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THE LAW OF THE EURO:

Constitutive, institutional and external aspects

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CONTENTS

1. INTRODUCTION

"Money has been introduced by convention as a kind of substitute for a need or demand. Its value is derived not from nature but from law, and can be altered or abolished at will"
– Aristotle[2]

Malta joined the euro area on 1 January 2008. It did so under a new framework that is substantially different from that used by the countries that joined before it,[3] as they adopted the euro legally first, and in cash form only after a transitional period.

When Malta joined the European Union on 1 May 2004, by the same act it also joined the Economic and Monetary Union (EMU) as a member of EMU with a derogation. Becoming a full member of the single currency area may be summed up legally as the removal of this derogation. In fact, by means of the Treaty of Accession, Malta undertook to converge with the Maastricht criteria and EMU *acquis* to achieve full EMU membership and the adoption of the euro – thus implying the removal of that derogation.

This article examines aspects of European monetary and economic law as applicable in or to Malta as a participating member state. It analyses the law related to the single currency within the context of EMU (section 2), discusses European law applicable during and after the changeover (section 3), studies the eventual structure of legal relations between Malta, the Community, the Central Bank of Malta and the European System of Central Banks (ESCB) upon membership of the euro area (section 4), and explains the external aspects of euro area membership together with the resulting division of external competences in monetary affairs (section 5).

While most law governing EMU and the euro stems from directly enforceable regulation, the changeover did, to some extent, have to be implemented in Maltese law. This article does not analyse or discuss Maltese implementing legislation, but focuses on the applicable European law. Most of the relevant law did not need to be implemented through local provisions, but came into force directly and has primacy over Maltese law. This has caused a pervasive overhaul of the legal regimes underpinning the monetary system of Malta. The status of the Central Bank of Malta ('the Bank') has changed. Malta's competence in the conduct of Maltese monetary policy has been diminished, as it inherited new obligations under European law; at the same time its rights in the governance of EMU and the European Central Bank (ECB), together with its affiliated bodies, have increased correspondingly. Various rights of representation in international fora and bodies have been passed on between players – from the Maltese government and the Bank to various others, notably the European Commission, the European Community, the ESCB and the ECB itself. At times, as trustee, the Maltese government or the Bank will internationally represent the Community or the ECB where these cannot represent themselves.

Courts will have to come to terms with these events; for example, they will be faced with contracts denominated in Maltese lira at a time when the lira is not legal tender. Maltese Courts will make reference to EU law in this regard, but the case in jurisdictions outside of the EU is not so clear cut.

EMU law is particular as it consists of a blend of private, public, national, European and international law methods and instruments. It combines hard and soft law[4] with political commitment, and these together create the world's first both supranational and multinational currency. Legally, however, euro area membership is much more than a currency changeover. It entails adhesion to a new multi-level monetary system, the largest, most complex, yet most innovative ever.

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[2] Aristotle, Nicomachean Ethics, Book 5, Ch 5, 350 BC.

[3] With the exclusion of Slovenia.

[4] The term 'soft' law refers to quasi-legal instruments which do not have any legally binding force, or whose binding force is somewhat weaker than that of traditional 'hard' law.

2. A LEGAL MAP TO THE SINGLE CURRENCY

This section sets out to explain and analyse the EU's monetary law, applying it to Malta where relevant. It focuses on constitutive and structural elements, and aims to impart a broad understanding of the framework of law as a whole.

This section does not consider many legal issues related to the run up to the changeover, or to the changeover itself (which are discussed in the following section).

2.1 European monetary law

Law relating directly to the euro does not constitute the entirety of European monetary law. In fact, ever since the EC Treaty was amended by the Maastricht Treaty to create the legal basis for EMU, a variety of legal instruments has been created. Together, these instruments form the monetary law of the member states that have adopted the single currency. This section will focus on the framework within which the euro operates, to place the law of the euro within the wider context of European monetary law.

Indeed, the European monetary system functions on the basis of four types of instruments. These consist of the Treaty provisions relative to EMU; the secondary law created under the Treaties; a variety of regulations, decisions, guidelines, instructions and agreements set up within the ESCB; and, in the field of external relations, several decisions relative to exchange rate matters.

2.1.1 Treaty basis of European monetary law

The EC Treaty contains the major provisions relative to Monetary Union in three groups of articles: Articles 105-111, Articles 112-115, and Articles 116-124. Furthermore, attached to the Treaty is the statute of the ESCB.

The first group of articles (Articles 105-111) relates directly to Monetary Union, and includes the major provisions relative to the Union's monetary and exchange rate policies. In particular, one finds the right to issue currency, the primary objective of price stability, and the tasks of the ESCB.

The second group (Articles 112-115), on the other hand, deals with the institutional provisions relative to the exercise of those policies. Here, one finds the rules related to appointments to the Governing Council, Executive Board and Economic and Financial Committee, as well as rules related to representation of the Community institutions in the ECB and consultation between these bodies.

Articles 116-124, the third group, contain transitional provisions relative to the three stages of Monetary Union, and as such are, in general, no longer relevant – as in the case of the Article 117 dealing with the European Monetary Institute (EMI), the predecessor to the ECB, or Article 118 dealing with the ECU. Nonetheless, Article 119, on assistance in the case of economic difficulties, still applies to 'pre-ins', as do Article 120 in relation to a sudden crisis in the balance of payments of a member state, and Article 124, which requires 'pre-ins' to treat "exchange-rate policy as a matter of common interest". Article 122 is of particular relevance to 5th enlargement countries,[5] and thus Malta, as it establishes the status of a member state with a derogation, as well as the procedure for the abrogation of this derogation.

Moreover, the Statute of the European System of Central Banks and the ECB (ESCB Statute) is attached to the EC Treaty as a protocol, and sets out in more detail the organisation and functions of the ESCB and the ECB.

While the provisions in the EC Treaty directly concerning Monetary Union can be found as described above, there are other provisions in the Treaty of importance to European monetary law. In particular, Articles 56-60 grant directly effective rights in terms of the free movement of capital and payments, while Articles 98 to 104 concern economic policy. With regard to the latter, despite speaking of economic union, in this field member states have largely retained their powers. However, this is within a framework of community rules, in particular the excessive deficit procedure, which stems from this part of the Treaty. While technically not part of the Union's monetary law, membership of the euro area changed Malta's obligations in this field, especially in terms of the elaboration

[5] The ten states that joined the EU on 1 May 2004.

of the excessive deficit procedure by means of the Stability and Growth Pact (discussed in section 3).[6]

2.1.2 Secondary legislation

On the basis of the Treaties, the Council of Ministers has enacted various legislative instruments in the monetary field.

Most importantly, three Council Regulations govern the euro itself, as well as its introduction, and the various ancillary issues thereto. These are discussed below. There are also three regulations that govern the exercise by the ECSB of its monetary powers. Regulation 2531/98[7] deals with the ECB's application of minimum reserves (as supplemented by an ECB regulation),[8] Regulation 2532/98[9] governs the powers of the ECB to impose sanctions (also, as supplemented by an ECB regulation)[10] and Regulation 2533/98[11] concerns the gathering of statistical information by the ECB. Furthermore, as a result of a Council Decision,[12] member states are bound to consult the ECB before passing certain types of draft legislation. There are also Council Decisions relating to the approval of the external auditors of the ECB[13] and national central banks (NCBs).[14] In this context, it is also relevant to mention the Rules of Procedure of the ECB[15] and of the General Council of the ECB.[16]

Together, these secondary legal instruments enable the ESCB to perform its tasks as laid down in the EC Treaty – most importantly, to decide and implement the monetary policy of the Eurosystem.

2.1.3 ESCB instruments

A large body of instruments, in the form of regulations, decisions, guidelines, instructions and agreements, has been created by the ESCB. These have various functions. Notably, they create a framework for the implementation of monetary policy, for the gathering of statistical information, and for the management of TARGET2[17] – the Real Time Gross Settlement (RTGS) system for the euro. There are also instruments relating to accounting and reporting by the ECB and NCBs, distribution of the ECB's monetary income, institutional aspects of the ESCB, as well as the management of the ECB's external reserves. Generally, these instruments are subject to implementation by the NCBs, which create their own acts, directives, regulations or guidelines, or engage in legal relationships with third parties (usually credit or financial institutions).

2.1.4 Decisions on exchange rate matters

Some territories outside the EU previously used the currencies of current euro area members. Various Council Decisions settle many of the legal issues relating to their use of the euro despite not being euro area members themselves, as in the case of French overseas

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6 The 'Stability and Growth Pact' is not a legal term – in fact it is shorthand for three instruments: (i) Resolution of the European Council on the Stability and Growth Pact, Amsterdam, 17 June 1997, OJ (1997) C 236; (ii) Council Regulation (EC) No. 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJ (1997) L 209; and (iii) Council Regulation (EC) No. 1467/97 of 17 July 1997 on the speeding up and clarifying the implementation of the excessive deficit procedure, OJ (1997) L 209.

7 Council Regulation (EC) No. 2531/98 of 23 November 1998 concerning the application of minimum reserves by the European Central Bank, OJ (1998) L 318.

8 ECB Regulation (EC) No. 2818/98 of 1 December 1998 on the application of minimum reserves (ECB/1998/15), OJ (1998) L 356.

9 Council Regulation (EC) No. 2532/98 of 23 November 1998 concerning the powers of the European Central Bank to impose sanctions, OJ (1998) L 318.

10 ECB Regulation (EC) No. 2157/1999 of 23 September 1999 on the powers of the European Central Bank to impose sanctions (ECB/1999/4), OJ (1999) L 264.

11 Council Regulation (EC) No. 2533/98 of 23 November 1998 concerning the collection of statistical information by the European Central Bank, OJ (1998) L 318.

12 Council Decision (EC) No. 98/415 of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions, OJ (1998) L 189.

13 Council Decision (EC) No. 98/481 of 20 July 1998 approving the external auditors of the European Central Bank, OJ (1998) L 216.

14 Council Decision (EC) No. 1999/70 of 25 January 1999 concerning the external auditors of the national central banks, OJ (1999) L 022.

15 Rules of Procedure of the European Central Bank, as amended most recently by Decision of the European Central Bank of 7 October 1999 (ECB/l999/6), OJ (1999) L 314.

16 Rules of Procedure of the General Council of the European Central Bank, OJ (1999) L 75.

17 TARGET 2 stands for the second version of the Trans-European Automated Real-time Gross settlement Express Transfer system, and is used for interbank transfers, settlement of central bank operations, as well as other transfers in central bank money. It includes a Single Shared Platform, and thus differs from its predecessor, which was created by integrating the RTGS systems of the Eurosystem NCBs and the ECB payment mechanism. Migration to TARGET 2 is currently under way, with the Central Bank of Malta having already migrated as part of the first group of NCBs to do so.

territories and departments and various European micro-states – Monaco,[18] San Marino[19] and the Vatican City,[20] for example.

Conversely, a European Council Resolution,[21] followed up by an agreement,[22] governs the exchange rate relations between the euro area and other non-euro EU member states – these are known collectively as the second exchange rate mechanism agreement (ERM II). Sweden and the UK, however, are not ERM II members, and while some 5th/6th enlargement countries have joined, others are still in the process of doing so.

2.2 How this law applied to Malta as an 'out' member

Malta has been subject to that part of EMU law which applies to member states with a derogation since 1 May 2004. This law is still in force in Malta, complemented today by the law applicable only to participating member states.

Preparations for EU membership in the economic and monetary sphere involved, in particular, major changes in rules on free of movement of capital and payments[23] and the integration of the Central Bank of Malta into the ESCB.[24] Furthermore, certain rules became directly applicable by power of EU law, such as the 'no bail out' rule, which prohibits credit to a member state by other member states or the Community, found in Article 8 of Regulation 3603/93.[25]

Many of the legal amendments required were carried out by Act XVII of 2002, and *inter alia* included changes in the powers of the Bank and prohibited activities of the Bank, the establishing of a Monetary Policy Advisory Council, the independence of the Bank and its Governor in deciding upon monetary policy, independent audits, rules on the collection of information and reporting of statistics, provisions on the Bank's relationship with the Government and prohibition of public sector financing, as well as the Bank's relationship with (and membership of) the ESCB.[26]

2.3 The legal basis of the euro

This section deals with the main provisions of EU law on the single currency, and relates them to the Maltese situation where relevant.[27]

Three Regulations set out the law of the euro[28] and regulate the changeover from national currencies. The first, Regulation 1103/97,[29] which gives the euro its name, provides for replacement of the ECU, sets conversion rules in relation to the former national currencies and lays down the principle of continuity of contracts. The second, Regulation 974/98,[30] provides for the introduction of the single currency, both in its non-cash form (as happened in the Euro-11 on 1 January 1999) as well as in its cash form (as happened in the Euro-11, plus Greece, on 1 January 2002). It also provides for various measures and rules applicable during the transitional period,[31] and

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18 Council Decision (EC) No. 1999/96 of 31 December 1998 on the position to be taken by the Community regarding an agreement concerning the monetary relations with the Principality of Monaco, OJ (1999) L 30.

19 Council Decision (EC) No. 1999/97 of 31 December 1998 on the position to be taken by the Community regarding an agreement concerning the monetary relations with the Republic of San Marino, OJ (1999) L 30.

20 Council Decision (EC) No. 1999/98 of 31 December 1998 on the position to be taken by the Community regarding an agreement concerning the monetary relations with Vatican City, OJ (1999) L 30.

