I

(Resolutions, recommendations and opinions)

OPINIONS

EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 17 December 2007

at the request of the Council of the European Union on a proposal for a Council Regulation amending Regulation (EC) No 1338/2001 laying down measures necessary for the protection of the euro against counterfeiting

(CON/2007/42)

(2008/C 27/01)

Introduction and legal basis

On 23 October 2007, the European Central Bank (ECB) received a request from the Council of the European Union for an opinion on a proposal for a Council Regulation amending Regulation (EC) No 1338/2001 laying down measures necessary for the protection of the euro against counterfeiting ([1]) (hereinafter the 'proposed Regulation').

The ECB's competence to deliver an opinion is based on the third sentence of Article 123(4) of the Treaty establishing the European Community, which is the legal basis for the proposed Regulation. The ECB's competence to deliver an opinion is also based on the first indent of Article 105(4) of the Treaty, in combination with Article 106 of the Treaty, as the proposed Regulation relates to the protection of euro banknotes and coins. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

1. General observations

1.1 As mentioned in the explanatory memorandum for the proposed Regulation, the ECB has recently issued Recommendation ECB/2006/13 of 6 October 2006 on the adoption of certain measures to protect euro banknotes more effectively against counterfeiting ([2]) (hereinafter the 'ECB Recommendation'). In the ECB Recommendation, the ECB takes the stance that while, generally, criminal law and the rules of criminal procedure do not fall within the competence of the Community, they may do so when necessary to ensure the effectiveness of Community law ([3]). The ECB specifically recommended that the Commission should 'consider proposing an extension of the powers of NACs (national analysis centres for counterfeits) and of NCBs (national central banks) that are not NACs, so that they may retain identified and analysed examples of counterfeit notes and also request and legitimately transport such notes intra-EU for the purposes of (testing under) the Framework (for the detection of counterfeits and fitness sorting by credit institutions and other professional cash handlers). In particular, Article 4(2) of Regulation (EC) No 1338/2001 should be amended, and Article 4(3) accordingly deleted. As a minimum, this latter paragraph should be amended so that the full application of Article 4(2) is not prevented by the use or retention of counterfeit notes as evidence in criminal proceedings, except when such an

([1]) COM(2007) 525 final.
([2]) OJ C 257, 25.10.2006, p. 16.
([3]) Judgement of 13 September 2005, Case C-176/03, *Commission* v *Council* [2005] ECR I-7879 and Judgement of 23 October 2007, Case C-440/05 (not yet published) *Commission* v *Council* [2007] ECR I-0000.

application is impossible, taking into account the quantity and type of seized counterfeits'. These recommendations have not been taken into account in the proposed Regulation.

1.2 In principle, the ECB welcomes any use of a first pillar act adopted under the Treaty to protect the euro against counterfeiting, rather than a third pillar act based on police and judicial cooperation in criminal matters, as first pillar acts provide the only appropriate legal means for protecting the euro against counterfeiting within the framework of the Community's economic and monetary union ([1]).

2. **Specific observations**

2.1 The proposed broadening of the scope of the title of Article 4 of Regulation (EC) No 1338/2001 of 28 June 2001 laying down measures necessary for the protection of the euro against counterfeiting ([2]), so as to impose an obligation to transmit new and old classes of counterfeit notes for purposes other than identification, partially follows the ECB Recommendation. However, the proposed amendment to Article 4(2) does not prevent suspected counterfeit notes from being used or retained in criminal proceedings, pursuant to Article 4(3), thus contradicting the broadening of the scope of the title thereof and jeopardising the effectiveness of the amended provision. Indeed, the application of the provision continues to be entirely dependent both on national criminal law and on the discretion of judicial or prosecution authorities. It is conceivable that samples of new or particularly dangerous counterfeits could be discovered in one country, through a single seizure, and that the judicial or prosecution authorities will refuse to release or be prevented by virtue of national criminal law from releasing any of them for the purpose of testing, and thus frustrate the spirit of the new provision. As stated in paragraph 2 of the ECB Recommendation, the ECB does not wish to prejudice the rights of suspects and defendants in criminal proceedings. However, in this respect the balance of interests established by Regulation (EC) No 1338/2001 and maintained by the proposed Regulation is tipped against the protection of the euro against counterfeiting. To ensure such protection, the ECB and the NCBs should as a rule be entitled to receive samples of banknotes used or retained as evidence in criminal proceedings, the sole exception being when this is impossible, taking into account the quantity and type of seized counterfeits.

2.2 As mentioned in the explanatory memorandum for the proposed Regulation, the ECB has already adopted a framework for the detection of counterfeit notes ([3]), which Eurosystem NCBs have to implement in their national legal frameworks. The ECB did this in fulfilment of its responsibilities under Article 106(1) of the Treaty and Article 16 of the Statute of the European System of Central Banks and of the European Central Bank, to ensure the integrity and preservation of euro banknotes in circulation and, by extension, the public's trust in euro banknotes. This should be more fully reflected in the proposed amendment to Article 6(1) of Regulation (EC) No 1338/2001, by making express reference to the ECB's competence in the field of establishing sorting standards for both the circulation fitness and authenticity checks of euro notes and the existing Eurosystem work undertaken for this.

