

THE LEGAL PROTECTION OF THE EURO AS A MEANS OF PAYMENT

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ABSTRACT

Concentrandosi sulla protezione dell'euro quale moneta a corso legale, il cui utilizzo ha efficacia liberatoria nell'adempimento delle obbligazioni pecuniarie, il contributo delinea il modo in cui gli Stati membri dell'Eurosistema hanno messo in comune la loro sovranità monetaria per creare un nuovo "bene europeo", l'euro, protetto legalmente a livello europeo.

Esponendo gli elementi essenziali del quadro istituzionale per l'emissione dell'euro, lo studio evidenzia il fondamento a doppio strato della lex monetae dell'euro: gli atti legali degli organi europei e quelli della Banca Centrale Europea.

Il contributo descrive quindi gli sforzi effettuati per garantire protezione penale all'euro nei confronti delle contraffazioni. In questo senso, molti sforzi sono stati compiuti al fine di armonizzare, nei limiti del possibile, le previsioni di legge nazionali in materia penale.

Un altro aspetto della protezione dell'euro è la progressiva integrazione, a livello sia europeo che nazionale, tra le strutture organizzative, per prevenire e reprimere le falsificazioni.

Infine, le regole fondamentali sulla riproduzione delle banconote in euro dimostrano come la protezione dell'euro si estenda oltre i limiti della tutela penale, coinvolgendo anche aspetti di tutela della proprietà intellettuale.

I INSTITUTIONAL FRAMEWORK

With the adoption of the European single currency, euro area Member States' sovereignty and monetary sovereignty were separated. Although traditionally considered as an inseparable part of a state's sovereignty¹, monetary sovereignty was actually shared between the Member States that adopted the euro², within the institutional framework of the European Union (EU), where the issue of the euro is governed by the European System of Central Banks (ESCB), consisting of the European Central Bank (ECB) and the national central banks (NCBs).³ The ECB and the NCBs of the Member States that have adopted the euro are known as the "Eurosystem", and together they conduct the monetary policy of the Union.⁴

As the institution where the decision-making bodies of the ESCB operate⁵, the ECB alone may authorise the issue of euro banknotes and coins.⁶ The ECB and the NCBs may issue banknotes, and these are the only legal tender in the Union.⁷ Member States may issue coins subject to the approval of the ECB as far as the volume of issue is concerned.⁸

- 1 See F. A. Mann (1992), *The Legal Aspects of Money*, (Oxford: Clarendon Press), p. 416 et seq. There have been some derogations to the principle, such as the "Latin Monetary Union" or "Latin League", in the second half of the nineteenth century; the so-called *currency board*, consisting of creating a link between the national money and a foreign currency that is taken as a benchmark; or the Articles of Agreement of the International Monetary Fund, which bind national monetary policies. On these topics, see M. Perassi, "Il cammino dell'Euro: da moneta virtuale a moneta effettiva" (Messina, 20 December 2001), mimeo. The Latin League was created by an International Convention on 23 December 1865, whereby Belgium, France, Italy and Switzerland created a common monetary area, in which golden and silver national coins had to be accepted in the other Member States. Greece joined the League in 1875. The International Agreement was dissolved on 24 December 1925. On this last topic, see P. Pecorari (1999), *La lira debole. L'Italia, l'Unione monetaria latina e il "bimetallismo zoppo"* (Padua: Cedam).
- 2 On this process, see C. Santini and P. Zamboni Garavelli, "La Banca d'Italia nel Sistema Europeo delle Banche Centrali", in Banca d'Italia (ed.) (1999), *Scritti in memoria di Pietro de Vecchis* (Rome: Banca d'Italia), II, pp. 904-05.
- 3 On the structure and the tasks of the ECB and of the NCBs, see S. Baroncelli (2000), *La Banca Centrale Europea: profili giuridici e istituzionali* (Fucecchio: European Press Academic Publishing); C. Zilioli and M. Selmayr (2001), *The Law of the European Central Bank* (Oxford, Portland). See also R. Smits (2003), *The Position of the European Central Bank in the European Constitutional Order* (Utrecht: Eleven International Publishing), p. 23 et seq.
- 4 The conduct of the monetary policy implies the definition and the implementation of the monetary policy of the Union: Article 105 (2) of the Treaty establishing the European Community ("the Treaty"). See also Articles I-30 (1) and III-185 (2a) of the Treaty establishing a Constitution for Europe ("the European Constitution"), OJ C 310, 16.12.2004, p. 1. The references in this article to the European Constitution are based on the assumption that the respective Treaty will actually enter into force, in accordance with Article IV-447.
- 5 Article 107 (3) of the Treaty. See also Articles I-30 (2) and III-187 (1) of the European Constitution.
- 6 Article 106 of the Treaty. See also Article I.30 (3) and III-186 of the European Constitution.
- 7 Article 106 (1) of the Treaty. See also Article III-186(1) of the European Constitution. The issue of banknotes is legally referred to the ECB and to NCBs (Decision of the ECB of 6 December 2001 (ECB/2001/15), OJ L 337, 20.12.2001, p. 52, amended by the Decision of the ECB of 18 December 2003 (ECB/2003/23), OJ L 9, 15.1.2004, p. 40, and by the Decision of the ECB of 22 April 2004 (ECB/2004/9), OJ L 205, 9.6.2004, p. 17).
- 8 Article 106 (2) of the Treaty. See also Article III-186 (2) of the European Constitution.

