is 15.2449 euro per share. When applying the rounding down of the shares’ nominal value to 15.24 euro, the amount of the capital would then be  $15.24 \times 15,000= 228,600$  euro instead of 228,673.53 euros.

Therefore, all rounding-off operations make ‘fine-tuning’ necessary at the level of the capital itself. Most States have provided for simplified rules for capital increases (the share’s value is rounded-up) where the amendment of the company’s by-laws will be processed in a general shareholder’s meeting, without any tax consequences (except in the Netherlands<sup>46</sup>). Germany, Belgium, Spain, Italy, Luxembourg, Portugal and France provide for such a procedure where the share’s value will be rounded up, leading to a capital increase, unless their company and accounting laws discharge com-

panies from providing a specific nominal value per share. In most of these States, the increase in capital can be performed through reserve capitalization (limited to 4 % in Luxembourg), and reduction of capital can also be performed in France, Spain and Italy.

### ***Tax and Accounting Law***

Another consequence for companies converting their financial statements into euro is the necessary foreign exchange gain or loss to be recorded at the moment of conversion. According to French accounting rules, the gain or loss on assets or liabilities in foreign currencies had to be recorded at 31 December 1998, because the exchange rates between the Euro and the participating States' currencies was known and definitive on 2 May 1998. The tax treatment of the exchange gains or losses follows the accounting rules, and no adjustments need to be performed since the realization of the gain/loss took place in 1998. The same solution was adopted in Belgium. In Germany, no exchange gain or loss had to be recorded, whereas in Spain and Luxembourg the exchange loss could have been subject to a deductible provision until the asset/claim is sold/repaid. In the Netherlands, the exchange losses and gains have to be neutralized until they are removed from the balance sheet.<sup>47</sup>

Regarding expenses incurred by companies for adapting to the euro, their tax treatment differs considerably among participating States. In some States, all intangibles (such as software) acquired in order to convert financial statements into euro have to be averaged over several years through amortization whereas in some other States, these expenses can be immediately deducted from the P/L account as exceptional expenses. The tax treatment of different expenses among States follows different rules that diverge. No European rule urges Member States to provide immediate tax relief for these expenses, which can be considered as a shame.

In other words, the consequences of conversion and adaptation to the euro for companies differ considerably from one participating State to another, creating once again differences of treatment based upon the tax residence of companies. This difference of treatment might influence the investments of multinational companies, in violation of the principle of "neutrality" so precious to the European authorities.

## 5 Conclusion

As a start, it can be reported that in practice,<sup>48</sup> cross-border payments in euro still generate higher costs than domestic payments. Paying by cheque in international transactions is risky for the payee who bears all the risks in accepting this payment. Therefore it is an expensive means of payment that is not much used in cross-border commerce. Payments in the form of bank wire also generate high fees (average 23,4 euro for a 100 euro wire) and are subject to long deadlines (from 2 to 6 days of delay), whereas domestic wires remain often remain free and immediate (Internet-based services). Finally, payments by credit card within the euro zone seem to remain the most adequate since identification of the cardholder is easier than identification of the bank account owner. As a result, two main credit card companies, Visa international and Europay International have been able to introduce a system free from transaction costs for all payment incurred in the euro-zone as from 1<sup>st</sup> January 1999.

In order to bring an end to these 'cross-border wire' problems, the Commission has issued a draft regulation in July 2001,<sup>49</sup> providing for the alignment of the prices of cross-border operations of domestic operations prices (for operations worth less than 50,000 euros as of 1<sup>st</sup> January 2003). Moreover, banks shall be obliged to inform their clients of any fee levied on a cross-border wire, and finally, the regulation will harmonize national rules upon the information to be provided for by the banks in cross-border wires, and introduce common procedures such as the IBAN (International Bank Account Number), the BIC (Bank Identifier Code) and the IIP (International Instruction of Payment). Banks have already made some efforts to reduce administrative difficulties and high fees upon international wires, but they seem to remain insufficient and the Commission's proposal will offer practical solutions. For transfers of larger amounts and operations between institutional banks, the ECB has created a specific system, the Trans-European Automated Real-time Gross settlement Express Transfer system (TARGET) allowing fifteen national real time gross settlement systems, together with the ECB payment system, to provide a uniform platform for the processing of cross-border payments. Consequently, the practical difficulties surrounding the transfer of payments within the EU will be solved with the support of harmonized legislation.<sup>50</sup>



Alongside the practical questions raised by cross-border payments, which will be solved in a close future, this report has tried to show that the introduction of the euro raises interesting and unanswered legal issues. The European authorities might face questions of competence, which were not thought of during the design of the common currency's legal status. They are quite natural and classical, for the European Union is not a federation and hence will always have to face Member States' sovereignty in all fields that do not clearly belong to its competence, such as civil law.

