

HOW EURO BANKNOTES ACQUIRE THE PROPERTIES OF MONEY

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ABSTRACT

Lo studio considera dove e come le banconote denominate in euro sono divenute moneta dal punto di vista della legge monetaria ed esamina, sulla base della legislazione comunitaria relativa alle banconote denominate in euro, il significato giuridico dell'emissione delle banconote e della loro messa in circolazione. Viene analizzata la storia giuridica delle banconote, considerate le diverse valutazioni legali sulla loro origine e si giunge alla conclusione che le banconote denominate in euro acquisiscono le caratteristiche di moneta nel corso delle seguenti fasi: nelle pubblicazioni (ufficiali) sono rese note le caratteristiche peculiari delle banconote; l'emissione delle banconote è autorizzata dal Consiglio direttivo della Banca Centrale Europea e, da ultimo, l'atto effettivo della loro messa in circolazione deve essere posto in essere dalle Banche Centrali Nazionali. Per contro, la demonetizzazione avviene attraverso il rientro di una banconota alla Banca Centrale Nazionale oppure tramite il ritiro delle banconote di una specifica serie o denominazione.

I COMMUNITY LEGISLATION CONCERNING THE ISSUE OF EURO BANKNOTES

The starting point of our deliberations on how euro banknotes acquire the properties of money is Community monetary legislation, specifically Article 106 (1) of the Treaty establishing the European Community (“the Treaty”). This provision gives the European Central Bank (ECB) the exclusive right to authorise the issue of banknotes within the Community. The ECB and the national central banks have the right to issue banknotes. Article 16 of the Statute of the European System of Central Banks and of the European Central Bank (“the Statute”) reiterates these rules and adds that the ECB should respect as far as possible existing practices regarding the issue and design of banknotes. The Council of the European Union set 1 January 2002 as the date for the introduction of euro banknotes and coins in Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro.² Through its decision of 7 July 1998 the Governing Council of the ECB determined the denominations and specifications of the euro banknotes and adopted (in addition to rules governing the reproduction of banknotes) provisions on the exchange and withdrawal of euro banknotes³, which were supplemented by a Guideline addressed to the national central banks⁴. With the decision of 6 December 2001 on the issue of euro banknotes the Governing Council of the ECB laid down a detailed division of responsibilities with regard to the issue of banknotes within the European System of Central Banks (ESCB).⁵

2 ISSUERS OF THE EURO BANKNOTES

It is not immediately clear from the Treaty just what “issuing banknotes” means. It is therefore reasonable to resort to the traditional interpretation of the term, which distinguishes between the issue of banknotes and the act of putting them into circulation.⁶ In the case of the euro banknotes, this is an important distinction, because these functions may be carried out by different parties. The act of issuing the banknotes implies that the issuer, by virtue of the issuance,

1 This is true despite the significant role played by book money, whose volume is many times greater than that of cash. For example, the value of banknotes issued by central banks of the Eurosystem in September 2004 amounted to approximately €440 billion, whereas the value of overnight deposits was more than five times greater at €2,428 billion. See ECB Monthly Bulletin (December 2004), p. 13.

2 OJ L 139, 11.5.1998, p. 1.

3 Decision of the ECB of 7 July 1998 on the denominations, specifications, reproduction, exchange and withdrawal of euro banknotes (ECB/1998/6), OJ L 8, 14.1.1999, p. 36; now replaced by Decision of the ECB of 20 March 2003 on the denominations, specifications, reproduction, exchange and withdrawal of euro banknotes (ECB/2003/4), OJ L 78, 25.3.2003, p. 16.

4 Guideline of the ECB of 26 August 1998 on certain provisions regarding euro banknotes, as amended on 26 August 1999 (ECB/1999/3), OJ L 258, 5.10.1999, p. 32. After the repeal of Article 1 (4) of this Guideline by the Decision of the ECB of 30 August 2001 on the denominations, specifications, reproduction, exchange and withdrawal of euro banknotes (ECB/2001/7), OJ L 233, 31.8.2001, p. 55, Articles 1, 2, and 4 of the same Guideline were repealed and replaced by Guideline of the ECB of 20 March 2003 on the enforcement of measures to counter non-compliant reproductions of euro banknotes and on the exchange and withdrawal of euro banknotes (ECB/2003/5), OJ L 78, 25.3.2003, p. 20.

5 Decision of the ECB of 6 December 2001 on the issue of euro banknotes (ECB/2001/15), OJ L 337, 20.12.2001, p. 52, as last amended by Decision of the ECB of 22 April 2004, amending Decision ECB/2001/15 of 6 December 2001 on the issue of euro banknotes (ECB/2004/9), OJ L 205, 9.6.2004, p. 17.

6 For the difference between the two terms, see also R. Smits (1997), *The European Central Bank: Institutional Aspects* (The Hague: Kluwer Law International), p. 206.

is incurring a liability because the banknotes have a value.⁷ This liability is also listed on the balance sheet of the central banks. By contrast, putting banknotes into circulation indicates that a banknote has physically left the premises of a central bank with the purpose of constituting a means of payment in the market.⁸ However, it would be wrong to deny the act of putting banknotes into circulation any legal significance and to see in it nothing more than a description of actual procedures. Issuing and putting into circulation are not entirely unconnected but, instead, are mutually complementary.

