THE LEGAL STATUS OF THE EURO

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ABSTRACT

La legge monetaria europea ha dovuto risolvere molti problemi fra i quali, la definizione della moneta (l'euro), dell'unità monetaria (un euro diviso in cento cents), la determinazione del valore di questa moneta ed anche della moneta di pagamento. Oltre a queste questioni, la legge incontrò due altri problemi di fondamentale importanza : (i) definire un'equivalenza fra l'euro e le monete nazionali preesistenti che fosse giuridicamente impegnativa e (ii) preservare la continuità dei contratti alla quale il mondo anglosassone era particolarmente legato.

Per iniziativa dell'Istituto Monetario Europeo, un gruppo composto dai giuristi delle Banche centrali sul quale Paolo Zamboni esercitò la propria influenza, si riunì e fu incaricato di trovare delle soluzioni.

Benché non fosse necessario dal punto di vista giuridico, l'inserimento d'un provvedimento specifico nel regolamento comunitario sull'euro del 17 Giugno 1997 riuscì ad acquietare le preoccupazioni che la continuità dei contratti aveva fatto nascere. Per quanto riguarda l'equivalenza fra l'euro e le moneti preesistenti, fu il concetto di fungibilità importato dal diritto romano e presente nel codice civile di parecchi paesi, a risolvere questa questione. Paolo Zamboni era, a buon diritto, molto fiero di vedere così ripresa una nozione di diritto romano tra i fondamenti dell'euro.

† This is a posthumous contribution. The author, Patrice de Lapasse, died in May 2005.

"À l'éminent juriste italien ami de la France,
Paolo Zamboni Garavelli, que soit dédiée cette brève étude
de droit monétaire, où se trouve entrelacé comme
un souvenir de l'Union latine et de l'Union européenne,
lesquelles furent aussi, entre les deux peuples, à leur
manière, une amitié."[1]

I PREAMBLE

Defining the legal status of the new currency played a large part in the preparations for the introduction of the euro on 1 January 1999. The question was taken up by the entire legal community in both the European Union and the English-speaking world.

I shall stick to what I know best, namely the work carried out by the European Monetary Institute working group of legal experts, in which Paolo Zamboni represented the Bank of Italy and played a leading role in defining the legal status of the euro.

It is customary in monetary law to draw a distinction between those matters in which States have sovereignty, monetary law (*lex monetae*), and those which remain in the realm of the independent will (*lex contractus*). Monetary law has never been supposed to govern everything.

That is why one of the first concerns of the Community authorities, including the European Monetary Institute (EMI), was to organise the coexistence of monetary law with contract law (I). Paolo Zamboni played a leading role in the EMI's work on the subject (II), which enabled the Community authorities to define Europe's monetary law (III).

2 THE EUROPEAN MONETARY INSTITUTE AND EUROPEAN MONETARY LAW

A. Monetary law

It is generally accepted that monetary law contains at least three key provisions, whether or not they are included in a single text or dispersed throughout the legislation, as was long the case in France. These provisions are:

– definition of the currency and the currency unit,
– determination of the value of the currency,
– determination of the currency of payment.

The State that issues the currency in question has exclusive competence, within the meaning of public international law, to determine each of these three elements.

1 Note of the author.

Consequently the State – in this case the European Community – has a discretionary right to change its monetary law without the parties to a contract being able to assert such a change as grounds for refusing to perform their obligations under it.

If the parties have expressed their obligations in the currency that is affected by the change of monetary law, that change is binding on them. There is no need, under any circumstances, to presume their acceptance of that competence because the matter is not governed by contract law. As the Permanent Court of International Justice found in 1929, in a famous case involving Serbian and Brazilian loans, "it is a generally accepted principle that a State is entitled to regulate its own currency."

The second principle found in all monetary laws is the payment value that the State bestows on its currency. This prerogative is merely the application of the principle of monetary nominalism; its consequence is that a debtor discharges a debt by paying the nominal amount of the debt. As Professor Jean Carbonnier says, nominalism means "that there is never any cause to take account of the currency's intrinsic value and that the conversion rate asserted by the sovereign authority between two successive currencies raises an irrebuttable presumption of the ratio of their values" (Droit Civil, Vol. 3, Les Biens, 18th edition, no. 16). That is the rule enshrined in Article 1895 of the French Civil Code on loans of money: "The obligation which results from a loan of money is always for the numerical sum stated in the contract."