The introduction of the euro in some Member States of the European Union is a major step towards an internal market without financial borders. However, the achievement of a European Monetary Union is far from completed, for many questions of competence between participating States and the European institutions are not solved yet. Optimistically, one could say that it is a matter of time.

## Notes

- <sup>1</sup> Lld, Researcher, Department of Business Law, University of Lund. The research performed here was financed by the Centrum för Europa Forskning (CFE) and by the Department of Business Law, University of Lund. This article written in 1999 was initially published in number 1 of Institut för utländsk rätt, 2000. Pr. Em. Leif Muten and Edward Cattermole have also suggested amendments to the text, for which the author is grateful.
- <sup>2</sup> See "The Legal Framework of the Euro" European Commission, 4 August 1997, II/088/97-EN ; Communication from the Commission to the European Parliament, the Council, the Economic and social Committee, the Committee of Regions, and the European Central Bank, "Principal aspects of the Euro: State of play and tasks ahead" 12 July 2000 Com (2000) 443 Final ; F. Kapteyn, VerLoren van Theemat "Introduction to the Law of the European Communities" third edition, Kluwer International 1998, pp. 941 and ff. Mikaël Stenström, ECB, DG Legal Services, "Timetable and Institutional and Legal Framework for the Introduction of the Euro" January 1999 (the International Business Lawyer, Vol. 27, No. 1, pp 1-48). See also <http://europa.eu.int/euro/html/home5.html?lang=5>. The main features of the legal framework for introducing the euro are published at: [http://europa.eu.int/comm/economy\\_finance/publications/euro\\_papers/2001/eup04en.pdf](http://europa.eu.int/comm/economy_finance/publications/euro_papers/2001/eup04en.pdf), visited on October 30, 2001
- <sup>3</sup> L'Euro, Ed. Francis Lefebvre p.11.
- <sup>4</sup> Protocol on certain provisions relating to the UK and Northern Ireland (pp. 541 to 546), protocol on certain provisions relating to Denmark (pp. 547 to 549) and Protocol on Denmark (pp. 529 to 531) to the Treaty on the European Communities (hereafter EC). The UK has notified on 30 October 1997 its intention not to enter into the EMU, therefore excluding application of rules about the European system of Central Banks. Denmark has notified at the Edinburgh summit of 12 December 1992 that it would not participate to the monetary policy and therefore benefits from an exception to articles 105 EC and following.
- <sup>5</sup> The economic tests in the Treaty (art. 121 EC) used to judge whether countries are ready to participate in monetary union. The four criteria are as follows: - inflation - within 1.5% of best three performing countries in terms of price stability; - public finances - absence of an excessive government deficit (public deficit < 3% of GDP and public debt < 60% of GDP); - exchange rate stability, - observance of the normal margins of the exchange rate mechanism without severe tensions or devaluation for 2 years; - long term interest rates - within 2% of rates in the three countries with lowest rates of inflation. Sweden (as well as UK) still does not meet the condition on exchange rate stability.
- <sup>6</sup> Council decision 2000/427/EC, and regulation 1478/2000 setting the conversion rate between the euro and the Drachma.
- <sup>7</sup> There are many other regulations dealing with the introduction of the euro, but they do not refer directly to the legal status of the new currency.