Pursuant to Article 106 (1), second sentence, of the Treaty, the ECB and the national central banks may issue banknotes. Pursuant to Article 106 (1), third sentence, of the Treaty, only these banknotes have the status of legal tender within the Community. These provisions in primary Community law stipulate that, as a matter of principle, only the ECB, the national central banks, or the ECB and the national central banks together may issue banknotes.⁹ Paramount importance is attached to the principle of decentralisation with respect to decisions that the Governing Council of the ECB, as its supreme decision-making body, has to take on the performance of ESCB tasks. In accordance with Article 12 (1), paragraph 3, of the Statute, the ECB, to the extent deemed possible and appropriate, is to have recourse to the national central banks to carry out operations which form part of the tasks of the ESCB.

During the period between the launch of Stage Three of Economic and Monetary Union (EMU) and the introduction of euro banknotes and coins the national central banks alone were empowered by the Governing Council of the ECB to issue national banknotes in accordance with their national practices.¹⁰ The background to this decision was that, pursuant to Article 9 of Council Regulation (EC) No 974/98¹¹, banknotes denominated in a national currency unit retained their status as legal tender within their territorial limits as of the day (i.e. 31 December 1998) before the entry into force of this Regulation.

The Governing Council of the ECB decided on 6 December 2001 that, with the introduction of euro banknotes and coins, both the ECB and the national central banks would issue banknotes in the legal sense.¹² In the same Decision the Governing Council of the ECB laid down the distribution of responsibilities for

7 See C. Zilioli and L. Di Preso, in H. von der Groeben and J. Schwarze (eds) (2003), *Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft*, Vol. 3, Articles 98-188 of the Treaty; 6th ed. (Baden-Baden; Nomos), Article 106 of the Treaty, margin number 11; see also H. Weenink (2003), "The Legal Nature of Euro Banknotes", in *Journal of International Banking Law and Regulation*, 18, p. 433.

8 See Zilioli and Di Preso, op. cit. footnote 7, Article 106 of the Treaty, margin number 11.

9 In order to take account of the special situation in the United Kingdom, where banknotes are issued not only by the Bank of England but also by commercial banks in Scotland and Northern Ireland although these banknotes do not have the status of legal tender, the possibility of other (private) issuers issuing banknotes with the authorisation of the ECB is not actually ruled out under primary Community law. However, these banknotes would not be deemed legal tender in the Community.

10 See Guideline of the ECB of 22 April 1999 on the authorisation to issue national banknotes during the transitional period (ECB/1999/NP11), published under Decision of the ECB of 10 November 2000 on the publication of certain legal acts and instruments of the ECB (ECB/2000/12), OJ L 55, 24.2.2001, p. 68.

11 Cited in footnote 2.

12 Article 2 of Decision ECB/2001/15, cited in footnote 5.

the banknote cycle within the Eurosystem. The ECB is not involved in the physical issue of banknotes. These are put into circulation and withdrawn from circulation solely by the national central banks, pursuant to Article 3 of Decision ECB/2001/15 on the issue of euro banknotes.¹³ Procurement for the production of banknotes is also undertaken on the level of the national central banks, which purchase them on the open market, use their own banknote printing works or resort to public security printers.¹⁴

Article 10 of Council Regulation (EC) No 974/98 stipulates that the ECB and the national central banks are to put euro-denominated banknotes into circulation as from 1 January 2002. The purpose of this was simply to fix the date for introducing cash. Rules governing the issuer of banknotes in the legal sense or the extent to which the ECB and the national central banks were to be involved in the physical issuance of banknotes were not intended to be affected by it. There was no intention to interfere with the competence of the Governing Council of the ECB.

These rules enshrined in Community monetary legislation on the euro provide no definitive answer to the question we posed at the beginning: how and when do euro banknotes acquire the properties of money. It therefore seems appropriate to examine our understanding of the subject in the German context.

3 DEVELOPMENT OF PAPER MONEY

Let us start by taking a look at the historical development of paper money and at the legal environment in which the various stages of this development occurred. This will make it easier to understand the legal implications of paper money today. In its present form, paper money is a recent phenomenon. Money in the Europe of antiquity, the Middle Ages and early modern times took the form of coins. Initially, these were made mostly from gold or silver and thereby transformed these precious metals, which were used as a measure of exchange, into manageable monetary units. The actual value of the metal was the deciding factor. One therefore speaks of commodity money. Later, coins were minted whose intrinsic value was less than their face value. These mark the transition to money which has only a nominal monetary value but no intrinsic value (fiduciary money).¹⁵ Banknotes developed from deposit certificates for gold or silver, which were issued by bankers or goldsmiths who promised in these certificates to pay out a certain quantity of gold or silver on presentation of the certificates.¹⁶ Soon the issue of notes began to take place independently of the actual amount of precious metal deposited, with the result that the promise of

13 This takes account of the principle of decentralisation cited in Articles 9 (2) and 12 (1) of the Statute. See Recital 8 of Decision ECB/2001/15.

14 For future procurement, see Guideline of the ECB of 16 September 2004 on the procurement of euro banknotes (ECB/2004/18), OJ L 320, 21.10.2004, p. 21.