The third principle found in all monetary laws is the determination of the currency of payment. In general, the common rule is that a payment made in the national currency is valid and must be accepted by the creditor.

B. Continuity of contracts

The general idea is that a change of monetary system, which is a matter of public law, should not under any circumstances prejudice pecuniary obligations contained in contracts between private individuals. If the name of the currency remains exactly the same from one system to another, the continuity of contracts is ensured automatically by the mere application of the nominalist principle: the subject of the obligation does not require any adaptive measure (thus, in 1928 and after, Germinal francs found themselves transformed, unwittingly, into Poincaré francs).

If, on the other hand, the successive names of the currency differ, the sovereign authority must intervene to set a ratio between the new currency that will be sole legal tender at the payment date and the previous currency that will no longer be valid (Carbonnier, Droit Civil, Vol. 3, Les Biens, 18th edition, no. 17).

3 THE EUROPEAN MONETARY INSTITUTE'S WORK ON THE LEGAL STATUS OF THE EURO

From its establishment in late 1995, the European Monetary Institute created various working group made up of experts appointed by the fifteen national central banks. The Working Group of Legal Experts (WGLE) – in which Paolo Zamboni represented the Bank of Italy –, was asked at its first meeting on 13 December 1995 to prepare the European regulations required for introduction of the euro and propose them to the Council of the European Monetary Institute. The European Monetary Institute was responsible for preparing the basic framework and preliminary draft regulations that the European Commission would subsequently submit to the Council of the European Union for final discussion and approval.

Two problems took a long time to solve, and it was partly thanks to Paolo Zamboni that the matter was finally settled. The first step was to establish the legal link between the euro and the national currencies during the transitional period so as to ensure – as the Treaty required – a legally binding equivalence between the euro and national monetary units[2] and then to give market operators a guarantee that the introduction of the euro would not adversely affect the continuity of contracts in any way.

A. The legally binding link between the euro and national currencies

One of the tasks of the Council regulation defining the legal framework for use of the euro was to establish "a legally binding equivalence between the euro and national monetary units" (Madrid Summit, December 1994).

The experts feared that the sheer statement of existence of a fixed and irrevocable conversion rate between the euro and national currencies would not be sufficient to achieve this. They thought that, in the absence of a legally binding mechanism that would independently ensure the immutability of the result of the conversion of national currencies into euros and vice versa, the risk of substantial fluctuations, varying from one currency to another, should not be ruled out.

The outcome would have been to disorganise markets, whose assessment of national currencies would have differed from that which would have resulted from the straightforward application of the conversion rates set on the changeover to the euro. One of the effects would have been the appearance of interest-rate differentials, the negation of a single money market.

It was a legal line of reasoning, in which Paolo Zamboni played an important part, which overcame this difficulty. It started from the idea that one of the chief characteristics of a currency is its fungibility, or even its "absolute fungibility", which goes much further than the fungibility of other goods (Carbonnier, Droit Civil, Vol. 3, Les Biens, 18th edition, no. 53). Fungibility needed being construed in the monetary regulation, and so it was when legally stating that payments in one unit would discharge debts in another unit. Thus, if the euro is fungible with

2 "Adopt the conversion rates at which their [the national] *c*urrencies shall be irrevocably fixed" (Art. 123(4)).

each national currency, the payment of 1 euro is equivalent to the payment of 6.55957 FRF or 1.95583 DEM, and monetary debts could be redeemed at such rates if the law so declared.

The insistence on fungibility undoubtedly reassured the markets. Moreover, the concept was easily incorporated into monetary law. Present in Roman law, fungibility is not peculiar to French law. It may be found at Article 337 of the Spanish Civil Code, Article 91 of the German Civil Code (BGB), Article 1243 of the Italian Civil Code and Article 561 of the Dutch Civil Code. It also provided a means for expressing in legal terms the principle according to which the national currencies and the euro, for as long as they had to coexist (i.e. until 2002), became different expressions of an identical currency in economic terms.