The European political bodies – the Parliament, the Council and the Commission⁹ – play an important role in defining the law of the euro, and there are many ways for such bodies and the ESCB to exchange views.¹⁰

All these bodies, together with the Member States, concurred in defining the rules for the introduction of the euro, so as to ensure a smooth use of the currency afterwards. This is based on awareness of the interaction between legal certainty and monetary stability, since a well-defined body of law is one of the elements that, in combination, may provide stability to a currency.¹¹

As a result, the introduction of the euro was accompanied by a close grid of rules, which vary in nature between civil, administrative and penal. In this way, the institutional rules for the governing of the euro, the *lex monetae*; the operational criteria that citizens and firms had to observe during the transition to the euro; and the common rules for the protection of the euro, either as the object of intellectual property or, most of all, as a means of payment, were all defined.¹²

2 THE LEX MONETAE

Sharing monetary sovereignty implies an immediate effect on the legal sources that define the money and control its use. In actual fact, if, as a rule, each currency is defined by the State that issues it¹³, then the definition of the *lex monetae* of the euro is basically a competence of the political bodies of the European Union. The Parliament, the Council and the Commission may thus issue European laws and framework laws¹⁴ to establish “the measures necessary for use of the euro as the single currency”, upon consultation and without prejudice to the competences of the ECB.¹⁵

9 With reference to the European Constitution, see Articles I-34 and III-191.

10 The President of the EU Council and a member of the Commission may participate, without voting rights, in the meetings of the Governing Council of the ECB. The President of the EU Council may submit a motion for deliberation by the Governing Council of the ECB. The President of the ECB is invited to the meetings of the EU Council when it discusses issues related to the objectives and the tasks of the ESCB. The ECB submits an annual report to the European Parliament, the EU Council, the Commission and the European Council, while the President of the ECB presents the report to the EU Council and the European Parliament, which can also proceed on this basis to a general debate. The President of the ECB and the other members of the Executive Board of the ECB may be heard by the competent committees of the European Parliament (Article 113 of the Treaty). The ECB will also be invited to participate in the informal meetings of the Euro Group, provided for by a Protocol to the European Constitution, whose members are the ministers of the Member States that adopted the euro plus the Commission (Article 1 of the Protocol on the Euro Group, annexed to the European Constitution).

11 Article 105 (1) of the Treaty. See also Article I-30 (2) of the European Constitution. The stability of the currency is essential to the welfare of society, as the recent Argentinian experience has shown. The stability of money as a reserve of value protects first of all the weakest parts of the population, who live from their jobs, provides firms with certainty in their investment plans and in their business, and strengthens the function of means of payment. For these reasons, the euro was created with price stability in mind; in its Preamble, the Treaty on European Union underlines the willingness of the Member States to create “a single and stable currency”. This is a key element in ensuring the stability of prices, which the European Constitution assumes is a basis for the “sustainable development” of Europe (Articles I-3 (3), III-177, second and third periods and III-185 (1) of the European Constitution) and which it assigns to the ESCB as the “primary objective”. See ECB (ed.) (2001), *Why Price Stability?* (Frankfurt am Main: ECB).

12 Major difficulties were faced with reference to the penal protection of the euro, because Member States share monetary sovereignty regarding the euro, but retain their legislative powers in the penal field; still, it is necessary to punish any counterfeiting of the euro and, in general, any unauthorised reproduction.