15 See P. Badura (1963), *Das Verwaltungsmonopol* (Berlin: Duncker & Humblot), p. 99, which contains further references.

16 See K. Olivecrona (1957), *The Problem of the Monetary Unit* (Stockholm: Almqvist & Wiksell), p. 49.

an exchange came to the fore. However, these notes did not lose their properties as a security at first but continued to represent a claim under private law.¹⁷ This means that they were bearer debt securities with which a redemption commitment on the part of the issuer was securitised and which were treated under the law of negotiable instruments (representative money).

Historically, various bodies were engaged in the issue of (covered) notes. In Germany, for example, not only state central banks had the right to issue their own notes; in the past private banks also enjoyed this prerogative. It was not until a unified Nation State had been founded in Germany in 1871 that this right was restricted to one (state-owned) central bank, the Reichsbank, which was established in 1876.¹⁸

The promise to pay the bearer in gold was also abolished eventually.¹⁹ This finally brought about a development which had long been advocated in political debate. As far back as the 18th century Sir John Sinclair saw the freeing of paper money from the redemption commitment as a prerequisite for any economic growth.²⁰ Yet, a promise to redeem these notes in gold remained on the banknotes of many countries for quite some time.²¹ However, the practical value of the redemption commitment was always marginal as it would probably have functioned only as long as it was not really required.²² With the abolition of the redemption guarantee the development of the banknote from being a security to being a monetary²³ token or a public monetary token²⁴ (fiat money) was complete.²⁵

The previously securitised right to fulfilment is having an effect on the legal treatment of banknotes to this day. Duden has arguably provided the most apt explanation of how we should understand the terms “redemption” or “cover” in the case of today’s money which is non-convertible, i.e. cannot be exchanged

17 See H. H. Schaelchlin, *Das Geld als ökonomische und juristische Kategorie* (dissertation, Freiburg/Schweiz, 1948), p. 71. The right to the exchange or replacement of (damaged) banknotes (which still exists today) has its origins in public law, at least in Germany; see L. Gramlich (1988), *Bundesbankgesetz* (Köln et al.: Heymann), section 14, margin number 10.

18 For the history of the central banks in Germany up to 1936, see B. Sprenger (1986), “Banknotenprivileg in Deutschland”, in *Die Bank*, p. 533 et seq.

19 See H. Beck (1959), *Gesetz über die Deutsche Bundesbank* (Mainz-Gonsenheim and Düsseldorf: Braun), section 14 K 349.

20 “It was a great discovery when a metallic medium was substituted for barter; it was also a great discovery when paper was made convertible into gold and silver; but a third discovery was reserved for our own times, namely that with an inconvertible paper currency, agriculture, commerce and manufactures might advance in a career of unexampled prosperity.” Sir John Sinclair, as quoted by J. Harvey (1877), *Paper Money, the Money of Civilization. An Issue by the State, and Legal Tender in Payment of Taxes* (London: Provost & Co.), p. 16.

21 See Olivecrona, op. cit. footnote 16, p. 49 et seq., who refers to the promise to pay which still appeared on US and UK banknotes at that time but which, he claims, is meaningless. However, this promise may have remained in use not only for reasons of tradition and to increase confidence in the currency but also for legal considerations because in the UK, for example, the guarantee to pay in gold was only suspended initially and was not abolished completely until later.

22 See A. Nussbaum (1925), *Das Geld in Theorie und Praxis des deutschen und ausländischen Rechts* (Tübingen: Mohr Siebeck), p. 31 et seq., who refers to Ludwig Bamberg’s description of the redemption guarantee as a “fur for dog days”.

23 For the development of paper money, the partial gold cover and the (false) wording “I promise to pay”, see Harvey, op. cit. footnote 20, p. 8.

24 See G. Grenz (1955), *Geldregel und Währungsverwaltung* (legal dissertation, Hamburg), p. 169.

25 See also *Bundesverwaltungsgericht* (the German Supreme Administrative Court), judgement of 23 November 1993, BVerwGE 94, 294 = *Neue Juristische Wochenschrift* (1994), p. 954. The court explicitly rejected the qualification of banknotes as bearer debt securities.

for precious metals or precious metal coins. Duden points out that today money is neither covered contractually nor legally by certain assets which would be linked to its security but, instead, that solely “appropriate banking operations” guarantee the cover of bank money.²⁶

Closely associated with the question of cover or redeemability is the government order which stipulates that the acceptance of banknotes is mandatory and which is encapsulated in the term “legal tender”.²⁷ The question is whether it is essential for money to be subject to unrestricted mandatory acceptance before one can speak of “money”.²⁸ The property of money as “legal tender” emphasises first and foremost its exclusive claim to be the money of a given currency area and renders legal actions easier. However, it would be equally conceivable to leave its acceptance to the discretion of the marketplace. It has been rightly pointed out that, although the general mandatory acceptance implied by the term “legal tender” is customary nowadays for monetary tokens, it is not essential for a certain object to be a monetary token.²⁹ In contrast to coins, banknotes were not recognised as legal tender for a long time. It was even maintained that paper money can be regarded as money in the legal sense only if it is at one and the same time legal tender as only coins were real money.³⁰ In Germany, for example, even the banknotes issued by the Reichsbank were not legal tender until declared so by the Coinage Act of 1 June 1909.³¹