21 Resolution of the European Council on the establishment of an exchange-rate mechanism in the third stage of economic and monetary union, Amsterdam, 16 June 1997, OJ (1997) C 236.

22 Agreement of 1 September 1998 between the European Central Bank and the national central banks of the Member States outside the euro area, laying down the operating procedures for an exchange rate mechanism in stage three of economic and monetary union, OJ (1998) C 345.

23 And thus the repeal and replacement of what was the Exchange Control Act 1972, Cap. 233 of the Laws of Malta.

24 See Gondellon Q. and Verlaine E., Les Nouveux etats membres et l'union economique et monetaire, Master of European Law thesis, University of Rennes 1, 2004, p. 7.

25 Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b (1) of the Treaty, OJ (1993) L 332.

26 Central Bank of Malta Act, Cap. 204 of the Laws of Malta.

27 However, some important issues (such as obligations during the various phases leading to full EMU membership) are not discussed here, either as they are treated in other sections of this article or because they are not within the scope of this work.

28 For a legal history, see European Commission, Euro papers No. 4 - Legal framework for the use of the euro, 1997, p. 1-11.

29 Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro, OJ 1997 L162/1.

30 Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro, OJ 1997 L161/1.

31 The period of time between the introduction of the euro in non-cash form and the introduction of the euro in cash form. There is no such period in member states that join under a

thus not to Malta. The third, Regulation 2866/98[32] simply lays out the conversion rates between the euro and the national currencies it replaces. As Van Lembergen and Wachenfeld point out, "the first regulation [Regulation 1103/97, as the third, Regulation 2866/98] is directly applicable as law in all EU Member States … The second regulation [Regulation 974/98] is applicable only in the Participating Member States." [33]

The legal basis of a measure is critical as it links that measure with a Treaty article whereby a power has been conferred to the Community by member states. The Community may only act where competences have been conferred in this manner. Interestingly, as pointed out by the Commission,[34] Regulation 1103/97 was based on Article 308 of the EC Treaty (the article on measures the Community can enact on unanimity without specific powers). This is because Article 123 (4) (which calls for the adoption of "the other measures necessary for the rapid introduction of the euro") restricts voting in Council on its basis only to (prospective) participating member states – and these were not yet known at the time. Furthermore, Article 308 (as opposed to 123 (4)) falls outside the scope of the UK Opt-out Protocol (attached to the EU Treaty), meaning that the euro, though not adopted, would be provided for also in the UK.[35] As Smits explains, "this is why there are two regulations, Regulation No. 1103/97 and Regulation No. 974/98 which, together, contain the main provisions on the euro".[36]

Regulation 974/98 has been amended by Regulation 2169/2005,[37] and was thus adapted to the needs of the new entrants. The amended Regulation no longer uses set dates or phrases like 'the beginning of stage three' and 'the end of the transitional period', which were previously defined as 1 January 1999 (except for Greece, which joined later)[38] and 1 January 2002, respectively. Instead, it now uses the phrases 'respective euro adoption date' and 'respective cash changeover date', adding a table to the annex with these dates defined for all existing member states. This means that for any newly joining member state, its own respective dates are added to the table by means of a further simple Regulation.

Furthermore, as euro banknotes and coins are already in circulation, Regulation 974/98 now envisages three scenarios for joining – a 'transitional period scenario', as was the case for the first 12 euro area members (Euro-12), a 'big bang scenario', where the 'euro adoption date' and 'cash changeover date' are the same, and a 'big bang scenario with a phasing-out period'. The latter is the same as the big bang scenario, except that legal instruments referring to the national currency can still be legally created after the 'big bang' date (€-day), and are to be read as references to the euro (as converted), thus needing to be performed in euro. Malta chose a 'big bang' scenario.

A further difference which applied, as a result of past experience, is that while for the Euro-12 the Commission had only issued a Recommendation[39] that there should be no banking charges for conversions to the euro, this time hard law applied, namely Article 15 of Regulation 974/98 as amended.

Over and above these Regulations, the Commission has added two Recommendations – on dual-display of prices[40] and on dialogue, monitoring and information to facilitate the transition.[41] Moreover, the ECB, by way of a decision,[42] determined the provisions relating to

'big bang' scenario, as the introduction of the euro in non-cash and cash form coincide.

32 Council Regulation (EC) No. 2866/98 of 31 December 1998 on the conversion rates between the euro and the currencies of the Member States adopting the euro, OJ (1998) L 359.

33 Van Lembergen W. and Wachenfeld M.G., Economic and Monetary Union in Europe, Legal Implications of the Arrival of the Single Currency, in Fordham International Law Journal, Vol. 22, No. 1, November 1998, p. 14-15.

34 European Commission, *supra* note 28, p. 1-11.

35 For example, in the case of Courts dealing with contracts denominated in old currency units after these have ceased to exist.

36 Smits R., Law of the Economic and Monetary Union, in Recuil des cours de l'Academie de driot international de La Haye, tome 300, 2002, p. 393.

37 Council Regulation (EC) No 2169/2005 of 21 December 2005 amending Regulation (EC) No 974/98 on the introduction of the euro, OJ L 346/1.

38 Greece joined under the provisions of Regulation (EC) No 2596/2000, created specifically for its case.

39 Commission Recommendation (EC) No. 98/286 of 23 April 1998 concerning banking charges for conversion to the euro, OJ (1998) L 130.

40 Commission Recommendation (EC) No. 98/287 of 23 April 1998 concerning dual-display of prices and other monetary amounts, OJ (1998) L 130.

41 Commission Recommendation (EC) No. 98/288 of 23 April 1998 on dialogue, monitoring and information to facilitate the transition to the euro, OJ (1998) L 130.

42 ECB Decision of 7 July 1998 on the denominations, specifications, reproduction, exchange and withdrawal of

denominations, specifications, reproduction, exchange and withdrawal of euro banknotes, and furthermore implemented a Recommendation on the legal protection of euro banknotes and coins.[43] All in all, the system created is – as Smits lucidly describes – the world's first supranational monetary law.[44]

However, as Smits[45] argues in another article, published two years later, one never finds the text "the currency of the European Community shall be the euro", but one does find "the currency of the participating Member States shall be the euro".[46] Regulation 974/98, in Article 4, simply states that the euro is the 'unit of account' of the ESCB, as well as of the NCBs. Smits feels that this "fails to acknowledge the legal reality of a higher level of government becoming exclusively competent in monetary affairs". But, concurrently, he also states that there "was a certain fear on the part of the Community that, this being not a 'normal' horizontal monetary succession but a vertical one (from Member State level to the Community level) and one without precedent, if one did not closely follow precedent, then there might be legal difficulties ahead", especially in the case of third country judges who may thus not correctly understand the nature of the euro. Whereas everything else points in that direction, Regulation 974/98 seems to be in denial about the supranational character of the currency.

2.3.1 The name of the single currency

The name 'euro' is nowhere to be found in the Treaties, which instead still refer to the 'ECU'. The latter stood for 'European Currency Unit', but was also the name of a medieval French coin – the *ecu*.[47] The change was brought about by the 1995 Madrid European Council,[48] whereby the Heads of State and Government agreed that their unanimous and definitive interpretation of the EC Treaty was that the term 'European Currency Unit' was generic, and thus they could, and did, give it the specific name 'euro'.

Usher[49] believes that this amounted to a Treaty change without changing the Treaty, but one will not necessarily agree with his reasoning. Smits[50] discusses the reason for this nonetheless peculiar state of affairs; there was a reluctance to change the Treaties "for fear of opening Pandora's Box with wishes for other changes which would unravel the Maastricht compromise".

The legitimacy of the name change was never dealt with by the ECJ, although it did come close to doing so. A French member of European Parliament twice tried to argue[51] that the name change was illegal, but the Court, both times, threw out his case. The first time the case was declared inadmissible as it challenged a proposal (which did later become Regulation 1103/97), and not a legal act; the second time because, despite owning assets denominated in ECU (and therefore arguing a financial interest), he failed to convince the Court that legal acts of general application can be challenged by individuals.

The established jurisprudence of the Court on whether legal acts of general application can be challenged by individuals was put into question in 2002, when the CFI in *Jego-Quere*[52] allowed an Irish fishing company to challenge a fishing regulation, thereby somewhat redefining individuals' rights to challenge legal acts of general scope. It felt that the older jurisprudence of the Court did not hold up to citizens "legitimate expectations", in line with the Charter on Fundamental Rights proclaimed at Nice.[53] However, the CFI's reasoning was invalidated by the ECJ in *Unión de Pequeños*

euro banknotes (ECB/1998/6) as amended by the ECB Decision of 26 August 1999 (ECB/1999/2), OJ (1999) L 8.

43 Recommendation of the Governing Council of the European Central Bank 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.

44 See Smits R., Le statut monetaire de l' euro, in: Luc Thevenoz/Marcel Fontaine, La monnaie unique et les pays tiers, 2000, p. 41-66.

45 Smits R., *supra* note 36, p. 401

46 Regulation 974/98, *supra* note 30, article 2.

47 Smits R., *supra* note 36, p. 399.

48 Madrid European Council, 15 and 16 December 1995, EU Bulletin 1995-12, 1.3.

49 Usher J.A , Legal Background of the Euro, in Sew Tijdschrift voor Europees en Economisch Recht: Zwolle. Jaarg. 47, Nr. 1, 1999, p. 16.

50 Smits R., *supra* note 36, p. 399.

51 See Berthu v. Commission , Case T-175/96, 15 May 1997, ECR 11-811, and Berthu v. Council, Case T-207/97, 12 March 1998, ECR 11-509.

52 Jego-Quere cie SA v. Commission, Case T-177/01, 3 May 2002.

53 Charter of Fundamental Rights of the European Union, Solemn Proclamation of the European Parliament, the Council and the Commission, done at Nice on 7 December 2000, OJ (2000) C 364/01.

Agricultores,[54] whereby the Court restated its case law on individual concern while also noting that interpretation otherwise would require Treaty change. The ECJ eventually saw in front of it the Commission's appeal to *Jego-Quere*[55] itself, and did not hesitate to restate *Pequeños Agricultores*, while criticising the CFI and holding that it had made an error of law.

All in all, however, the situation as it now stands is that the name change is explained in the recitals[56] of the two main regulations, and the currency is further baptised the euro in Article 2 of Regulation 974/98 "the currency of the participating Member States shall be the euro", and referred to as such within the entire secondary law of the EU.

The euro is also defined in Maltese law.[57] However, in view of the direct effect in all member states of Regulation 1103/97 and the definition of the 'euro' contained therein, any definition within Maltese law is redundant and without legal effect and has been such since the date of Malta's EU accession. In this context, one should note that in European law the terms 'currency' and 'currency unit' mean different things.[58]

2.3.2 The legal tender status of euro banknotes and coins

It may be presumed that as monetary law is of exclusive EU competence, the notion of 'legal tender' applying to it would also be such. This is important since legal questions arise as to when payment in euro banknotes and coins can be validly tendered in discharge of obligations. For example, is one bound to accept huge amounts of coins for a large transaction, or conversely, a €500 note for a transaction worth a few cents? In truth, there is split competence between the EU institutions and the member states in this regard. In law, the academic distinction between the 'form of money designated' (e.g. the euro) and 'the power of discharging a monetary obligation' (e.g. a law that prescribes that income tax can only be validly paid by cheque but not in cash) has now become of great practical importance. In effect, the designation of a form of money is a Community competence, whereas the establishment of the power to discharge payment obligations mostly remains the competence of the member states.

The result of this duality is that the whole assortment of 'standards for cash payments' existing in member states is still in force. For example, the Netherlands provides that a debt is discharged by a direct debit to a bank account of the creditor - this is referred to as "giving book money legal tender".[59] There are a whole range of legislative provisions in Greece, Finland, Belgium, France, Italy, Spain and the Netherlands that have the effect of limiting the ability of cash to discharge certain obligations.[60] Finland never issued 1 and 2 euro cent coins. Instead, all cash payments are by national law to be rounded to the nearest multiple of five – to Smits, this "to my mind, is in violation of the very idea of a single monetary area", but he admits that, and explains how, it is allowed by EU law. In some states one also finds criminal law provisions that penalise the non-acceptance of legal tender.[61]

There are no such provisions in Maltese law,[62] though expenses of a Court deposit act as an incentive for the acceptance of payment. By virtue of Articles 1173 and 1174 of the Civil Code,[63] if an offer of 'valid tender' is made to a debtor, and this is refused, the creditor may deposit the sum in Court at the debtor's expense (and risk), and such deposit, validly made, is equivalent to payment. Maltese law itself does not define legal tender, although, prior to euro adoption, the Central Bank of Malta was given the sole right to issue it.[64] One must note,

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54 Unión de Pequeños Agricultores v Council, Case C-50/00P, 25 July 2002.

55 Commission v Jègo-Quèrè, Case C-263/02P, 1 April 2004.

56 See the second recital of both Regulation 1103/97 and Regulation 974/98, *supra* notes 29 and 30 respectively.

57 Amongst others in the Companies Act, Cap. 386 of the Laws of Malta.

58 The euro is the currency of the Member States; a 'currency unit' is a currency denomination, 'sub-division' or 'expression' of the euro, as was the case during the transitional period when national currency units and the euro unit were legally one and the same currency.