B. The continuity of contracts

Another concern that the legal experts had to address during the groundwork for the introduction of the euro was the problem of the continuity of contracts. Of all the legal issues surrounding the changeover to the single currency, it was its effects on the continuity of current contracts that most immediately attracted attention.

If substitution of the euro for national currencies had empowered the parties to a contract to change its terms, or even to terminate it unilaterally, legal certainty would undoubtedly have been destroyed and the fate of millions of contracts called into question.

English-speaking legal experts were the first to point out the danger, which was taken very seriously because of its inevitable effect on the smooth operation of financial markets. Studies of the subject by Community institutions (the Commission, the Monetary Committee and the European Monetary Institute) came to the same conclusion: replacing national currencies with the euro would have no effect on the continuity of contracts. However, it was necessary to reassure the markets, whose occasionally irrational reactions are well-known.

That is why Article 3 of Council Regulation (EC) 1103-97 of 17 June 1997 on certain provisions relating to the introduction of the euro, taken by the Council of the European Union on the basis of Article 235 of the European Union Treaty, contains the following provision, which is sufficiently important to quote in full: “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.”

The markets welcomed this as the measure that finally lifted all the uncertainties mentioned earlier about the possible effect of the introduction of the euro on the continuity of current contracts. Even the English-speaking experts who had studied the question extensively and had proved the most alarmist let the issue drop.

Let us now see how all these principles were incorporated into European monetary law.

In Council Regulation 974-98 of 3 May 1998 concerning the introduction of the euro, the chief principles that underlie any monetary law, mentioned earlier, are treated as follows.

A. Definition of the currency and the currency unit

As from 1 January 1999, the currency of the participating Member States shall be the euro. The currency unit shall be one euro. One euro shall be divided into one hundred cent. (Article 2, Regulation 974-98 of 3 May 1998).

B. Determination of the payment value of the currency

The euro shall be substituted for the currency of each participating Member State at the conversion rate. (Article 3).

All contracts denominated in ECU without any other details are presumed to continue in euros at the rate of 1 for 1 unless the parties have provided otherwise in the contract. (Article 2, Council Regulation (EC) 1103-97 of 17 June 1997).

C. Determination of the currency of payment

On expiry of the transition period (31 December 2001), only banknotes issued by the European Central Bank and coins issued by the Member States shall have the status of legal tender. (Articles 10 and 11 of Regulation 974-98).

During the transition period, banknotes and coins denominated in a national currency unit that is a non-decimal subdivision of the euro shall retain their legal tender status within their territorial limits. (Article 9 of Regulation 974-98).

All these provisions, which may be considered to form part of Community public policy, apply ipso facto to current contracts, without of course posing any threat to their continuity.

Another reason for having complete confidence in the normal pursuit of current contracts on the changeover to the euro was the fact that the monetary law of the European Community ensured continuity between the ECU and national currency units on the one hand and the euro on the other.

This monetary continuity between different monetary units helped to guarantee the continuity of contracts in accordance with the nominalist principle. It was expressed as follows: the basket ECU was replaced by the euro at the rate of 1 for 1 and the private ECU, except where otherwise provided, was presumed to refer to the ECU as defined by Community legislation.

During the transition period, which lasted from 1 January 1999 to the disappearance of national currencies in 2002:

- the euro was divided into national currency units at the conversion rate and the Member States' monetary law continued to apply;

– amounts denominated in national currency units were payable with amounts denominated in euro units at the conversion rate;
– any sum denominated in euro units or in national currency units could be credited to a creditor's account in the currency unit of the account.

5 EPILOGUE

This brief study shows that thanks to the work in which Paolo Zamboni played an active part, the European Union was able to endow itself with a monetary law and ensure that the changeover to the single currency happened so naturally that none of the predicted disasters occurred. It was an achievement that we owe to people who, like Paolo Zamboni, were able to reason calmly, drawing on age-old principles already enshrined in Roman law. At a time when there is much discussion of the merits of the common law and civil law systems, it was a civil law notion advanced by Latin legal experts that firmly secured the "legally binding equivalence between the euro and national currency units" sought by the Member States at the Madrid Summit of December 1994. And in a last nod to history, it is Roman law that provided the definitive foundation for the euro. Paolo Zamboni was rightly very proud.