- <sup>8</sup> See in appendix the bibliography. Official websites: <http://www.euro.fgov.be> for Belgium. <http://www.euro.gouv.fr/> for France and [http://www.bcl.lu/html/fr/index\\_euro.html](http://www.bcl.lu/html/fr/index_euro.html) for Luxembourg. The interest of the preparatory works found out in Belgium and Luxembourg mainly relates to the conversion difficulties. No deep discussion was identified in relation to the civil law question dealt here with in part II.
- <sup>9</sup> Obligation is not meant here as a bond, but as a duty arising from a contract or an agreement.
- <sup>10</sup> J. Stoufflet describes the traditional competence of a State in monetary field (arising from the traditional *lex monetae*) within civil law as relating to definition of the debtor's obligation of payment, or to the legality of currency and reference clauses, or to the legal rate for foreign currency exchange operations. "L'euro et les produits de taux", *Revue de droit bancaire et de la bourse* n:o 66 1998, pp. 39 & ff.
- <sup>11</sup> From the French '*ordre public*', characterizing those rules taken in the general interest or in the context of an economic or social policy that cannot be derogated to within a contract. Should a clause breach a "public order" law the whole contract would be void. See Philippe Malaurie, "La théorie des obligations" 1981/82, *les cours du droit*, §245 ff.
- <sup>12</sup> F.A.Mann reports in "The Legal Aspect of Money" 1992, at p. 92 that Aristotle would first have provided for a definition of nominalism saying that 'Money has been introduced by convention as a kind of substitute for a need or demand, and this is why it is called "nomisma" because its value is NOT derived from nature but from law (nomos). However, from a purely etymological viewpoint, some dictionaries (see for instance dictionnaire étymologique du français, J. Picicho, Ed. Robert, sous "NOM/Nominalisme) relate the word of "nominalisme" (in French) to the Latin "nomen" (the name) also called "onoma" in Greek. Therefore, the link of "nominalism" to the Greek "nomos" is disputable.
- <sup>13</sup> The principle of valorism entails a permanent re-valuation of the obligation to pay that does not rely on the money as such, and the natural example of application of this principle is the valuation of the compensation for damage, that occurred long time before the judgment setting the issue is held. The judge would equitably allow compensation of the value of the prejudice at judgment day (system of 'dette de valeur' common in France, Germany, Belgium, Italy, whereas in England the question is discussed).
- <sup>14</sup> F.A. Mann provides a comprehensive report of the nominalistic and valoristic principles in a comparative approach in "The Legal Aspect of Money" 1992, at pp. 86 and following.
- <sup>15</sup> Contrary to common law traditions, and according to the continental approach of the "*rebus sic stantibus*" clause, only international agreements use this procedure, allowing for a total change of the contract between parties. The disappearance of the 'cause' in the contract would lead, in French law, to its nullity.
- <sup>16</sup> *Idem*, at p.117.
- <sup>17</sup> Lord Denning's theory is famous after his *Staffordshire Area Health authority v. South Staffordshire Waterworks Company* in 1978. See Lord Denning "The Discipline of Law" Butterworths 1979 at p. 48.

- <sup>18</sup> For a comparative overview of differences in civil laws system, with an emphasis of the specialty of the French civil law principles, see for instance Ole Lando's article "Salient Features of European Contract Law" European Parliament working paper "The Private Law Systems in the EU: Discrimination on the Grounds of Nationality and the Need for a European Civil Code", Legal Affairs Series JURI-103 En.
- <sup>19</sup> "Jämkningsregler" 36§ AvtL .See Adlercreutz, Avtalsrätt II at p. 138. See also Jansohn & Henrik Kjellin "Vad är oskäligt" en analys av 36 § avtalslagen, Inst för handelsrätt Handelsrättslig skriftserie nr. 2.
- <sup>20</sup> Beside the complete work of F.A. Mann, one can refer to Lars Gorton, "Escalation and currency clauses in shipping contracts", *Journal of World Trade Law*, July-August 1978 pp. 319 and ff.
- <sup>21</sup> Art. 79-3 of the 30 December 1958 Ordinance, incorporated in article L-112-1 of the Financial and Monetary code by the Ordinance n:o2000-1223 of 14 December 2000 (Official Journal 291 of 16/12/2000 pp. 20003 and f.). These texts forbid any clause providing for automatic indexing on the minimum salary index, on the cost-of-living index without direct link with the agreement's object or with the occupations of the parties. In addition to a large literature on this topic, a large case law has interpreted the direct link requirement.
- <sup>22</sup> Art. 3 in the Monetary Act (Währungsgesetz) of 20 June 1948, introduced in Germany by the Control Council in order to guarantee stability of the Deutschmark, submitting the introduction of any indexing clause to the previous authorization of the Deutsche Bank.
- <sup>23</sup> The Finnish legislation of 1968 has since then been repealed completely.
- <sup>24</sup> An escalation clause (clause d'échelle mobile) can either provide for increases in prices linked to a real cost scale, or to an index officially published for instance. Neither index clauses nor general indices clauses can be used in French civil law, but indices related to the specific object of the contract are allowed under certain conditions.
- <sup>25</sup> If indexing can be considered as a decisive factor in generating inflation, and if it is deemed to be a dangerous factor of economic instability...
- <sup>26</sup> In France for instance, there are many fields where long-term contracts are commonly used, and the creditors are allowed to provide in advance for an indexing of their receivable that has a direct relation to the object of the contract. Similarly, the protection of a 'weak' party in for instance alimony or a pension scheme can justify an indexing of their receivable towards the other party (such as the State)
- <sup>27</sup> According to Georg Gruber, "L'euro et les clauses d'indexation" *Rec. Dalloz* 1999, chron., 258-262, the German law still forbids indexing in general, with certain exceptions where price stability and protection of consumers are the underlying goals, as opposed to protection of national currency. It seems that during negotiations of the Treaty of Maastricht Germany proposed the adoption of a common position on this question, but no agreement was reached on the issue.