59 Section 6: 114 Burgerlijk Wetboek (Netherlands Civil Code), as described by Smits R., *supra* note 47, p. 404.

60 Sainz de Vicuna A., The Introduction of the Euro Banknotes – Some Legal Issues, in Cambridge yearbook of European legal studies, 2004, v.5, p. 65.

61 Ibid., pp. 62-63.

62 Malta had provisions limiting the number of coins which would be tendered in satisfaction of obligations. Since Act XVII of 2002, however, these provisions are no longer in force.

63 Civil Code, Cap. 16 of the Laws of Malta.

64 Central Bank of Malta Act, *supra* note 26, as in force before 1 January 2008, articles 42 and 43.

however, that as admitted by Mann, Smits and Sainz de Vicuna,[65] the notion of 'legal tender' is always subordinate to freedom of contract, which clearly includes usages of trade. Therefore, except as discussed, Maltese law leaves it up to such evolving usage or express agreement to govern this matter.

'Legal tender' is introduced as a community concept by virtue of Article 106 of the EC Treaty: "The banknotes issued by the ECB and the national central banks shall be the only such notes to have the status of legal tender within the Community".[66] Coins are in turn made legal tender by virtue of Article 11 of Regulation 974/98. Therefore, as at the 'cash changeover date', the governance of what is legal tender is passed over to Community law, which, in turn, allows a period of dual circulation for a maximum of six months. The only provision in Community law that governs limits for the tender of cash can be found in Article 11 itself, whereby "except for the issuing authority and for those persons specifically designated by the national legislation of the issuing Member State, no party shall be obliged to accept more than 50 coins in any single payment".

Recital 19 of the Regulation is critical. It states that "limitations on payments in notes and coins, established by Member States for public reasons, are not incompatible with the status of legal tender of euro banknotes and coins, provided that other lawful means for the settlement of monetary debts are available". In other words, save the 50-coin limitation, it is up to member states to establish a framework for the acceptance or otherwise of amounts or payment methods. To apply this to Malta, as of 1 January 2008, there is an abrogation from Articles 1173 and 1174 of the Civil Code in terms of payments by 50 coins or more (as the creditor is now given a right to refuse payment by EU law), but any other payment 'validly tendered' will continue to be subject to these provisions.

Sainz de Vicuna,[67] General Counsel of the ECB, discusses the two elements of legal tender. First, it is the "physical form of money designated by the monetary authority to serve as means of payment in a standardised manner". Second, "legal tender … bank notes and coins … are invested with the power of discharging a monetary obligation". In Carreau's words, payment in legal tender should lead to a "full and valid discharge of pecuniary debts".[68]

Mann reflects only the first half of Sainz de Vicuna's definition of legal tender, describing it as:

> *"such money in the legal sense as the legislator has so defined in the statutes organising the monetary system. Chattels which are legal tender have, therefore, necessarily the quality of money, but, logically, the converse is not true – not all money is necessarily legal tender".*[69]

Sainz de Vicuna's conclusion[70] is that "there are several reasons that cast doubt about the notion of legal tender as being a Community concept … what remains clearly a Community competence is the first element of the notion of 'legal tender': the setting of the uniform specifications for banknotes and for coins so that these are the 'standard' for cash payments." In conclusion, therefore, member states are able to legislate in this field within the constraints described above. In fact, apart from the 50-coin rule, all legislation concerning 'the power of discharging a monetary obligation' remains at national level, in so far as it is consistent with Recital 19 of Regulation 974/98.

2.3.3 The legal status of the issuer of euro banknotes

It was mentioned earlier that the implementation of a supranational monetary law in the EU is indeed a first. However, this is not the only innovation as far as the euro is concerned.

In typical currency issues, each note is underwritten by a central bank, which accounts for that note as a liability on its balance sheet. Every note has one issuer against which it is drawn. In this light one must remember the history of banknotes, which evolved from

[65] As discussed in Sainz de Vicuna A., *supra* note 60, pp. 59-70.

[66] This provision does not apply to non-participating member states.

[67] Sainz de Vicuna A., *supra* note 60, pp. 59-70.

[68] Carreau D, Le systeme monetaire international prive, in Recueil des Cours, Academie de Droit International, 1998, p. 274 (author's translation).

[69] Mann F.A., The Legal Aspect of Money, 5th ed., 1992, p. 42.

[70] Sainz de Vicuna A., *supra* note 60, p. 70.

promissory notes issued by commercial or merchant banks.

As noted by Sainz de Vicuna, even in the US, for example, notes are issued by one of 12 reserve banks, and each note contains an identification number of its issuer.[71] The euro banknote, however, contains no such identification, and so one has the legal problem of identifying the issuer of any one banknote. This has practical consequences. For example, as notes travel across the euro area, if an old German euro banknote is returned to the Central Bank of Malta, should it repatriate it to the Bundesbank (as happens within the Federal Reserve System), or issue a new note in replacement itself? Furthermore, who is to underwrite the issue as a liability?

While central banks in the euro area repatriate coins, by means of an ECB Decision of 6 December 2001[72] an obligation is imposed upon each NCB to 'treat all euro bank notes as liabilities and process them in an identical manner'. At first, this may seem puzzling. However, what happens is that euro area NCBs are legally jointly and severally liable[73] for the banknotes, and may thus reissue each other's notes. The whole system works on the basis of an 'intra-Eurosystem' balance which keeps track of the difference between banknotes issued by each NCB on behalf of the Eurosystem[74] and the proportion of its share capital in the ECB. The balances are set off against the monetary income of the ECB allocated to the NCB.[75] All in all, this system makes for the first multi-issuer banknote, with each note being underwritten by an entire membership of an international system of central banks – the Eurosystem. Notes do not need to be repatriated and are allowed to travel freely across the euro area, and, in fact, the world.

2.3.4 Continuity of contracts

A fundamental characteristic of the changeover to the euro is that every contract with obligations denominated in Maltese lira (created before €-day) now has to be read as referring to euro at the irrevocably fixed conversion rate. However, the question arises as to whether such a provision ensures that such contracts are not set aside under any circumstance. Can it be argued that a contract is no more as the Maltese lira is no more? Seemingly simple, this issue has been the subject of much legal debate.[76] The answer is that EU law provides an excellent framework for guaranteeing the continuity of contracts. Problems of this sort have not occurred in other member states, nor should they arise in Malta.

The Civil Code,[77] in article 985, states that "Things which are impossible …may not be the subjectmatter of a contract." Moreover, article 1145, on the modes of extinction of obligations, insists *inter alia* that "obligations are extinguished by – …"(f) the loss of the thing".

The Maltese Court of Appeal interpreted these provisions, particularly in relation to a thing becoming inexistent, in Benedetto Axisa v. Salvatore Caruana.[78] The defendant had booked a vehicle from an agent, but the government had subsequently prohibited the importation of the model; thus, the defendant demanded rescission and the return of the deposit he had paid. The Court concurred and held that the element of *causa* was lacking in the contract. In fact it stated:

> *"Din l-impossibilità hija, kif trid il-ligi sabiex obbligazzjoni ma treggix, assoluta [...] Ghalhekk, il-kawza tal-obligazzjoni fil-kaz prezenti hija inezistenti, ghaliex impossibli."*

Since fulfilling an obligation in lira becomes impossible after €-day, does this mean that the lira 'is lost' and thus obligations denominated in it are extinguished, or subject to rescission as they are devoid of *causa*? This gets more pronounced in the case of contracts whose entire purpose of existence is related to speculation or hedging of currency exchange

71 Ibid., p.68.
72 ECB Decision 2001/15, OJ L (2001) 337.
73 Sainz de Vicuna, A., Sainz de Vicuna A., *supra* note 60, p. 69.
74 The Eurosystem comprises the ECB and euro area NCBs.
75 See also ECB Guideline of 5 December 2002 on the legal framework for accounting and financial reporting in the European System of Central Banks (ECB/2002/10).

76 See, in particular, Gruson M., The Introduction of the Euro and its Implications for the Obligations Denominated in Currencies Replaced by the Euro, in Fordham International Law Journal, Vol. 21, 1997, pp. 65-107.
77 Civil Code, *supra* note 63.
78 Court of Appeal, 18 May 1956.

risk, as in the case of what are known as cross-currency interest-rate swaps.[79]

It could be argued that such contracts are left without purpose after the introduction of the euro. Yet, Article 123 of the EC Treaty notes that "the ecu [euro] shall be substituted for [the replaced] currencies". In other words, the currencies do not 'cease to exist'. They are substituted, meaning they are renamed and redenominated into a new nominal value; they are succeeded to at law by the euro. The position in the Euro-12 was even clearer during the transitional period, where currencies became 'denominations of the euro'. Furthermore, it may be submitted that, in effect, a reference to payment in a currency is in essence a reference to value, measured in terms of that currency; it is not particular coins or pieces of paper that a payee wants, but the value measured and stored by that money. Such value is unaffected by a substitution in currency. This is the principle of 'nominalism' which according to Mann has "universal recognition".[80] This is also the view of Sideek,[81] who insists that even on the sole basis of the Treaty, let alone the application of the principle of nominalism, this substitution ensures the continuity of currencies and the obligations denominated in them.

In Maltese law, one finds specific provision for such currency substitution only as related to muutum in article 1844 (2) of the Civil Code:

> *"Notwithstanding any agreement to the contrary, if any change occurs in the monetary system before the expiration of the time for payment, the debtor is only bound to return the numerical sum which was lent to him, in coins according to their legal value at the time of payment."*

Thus, not only is continuity ensured in this context, it is, furthermore, not subject to agreement to the contrary by the parties. While such abrogation of freedom of contract is related to the particular characteristics of loans and their possible usurious abuse, one may argue that the principle of continuity would be well applicable by analogy generally, as this is the only instance where Maltese law deals with a change in currency.

However, while keeping the provisions of Maltese law in mind is useful, delving deep into such arguments within the sole context of Maltese law becomes superfluous. This because EU law has supplemented Article 123 of the Treaty so that the principle of continuity of instruments, despite the change in currency, is explicitly stated and is directly applicable. Regulation 1103/97, in Article 3, states that "the introduction of the euro shall not have the effect of altering any term of a legal instrument or of discharging or excusing performance under any legal instrument". Moreover, the introduction of the single currency does not "give a party the right unilaterally to alter or terminate such instrument".

The term 'legal instrument' is defined very widely within the Regulation itself and includes "contracts, unilateral legal acts, payment instruments other than bank notes and coins … legislative and statutory provisions, acts of administration, judicial decisions [and] other instruments with legal effect".[82] Therefore, by direct effect of EU law, no contract or term may be rescinded or changed, irrespective of national provisions. This is, however, subject to agreement to the contrary by the parties. Recital 8 of the Regulation also refers to Article 3 as an "explicit confirmation of the principle of continuity", implying that the principle of continuity already applied anyway, presumably as a result of the provisions in the Treaty.

In the particular case of contracts that aim at covering only exchange rate risk, the Commission[83] argues that:

> *"even for contracts where the only purpose is the coverage of an exchange risk, the introduction of the euro does not make performance of the contracts impracticable. The risk that the exchange rates of the currencies referred to in the swap contract would become permanently fixed was one of the risks that the parties have taken by setting up such a contract.*

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79 For a more thorough discussion of this example, see Dunnett D.R.R., Some legal principles applicable to the transition to the single currency, in Common Market Law Review: Dordrecht, Vol 33, No 6, December 1996, pp. 1133-1167.

80 Mann F.A., supra note 69, p. 292.

81 Sideek M., A Legal Analysis of the Euro Regulations, in European Business Law Review: London, Vol. 8, No 7–8, July - August 1997, p. 167.

82 Regulation 1103/97, *supra* note 29, article 1.

83 European Commission, *supra* note 28, pp. 1-11.

> *For most contracts involving European currencies, this risk was even well foreseeable."*

While this was written in the context of member states joining the euro area in 1999, it can only be more applicable in terms of 5th enlargement member states, which have had even more time to foresee the domestic introduction of the euro.

However, as these principles are subject to freedom of contract, it is important to note that some contracts have 'increase of costs' or 'force majeure' clauses. Yet, the potential application of force majeure clauses in contracts is subject to the same logic – force majeure is related by definition to unpredictable and uncontrollable events. Entry into the euro area, on the other hand, is hardly an unpredictable event. EMU has been planned and discussed since the 1960s, and the possibility of any country's accession becomes clear many years before it happens.

Many authors[84] undertake a comparative analysis of force majeure and 'frustration'-like laws in the Euro-12, yet they all reach conclusions similar to those of Van Lembergen and Wachenfeld,[85] "it is …highly unlikely that case law will develop confirming the application of force majeure or frustration doctrines to the introduction of the euro".

On the other hand, the situation with 'increased cost' clauses is not so clear. By means of these clauses, which are usually used in the context of loans and financing, parties agree that if the lender is faced with higher costs, for example due to a higher interest rate, these costs will be passed on to the borrower. Furthermore, some such clauses also provide possibilities for rescission should costs surpass a certain threshold. As these clauses are a result of agreement by the parties, they are well capable of being applied. The rescission is not due to the introduction of the euro itself, but to any increased costs as provided for, whatever the monetary system. However, the Commission, in its Green Paper[86] preceding the introduction of the euro, pointed out that prior convergence of interest rates and fixed conversion rates would make the application of such clauses highly unlikely. In addition, the Commission notes, one saw a large and unprecedented fall in interest rates in all the Euro-12 in the early 1990s, and yet there was "no significant reported Court action seeking to modify contractual terms".

