

Opinion on removing the legal obstacles to the use of the ecu

(94/C 133/12)

The Economic and Social Committee decided on 29 June 1993, in accordance with the fourth paragraph of Article 20 of the Rules of Procedure, to draw up an Opinion on removing the legal obstacles to the use of the ecu.

The Section for Economic, Financial and Monetary Questions, which was responsible for the preparatory work, adopted its Opinion on 8 February 1994. The Rapporteur was Mr Meyer-Horn.

At its 313th Plenary Session (meeting of 23 February 1994) the Economic and Social Committee adopted unanimously the following Opinion.

1. Preliminary Remark

1.1. On 23 December 1992 the EC Commission submitted to the European Council a White Paper on removing the legal obstacles to the use of the ecu⁽¹⁾.

In this White Paper the Commission calls upon the Member States to guarantee the legal status of the ecu as a foreign currency and take measures concerning:

- the use of the ecu in private contracts (e.g. ecu payment clauses);
- court decisions based on legal procedure;
- business management and organisation (e.g. publication of prices and accounts); and
- customs and taxation (e.g. tax payments in ecus).

1.2. The Commission does not advocate a Community regulation; instead, it leaves it up to the individual Member States to take the measures they think fit in accordance with their own national laws, so that no one is put off from using the ecu because of the laws or administrative procedures in force (§ 40).

1.3. The Commission points out in the White Paper that:

- the European Council declared that wider use of the ecu should be encouraged (Dublin, 25/26 June 1990); and
- the European Monetary Institute has the task of facilitating use of the ecu and overseeing its development, including the smooth functioning of the ecu clearing system [Maastricht Treaty Art. 109f(2)].

1.3.1. The Commission feels that wider use of the ecu during the transitional phase will facilitate its intro-

duction as an independent single currency in the Community [Maastricht Art. 109l(4)] in the third phase (§ 77).

1.3.2. The Commission sees the changeover to the single currency as a complex event requiring careful preparation. This includes giving citizens, businesses and administrations the chance of getting some experience of using the ecu unhampered by legal restrictions (§ 74).

1.4. The Commission has described the type of legal obstacles to the use of the ecu in the White Paper and listed them in a 78-page Annex. The White Paper is based on a survey among banks and firms and on a vast study of several thousand pages which was completed at the end of 1991 (§ 16).

2. General Comments

2.1. *The ecu's status as a foreign currency*

2.1.1. Use of the ecu will not be encouraged merely by removing legal obstacles. During the transition to economic and monetary union the ecu will remain a basket currency with many disadvantages and risks. The Commission itself rightly points out that the ecu is not always the best currency for transactions during the transitional phase (§ 74). A declaration to boost public confidence in the present and future role of the ecu therefore seems necessary (see point 2.3.2).

2.1.1.1. But removing the legal obstacles to the use of the ecu is a step in the right direction. For if, in a few years time, the ecu is to be introduced, one cannot very well shortly beforehand still have legal constraints on the use of its precursor, the ecu basket currency. Article 109l(4) of the Maastricht Treaty states that the ecu is to be introduced 'at the starting date of the third stage'. However, removing the legal obstacles to the ecu's use should not go so far as to give it the status of

⁽¹⁾ SEC(92) 2472 final.

a legal means of payment during the transitional phase. This would be irreconcilable with the unrestricted independence which the national central banks are to retain until the start of the third stage. During the transitional phase it is the national central banks alone who will remain competent and responsible for deciding what should be the legal means of payment on the territory of their respective Member States.

2.1.1.2. The key to removing the legal obstacles, as the Commission rightly sees it, is the fact that no country issues ecus as legal tender. (The Belgian and Irish ecu coins are not really legal tender; in practice they are collectors' items)(§ 18). Some Member States recognise the ecu as a foreign currency in law (Belgium, France, Greece, Italy, Luxembourg, Spain and Portugal) or in practice (Denmark, Ireland and the Netherlands).

In the UK there is no special legal rule concerning the ecu, so it can be used as a foreign currency. In Germany the ecu is regarded simply as a unit of account. But the Bundesbank has said that banks in Germany can operate ecu accounts and grant loans in ecus⁽¹⁾.

2.1.1.3. If the ecu were officially recognised as a foreign currency in all Member States, many of the legal obstacles to its use would disappear (§ 51). This remark by the Commission is correct. But this on its own may not necessarily mean that use of the ecu would increase.

2.1.2. Not only legal obstacles have to be removed if the ecu is to be used more during the transitional phase. The hesitancy towards the ecu is due above all to the costs and exchange risks involved when converting national currencies into ecus and back again.