2.3 The proposed amendment to Article 6(1) of Regulation (EC) No 1338/2001 imposes upon 'credit institutions, and any other institutions engaged in the sorting and distribution to the public of notes and coins as a professional activity' the obligation to ensure that the notes and coins they receive are checked for authenticity and counterfeits are detected. While the object of the obligation is clear and desirable, the wording 'other institutions engaged in the sorting and distribution to the public of notes and coins as a professional activity' leaves out of its scope other organisations which operate self-service devices supplying euro banknotes to the public, even if not as a professional activity. Indeed, the practical implementation of the ECB Framework at national level has revealed the narrowness of the term, especially as regards retailers who re-fill automated teller machines (cash points). This narrow scope as to the addressees of the obligation in Article 6 may create a loophole through which euro notes and coins will not be checked in compliance with ECB and Commission procedures, to the detriment of the public at large and of the credit institutions in the euro area, which will be subject to stricter standards. A broader definition would thus be the most adequate solution.

([1]) See also Recommendation ECB/1998/7 of 7 July 1998 regarding the adoption of certain measures to enhance the legal protection of euro banknotes and coins.
([2]) OJ L 181, 4.7.2001, p. 6.
([3]) See the Framework for the detection of counterfeits and fitness sorting by credit institutions and other professional cash handlers, available on the ECB's website at: www.ecb.int/pub/pdf/other/recyclingeurobanknotes2005en.pdf

2.4 The proposed Regulation will add to Article 6(3) of Regulation (EC) No 1338/2001 a provision requiring the Member States to make the laws, regulations and administrative provisions for applying the obligation of credit and other institutions to ensure that euro notes and coins are checked for authenticity and that counterfeits are detected, in line with procedures to be defined by the ECB and the Commission. Member States would be required to adopt these laws, regulations and administrative provisions by 31 December 2009 at the latest, and to forthwith inform the ECB and the Commission thereof. The ECB is of the opinion that, as the ECB and the Commission are responsible for laying down the procedures underpinning this obligation, it is the ECB and the Commission that should stipulate the deadlines for their implementation, both for practical and legal reasons. From a practical point of view, imposing deadlines for implementation requires expert knowledge of the know-how and capabilities of the local operators. The migration costs and costs for manufacturing and obtaining the new detectors required must also be considered. Hence, the single deadline of the proposed Regulation might prove inflexible. From a legal point of view, the body which has the competence to establish the procedures with respect to sorting standards for both fitness and authenticity checks of euro notes or coins should be the body to establish the deadlines for their application. It is therefore suggested that this deadline should be deleted from the proposed Regulation, and instead it should be provided that the deadlines for applying this obligation, in line with the procedures to be defined by the ECB and Commission, should be laid down in those same procedures.

2.5 As regards the inclusion of coins under the scope of the Regulation on the same level as banknotes, and conscious of its competence on matters related to euro banknotes, the ECB would observe that this approach could have the drawback of endangering retail payment in Member States, as the technical feasibility of the proposed checking requirement for coins is — unlike the one for banknotes — yet uncertain.

2.6 As it is not completely clear whether the reference of Regulation (EC) No 1339/2001 of 28 June 2001 extending the effects of Regulation (EC) No 1338/2001 laying down measures necessary for the protection of the euro against counterfeiting to those Member States which have not adopted the euro as their single currency ([1]) to Regulation (EC) No 1338/2001 is a dynamic one, there is a need for another proposal for a Regulation, extending to non euro area Member States the effects of the proposed Regulation ([2]), in particular as regards the amendments to Articles 4 and 5. However, in the context of the 'procedures to be defined by the European Central Bank' to which the proposed Regulation will include a reference in Article 6(1) of amended Regulation (EC) No 1338/2001, as noted above, the ECB is best placed to decide upon the implementation of its procedures in relation to euro banknotes. In this respect and in the light of the limits of the geographic area in which the euro is legal tender, the ECB decided in July 2006 ([3]) that these procedures will become effective in newly participating Member States once they adopt the euro.

3. **Drafting proposals**

Where the above advice would lead to changes in the proposed Regulation, drafting proposals are set out in the Annex.

Done at Frankfurt am Main, 17 December 2007.

The President of the ECB

Jean-Claude TRICHET

([1]) OJ L 181, 4.7.2001, p. 11.

([2]) This has recently been the case with other texts amending legal instruments relating to the protection of the euro, i.e. Council Decision 2006/849/EC of 20 November 2006 amending and extending Decision 2001/923/EC establishing an exchange, assistance and training programme for the protection of the euro against counterfeiting (the Pericles programme) (OJ L 330, 28.11.2006, p. 28) and Council Decision 2006/850/EC of 20 November 2006 extending to the non-participating Member States the application of Decision 2006/849/EC amending and extending Decision 2001/923/EC establishing an exchange, assistance and training programme for the protection of the euro against counterfeiting (the Pericles programme) (OJ L 330, 28.11.2006, p. 30).