Nonetheless, Candon[87] is perhaps the most prudent and suggests that while "it should not normally be necessary to amend existing contracts denominated in national currencies … so as to include continuity clauses […] it is recommended […] that contracts are reviewed to ensure that there is nothing that could affect the application of Article 3 or require renegotiation". Mance,[88] on the other hand, takes the opposite view and feels that contracts are protected by a "well-settled framework of European regulation".

As for Malta's ability to restrict continuity of contracts of its own initiative, the answer is a simple 'no'. Whatever legislation went contrary to Article 3 of the directly effective Regulation (which does not allow for derogations from it) would be squarely overruled by it in light of the primacy of EU law. This is confirmed by the Commission: "Measures which would confer a unilateral right on one party to alter or terminate an existing contract only because of the introduction of the euro would not be compatible with the confirmation of continuity included in EC law".[89]

However, the validity of a restriction of the freedom of parties to abrogate from continuity is less clear. This particularly concerns article 1844 (2) of the Civil Code related to muutum, which as discussed earlier, does not allow freedom for parties to derogate from its provisions. It could thus well be argued that it is superseded by EU law. However, it could be equally well argued that a restriction of this type is based on public policy grounds, and not on grounds of monetary policy. While monetary

[84] See Livingston D. and Hutchings B., Legal Issues Arising from the Introduction of the Euro, 1997, p. 63; or Yeowart G., Legal Repercussions of a Single European Currency, International Financial Law Review, No 44, Dec 1995.

[85] Van Lembergen W. and Wachenfeld M.G., *supra* note 33, pp. 42-50.

[86] European Commission, Green Paper, One Currency for Europe, 31 May 1995, p. 68.

[87] Candon J., Euro and EMU - Some practical advice for lawyers in respect to contracts and other legal instruments, in ECU: Bruxelles, No. 44, 1998, pp. 31-34.

[88] Mance Sir J., Possible Legal Problems Affecting Financial Transactions at the Time of European Monetary Union, in European Business Law Review, Vol. 8, No. 11 – 12, 1997, pp. 266-272.

[89] European Commission, *supra* note 28, pp. 1-11.

law and policy are competences conferred in the Treaties, public policy is the competence of member states. Nevertheless, while at times allowing derogations from EU law on the basis of public policy, the ECJ has argued that:

> *"it should be noted, first, that the concept of public policy assumes a genuine and sufficiently serious threat affecting one of the fundamental interests of society […] the public policy exception must be interpreted restrictively."*[90]

Whether the prevention of usury in the currency changeover is a real concern or not, or whether it concerns a 'genuine and sufficiently serious threat to the fundamental interests of society' is arguable both ways. However, in the light of the consistent restrictive interpretation found in case law, one may argue that the ECJ would probably not see a sufficient proportional link to allow EU law to be abrogated from, and article 1844 (2) is thus susceptible to be deemed inapplicable.

2.3.5 The disappearance of reference rates

While changeover to the euro should not affect the continuity of contracts generally, a particular question arises in the context of reference rates – quoted rates, indices, or price sources that are bound to be replaced on entry into the single currency. A reference rate can be loosely defined as:

"a rate that determines pay-offs in a financial contract and that is outside the control of the parties to the contract… it can take many forms, such as a consumer price index, a house price index or an unemployment rate. The reference rate is normally determined by a third party. It must be independent, to avoid a conflict of interest - if one party has the ability to influence the rate, it is safe to assume that they will do so in their favour."[91]

Some of these rates became superfluous at the time of euro adoption. These include the central intervention rate, the Malta Interbank Bid Rate (MIBID) and the Malta Interbank Offered Rate (MIBOR).

The Commission itself admits that "the legal framework for the euro does not expressly address the issue of the disappearance or replacement of reference rates like interest rates or securities prices."[92] This was because of the diversity of such rates. Nonetheless, the Commission also notes that many contracts "include a fall-back clause which designates a substitute for the original reference rate."

As noted in another paper by the Commission,[93] the disappearance of reference rates is no new phenomenon, and happened often during the deregulation of EU capital markets. Where parties were not able to agree to the replacement of a rate, "courts have in general tried to ensure the execution of the contract by taking a new reference rate which was economically as close as possible to the old one." Nonetheless, the Commission "has urged price sponsors and subsequently screen providers to announce quickly their plans regarding the publication of existing national rates".[94] Of particular note in relation to euro money and capital markets is that there are now Europe-wide benchmark rates, the most important being the ECB's Minimum Bid Rate, EURIBOR (Euro Interbank Offered Rate) and EONIA (Euro OverNight Index Average). These took over the function of many of the rates that became redundant in the Euro-12, and the same now applies to Malta.[95]

2.3.6 Transitional measures, replacement of the ECU

Regulations 974/98 and 1103/97 made various provisions relating to the replacement of the ECU by the euro in the Euro-12, as well as in relation to the transitional period (1 January 1999 – 1 January 2002, except for Greece). In the first case, the ECU was replaced by the euro in 1999, and since this will not happen again, it now falls within the realm of legal history. In the second case, none of the 5^{th} or 6^{th} enlargement countries have yet decided to adopt

90 Case C-355/98, Commission v Belgium, para. 28, also reflecting considerable previous case law.

91 Wikipedia, Reference Rate, at {http://en.wikipedia.org/wiki/Reference_rate} (last accessed 09.10.07).

92 European Commission, Euro papers 10 - The legal framework for the use of the euro. Questions and answers on the euro regulations, 1997, pp. 10-12.

93 European Commission, *supra* note 28, p. 9.

94 European Commission, *supra* note 92, pp. 10-12; referring to European Commission, Euro papers 3 - The impact of the introduction of the euro on capital markets, 1997, p. 2.

95 See EURIBOR Press Releases, EURIBOR: The new money market reference rate for the Euro, available at {http://www.euribor.org/html/content/press1.html} (last accessed 04.10.07).

a transitional period changeover scenario. Therefore, the transitional period articles will generally apply to them only for 'one logical second', in practice not at all. As explained above, Malta selected the 'big bang' scenario. In the light of these facts, the relevant provisions will only be treated in brief.

Replacement of the ECU

Until 1 January 1999, the ECU was a basket currency and the unit of account of the various European institutions, as the SDR of the International Monetary Fund (IMF) still is for the IMF. It also was used by the European Monetary System (EMS) as the means of settlement between monetary authorities. Its composition consisted of the various currencies of the member states of the EU, and was last revised in 1994.[96]

By means of Regulation 1103/97,[97] it was replaced by the euro at a rate of 1 euro for 1 ECU, in a way that extended the replacement to every reference in every legal instrument (which in the regulation is widely defined), in much the same way as national currencies were replaced by the euro. The result is that, subject to agreement to the contrary of the parties, references to the ECU even in private contracts, and especially financial contracts, became references to the euro. However, as pointed out by Vissol,[98] some contracts used a 'private ECU' which they defined themselves, and as such were not affected – except if, as usually happened, the parties had linked their 'private ECU' to the 'official ECU'. As noted by the Commission, "[t]his follows the approach taken in the Commission Recommendation of April 1994 where it was said that in case of doubt, references in contracts to the ECU should be interpreted as meaning the ECU as defined in Community legislation. The rebuttal is not dependent on a written agreement in the contract. It might also be deduced from the conduct of the parties or from other factors. Nevertheless the presumption modifies the burden of proof for the parties".

The transitional period

Part II of Regulation 974/98 governed the transitional period until 1 January 2002. As the national currencies of the Euro-12 became denominations of the euro as at 1 January 1999 (except in the case of Greece), in law there was only one currency. While national banknotes and coins remained legal tender, they were so as 'non-decimal subdivisions' of the euro, much as the cent is a decimal subdivision of the euro. Legal tender status was granted to them by EU law, and no longer by national law, though in each case it was restricted to the territory where the currency was legal tender the day before 1 January 1999.[99]

The no compulsion/no prohibition rule applied, meaning that new instruments could be set up in either currency unit. Performance of a contract was to be on the basis of the currency unit used in the underlying instrument, unless the parties agreed otherwise.[100] However, cashless payments could be made in either currency unit, and would be converted to the currency unit of the account of the payee, according to the conversion rates, by the payee's bank.[101] Of course, cash payments could only be made in the old national currency, as euro banknotes and coins were not yet in circulation.

Private debt instruments (bonds or other forms of securitised debt) could be redenominated by private parties once their government did so, unless specifically excluded by contract terms.[102] Member states were also allowed to decide when to permit (though they could not compel) financial markets to redenominate.[103] However, redenomination only went as far as conversion according to the conversion rates. Any other operations to make the amounts manageable, such as further rounding or smoothing of amounts, or conversion of nominal amounts to, for example, one cent, would have to be done according to the normal applicable contract law.

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96 In its final state, the ECU was made up of: 30.6242 German marks + 0.08784 pounds sterling + 1.332 French francs + 151.8 Italian lire + 0.2198 Dutch guilders + 3.301 Belgian francs + 0.130 Luxembourg francs + 0.1976 Danish krones + 0.008552 Irish pounds + 1.440 Greek drachmas + 6.885 Spanish pesetas + 1.393 Portuguese escudos; See Council Regulation No. 3320/94, OJ (1994) L 350/27; The ECU never contained the currencies of Austria, Finland and Sweden, as they joined the EU in 1995.

97 Article 2.

98 Vissol T., De L 'ECU, Quelques Commentaires a Propos du Traite de Maastricht, Revue Du Marche Common et De L'Union Europeenne, 1992, pp. 280-372.

99 Article 9.

100 Article 8(1).

101 Article 8(3).

102 Article 8(4).

103 Article 8(4)(b).

3. THE CHANGEOVER AND BEYOND

This section describes in further detail various legal mechanisms and provisions found in instruments described above. Many of these are not only relevant to the changeover itself, but constitute the legal regime that will continue to apply to Malta as an 'in' member. Various elements of this framework have been updated since the changeover in the Euro-12, in light of the experiences of those countries. Before Malta and Cyprus joined the euro area, Slovenia was the only country to have adopted the euro under the new provisions.

Within this context, as has been noted, the 'end of the transitional period' originally foreseen has been renamed 'the respective cash changeover date' by virtue of Regulation 2169/2005[104] to cater for new entrants, and an annex has been introduced in Regulation 974/98 enunciating such dates.

3.1 Automatic redenomination

As of the cash changeover date (€-day), by virtue of Article 14 in Regulation 974/98 as amended, all references to the old currency unit in legal instruments "shall be read as references to the euro unit according to the respective conversion rates",[105] and any bank account, debt or other instrument is redenominated to euro *ex lege*, therefore making anything but cash transactions in the old currency legally impossible. This is the fulcrum of the changeover at law. Physical redenomination is not necessary, legally speaking.

Therefore, the old currencies are no longer currencies, although during a dual circulation period of up to six months, which can be made shorter by national law, banknotes and coins denominated in these currency units remain legal tender. However, though the Regulation allows a dual circulation period of up to six months, member states had issued a common statement during the ECOFIN Council meeting in September 1999 agreeing to limit dual circulation to one or two months.[106]

104 Regulation 2169/2005, *supra* note 37.
105 Regulation 974/98, *supra* note 30, article 6.
106 The Maltese legislator limited dual circulation to one month.

Any new instruments after the end of dual circulation making reference to old currency units have as their subject something that does not exist. Courts, clearly, are nonetheless likely to enforce them if the intention of the parties is clear.

3.2 The right to issue euro banknotes and coins

As of €-day, the NCB of a joining member state acquires the right under Article 106 of the EC Treaty to issue euro banknotes, while the member state itself acquires the right under Article 11 of Regulation 974/98 to issue coins with a national face. These rights are, however, subject to the authority of the ECB to authorise these issues (also as a result of Article 106), a right traditionally regarded as a function of states.[107] Denominations and specifications of coins are provided for by Regulation 975/98, while the ECB governs the issue[108] and technical qualities[109] of banknotes. However, as of the euro adoption date, NCBs, and thus the Bank, gain the right to issue notes that become legal tender within the entire euro area.

3.3 Old banknotes and coins

Article 15 of Regulation 974/98 explicitly allows member states to make rules for the use of the old coins and banknotes during the double circulation period, and may thus further restrict their use. For example, a member state could impose an upper value limit on transactions that can take place in the old currency, or shorten the six month dual-circulation period allowed by EU law. Member states are also empowered to take any measures that facilitate the withdrawal of the old currency.

Article 16 holds that NCBs must continue to accept their old banknotes and coins, against euros at the conversion rate, for a timeframe "in accordance with their laws or practices". In Malta's case, this issue of exchangeability of demonetised currency is dealt with in Articles

107 See R. v. Thompson, Case 7/78 (1978), ECR 2247.
108 ECB Decision of 6 December 2001 on the issue of euro banknotes, OJ (2001) L 337 as amended by Decision ECB/2003/23 of the European Central Bank of 18 December 2003, OJ (2004) L 9 and Decision ECB/2004/9 of the European Central Bank of 22 April 2004, OJ (2004) L 205.
109 ECB Decision of 20 March 2003 on the denominations, specifications, reproduction, exchange and withdrawal of euro banknotes (ECB/2003/4), OJ (2003) L 78.

62(1) and 63(1) of the Central Bank of Malta Act,[110] which prescribe a ten-year exchangeability period for demonetised banknotes, and a two-year period for demonetised coins, respectively.