If the State refrains from granting any monetary token the status of legal tender, problems will arise, if at all, only in the case of weak currencies. However, events in the 1930s in Switzerland, where there was no legal tender in circulation between 1930 and 1936, show that, even when none of the monetary tokens issued has the property of legal tender, the tokens in circulation, such as banknotes denominated in Swiss francs, can be accepted in transactions without difficulty. They are therefore also to be treated as money in the legal sense.³²

Nowadays, it is sensible and consistent with tradition to grant banknotes the status of legal tender. However, it does not appear to be absolutely essential. By contrast, the value of the material or the redemption commitment are meaningless. Distinguishing between coins and paper money within the same monetary legislation is no longer appropriate.³³ In the case of the euro the European legislators decided to grant euro banknotes the status of (sole) unrestricted legal tender.³⁴

26 See K. Duden (1968), *Der Gestaltwandel des Geldes und seine rechtlichen Folgen* (Karlsruhe: CF Müller), p. 10.

27 See Nussbaum, op. cit. footnote 22, p. 32.

28 Again, see Nussbaum, op. cit. footnote 22, p. 32; for a critical appreciation of the term “legal tender” see also Duden, op. cit. footnote 26, p. 15.

29 See U. Häde (1994), “Die rechtlichen Grundlagen der Bargeldausgabe”, in *Zeitschrift für Rechtsvergleichung*, p. 90.

30 See C. Knies (1931), *Das Geld*, reprint of the 2nd edition of 1885 (Leipzig: Buske), p. 348.

31 In Article 3 of this Act, RGBl. 1909, p. 507; see also Nussbaum, op. cit. footnote 22, p. 30.

32 See Schaelchlin, op. cit. footnote 17, p. 73.

33 Regarding the legal division of responsibilities, it must be remembered that in many countries the right to mint coins and the right to issue banknotes are not held by the same institutions. The central bank is frequently responsible for issuing the banknotes while the “coin prerogative”, as it is called, belongs to the government.

34 Article 106 (1) of the Treaty and Article 16 of the Statute, reiterated by Article 10 of Council Regulation (EC) No 974/98.

4 MONETISING EURO BANKNOTES

With respect to the euro banknotes any legal notification of the origin of paper money must state not only that banknotes which are stored in the vaults of the central banks (either because the central banks have not yet put them into circulation or because the banknotes have flowed back to them) are not shown on the liabilities side of these central banks' balance sheets but also that the ECB, which does not put banknotes into circulation itself, nevertheless lists, as the issuer of banknotes, such banknotes as liabilities on its own balance sheet and receives from the Eurosystem profits arising from the banknote issue.³⁵

No standard legal definition (or one agreed at the international level) of money exists at present.³⁶ Civil law and criminal law each have their own way of looking at money as a phenomenon. The definition of money in civil law has remained (almost) unaffected by the changes in the term "money" in the economy as a result of the increase in book money and is still largely determined by a physical notion of money.³⁷ Owing to the principle of *nulla poena sine lege*, criminal law requires precise definitions. It is therefore not surprising that an early definition of money in German law introduced in a united Germany after 1871 is to be found in a decision delivered in a criminal case on counterfeiting. The Supreme Court defined money as "any means of payment certified as a medium of value by the State or by any body authorised by it and destined for public circulation".³⁸ In monetary legislation, money is defined as what is proclaimed by the State to have *valor impositus* and which must be, or at least is, accepted to repay debts.³⁹

It is clear from these definitions that the emergence of the property of "money" is not a purely factual matter but rather a legal matter. Given the necessary technical know-how, anyone can produce printed paper with colourful designs and special security features.⁴⁰ If such a product is to become (paper) money which will be accepted by third parties as a universal means of exchange, a legal act to that effect is required. There is a broad consensus within the field of jurisprudence in Germany that the legal act denoting the "birth" of a banknote belongs to the sphere of public law⁴¹ for the mere reason that the issuance of banknotes in Germany was, and is, a task reserved exclusively for public bodies,

35 See Annex II of the Decision of the ECB of 5 December 2002 on the annual accounts of the ECB (ECB/2002/11), OJ L 58, 3.3.2003, p. 38, and Article 10 and Annex IV of the Guideline of the ECB of 5 December 2002 on the legal framework for accounting and financial reporting in the ESCB (ECB/2002/10), OJ L 58, 3.3.2001, p. 1.

36 Nothing has changed with respect to the finding of S. Simitis (1960), "Bemerkungen zur rechtlichen Sonderstellung des Geldes", in *Archiv für die civilistische Praxis*, Bd 159, p. 406 and p. 465, to the effect that there is no such international definition of money.