2.2. *The exchange risks of using the ecu*

2.2.1. The economic barriers to using the ecu cannot be removed by order.

2.2.1.1. The risks of using the ecu and other foreign currencies have become clear to the general public with the changes in the exchange rates of the individual currencies against the ecu since August, the turbulence on the foreign exchange markets in autumn 1992 and summer 1993 and the decision of the finance ministers and central bank chairmen on 2 August 1993 to widen the margin of fluctuation of exchange rates in the

European Monetary System to 15 % either side of mid-rate.

2.2.1.2. The exchange risks of using the ecu or any other EU currency can only be expected to decrease if a greater convergence of key national economic data is achieved. In conditions of recession and mass unemployment greater convergence will only be achieved in the foreseeable future if there is a corresponding political will. In its Opinion on policy during the transition to economic and monetary union⁽²⁾ the ESC has pointed this out and identified three preconditions for this to occur:

2.2.1.2.1. Better co-ordination of national economic policies at EC level.

2.2.1.2.2. Intensive multilateral supervision of them at EC level; and

2.2.1.2.3. Mutual synchronisation of convergence and recovery programmes.

2.2.2. As long as the preconditions mentioned in point 2.2.1.2 are lacking, one cannot count on private households using the ecu. Under these circumstances it is only right that the Commission should not propose any measures to forcibly promote use of the ecu. That could only lead to deception and disappointment which would be bad for the ecu's image. And such disappointments would be prejudicial to the introduction of a single currency with the name 'ecu' in the third phase of economic and monetary union.

2.2.3. So, initially the removal of legal obstacles to the use of the ecu would, above all, benefit companies trading internationally. According to the White Paper (§ 7) the ecu so far accounts for only 1 or 2 % of the Member States' external trade. But by mid-1993 the volume of ecu credits was running at some ECU 200 bn while clearing house payments in ecus amounted to some ECU 50 bn per day.

2.2.4. The ecu is increasingly used in the clearing systems of international organisations such as Eurocontrol for flight safety, Amadeus for flight and hotel reservations and the UIC for settling payments between railway companies, which for this purpose list their prices per kilometre each year in ecus. According to the Commission's data bank in Directorate-General II-D/2 turnover amounts to ECU 2,150 m. for Eurocontrol and ECU 7,500 m. for the UIC⁽³⁾. In 1993 over 35 % of the

⁽¹⁾ e.g. Notice 1002/90, Bundesanzeiger of 5 January 1990.

⁽²⁾ See Analysis of the policies to be followed in the transition to economic and monetary union, OJ No C 34, 2. 2. 1994, p. 25.

⁽³⁾ See European Economy, Supplement A No 4/93.

expenditure from the Community budget of around ECU 70 bn was settled in ecus (in 1987: less than 6%).

2.3. *Informing the public and confidence in the ecu*

2.3.1. In addition to the White Paper on the legal obstacles to the use of the ecu, the Committee recommends that the European citizen be informed in a suitable and understandable way about what will be going on during the phase of transition to economic and monetary union, which will begin on 1 January 1994⁽¹⁾. The object of the folders, brochures, etc. should be to provide an answer to the questions which citizens ask, and in particular those concerning:

2.3.1.1. The impact of economic and monetary union on private households.

2.3.1.2. The advantages and risks of using the ecu during the transitional period.

2.3.1.3. The practical results of replacing national currencies by a single European currency, the ecu, in the third phase, especially as regards the circulation of notes and coins, pricing, accounting, issuing and redemption of securities and bookkeeping.

2.3.2. If the Commission does inform the public in co-operation with the appropriate authorities in the Member States, as referred to in point 2.3.1, the European Monetary Institute should be consulted.

2.3.3. It seems necessary to inform the European Monetary Institute of all measures taken by the Member States to remove legal obstacles to the use of the ecu. This particularly applies to the prudential obligations applying to credit institutions' ecu risks (see point 3.1.2).

2.3.4. Informing the public means covering the various possibilities of using the ecu basket currency during the transitional period with all the risks involved (see points 2.2.2 and 3.1.7.3) but also the many advantages.

2.3.4.1. Among the advantages: under Article 109l(4) the ecu basket would be converted into the independent — and ultimately only — EU common currency at a rate of 1:1, while the exchange rates of the individual national currencies in ecus would remain uncertain until the end of the transitional period. So, even though it is only a basket currency at present, the ecu would legally change into the ecu of the third stage of monetary union. If, for example, money was invested during the transitional period in longer-term bonds denominated

in ecus⁽²⁾ interest and redemption payments falling due during the third stage would be made in the future common European currency at a rate of 1:1 with the present ecu.

2.3.4.2. Another advantage, which is not generally known, is that under Article 109g of the Maastricht Treaty the composition of the ecu basket would be 'frozen' in the second stage. So, the amounts of the individual national currencies making up the ecu would no longer change. But, depending on exchange rate developments, the weighting of the individual currencies (and thus their respective percentage of the currency basket) can change. In other words: instead of the two risks which have existed to date — namely changes in the make-up of the basket and changes in the exchange rate — there is now only the exchange risk. For the markets it will be easier to obtain or liquidate ecu assets when these percentages become fixed⁽³⁾.