13 M. Perassi (2003), “Armonizzazione e contratti bancari”, in F. Cafaggi (ed.) *Quale armonizzazione per il diritto europeo dei contratti?* (Padova: CEDAM), p. 153 ff; T. Treves, “Pagamenti internazionali”, in *Enciclopedia Giuridica*, (Rome: Istituto della Enciclopedia Italiana Treccani), p. 2.

14 Articles I-33 and I-34 of the European Constitution.

15 Article III-191 of the European Constitution.

The EU Council defined some aspects of the *lex monetae* of the euro through Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro¹⁶, and through Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro.¹⁷ Besides scheduling the times and the modalities for the changeover to the euro¹⁸ and introducing some contractual rules¹⁹, these Regulations provide that the banknotes denominated in euro are the only general means of discharging pecuniary obligations, while no person or business is bound to accept more than 50 euro coins in a single payment.²⁰

National provisions that limit cash payments for reasons of public interest are expressly declared compatible with European rules, “provided that other lawful means for the settlement of monetary debts are available”.²¹

In fact, the *lex monetae* of the euro is not only established in Council Regulations. As mentioned above, the power of other European bodies in this field does not prejudice the competencies of the ECB, according to which view its exclusive power to authorise the issue of banknotes encompasses that of *adopting* “all necessary legal measures to protect the integrity of the euro banknotes as a means of payment”, including the adoption of a regime, common to central banks, to exchange mutilated or damaged banknotes²² and to “withdraw euro banknotes and to establish a common regime under which the ECB and the NCBs can perform this withdrawal”.²³

16 OJ L 162, 19.6.1997, p. 1.

17 OJ L 139, 11.5.98, p. 1. Regulation (EC) No 1103/97 was amended by Regulation (EC) No 2595/2000 of 27 November 2000, OJ L 300, 29.11.2000, p. 1, and Regulation (EC) No 974/98 was amended by Regulation (EC) No 2596/2000 of 29 November 2000, OJ L 300, 29.11.2000, p. 2. Regulation (EC) No 1338/2001 of 28 June 2001 lays down measures necessary for the protection of the euro against counterfeiting, OJ L 181, 4.7.2001, p. 6, whose effects have been extended to the Member States that did not adopt the euro as their single currency by Regulation (EC) No 1339/2001 of 28 June 2001, OJ L 181, 4.7.2001, p. 11.

18 As from 1 January 1999 the euro is the currency of the Member States of the European Union that adopted the single currency, with the exception of Greece, which joined the single currency as from 1.1.2001 (Article 2 of Regulation (EC) No 974/98, as amended by Regulation (EC) No 2596/2000). From 1 January 2002, the euro, formerly a “virtual” money, became money under any effect, since it circulates and is legal tender in all the States that adopted the single currency. The conversion rates between the euro and national currencies were established by EU Council Regulation (EC) No 2866/98 of 31.12.1998, OJ L 359, 31.12.1998, p. 1. During the transitional period (1 January 1999-31 December 2001), the national currencies had to be considered as subdivisions of the euro according to the irrevocable conversion rates, and could still circulate in each respective Member State as legal tender according to the respective national rules (Article 6.1 of Regulation (EC) No 974/98). In any case, on the basis of Article 52 of the Statute of the European System of Central Banks and of the European Central Bank (“the Statute”), it was possible until 31 March 2002 to exchange national currencies among themselves according to the respective conversion rates with the euro (Guideline of the ECB of 20 July 2000 on the implementation of Article 52 of the Statute after the end of the transitional period (ECB/2000/6), OJ L 55, 24.2.2001, p. 66, amended by Guideline of the ECB of 25 October 2001 (ECB/2001/10), OJ L 304, 21.11.2001, p. 281. The “virtual” character of the euro during the transitional period meant that the euro could be used only on a voluntary basis – according to the principle of “*no prohibition no compulsion*” – for non-cash payments.

19 The provision that the introduction of the euro is without prejudice to the continuity of the contracts and of the other legal instruments belongs more to the *lex contractus* than to the monetary law (Article 3 of Regulation 1103/97), unless the parties agree in a different way or, of course, the parties sign a contract to cover exchange rate risk, in which case the introduction of the euro directly affects the contractual consideration. On this and other aspects related to the introduction of the euro, see A. Giardina (1999), “L’euro: Aspetti Internazionali”, in *Rivista di Diritto Internazionale Privato e Processuale*, 4, pp. 789-800.