3.4 Bank charges for conversion

Commission Recommendation 98/286[111] sets out a standard of good practice in the area of banking charges during the euro changeover. This suggests that banks should not charge for conversion of amounts to and from euro during the transitional period, nor for the conversion of 'household amounts' of national currency to euro during the dual circulation period. Banks are also urged not to "charge a different fee for services in the euro unit than that for otherwise identical services in the national currency unit."

However, as a result of the amending of Regulation 974/98 by Regulation 2169/2005,[112] some of these principles are now also part of enforceable EU law. Regulation 974/98 prescribes free conversion, during the dual circulation period, of amounts up to a ceiling set by national law, or if this is not done, by the banks themselves in terms of what is a 'household amount' in that member state. The amendment makes no reference to charges during a 'transitional period'.

3.5 Conversion rates

The conversion rates between the euro and national currency units are set out in Regulation 2866/98,[113] which is little more than a list of such rates. The conversion rate of any currency becomes certain once determined by the ECOFIN Council meeting lifting that State's derogation, in relation to that currency's fluctuation within the bands of ERM II.[114] In Malta's case, the situation was much simpler as the unilateral hard peg set by the Maltese authorities meant that the Maltese lira did not fluctuate, but remained at the ERM II central parity rate of €1 = Lm0.429300. The ECOFIN Council subsequently determined that the rate would become the immutable conversion rate to the euro as at the date Malta's derogation was lifted, that is, 1 January 2008.

3.6 Conversion, triangulation, rounding and smoothing rules

3.6.1 Conversion rules and triangulation

Before €-day, no conversion or rounding rules applied as these are the result of Article 15 in Regulation 974/98, which only becomes effective on the day the abrogation of a member state's derogation comes into force. Any prior redenomination in contracts needed to be the result of contractual agreement between the parties. Where parties thus redenominated before €-day, the amounts they decided upon were unaffected by automatic redenomination on €-day, since they were already amounts in euro. The same situation is prevalent for laws redenominated before 1 January 2008, as well as, for example, shop price displays, which, if shown in euro before €-day, are not affected by conversion rules. Of course, both laws and shop price displays can also be changed unilaterally after €-day (subject to the modalities of Maltese implementing legislation and undertakings by the trader) – though if a shopkeeper displays a price in Maltese lira after €-day, this is to be read as a reference to euro, as per the conversion rules.

It is the automatic redenomination of references to old currency unit amounts still existing on €-day that brings into play the conversion and rounding rules found in Regulation 1103/97. The most important of these rules stipulates that the official conversion rates are not to be rounded or truncated during conversion. Conversion rates are expressed to six significant figures. However, as the last two figures of the Maltese eventual conversion rate are zeros, in practice just four significant figures are used.

One should also note that Article 4(3) of Regulation 1103/97 does not allow inverse rates (e.g. Lm1 = €2.32937) to be used in conversion, as this would cause inaccuracies. A currency conversion must always be carried out by

110 Central Bank of Malta Act, *supra* note 26.

111 Commission Recommendation (EC) No. 98/286 of 23 April 1998, OJ (1998) L130/22.

112 Regulation 2169/2005, *supra* note 37.

113 Council Regulation (EC) No. 2866/98 of 31 December 1998 on the conversion rates between the euro and the currencies of the Member States adopting the euro, OJ (1998) L 359/1, as amended by Council Regulation (EC) No. 1478/2000 of 19 June 2000 amending Council Regulation (EC) No. 2866/98 on the conversion rates between the euro and the currencies of the Member States adopting the euro, OJ (2000) L 167/1.

114 For a more complete explanation, see Bank of England, Practical Issues Arising from the Introduction of the Euro, No.7, 1998, pp. 89-93.

multiplying (euro to Maltese lira) or dividing (Maltese lira to euro) by the conversion rate.

As mentioned, these provisions only became law on €-day, and then again only relate to Maltese lira amounts as yet not redenominated. Since a number of individuals and traders may have had to redenominate contracts or display prices in euro before €-day, to cover this period the National Euro Changeover Committee (NECC) issued a recommendation mirroring the provisions in EU law.[115]

Interestingly, as of €-day it became impossible to exchange the Maltese lira directly into any other currency save the euro. Any such conversion first has to be effected into euro, and subsequently the resulting amount (which can be rounded to not less than three decimal places) is to be converted into the destination currency. This procedure is known as triangulation and was applied, by virtue of Article 4(4), during the transitional period in the Euro-12. In Malta, the procedure only came into play on the cash changeover date, and not by virtue of Article 4(4), but as a result of automatic redenomination at €-day (all Maltese lira amounts in legal instruments have to be read as references to the euro). Moreover, direct Maltese lira exchange rates, such as those that would have been formerly quoted daily by the Bank (e.g. Maltese lira/US dollar rates), no longer refer to the Maltese lira, but instead are expressed in terms of the euro – in practice meaning that an individual cannot even find a direct rate to use in a direct conversion.

3.6.2 Rounding and smoothing rules

Once amounts are converted, they are to be rounded to the nearest cent, with a result halfway being rounded up (e.g. 2.435 to 2.44).[116] Regulation 1103/97 also prescribed conversion from the euro to national currency units, as well as the method for various conversions to and from euro. However, this was possible, and applied, within the context of a transitional period wherein many bank accounts were still legally denominated in national currency units. Nonetheless, there still is a problem in relation to the sums and products of various transactions being rounded, as one may compute precise amounts and round the total, or round individual amounts to start with. Article 5 states that the rounding obligation applies on amounts to be 'paid or accounted for', meaning that rounding must take place on the total sum, but may also take place before.

In this regard, Recital 11 allows member states to legislate more accurate rules to be used in such 'intermediate computations', although differences between the two techniques are likely to be small, even where large quantities of transactions are involved. Nonetheless, the NECC published guidelines which suggest that it is the sum, not the individual amounts that should be rounded. This is purely a matter of convention; the Commission notes that in 1997 banking associations in Germany had decided to round individual amounts, while a multi-stakeholder working group in France had decided to only round totals.[117] In this context, one can point out that in its judgement of 14 September 2004, the ECJ interpreted Article 5 and held that tariffs, as in the case of per-minute telephony charges, did not constitute amounts to be 'paid or accounted for', and could not be rounded to the closest cent simply as a result of euro conversion.[118]

Clearly, applying the conversion rules alone will not always give the optimal result. A psychologically attractive price like Lm9.99 or a Lm10 parking fine become unwieldy numbers in terms of euro. It is, therefore, normal that the legislator, contracting parties and traders intervene to 'smooth' sums. However, there is no EU legislation in this field, and smoothing happens within the normal confines of law. Nonetheless, an NECC recommendation suggested that smoothing should always favour the consumer, and also stated that the Government would always follow this practice to set a good example. The situation at law became more restrictive in Malta, however, with the Smoothing of Monetary Amounts Regulations,[119] which lay down stricter rules for

[115] NECC, Guidelines on the rounding and smoothing of Maltese lira amounts converted into euro, Guideline: NECC/0004/06, 2006.

[116] See Regulation 1103/97, *supra* note 29, article 5.

[117] European Commission, *supra* note 28, p. 20.

[118] Verbraucher-Zentrale Hamburg eV v O2 (Germany) GmbH & Co. OHG, Case C-19/03, (2004) ECR I-8183.

[119] Smoothing of Monetary Amounts Regulations, 2007, L.N. 369 of 2007 under the Euro Adoption Act, Cap. 485 of the Laws of Malta

smoothing and which generally disallow smoothing disadvantageous to the consumer.

In some cases, though, smoothing is more than just making amounts convenient. For example, tax bands might no longer cover all possible instances (e.g. Lm3101-4100, Lm4101-5000 may become €7223.39-9550.43, €9552.76-11646.87, leaving €9551 uncovered[120]). In these cases, legislative intervention before €-day was a priority.

3.7 Dual display of prices

There is no EU legislation, other than a Commission Recommendation,[121] on dual display of prices, and this is, therefore, to be regulated by national law. In Malta, this is regulated by the Euro Adoption Act 2006 and subsidiary legislation enacted under it.

Allix argues that legislation imposing early compulsory dual pricing, which furthermore remains in place for some months after the cash changeover date, is one of the most effective ways of combating inflationary pressures which the currency change may generate.[122] Nonetheless, in Malta euro banknotes and coins already existed and while traders could even choose to accept them before the cash changeover date (as many did), the prohibition of banking charges related to euro conversion at European law[123] only became effective as at the cash changeover date.[124] This meant, therefore, that traders who chose to accept the euro in payment when exchange was not free of charge included exchange charges in their conversion, but would probably not have accepted the euro in payment at all before the changeover date if the law compelled them not to include charges while credit or financial institutions still imposed them.

[120] This example is given in: NECC, *supra* note 115, para 4.2.5.
[121] Commission Recommendation (EC) No. 98/287 of 23 April 1998, OJ (1998) L130/26.
[122] Allix J., Consumers and the single currency, legal problems, 1996, p. 92.
[123] Regulation 974/98, *supra* note 30, article 15.
[124] As a result of contractual arrangements, in Malta banks began to exchange Maltese lira for euro free of charge on 1 December 2007. They are obliged by the Cash Changeover Regulations under the Euro Adoption Act to exchange Maltese lira for euro free of charge from 1 January 2008 to 31 March 2008.

The Commission Recommendation[125] on dual display of prices therefore remains largely insufficient (Maltese implementing legislation was necessary), not only because it does not have the force of law, but also because it envisages dual display occurring during a transitional period, as was the case with the Euro-12. Nonetheless, it calls for clear indications from retailers as to when they will accept payments in euro, clear distinctions between the currency unit a price is set in and the unit displayed only for information purposes, as well as agreements on possible standard formats for displays.

Beyond the compulsory dual display of prices, another important issue to be considered is the cut-off date for pricing in Maltese lira – after which only price displays in euro are allowed. Such a measure greatly facilitates the psychological changeover – in contrast to countries like France which still today allow display of prices in the old currency, with the reported result that the population has the lowest familiarity with the euro out of the old Euro-12.

3.8 The ‘phasing-out’ period

The changeover scenario adopted by Malta under the new possibilities granted by means of Regulation 2169/2005[126] allowed a phasing-out period, during which, by virtue of the new Article 9a introduced in Regulation 974/98, legal instruments created after the cash changeover date that refer to the old currency unit would be allowed, and provided for explicitly by law. However, Malta decided not to implement such a phasing-out period.

Yet, even without a phasing-out period, there is nothing in EU law[127] that stops a Maltese Court from enforcing in euro a contract agreed after €-day referring to Maltese lira, provided, of course, that the intention of the parties to bind themselves in legal tender currency is not in dispute. In fact, at least until a substantial amount of time has passed since the changeover, a Maltese Court should apply article 1003 of the Civil Code,[128] which sets out

[125] Commission Recommendation (EC) No. 98/287 of 23 April 1998, OJ (1998) L130/26.
[126] Council Regulation (EC) No 2169/2005, *supra* note 37.
[127] See European Commission, *supra* note 92, pp. 10-12.
[128] Civil Code, *supra* note 63.

that "where the literal meaning differs from the common intention of the parties as clearly evidenced by the whole of the agreement, preference shall be given to the intention of the parties". Failing such intention, the contract would fall foul of article 966 which requires *inter alia* "a certain thing which constitutes the subject-matter of the contract" as an essential condition for its validity. Recognition of the intentions of the parties does not derive from EMU law, but from the principles of contract law and public policy, which are competences of the member states.

3.9 Malta as a member of the euro area: obligations

Malta's pre-€-day status was established by Article 4 of the Act of Accession[129] which enunciates that it was bound by the provisions of the EMU *acquis*, as a country with a derogation under Article 122 (1) of the EC Treaty, as from date of accession.

Article 122 (2) governs the procedure for the abrogation of such derogation, which can be carried out on a proposal by the Commission approved by a qualified majority of member states in the Council (meeting in its composition of Heads of State or Government).[130] Article 122 (3) sets out the Articles in the Treaty that are not applicable to members with a derogation, and, consequently, acts adopted under them do not apply either. Furthermore, Chapter IX of the Statute of the European System of Central Banks (ESCB) caters for the exclusion of member states with a derogation, and their central banks, from a number of rights and obligations within the ESCB.

When Malta became a member of the euro area, many of the obligations it had as a member state with a derogation continued to apply, as did most of the EMU law already applying to it. Thus, as has been already detailed, it is *inter alia* to regard its economic policies as a "matter of common concern", it is subject to the 'no bail out' rule, and it must continue to consult the ECB on legislative proposals within the ECB's area of competence. Clearly this happens within the context of Malta having effectively transferred its competence in monetary policy over to the ESCB. Of particular interest, however, is that the Stability and Growth Pact (SGP) acquires greater importance with Malta becoming a full EMU member.

3.9.1 The Stability and Growth Pact[131]

The SGP legally consists of one European Council Resolution[132] and two Council Regulations – 1466/97[133] and 1467/97.[134] Together, they form a system of surveillance, early warning, peer pressure and sanction, aimed at ensuring long-term macroeconomic stability within the EU. These build upon the EC Treaty provisions related to the 'excessive deficit procedure', as set out in Article 99 (which allows the Council to "adopt detailed rules for the multilateral surveillance procedure") and Article 104 (on excessive government deficits), as well as the Protocol on the excessive deficit procedure.[135] While this system applies generally to EU Members,[136] only euro area members, including Malta, are subject to sanctions under it.