2.3.4.3. A further use for the ecu currency basket during the transitional period arises from the obligation incumbent upon the Member States to pay in ecus into the Communities' budget for the Structural Funds and withdraw sums in ecus from Community funds for payment to beneficiaries. Because of the increased number of transfer payments in ecus the need for ecus and the possibilities of settlement will increase too. This may perhaps also lead to a greater interest in the Member States in receiving tax payments in ecus (see points 3.3.2 and 3.3.3).

3. *Comments on the individual proposals*

3.1. *The ecu as a means of payment, a mortgage currency and its legal status.*

3.1.1. We support the Commission's recommendation that all Member States should grant the ecu legal status as a foreign currency and expressly provide for the following possibilities (§ 49):

3.1.1.1. Use of the ecu in contracts (§ 50).

3.1.1.2. Issuing of bills denominated in ecus and payment of ecu paper issued by non-EC countries (§ 27, 52), quotation of share prices in ecus (§ 33);

3.1.1.3. Operation of ecu sight and deposit accounts

⁽²⁾ By the end of 1992 the European Investment Bank alone had issued ecu bonds for a total value of ECU 13,4 bn.

⁽³⁾ See Appendix showing the changes in the composition of the ECU currency basket (Data from Commission Directorate-General II D 2).

⁽¹⁾ OJ No C 34, 2. 2. 1994, p. 25, point 1.6.1.

with interest, allowing payments in ecus (§ 53).

3.1.2. It also seems advisable to adjust the monitoring rules so that credit institutions' and insurance risks in ecus are not placed at a disadvantage compared with risks in other foreign currencies (§ 54).

3.1.3. Finally, the rules of the individual Member States on the use of the ecu should no longer draw distinctions in business relations between residents and between residents and non-residents (§ 56).

3.1.4. The Belgian Law of 12 July 1991 (*Moniteur Belge* of 9 August 1991), the French Law of 16 July 1992 (*Journal Officiel de la République Française* of 18 July 1992) and the Luxembourg Law of 29 July 1993 provide examples for removing legal obstacles to the use of the ecu as referred to in point 3.1.1.

3.1.4.1. The Belgian Law, which amends Article 3 of the Law of 30 December 1885, stipulates that public and official documents may be expressed not only in Belgian francs but also in ecus or in the currency of any one of the 24 Member States of the OECD (Organisation for Economic Co-operation and Development).

3.1.4.2. The French Law concerns the promotion of and tax concessions for equity savings plans (PEA). But in its Article 14 it allows liabilities to be expressed in ecus. Before this condition is exercised, contracts between residents can be annulled if they stipulate a payment in foreign currency where there is no cross-border business involved. The Law has not changed the French franc's status as the sole means of legal tender. Moreover, both parties to the contract must first agree to the use of the ecu. Subject to this condition, use of the ecu is to be permitted by the authorities in, for example, public calls for tender, taxes and the issuing of government bonds (Article 37 § 44 of the French Finance Bill).

3.1.5. The Belgian and French laws referred to in point 3.1.4 are steps in the right direction. But they still do not resolve the problem that in certain cases, such as auctions and property deals, some Member States' laws insist on cash payment in banknotes and do not allow funds on deposit to be made available through payment by cheque, bank transfer etc. As no Member State has ecus in circulation (see point 2.1.1), giving the ecu the same legal status as a foreign currency only

allows ecus to be actually used if payment by funds transfer is allowed, as funds in ecu accounts can then be made available.

3.1.5.1. Even the European Convention of 11 December 1967 on foreign currency liabilities (Article 5 of the Annex thereto) draws no distinction between cash and deposit money. But legislation and case-law in many countries still does not allow deposit money to be treated in the same way as cash unless the contracting parties have expressly agreed to do so. Under these circumstances ecu payments may not be legally acceptable in certain cases for paying off obligations.

3.1.5.2. The removal of the legal obstacles to the use of the ecu would therefore be a good reason for legislators to make payment by funds transfer generally equivalent to cash payments. Even today, in some Member States, cash payment can in fact be enforced if a creditor so wishes or if contracting parties cannot agree. But this seems to be on the way out because of the decline in the use of cash and the measures to combat money laundering.

3.1.6. In court decisions, steps should be taken to ensure that payment obligations can be established and enforced in ecus if contracting parties have agreed to use of the ecu. The pledging of assets in ecu accounts should also expressly be allowed to discharge a debt. The debtor should have to bear the costs of any conversion into local currency. Any conversion should be at the exchange rate prevailing on the day of the court's judgement (as provided for in, for instance, Articles 1018 and 1650 of the Belgian Legal Code).