20 Article 11 of Regulation (EC) No 974/1998.

21 See “whereas” clause (19) of Regulation (EC) No 974/1998.

22 See “whereas” clauses (4) and (7) of the 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.

23 See “whereas” clause (12) of Decision ECB/2003/4.

As a rule, genuine euro banknotes which have legal tender and that are mutilated or damaged can be exchanged at the NCBs if more than 50% of the banknote is presented to the counter or if the bearer can demonstrate that the missing parts were destroyed.²⁴ Such an exchange is refused if the NCBs are certain or if they have sufficient reason to believe that a crime was committed in relation to the presented banknote; in this case, the NCBs shall seize the banknote and transmit it to the judicial authorities.²⁵

The ECB has not yet established a general regime for withdrawing euro banknotes from circulation; nonetheless, it has established, on the one hand, that such a regime shall include as a minimum the indication of the type or of the series of the banknote that has to be withdrawn, “the duration of the exchange period”, the date on which the banknote will lose its legal tender status, and “the treatment of the euro banknotes presented once the withdrawal period is over and/or they have lost their legal tender status” and, on the other hand, that the rules on the withdrawal have to be published for purposes of general information in the Official Journal of the European Union and in other means of communication.²⁶

3 CRIMINAL PROVISIONS

Ever since the Geneva Convention of 20 April 1929 on the Suppression of Counterfeit Currency, counterfeiting has been a matter of special attention at international level.²⁷ This is probably one of the reasons why Regulation (EC) No 974/98, which established the legal principles for the euro, briefly states that “participating Member States shall ensure adequate sanctions against counterfeiting and falsification of euro banknotes and coins”.²⁸

Nonetheless, a more profound awareness about the risks of counterfeiting regarding the euro was slowly developing, taking into account the introduction of a completely new monetary sign at European level, the treacherousness of counterfeits, especially during the first period of circulation of the euro, when European citizens were not yet fully accustomed to the basic features of euro banknotes, and the greater potential that new digital techniques offer for reproduction, which are now more diffused than ever before.

Thus, the ECB, in the middle of 1998, issued a Recommendation for the European bodies and the Member States to review their policies in the fight against counterfeiting, to provide a new evaluation of the possibilities of

24 Article 3.1 of Decision ECB/2003/4.

25 Article 3.3 (b) of Decision ECB/2003/4.

26 Article 5 of Decision ECB/2003/4.

27 Under the Convention, the signing States shall: a) punish the forgery of counterfeited banknotes and coins, the counterfeiting of genuine banknotes and coins, their putting into circulation, the procurement of such values and of the instruments necessary for the forgery or the counterfeiting; and b) punish those facts even if they concern foreign money or were committed abroad. The only requirement is that the forgeries must have been committed on banknotes or coins with legal tender.

28 Article 12. In fact, all Member States already had national criminal provisions in place against counterfeiting, in some cases also entailing very severe sanctions.

harmonising national criminal laws in this field, and to improve cooperation at institutional, judiciary and police level, also by analysing the new techniques which are available for banknote counterfeiting.²⁹ The ECB stated that all Member States should make it mandatory for banks and other professional handlers of cash to seize suspected counterfeit banknotes and to send them to the competent law enforcement authorities, as already provided for in Germany.³⁰

In a short time³¹, the modalities to prevent and punish counterfeiting were reconsidered, specifically to protect the euro. Major steps towards the harmonisation of criminal provisions on counterfeiting were taken, and administrative structures were created to study counterfeiting techniques both at a technical (with reference to comparisons between counterfeit and genuine banknotes) and at an *intelligence* level, with specific reference to methodologies and resources dedicated to investigations.³²

The harmonisation of penal elements regarding the crime of counterfeiting was obtained on the basis of the Council Framework Decision of 29 May 2000 on increasing the protection provided by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro³³ and Council Regulation No 1338/2001 of 28 June 2001, which laid down measures necessary for the protection of the euro against counterfeiting.³⁴ These acts defined the common elements of the crime of counterfeiting in the EU Member States and created an administrative structure for European cooperation, with the aim of preventing and studying the phenomena related to counterfeiting.