Of note is that the Maastricht criteria no longer need to be fulfilled once in the euro area. Instead, it is the surpassing of reference values under Article 1 of the Protocol that is to govern the exercise of the excessive deficit procedure. These are:

> *"— 3% for the ratio of the planned or actual government deficit to gross domestic product at market prices;*
>
> *— 60% for the ratio of government debt to gross domestic product at market prices."*

[129] Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (Act of Accession), AA 3/03, OJ L 236, 23 September 2003.

[130] After reports by the Commission and ECB and an opinion of the European Parliament.

[131] For a more detailed discussion of the SGP, see Caruana E., The Reformed Stability and Growth Pact: Implications for Malta, Central Bank of Malta Quarterly Review 2007:3, Vol. 40 No. 3

[132] Resolution of the European Council on the Stability and Growth Pact, *supra* note 6.

[133] Regulation 1466/97, *supra* note 6.

[134] Ibid.

[135] Attached to the EC Treaty.

[136] It applies only partially to Denmark and the UK, in light of their opt-outs.

In analysing the instruments implementing the Treaty provisions (the SGP), one finds firstly that the Resolution sets out a political commitment from the Council, Commission and individual member states to fully and properly implement the system.

Regulation 1466/97, in turn, enunciates the elements of the surveillance mechanism, further requiring member states to submit yearly stability (euro area members) or convergence (pre-ins) programmes. It also sets out provisions aimed at the coordination of economic policies, and establishes an early warning mechanism in relation to excessive deficits that may disrupt the goal of ensuring long-term price stability.

Regulation 1467/97, on the other hand, sets out a procedure whereby, on the basis of the reports from member states and its own statistics, the Commission is to report to the Council. The Council may in turn determine that an excessive deficit exists in relation to a member state, and if so, may set out recommendations, as well as deadlines for their execution. If these recommendations are not followed, the Council may impose monetary sanctions that are to be calculated in terms of the offending state's GDP. This is known as the excessive deficit procedure.

Sanctions have never as yet been applied. While Van Lembergen and Wachenfeld[137] point out that the pact was not really conceived to mete out sanctions but to apply political and peer pressure on less disciplined member states, the non-application of sanctions on France and Germany, despite their long-standing excessive deficits, led to media uproar and public disillusionment.

Even the then President of the Commission, Romano Prodi had his say on the matter; in a much publicised incident, he had called the pact "stupid" and "rigid", and insisted that it had large faults.[138] The main criticism was that the Pact did not consider cyclical factors, and made no provisions for measures, such as pension reform, which would weaken budgetary positions in the short term, but make them stronger in the long term. Thus, a member state could be sanctioned for experiencing a cyclical downturn, or worse – for actually taking measures which led to long-term budgetary health and price stability.

In this light, the Pact was substantially amended in 2005 by means of another two Council Regulations – 1055/2005[139] and 1056/2005,[140] which together, after providing flexibility for measures aimed at long-term stability, were intentioned to set the:

> *"medium-term objective of budgetary positions close to balance or in surplus [… allowing …] all Member States to deal with normal cyclical fluctuations while keeping the government deficit within the reference value of 3% of GDP".*[141]

[137] Van Lembergen W. and Wachenfeld M.G., *supra* note 33, p. 32.

[138] Budget rules are still 'stupid', Prodi says, BBC news, 21 October 2002, available at {http://news.bbc.co.uk/1/hi/business/2345653.stm} (last accessed 03.10.07).

[139] Council Regulation (EC) No. 1055/2005 of 27 June 2005 amending Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJ (2005) L 174.

[140] Council Regulation (EC) No. 1056/2005 of 27 June 2005 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ (2005) L 174.

[141] Regulation 1055/2005, *supra* note 139, recital 6.

4. MALTA'S LEGAL RELATIONSHIP WITH THE ESCB AND THE ECB

4.1 The institutional structure of the ESCB

The ESCB lies at the heart of EMU, though it is itself not a legal person. In fact, in company law terms, the ESCB is a rather strange structure.

The ESCB is, in fact, currently composed of 28 entities, each a legal person – the 27 NCBs and the ECB itself. The ESCB is described by Smits as a "body of Community law".[142] It is established by Article 8 of the EC Treaty, in accordance with the statutes attached thereto. It is not an institution of the Community either, described in Article 7 of the EC Treaty as the five organs[143] established to represent the legal person 'European Community'.[144]

The ECB is established as an international legal person by Article 107(2) of the Treaty, but the ESCB also consists of the NCBs, which in turn have a number of legal forms – there are public limited companies, *sociétés anonymes* and public bodies in a variety of guises. The Central Bank of Malta is itself a 'body corporate' established by law.[145] Together, these form the monetary authority of the Community.

The ESCB is "governed by the decision-making bodies of the ECB".[146] Here, one of the major peculiarities of the system comes to light. While the ECB is a subsidiary of the NCBs, with its shares held by them,[147] Smits notes that "I do not know of any ordinary corporate structure under which the subsidiary governs the parent company, but this is exactly the situation within the EU's monetary authority". [148]

However, the NCBs do also have a central role within the decision-making bodies of the ECB itself. In fact, there are two main decision-making organs within the ECB – the Executive Board (EB) and the Governing Council. The EB is appointed "by common accord of the governments of the Member States at the level of Heads of State or Government, on a recommendation from the Council, after it has consulted the European Parliament and the Governing Council of the ECB".[149] This board, which consists of the President of the ECB, the Vice-President, and four other members, is responsible for much of the 'day-to-day' decisions of the ECB, including implementing monetary policy and instructing NCBs to carry out the necessary supporting operations.[150] However, as the members all also sit on the Governing Council, they also form the ESCB's community element. The Governing Council is, in turn, composed of the six EB members, as well as the governors of the NCBs of participating member states,[151] currently the Euro-15. Its main responsibilities are to define the monetary policy of the Community, set intermediate monetary objectives, decide upon key interest rates and foreign-exchange operations, hold and manage the official foreign reserves of the participating member states and promote the smooth operation of clearing and payment systems.[152]

NCB governors sit in *ad personam* capacity, meaning that they do not sit as representatives of their own national interests. In fact, they are independent and cannot receive instruction from their governments or any other body,[153] and are to act in line with Community rules and interests, in particular the objective of price stability. To guarantee this independence, the ESCB Statute[154] also lays down that the proceedings of Governing Council are to be confidential, and it is only the Governing Council itself which may "decide to make the outcome of its deliberations public".

Votes are taken by simple majority, on the basis of a one (wo)man, one vote principle, the President of the ECB having a casting vote.[155] However, two qualifications are necessary. First, in the sole case of decisions relating to intra-ECB/NCB financial affairs,[156] votes are

[142] Smits R., *supra* note 47, p. 366.
[143] The European Parliament, European Commission, Council of Ministers, European Court of Justice and Court of Auditors.
[144] The ECB will become a Community institution upon ratification of the Lisbon Treaty.
[145] Central Bank of Malta Act, *supra* note 26, article 3.
[146] EC Treaty, article 107(3); ESCB Statute, article 8.
[147] ESCB Statute, article 28.2.
[148] Smits R., *supra* note 36, p. 367.
[149] EC Treaty, article 112 (2)(b).
[150] ESCB Statute, article 12.1.
[151] EC Treaty, article 112 (1); ESCB Statute, article 10.
[152] ESCB Statute, article 12; EC Treaty, article 105.
[153] EC Treaty, article 108; ESCB Statute, articles 7 and 14.2.
[154] Article 10.4.
[155] ESCB Statute, article 10.2.
[156] This refers to issues such as allocation of monetary profit, subscription of capital, transfer of reserves to the ECB etc., as per ESCB Statute, article 10.3.

weighted according to share capital, with the EB having no weighting. Second, as from when the number of participating NCBs exceeds 15, a rotation system comes into play,[157] as shall be discussed below. However, Smits notes that, in practice, voting rarely, if ever, occurs as decisions tend to be taken by consensus.[158]

A third, temporary, decision-making organ is also established by the EC Treaty.[159] This General Council, as it is known, is to exist until all member states join the euro area. Until then, it consists of the President and Vice-President of the ECB, together with the governors of all member states' NCBs[160] – currently 27. This Council does not take decisions on monetary policy, but is instead charged with coordinating the monetary policies of 'ins' and 'outs' and performing many of the functions of the defunct EMI that are left over in regard of non-euro states,[161] mainly preparing analyses of convergence and monitoring the functioning of ERM II.

In practice the ESCB does not use its Treaty-given name when acting through the Governing Council. Instead, it terms itself the 'Eurosystem', which is legally meaningless[162] and described by Zilioli and Selmayr[163] as "a kind of trade name". This perhaps helps one distinguish from acts performed by the ESCB's 'temporary' General Council, for which it generally reserves the term ESCB.

Also worth mentioning is that the ESCB had established a fraud-busting Anti-Fraud Committee within itself, by means of two ECB Decisions.[164] However, the Commission insisted that this function was to be performed by the *Office européen de lutte anti-fraude* (OLAF), its own anti-fraud body. While at first the ECB underlined its own independence and refused this (a position endorsed by Smits),[165] the issue was eventually settled by the ECJ in favour of the Commission.[166] However, while the Anti-Fraud Committee no longer exists, the resultant case law clarified the extent to which the ECB is protected from legislative interference in the performance of its functions. While law may affect the internal functioning of the ECB, without violating the principle of independence set out in Article 108 of the Treaty, the ECB remains protected from even legislative interference in the performance of its tasks as set out in Article 105(2).

The ECB is empowered, under the EC Treaty, and within its areas of competence, to make regulations, take decisions and issue recommendations of equivalent legal value to those issued by the other institutions. Thus an ECB Regulation is "binding in its entirety and directly applicable in all Member States".[167] The ECB can also impose sanctions up to a maximum of €500,000, as well as periodic payments up to a maximum of €500,000, and daily fines of up to €100,000 for a maximum of six months.[168] As mentioned above, it has the sole power to authorise the issue of euro notes and coins.[169]

4.2 The ESCB and euro area enlargement

In view of imminent euro area enlargement, the Council of Ministers changed the ESCB Statute by means of Decision 2003/223[170] to set up a rotation system for voting in the Governing Council, with the amended procedure now set out in Article 10.2 of the ESCB Statute.

While all participating NCB governors will continue to attend all meetings together with the 6 EB members, as soon as there are 16 participating NCBs these will be divided into two groups. Under this dual system, the first group will consist of the NCBs representing the largest 5 member states (group membership is always decided on basis of GDP and size of financial system, with a 5/6 and 1/6 weighting

157 ESCB Statute, article 10.2.
158 Smits R., *supra* note 36, p. 369.
159 Article 123(3) as well as ESCB Statute, article 45.
160 ESCB Statute, article 45.2.
161 ESCB Statute, articles 44 and 47.
162 See the first ECB Monthly Bulletin, January 1999, p. 7.
163 Zilioli C. and Selmayr M., The External Relations of the Euro Area, Legal Aspects in Common Market Law Review: Dordrecht, Vol. 36, No. 2, April 1999, p. 273.
164 ECB Decision of 7 October 1999 on fraud prevention (ECB/1999/5), OJ (1999) L 291; ECB Decision of 16 November 1999 appointing the members of the Anti-Fraud Committee of the ECB (ECB/1999/8), OJ (1999) L 299.
165 Smits R., *supra* note 36, p. 372.
166 Commission v ECB, 2003, Case C-11/00, ECR I-7147.
167 EC Treaty, article 110.
168 Council Regulation (EC) No. 2532/98 of 23 November 1998 concerning the powers of the European Central Bank to impose sanctions, OJ (1998) L 318/41.
169 EC Treaty, article 106.
170 Council Decision (EC) No. 2003/223/EC meeting in the composition of the Heads of State or Government of 21 March 2003 on an amendment to Article 10.2 of the Statute of the European System of Central Banks and of the European Central Bank, OJ (2003) L 83.

respectively) and will share 4 votes. The remaining NCBs will form the second group and share 11 votes. However, the votes are not weighted, and the one member, one vote principle still applies – though any NCB will only be able to vote part of the time. Under the Statute, at no time can members of the first group vote less frequently than those of the second. In effect, this qualification means that the system will only work as described when there are 19 NCBs, as otherwise members of the second group would be voting more often than the first. The Governing Council can make provision for this anomaly (by two-thirds majority) and is even given the right by the Statute to delay the entry into force of the rotation system until there are 19 NCBs. As the number of NCBs stands at 15, the current system must remain in force until another NCB joins. Subsequently, the system will either remain in place until there are 19 NCBs, or the Governing Council will make other provision (by two-thirds majority) for the period during which there are 16-18 members.

When the number of NCBs reaches 22, a new three-group rotation system comes into play. Under this system, the first group (5 NCBs) shares 4 votes, the second group (half the NCBs, rounded up) shares 8 votes, and the third group (the rest) shares 3. Indicatively, under a situation with 22 participating member states, the Central Bank of Malta, certainly in group 3, will be entitled to vote half of the time. Yet, it must be recalled that in practice decisions tend to be taken by consensus.

Whatever the system, the members of the EB always can vote, and, moreover, the President always retains a casting vote. Furthermore, subject to any provision that may be introduced to cater for the anomaly described above (16-18 NCBs), there is always a total of 21 votes to be cast – 6 by the EB, and 15 by the NCBs.

4.3 Malta in the ESCB

Before €-day, as an EU member state and member of EMU with a derogation, the Central Bank of Malta's Governor sat as an active member of the General Council, but not of the Governing Council of the ECB. As of the lifting of Malta's derogation, the Governor also became a full member of the Governing Council, with voting rights as previously described. Similarly, albeit on an informal level, finance ministers of the participating member states also meet periodically in what is known as the 'eurogroup'.