37 See H. U. Franzke (1964), *Geldhoheit und Währungssteuerung* (Frankfurt am Main: Knapp), p. 106.

38 *Reichsgericht* (Supreme Court of the German Reich), judgement of 11 July 1924, RGSt 58, 255, 256. This definition which was derived from the court decision, was generally taken over by the legal literature; see W. Ruß, in H.-H. Jescheck, W. Rus and G. Wilms (eds) (2000), *Leipziger Kommentar Strafgesetzbuch*, 11th edition (Berlin and New York: de Gruyter) section 146, margin number 4; W. Stree and D. Sternberg-Lieben, in A. Schönke and H. Schroeder (2001), *Strafgesetzbuch Kommentar*, 26th edition (Munich: Beck), section 146, margin number 2; H. Tröndle and T. Fischer (2001), *Strafgesetzbuch und Nebengesetze*, 50th edition (Munich: Beck), section 146, margin number 2; K. Kühl in K. Lackner and K. Kühl (2001), *Strafgesetzbuch mit Erläuterungen*, 24th edition (Munich: Beck), section 146, margin number 2; Häde, op. cit. footnote 29, p. 90.

39 See Schaelchlin, op. cit. footnote 17, pp. 70 et seq., who describes this money as "money *par excellence*".

40 However, certain materials used in the manufacture of banknotes are given special protection against unauthorised use, section 127 of the *Gesetz über Ordnungswidrigkeiten* (Act on Breaches of Administrative Regulations).

41 See H. J. Hahn (1990), *Währungsrecht* (Munich: Beck:), p. 65.

both prior to entry into Stage Three of EMU and after the introduction of the euro.⁴² Consequently, the unauthorised issue of monetary tokens is a punishable offence, pursuant to section 35 of the Bundesbank Act.⁴³

The act of monetisation, through which a moveable object is accorded the function of a general means of exchange, or, in other words, the function of money, is supposed to be identifiable by an outwardly recognisable mode of behaviour.⁴⁴ However, owing to the undeniable difficulties, some commentators avoid specifying by what outwardly recognisable act the transformation from printed paper to banknote is manifest. They restrict themselves to the statement that this act is an administrative act with no particular addressee and bring it close to the status of dedication. Many even see a similarity between dedicating a banknote and dedicating any object to be a public entity.⁴⁵ In German law this is understood to be a measure by which the government or other national bodies with sovereign powers acquire specific physical control, which leaves private property untouched but burdens it with public servitude.⁴⁶ Accordingly, the issue of banknotes is said to be the dedication of banknotes to the public entity of money in the form of unrestricted legal tender.⁴⁷ As a counter to this legal construction, however, it has been argued that the jurisdiction of the holder of the paper money is not restricted but, instead, is extended because the paper acquires a value in addition to its purely material value.⁴⁸ Furthermore, neither public use nor public ownership coupled with the transfer of money to private use is associated with money.⁴⁹ These weaknesses are recognised by others, and the act of dedication is deemed to be *sui generis*.⁵⁰

However, this does not bring us much further in answering the questions posed at the beginning because that depends crucially on what outwardly visible act the monetisation act⁵¹ is associated with from a legal point of view. There are three possible options:

(a) Manufacturing banknotes;

42 See J. von Spindler, W. Becker and O.-E. Starke (1973), *Die Deutsche Bundesbank*, 4th edition (Stuttgart et al.: W. Kohlhammer), section 27, note IV in conjunction with Beck, op. cit. footnote 19, section 14, footnote I 2.

43 The same applies to non-interest-bearing bearer debt securities. In the history of law, this again illustrates the origin of the modern uncovered banknote, which arose from the bearer debt security of a central bank.

44 For a definition of the monetising act, see U. Häde (1991), *Geldzeichen im Recht der Bundesrepublik Deutschland* (Baden-Baden: Nomos), p. 50.

45 For example, Grenz, op. cit. footnote 24, p. 179, although she does not deal with the preconditions and consequences of this act of dedication in more depth; also, more recently, D. von Stebut (1982), "Geld als Zahlungsmittel und Rechtsbegriff", in *Jura*, p. 561 and p. 563.

46 See G. Pfennig (1971), *Die Notenausgabe der Deutschen Bundesbank* (Berlin: Duncker & Humblot), p. 28 et seq.; H. Dilcher, in J. von Staudinger (1995), *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetzen und Nebengesetzen*, sections 21-103, 13th revision (Berlin: de Gruyter), section 91, margin number 13; with regard to its dedication to be a public entity, see also L. Gramlich (1987), "Die Begebung von Geldzeichen", in *Zeitschrift für das gesamte Kreditwesen*, p. 548 and p. 552, although he assumes the existence of an "inherent power" arising from the actual process of putting the monetary tokens into circulation, a phenomenon which he detects in the issuance by the Bundesbank.

47 See Pfennig, op. cit. footnote 46, p. 47.

48 See Häde, op. cit. footnote 44, p. 183.

49 See Dilcher, op. cit. footnote 46, section 91, margin number 13.

50 See, for example, K. Schmidt, in: Staudinger (1997), *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetzen und Nebengesetzen*, sections 244-248 (monetary legislation), 13th revision (Berlin: de Gruyter), before section 244, margin number B 2; see also Häde, op. cit. footnote 44, p. 183; see also Hahn, op. cit. footnote 41, p. 65.

51 For terminology, see Häde, op. cit. footnote 44, p. 51 et seq.

- (b) Announcing the distinguishing features on a particular banknote denomination or banknote series;
- (c) Putting an individual banknote into circulation.