([3]) See the ECB document 'Transitional regime for the implementation of the banknote recycling framework in the new participating Member States' available on the ECB's website at: www.ecb.europa.eu/pub/pdf/other/recyclingeurobanknotesframework2006en.pdf

ANNEX

DRAFTING PROPOSALS

Text proposed by the Commission	**Amendments proposed by the ECB** [1]
Amendment 1 Article 1(1)	
Regulation (EC) No 1338/2001 is amended as follows:	Regulation (EC) No 1338/2001 is amended as follows:
1. Article 4 is amended as follows:	1. Article 4 is amended as follows:
(a) the title is replaced by the following: 'Obligation to transmit counterfeit notes';	(a) the title is replaced by the following: 'Obligation to transmit counterfeit notes';
(b) at the end of paragraph 2 the following sentence is added: 'For the purpose of facilitating the control for authenticity of circulating euro notes, the transport of counterfeit notes amongst the competent national authorities as well as the institutions and bodies of the European Union shall be permitted.'	(b) at the end of paragraph 2 the following sentence is added: 'For the purpose of facilitating the control for authenticity of circulating euro notes, the transport of counterfeit notes amongst the competent national authorities as well as the institutions and bodies of the European Union shall be permitted.'
	(c) paragraph 3 is replaced by the following: **'Paragraph 2 shall be applied in such a way that it does not prevent suspected counterfeit notes from being used or retained as evidence in criminal proceedings, taking into account the quantity and type of seized counterfeits.'**
Justification — *See paragraph 2.1 of the opinion*	
Amendment 2 Article 1(3)(a)	
3. Article 6 is amended as follows:	3. Article 6 is amended as follows:
(a) paragraph 1 is replaced by the following: '1. Credit institutions, and any other institutions engaged in the sorting and distribution to the public of notes and coins as a professional activity, including establishments whose activity consists in exchanging notes and coins of different currencies, such as bureaux de change, shall be obliged to ensure that euro notes and coins which they have received and which they intend to put back into circulation are checked for authenticity and counterfeits are detected. This verification shall be carried out in line with procedures to be defined by the European Central Bank and the Commission for euro notes and coins respectively. The institutions referred to in the first subparagraph shall be obliged to withdraw from circulation all euro notes and coins received by them which they know or have sufficient reason to believe to be counterfeit. They shall immediately hand them over to the competent national authorities.'	(a) paragraph 1 is replaced by the following: '1. Credit institutions, and any other institutions engaged in the sorting and distribution to the public of notes and coins ~~as a professional activity~~, including: — establishments whose **professional** activity consists in exchanging notes and coins of different currencies, such as bureaux de change, **and** — **retailers and other economic agents, such as casinos, engaged as a subsidiary activity in the sorting and distribution of notes to the public by means of automated teller machines** shall be obliged to ensure that euro notes and coins which they have received and which they intend to put back into circulation are checked ~~for authenticity~~ and counterfeits are detected. The~~is~~**se** ~~verification~~ **checks** shall be carried out in line with procedures to be defined by the European Central Bank and the Commission for euro notes and coins respectively**, according to their respective competences and taking into account the particularities of euro notes and coins respectively**. The institutions**, retailers and other economic agents** referred to in the first subparagraph shall be obliged to withdraw from circulation all euro notes and coins received by them which they know or have sufficient reason to believe to be counterfeit. They shall immediately hand them over to the competent national authorities.'
Justification — *See paragraph 2.3 of the opinion*	

[1] Bold in the body of the text indicates where the ECB proposes inserting new text. Strikethrough in the body of the text indicates where the ECB proposes deleting the text.

Amendment 3

Article 1(3)(b)

(b) at the end of paragraph 3 the following subparagraph is added:	(b) at the end of paragraph 3 the following subparagraph is added:
'By way of derogation from the first subparagraph of paragraph 3, the laws, regulations and administrative provisions for applying the first subparagraph of paragraph 1 of this Article shall be adopted by 31 December 2009 at the latest. They shall forthwith inform the Commission and the European Central Bank thereof.'	'By way of derogation from the first subparagraph of paragraph 3, the laws, regulations and administrative provisions for applying the **procedures mentioned in the** first subparagraph of paragraph 1 of this Article shall be adopted ~~by 31 December 2009 at the latest~~ **in accordance with the deadlines laid down in such procedures**. The~~y~~ **Member States** shall forthwith inform the Commission and the European Central Bank thereof.'

Justification — *See paragraph 2.4 of the opinion*

Amendment 4

Article 2

This Regulation shall have effect in the participating Member States as defined in the first indent of Article 1 of Council Regulation (EC) No 974/98 ([14]).	This Regulation shall have effect in the participating Member States as defined in the first indent of Article 1 of Council Regulation (EC) No 974/98 ([14]).
	The procedures referred to in Article 6(1) of Regulation (EC) No 1338/2001 shall have effect in the participating Member States as stipulated in the second subparagraph of Article 6(3) thereof.
([14]) OJ L 139, 11.5.1998, p. 1.	([14]) OJ L 139, 11.5.1998, p. 1.

Justification — *See paragraph 2.5 of the opinion*