By means of Article 49.3 in the ESCB Statute, added by Article 17 of the Act of Accession, the ECB's capital was increased by new member states in accordance with the ECB's capital key (weighted at 50% GDP, 50% population, revised every 5 years)[171] as at EU accession. Thus, the Bank was already a shareholder in the ECB before euro adoption, according to the key, at the same ratio as participating member states. The difference between 'ins' and 'outs' is not the amount of subscribed capital, but the amount of capital that is actually paid up. In fact, whereas by virtue of Article 1 of ECB Decision 2004/06,[172] 'ins' are to pay up 100% of their subscribed capital, by virtue of Article 1 of ECB Decision 2004/10,[173] 'outs' are only obliged to pay up 7%. Therefore, while before €-day the CBM had paid up €252,023.87, on joining it had to transfer the remaining 93%.[174]

Furthermore, Malta's derogation exempted it from a contribution towards the foreign reserve assets of the ECB as set out in Article 30.1 of the Statute (the exemption is found in Article 43). Upon the derogation being lifted, the Bank also contributed towards, and thus increased, the foreign reserve assets of the ECB in accordance with Article 30 of the Statute, and thus again in relation to its share capital in the ECB.[175]

In practice, the role of the Bank has changed substantially, particularly through the Governor's participation in the Governing Council. While it no longer has responsibility for monetary policy, it is now a key actor in forming and executing the policy of the ECB. Furthermore, it retains responsibilities for safeguarding financial stability. The Bank has also retained a reserve management role, as manager of the foreign reserve assets transferred to the ECB, and as manager of its own assets

[171] ESCB Statute, article 29.3.

[172] ECB Decision of 22 April 2004 laying down the measures necessary for the paying-up of the European Central Bank's capital by the participating national central banks (ECB/2004/6) (2004/503/EC).

[173] ECB Decision of 23 April 2004 laying down the measures necessary for the paying-up of the European Central Bank's capital by the non-participating national central banks (ECB/2004/10) (2004/507/EC).

[174] This remainder amounted to €3,332,306.98.

[175] The reserves transferred to the ECB amounted to the equivalent of €36,553,305.17.

within the ESCB framework. It still issues currency, though clearly in concert with the Eurosystem. Finally, an important role remains as regulator of payment and securities settlement systems, including payment services and payment instruments, and as a channel for high-value domestic and overseas payments, through participation in TARGET2.

5. EXTERNAL ASPECTS OF EMU

5.1 Actors in the external representation of the euro area

Until euro adoption, Malta represented itself in monetary matters at international level. It has been *inter alia* a member of the IMF since 1968, the International Bank for Reconstruction and Development (IBRD) since 1983, the International Finance Corporation (IFC) since 2005, the Multilateral Investment Guarantee Agency (MIGA) since 1990 and the International Centre for Settlement of Investment Disputes (ICSID) since 2003. The Bank, while not a member of the Bank for International Settlements (BIS), is a party to the ERM II agreement and thus already has a recognised international legal personality. However, the question arises as to how such representation is changing now that Malta is a euro area member, and, more generally, as to how Malta is now to be represented externally in monetary affairs.

When discussing the external competences of the Community, the starting point is virtually always the ERTA case[176] and the principle of parallelism enunciated therein. The Court had stated that as a result of the Community's legal personality,[177] it had the power to act externally in parallel to its corresponding internal competence, even without express Treaty provision.[178] In terms of EMU, it is thus necessary to differentiate between the competences of different actors, especially as a result of the complicating factor that the ECB is not a Community institution (and therefore not able to represent the Community's legal personality). In fact, the ECB has an international legal personality of its own.

As discussed earlier, the ESCB does not have such personality, while the terms 'Eurosystem', 'eurozone' and 'euro area' do not derive from law.[179] As only actors with international legal personality can enter into treaties, public international law agreements, or be members of international organisations,[180] this is potentially up to the ECB, NCBs, member states and the Community.

Clearly, member states have originary international legal personality and are the traditional actors at interstate level; it is now an international law cliché that states are born international legal persons. However, as "the Community constitutes a new legal order of international law for the benefit of which the Member States have limited their sovereign rights, albeit within limited fields",[181] their competence to act at the international level has been thus limited too.[182] In terms of EMU, this is spelt out by the Treaty, whereby member states may only act on the international plane "without prejudice to Community competence and Community agreements regarding economic and monetary union".[183] Clearly, this is in line with the fact that the international legal personality of international organisations has over the last decades become recognised at international law.[184]

There is a solid Treaty basis for Community external competence in EMU matters; Article 111(3) of the EC Treaty describes "agreements on monetary or foreign exchange regime matters [that] need to be negotiated by the Community with one or more States or international organisations", Article 111(1) provides for "agreements on an exchange rate system", while Article 111(4) allows the institutions to define a "position at the international level as regards issues of particular relevance to economic and monetary union and on its representation". In principle, for participating member states, monetary policy becomes an area of exclusive competence of the Community,[185] though they may have residual competences in matters either not transferred to Community level or where allowed or granted

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176 European Road Transport Agreement - ERTA Case, Commission vs. Council, Case 22/70, 31 March 1971, ECR 1971, pp. 263 et seq.

177 Article 281 of the EC Treaty.

178 For a more thorough discussion, see: Mignolli A., The EU's Powers of External Relations, in The International Spectator, 3/2002, pp. 3 et seq.

179 However, one finds that term 'euro area' has been used in the ERM II agreement, *supra* note 22.

180 Brownlie, Principles of Public International Law, 4th ed., 1990, p. 58.

181 Van Gend & Loos, Case 26/62, (1963) ECR 1.

182 Ruling 1/78 Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports, (1978) ECR 2151, para. 32.

183 EC Treaty, article 111(5).

184 See Advisory Opinion of the ICJ in Reparation for Injuries Suffered in the Service of the United Nations, ICJ-Reports 1949, 174.

185 Article 4 (2) refers to "a single monetary policy and exchange rate policy".

by Community law.[186] The Community is represented by its institutions,[187] though clearly "only the Community has legal personality, and its institutions do not".[188]

NCBs are less commonly described as international legal persons, but can be nonetheless. While certain international banking organisations like the World Bank, the European Bank for Reconstruction and Development (EBRD) and the BIS are well established bodies of international law, NCBs also have at times been recognised to have derivative international legal personality – as members of international organisations like the BIS itself, or as parties to international agreements[189] such as the ERM II agreement,[190] or ERM before it.[191] This devolution and fragmentation of personality within a state has been described as similar to the powers granted to internal bodies in certain federal states.[192]

As mentioned, the ECB is not a Community institution but does have legal personality in its own right.[193] Its case is similar to that of the European Investment Bank (EIB) which is granted legal personality,[194] as acknowledged by the ECJ: "… the Bank has legal personality distinct from that of the Community ... In order to perform the tasks assigned to it by ... the Treaty the Bank must be able to act in complete independence on the financial markets like any other bank";[195] the EIB has concluded international agreements since its inception.[196] The ECB has an even stronger Treaty basis in this regard; it is empowered to "conduct foreign exchange operations [and] hold and manage the foreign reserves of the Member States",[197] as well as "establish relations with central banks and financial institutions in other countries and, where appropriate, with international organisations".[198] In practice, the ECB has already participated in international agreements, including the ERM II agreement[199] and a Headquarters Agreement with Germany.[200] As it has its own international legal personality, competences, and membership (the NCBs), Zilioli and Selmayr term the ECB a "Community within the Community … an autonomous specialized organization of Community law and… an independent actor at the international level".[201] In terms of representation, it is clearly laid out that "the President or his nominee shall represent the ECB externally",[202] while the ESCB is to be represented externally as determined by the ECB (more precisely by its Governing Council).[203] This needs to be read in the light of the fact that while one would assume that the ESCB would be represented by the ECB itself, not all international organisations' statutes or charters may allow this. Thus, there is the possibility for the ECB to allow the ESCB to be represented by others (presumably NCBs, member states or the Community) acting on its behalf.

5.2 External representation of the euro area in international organisations

5.2.1 General principles

As has been discussed, the Treaty foresees two main European actors deciding on the external representation of the Community in EMU matters.

Article 111(4) gives the Council "on a proposal from the Commission and after consulting the

186 On the basis of the Maastricht Treaty, this view is already found in: Martha, The Fund Agreement and the Surrender of Monetary Sovereignty to the European Community, 1993, CML Rev. 749.

187 French Republic v. Commission, Case C-327/91, (1994) ECR 1-3641, para 24.

188 Algera v. Common Assembly of the European Coal and Steel Community, Joint Cases 7/56 and 73/57, (1957) ECR 81, p. 57.

189 See Burdeau, Independance des banques centrales et droit international, in Weber A., (ed.), Wahrung und Wirtschaft. Das Geld im Recht. Festschrft fur Hahn, 1997, p. 17.

190 ERM II Agreement, *supra* note 22.

191 For a discussion of NCBs as international actors in terms of the first ERM agreement, see Radicati Di Brozolo, Some Legal Aspects of the European Monetary System, in Rivista di Diritto Internazionale, 1980, p. 440.

192 For example, the German Lander, German Basic Law, article 32(3), Austrian Bundeslander, Federal Constitutional Act, article 16; and Swiss Cantons, Federal Constitution, article 9; as described by Zilioli C. and Selmayr M., *supra* note 163, p. 278 (footnote 26).

193 EC Treaty, article 107.

194 EC Treaty, article 266.

195 Commission v. Board of Governors of the European Investment Bank, Case 85/86, (1988) ECR 1281, para 28.

196 See Henrion, La banque europeenne d'investissement, in Ganshof van der Meersch (ed.), Droit des communautes europeennes, 1969, No. 2425, pp. 967 et seq.

197 EC Treaty, article 105(2) and (3).

198 ESCB Statute, article 23.

199 ERM II Agreement, *supra* note 22.

200 See Zilioli C. and Selmayr M., *supra* note 163, p. 285 (footnote 53).

201 Ibid., p. 286.

202 ESCB Statute, article 13.2.

203 ESCB Statute, articles 6 and 12.5.

ECB, [...] acting unanimously" the right to decide on representation of the Community in EMU matters. However, this is made subject to Article 99, which enunciates member states' competence (and constraints thereon) in respect of economic policy, as well as Article 105, which lays down the objectives, tasks and competences of the ESCB.

Conversely, Article 6.1 of the ESCB statute grants power to the ECB to decide on representation of the ESCB in matters of its competence, with Article 6.3 then referring back, and making this without prejudice, to Article 111(4) of the Treaty. All in all, therefore, one sees two mutually exclusive sources of external competence.

Also of note is that Article 6.2 of the Statute provides that "The ECB and, subject to its approval, the national central banks may participate in international monetary organizations". Clearly, as noted by Zilioli and Selmayr,[204] there is no such thing as a 'pure' international monetary organisation, and even the IMF deals with economic affairs. Smits,[205] too, making reference to Article 6.3, comes to the conclusion that this includes any international organisation that deals with monetary affairs when discussing matters within the ESCB's competence.

Applying these principles, one finds that the Community is externally competent when its internal EMU competences are involved – therefore, in relation to formal agreements on exchange-rate systems (Article 111(1)), agreements concerning monetary or foreign-exchange regime matters (Article 111(3)) and in instances where the Community wishes to take a position on matters of "particular relevance" to EMU (Article 111(4)), the latter subject to competences in Article 99 and 105 as discussed.

The ECB, on the other hand, is externally competent whenever the tasks granted to it by Article 105 are concerned – thus monetary policy, foreign-exchange operations (without prejudice to the Community's right to negotiate agreements in this regard) the holding and management of foreign reserves, the smooth operation of clearing and payment systems, as well as, if and when granted power to do so by the Council, any specific task related to the prudential supervision of credit and financial institutions (except insurance undertakings).

Participating member states remain generally externally competent in all economic matters within the constraints of Articles 98-104, as well as in terms of any residual competence they may have (this is discussed below). Their central banks, with ECB approval, may also participate in international monetary organisations in terms of their residual monetary competences.

External competence, therefore, seems quite clearly divided. However, as the internal rules of the Community have no bearing on the constituent rules of international organisations, this does not work out so simply in practice – some organisations may, for example, only allow countries to be members.

Where organisations do not permit representation reflecting the Community's internal rules, the ECJ has consistently maintained that the cardinal guiding principle was to be that of unity in external representation,[206] meaning that actors are to take all necessary steps to ensure the best possible cooperation.

In the *Food and Agriculture Organization of the United Nations (FAO)* case[207] it was held that where different types of international legal persons can take part on behalf of the Community, they are obliged to coordinate their speaking, voting and other rights, with these arrangements being preferably laid down in inter-institutional or administrative agreements. Of note is that in line with its charter, the FAO had requested that the Community file a 'declaration of competences',[208] which was attached to its application for membership.

One also finds case law[209] related to situations where only one type of actor (supposedly

204 Zilioli C. and Selmayr M., *supra* note 163, p. 336.
205 Smits R., The European Central Bank, Institutional Aspects, 1997, p. 426.