- <sup>28</sup> G. Gruber refers to the preparatory works of the law on the introduction of the euro in Germany (Gesetz zur Einführung des Euro) that can be found at BT-Drs. 13/9347, p. 55.
- <sup>29</sup> Georg Gruber, “L’euro et les clauses d’indexation” Rec. Dalloz 1999, chron., 258–262. His article refers to many valuable sources in civil law of France and Germany.
- <sup>30</sup> The automatic escalation of wages based on this index is illegal in France, unless authorized in a collective bargaining... On the contrary in Luxembourg, a 1975 law allows automatic escalation of wages based on this type of clauses.
- <sup>31</sup> F.A. Mann relates the discussions among economists that lack agreement on the consequences of introducing an index, that can be ‘a confession of failure to maintain a reasonable degree of stability in the value of the money’, 1963, Radcliffe Committee noted at footnote 213 p. 180 in Mann’s book.
- <sup>32</sup> See Council regulations n:o1499/97 and n:o1467/97, adopted during discussions on the Dublin Stability and Growth Pact on July 7, 1997, as well as article 104 EC.
- <sup>33</sup> In the case n:oC-35/98 of 6<sup>th</sup> June 2000 (Verkooijen), the ECJ criticized the Dutch personal income tax system allowances reserved for national source dividends paid to Dutch resident taxpayers. The same kind of income perceived from Belgium did not give right to the same allowance; therefore the Dutch tax law indirectly encouraged investments into Dutch companies in breach of the Treaty of Rome’s prohibition of discrimination upon nationality. The interesting issue here is that for the first time, the ECJ favored capital import neutrality as a basis of the free movement of capital.
- <sup>34</sup> Principle of judicial autonomy recognized by the ECJ from cases 33/76 Rewe, 117/78 Mc Carren, 68/79 Hans Just, 61/79 Denkavit Italiana, 199/82 San Giorgio, until C-88/99 Roquette Frères in tax law.
- <sup>35</sup> “8. Whereas the introduction of the euro constitutes **a change in the monetary law of each Member State; whereas the recognition of the monetary law of a State is a universally accepted principle...**”
- <sup>36</sup> E. Loquin, “Délimitation juridique des espaces monétaires nationaux et espace monétaire transnational” Droit et Monnaie, Litec, 1988, pp. 425 and ff. Ph. Malaurie “Le droit monétaire dans les relations privées et internationales” Rec. cours de la Haye, 1978, vol. 160, pp. 130 and ff. “EURO” Bulletin Joly des sociétés, § 15 and ff.
- <sup>37</sup> Once again, the State’s monetary sovereignty should ensure the continuity of international agreements that can be re-negotiated only if the disappeared currency was the essential basis of the treaty. France has identified a few treaties where the substitution of the euro for the French franc can cause trouble, such as international agreements granting loans to developed countries or ex-soviet Union States.
- <sup>38</sup> The Green Paper also gives the equivalent of ‘Wegfall der Geschäftsgrundlage’, or the ‘théorie de l’imprévision’.
- <sup>39</sup> See J. Stoufflet, “l’euro et les produits de taux “, p.40.

- <sup>40</sup> Art. S-5-1602-2 of NY Gen. Oblig. Law as on July 29, 1997 states “None of the introduction of the euro[...] or the calculation or determining of the subject or medium that has been substituted or replaced due to the introduction of the euro and that is a commercially reasonable substitute and substantial equivalent shall either have the effect of discharging or excusing performance under any contract, security or instrument, or give a party the right to unilaterally alter or terminate any contract, security or instrument.”
- <sup>41</sup> Info Euro n:o 6, December 1997 p. 9, mentioned in Dictionnaire Joly at footnote 49.
- <sup>42</sup> See for ex. Art. 24 DDOEF of French law n:o98-546 of 2 July 1998, introducing the euro.
- <sup>43</sup> See J. Stoufflet, “L’euro et les produits de taux” at p. 41. F. Ruiz Ruiz, “L’introduction...” at p. 410,. See also B. Dutour “L’euro et la continuité des contrats” at p. 391.
- <sup>44</sup> The European Council adopted a decision on 31 December 1998 about Monaco, and the ECOFIN of 23 November 1998 has allowed and recognized exchange rates between the euro and CFA/Comoros Francs.
- <sup>45</sup> See the Commission’s recommendation of 23 April 1998, OJEC 1998 L 130, p. 22.
- <sup>46</sup> See F. Lefebvre, “l’euro” at 214.
- <sup>47</sup> All the sources of information on the participating States are provided for in “l’euro” F. Lefebvre.
- <sup>48</sup> See Benjamin Angel “Les paiements transfrontières en Euro”, RMC UE n:o 451 Sept. 2001, pp. 516/520.
- <sup>49</sup> No official reference was given in the article of B. Angel describing this proposed regulation, see previous footnote.
- <sup>50</sup> See the communication of January 2000 (COM (2000) 447 final), and of September 2000 (COM (2000) 36 final) about cross-border payments within the internal market.