The first thing that has to be emphasised is that the *production of banknotes*, just like the minting of coins, cannot be said to have direct legal effects as they are both purely technical processes. Money does not come into being simply as the result of the production of “banknotes”.⁵² Even if one wanted to regard this juncture as the moment when a banknote is “born”, the transformation of printed paper into a banknote would occur, if at all, at the time this technical process took place and not as a result of that process in itself. Grenz believes that the characteristics of money are bestowed on printed banknote paper at the point of manufacture itself by virtue of that very process and, moreover, that the act of manufacture undergoes an act of dedication which gives it monetary value.⁵³ Here, she follows older German authors who developed this explanation for the minting of coins. She classifies the act of dedication as an administrative act with no particular addressee. According to Grenz, the customary signatures depicted on banknotes are to be seen as a “certification of banknotes” just as the government stamp is on coins.⁵⁴ These thoughts evidently stem from the similarity between seals and coin motifs but are hardly valid now that the ability to reproduce these processes is so simple. Hahn, by contrast, maintains that, once a particular banknote denomination has been announced⁵⁵ or, in the absence of such an announcement, has been put into circulation, every other banknote of this type acquires the characteristics of money on completion.⁵⁶ A related idea is linked to the creation theory held in some quarters with respect to the German law on securities. According to this theory, a security becomes such as soon as it is issued and does not depend, for its properties of being a security, on the subsequent act of issuance by the issuer.⁵⁷ That does not explain why banknotes which are not in circulation but, instead, are stored in the vaults of a central bank are not banknotes in the legal sense and do not appear on the central bank’s balance sheet. These opinions are therefore widely rejected.⁵⁸

Another point of reference for monetisation could be the (*official*) *announcement* of a banknote series. The Governing Council of the ECB laid down the denominations and features of the euro banknotes by virtue of a decision which was published in the Official Journal of the European Union.⁵⁹ At the same time this decision is an expression of the ECB’s intention that euro banknotes should be issued with certain features.⁶⁰ Pursuant to section 14 (1), sentence 3, of the

52 See Hahn, op. cit. footnote 41, p. 65; and Grenz, op. cit. footnote 24, p. 173, who makes a distinction between the printing of banknotes and the creation of their monetary properties.

53 See Grenz, op. cit. footnote 24, p. 179. However, she sees monetary value as a subjective public right.

54 See, for example, Grenz, op. cit. footnote 24, p. 175 et seq.

55 See below.

56 Hahn, op. cit. footnote 41, p. 69; and Schmidt, op. cit. footnote 50, before section 244 margin number B 3; Nussbaum, op. cit. footnote 22, p. 35; von Spindler, Becker and Starke, op. cit. footnote 42, section 14, footnote 2.

57 Nussbaum, op. cit. footnote 22, p. 35; for a similar line of argument, see also Grenz, op. cit. footnote 24, p. 171.

58 See Dilcher, op. cit. footnote 46, section 91, margin number 13.

59 For the first euro banknote series, reference may therefore be made to Decision ECB/1998/6. This decision has since been replaced by Decision ECB/2003/4 (both Decisions cited in footnote 3).

60 This expression of willingness was demanded by H. Fögen (1969), *Geld- und Währungsrecht* (Munich: Beck), p. 21.

Bundesbank Act, the Bundesbank is also required to announce publicly the denominations and distinguishing features of the banknotes which it issues. Prior to the introduction of the euro it published these features in the Federal Gazette. It has retained this practice for the euro banknotes.

The essential purpose of these announcements is to inform the general public about the distinguishing features of the banknotes. However, illustrations of the euro banknotes appear neither in the official announcements of the ECB nor in those of, for example, the Bundesbank. The announcement in the relevant legal provisions is therefore legally necessary but in practice hardly sufficient. Large sections of the general public are probably informed about the issue of new banknotes not through official publications but, instead, through media campaigns commissioned by the central banks. A crucial role is therefore attached to the supplementary publicity work carried out by the central banks. Prior to the introduction of the euro banknotes and coins this work focused on the visual appearance of the euro banknotes and on how to recognise the security features incorporated into the euro banknotes.

It might actually be worth ascertaining whether announcement in this context would not mean more than publication in official journals, and whether it requires the central banks to undertake publicity work rather than just allowing this work.

Voigt regards the announcement of denominations and distinguishing features in the Federal Gazette as a legal norm (i.e. a statutory regulation) because, he says, by its very nature it ascribes the characteristics of money to all the relevant monetary tokens and consequently regulates the rights and obligations of every individual participating in the economy as a whole.⁶¹ He rejects any further act of creation or dedication that may be associated with the issue of the tokens.⁶²

Others do not see the announcement of a new banknote series as a condition for the bestowing of the function of money on it.⁶³ Even the publication of the distinguishing features is seen by some as unnecessary for transforming a note into money. Accordingly, a banknote issued without prior announcement is also to be ascribed a monetary value. The announcement of the denominations and the distinguishing features has no normative value, it is claimed; nor does it have any direct legal effect. This can be seen in the fact that the security of the payment system would be endangered unless each banknote put into circulation by the authorised bodies were given the characteristics of money.⁶⁴ However, some add the qualification that banknotes which were not put into circulation by the central bank but were lost by it prior to issue can be acquired honestly only if such an announcement were made.⁶⁵ This argument is not convincing. The security of the

61 See H.-U. Voigt (1969), *Die Währungsverwaltung der Deutschen Bundesbank* (legal dissertation, Göttingen), p. 197.

62 See Voigt, *op. cit.* footnote 61, p. 198.

63 See Hahn, *op. cit.* footnote 41, p. 66; see also Grenz, *op. cit.* footnote 24, p. 177.

64 See Grenz, *op. cit.* footnote 24, p. 175 et seq.

65 See Grenz, *op. cit.* footnote 24, p. 171 et seq.

paper-based payment system is based precisely on the fact that authorised banknotes are distinguishable from other banknotes. This attaches paramount importance to their outward appearance. The general public uses both the graphic elements and the special security features (special printing techniques, watermarks, security threads and the embossed “ECB” acronym) to ascertain whether a particular piece of printed paper is a genuine banknote or not.