206 In particular see: Opinion 2/91 ILO-Convention No. 170, (1993) ECR I-1061, para 36; Opinion 1/94 WTO, GATS, TRIPs (1994) ECR I-5267, para 108; Commission v. Council, Case C-25/94, (1996) ECR 1996 I-1469, para 48.
207 Commission v. Council, Case C-25/94, (1996) ECR I-1469.
208 OJ (1991) C 292/8.
209 Opinion 2/91 ILO-Convention No. 170 (1993) ECR I-1061, para 5.

member states) is permitted to participate in an international organisation; in this case, these actors would have to coordinate beforehand, act as trustees for the Community (where its competences are concerned) and ultimately initiate amendments to the organisation's internal rules to make participation of the appropriate actors possible.

Below is an application of these principles to the international organisations most important to EMU.

5.2.2 The International Monetary Fund

The IMF only allows 'countries' as members.[210] Malta is a member of the IMF with a quota of 102 million SDRs,[211] 0.05% of global ownership, and 1,270 votes (0.06% of total).

While Smits[212] argues that the Community should be considered a country, this view is not quite in accordance with the general tenets of international law, as described by Brownlie[213]: "a defined territory, a permanent population, and the *plenitudo potestatis*, i.e. the competence to create new competences for itself" – the third element is particularly lacking within the Community's constitutional framework. Zilioli and Selmayr[214] come to the same conclusion, as does Der-Chin,[215] who also notes that the ECB is an observer in the IMF, with a role likely to evolve over time. Solans explains that "the ECB was granted Permanent Observer status at the IMF" on 21 December 1998 and that the "President of the ECB also participates in the Interim Committee of the IMF as an observer". In practice, "common positions are prepared within the Eurosystem … [and are] delivered by the ECB observer at the Fund".[216]

5.2.3 The Bank of International Settlements

BIS members are central banks – the Central Bank of Malta is not currently a member of the BIS, though the ECB became a member in December 1997. The ECB's President, however, does not sit on the Board of Directors, though the governors of the central banks of Belgium, France, Germany and Italy do so *ex officio*. A number of NCBs' governors are elected to the Board by members, so the ECB's President can be a Board member without a change in underlying acts. However, failing this, NCB governors will have to act jointly as trustees of the ECB whenever the tasks of the ESCB are involved.

5.2.4 The Organization for Economic Co-operation and Development

Even though established on 14 December 1960, the Convention on the Organization for Economic Co-operation and Development, (OECD)[217] provides, in Supplementary Protocol No. 1, as referred to in Article 13, that "Representation in the Organization for Economic Co-operation and Development of the European Communities established by the Treaties of Paris and Rome […] shall be determined in accordance with the institutional provisions of those Treaties."

Therefore, while all members are states and Article 16 speaks of the invitation and accession of governments, the ECB is still able to participate fully in relation to areas of its competence. While the ECB is not the Community, one foresees no problem in this regard; although the main activities of the OECD relate to economic cooperation, the ECB is able to take part in its Working Party 3 which involves central banks.[218] In practice, "the ECB is a separate member of the European Community delegation in these meetings alongside the European Commission".[219] Malta

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210 IMF, Articles of Agreement of the International Monetary Fund, available at {http://www.imf.org/external/pubs/ft/aa/index.htm} (last accessed 20.02.06), article 2(2).

211 The SDR is the unit of account of the IMF and an international reserve asset. It used to be defined to the same gold standard of the dollar until 1973, but is today a currency-basket comprised of dollars, pounds, euro and yen; see {http://www.imf.org/external/np/fin/rates/rms_sdrv.cfm} (last accessed 20.02.06).

212 Smits R., *supra* note 205, p. 441.

213 Brownlie, *supra* note 180, pp. 72 et seq.

214 Zilioli C. and Selmayr M., *supra* note 163, p. 336.

215 Der-Chin H., The ECB's Membership in the IMF: Legal Approaches to Constitutional Challenges, in European Law Journal, Nov 2005, Vol. 11, No. 6, pp. 802-822.

216 Solans D. (Member of the Governing Council and the Executive Board of the European Central Bank), The euro and the activities of the European Central Bank, Speech delivered at the luncheon conference organised by the Money Matters Institute and The European Institute at the Boston Harbor Hotel, Boston, 15 November 1999, available at {http://www.ecb.int/press/key/date/1999/html/sp991115_1.en.html} (last accessed 09.10.07).

217 Convention on the Organisation for Economic Co-operation and Development, available at http://www.oecd.org/document/7/0,2340,en_2649_201185_1915847_1_1_1_1,00.html} (last accessed 05.10.07).

218 Smits R., *supra* note 205, p. 427.

219 Solans D., *supra* note 216.

applied for membership of the OECD on 24 September 2005.

5.3 Malta and the CBM – residual external competence in monetary affairs

Since adoption of the euro, there are some residual external competences in monetary matters left for Malta or the Bank. These generally arise directly from the Treaty. Article 111(5) of the EC Treaty reads: "Without prejudice to Community competence and Community agreements regarding economic and monetary union, Member States may negotiate in international bodies and conclude international agreements". While competence in economic affairs remains with member states in a constrained manner, monetary affairs, as noted by Smits,[220] is an area of exclusive competence of the Community and ESCB, albeit with minor exceptions.

Article 105(3) holds that it is a task of the ESCB to "hold and manage the official foreign reserves of the Member States", but this is "without prejudice to the holding and management by the governments of the Member States of foreign exchange working balances". However, under Article 31.2 of the ESCB Statute, transactions over a limit are subject to prior approval. This limit was most recently set at €500m by means of ECB Guideline 2003/12.[221] As member states and their NCBs can conduct transactions autonomously below these limits, Zilioli and Selmayr[222] feel that this clearly implies that they may conclude agreements in this regard.

Article 105(6) gives the ESCB competence in relation to specific tasks concerning the prudential supervision of banking and financial institutions (except insurance undertakings) though only if, and in so far as, decided by the Council with unanimity, on a proposal by the Commission, and with the European Parliament's assent. Until this happens, these remain of residual competence (though not necessarily for NCBs; in Malta this role pertains to the MFSA). As noted by Smits,[223] international coordination of banking supervision does take place in fora such as the Basle Committee on Banking Supervision.

Member states have competence, under Article 11 of Regulation 974/98, to issue coins with a national side, as well as commemorative coins. Zilioli and Selmayr[224] envisage the possibility of international agreements relating to technical standards of such commemorative coins.

Even more remotely, Article 307 of the EC Treaty allows member states to continue to fulfil international obligations entered into before entry into force of the Treaty, or accession of the member state concerned – though with many limitations. If such an agreement is not compatible with the Treaty, Article 307(2) requires member states to "take all appropriate steps to eliminate the incompatibilities established". Furthermore, member states cannot exercise rights granted under these agreements if incompatible with EU law: "when an international agreement allows, but does not require, a Member State to adopt a measure which appears to be contrary to Community law, the Member State must refrain from adopting such a measure"[225]; it may, however, fulfil obligations under such a agreement. However, in this regard Article 31.1 of the ESCB Statute also allows NCBs to "perform transactions in fulfilment of their obligations towards international organisations" entered into prior to the Treaty coming into force. This acquires importance when one notes that the BIS was established in 1930. However, the wording is 'perform transactions'; there is no competence to enter into further obligations.

A last residual competence of member states does not concern Malta, and relates to agreements with countries which had or have monetary agreements with member states – notably San Marino, the Vatican City, Monaco, French DOM-TOMs, British overseas territories, the Netherlands' Antilles, Saint-Pierre-et-Miquelon and Mayotte, the 'Zone Franc', Cape Verde, the Faeroe Islands and

220 Smits R., *supra* note 205, p. 379 (footnote 51).
221 ECB Guideline of 23 October 2003 for participating Member States' transactions with their foreign exchange working balances pursuant to Article 31.3 of the Statute of the European System of Central Banks and of the European Central Bank (ECB/2003/12) (2003/775/EC).
222 Zilioli C. and Selmayr M., *supra* note 163, p. 317.

223 Smits R., *supra* note 205, p. 331.
224 Zilioli C. and Selmayr M., *supra* note 163, p. 319.
225 The Queen v. Secretary of State for Home Department, ex parte Evans Medical Ltd. and Macfarlan Smith Ltd., Case C-324/93, (1995) ECR 1-563, para 32; also see Commission v Italian Republic, Case 10/61, (1962) ECR 1.

Greenland. These are generally as a result of protocols or declarations attached to the Treaties or particular arrangements, but will not be elaborated upon here.[226]

Of importance is that Malta, like other member states, can make an application under Article 300 of the EC Treaty to obtain an *a priori* opinion from the ECJ as to compatibility of an agreement envisaged by the Community or the ECB with the Treaty. *A posteriori*, Malta is clearly a privileged applicant (does not need to prove concern or locus standi) in terms of the Article 230 action for annulment, allowing it to challenge legally binding acts, including international agreements, of general application adopted by the institutions and ECB outside their areas of competence.

5.4 The Maltese lira in foreign courts

As discussed above, the rules relating to the continuity of contracts affected by redenomination of national currencies into euro are found in Regulation 1103/97 and are directly applicable in all EU member states. However, the issue seems more complicated in terms of foreign court treatment of such contracts, where ostensibly Regulation 1103/97 does not apply. One therefore faces the question of how a court outside the EU would treat a contract or international agreement referring to the Maltese lira after the lira has ceased to exist legally or be legal tender.

However, the issue is not, in fact, so complex. The state theory of money or principle of *lex monetae* is described in Mann's authoritative work,[227] as well as others,[228] as an integral part of nominalism, which has "universal recognition". As has already been discussed, nominalism is the quite simple idea that references to money are actually references to underlying value measured in terms of that money. This implies that a currency change does not terminate obligations, but simply makes them executable in the new currency.

The state theory of money, on the other hand, is a conflict of laws principle that establishes that it is the *lex monetae* that is to be applied by a court when dealing with foreign currencies: "the law of the currency determines which things are legal tender, and how, in the case of a currency alteration, sums expressed in the former currency are to be converted into the existing one, the metallic or functional value of money always being immaterial".[229] This view is widely and broadly endorsed; the Commission,[230] as do many authors,[231] states that "the principle of *lex monetae* ... is a universally accepted principle of law". The view has also been set forth by the U.S. Supreme Court,[232] which has consistently insisted that every contract for the payment of money is subordinate to government power over that currency. The Commission clearly holds that "the principle of *lex monetae* which is applicable to contracts under private law, also holds for international agreements",[233] and indeed there is no reason to argue otherwise. Sainz de Vicuna, writing in 2004, does not report any third-country post-euro-introduction court cases having challenged the orthodoxy of the state theory of money.[234] As a result of its tried and tested applicability (not just in the adoption of the euro and replacement of the ECU, but over centuries, and in relation to countless currency changes) there is no cause for concern over the foreign treatment of lira denominated contracts or international agreements.

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226 All these particular cases are discussed at some length by Zilioli C. and Selmayr M., *supra* note 163, pp. 322 et seq.

227 Mann F.A., *supra* note 69, p. 292.

228 For example, Nussbaum A., Money in the Law: National and International, 1950, pp. 353-59.

229 Mann F.A., *supra* note 69, p. 292.

230 European Commission, *supra* note 28, p. 9.

231 Van Lembergen W. and Wachenfeld M.G., *supra* note 33, p. 30; Mance Sir J., *supra* note 88, p. 268.

232 As discussed at some length in: European Commission, Euro papers 15 - The legal implications of the European Monetary Union under U.S. and New York law, 1998, p. 4.

233 European Commission, *supra* note 92, p. 12.

234 Sainz de Vicuna A., *supra* note 60, pp. 59-70.

6. Conclusion

The adoption of the euro is much more than a currency changeover - it has brought about vast changes as the EU's monetary law became fully applicable, and in turn Malta's sovereignty in monetary matters was pooled and transferred to the Community and ESCB. The Bank is now an integral part of the Eurosystem, and has gained a permanent seat on the Governing Council of the ECB.

Since €-day, all Maltese lira amounts in legal instruments are to be read as euro at the conversion rate, with amounts being converted according to the rounding rules. Problems are not foreseen in relation to the continuity of contracts so redenominated, and foreign courts are expected to also treat contracts in lira as continuing and redenominated according to EU law.

Malta joined under a different procedure from that used by the Euro-12. There was no transitional period between adoption of the euro legally and in its cash form. Malta has acquired the right to issue coins with a national side which are legal tender throughout the euro area. The lira ceased to exist as a currency on 1 January 2008, but, as a currency unit, its cash form remained legal tender during the dual circulation period.

As a full member of EMU, Malta is now subject to the sanctions of the SGP. Malta's internal and external competences in monetary affairs will largely be exercised by the Community and the ESCB, even though there is still some residual competence, as well as scope, for Malta and the Central Bank of Malta to participate in international monetary organisations as representatives of euro area interests where their areas of competence are concerned.

For a lawyer, the introduction of the law of the euro is particularly exciting because it is underpinned by an interlinking combination of private, public, European and international laws and concepts, and also because it is underpinned by a captivating mélange of hard and soft law and political will, while also serving as the EU's first mammoth-scale experiment in creating a two-speed Europe. It is the world's first modern both multinational and supranational currency. Nevertheless, despite the fact that euro law has so far been implemented in 15 member states, every time it is applied to a State with its own characteristics, legal system and tradition, new challenges, debates and questions arise.

In terms of its effects, the euro is already binding European financial, capital and other markets in a way never seen before. As the markets evolve and new states join, the euro increasingly becomes a global currency. These developments will shape the future of the euro and also that of the Maltese economy, as it integrates more closely into the EU single market. As a euro area member, Malta will itself be a player in shaping these developments.