Under Framework Decision 2000/383/JHA of 29 May 2000³⁵, Member States shall ensure adequate protection of the euro against counterfeiting, with criminal

29 Point 4 of the Recommendation of the ECB of 7 July 1998, regarding the adoption of certain measures to enhance the legal protection of euro banknotes and coins (ECB/1998/7), OJ C 11, 15.1.1999, p. 13.

30 Point 6 of Recommendation ECB/1998/7.

31 On 28 May 1999, the EU Council adopted Resolution 1999/C 171/01, OJ C 171, 18.6.1999, p. 1, which urged Member States and the European bodies to cooperate more closely to protect the euro against counterfeiting. In November 1999, the ECB published a Report on the legal protection of euro banknotes in the EU Member States, which identified distinct areas of intervention and revealed the measures that the ECB considered as necessary. On the basis of a comparative analysis, the Report ascertained that four kinds of counterfeiting were punishable in the Member States: the duplication without legitimacy of genuine banknotes or the alteration of their value; putting into circulation money which was counterfeited as indicated above; holding, acquiring or transporting false money; and producing or distributing instruments to produce false money. The ECB immediately underlined the need for close cooperation among the European police forces.

32 From a legal point of view, the interventions of the European bodies are founded on different legal bases: some acts have been adopted on the basis of Title VII of the Treaty on economic and monetary policy. Other measures are founded on the so-called third pillar of the EU, which means the provisions of the Treaty regarding the cooperation of the police and the judiciary in the penal field (JHA).

33 Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, OJ L 140, 14.6.2000, p. 1. The content of the Framework Decisions may be similar under some aspects to that of a Directive, since they, in order to harmonise the legal systems of the Member States (Article 34.2 (b) of the Treaty on European Union), introduce some obligations for Member States. Regarding the differences between the Framework Decisions and the Directives, see C. Koenig, A. Haratsch and M. Bonini (2000), *Diritto Europeo* (Milan: Giuffrè), p. 357.

34 Council Regulation (EC) No 1338/2001 of 28 June 2001, OJ L 181, 4.7.2001, p. 6. The territorial application of this Regulation was extended to the Member States that did not adopt the euro as their single currency by Council Regulation (EC) No 1339/2001 of 28 June 2001, OJ L 181, 4.7.2001, p. 11.

35 Framework Decision 2000/383/JHA aims to complete and facilitate the application of the Geneva Convention of 20 April 1929 in the field of punishment of counterfeiting; several provisions similar to those of the Framework Decision 2000/383/JHA are contained in the Council Framework Decision 2001/413/JHA of 28 May 2001, on combating fraud and the counterfeiting of non-cash means of payment, OJ L 149, 2.6.2001, p. 149.

provisions.³⁶ “Currency” means “paper money (including banknotes) and metallic money, the circulation of which is legally authorised including euro banknotes and euro coins, the circulation of which is legally authorised pursuant to Regulation (EC) 974/98” (Article 1, second indent). Criminal penalties shall be “effective, proportionate and dissuasive” and they shall include “penalties involving deprivation of liberty which can give rise to extradition”; “the offences of fraudulent making or altering of currency [...] shall be punishable by terms of imprisonment, the maximum being not less than eight years” (Article 6).³⁷

Moreover, Member States shall also provide for “the necessary measures to ensure that legal persons can be held liable for the offences [...] committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person” (Article 8.1).³⁸

In order to create a common space of freedom, security and justice, the European Union simplified the procedures for judicial cooperation, introducing a “European arrest warrant”³⁹, which consists of the application (which also applies to forgery and counterfeiting of the euro and to the counterfeiting of means of payment (Article 2.2, 10th and 24th indents)) of the principle of mutual recognition of a series of judicial penal measures, such as definitive sentences (therefore going beyond the formal procedure for extradition), the provisional measures of sequestration and confiscation of goods, and arrest.

Regulation (EC) No 1338/2001 created an administrative structure to prevent counterfeiting of the euro, which is characterised by the integration between European and national administrations. It is provided that each State shall designate national competent authorities that are enabled to identify counterfeited banknotes and coins, to collect and to analyse technical and statistical data and to perform *intelligence* activities on counterfeits as well.⁴⁰

36 To achieve this, it is provided that Member States shall punish as a crime the following: the fraudulent making or the alteration of currency, whatever means are employed; the fraudulent uttering of counterfeit currency; the importation, exportation, transport, receiving or obtaining of counterfeit currency with a view to uttering the same and with knowledge that it is counterfeit; the fraudulent making, receiving, obtaining or possession of instruments, articles, computer programs or other means peculiarly adapted for the counterfeiting or altering of currency, or of holograms or other components of currency that serve to protect against counterfeiting (Article 3.1).