Häde⁶⁶ sees in the announcement of the new issue of a banknote series the crucial and publicly discernible declaration of intent on the part of the issuer which gives the printed paper the characteristics of banknotes. Even so, he qualifies this by adding that this declaration can refer only to the banknotes already produced at the time of the announcement. By contrast, he sees the manufacturing order as the deciding act for subsequently produced banknotes of a series already introduced. This view is not convincing because it creates an artificial split in a process that cannot be detected from outside the bank. Furthermore, the contract to produce the banknotes is awarded before the actual production of the notes begins. Evidently Häde uses this construct simply to avoid attributing legal significance to the act of production itself.

It is therefore clear that the decision to issue a banknote series and to announce this decision is a necessary but not a sufficient condition for monetising euro banknotes. The actual “transfer of banknotes to the public” as the decisive act in their transformation into money is carried out by the national central banks, which also put into circulation the banknotes issued by the ECB.

In our opinion, *putting the banknotes into circulation* with the authorisation of the Governing Council of the ECB is an essential element of their transformation into money and fulfils the decision to issue banknotes manifest in the announcement.⁶⁷ The transfer of ownership is to be seen as the moment when the banknotes take on a monetary value.⁶⁸ The transfer, which is to be viewed as an act under civil law, simultaneously has an impact under public law because the granting of the characteristics of money is a sovereign act. In principle, the act of putting the banknotes into circulation is carried out by bodies endowed with sovereign authority. In this way, the national central banks implement the decisions taken by the Governing Council of the ECB.⁶⁹

66 See Häde, op. cit. footnote 44, p. 73. However, Grenz, op. cit. footnote 24, p. 177, rejects the announcement as the point of transformation into money, asserting that the announcement has no direct temporal connection with the act of creation.

67 See Fögen, op. cit. footnote 60, p. 21; P. Probst, “Straf- und währungsrechtliche Aspekte des Geldwesens”, in G. Warda et al. (eds) (1976), *Festschrift für Richard Lange zum 70. Geburtstag* (Berlin and New York: de Gruyter) describes this act as the point of issue; W. Fröhlich (1983) agrees in *Die währungspolitischen Instrumente der Deutschen Bundesbank und ihre Einordnung in die Regelungskategorien des öffentlichen Rechts* (legal dissertation, Würzburg), p. 110; Gramlich, op. cit. footnote 46, concurs (p. 548 and p. 550); for the creation of coins as legal tender, see also Gramlich, op. cit. footnote 17, section 8 of the Coinage Act, margin number 4.

68 See Fögen, op. cit. footnote 60, p. 22, for the importance of the transfer of the ownership of money in line with the provisions for movable property; the characteristics were highlighted earlier by Schaelchlin, op. cit. footnote 17, p. 74.

69 For a similar situation where Community law is implemented by national authorities without procedural rules laid down by treaty or secondary legislation, see C. Koenig and A. Haratsch (2000), *Europarecht*, 3rd edition (Tübingen: Mohr Siebeck), p. 50, margin number 129.

In the Eurosystem the task of putting the banknotes ascribed to the ECB into circulation was also transferred to the national central banks.⁷⁰ In Germany the banknotes are put into circulation through the branches of the Bundesbank which in turn pass them on to the holders of current accounts at these branches (as a rule, these account holders are credit institutions or cash-in-transit companies).

Accordingly, it can also be conclusively stated that banknotes do not acquire the characteristics of money until they are put into circulation by being transferred to a third party and that banknotes which flow back to the central bank (or to one of the other national central banks within the Eurosystem) again lose their characteristics of money as a result and, further, that these banknotes which are now out of circulation are not shown as a liability item on the central bank's balance sheet. Only when it is retransferred to the public does a banknote regain the characteristics of money.

At least according to German legal interpretation, the acquisition of monetary value can also be ascribed to “banknotes” which become lost at the issuing central bank. The question here is whether and, if so, when these lost “banknotes” become money in the legal sense. These notes are definitely not money in the legal sense when held by parties in bad faith. The solution here is therefore likely to be found in a bona fide approach.⁷¹ German law on the acquisition of property in good faith stipulates that ownership of lost property cannot be acquired in good faith (see section 935 (1) of the Civil Code.) However, section 935 (2) of the Civil Code makes an exception in the case of money. It is widely held that, pursuant to section 935 (2) of the Civil Code, at least by analogy, ownership of this printed paper can be acquired as in the case of money.⁷² The characteristics of money would arise with the acquisition of the property through a bona fide third party as the central bank does not lose ownership until this point and the situation is therefore comparable with the deliberate transfer of ownership in the case of putting banknotes into circulation. In support of this argument reference has sometimes been made to the historical origin of the banknote as a physical bearer debt security: banknotes could not be subject to less protective provisions for the general public than physical bearer debt securities and therefore the transformation into money accompanies in any event the bona fide acquisition.⁷³

Putting banknotes into circulation through a body specifically authorised for the purpose, i.e. the national central banks in the case of the Eurosystem, is therefore the last step in the process of printed paper acquiring the characteristics of money.