3.1.7. A further area for using ecus involves the legal possibility of registering mortgages in ecus and allowing mortgage loans in ecus. The Belgian Law of 12 July 1991 already makes provision for this (in Article 3) and for converting ecu mortgages into local currency. The changes in the ecu's exchange rate with national currencies since autumn 1992 have shown that ecu mortgages involve considerable risks for mortgage-holders if the national currency is devalued against the ecu, and these risks should be specially brought to the mortgage-holders' attention.

3.1.7.1. In recent years mortgage loans and other forms of credit in ecus have been offered at much lower interest rates than those in local currency. But the fall in value of some currencies against the ecu since autumn 1992 means that debtors now have to pay more than they expected in local currency for their repayments. The exchange rate loss can be much greater than the gain from lower interest rates — at any rate when the debtor has no income in ecus and has to convert local currency to make repayments.

3.1.7.2. Another often overlooked disadvantage is when a primary mortgage is registered in ecus and the local currency falls in value against the ecu. The value of the mortgage may then become so close to the market value of the property that it is impossible to take out any further mortgage.

3.1.7.3. The risk of ecu mortgages and loans described in points 3.1.7.1 and 3.1.7.2 are an example of the disappointments which private households using ecus may encounter during the transitional period. It is yet another reason to support the Commission's decision not to propose any measures to forcibly promote use of the ecu in the private sector before the third stage (see point 2.2.2).

3.2. *Company capital, invoices and accounts in ecus*

3.2.1. In line with the White Paper, all Member States should allow their companies the possibility of:

3.2.1.1. Constituting, increasing and decreasing their capital in ecus (§ 19, 32, 63).

3.2.1.2. Setting and displaying their prices in ecus and invoicing directly in ecus if the contracting parties so agree (§ 29, 64).

3.2.1.3. Keeping all their books in ecus and publishing the annual accounts and all other accounts in ecus (§ 34, 63).

3.2.2. The Member States could initially limit themselves to granting the possibilities referred to in point 3.2.1 to companies which trade across borders (§ 66). Once invoked, the option mentioned in point 3.2.1.1 should always be linked to that in 3.2.1.3, and not just be used for one or two financial years.

3.2.3. Many firms, especially in the retailing, mail order, tourism, hotel and catering sectors, already display their prices in ecus, as described in point 3.2.1.2.

Ecu pricing makes it easier to compare prices, particularly in border areas, holiday resorts and in international hotel chains. But to avoid disappointments care should be taken to see that:

3.2.3.1. Ecu prices constantly reflect exchange rate trends.

3.2.3.2. Ecu prices are not routinely rounded upwards; and

3.2.3.3. The rate used for converting prices into ecus is clearly visible in every case.

3.2.4. Firms which submit their company reports and accounts in ecus, as well as in other currencies, should have to show clearly the rate used when converting figures from local currency.

3.3. *Customs and taxation in ecus*

3.3.1. The customs duties levied at the external frontiers of the EC go straight into the Community's budget, which is drawn up in ecus. It seems sensible to change the EC Customs Code so that the following are possible (§ 71):

3.3.1.1. The expression of goods' value for customs purposes in ecus.

3.3.1.2. An ecu box on customs forms; and

3.3.1.3. The payment of customs duties in ecus.

3.3.2. It is to be expected that many multinationals will keep all their accounts in ecus, as suggested in point 3.2.1.3. It would therefore be logical for them to also use the ecu for working out and paying their taxes. Otherwise the 'taxes payable' column would be the only entry in the accounts still expressed in local currency. As tax payment is a direct relationship between companies and the state it would not be necessary for the ecu to be generally recognised as a legal means of payment with compulsory acceptance.

3.3.3. In France and the Netherlands it is already possible to pay taxes in ecus. Such a facility could also be made available to private households who have income in ecus. But paying taxes in ecus would primarily be considered by firms whose income in ecus exceed-

ed their ecu costs. This would especially apply when the exchange rate against the local currency worsened during the business year and a surplus in ecus would otherwise become an exchange loss in the accounts.

3.3.4. Tax payments in ecus could also become interesting for national authorities when they needed ecus to pay their contributions to the Community budget (see point 2.3.4.3).

3.4. *The ecu in EC law*

3.4.1. It seems a good idea to refer to the ecu systematically and expressly in EC law.

3.4.2. This particularly applies to the proposals currently being prepared or discussed for regulations, directives and decisions in the fields of insurance, banking, securities trading and company law, and especially those relating to the European company, the European co-operative society, the European mutual society and the European economic interest grouping (§ 76).

3.4.3. Provision should also be made for using the ecu in public procurement where EC rules on this apply.

Done at Brussels, 23 February 1994.

*The Chairman
of the Economic and Social Committee*

Susanne TIEMANN