37 Framework Decision 2000/383/JHA was amended by Council Framework Decision 2001/888/JHA of the Council, of 6 December 2001, OJ L 329, 14.12.2001, p. 3, which introduced a “European recidivism”, consisting of the duty to recognise as a cause of recidivism the final judgements of conviction issued in other Member States for the crimes of counterfeiting, whatever the counterfeited money is.

38 The liability of the legal entity shall imply the imposition of “effective, proportionate and dissuasive sanctions”, comprising criminal or non-criminal fines and possibly other sanctions, including: a) the exclusion from entitlement to public benefit or aid; b) the temporary or permanent prohibition to exercise commercial activities; c) the placing under judicial surveillance; and d) a judicial winding-up order (Article 9.1).

39 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002, p. 1. According to the Framework Decision, a French judicial authority, for instance, can order the arrest of someone who has counterfeited banknotes in France and, if the author of the crime has returned to, say, Italy, the Italian judicial authority shall execute the French arrest warrant and shall surrender the person after verifying that the crime falls within the categories provided for in Article 2.2 of the Framework Decision. There is no need for a corresponding crime to exist in Italy. As far as counterfeit banknotes are concerned, in this example, the Italian judicial authority shall transmit them to France, unless another trial is pending in Italy regarding the same banknotes, in which case the Italian authority may decide that the banknotes shall temporarily stay in Italy or that they should be delivered to the French authorities upon the condition that they shall be returned.

40 Article 2 (b) of Regulation (EC) No 1338/2001.

Under Regulation (EC) No 1338/2001, banks and other professional handlers of banknotes and coins shall seize counterfeits and remove them from circulation each time they “know or have sufficient reason to believe [them] to be counterfeit”, in order to ship them “immediately” to the national competent authorities (Article 6 (1)). These authorities shall convey the banknotes and coins which are suspected to be false to the National Analysis Centres (NACs) or to the Coin National Analysis Centres (CNACs), respectively, so as to allow them to conduct the first analysis and classification of the technical and statistical data concerning the counterfeit; the final evaluation shall then be performed by the ECB or by the European Technical and Scientific Centre (Articles 4 and 5). The technical data concerning the counterfeits are then communicated to the ECB so that they can be included in the Counterfeit Monitoring System (CMS), a database created within the ESCB that permits users to analyse and manage technical and statistical data related to euro counterfeits.⁴¹

Forms of cooperation concerning *intelligence* activities are also provided: Member States, the Commission, the ECB and Europol shall cooperate by exchanging information and by mutually assisting each other by means of scientific support, training and logistical support (as per Article 7 of Regulation (EC) No 1338/2001).

With reference to collaboration between polices, the European authorities chose to strengthen the role of Europol, which performs *intelligence* activities by collecting, storing, elaborating and analysing information⁴², by extending its mandate to fight against the counterfeiting of money and other means of payment.⁴³ To help in the performance of the tasks assigned to Europol, the Member States shall ensure that Europol is informed about the result of the analyses carried out by the national analysis centres on banknotes and coins denominated in euro that are suspected to be false, within the criminal procedures against counterfeiting.⁴⁴

The extension of the Europol mandate to counterfeiting of money and other means of payment automatically implies that Eurojust is also competent for the same issues.⁴⁵ Eurojust is a European office with a decentralised structure which is entrusted with the tasks of stimulating, coordinating and supporting both criminal investigations and judicial procedures, when at least two Member States are involved. In the exercise of its tasks, Eurojust closely cooperates with Europol and may exchange information with national, European and other

41 Article 3 of Regulation (EC) No 1338/2001 and Decision of the ECB of 8 November 2001 (ECB/2001/11), OJ L 337, 20.12.2001, p. 49.

42 The tasks of Europol are to facilitate the exchange of information between Member States; to acquire, collect and analyse information; to inform promptly the competent authorities of Member States about crimes that can be of interest to them, also because these may be connected to other crimes, to assist the investigations in the Member States, and to manage a database of relevant information.