70 See Article 3 (1) of Decision ECB/2001/15, cited in footnote 5.

71 It is only if every moveable object is regarded as money, assuming the nature of its production and appearance is consistent with the general conception of money, that such a case does not pose problems. See, for example, Nussbaum, *op. cit.* footnote 22, p. 35. For the reasons given above, however, this production-related approach should be rejected.

72 See Fögen, *op. cit.* footnote 60, p. 22; Probst, *op. cit.* footnote 67 p. 422 et seq.; and D. Coburger (1988), *Die währungsrechtlichen Befugnisse der Deutschen Bundesbank* (Berlin: Duncker & Humblot), p. 66 et seq.

73 See Grenz, *op. cit.* footnote 24, p. 170; F.A. Mann (1970), for example, in *Juristenzeitung*, p. 212 and p. 409, emphasises more strongly the analogy with section 794 of the Civil Code concerning the obligation on the part of the issuer arising from a debt security that he or she has lost or that has been put into circulation against his or her will; Pfennig, *op. cit.* footnote 46, p. 69; and (for coins) Gramlich, *op. cit.* footnote 17, section 8, margin number 4, of the Coinage Act.

5 DEMONETISATION

A banknote can lose the characteristics of money in two ways. First, a (temporary) demonetisation can occur in the cash cycle if the banknote flows back to the cash office of the central bank and its value is credited to an account or if it is exchanged for another banknote. Second, a banknote can lose its monetary properties if banknotes are recalled or withdrawn from circulation.

Recall and withdrawal are used to replace one banknote series with another or to introduce individual banknote designs with a new design. Recalled banknotes have to be exchanged. This stems from an obligation under public law to grant replacements; it arises from the nature of monetary sovereignty and concerns the nominal value of the banknotes. An expiry period for the exchange is customarily defined. Once this exchange period has expired, the banknotes become invalid and lose their monetary properties.⁷⁴ Under German law the recall of a banknote is tantamount to an administrative expropriation which divests the holder of the note of his/her subjective public right⁷⁵ to the monetary value of the banknote, but leaves him/her in ownership of the banknote paper. However, this expropriation is lawful⁷⁶ as long as such government action serves the common weal and as long as the length of the exchange period is adequate.⁷⁷ The ECB's rules governing the recall of a banknote series, an event which has so far not taken place since the start of Monetary Union, are still rudimentary and provide for the adoption of a Decision by the Governing Council of the ECB, which will be published in the Official Journal of the European Union (and in other media).⁷⁸ Furthermore, the national central banks are required to announce this decision in the national media at their own expense.⁷⁹

Some people have also seen a termination of a banknote's monetary properties in the wear and tear or other physical mutation which results in a banknote being deemed no longer fit for circulation.⁸⁰ However, this is countered by the fact that central banks are also required to exchange these banknotes.⁸¹ Moreover, cash payments would be fraught with considerable risks as it would be unclear at what point of deterioration the banknotes would lose their monetary properties.

74 That, however, does not rule out the fact that such a period of exchange will be waived, at least for the time being, as it happened, for example, at the Bundesbank with respect to Deutsche Mark banknotes when the euro banknotes were introduced.

75 To understand monetary value as a subjective public right, see Grenz, op. cit. footnote 24, p. 38 et seq. and p. 170.

76 See Voigt, op. cit. footnote 61, p. 200. For an analysis of demonetising from the point of view of expropriation under French law, see E. Alfandari, "Le droit et la monnaie: de l'instrument à la politique", in P. Kahn (ed.) (1988), *Droit et Monnaie. Etats et espace monétaire transnational* (Paris: Litec), p. 135 and p. 146 et seq.

77 See Gramlich, op. cit. footnote 46, p. 548 and p. 553.

78 Article 5 of Decision ECB/2003/4, cited in footnote 3.

79 Article 5 of Decision ECB/2003/5, cited in footnote 4.

80 See Nussbaum, op. cit. footnote 22, p. 38, for whom it was also immaterial whether this could be supported by statutory provisions or not.

81 Regarding Deutsche Mark banknotes, see *Bundesverwaltungsgericht*, judgement of 23 November 1993, cited in footnote 25.

6 SUMMARY

According to the Treaty and secondary EC legislation, both the ECB and the national central banks have the right to issue banknotes. The Governing Council of the ECB has decided to allow the ECB and the national central banks to issue banknotes and has published the distinguishing features of the euro banknotes in a Decision.

As we understand it, printed paper becomes a euro banknote as a result of its being put into circulation through its transfer by a national central to a third party following the announcement of the Decision by the Governing Council of the ECB to issue and the said Council's authorisation to issue.

Conversely, demonetisation occurs either through the return of a banknote to a national central bank or through the recall of a banknote series or a specific denomination.