43 Council Decision 1999/C 149/02, of 29 April 1999, extending Europol's mandate to deal with forgery of money and other means of payment, OJ C 149, 28.5.1999, p. 16; in this Decision, the concept of forgery of money and other means of payment is defined in relation to Article 3 of the Geneva Convention of 20 April 1929.

44 Article 3 of Decision 2001/887/JHA.

45 Article 4.1(a) of Council Decision 2002/187/JHA of 28 February 2002, setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 63, 6.3.2002, p. 1. This Decision was also taken under the third pillar of the EU Treaty.

international bodies and organisations (for instance, the ECB and the NCBs which have been designated as NACs), as well as with authorities of third countries which have competence in criminal investigations and judicial procedures.⁴⁶

4 UNAUTHORISED REPRODUCTION

Copyright on euro banknotes belongs to the ECB⁴⁷; the copyright on the design of the common face of euro coins belongs to the European Union, represented by the Commission.⁴⁸ Therefore, the protection of copyright on the designs of euro banknotes and coins is left to the initiative of the central banks of the ESCB, as far as banknotes are concerned, and to the Member States with reference to coins; such a solution is in keeping with the civil and pecuniary nature of the protection mainly offered by copyright law.

It should be mentioned that criminal sanctions against the breach of copyright also exist, and that overall protection of copyright permits the completion of the protection that is ensured in punishing counterfeiting by extending the control of the police and the courts to cases that, although not strictly falling under the criminal provisions, create unauthorised reproductions of banknotes and coins that can confuse the public with regard to the exact individuation of genuine monetary signs with legal tender, or that can damage the image of the issuing institutions.

The purposes of reproductions of the euro may vary, but they can be classified into two categories. The first refers to the creation and circulation of banknotes or metallic pieces that, by reproducing more or less faithfully the legal tender or by making reference to some elements that identify them (e.g. the name “euro”, possibly with a prefix or a suffix), are intended to be means of payment in a more or less wide context (e.g. displays, fairs). In the second category, the object of reproduction is the design of the banknotes or of the coins, and its purpose is cultural or educational (e.g. photos in specialised magazines, inclusions in pieces of art) or commercial (e.g. on t-shirts, chocolates, etc.). This therefore creates a grey zone, where reproductions – according to their nature – may on the one hand be irrelevant from a legal point of view, but could on the other hand imply a breach of copyright and/or damage to the image of the issuer.⁴⁹

The rules on reproduction, although based in copyright in a first moment⁵⁰, later found a wider legal basis. In actual fact, the legal basis to regulate reproduction

46 The Treaty of Nice amending the Treaty on European Union and the Treaties establishing the European Communities and certain related acts (Nice Treaty) modified Article 29, second paragraph, second indent, of the Treaty on European Union to mention explicitly Eurojust among the instruments of judicial cooperation (Article 1.7 of the Nice Treaty).

47 See “whereas” clause (3) and Article 1.2 of Decision ECB/2003/4.

48 Communication from the Commission on copyright protection of the common face design of the euro coins, 22 January 2001, paragraph 1.

49 For example, reproductions with pornographic elements.

50 Commission, *op. cit.* footnote 48, paragraph 2, “Reproduction regime”.

of the euro was found in the power of issuing the banknotes that are legal tender; it can be assumed that such power, as a rule and without prejudice to different provisions, includes the competence to adopt the legal measures which are necessary to protect the integrity, as a means of payment, of banknotes and coins that are expressed with the relevant monetary sign.⁵¹

Since the integrity of the means of payment is at stake if there is any confusion on the part of the public with regard to the exact individuation of the values that are legal tender, the criterion which was chosen to distinguish lawful reproductions from those that are illicit was the existence of a danger of confusion among the general public.⁵²

Therefore, while the Commission adopted reproduction rules for the common face of euro coins on the basis of its power as the representative of the European Union, which is the holder of the copyright on the common face of euro coins⁵³, the ECB distinguished between “unlawful” reproductions (of banknotes denominated in euro), in that they do not fulfil the criteria established by the ECB to avoid the risk of confusing the public, and reproductions that infringe the ECB’s copyright on the design of euro banknotes.⁵⁴ Both typologies are defined as “non-compliant” and, in connection with this, mechanisms of activation of central banks are provided.⁵⁵

The ECB indicated either those elements that, in se, do not exclude the illicit character of the reproduction (e.g. the reproduction technique, the addition of elements that do not belong to the original design of the genuine banknote), as well as the criteria designed to eliminate the danger of confusion; the ECB also provided for an instrument of legal certainty, such as the safe harbour represented by the possibility given to citizens to ask central banks in written form to provide an evaluation as to whether or not a specific reproduction that is not in line with the above-mentioned conformity criteria could confuse the general public.⁵⁶

5 INFORMATION FOR CITIZENS

Any rule on the use of the euro, any criminal provision against counterfeiting, and any criterion issued to discourage unauthorised reproduction of the euro would risk being insufficient if citizens did not possess adequate knowledge of the basic features of banknotes and coins denominated in euro.

51 See “whereas” clause (4) of Decision ECB/2003/4.

52 Article 2 of Decision ECB/2003/4; Commission, op. cit in footnote 48, paragraph 2, third period; and (4) and Article 2 of the Commission Recommendation of 19 August 2002 concerning medals and tokens similar to euro coins, OJ L 225, 22.8.2002, p. 34.

53 Commission, op. cit footnote 48, paragraph 2, “Reproduction regime”.

54 As far as violations of copyright on the design of banknotes are concerned, the ECB recommended to the Member States to ensure that designs on banknotes may benefit, under the law, from the protection provided for the registered marks (Point 3 of Recommendation ECB/1998/7).

55 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.

56 Article 2.1, 3 and 4 of Decision ECB/2003/4.

For this reason, European bodies and central banks placed great importance on the provision of adequate information, to be furnished especially to the most vulnerable parts of society, such as elderly people, persons in economic or social difficulties, persons with disabilities of a physical, sensorial or mental nature⁵⁷, or young people outside the educational system.⁵⁸

Initiatives in European schools were set up by the European Parliament with a view to the introduction of the euro⁵⁹, when information campaigns were designed by EU bodies, central banks and national governments and local authorities.

6 THE EURO AS A “EUROPEAN GOOD”

The European interventions aimed at defining the legal regime of the euro characterise the euro as a “European good”.

The development of the euro into a good of a European nature is currently under way following a track that started from the adoption of the single currency, passed through the creation of the ESCB as a European structure to govern the money, to come to the explicit provision, in the European Constitution, of the Euro Group.

Although most attention is generally paid to the dialogue between the EU representative bodies and the ESCB and to the financial instruments used to conduct the monetary policy, the stability of the euro cannot be obtained without adequate measures of legal protection; such measures are another important element in ensuring that European citizens can trust in the euro as a means of payment with legal tender and, thus, to contribute to its stability.

With this in mind, the legislative and monetary authorities in Europe have defined a system to protect the euro, which now can genuinely be qualified as a “European good”, not only in a political and economic sense, but also in a legal sense.

The protection of the euro is the object of European interest for a variety of reasons, including the social welfare of European citizens, which is closely linked to their trust in the euro as a means of payment with legal tender; and the pecuniary interest of the issuers operating at the European level. The European rules therefore protect the euro sometimes directly, and sometimes through the Member States or the NCBs of the Eurosystem.

57 Article 1.1 of the Recommendation of the Commission 2000/C 303/05 of 11 October 2000, on the measures to facilitate the preparation of economic operators to the changeover to the euro, OJ C 303, 24.10.2000, p. 6, which is addressed on this point to the Member States.

58 Article 3.3, last period, of the Recommendation of the Commission of 23 April 1998, concerning the dialogue, monitoring and information provided to facilitate the transition to the euro, OJ L 130, 1.5.1998, p. 29.

59 Point 10 of the Resolution of the European Parliament of 21 June 2001, A5-0222/2001, 2000/2278 (INI) on the measures to assist economic operators in the changeover to the euro, approved by the European Parliament at its meeting of 4 July 2001, OJ C 65 E, 14.3.2003, pp. 24 and 61.

The protection is pursued by convergent actions, also of an informational nature, that are performed by the central banks and by the European and national authorities. A significant level of co-ordination of the actions of police forces and courts in the Member States was provided on the basis of the harmonisation of criminal provisions. A strong impulse was given towards the harmonisation of the rules on the use of the euro among citizens.⁶⁰

60 A. Sainz de Vicuña (2002), "Legal Issues of the Single Currency", in M. Giovanoli (ed.), *International Monetary Law. Issues for the New Millennium* (Oxford: OUP), p. 170 et seq.; Perassi, op. cit., p. 156.